

**Article 17 of the Directive on Copyright on the Digital Single Market**

**A continuation of an established fair balance between fundamental rights?**

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Master of Laws thesis

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Euroopan unionin parlamentti hyväksyi maaliskuussa 2019 direktiivin tekijänoikeudesta digitaalisilla sisämarkkinoilla. Direktiivin artikla 17 tuo aikaisempaa ankarampia velvoitteita verkkosisällönjakopalvelujen tarjoajille, joiden katsotaan parhaiten kykenevän puuttumaan alustoillaan tapahtuviin tekijänoikeusloukkauksiin. Artiklan 17 esittelemien uusien vaatimusten mukaisesti palveluntarjoajien tulee jatkossa parhaansa mukaan pyrkiä estämään tekijänoikeuksia loukkaavan materiaalin päätyminen alustoilleen. Palveluntarjoajat eivät myöskään enää saa suojaa tilanteessa, jossa niillä ei ole ollut tosiasiallista tietoa tekijänoikeuksia loukkaavan materiaalin olemassaolosta alustallaan.

Tämän tutkielman tarkoituksena on selvittää, noudattaako Unionin lainsäätäjän artiklassa 17 hahmottelema perusoikeuksien välinen tasapaino aikaisempaa eurooppalaisessa oikeuskäytännössä löydettyä tasapainoa kilpailevien perusoikeuksien välillä. Kilpaileviksi perusoikeuksiksi on artiklan 17 kontekstissa identifioitu sanan- ja tiedonvälityksen vapaus, elinkeinovapaus ja tekijänoikeudet. Tutkielmassa tarkastellaan pääsääntöisesti Euroopan unionin tuomioistuimen sekä Euroopan ihmisoikeustuomioistuimen ratkaisuja, joissa on tasapainoiltu edellä mainittujen perusoikeuksien toteutumisen välillä.

Artiklasta 17 havaittavissa olevan perusoikeuksien välisen tasapainon voidaan katsoa noudattavan elinkeinovapauden ja tekijänoikeuksien osalta oikeuskäytännössä kehittyntä linjaa. Palveluntarjoajat ovat olleet etenevässä määrin tiukkojen vaatimusten kohteena tekijänoikeusloukkauksien ehkäisemiseksi ilman että vaatimusten katsottaisiin olevan tekijänoikeuksien toteutumisen kannalta kohtuuttomia tai loukkaavan elinkeinovapauden ydintä. Elinkeinovapauden on lisäksi oikeuskäytännössä nähty olevan arvoltaan vähäisempi perusoikeus.

Linja ei sen sijaan ole yhtä selkeä tarkasteltaessa sanan- ja tiedonvälityksen vapauden sekä tekijänoikeuksien välistä tasapainoa. Verkon käyttäjien tiedonsaantioikeus on noussut oikeuskäytännössä keskeiseen asemaan, eikä artiklan 17 mahdollisesti aiheuttamien suojaustoimien voida katsoa tukevan tätä kehitystä. Lisäksi oikeuskäytännössä on arvioitu, että ainoan mahdollisen tiedonsaantiväylän häviäminen saattaa kajota oikeuden ytimeen, mikä vaikeuttaa entisestään palveluntarjoajien tehtävää perusoikeuksien välisen tasapainon käytännön toteuttajana.

Asiasanat: perusoikeuksien välinen tasapaino, perusoikeudet, teollis- ja tekijänoikeudet, sanan- ja tiedonvälityksen vapaus, elinkeinovapaus, direktiivi tekijänoikeudesta

## Abstract

UNIVERSITY OF TURKU  
Faculty of Law

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The Directive on Copyright on the Digital Single Market was approved by the European Parliament in March 2019. Article 17 of the directive presents new stricter obligations for the online content sharing providers, who are best positioned to prevent copyright violations from occurring on their platforms. According to these new obligations the providers must with their best efforts strive to prevent the uploading of copyright infringing material on their platform. Furthermore, the providers are no longer shielded from liability in circumstances where they do not possess actual knowledge of infringing activities.

The purpose of this paper is to examine whether the fair balance between competing fundamental rights constructed by the legislator in Article 17 is in line with the established perception of fair balance visible in the case law of the European legal framework. The competing fundamental rights in the context of Article 17 are the freedom of expression and information, freedom to conduct a business and right to intellectual property. This examination of the case law is carried out primarily by discussing the judgments of Court of Justice of the European Union and European Court of Human Rights.

The perceived balance between the freedom to conduct a business and the right to intellectual property can be seen falling in line with the previous case law. The content sharing providers have been subject to increasingly stricter measures which have not been deemed unproportioned or violating the essence of a right to conduct a business. Furthermore, the right to conduct a business has been regarded as a fundamental right of less significance in the case law.

The relationship between previous case law and Article 17 is less consistent when it comes to the balance between the freedom of expression and information and right to intellectual property. The freedom of information of the users of the services has become a focal point in the case law and the potential protective measures initiated by Article 17 cannot be seen functioning well with this development. Furthermore, depriving the users of their sole mean of accessing information may constitute as a violation of the essence of the right to information. Consequently, the position of the service provider in implementing measures that fulfill the requirement of fair balance becomes more difficult.

Subject matters: fair balance of fundamental rights, fair balance, intellectual property rights, freedom of expression and information, right to conduct a business, directive on copyright

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Directive 2006/24/EC of of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (Data Retention Directive) (2006) OJ L 105, p. 54 – 63.

Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332, p. 27 – 45.

Directive 2019/790 2019 of the European Parliament and of the Council of 17 April on Copyright in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, p. 92 – 125.

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### **International conventions**

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Commission, “Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A balanced IP enforcement system responding to today’s societal challenges” COM (2017) 707 final, p. 2.

EUIPO, “The Economic Cost of IPR Infringement in the Recorded Music Industry” (2016) p. 5, <[https://euipo.europa.eu/tunnelweb/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study7/Music\\_industry\\_en.pdf](https://euipo.europa.eu/tunnelweb/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study7/Music_industry_en.pdf)>, accessed 2.4.2019.

FRA, “Freedom to conduct a business: exploring the dimensions of a fundamental right” (2015) p. 21 < [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2015-freedom-conduct-business\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf)>, accessed 29.7.2019.

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WIPO, <<https://wipolex.wipo.int/en/legislation/profile/EU>>, accessed 7.6.2019.

WIPO, <<https://wipolex.wipo.int/en/legislation/profile/US>>, accessed 8.6.2019.

## ABBREVIATIONS

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DSM	Digital Single Market
E-commerce	Electronic commerce
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUIPO	European Union Intellectual Property Office
FRA	European Union Agency for Fundamental Rights
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
InfoSoc	Information Society
INTA	International Trademark Association
OJ	Official Journal of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Office

# 1 INTRODUCTION

The Directive on Copyright on the Digital Single Market, hereinafter referred to as the Directive, was approved by the European Parliament in March 2019. It does not replace but is based upon and compliments the previous directives regarding copyright protection within the Union<sup>1</sup>. The Directive is an integral part of the Unions Digital Single Market Strategy, the purpose of which is to improve the accessibility to online goods and services for consumers and businesses, create a suitable environment for digital networks and services, and realize the full potential of a European Digital Economy. In practice, this means harmonizing and modernizing the legislation concerning e-commerce, data privacy and ownership, communication and the intellectual property, especially the legislation regarding copyright.<sup>2</sup>

The reformation and harmonization of copyright legislation across the Union can be deemed as a central part of the DSM-strategy. EU has so far been interested in harmonizing the economic rights aspect of copyright protection which contains the provisions on how the right holders like authors and artists can have control over the use of their works while also getting an adequate monetary compensation for this use<sup>3</sup>. The more efficient protection and remuneration for the copyright owners is also clearly present in the upcoming copyright legislation, especially in Article 17 of the Directive, which regulates the use of protected content by online content sharing service providers such as YouTube, Reddit and Twitch.

However, current best practices applied by the intermediaries, such as YouTube's Content ID system, rely heavily on automatic filtering of the material uploaded on the platforms. Some of the weaknesses of these systems are, for example, their inability to recognize material protected under the exceptions and limitations to copyright listed in Article 5 of the InfoSoc. Directive<sup>4</sup>,

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<sup>1</sup> Directive 2019/790 of 17 April 2019 of the European Parliament and of the Council on Copyright in the Digital Single Market (2019) OJ L 130/92.

<sup>2</sup> Commission, "A Digital Single Market strategy for Europe" COM (2015)192 final, p. 20.

<sup>3</sup> Commission, "Copyright" < <https://ec.europa.eu/digital-single-market/en/copyright> > accessed 13.3.2019.

<sup>4</sup> 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 (2002) OJ L 167.

such as parodies or reviews.<sup>5</sup> Furthermore, the operating environment for the businesses of online intermediaries and online content providers might change drastically, perhaps even endangering the opportunity to conduct business within the Union.

This is not to say that protecting intellectual property rights should not be an important aspect regarding the future of the internal market. According to a report by EUIPO<sup>6</sup>, the music industry within the Union suffered losses of €170 million in 2014 due to copyright infringements<sup>7</sup>. Looking at the global scale, it has been reported by ICC and INTA<sup>8</sup> that digital IP-infringements towards movies, music and software amounted to \$213 billion in 2013 and the figure was believed to grow to anywhere between \$384 and \$856 billion by 2022<sup>9</sup>. The damage is not only suffered by the right holders but also the internal market, as jobs, tax revenues and consequently social security benefits are affected within the Union<sup>10</sup>.

The importance of IP rights regarding the functioning of the internal market has long been understood by the Union, and they are firmly established as fundamental rights in EU. Article 17 of the Charter of Fundamental Rights of the European Union, hereinafter referred to as the Charter, affirms the right to property as a fundamental right, and intellectual property is included in this provision<sup>11</sup>. The position of right to property as a fundamental right is also apparent in the European Convention of Human Rights<sup>12</sup>. Therefore, it seems that the Directive

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<sup>5</sup> Leron Solomon, “Fair Users or Content Abusers: The Automatic Flagging of Non-Infringing Videos by Content ID on Youtube” (2015) 44 Hofstra L. Rev. 237, 257.

<sup>6</sup> European Union Intellectual Property Office.

<sup>7</sup> EUIPO, “The Economic Cost of IPR Infringement in the Recorded Music Industry” (2016) p. 5, <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study7/Music\\_industry\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study7/Music_industry_en.pdf)>, accessed 2.4.2019.

<sup>8</sup> The International Chamber of Commerce and The International Trademark Association, respectively.

<sup>9</sup> ICC & INTA, “The Economic Impacts of Counterfeiting and Piracy” (2016) p. 8, <[http://www.inta.org/Communications/Documents/2017\\_Frontier\\_Report.pdf](http://www.inta.org/Communications/Documents/2017_Frontier_Report.pdf)>, accessed 2.4.2019.

<sup>10</sup> Commission, “Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A balanced IP enforcement system responding to today’s societal challenges” COM (2017) 707 final, p. 2.

<sup>11</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

<sup>12</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, [1950] Art. 1.

is indeed an appropriate tool to more effectively achieve the status of intellectual property as a fundamental right.

However, the aspects that could be affected by the stricter liability of intermediaries are also protected by the Charter. Freedom of expression and information alongside freedom to conduct a business are both covered by the respective Articles of 11 and 16 of the Charter. It is possible that the Directive might indirectly lead to the infringement of these fundamental rights. Article 52(1) of the Charter provides that limitations on these rights must be proportional, in that they must be “necessary and genuinely meet the objectives of general interest” or must “protect the rights and freedom of others”. Moreover, these limitations must “respect the essence” of these rights.

This thesis evaluates whether the fair balance between competing fundamental rights set by the legislator in Article 17 is following the guidelines presented in the European case law. This is done by examining the case law of CJEU<sup>13</sup> and, to a lesser extent, that of ECtHR<sup>14</sup>. The purpose of this examination is to determine how far the Court has gone in protecting intellectual property as a fundamental right in the expense of other fundamental rights and whether the seemingly stricter responsibilities given for the online intermediaries set by the new Directive are in line with the Courts previous assessments. The examination focuses on those fundamental rights that can be deemed relevant considering the possibly pervasive effect of more efficient IP protection introduced by the Directive: freedom of expression and information and freedom to conduct a business.

The type of research conducted in this paper is a combination of explanatory, empirical and evaluative research<sup>15</sup>. Largest portion of the paper focuses on presenting and explaining the judgments of the Courts in specific cases regarding the relevant fundamental rights. Amidst this descriptive research the paper compares the cases focusing on the ways the Courts have found the balance between competing fundamental rights, and whether certain rights seem to have a higher or lower level of protection than others. Finally, the paper evaluates whether the

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<sup>13</sup> Court of Justice of the European Union.

<sup>14</sup> European Court of Human Rights.

<sup>15</sup> Mark van Hoecke, “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in Mark van Hoecke and François Ost (eds), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011).

assessments of the Courts can be seen strengthening of hindering the proposed aims of Article 17 of the Directive.

This paper is divided into 6 parts. After the introduction, we will move on to Chapter 2, in which we will look at the status and primary sources of fundamental rights within the Union. Moreover, the general idea of balance between different fundamental rights is presented. In Chapter 3, intellectual property as a fundamental right in EU is introduced and its growing importance in both the legislative framework and in the European case-law is presented. Furthermore, the changes introduced by Article 17 of the new copyright directive are more thoroughly described. In Chapter 4, the freedom of expression and information as a fundamental right is briefly introduced, and then the case law regarding the balancing between this right and the right to intellectual property is examined. Chapter 5 is constructed in similar fashion discussing the status between freedom to conduct a business and the right to intellectual property. The paper ends with the concluding remarks of Chapter 6.

## 2 THE STATUS OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

### 2.1 *Introduction*

The position of fundamental rights within EU has continuously strengthened. Currently, there are three distinguishable, albeit fundamentally interlinked, sources of human rights provisions affecting the Union legal order.<sup>16</sup> These sources are presented in Article 6 of TEU<sup>17</sup>. Two of them have already been identified above as the Charter of Fundamental Rights and European Convention on Human Rights, the third one being the uncodified general principles of EU law. It is of paramount importance for the following discussion to understand this interrelationship between these sources, as the fair balance between two competing fundamental rights, such as freedom of expression and the right to intellectual property, is not only inspired by the previous judgments of CJEU which is why the following chapters will not solely focus on these judgements.

First, I shall argue that despite the Charter being the most important fundamental rights instrument in the Union legal order, it is also affected by the ECHR as well as general principles of EU law. Secondly, I shall argue that fundamental rights have in the past on many occasions had an enormous impact on different legislative measures of the Union and implementing measures of the Member States. Thirdly, I shall present the interlinked concepts of proportionality of a measure, fair balance between fundamental rights and the essence of a right.

Next, we will look at the three important fundamental right sources one by one, focusing on their role in the development of fundamental rights within the Union and specifically regarding their previous impact on the Union legislation.

### 2.2 *General principles of EU law*

Regarding the fundamental rights as general principles of EU law, Article 6(3) TEU states as follows:

“Fundamental 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”

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<sup>16</sup> Robert Schütze, “Three ‘Bills of Rights’ for the European Union” (2011) 30 YEL 131, 132.

<sup>17</sup> Treaty on European Union.

The general principles are European human rights independent from those of national constitutions<sup>18</sup> but are nevertheless derived from the “common constitutional traditions” of Member States<sup>19</sup>. These traditions were defined as influencers to the general principles in *Internationale Handelsgesellschaft*<sup>20</sup>, even though the principles themselves had already been introduced in *Stauder*<sup>21</sup>. In *Nold*<sup>22</sup>, ECJ further developed these principles by affirming that they are also inspired by international human rights conventions alongside the national constitutional traditions.<sup>23</sup> Moreover, in *Schmidberger*, it was specified that ECHR is of fundamental importance in this respect.<sup>24</sup>

Even though the general principles are not in a written form, it does not follow that their status as a source of law is lesser than that of ECHR or the Charter. In fact, Article 6 TEU elevates the general principles to the same level as ECHR and the Charter, that is, fundamental rights as general principles are primary law within the Union.<sup>25</sup> As primary law, the general principles regarding fundamental freedoms alongside the Treaties should overcome secondary legislation such as directives and regulations.<sup>26</sup> Indeed, there have been many instances in which fundamental rights as general principles of EU law have had, for example, impact on Member States’ implementation of Union legislation. This has happened especially after *Wachauf*<sup>27</sup> and

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<sup>18</sup> Schütze (n 16) 132.

<sup>19</sup> Elise Muir, “The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges” (2014) 51 CML Rev. 219, 242.

<sup>20</sup> Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114, para 4.

<sup>21</sup> Case 29/69 *Erich Stauder v City of Ulm* EU: C: 1969:57, para 7.

<sup>22</sup> Case 4/73 *J. Nold, Kohlen- und Baustoffgrosshandlung v Commission* EU:C:1974:51, para 13.

<sup>23</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6<sup>th</sup> edn, Oxford University Press 2015) 384 – 385.

<sup>24</sup> Case C–112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* EU:C:2003:333, paras 71–72. See also: Robert Schütze, “Three ‘Bills of Rights’ for the European Union” (2011) 30 YEL 131, 138.

<sup>25</sup> Muir (n 19) 219.

<sup>26</sup> Phil Syrpis, “The Relationship Between Primary and Secondary Law in the EU” (2015) 52 CML Rev. 461, 461.

<sup>27</sup> Case 5/88 *Hubert Wachauf v Germany* EU:C:1989:321, para 17.

before the Charter became binding<sup>28</sup>, however, the principles have not become irrelevant after the status of the Charter changed either. Furthermore, the principles have had effect regarding actions towards secondary legislation itself.

In *Elgafaji*, for example, Directive 2004/83/EC on persons eligible for subsidiary protection was interpreted in favor of the applicant in the light of general principles of EU law.<sup>29</sup> Similarly in *Bavarian Lager*, data privacy and protection overcame the transparency doctrine.<sup>30</sup> In both of these cases, ECHR functioned as an inspiration for the interpretation of the general principles. *Parliament v Council*<sup>31</sup> is a rare instance where the Court drew from another source of international human rights instrument than ECHR and refused the annulment of specific provisions of the Family Reunification Directive<sup>32</sup> requested by the Parliament. ECJ's seemingly reluctant attitude to use other international human rights instruments as a source of inspiration has raised criticism.<sup>33</sup>

As for the effect of common constitutional traditions of Member States to the general principles regarding fundamental rights, the situation has been far from straightforward since the landmark *Hauer*<sup>34</sup>-case, in which the importance of these constitutional traditions was reaffirmed<sup>35</sup>. There have been some instances where the Court's approach regarding these traditions common to Member States has been less contested, such as *Omega*<sup>36</sup> where the Court was able to establish

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<sup>28</sup> For case law regarding fundamental rights review of national measures pre- and post-CFR, see: Jukka Snell, "Fundamental Rights Review of National Measures: Nothing New under the Charter?" (2016) 21 EPL 285.

<sup>29</sup> Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* EU:C: 2009:94, para 28.

<sup>30</sup> Case C-28/08 *Commission v Bavarian Lager* EU:C: 2010:378, para 62. See also: Els J. Kindt, *Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis* (Springer 2013) 413.

<sup>31</sup> Case C-540/03 *Parliament v Council* EU:C:2006:429, para 37. In this case, the Court drew from International Covenant on Civil and Political Rights and from Convention on the Rights of the Child.

<sup>32</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

<sup>33</sup> Olivier de Schutter and Israel de Jesús Butler, "Binding the EU to International Human Rights Law" (2006) 27 YEL 277, 282 – 283.

<sup>34</sup> Case 44/79 *Liselotte Hauer v. Rheinland-Pflaz* EU:C:1979:290.

<sup>35</sup> Sejal Parmar, "International Human Rights and the EU Charter" (2001) 8 MJ 351, 352.

<sup>36</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellung- GmbH v Oberbürgermeisterin der Bundesstadt Bonn* EU: C: 2004:614. In this case, German authorities prohibited Omega from selling games containing simulation of killing people by the grounds of it being against German constitution. Omega argued that this was

that looking for inspiration from common constitutional traditions does not necessarily lead to a situation where the measures adopted by the most lenient Member State are automatically a benchmark for the ECJ. Furthermore, it is not at all clear that a measure adopted by most Member States becomes a common tradition which has effect on general principles if the differences between the approaches are not small, as evident in *Grant*<sup>37,38</sup>. Interesting and controversial positions of ECJ have also emerged through cases such as *Mangold* and *Kükükdeveci*<sup>39</sup> which suggest that the general principles of Union law regarding fundamental rights might in fact be hierarchically superior to other primary law<sup>40</sup>.

### 2.3 *The European Convention on Human Rights*

ECHR is the second source of inspiration for the protection of fundamental rights within the Union. Article 6(2) of TEU states:

”The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.”

EU has not acceded to ECHR as promised in the article and it does not look like this suggestion is going to materialize in the foreseeable future either<sup>41</sup>. However, regardless of the ultimate result of the accession plan, ECHR has had and more than likely continues to have a major role in the human rights framework of the Union. This has occurred through two different routes. Firstly, ECHR affects the general principles and the Charter directly and through the constitutions of the Member States<sup>42</sup>. As evident from the above discussion on the significance

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against freedom to provide services, but ECJ stated that the action by German authorities was in proportion to the task it was set to fulfill, even though some EU Members were less restrictive in their measures.

<sup>37</sup> Case C-249/96 *Lisa Jacqueline Grant v South West Trains Ltd.* EU:C:1998:63.

<sup>38</sup> Koen Lenaerts and José A. Gutiérrez-Fons, “The Constitutional Allocation of Powers and General Principles of EU Law” (2010) 47 CML Rev. 1629, 1634 – 1635; 1663; 1667. For the cases having to do with a fundamental EU value, see cases: Case C-438/05 *ITF and FSU v. Viking Line ABP and OÜ Viking Line East* EU:C:2007:772 and Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, EU:C:2007:809.

<sup>39</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* EU: C: 2005:709 and Case C-555/07 *Seda Kücüdeveci v Swedex GmbH* EU: C: 2010:21.

<sup>40</sup> Vojtech Belling, “Supranational Fundamental Rights or Primacy of Sovereignty” (2012) 18 ELJ 251, 254.

<sup>41</sup> Opinion 2/13 “Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms” [2014].

<sup>42</sup> Robert Schütze, “Three ‘Bills of Rights’ for the European Union” (2011) 30 YEL 131, 158.

of fundamental rights as general principles of EU law, it is not always unproblematic to try and distinguish the effects of ECHR from those of the general principles. The same can be said of the relationship between the Charter and ECHR, which we will examine below. Secondly, ECHR affects the fundamental rights framework of EU as an “external bill”<sup>43</sup>, which most transparently manifests itself through Article 52(3) of the Charter:

”In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”

According to the article, ECHR provides a “floor” of a sorts for the fundamental rights protection of the CJEU. The article also states that even though these so-called minimum standards are thus firmly set by the ECHR, it does not mean that CJEU could not establish higher standards. In the hallmark *Bosphorus*<sup>44</sup> ruling, ECtHR constructed a rule of thumb according to which EU can generally be presumed to offer an amount of protection equivalent to the ECHR unless facts of a case prove otherwise. Moreover, the presumption does not apply in situations where the Member State has had an opportunity to use its own discretion regarding the implementation of the EU measure, as in the case of directives.<sup>45</sup>

There has been notable reluctance on behalf of ECtHR to review EU actions<sup>46</sup>. However, it has on rare occasions reviewed actions of the Member States acting within their competence giving effect to EU legislation<sup>47</sup>. Moreover, referencing of ECHR by CJEU is not an entirely one-sided affair, as ECtHR has also frequently referenced the Charter<sup>48, 49</sup>

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<sup>43</sup> *ibid* 158.

<sup>44</sup> *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005).

<sup>45</sup> Johan Callewaert, “Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences” (2018) 55 CML Rev. 1685, 1692 – 1693.

<sup>46</sup> *Connolly v 15 Member States of the European Union* App no 73275/01 (ECtHR, 8 December 2004).

<sup>47</sup> For example *Matthews v United Kingdom* App no 24833/94 (ECtHR, 18 February 1999).

<sup>48</sup> For example *Goodwin v United Kingdom* App no 28957/95 (ECtHR, 12 April 2006).

<sup>49</sup> Rhona Smith, “Interaction between international human rights law and the European legal framework” in Christophe Geige (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).

## 2.4 The Charter of Fundamental Rights

The most important individual written document regarding the protection of fundamental rights within the Union is the Charter. Article 6(1) TEU states as follows:

” The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

After the entry into force of the Lisbon Treaty, the Charter became legally binding and is now to be treated of equal value to other EU Treaties as a source of law<sup>50</sup>. This does not mean, however, that the Charter would have been of no importance pre-Lisbon. From its approval in 2000 to the determining and strengthening of its legal status in 2009, it served as an inspiration in a plethora of cases concerning challenges to EU legislation and Member States action regarding implementation. Perhaps the most notable case in this transitional era is *Kadi*<sup>51</sup>, in which United Nations and EU had ordered sanctions against individuals associated with Al-Qaida and Taliban in the post 9/11 turmoil. ECJ proceeded to strike down Council Regulation 881/2002 as it had effectively made the financial assets of Mr. Kadi completely unavailable to him, thus violating his right to property<sup>52</sup>. Other cases challenging EU legislation pre-Lisbon include *Netherlands v Council and Parliament* and *European Parliament v Council*<sup>53</sup>. Cases challenging Member State implementation include *Promusicae* and *Tietosuojavaltuutettu*<sup>54</sup>.

It is safe to say that the coming into effect of the Charter as a legally binding instrument was not as great of a shock to the EU legal system as it could have been thanks to the fact that it was

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<sup>50</sup> Elise Muir, “The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges” (2014) 51 CML Rev. 219, 219.

<sup>51</sup> Case C-402/05 P & 415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission* EU:C:2008:46.

<sup>52</sup> Andrea Gattini, “Joined Cases C-402/05 P & 415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission*, judgment of the Grand Chamber of 3 September 2008, nyr.” (2009) 46 CML Rev. 213, 222 – 223.

<sup>53</sup> Case C-377/98 *Netherlands v Council and Parliament* EU:C:2001:523 which concerns possible human dignity violations of the Biotechnology Directive and Case C-540/03 *European Parliament v Council* EU:C: 2006:429 which concerns possible violation regarding respect to family life by the Family Reunification Directive. See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6<sup>th</sup> edn, Oxford University Press 2015) 401.

<sup>54</sup> Case C-275/06 *Promusicae v Telefónica de España SAU* EU:C: 2008:54 regarding the conflict between right to property and data protection, and Case C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy* EU:C:2008:727 concerning the conflict between freedom of expression and privacy rights. See *ibid* 412.

used as an inspiration and made a familiar part of the Unions legislative framework beforehand. However, this does not mean that the post-Lisbon era has been identical to the years preceding the Lisbon Treaty, for fundamental rights have assumed a central role both on the Union level and before national courts as the number of cases concerning human rights has grown.<sup>55</sup> Furthermore, the Charter did not introduce new rights but rather made the already established rights visible<sup>56</sup>.

It is important to note that most of the rights protected by the Charter are not absolute, that is, they can be subject to limitations. The key provision in this regard is Article 52(1) of the Charter, which states:

”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.”

First, the limitation must respect the “essence” of the right and freedoms that are being limited. In most cases the essence is not clearly defined. However, it can be argued that all fundamental rights possess a “core” and interfering with this core deprives all or a distinct group of right holders from enjoyment of the right in question<sup>57</sup>. The general idea behind this core or essence within the human rights presented in the Charter is inspired by both Member States’ constitutions and ECHR as evident in the respective Articles 52(4) and 52(3) of the Charter<sup>58</sup>. The essence of a fundamental right is not specifically mentioned in ECHR but the idea is clearly visible in numerous judgements of ECtHR<sup>59</sup>.

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<sup>55</sup> Sara Iglesias Sánchez,” The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ’s approach to fundamental rights” (2012) 49 CML Rev. 1565, 1609.

<sup>56</sup> Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2016] C 202/312.

<sup>57</sup> Maja Brkan,” The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core” (2018) 14 Eu Const. 332, 368.

<sup>58</sup> See *ibid* 339.

<sup>59</sup> E.g. *Belgian Linguistic App. no 2126/64* (ECtHR, 23 July 1968), in which the Court stated that “such regulation must never injure the *substance* of the right to education --” (emphasis added). See Jonas Cristoffersen,” Human rights and balancing: The principle of proportionality” in Christophe Geige (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015). Other examples include *Goodwin v United Kingdom App. no 17488/90* (ECtHR, 11 July 2002) and *Heaney and McGuinness v Ireland App. no 34720/97* (ECtHR, 21 December 2000).

The second essential aspect of Article 52(1) is the principle of proportionality. Proportionality is a general principle of EU law, which provides that measures taken by the Union or the Member States within the scope of EU law “should be appropriate for attaining the objective and must not go beyond what is necessary to achieve it”<sup>60</sup>. Thus, the “proportionality test” can be seen comprising of three parts, which are suitability, necessity and proportionality of the measure.<sup>61</sup> The last stage of the test focuses on determining whether the measure that has been imposed to achieve the sought objective has been excessive considering the burden suffered by the individual<sup>62</sup>. There has been some discussion on whether CJEU on its own initiative takes the third stage of the proportionality test into consideration as an independent part of the test or does it in practice often merge with the previous two stages<sup>63</sup>.

Closely interlinked with the principle of proportionality is the principle of fair balance. As with most principles regarding the fundamental rights, the exact relationship of these two principles is somewhat complex. Some commentators see the fair balance principle as a variant of the principle of proportionality<sup>64</sup> while others, at least in the context of the ECtHR, see it as a mandatory basis under which the proportionality test can be conducted<sup>65</sup>. Whatever the case, the concept of fair balance is, if possible, even vaguer than that of proportionality. Nevertheless, the requirement of fair balance between competing fundamental rights has been stated in numerous CJEU cases<sup>66</sup>.

There are a handful of CJEU cases that at the same time encapsulate the relationship between the essence of a fundamental right and the principle of proportionality while also showcasing the momentum the Charter can have in a situation where a fair balance has not been struck

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<sup>60</sup> Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* EU:C: 2002:741.

<sup>61</sup> Michael Wimmer, “The Dinghy’s Rudder: General Principles of European Union Law through the Lens of Proportionality” (2014) 20 EPL 331, 338.

<sup>62</sup> *Craig and de Búrca* (no 57) 551.

<sup>63</sup> *ibid.*

<sup>64</sup> Peter Oliver and Christopher Stothers, “Intellectual property under the Charter: Are the Court’s scales properly calibrated” (2017) 54 CML Rev. 517, 546.

<sup>65</sup> Alastair Mowbray, “A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights” (2010) 10 HRL Rev. 289, 308.

<sup>66</sup> E.g. Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C: 2013:28 para 60.

between competing fundamental rights. One of the most important cases with these qualities is *Digital Rights Ireland*<sup>67</sup>, which led to the demise of the Data Retention Directive<sup>68</sup>. The Data Retention Directive gave electronic communication service providers a duty to collect and store information, such as the recipient and the sender of a message, in order to more effectively enable battling serious crime, such as terrorism<sup>69</sup>. Content of the messages, however, was not among the data gathered<sup>70</sup>. The national implementing measures of the Directive were challenged for being incompatible with EU law, especially with data protection and privacy, and subsequently questions were referred to ECJ by the national courts<sup>71</sup>.

The Court examined whether the essence of the rights of data privacy and protection were infringed but came to the conclusion that this was not the case, as the content of the messages was not being captured<sup>72</sup> and the directive set adequate requirements for the communication providers to ensure the protection of the data<sup>73</sup>. The Court then engaged in a proportionality test. The “general interests” -requirement was met, as the directive sought to harmonize the measures taken by the Member States while actively strengthening the fundamental right of security captured by Article 6 of the Charter<sup>74</sup>. Moreover, the directive was deemed suitable, as it achieved its purpose<sup>75</sup>. However, the directive failed the necessity test, as the Court among other arguments stated that the idea behind gathering information of ultimately every single person in EU with no limitation regarding the time nor the place of the messages sent was

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<sup>67</sup> Joined cases C-293 & 594/12, *Digital Rights Ireland Ltd and Seitlinger and others* EU:C:2014:54.

<sup>68</sup> Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (Data Retention Directive) [2006] L 105/54.

<sup>69</sup> *ibid* Art. 1(1).

<sup>70</sup> *ibid* Art. 1(2).

<sup>71</sup> Orla Lynskey, “The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: *Digital Rights Ireland*” (2014) 51 CML Rev. 1789, 1792.

<sup>72</sup> *Digital Rights Ireland* (n 67) para 39.

<sup>73</sup> *ibid* para 40.

<sup>74</sup> *ibid* paras 41 – 44.

<sup>75</sup> *ibid* para 46.

disproportionate when compared to the aim of the directive<sup>76</sup>. The Data Retention Directive was consequently declared void<sup>77</sup>, seemingly because the balance between the right to security and right to effective data protection and privacy was not fair.

Another hallmark case that is especially useful in comprehending the vague and problematic relationship between the essence of a right and proportionality is *Schrems*<sup>78</sup>. In this case, Mr. Schrems requested the Irish Data Protection Commissioner to examine the data transfer of Facebook Ireland from EU to United States under the Safe Harbour Decision<sup>79</sup> in the wake of the Snowden revelations of 2013 regarding the unlimited data retention practiced by the US intelligence agencies<sup>80</sup>. The Irish Data Protection Commissioner rejected the request based on the Safe Harbour Decision and the case eventually landed before ECJ.

ECJ declared the Safe Harbour Decision invalid<sup>81</sup>. Unlike in *Digital Rights Ireland*, the Court did not engage in the proportionality test to determine the fair balance between privacy and security<sup>82</sup>. Instead, ECJ argued that the essence of the fundamental right to respect for private life was compromised because the *content* of the communication could be accessed by public authorities<sup>83</sup>. Despite the perfect opportunity for ECJ to perhaps clarify its standing regarding a fair balance between two competing fundamental rights, in this context privacy and security, it seemed to be reluctant to do so<sup>84</sup>. The concept of essence of a fundamental right is therefore

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<sup>76</sup> *ibid* paras 56, 58 – 59.

<sup>77</sup> *ibid* para 69.

<sup>78</sup> Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* EU:C:2015:117.

<sup>79</sup> Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce [2000] OJ L 215/7. The decision recognized US as having an “adequate level of protection” regarding data privacy and protection -policies, and thus those private entities which resided in US and were committed to complying with EU data protection rules could receive data from Member States without further guarantees. See *ibid* paras 1 – 5.

<sup>80</sup> Loïc Azoulay and Marijn van der Sluis, “Institutionalizing personal data protection in times of global institutional distrust: Schrems” (2016) 53 CML Rev. 1343, 1343.

<sup>81</sup> *Schrems* (n 78) para 105.

<sup>82</sup> Azoulay and van der Sluis (n 80) 1365 – 1366.

<sup>83</sup> *Schrems* (n 78) para 94.

<sup>84</sup> Azoulay and van der Sluis (n 80) 1365 – 1366.

problematic as it might in some cases prevent the perhaps more useful examination of the fair balance between two fundamental rights. At the same time, however, the concept of essence might help to determine the boundaries in which the proportionality review can take place in if the Court has provided some guidelines on what constitutes as the essence of a right in question.

## 2.5 *Conclusions on the sources and status of fundamental rights in EU*

Fundamental rights as general principles of EU law, ECHR and the Charter together form an integrated, albeit complex, framework for the human rights protection of the Union. Even though the Charter can be identified as the most important part of this trinity, it is clearly affected by the other two as evident from the wording of the Charter.

It is also evident from the above discussion that fundamental rights have enormous influence in the legislative framework of the Union. Firstly, they can have direct impact on EU legislation, such as regulations, directives and decisions, as apparent in the respective cases of *Kadi*, *Digital Rights Ireland* and *Schrems*. What is especially important in the context of directives, however, is the fact that Member State implementation of Union legislation has also been the object of fundamental rights -scrutiny, as showcased in *Promusicae* and *Tietosuojaaltuutettu*. It is thus far from certain that the future only holds smooth sailing and favorable winds for the Directive if questions regarding the resulting fundamental rights aspects should arise.

Most of the fundamental rights provided in the Charter are not absolute in nature, that is, they can be subject to limitations if certain preconditions are met. These preconditions are suitability, necessity and proportionality of the limitation, and together they form the proportionality test, which is then conducted by the Court. Closely related to the principle of proportionality is the “fair balance” of fundamental rights, which is often sought between two or more competing non-absolute human rights. It must be noted that the terms proportionality and fair balance are both inherently vague in nature, and this is why the following discussion regarding the fair balance between the rights to freedom of expression and freedom to conduct a business against right to property is always heavily dependent on the factual background of the judgment in question.

What further complicates the matter is the concept of “essence” of a right, which according to previous judgements of ECtHR and CJEU can never be infiltrated by the influence of another right. As is the case with fair balance, there are no clear guidelines on what exactly constitutes

as the essence of a right, however, previous judgments regarding the interrelationship between the rights discussed in this paper will hopefully shed some light on where the Court(s) have drawn the line in the past. This will, in turn, help to evaluate whether the measures suggested to be taken by Article 17 of the Directive are a logical continuum in EU copyright protection, or whether these measures are a sudden turn when compared to the previous fair balance set by the Court.

### 3 INTELLECTUAL PROPERTY AS A FUNDAMENTAL RIGHT IN EU

#### 3.1 Introduction

In this chapter, I shall first introduce the right to intellectual property as a fundamental right in the Union legal order. After this, I shall briefly present the history of IP-protection within the Union legal order. Then, I shall present the new copyright directive and argue that it lays more proactive responsibilities for the online intermediary. Lastly, I shall argue that intermediaries have been the target of continuously stricter measures while the position of IP-rights has strengthened.

The right to intellectual property is established in Article 17 of the Charter, which states:

“1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.”

Looking at the article, it may at first glance seem that it has mainly to do with the concept of protecting “traditional”, tangible property, and that addressing intellectual property rights has been added in only as an afterthought. Another possible impression left by this article could be that the right to intellectual property is somehow stronger than that of tangible property, as there are no visible exceptions regarding intellectual property, unlike in the first part of the provision<sup>85</sup>. However, both of these readings of the article would be incorrect.

As for the first reading, it is important to notice that Article 17(2) is heavily inspired by ECHR Article 1 of Protocol 1, and thus ECHR in accordance with Article 52(3) of the Charter provides a “floor” for the protection of intellectual property in EU<sup>86</sup>. Thus, the right to intellectual property as a right is not neglected at Union level. As for the second reading, explanations relating to the Charter confirm that the guarantees provided in paragraph 1 of the Article 17,

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<sup>85</sup> Christophe Geiger, “Intellectual property shall be protected!? – Article 17 (2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope” (2009) 31 EIPR 113, 115.

<sup>86</sup> Martin Husovec, “Intellectual Property Rights and Integration by Conflict: The Past, Present and Future” (2016) 18 CYELS 239, 241.

where applicable, also concern intellectual property<sup>87</sup>. Both the right to property and to intellectual property should hence, at least in theory, be evenly respected as fundamental rights. Thus, the aspects that intellectual property legislation strives to protect, which are mainly the free and exclusive use of one's intellectual property and the enjoyment of the profits associated with such use, should possess the same level of protection as tangible property.

However, the right to intellectual property is not absolute. Article 5 of the InfoSoc Directive presents an extensive list of exceptions and limitations to the reproduction right and the right to communication to the public. These exceptions include quotations, reviews, parody, and use for the benefit of public security to name a few. The Union has not in so far recognized any exceptions outside this list introduced in the InfoSoc Directive, that is, the list is inclusive<sup>88</sup>.

It must be noted that copyright legislation is only a part of the entire framework of IP-related legislation, as the term "intellectual property" also covers, among others, trademarks and patents. However, it would be counterproductive for the following discussion to try and filter only those cases that have to do with copyright issues from the body of cases that have to do with balancing the right to intellectual property with other fundamental rights. First reason for this is purely semantical: The Charter does not specifically classify different categories of fundamental rights, but rather focuses on the overarching term of "intellectual property". Secondly, and partly relating to the first point, filtering out intellectual property judgements in which the Court engages in a fair balance or proportionality review only because they are not to do with copyright issues per se might hamper the understanding of the overall stance of the Court regarding the relationship between intellectual property and other fundamental rights. Moreover, ignoring these cases completely prevents addressing possible differences in determining the fair balance when comparing copyright to other forms of intellectual property. Lastly, the different types of intellectual property judgements are not artificially separated by

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<sup>87</sup> Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02, 23.

<sup>88</sup> Christophe Geiger and Elena Izyumenko, "Towards a European 'Fair Use' Grounded in Freedom of Expression" (2019) 35 *American International Law Review* 1, 9 – 10.

the Courts either. For example, in the *SABAM* -cases<sup>89</sup> CJEU applied its reasoning established in cases having to do with trademark law to infringement of copyright<sup>90</sup>.

The liability aspects of online intermediaries in the InfoSoc and Enforcement<sup>91</sup> directives focus on the injunctions that the right holder can apply for against intermediaries. What is especially noteworthy concerning the topic of this paper is that the provisions of the E-Commerce Directive<sup>92</sup> relating to the liability of the online intermediary also regulate the liability of online service providers regarding copyright infringements<sup>93</sup>. The E-Commerce Directive offers provisions on the general non-liability of information transmission service providers regarding the information communicated by the recipient of the service. This “mere conduit” provision is described in Article 12 of the E-Commerce Directive. Moreover, the directive prohibits any general monitoring obligations that may be required from the intermediary as per Article 15.

In order to evaluate whether the new copyright directive can be seen as a logical continuum of the fair balance established in previous case law and legislation between the IP-rights and the freedom of expression and information and the freedom to conduct a business, we must first understand the most important developments regarding intellectual property as a fundamental right and the role of the online intermediary. Despite the holistic view of intellectual property cases explained above, the most significant developments in copyright legislation and online intermediary liability will also be included in the discussion. This is done in parallel with the discussion on the significant developments of IP rights in general in order to more clearly showcase the simultaneous evolution occurring in the case law.

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<sup>89</sup> Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771 and Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* EU:C:2012:85. These cases will be more thoroughly examined in the subsequent chapters.

<sup>90</sup> Matthias Leistner, “Europe’s copyright law decade: Recent case law of the European Court of Justice and policy perspectives” (2014) 51 CML Rev. 559, 591.

<sup>91</sup> Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45.

<sup>92</sup> 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 (2002) OJ L 178/1.

<sup>93</sup> Arts.12 – 15 of the E-Commerce Directive, Art. 8(3) of the InfoSoc Directive and Arts. 11 and 9(1) of the Enforcement Directive.

With these objectives in mind this chapter is divided into 4 parts. First, we are briefly going to look at the history of protection of property and intellectual property within the Union. The second part of the chapter introduces the relevant articles from the earlier copyright related directives having to do with the liability of an online intermediary. After this, Article 17(4) of the new Directive is then briefly introduced, as this provision deals with the requirements set for the online content sharing provider. The third part strives to offer some insight on the developments in the European IP case law that have influenced the changes that have affected the liability of the online content sharing provider, and also those cases that have had an impact in the broader position of IP towards other fundamental rights. Last part of the chapter offers concluding remarks related to this discussion.

### *3.2 The road of IP towards the status of fundamental right*

The European Union began legislating on matters relating to intellectual property since the establishment of EEC in 1957 with the Treaty of Rome<sup>94</sup>. In 1962, it enacted its first piece of secondary legislation implementing the Articles 85 and 86 of EEC that have to do with, among other things, industrial property rights such as patents, utility models and trademarks<sup>95</sup>. The first shades of the upcoming fundamental importance of IP-rights were already visible in the predecessors of Article 36 TFEU, which listed the “protection of industrial and commercial property” as one of the viable justifications for obstacles of free movement. It did not take long before Article 36 included the entire array of IP legislation ranging from industrial rights such as patents and trademarks to personal rights such as copyrights<sup>96</sup>.

The first proper wave of intellectual property legislation came in the 1990s as EU was in the process of negotiating three significant international agreements related to IP-rights: the TRIPS Agreement<sup>97</sup>, the WIPO Copyright Treaty and the WIPO Phonograms and Performances

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<sup>94</sup> Treaty establishing the European Economic Community [1957].

<sup>95</sup> Council Regulation of 21 February 1962 REGULATION No 17 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 204/62.

<sup>96</sup> Husovec (n 86) 343.

<sup>97</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights.

Treaty<sup>98</sup>. A large part of the body of legislation adopted during this period was related to copyright<sup>99</sup>. It cannot be said that the Union had been slacking in terms of these legislative measures, as this period was also a revolutionary decade in the lawmaking of intellectual property forerunners such as USA<sup>100</sup>, who were a major force behind modernizing international copyright legislation in the mid-1990s<sup>101</sup>.

Despite the IP legislation and the case law relating to it being in a relative stage of infancy, by the 1990s, many crucial developments had occurred in the Union case law regarding the “traditional” right to property. The seminal judgements in this regard were the cases of *Nold* and *Hauer* from the 1970s<sup>102</sup>. Both these cases were to do with the claimant arguing that Union legislative action resulted in breach of her right to property. In *Nold*, the claimant argued that a Commission decision affecting its position as the direct wholesaler of Ruhr coal violated this right but CJEU responded that property rights can be limited in accordance with public interest. Moreover, CJEU suggested that the property rights of the Member States “must be viewed in the light of the social function of the property”.<sup>103</sup>

In *Hauer*, the claimant argued that a Council Regulation banning the plantation of new vines violated her right to property. CJEU turned to its judgement in *Nold* and argued that this was not the case as the regulation does not affect the access or freedom to pursue that occupation on land already in use. Furthermore, CJEU reiterated the argument from *Nold* regarding the societal function of the property.<sup>104</sup> The argument of the Court regarding this social function

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<sup>98</sup> Péter Mezei and István Harkai, “Enforcement of Copyrights over the Internet: A Review of the recent case law” (2017) 21 Journal of Internet Law 12, 13.

<sup>99</sup> WIPO, <<https://wipolex.wipo.int/en/legislation/profile/EU>>, accessed 7.6.2019.

<sup>100</sup> WIPO, <<https://wipolex.wipo.int/en/legislation/profile/US>>, accessed 8.6.2019.

<sup>101</sup> Peter Drahos, “The universality of intellectual property rights: Origins and development” (1998) WIPO Panel Discussion on Intellectual Property and Human Rights, Geneva. [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf), accessed 8.6.2019.

<sup>102</sup> Peter Oliver and Christopher Stothers, “Intellectual property under the Charter: Are the Court’s scales properly calibrated” (2017) 54 CML Rev. 517, 538.

<sup>103</sup> *Nold* (n 22) para 14.

<sup>104</sup> *Hauer* (n 34) para 32.

would later be in the center of the first case underlining the constitutional importance of IP-rights.

The case that brought IP-rights to the field of fundamental rights was *Metronome Musik*<sup>105</sup>. In this case, Music Point Hokamp, which was in the business of renting compact discs, was subject to an injunction filed by Metronome Musik, a company in the field of producing sound recordings. The injunction was based on Article 1(1) of the no longer valid Directive on rental and lending right, which gave the holder of the copyright an opportunity to prohibit the rental of works that were protected by the copyright<sup>106</sup>. Music Point Hokamp argued that the injunction was violating its freedom to conduct a trade or profession, and the case landed before CJEU. According to the Opinion of Advocate General Tesauro both the freedom to pursue a trade or profession and the right to property are general principles of Community law<sup>107</sup>. As in *Hauer and Nold*, the Court continued by stating the social function relating the principles must be taken into consideration. Furthermore, it was reaffirmed that neither of these rights is absolute and hence they can be restricted if those restrictions are proportionate and in favor of general interests pursued by the Union.<sup>108</sup>

CJEU chose to uphold the Article 1(1) of the rental directive. It based its decision on the fact that the increasing threat of piracy coupled with the high and risky investments on behalf of the producers of the recording warranted the strict measure.<sup>109</sup> Moreover, the Court also noted that according to Article 36 TFEU the protection artistic property is a justifiable reason to restrict the free movement of goods. The Court also derived inspiration from general principles of Member States and the Union, which apparently most clearly manifested themselves through

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<sup>105</sup> Case C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* EU:C: 1998:172.

<sup>106</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L 346/61.

<sup>107</sup> C-200/96 *Metronome Musik v Music Point Hokamp* EU:C:1998:18, Opinion of AG Tesauro, para 21.

<sup>108</sup> *Metronome Musik* (n 105) para 21. See also: Husovec (n 86) 242.

<sup>109</sup> Some authors such as Mylly have heavily criticized the proportionality test conducted by the Court. See: Tuomas Mylly, "The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU" in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).

international treaties such as the TRIPS Agreement, which also supported these restrictive measures.<sup>110</sup>

### 3.3 *The liability of the online content sharing provider in Article 17 of the new copyright Directive and the great contrast to the earlier E-Commerce Directive*

*Metronome Musik* had just thus started the development of intellectual property, and evidently copyright rights, in the framework of human rights within the Union. Regarding legislative measures, next steps on this path were the E-Commerce Directive of the year 2000, the Information Society Directive of 2001 and the Enforcement Directive of 2004. These pieces of secondary legislation all strived to more effectively enforce IP-rights<sup>111</sup>. The purpose of the InfoSoc Directive was to greatly harmonize many important concepts related to copyright law<sup>112</sup>, such as exceptions and limitations to copyright presented in Article 5. The Enforcement Directive is the only legal instrument that encompasses all IP-rights within the Union<sup>113</sup> and mainly provides tools for IP-right holders in order to better defend themselves against IP violations<sup>114</sup>.

Intermediaries have traditionally been protected by numerous exceptions both in and outside the EU for user generated content<sup>115</sup>. In the Union legislation intermediaries have been exempted from primary liability regarding this content both in InfoSoc Directive and the E-Commerce Directive. In Article 12 paragraph 1 of the E-Commerce Directive it is stated that intermediary service providers are not liable for the transmitted information as long as they don't actively participate in the initiation or content of the transmission or select its recipient. However, what is most significant regarding the changes made in Article 17 of the new

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<sup>110</sup> *Metronome Musik* (n 105) paras 23 – 26.

<sup>111</sup> Matthias Leistner, "Copyright law in the EC: Status quo, recent case law and policy perspectives" [2009] 46 CML Rev. 847, 871.

<sup>112</sup> Christophe Geiger and Franciska Schönherr, "The Information Society Directive" in Irimi Stamatoudi and Paul Torremans (eds.) *EU Copyright Law: A Commentary* (Edward Elgar Publishing 2014).

<sup>113</sup> Irimi Stamatoudi, "The Enforcement Directive" in Irimi Stamatoudi and Paul Torremans (eds.) *EU Copyright Law: A Commentary* (Edward Elgar Publishing 2014).

<sup>114</sup> Darius Adamski, "Lost on the digital platform: Europe's legal travails with the digital single market" [2018] 55 CML Rev. 719, 728 – 729.

<sup>115</sup> Daphne Keller, "The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation" (2018) 33 Berkeley Tech. L.J. 287, 295.

copyright directive, is the provisions laid out in Article 14 of the E-Commerce Directive, which states as follows:

” Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”

Article 14 paragraph 1 of the E-Commerce Directive provides that the intermediary service providers must act to disable access to the infringing material only after gaining knowledge of the existence of said material. Thus, the requirement for the intermediaries to act has in so far been mostly reactionary, meaning that they are not expected to actively monitor or seek illegal activity within their platforms, instead acting on a case-by-case basis after notification from the right-holder. This system is also known as the “notice and takedown” procedure.<sup>116</sup>

The liability regime of the intermediary seems to be considerably stricter according to Article 17 of the new Directive. First, Article 17 of the Directive deprives the online content sharing providers of the safety provided by Article 14 of the E-Commerce Directive. Article 17(4) lays out new obligations for these online content sharing providers in a following fashion:

“If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

(a) made best efforts to obtain an authorisation, and

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).”

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<sup>116</sup> Giancarlo F. Frosio, “Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy” (2017) 112 Nw. U. L. Rev. Online 18, 20; 41.

Firstly, the intermediaries acting as online content sharing service providers, in order to escape liability, should have made “best efforts” to obtain an authorization from the copyright holder regarding the potentially copyright infringing material. More precisely and according to the demands of the Directive, this authorization should be obtained via a licensing agreement between the intermediary and the right-holder<sup>117</sup>. Considering the dumbfounding amount of copyright protected material being uploaded to platforms such as YouTube on a daily basis, this is undoubtedly an impossible feat, which consequently puts more emphasis on the second and third requirement set for the intermediaries.

Secondly, the Directive demands that the intermediaries, with their best efforts, “ensure the unavailability” of copyright protected material (Article 17(b)) while similarly removing and ensuring the unavailability of the material they have been notified by the right-holders (Article 17 (c)). It is important to note that there aren’t specific requirements of general monitoring or use of upload filtering technologies set for the intermediaries. In fact, paragraph 6 of the Directive explicitly explains that the “application of the provisions shall not lead to any general monitoring obligation”.

Regarding the role of an online intermediary or more specifically that of an online content sharing provider, a fundamental shift seems to have occurred in the liability of the service provider. In general terms, the shift has mostly happened with the type of activity that is required from the service provider. Whereas in the Article 14 of the E-commerce Directive the liability is based on the awareness of infringing material, Article 17 of the new copyright directive demands a more proactive approach. The service provider must now, unlike before, try to obtain an authorization from the right holder, and failing that, otherwise try and ensure the unavailability of copyright protected material on their platform.

Next, we are going to look at the EU-case law that perhaps assists in understanding the rather drastic changes that have occurred between the adoption of the earlier directives and the copyright Directive. In addition to cases that have the element of involvement of an online intermediary, we are going to look at those important IP-cases that do not possess such element to get a clearer picture of the position of the CJEU and ECtHR regarding intellectual property in general. Despite the lack of CJEU-level judgments having to do with the liability of online

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<sup>117</sup> Directive 2019/790 of the European Parliament and of the Council on copyright in the Digital Single Market” COM (2018) Art. 17 (2).

intermediaries until 2008, the period between the adoption of the first set of copyright related directives and the first CJEU-ruling was congested with Member State-level judgments that were in favor of the right holders in expense of the intermediaries<sup>118</sup>.

### 3.4 *The changing position of an online intermediary and the development of IP-protection in the European landscape*

Regarding the framework in which the balancing between intellectual property rights occurs there are three distinguishable changes that have happened during the last decade or so. Firstly, the way in which the Court conducts the balancing exercise has become more thorough. Secondly, intermediaries haven been the target of increasingly strict measures. Thirdly, the importance of intellectual property seems to have grown significantly, and the change has been mainly driven by cases where the Court has weighed IP-interests against data privacy rights, which have traditionally been strongly protected by the Union. Next, we are going to look at these changes in more detail.

#### 3.4.1 The development of the balancing exercise concerning IP-rights

A CJEU-level judgement directly related to the new copyright directives, specifically the InfoSoc Directive, is the judgement of *Laserdisken*<sup>119</sup> from 2006. In this case the claimant, Laserdisken, argued that Article 4(2) of the InfoSoc Directive is invalid as it restricts, among other things, freedom of information. The article in question concerned the exclusion of the international exhaustion principle within the Community, and because of this provision, Laserdisken was unable to import without prior consent from the copyright owners. The CJEU in its judgement stated rather straightforwardly that this restriction on the freedom to receive information was justified because of the need to protect the right to property<sup>120</sup>.

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<sup>118</sup> See for example: Case IZR304/01, *Rolex v Ricardo*, The German Federal Court of Justice, 11 March 2004; *Sabam and IFPI v Seniorennnet*, Court of Antwerp 5 October 2006; *Lafesse v Myspace*, Civil Court of Paris, 22 June 2007; *Nord-Ouest Production v S.A. DailyMotion and S.A. UGC Images*, Civil Court of Paris, 13 July 2007. For further discussion, see Patrick van Eecke, "Online service providers and liability: A plea for a balanced approach" (2011) 48 CML Rev. 1455, 1459 – 1462.

<sup>119</sup> Case C-479/04 *Lasedisken ApS v. Kulturministeriet* EU:C:2006:549.

<sup>120</sup> *ibid* para. 65.

For example Mylly has rather dramatically stated that the period starting from the rulings establishing the fundamental status of IP-rights all the way to the *Laserdisken*-ruling has been characterized by rejection and ignorance of other fundamental rights for the benefit of IP-rights<sup>121</sup> and gone as far as suggesting that fundamental rights were consciously interpreted so as not to challenge secondary IP-law of the Union<sup>122</sup>. Some authors such as Oliver and Stothers have pointed out that seminal judgments in the line of *BAT*<sup>123</sup> prove otherwise, and the situation has perhaps not been as dire as Mylly has suggested<sup>124</sup>. Whatever the case, the balancing exercise conducted by the Court had still been lackluster to say the least.

The turn of tides regarding the Courts stance towards the balancing exercise when IP/rights were on the line can be seen to have happened in *Promusicae*. In the case, Promusicae, who were representing the right holders of musical and audiovisual recordings, demanded that Telefónica, an internet access provider, must release the personal information of an end-user who was allegedly behind infringements of copyright. The demand was based on the Data Retention Directive<sup>125</sup>, which has been more thoroughly discussed above. ECJ decided against Promusicae and argued that the original purpose of the Data Retention Directive was to assist in the battle against serious crime, and data gathered on the basis of the directive could not be used in a civil lawsuit unless the Member State legislator chose to act towards such goal. Even then, the Member State should “allow a fair balance to be struck” between the competing fundamental rights.<sup>126</sup> This reasoning was reaffirmed a year later in *Tele2*<sup>127</sup>.

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<sup>121</sup> Mylly (n 109) 107.

<sup>122</sup> *ibid* 112.

<sup>123</sup> Case C-491/01 *British American Tobacco (Investments) Limited and Imperial Tobacco Limited v Secretary of State for Health* EU:C: 2002:741. It may be fair towards Mylly to point out that the preliminary ruling given by CJEU against IP-rights in this case happened largely because they were set against public health, which is traditionally protected quite heavily.

<sup>124</sup> Oliver and Stothers (n 102) 564.

<sup>125</sup> Data Retention Directive (n 72).

<sup>126</sup> *Promusicae* (n 54), para 70.

<sup>127</sup> Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele 2 Telecommunication GmbH* EU:C: 2009:107.

The *Promusicae*-case is important for IP-rights for three main reasons. First, it can be argued that despite earlier rulings, this case was the jumpstart for constitutional value of IP and its effective protection becoming “mainstream” within the Union legal order<sup>128</sup>. Second, it set the precedent of demanding Member State to always find the fair balance with other rights when enforcing IP-rights<sup>129</sup>. Third, while striving for this fair balance, the Member States must act within the boundaries set by the Union, that is, finding the balance between different human rights is primarily the task of the Union<sup>130</sup>.

After *Promusicae* there have been numerous cases in which the balancing exercise concerning intellectual property and other fundamental rights has become more thorough. These include the *SABAM-cases*, *L'Oréal v. eBay*<sup>131</sup>, *Telekabel*<sup>132</sup> and *McFadden*<sup>133</sup>, in which the Court has given some ideas of what means taken by an intermediary can be considered achieving a fair balance. These cases are going to be more thoroughly examined later in this chapter as well as subsequent chapters.

### 3.4.2 Stricter requirements for the intermediaries

The last decade after coming into force of the Lisbon Treaty has been by far the busiest regarding the number of cases relating to IP-law both on the Union and a Member State level. The coming into force of the Lisbon Treaty and the consequent primary law status of the Charter is undoubtedly one factor in this development, however, it isn't the most significant one. The fundamental status of IP-rights was evidently recognized before this further elevation of its status in numerous cases, some of which have been discussed above. Instead, the unprecedented technological developments of the last decade in fields such as e-commerce, cloud-based

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<sup>128</sup> Husovec (n 86) 242.

<sup>129</sup> Tatiana-Eleni Synodinou, “Intermediaries' liability for online copyright infringement in the EU: Evolutions and confusions” (2015) 31 CLSR 57, 58.

<sup>130</sup> van Eecke (n 120) 1494 – 1495.

<sup>131</sup> Case C-324/09 *L'Oréal SA, Lancôme parfums et beauté & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL and eBay (UK) Limited* EU:C: 2011:474.

<sup>132</sup> Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* EU:C :2014:192.

<sup>133</sup> Case C-484/14, *Tobias McFadden v Sony Music Entertainment Germany GmbH* EU:C:2016:689.

streaming services and social media have been the prominent driving-force behind IP rights taking a central role in the case law of the Union.

Considering the growing element of third-party involvement in these new technologies, it is only natural that the most influential developments in the status of IP-rights have also occurred in cases where the role of the service provider in an alleged copyright infringement is a focal point in the judgement. One of these cases is the 2011 judgement of *Scarlet Extended*<sup>134</sup>, which had implications on both the broader spectrum of the IP-rights and in the liability of the intermediaries. In the case, a collective society, SABAM, demanded that Scarlet, an internet service provider, would put in place filtering mechanisms in order to prevent the copyright infringement towards the members of SABAM. These violations happened because of peer-to-peer file sharing of music committed by the users of Scarlet's internet service.

CJEU rejected the claims of SABAM. What is important regarding the fundamental status of IP-rights, the Court declared that nothing in the wording of the Article 17(2) of the Charter or earlier case law suggests that the right to intellectual property is inviolable and hence absolutely protected<sup>135</sup>. Consequently, and in line with *Promusicae*, the Court demanded that a fair balance must be struck between IP and other fundamental rights<sup>136</sup>. What is important for both the fundamental status of IP-rights and the position of the service provider, the Court stated that a monitoring obligation with no clear temporal or other limitations is too expansive when the fundamental rights of freedom to conduct a business, right to data protection and freedom of information are taken into consideration<sup>137</sup>. The Court saw the monitoring obligation as so unproportioned that in this preliminary ruling it did not give the Member State any discretion for striking a fair balance unlike in *Promusicae*<sup>138</sup>, but took upon itself to give a clear and firm statement regarding the matter. In 2012 the ruling of CJEU in the *Netlog*<sup>139</sup> case confirmed the position of the Court adopted in *Scarlet*, however, this time in the context of a social media

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<sup>134</sup> *Scarlet Extended* (n 92).

<sup>135</sup> *ibid* para 43.

<sup>136</sup> *ibid* para 44.

<sup>137</sup> *ibid* paras 47 – 48, 50.

<sup>138</sup> *Mylly* (n 109) 114.

<sup>139</sup> *Netlog* (n 92)

platform. That is, general monitoring obligations set for the intermediary are not in most cases striking a fair balance as they are against Article 15 of the Enforcement Directive.<sup>140</sup>

A judgement of similar qualities from the same year is the case of *L'Oréal v. eBay*<sup>141</sup>, with the main differences being that instead of a copyright dispute against an internet service provider the case was about the role of an auction service provider in a trademark violation. In this case, in which the claimant argued that eBay was liable for the trademark infringements of its users by failing to act accordingly and financially benefitting from each transaction happening in its site, the Court decided in the claimant's favor. ECJ did affirm once again that any general monitoring obligations for the hosting provider were prohibited, as they would automatically go against the provisions set in the Enforcement Directive which demands proportionality from possible measures to be taken by the intermediary<sup>142</sup>. However, the Court continued, measures that are proportionate, as identifying trading partners, can be demanded by the way of an injunction<sup>143</sup>. Furthermore, the Court stated that Article 14(1) of the E-Commerce Directive does not allow the intermediary to be passive even without the existence of the injured party's specific notice, as knowledge of a possible infringement can also be obtained through an investigation made by the service provider on its own initiative<sup>144</sup>. In other words, the hosting provider cannot rely on Article 14 (1) of the E-Commerce Directive, which exempts the hosting provider from liability if it "does not have actual knowledge of illegal activity" by being completely passive with regards to achieving awareness of these activities<sup>145</sup>.

The lines of cases from *Scarlet* and *L'Oréal* to *Netlog* seems to be indicative of the first steps towards the position of the Court of a more active role of the online intermediary by rejecting the possibility of complete passivity on behalf of the intermediary. As such, this line of cases seems to be the first phase in moving from the requirements set by the first batch of copyright

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<sup>140</sup> *ibid* paras 33 – 35. See also Synodinou (n 129) 66.

<sup>141</sup> Case C-324/09 *L'Oréal SA, Lancôme parfums et beauté & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL and eBay (UK) Limited* EU:C: 2011:474.

<sup>142</sup> *ibid* para 139. See also: van Eecke (n 120) 1487.

<sup>143</sup> *ibid* para 141.

<sup>144</sup> *ibid* para 122.

<sup>145</sup> Synodinou (n 129) 65 – 66.

directives towards the current regime. The Court took this stance a step further in 2014 *Telekabel* where it found that it was indeed plausible for the right-holder to demand a specific end-result from the service provider<sup>146</sup>. Thus, the CJEU argued, it was not directly against the goals of fair balance for the national Court to issue an injunction towards Telekabel to block access to a website containing infringing material when the injunction does not specify the exact measures to be taken to reach the desired end-result. Furthermore, the measures must not be too restrictive towards accessing information regarding the end-users and they must be efficient in a way that they discourage or sufficiently hamper the efforts of possible copyright infringers<sup>147</sup>.

Some parallels with the *Telekabel* judgement can be drawn with the ECtHR decision of *Delfi*<sup>148</sup>, which was given by the Grand Chamber in 2015. In this case ECtHR decided that Delfi, an online news portal, could be held liable for third party comments made by the users of the portal, even if Delfi acted upon requests of takedown regarding the comments and did not possess prior knowledge of the said comments. This was the first judgement of ECtHR regarding the liability of an online intermediary<sup>149</sup> and the case did not concern a copyright issue, however, the nature of the liability described by ECtHR seemed to have similarities to those presented in the *Telekabel*-case. In particular, ECtHR's indirect requirement imposing active monitoring obligations to Delfi<sup>150</sup> seems to fall in line with the interpretation of CJEU in *Telekabel* and *L'Oréal v. eBay*, which hint at a more proactive role of the intermediary regarding preventing copyright infringements from occurring, even if imposing monitoring obligations for online intermediaries is forbidden within the Union legal order per se<sup>151</sup>.

The 2016 case of *McFadden*<sup>152</sup> also seemed to set new requirements for an intermediary. The case was brought before CJEU for a preliminary ruling when a provider of a Wi-Fi-service

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<sup>146</sup> Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* EU:C:2014:192, para 64.

<sup>147</sup> *ibid.*

<sup>148</sup> *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015).

<sup>149</sup> Lisl Brunner, "The Liability of an Online Intermediary for Third Party Content; The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*" (2016) 16 HRL Rev. 163, 164.

<sup>150</sup> *Delfi* (n 148) paras 152, 160 – 161. See also Brunner (n 149) 169.

<sup>151</sup> Art. 15(1) of the InfoSoc Directive (n 4).

<sup>152</sup> Case C-484/14, *Tobias McFadden v Sony Music Entertainment Germany GmbH* EU:C:2016:689.

network, Mr. McFadden, refused to secure his Wi-Fi-hotspot with a password following the claim by Sony Music Germany that the Wi-Fi-network had been used to infringe the right-holders copyright. First of the significant statements given by the Court was that an individual operating Wi-Fi-hotspot service provider could be regarded as an intermediary with the meaning given in Article 12(1) of the E-Commerce Directive<sup>153</sup>, thus broadening the concept of online intermediary within the Union legal order. Secondly, it developed the concept of indirect liability of website intermediaries, meaning that the operators are indirectly liable of the infringing content shared by their users and can thus be sued for damages by the right-holders under Article 3(1) of the InfoSoc Directive<sup>154</sup>. The concept of indirect liability concerning the website operators was later affirmed in *The Pirate Bay*<sup>155</sup> case, in which two ISPs were requested to block entry to The Pirate Bay website, infamous for its torrenting activities<sup>156</sup>.

### 3.4.3 The strengthening position of IP-rights

After coming into force of the Lisbon Treaty there have been cases that have seemingly both strengthened and weakened the position of IP-rights. One example of a pro-IP-rights ruling was the case of *Luksan*<sup>157</sup> in which a national measure restricting ownership of IP-rights was seen breaching Article 17(2) of the Charter<sup>158</sup>. The case was the first of its kind in the sense that not before had the existence and ownership of IP-rights been considered in relation to fundamental rights<sup>159</sup>. The judgement also implicated that a Member State departing from the CJEU interpretation of copyright norms is a fundamental rights breach, if this departure results in unfavourable outcome for the right-holder<sup>160</sup>. If this ruling seemed to be grossly in favor of IP-

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<sup>153</sup> Mezei and Harkai (n 98) 18. *McFadden* (n 152) para 43.

<sup>154</sup> Mezei and Harkai (n 98) 20. *McFadden* (n 152) para 65.

<sup>155</sup> Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV* EU:C:2017:456.

<sup>156</sup> Mezei and Harkai (n 98) 20.

<sup>157</sup> Case C-277/10, *Martin Luksan v Petrus van der Let* EU: C:2012:65. The case was about a copyright dispute between the director and producer of a documentary film.

<sup>158</sup> *ibid* para 71.

<sup>159</sup> Oliver and Stothers (n 102) 541.

<sup>160</sup> Mylly (n 109) 120.

rights, the contrary can be said occurring in *Sky Österreich*<sup>161</sup>, the judgement of which came the following year. Here, the result for the right holder was surprisingly rough, as CJEU did not consider an exclusive broadcasting right acquired via a licensing agreement by Sky Österreich “an established legal position”<sup>162</sup> which is a prerequisite for the applicability of a fundamental right to property<sup>163</sup>.

However, the most obvious steps towards the strengthening of intellectual property as a fundamental right were taken in cases having the presence of an intermediary. In *Bonnier Audio*<sup>164</sup>, the CJEU continued its arguments in line with the cases of *Promusicae* and *Tele2*. Thus, it is not completely forbidden for Member States to give an obligation for the intermediaries to reveal personal data of alleged infringers in civil proceedings, provided that such obligations manage to strike a fair balance with other rights<sup>165</sup>. The Court did, however, give a bit more information of the ways such balancing exercise could be conducted<sup>166</sup>.

In 2017, the CJEU changed its position established in *Promusicae* in the judgement of *Coty Germany*<sup>167</sup>. In the case, Coty requested a German bank to release information regarding the owner of a bank account, which had been used by the owner to receive funds originating from the sale of a counterfeit product, the trademark of which was owned by Coty. As Husovec points out, the facts of the case were very similar to those of *Promusicae*, with the main differences being that the requestee for the personal information of the infringer was a bank, the type of the infringement was that of trademark instead of copyright and, unlike during the judgment of *Promusicae*, the Charter was legally binding<sup>168</sup>.

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<sup>161</sup> Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28.

<sup>162</sup> *ibid* para 38.

<sup>163</sup> Wouter Hins, “The freedom to conduct a business and the right to receive information for free: *Sky Österreich*” (2014) 51 CML Rev. 665, 666.

<sup>164</sup> Case C-461/10, *Bonnier Audio AB and Others v Perfect Communication Sweden AB* EU:C :2012:219.

<sup>165</sup> *ibid* para 56. See also Mezei and Harkai (n 98) 16.

<sup>166</sup> *ibid* para 58. See also Oliver and Stothers (n 102) 555. The preconditions that must be fulfilled for the data to be released by the intermediate include the certainty of the infringement and that the nuisance for the end-users is outweighed by the “reasons for the measure”.

<sup>167</sup> Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941.

<sup>168</sup> Husovec (n 86) 256.

Despite these similarities, the CJEU arrived in a stricter conclusion than in *Promusicae*. After *Promusicae*, the stance of the Court was that there was no requirement for Member States to have in place an obligation that ensures the communication of personal data to the right-holders in a civil proceeding in order to protect IP-rights<sup>169</sup>. However, after *Coty Germany*, the new stand is that such obligation must be in place, and moreover, the absence of such obligation may constitute a fundamental rights breach towards the right to intellectual property<sup>170</sup>. Thus, the line of cases ranging from *Promusicae*, *Tele 2* and *Bonnier Audio* to the strict ruling of *Coty Germany* seems to indicate a more general strengthening of intellectual property rights, as traditionally strong data protection and privacy had to give way for the enforcement of IP-rights.

### 3.5 Conclusions on the development of intellectual property as a fundamental right in EU

Intellectual property as a fundamental right has taken the center stage in the fundamental right discussion of the Union in a relatively short time. Despite the brevity of this journey, it has been filled with many important developments which have in some instances seemed confusing or even contradictory. Nevertheless, there are some patterns visible regarding the CJEU's position towards fundamental rights in general and more specifically, the role of intermediaries within this framework.

First, the Court has never found the right to intellectual property, or property in general for that matter, to be absolute in nature. This has been clear since the “social function” relating to IP-rights established in *Metronome Musik*, and the development has continued with the more sophisticated concept of fair balance from *Promusicae* all the way to *Sky Österreich* and *McFadden*. The Court has taken up the task of more clearly determining how to achieve this fair balance between different fundamental rights, rather than completely leaving it to the discretion of the national courts.

Secondly, it is contestable whether the position of IP as a fundamental right has strengthened vis-à-vis other fundamental rights, as during the last 15 years or so there have been seminal cases both for and against the right-holders as in the judgements of *Luksan* and *Sky Österreich*.

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<sup>169</sup> *Promusicae* (n 54) para 70. See also: Husovec (n 86) 257.

<sup>170</sup> Husovec (n 86) 257. Obligation for internet access providers to disclose information internet had already been suggested by ECtHR in case *KU v Finland* App no 2872/02 (ECtHR, 2 December 2008).

What seems to be indisputably clear, however, is that the position of the online intermediaries and service providers in terms of liability for third party infringements has become considerably stricter. This can be seen from the line of cases ranging from *Scarlet* and *Netlog* to *Telekabel* where the CJEU has seemingly considered more and more stringent actions demanded by the right-holders to be taken by the intermediary to fall within the grey area of fair balance.

Furthermore, the line of cases from *Promusicae*, *Tele2* and *Bonnier Audio* to *Coty Germany* showcase that Member States, unlike earlier, must now have in place an obligation for the intermediaries to release personal data of the claimed infringers for the right-holders in civil-proceedings. This seems to indicate that the position of IP-rights as a fundamental right has indeed become stronger. Even the right to personal data, which have been famously protected in *Schrems* and *Digital Rights Ireland*, has had to give some leeway for the right-to property. Moreover, the *McFadden* decision broadened the concept of “online intermediary” of Article 12(1) of the E-Commerce Directive and the judgement together with the ruling of *The Pirate Bay* affirmed the indirect liability of the online service provider.

It is visible from the continuum of the case law concerning IP-infringements that CJEU has desperately attempted to keep up with the rapidly changing technological environment and the increased involvement of the intermediaries within the limits allowed by copyright-related directives legislated in the early 2000’s. With this in mind, it is no surprise that the legislator recognized the need for the updating of the copyright-regime as a part of the Digital Single Market -strategy. Many of the positions assumed by the Court can also be seen influencing Article 17 of the new copyright directive. For example, CJEU evidently tried to alleviate the problems caused by the somewhat passive position of the hosting service provider granted by Article 14(1) of the E-Commerce Directive in *Telekabel* and *McFadden*. This position of the Court has in some form found its way into Article 17(3) of the Directive in the context of online content sharing service providers, which states:

”When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.”

Moreover, the preconditions that the content-sharing service providers must fulfill to be exempted from liability presented in Article 17(4) of the Directive<sup>171</sup> seem to echo the stance of the Court concerning the more active role of the online intermediaries. However, monitoring obligations per se are still not demanded from the online-content sharing service providers in the Directive.

Given the developments described in the discussion above, the stricter position assumed by the legislator towards the liability of online-content sharing service providers can hardly be seen as an enormous surprise. What cannot be concluded from this discussion, however, whether the provisions of the Directive follow from the “fair balance” set by the Court between *specific* fundamental rights. Thus, we are next going to look at the relationship between individual fundamental rights and the right to intellectual property. As already discussed above, we are going to focus on the two rights that are most probably influenced by the directive. These rights are the freedom of expression and information and freedom to conduct a business.

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<sup>171</sup> See page 24 of this paper for the full provision.

## 4 THE FAIR BALANCE BETWEEN THE FREEDOM OF EXPRESSION AND INFORMATION AND THE RIGHT TO INTELLECTUAL PROPERTY

### 4.1 Introduction

In this chapter, we are first going to introduce the freedom of expression and information as a general concept in the European framework. After this, we are going to look at cases from ECtHR and CJEU where the relevant rights are being balanced. From this examination, certain things can be concluded. First, the right to information as a fundamental right has considerably strengthened through the years. Related to this point, the lawful access to information has gained ground as a significant aspect when considering the proportionality of a measure protecting the right to intellectual property. Lastly, the balancing act taken by CJEU with regarding the freedom of expression and the right to intellectual property may be undergoing a change. All these aspects together may have influence on the application of Article 17 of the new copyright directive.

Like the right to intellectual property, the freedom of expression and information as a fundamental right is protected by multiple international and European conventions, and the right has a long tradition in all parliamentary democracies of Europe<sup>172</sup>. The right is protected, among others, in Article 19(2) of ICCPR<sup>173</sup> and Article 10 ECHR, which grants the freedom “to hold opinions and to receive and impart information and ideas without interference by authorities and regardless of frontiers<sup>174</sup>”. In the legislative framework of the Union the most crucial provision that gives the freedom of expression and information the status of a fundamental right is naturally Article 11 of the Charter, which states as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.”

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<sup>172</sup> Dirk Voorhoof, “Freedom of expression and the right to information: Implications for copyright” in Christophe Geige (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).

<sup>173</sup> United Nations, International Covenant on Civil and Political Rights, [1966].

<sup>174</sup> Art. 10(2) ECHR (n 12).

The vast majority of fundamental rights are not absolute, however, and the freedom of expression and information is no exception in this regard. The contents of Article 19(2) of ICCPR and Article 10(2) of ECHR concerning these limitations have much in common, as both provisions state that the right can be subject to restrictions, among other things, for the protection of rights of others if these restrictions are provided by law and necessary<sup>175</sup>. As with most rights within the Charter, Article 11 does not contain specific limitations relating to the freedom of expression and information. However, the provision is subject to the general limitation regime set by Article 52(1) which demands that the limitations are proportional, necessary, and “meet the objectives of general interest”<sup>176</sup>.

Within the legal framework of the Union, the balancing of freedom of expression to that of intellectual property has traditionally been done entirely through the exceptions and limitations set in Article 5 of the InfoSoc Directive<sup>177</sup>. Unlike in United States, there is no fair use doctrine available in the EU. The fair use system present in the US is flexible by nature, as it only provides the framework in which courts can operate rather freely. That is, American courts possess a great deal of discretion when contemplating on the fairness of the use of copyright protected material<sup>178</sup>. The possible introduction of a European fair use regime into the fundamental right -framework of the Union has in the past met strong resistance, because despite its flexibility, many see it affecting negatively regarding the predictability and harmonization of the legislation<sup>179</sup>.

What is important to notice in this regard is that, unlike ECtHR, CJEU has not so far recognized the existence of an external balancing act concerning the fair balancing of freedom of expression and intellectual property and has relied on the internal system of limitations and exceptions to copyright<sup>180</sup>. This does not, however, mean that there hasn't been a proper

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<sup>175</sup> Voorhoof (n 172) 338.

<sup>176</sup> See page 11 of this paper for the full provision.

<sup>177</sup> Geiger and Izyumenko (n 88) 9 – 10.

<sup>178</sup> *ibid.* (n 88) 6.

<sup>179</sup> *ibid.* 6.

<sup>180</sup> Stijn van Deursen and Thom Snijders, “The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework” (2018) 49 IIC 1080, 1091.

balancing between the two rights in the case law of the Union. CJEU has in the past initiated the balancing exercise on two different grounds. First, the CJEU has increasingly started to interpret many of the exceptions and limitations as underlying “rights” which has made the balancing exercise possible<sup>181</sup>. These actions by the Court have consequently extended the scope of the exceptions and limitations, as they are now interpreted in a more lenient way<sup>182</sup>. Secondly, CJEU has strived to balance the scales by taking into account the rights of the users as of equal value<sup>183</sup>. The balancing exercise in the latter situation is usually related to an enforcement of a specific measure that has effect on other fundamental rights and has to do with the intermediaries rather than the infringing parties per se<sup>184</sup>.

Thus, within the EU legal landscape, the freedom of expression and information can to a certain extent be limited to protect the interests of the intellectual property right-holders and vice versa. What complicates the assessing of fair balance between these fundamental rights in an online environment is the fact that strengthening the position of freedom of expression via communication networks is one of the long term strategic objectives of the Union<sup>185</sup>, and it is safe to say that the stricter obligations set in Article 17 for an online content-sharing service provider do not help in achieving these goals. When contemplating on the continuity or lack thereof of the previous fair balance set by the legislator and the Court with the demands set by Article 17, it is important to recall that the “fair balance” between these rights does not exist in a void unaffected by the fluctuating strategic paradigms of the Union.

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<sup>181</sup> See e.g. Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* EU:C:2014:2132 and Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others* EU:C:2011:798, para 115. See also: Leistner (n 90) 585 concerning freedom of expression vs. copyright and Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* EU:C: 2014:2196 and Case C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España* EU:C:2010:620 regarding the balance between other rights than freedom of expression vs. copyright. See also: Christophe Geiger, Jonathan Griffiths, Martin Senftleben and Lionel A.F. Bently, “Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn* (2015) 46 IIC 1, 5.

<sup>182</sup> van Deursen and Snijders (n 180), 1088.

<sup>183</sup> See e.g. *Telekabel* (n 160), *Scarlet* (n 92) and *Netlog* (n 92) concerning freedom of expression vs. copyright and *Promusicae* (n 54), *Tele 2* (n 127) and *Bonnier Audio* (n 164) concerning other fundamental rights vs. copyright. See also Geiger et. al. (n 181) 5 – 6.

<sup>184</sup> van Deursen and Snijders (n 180), 1088 – 1089.

<sup>185</sup> Etienne Montero and Quentin van Enis, “Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?” (2011) 27 CLSR 21, 26 – 27.

In addition to the potential conflicts of internal policies of the Union, finding the fair balance between the freedom of expression and the right to intellectual property in the context of online intermediaries is further complicated by the fact that the current reign of “notice-and-takedown” regime of liability of the intermediaries is not European by nature. The roots of the system firmly reside in the United States, which established the safe harbor of online intermediaries that has heavily inspired the relevant liability provisions in the EU<sup>186</sup>. Therefore, any deviations from this already foreign area of liability will undoubtedly amount to a challenge of navigating in a previously uncharted territory.

This chapter is divided into three parts. First, we are going to look at the case law of CJEU and ECtHR relating to cases where the freedom of expression and right to intellectual property has raised a discussion on the fair balance of the two rights in a situation where there is no involvement of a third party, and try to determine some more general guidelines that can be recognized from these judgements without needing to focus on the role of the online intermediary. After this, we are going to focus on those decisions that concern specifically the issue of freedom of expression in cases where there is a presence of an intermediary. This division also more or less follows the aforementioned two different grounds for the balancing exercise established by the CJEU with the exceptions of the couple of cases from ECtHR, where the balancing is based on the external protection of freedom of expression. In the last part, the paper strives to offer some concluding remarks on the issue specifically taking into account the demands set for the intermediary in Article 17 of the Directive.

#### *4.2 Freedom of expression and intellectual property – the balancing exercise in cases without the involvement of an online intermediary*

A case that started, albeit shakily, the balancing exercise between the rights of freedom of expression and information and the right to intellectual property is the already presented case of *Laserdisken*<sup>187</sup>, which concerned the exclusion of the international exhaustion principle within the Community caused by Article 4(2) of the InfoSoc Directive. Even though the extent of this so-called balancing conducted by the Court can be heavily criticized, the fact that both

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<sup>186</sup> Section 512(c) of the Digital Millennium Copyright Act contains provisions concerning the exemption from liability of the online service provider that are almost directly absorbed in Article 14 of the E-Commerce Directive.

<sup>187</sup>*Laserdisken* (n 119).

freedom of expression and freedom of information were considered separately might offer some tidbits of information regarding the line of thinking of the CJEU.

As mentioned in the previous chapter, the public's right to information was bypassed straightforwardly by the Court which simply stated that the restriction on freedom of information caused by the InfoSoc Directive is justifiable in order to protect IP-rights<sup>188</sup>. The relevant Article 4(2) of the InfoSoc Directive gave more control of the distribution of copyright protected material to the right-holders in expense of the right to information, provided that this restriction on freedom of information was justified by interests of the public, motivated by legitimate aims and "necessary in a democratic society"<sup>189</sup>.

Regarding the freedom of expression aspect of the judgement, the Court was a little more generous with its arguments. *Laserdisken* had argued that the freedom of expression governed by Article 10 of ECHR was breached, as the right to distribution was exhausted by the first sale the copyright holder was made, and thus the right-holders could no longer freely express their ideas. The Court dismissed this claim by stating that the right-holder continues to have full power over this first sale and thus over the access to market, and hence there is no breach of Article 10 ECHR<sup>190</sup>.

The first proper ruling of ECtHR on the balancing of freedom of expression and information and right to intellectual property seemed to rely on arguments similar to those used by CJEU in *Laserdisken* regarding the "balancing" of freedom of information and IP-rights. The case in question is *Ashby Donald*<sup>191</sup>, which was about fashion photographers that were sentenced to pay fines by the French national court after a copyright infringement. The photographers had published the photographs on a website without the permission of the fashion houses, which had organized the fashion shows the pictures were taken in. The photographers consequently argued before ECtHR that their freedom of expression had been breached.

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<sup>188</sup> *ibid* para 65.

<sup>189</sup> *ibid* para 64.

<sup>190</sup> *ibid.* para 63.

<sup>191</sup> *Ashby Donald and Others v. France* App no 3676/08 (ECtHR, 10 January 2013).

ECtHR agreed that the conviction and subsequent damages suffered by the photographers were indeed an interference with their freedom of expression protected in Article 10 of ECHR<sup>192</sup>. However, the interference fulfilled the conditions set by Article 10(2) of ECHR in that it was provided by law, strived legitimately to protect the rights of others and was necessary in a democratic society<sup>193</sup>. These were more or less the same arguments that were used by CJEU a couple of years earlier. However, ECtHR gave some more information about its balancing exercise by stating that the commercial nature of the published photographs was a major reason why the IP-rights had to be seen as a prevailing right<sup>194</sup>. Were the purpose of the publishing for example political, the outcome might have been different.

It is also noteworthy that, as already alluded to in the introduction of this chapter, ECtHR unlike CJEU recognizes the external importance of the freedom of expression as a fundamental right instead of indirectly deriving it internally from the exceptions and limitations of copyright. This stance of ECtHR was also affirmed in the *Pirate Bay*<sup>195</sup>-case of the same year. In the case, two of the founders of the Pirate Bay-website, notorious for its activities relating to torrenting, claimed that the freedom of expression and information under Article 10 ECtHR were violated because of the conviction for crimes in violation of the Swedish Copyright Act<sup>196</sup>. ECtHR found that the Swedish copyright regulation did indeed infringe the Article 10 as it resulted in the liability of the co-founders of a website which facilitated the imparting and receiving of information for its users<sup>197</sup>. Nevertheless, ECtHR found the balance to be fair regarding the conviction of the national court, as it reasoned that the interference with Article 10 was justified

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<sup>192</sup> Elena Izyumenko, “The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective” (2016) 19 J. WORLD INTELL. PROP. 115, 116.

<sup>193</sup> Voorhoof (n 172) 347. The official judgement is only available in French, which is why only the secondary sources are referenced here.

<sup>194</sup> Oliver and Stothers (n 102) 531.

<sup>195</sup> *Fredrik Neij and Peter Sunde Kolmisoppi v, Sweden* App no 40397/12 (ECtHR, 19 February 2013).

<sup>196</sup> Voorhoof (n 172) 347.

<sup>197</sup> Izyumenko (n 192) 116.

in order to protect the intellectual property rights<sup>198</sup>. The application was therefore rejected with arguments largely similar to those presented in *Ashby Donald*<sup>199</sup>.

Furthermore, ECtHR refers to the indictment and damages suffered by the applicants as restrictions on the freedom of expression. This is a fundamentally different approach than the one assumed by CJEU and the Copyright Directive, both of which see the copyright as a general principle and the aspects of freedom of expression as an exception.<sup>200</sup>

Regarding cases where there isn't an involvement of intermediary, some wisdom concerning the fair balance between freedom of expression and intellectual property may also be found in the CJEU case of *Sky Österreich*<sup>201</sup>. In this case, an Austrian media service authority gave an Austrian public broadcaster the right to use coverage of Sky Sports in short highlight-excerpts. Sky had the exclusive right to the broadcasting, however, Directive 2007/65<sup>202</sup> required that exclusive broadcasters must provide public broadcasters broadcasting material for short reports without requiring them reimbursement that exceeds the cost of providing the signal. Consequently, Sky Österreich challenged this provision being against its freedom to conduct a business and the right to property. As explained in the previous chapter, CJEU didn't recognize the breach of Article 17 and right to property of the Charter and thus only considered the fair balance between freedom to conduct a business and freedom to expression and information. However, the arguments of the Court regarding this fair balance are essentially identical to those of Advocate General Bot, who considered the fair balance between both Article 16 and 17 of the Charter and the freedom of expression.

Like the Court, AG Bot recognized the significance of the broadcasted material in terms of information to the public, as opposed to only considering the entertainment value of the

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<sup>198</sup> Voorhoof (n 172) 348.

<sup>199</sup> Izyumenko (n 192) 116.

<sup>200</sup> van Deursen and Snijders (n 180), 1089 – 1090.

<sup>201</sup> *Sky Österreich* (n 161).

<sup>202</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332/27.

report<sup>203</sup>. Building from here, AG Bot extensively considered both the necessity and proportionality of the relevant provision in Directive 2007/65 and concluded that a fair balance between the right to freedom of expression and information and Articles 16 and 17 of the Charter had been achieved by the directive<sup>204</sup>. Firstly, regarding the necessity of the measure, both the Court and AG Bot agreed that less restrictive measures than the one prescribed in the directive would lead to higher costs demanded by the exclusive broadcaster, which in turn may effectively deprive the public broadcasters of their ability to offer the highlight-reports, thus not achieving the goals relating to information set by the relevant article of the directive<sup>205</sup>. Secondly, regarding the proportionality of the measure, both the Court and AG Bot agreed that the limited financial burden occurring for the exclusive broadcaster, the limited nature of the short extracts used and possible publicity benefits enjoyed by the exclusive broadcaster all amount to a proportionate restriction, and thus a fair balance between the rights in question<sup>206</sup>.

Given the similarity of the of the arguments used by the Court and AG Bot, the interlinked nature of Articles 16 and 17 of the Charter<sup>207</sup> coupled with the curious way the Court disregarded the claims of the applicant concerning its right to property it is difficult not to ponder whether the Court consciously bypassed the claims concerning the right to property in order to avoid a direct balancing exercise between the freedom of intellectual property and freedom of information. Instead, it chose to focus on the right to conduct a business, which is a right perhaps more easily constrained. Of course, it is useful to point out that in theory there was indeed no need for the Court to conduct this balancing exercise, as this restriction on the freedom to conduct a business was already present as per Directive 2007/65. However, nothing would have prevented the Court from assessing the necessity and proportionality of the Directive 2007/65 similarly to AG Bot.

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<sup>203</sup> *Sky Österreich* (n 161), para 51, Opinion of AG Bot, paras 57 and 65.

<sup>204</sup> *Sky Österreich* (n 161), Opinion of AG Bot, para 72.

<sup>205</sup> *Sky Österreich* (n 161), paras 54 – 55, Opinion of AG Bot, paras 56 and 59.

<sup>206</sup> *Sky Österreich* (n 161), paras 63 – 66, Opinion of AG Bot, paras 66 and 69.

<sup>207</sup> See *Oliver and Stothers* (n 102) 535 for listing of cases where CJEU has referred to Articles 16 and 17 of the Charter without making a distinction between them.

Even though the rejection of Article 17 of the Charter in this case at first glance seems like the balance would have been in the favor of freedom of information, based on a closer scrutiny, it is difficult to look at it this way. Rather, it seems that the Court has perhaps avoided the question, and it cannot thus be seen contradicting the provisions of Article 17 of the Directive, where copyright is perhaps protected in the expense of the right to information.

A case where the fair balance between freedom of expression and right to intellectual property was recognized more clearly by the CJEU was *Deckmyn*<sup>208</sup> later in the same year. In this case Mr. Deckmyn, the member of an openly racist Flemish party had edited and published an equally racist calendar, which was based on the works a famous Belgian comic-book artist, Mr. Vandersteen. The case landed before CJEU, as the Belgian court sought guidance on the meaning of the term “parody”.

Whether or not the work of Mr. Deckmyn could be considered parody is irrelevant for the purpose of this paper. What is relevant, however, is the fact that the Court underlined the task of the national courts in balancing the rights of the original author and the user of his works, and directly emphasized the fair balance between the right to property of the former and the freedom of expression of the latter<sup>209</sup>. Even though the Court did not give any insight into how this balancing exercise should be conducted in practice, it did confirm that parody as an exception to copyright as meant in Article 5(3)(k) of the InfoSoc Directive is to be interpreted as a proper way of expressing an opinion<sup>210</sup>. Freedom of expression can thus be recognized as an underlining right relating to parody<sup>211</sup>. Therefore the discussion relating to parody as an exception seems to always lead to a discussion about the balance between freedom of expression and IP as a fundamental right, as the interests of the right-holders are to be balanced against the right to freedom of expression of the users of the protected work rather than against the exception for parody<sup>212</sup>.

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<sup>208</sup> *Deckmyn* (n 181).

<sup>209</sup> *ibid* para 34.

<sup>210</sup> *ibid* para 25.

<sup>211</sup> Eleonora Rosati, “Just a laughing matter? Why the decision in *Deckmyn* is broader than parody” (2015) 52 CML Rev. 511, 522.

<sup>212</sup> *Deckmyn* (n 181) para 27. See also *Izyumenko* (n 192) 118.

Parody isn't the only exception or limitation to intellectual property that has caused the "fair balance" between freedom of expression and IP-rights to be considered by the Court. The earlier *Painer*<sup>213</sup>-case concerned a quotation exception also covered by Article 5 of the InfoSoc Directive. Even though the Court in this case chose to defend the rights of the IP-owner<sup>214</sup>, the fact that different types of exceptions and limitations to copyright have been seen first and foremost representing freedom of expression by CJEU seems to indicate that the Court is not afraid to pose restrictions to IP-rights via these instruments in the name of fair balance. This argument is reinforced by the Courts assessment in *Deckmyn*, which recognized the term "parody" as a concept which must be broad enough for the exception to be effective<sup>215</sup> rather than viewing it as a narrow term in order to avoid a clash with the rights of the IP-holder. The judgements in *Painer* and *Deckmyn* can hence be seen indicating a change in the way the Court looks at the exceptions to copyright, at least when looking at some of the earlier decisions such as *Laserdisken*. This shift might prove to be significant for Article 17 of the Directive.

#### 4.3 *Freedom of expression and intellectual property – the balancing exercise in cases with the involvement of an online intermediary*

A case that started the balancing exercise in situations where there is an involvement of an intermediary is *Promusicae*<sup>216</sup>, in which a music industry representative demanded that an internet access provider releases information of an alleged copyright infringer. However, this case did not try to find a fair balance between the fundamental rights of freedom of expression and intellectual property. Nevertheless, regarding the balancing, the case did seem to convey a more pivotal role of the Union in determining this fair balance and established the proportionality as a tool that is used in this evaluation in practice<sup>217</sup>. Given the importance of the ruling and especially the fair balance exercises conducted in later decision of CJEU, it is safe to say that the involvement of an intermediary has been a crucial element in the development of the fair balance between freedom of expression and intellectual property. This

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<sup>213</sup> *Painer* (n 181).

<sup>214</sup> *ibid* paras 110 – 112.

<sup>215</sup> *Deckmyn* (n 181) para 23. See also Voorhoof (n 172) 346.

<sup>216</sup> *Promusicae* (n 54).

<sup>217</sup> Husovec (n 86) 250.

is evident in the larger number of case law dealing with the fair balance in the situation where there is an intermediary involvement as opposed to those where there is no such involvement.

*Scarlet Extended*<sup>218</sup> was the first case involving an online intermediary where the balance between the two rights in question was touched upon by the CJEU. The facts of the case were to do with a collective society demanding an internet service provider to install filtering mechanisms in order to avoid copyright violations. Even though majority of the arguments presented by the Court were to do with personal data issues and those relating to freedom to conduct a business, the Court also mentioned the significance a possible injunction could have on freedom of information:

” -- injunction could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.”<sup>219</sup>

The Court then continued to determine that the filtering system proposed by SABAM does not fulfill the fair balance requirement<sup>220</sup>. It is visible from the wording of the Court that it is the *broadness* of the filtering mechanisms that causes the problems regarding the fair balance, as a system that encompasses all users and an unlimited time-period cannot be considered proportional<sup>221</sup>. Similar demands concerning filtering mechanisms were made by SABAM in the *Netlog*<sup>222</sup>-case, and regarding the freedom of information, they were turned down by the Court with arguments identical to those in *Scarlet*. What is perhaps useful to remember, however, is that despite the Court denying the filtering mechanisms suggested by SABAM due to them leading to an unproportioned outcome, it does not mean that less restricting filtering mechanisms would necessarily be struck down by the Court<sup>223</sup>. Therefore, the lack of specific prohibition of filtering mechanisms in Article 17 of the Directive is hardly surprising.

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<sup>218</sup> *Scarlet Extended* (n 92).

<sup>219</sup> *ibid* para 52.

<sup>220</sup> *ibid* paras 53 – 54.

<sup>221</sup> *Izyumenko* (n 192) 117.

<sup>222</sup> *Netlog* (n 92) paras 50 – 52.

<sup>223</sup> Christina Angelopoulos, “Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third-party liability” (2015) 17 *Digital Policy, Regulation and Governance* 72, 88.

The next case of CJEU focusing on the relationship between freedom of information and right to property was the *Telekabel*<sup>224</sup>-case, in which an internet service provider UPC Telekabel Wien was being pressured to block the access to a website in which films owned by the copyright-owner were being made available. The Austrian court requested a preliminary reference asking, among other things, whether such an injunction was compatible with the fair balance of the fundamental rights of the parties in question.

The Court recognized potential conflicts with multiple fundamental rights of the Charter regarding the unlimited exercise of such an injunction<sup>225</sup>, however, regarding the freedom of information it stated followingly:

”None the less, when the addressee of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.

In this respect, the measures adopted by the internet service provider must be strictly targeted, in the sense that they must serve to bring an end to a third party’s infringement of copyright or of a related right but without thereby affecting internet users who are using the provider’s services in order to lawfully access information. Failing that, the provider’s interference in the freedom of information of those users would be unjustified in the light of the objective pursued.”<sup>226</sup>

There are a couple of things that are worth noting in these two passages of the judgement. Regarding the first paragraph it is useful to point out that, similarly to *Scarlet* and *Netlog*, the Court recognizes the rights of all internet users as opposed to only balancing the rights of the IP-owner and the service provider<sup>227</sup>. This obviously considerably empowers the position of the freedom of information. Regarding the second paragraph, it is evident that in addition to the broadness of the protectable freedom of information, any restrictions for this freedom are almost automatically unproportioned: the measures taken by the intermediary cannot “affect” users who lawfully access information, and if the service provider fails in this regard, the measure will be considered “unjustified”.

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<sup>224</sup> *UPC Telekabel Wien* (n 146).

<sup>225</sup> *ibid* para 47.

<sup>226</sup> *ibid* paras 55 – 56.

<sup>227</sup> *Izyumenko* (n 192) 119.

The position of freedom of information seems to further strengthen in the following two passages of the judgement. First, the Court gives the national Courts the task of ensuring that the internet users have a possibility “to assert their rights” after the measures taken by the service provider become clear<sup>228</sup>. Secondly, the Court notes that it may indeed be impossible for the intermediary to find such a measure that brings an end to the infringing activities once and for all<sup>229</sup>. Both of these arguments seemed also have found their way in the Directive and manifest themselves in the respective paragraphs of 9 and 5(b) of Article 17 of the Directive.

Despite understandably avoiding giving exact instructions on which measures taken by the intermediary are in the field of fair balance, the Court did offer some guidelines on the nature of a measure that fulfill the requirements of a fair balance between the two rights. The Court set out two preconditions for these measures:

- (i) “the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and
- (ii) those measures have the effect of preventing unauthorised access to the 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—”<sup>230</sup>

Regarding the first precondition, the Court seems to have taken a step back from the assessment of previous paragraphs regarding the position of freedom of information. That is, instead of completely prohibiting any kind of negative effects that may be occur concerning the lawful accessing of the information, the Court only prohibits “unnecessary” detriment towards this goal. As for the second precondition, the Court stays its course stating that a fool-proof measure taken by the service provider might be impossible to achieve. Nevertheless, the Court does try to underline the importance of property rights by giving the measure requirements that are strict, so that its effect wouldn’t be unnoticeable regarding the protection of IP-rights and thus detrimental to the idea behind fair balance. This approach of making copyright violations

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<sup>228</sup> *UPC Telekabel Wien* (n 146) para 57.

<sup>229</sup> *ibid* paras 58, 60.

<sup>230</sup> *ibid* para 64.

“difficult to achieve” and “seriously discouraging” acts leading to it has also been called a “dual minimum threshold”<sup>231</sup>.

The case of *Akdeniz*<sup>232</sup>, like *Telekabel*, was about an injunction towards a specific website. This ECtHR-case dealt with the blocking of access to “myspace.com” and “last.fm” in Turkey, as these websites were used for copyright infringements. The applicant argued that this injunction violated his right to information under Article 10 ECHR, as he was a user of these websites and could no longer access non-infringing information relevant to him. ECtHR refused the claim of the applicant on the basis that the websites in question were by no means the only source of identical information available to him, nor did they contain information specifically important to him<sup>233</sup>. What this decision means for the fair balancing exercise in European context is that unlike CJEU, ECtHR does not seem to recognize the rights of an individual user of a website in its fair balancing exercise<sup>234</sup>, which seems to favor the position of intellectual property as a fundamental right.

The next case in which the CJEU balanced these two rights was *McFadden*<sup>235</sup>, in which suitable preventive actions concerning possible copyright infringements to be taken by a Wifi service provider were reviewed by CJEU. As in many other cases with the involvement of an intermediary the balancing exercise did not solely concern the relationship between only two fundamental rights. However, as in the *Telekabel*-case, there are still some things to learn regarding the relationship between the freedom of information and IP-rights specifically.

After categorically ruling out other possible measures to be taken by the intermediary that were proposed by the referring court, CJEU turns towards the third “option”, which was the password protection of the Wifi-connection, the purpose of which was to force possible copyright

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<sup>231</sup> Christina Angelopoulos and Stijn Smet, “Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability” (2016) 8 J. Media Law 266, 295.

<sup>232</sup> *Akdeniz v Turkey* App no 3676/10 (ECtHR, 11 March 2014).

<sup>233</sup> *ibid*: Information Note on the Court’s case law No. 173 issued in April 2014. The English translation of the judgement is unfortunately not available. See also: Geiger and Izyumenko (n 188) 48.

<sup>234</sup> Izyumenko (n 192) 119.

<sup>235</sup> *McFadden* (n 152).

perpetrators to reveal their identity<sup>236</sup>. Here, unlike in its previous judgements concerning the injunction towards and online intermediary, the Court starts to offer hints towards the definition of “essence” of right to information. Specifically, the Court states:

” -- a measure consisting in securing an internet connection does not appear to be such as to undermine the essence of the right to freedom of information of the recipients of an internet network access service, in so far as it is limited to requiring such recipients to request a password, it being clear furthermore that that connection constitutes only one of several means of accessing the internet.”

As explained in chapter two of this paper, the essence of a right is its “core”, which cannot be violated. The Court argues here that the essence of right to information stays untouched, as the Wifi-connection in question is only one of multiple ways of accessing the internet<sup>237</sup>. The Courts arguments concerning the essence of the right to information seem to thus fall in line with those of ECtHR in *Akdeniz*, where the question regarding the *external* right to information was not seen to be violated, as there were *other ways* of accessing the information in question.

The Court then moves on to refer its judgements in *Telekabel* by reinstating that the lawful access of information cannot be hampered by the injunction, and if this would occur, the measure would consequently be considered unjustified. Also following *Telekabel*, CJEU then argues that the measure to be taken by the intermediary must fulfill the “dual threshold”.<sup>238</sup> Finally, after confirming the suitability and necessity of the measure<sup>239</sup>, the CJEU concludes that a password protected Wifi does strike a fair balance between the competing fundamental rights<sup>240</sup>.

#### 4.4 *Conclusions on the established fair balance between freedom of expression and information and intellectual property and its relevance regarding Article 17 of the Directive*

Despite the fluctuating manner in which the CJEU has taken the fair balancing exercise into account in cases having to do with freedom of expression or information and right to intellectual

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<sup>236</sup> *ibid* paras 87 – 90.

<sup>237</sup> *ibid* para 92.

<sup>238</sup> *ibid* paras 93, 95. See page 49 for the explanation of the “dual threshold”.

<sup>239</sup> *ibid* paras 96 and 99.

<sup>240</sup> *ibid* para 100.

property, there are still some common elements and patterns visible in these judgements regarding the outcome of the balancing operation. First, there is the changing importance in the role of right to information. Secondly, the lawful access to information has been established as an integral part of the proportionality review. Thirdly, there seems to be an ongoing change in the way the Court perceives the balance between the freedom of expression and the right to intellectual property.

There seems to have happened a considerable shift in the balance of freedom of information and IP-rights. From its humble roots in *Laserdisken*, where the balancing exercise concerning the right to information was seemingly added as an afterthought, the right to information has since proved to be right in the center stage of the fair balancing exercise, perhaps most notably in *Telekabel*. One great factor in this ascension to significance has been the recognition of the rights of the users as opposed to only considering the rights of the intermediaries, which has undoubtedly increased the pressure of taking the right of information properly into account in the balancing exercise.

The first point in the balance links directly to the second. When the Court has in the judgements related to injunctions posed on intermediaries contemplated the proportionality of the measure in question, it has been of crucial importance whether the measure hinders the lawful access to information by the users. This lawful access to information has been in a decisive role regarding proportionality in both SABAM cases concerning possible filtering measures and in the website blocking -measure of *Telekabel*. Furthermore, this access to information is also referenced in *McFadden*.

Article 17(7) of the Directive considers this lawful access to information by stating:

“The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights—”

Considering the CJEU case law relating to the relationship between right to information and IP-rights, it is not surprising that this provision has found its way into the article. However, how far can the possible filtering mechanisms put in place to prevent copyright infringements go before they inevitably begin to hamper the lawful access to information of individuals? It has not been unproblematic to try and find they fair balance between these two rights within the current legislative framework. Rather than aiming for an area where this balance could perhaps more easily be achieved, the legislature has now arguably made the balancing even more

challenging by burdening the intermediaries with stricter requirements, which may in many cases lead to overly protective practices. Considering the growing importance of right to information and the arguments CJEU has used in its judgements, Article 17 the Directive does not seem to help in achieving the balance between this right and the right to intellectual property.

Furthermore, what makes matters even more difficult is the fact that the hints presented by the Court about the “essence” or “core” of right to information in *McFadden* seems to indicate that the core of the right is violated if a measure takes away the only mean of accessing the information. Taking YouTube as an example, many content providers use that platform as a sole mean of communicating their works to the public. If an overly restrictive measure taken by the intermediary in fear of liability under 17(4) of the Directive for example takes down a video which in fact does not infringe any copyright, this measure can be based on the reasoning in *McFadden* seen as violating the very essence of the right to information.

It is thus possible that the Directive leads to a situation where many preliminary references that land before CJEU are to do with questions regarding possible violation of the core of a right by a measure taken by the intermediary rather than the proportionality of that measure. This, in turn, seems to indicate a rather drastic moving of the goal posts by the legislator and thus not even the sweetest of strikes by the Court, even if hitting the target, is able to ensure a truly fair balance between the two rights.

This doesn't tell a story of a logical continuum of the balance between the two rights. The legislator perhaps makes a steeper than needed turn towards the right holders of intellectual property. The provisions presented by Article 17 of the new copyright directive seem to be surprisingly rough even if the general liability of the intermediary has become more stringent during the past few years. As pointed out in the literature, sufficiently protecting the intermediaries directly leads to the protection of freedom of expression and information<sup>241</sup>.

There seems to also be a fundamental shift in the way the Court deals with the clashes between the rights. As discussed before, unlike the CJEU, ECtHR has always conducted a fair balance review that has been based on the freedom of expression as an *external* right rather than as an

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<sup>241</sup> Montero and van Enis (n 185) 24.

internal exception or limitation to copyright. The reason for this disparity is simple, as CJEU has seen the balancing act mainly as a task of the legislator. The externality of the balancing act is perhaps the most useful thing to be taken from these ECtHR cases relating to freedom of expression and IP-rights concerning CJEU, as the balancing exercise itself conducted by ECtHR in these cases leaves much to be desired. As explained in Chapter 2, the ECHR and the Charter are both implicitly and explicitly interlinked, and it is not difficult to imagine that this has for its part influenced CJEU's interpretation of the internal exceptions and limitations to copyright. This is visible in the Court's interpretation of the underlying rights in exceptions and limitations in cases such as *Deckmyn* and *Painer* and broadening the ground on which balancing must take place by considering the rights of the users in cases such as *Scarlet* and *Telekabel*.

In addition, there are also indications that a more direct reference by the Court regarding the external significance of freedom of expression when considering the balancing with IP-rights may be imminent. In his Opinion in *Afghanistan Papers*<sup>242</sup> AG Szpunar for the first time at EU level recognized that copyright has to be in "exceptional cases" restricted by external limitations based on freedom of expression, and looked for backing for his statement from the ECtHR cases of *Ashby Donald* and *Pirate Bay*<sup>243</sup>. Moreover, in his later Opinion in *Pelham*<sup>244</sup> AG Szpunar seemed to go into more detail of what these exceptional cases could be, even if he at the same time also took a few steps back regarding this possible new paradigm of external review<sup>245</sup>. He stated that such externality of the fair balancing exercise could be possible in situations where the "essence" of a fundamental right is violated, the position which he later repeated in *Spiegel Online*<sup>246</sup>.

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<sup>242</sup> Case C-469/17 *Funke Medien NRW GmbH v. Federal Republic of Germany* EU:C: 2018:870, Opinion of AG Szpunar delivered on 25 October 2018. The case concerns the publishing activities of Funke Medien regarding supposedly classified army documents, the copyright of which the German government claims to hold.

<sup>243</sup> *ibid* paras 40 – 41. See also Christophe Geiger and Elena Izyumenko, "Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way" (2018) Center for International Intellectual Property Studies Research Paper 12/2018, 10 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3293735](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293735), accessed 24.7. 2019.

<sup>244</sup> Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v. Ralf Hütter, Florian Schneider-Esleben* EU:C: 2018:1002, Opinion of AG Szpunar delivered on 12 December 2018. The case concerns "sampling" activities and their status as a part of a "new work" against the right holders of the "sample".

<sup>245</sup> *ibid* para 98.

<sup>246</sup> Case C-516/17 *Spiegel Online GmbH v. Volker Beck* EU:C: 2019:16, Opinion of AG Szpunar delivered on 10 January 2019 paras 62, 64, 71. See also Geiger and Izyumenko (n 247) 17.

Even though CJEU in its judgements stuck with the exceptions and limitations presented in the InfoSoc Directive without considering any external review<sup>247</sup>, it is safe to say that these statements by the AG are the latest step in the Union coming closer to the position of ECtHR in terms of the balancing IP-rights with the freedom of expression and information. It is hence uncertain if the exceptions listed in Article 17(7) of the Directive are enough to truly represent the current stance of the case law regarding the forming of the fair balance. Furthermore, the above discussion related to the “essence” of right to information hinted in *McFadden* coupled with the AG’s points in the latest case law might lead to some problems regarding balancing in the current framework provided by the legislator in the Directive.

Based on the discussion above, it is thus difficult to see Article 17 of the Directive as a piece of secondary legislation that logically continues the development in the balance of the two rights set in the Court’s judgements. First, the right of information of the users has become more important in the last years, and Article 17 does not help in fulfilling these new requirements. Secondly, if Article 17 leads to a situation where the only source of a given information is unavailable for the user of a platform, there may be more questions regarding whether a measure taken by an online content sharing service provider is infringing the essence of right to information. Thirdly, it is visible that there may be an upcoming shift towards a more of an external review regarding exceptions to copyright. Article 17 does not seem to recognize this possible shift.

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<sup>247</sup> Case C-516/17 *Spiegel Online GmbH v. Volker Beck* EU:C:2019:625; Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v. Ralf Hütter, Florian Schneider-Esleben* EU:C:2019:624; Case C-469/17 *Funke Medien NRW GmbH v. Federal Republic of Germany* EU:C:2019:623.

## 5 THE FAIR BALANCE BETWEEN THE FREEDOM TO CONDUCT A BUSINESS AND THE RIGHT TO INTELLECTUAL PROPERTY

### 5.1 Introduction

In this chapter, we are first going to introduce the freedom to conduct a business as a general concept in the European framework. After this, we are going to look at cases from ECtHR and CJEU where the relevant rights are being balanced. From this examination it can be concluded that freedom to conduct a business gives much room for the proper protection of intellectual property rights. This “flexibility” of the fundamental right seems to also indicate that core functions of businesses can be affected without the measure being seen as a breach of the essence of the right. Furthermore, increasingly stringent measures have been demanded from the intermediaries.

Article 16 of the Charter covers the freedom to conduct a business. Specifically, it states as follows:

”The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.”

The freedom to conduct a business seems to be recognized in the simplest of ways possible. Some might say that the recognition is even laconic when compared to other rights and freedoms in the Charter, for example the freedom of expression, and perhaps of lesser importance than many other freedoms and rights, at least if only looking at the wording of the Charter.

In some ways this is true. First, the freedom to conduct a business doesn’t affect the number of individuals that, for example, the freedom of expression does. Furthermore, the impact often resonates indirectly, or at least in a fundamentally different way than with freedom of expression. Secondly, in its current form it is a relatively new right within the Union legal order, gaining legitimacy through the coming into force of the EU Charter<sup>248</sup>. Thirdly, the Charter is the first and only legally binding international human rights instrument that recognizes the

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<sup>248</sup> Christophe Geiger, Giancarlo Frosio and Elena Izyumenko, “Intermediary Liability and Fundamental Rights” (2019) Center for International Intellectual Property Studies Research Paper 6/2019, 17 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3411633](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3411633)>, accessed 26.7. 2019.

freedom to conduct a business explicitly as a fundamental right<sup>249</sup>. Fourthly, the states seem to have a wide margin of appreciation in restricting the right<sup>250</sup>.

On the other hand, however, this is not the case. The freedom to conduct a business was indirectly referenced as early as in the judgement in *Nold*<sup>251</sup>. Moreover, although the term itself might be relatively new, it also encompasses the freedom to pursue economic or commercial activity, contractual freedom and free competition<sup>252</sup>. The right has also a long history in the constitutions of multiple Member States<sup>253</sup>, and it has been confirmed as a general principle of EU law<sup>254</sup>. Furthermore, the right has been in the center of multiple recent cases involving balancing with intellectual property rights, such as the *SABAM*-cases, *Telekabel* and *McFadden*.

The purpose of freedom to conduct a business is to ensure the possibility to operate in the market without unnecessary State intervention<sup>255</sup>. Furthermore, even though there are close links with the rights of freedom to conduct a business and right to property as seen as, for example, in *Sky Österreich*, they are still in many situations very much distinguishable. A fine explanation of the fundamental difference between these two rights was given by AG Cruz Villalón in his Opinion in *Alemo-Herron*, in which he stated:

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<sup>249</sup> *ibid*, Andrea Usai, “The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration” (2013) 14 GLJ 1867, 1868.

<sup>250</sup> Geiger et. al. (248) 17.

<sup>251</sup> *Nold* (n 22). See also: Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, “Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights” (2014) Lund University Legal Research Paper Series 01/2014, 2 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=242818](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=242818) >, accessed 26.7.2019.

<sup>252</sup> Explanations relating to the Charter of Fundamental Rights (2007) C 303/17, 23. See also: European Union Agency for Fundamental Rights (FRA), “Freedom to conduct a business: exploring the dimensions of a fundamental right” (2015) 21 < [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2015-freedom-conduct-business\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf) >, accessed 29.7.2019.

<sup>253</sup> Peter Oliver, “What Purpose Does Article 16 of the Charter Serve?” in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds.) *General Principles of EU Law and European Private Law* (Kluwer Law International 2013).

<sup>254</sup> Case C-1/11, *Interseroh Scrap v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH* EU:C:2012:194. See also: Usai (n 249) 1874.

<sup>255</sup> Groussot et al. (n 251) 2.

“If the right to property operates in the sphere of tangible and intangible assets, the freedom to conduct a business protects economic initiative and the ability to participate in a market, rather than the actual profit, seen in financial terms, that is earned in that market.”<sup>256</sup>

The Advocate General thus made a distinction between protecting the access to market and protecting the profits of right-holders, the latter of which is protected by right to property. In line with this distinction are the Union’s objectives touching upon the freedom to conduct business. For example, demands which are set for companies because of competing priorities, such as copyright protection, should be proportionate<sup>257</sup>.

The influence of the right to conduct a business is also visible in Article 17 of the Directive. First, it can be seen in Article 17(5), where it is stated that when determining whether the service provider has adequately fulfilled its obligations one must, in line with the principle of proportionality, look at “the availability of suitable and effective means and their cost for service providers”. The legislator recognizes that there might not exist a way with which a certain type of copyright infringement would be preventable, and even if did exist, the cost of this procedure may be such that it simply isn’t feasible for the service provider, thus effectively hindering its opportunity to engage in business within the market.

Secondly, the effect of freedom to conduct a business can be recognized in paragraph 6, which provides an exception concerning the obligations for the service provider if the provider can be considered “new”. Specifically, if the service provider has been in the market for less than three years and its annual turnover does not exceed EUR 10 million, less is expected from the provider in order to avoid liability. In this situation, the service provider must “only” comply with the requirements set in paragraph 4(a)<sup>258</sup>, according of which the provider must have made “best efforts” in order to obtain an authorization from the right-holder, and if the provider has failed to do this, it has acted expeditiously to disable access to the works after receiving notice from the right-holder. If, however, the number of monthly visitors of the website of the provider exceeds 5 million, it must have also “made best efforts to prevent further uploads of the notified

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<sup>256</sup> Case C-314/12, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* EU:C:2013:521. Opinion of AG Cruz Villalón delivered on 19 February 2013, para 51. See also *Groussot et. al.* (n 251) 4.

<sup>257</sup> FRA (n 252) 7.

<sup>258</sup> See page 24 for the full provision.

works”. Thus, only the smallest of the service providers are seemingly still within the liability rules set by the earlier notice-and-takedown regime.

Next, we are going to discuss how the demands set for the online service providers by Article 17 of the Directive line up with the previous fair balance that has been established between the freedom to conduct a business and the right to intellectual property by the Court of Justice of the European Union. Unlike in previous chapters, here we are only focusing on the cases of CJEU as ECHR does not currently recognize the freedom to conduct a business as an independent right. Like Chapter 4, this chapter is also divided into three parts. First, we are going to look at the balancing exercise in cases where there is no involvement of an online intermediary. After this the cases where the intermediary is present are examined. The chapter ends with concluding remarks regarding the fair balance between the rights and its importance regarding Article 17 of the Directive.

## 5.2 *Freedom to conduct a business and intellectual property – the balancing exercise in cases without the involvement of an online intermediary*

Arguably the first case in which the Court started the balancing exercise between these two rights was *Metronome Musik*<sup>259</sup>, in which the validity of a provision of a directive that restricts the rental rights of recordings protected by copyright was being reviewed. The case didn’t for obvious reasons refer to the freedom to conduct a business but instead to a general principle of EU law: the freedom to pursue a trade or profession<sup>260</sup>. This principle has undoubtedly served as an inspiration when the legislator has crafted the freedom to conduct a business of the Charter, as it is very similar to the “freedom to pursue economic and commercial activity” presented as one of the corner stones of the freedom to conduct a business in the explanations of the Charter.

As already explained in Chapter 3, the Article 1(1) of the rental directive<sup>261</sup> giving the right-holder the power to restrict the rental of copyright protected phonograms was deemed to be proportionate by the CJEU. What was left undiscussed, however, is how the Courts reasoning

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<sup>259</sup> *Metronome Musik* (n 105).

<sup>260</sup> *ibid* para 21.

<sup>261</sup> (n 106).

could be seen affecting the balance between the rights. The most interesting parts of the judgement in this regard can be found in paragraphs 21 and 26. In the first of these paragraphs, the Court states that the restrictions on freedom to pursue a trade or profession are disproportionate and intolerable in so far as they impair “the very substance” of the right. In the latter paragraph, the Court concludes that since the rights of the copyright-holders could not be protected in a *less intrusive* way regarding the business of renting phonograms, the restriction provided in Article 1(1) of the rental directive cannot be considered disproportionate.

This provides some guidelines regarding the fair balance in two ways. First, Hokamp was in the business of renting phonographs. The obvious result of the injunction under Article 1(1) of the rental directive is that it did hamper Hokamp’s business activities. However, as this impairment seemingly didn’t affect the business on a larger scale, it could be deemed proportionate. That is, these business activities could evidently at least to some extent be interfered with without the interference constituting as so disproportionate that it hampers the substance of the freedom to conduct a business even if the action is targeted directly to the core functions of the business. Secondly, the Court did evidently recognize the intrusive nature of the Article 1(1) regarding the freedom to pursue a trade or profession and indirectly suggested that interfering with the core activities of a business should generally be avoided as much as possible.

If the “substance” of freedom to conduct business was touched upon in *Metronome Musik*, the same can be said concerning the right to intellectual property in the judgment of *DR and TV2 Danmark*<sup>262</sup>, even if this reference was done in an indirect way. The case was about whether DR and TV2 Danmark, public radio and television broadcasting organizations, could broadcast recordings made by independent third-party companies and still be covered by the exception for the recordings in question provided in Article 5(2) of the InfoSoc Directive.

The Court agreed that the recordings made by subcontracting companies could indeed be seen included under the protection of exception covered by Article 5<sup>263</sup>. The Court did not engage in a fair balancing exercise between the freedom to conduct a business and right to intellectual property per se, but it did indirectly refer to this discussion. The Court stated that this expansive

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<sup>262</sup> Case C-510/10, *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau* EU:C:2012:244.

<sup>263</sup> *ibid* para 58.

reading of the exception concerning copyright “ensures that broadcasting organizations have a greater enjoyment of the freedom to conduct a business<sup>264</sup>”. In the same sentence, the Court stated that this broader reading does not hamper “the substance of copyright”.

As noted in the literature, the decision itself is not really surprising<sup>265</sup>. There are a couple of points to be taken away from the decision regarding fair balance between the rights, however. First, the ruling affirms that the broad interpretation of the exceptions and limitations to copyright is not only used when freedom of expression and information is in question, it also seems to apply to “lesser” rights such as freedom to conduct a business. Secondly, similar to the arguments concerning freedom to conduct a business in *Metronome Musik*, core activities which are protected by the fundamental right can be touched without it impairing the substance of a right. This time it is freedom to conduct a business that hampers the copyright and not vice versa, however. Thirdly, if the “very substance” and “substance” of a right can indeed be understood as interchangeable with the term “essence” used in Article 52(1) of the Charter, as suggested in the literature<sup>266</sup>, some information regarding of what doesn’t constitute as an essence of freedom to conduct a business or intellectual property can perhaps be gathered from the respective judgements of *Metronome Musik* and *TV2 Danmark*.

A case that didn’t strive to find a fair balance between the rights but nevertheless provides some information regarding the Courts stance of the relationship of the rights is *Sky Österreich*<sup>267</sup>. Even though based on the judgements of *Metronome Musik* and *TV2 Danmark* it could be concluded that the core activities protected by neither freedom to conduct a business and the right to intellectual property are untouchable, it still seems from the ruling of the Court in *Sky Österreich* that the “substance” or “essence” of freedom to conduct a business is more difficult to violate. That is, the essence of the right to intellectual property is more carefully protected by the Court.

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<sup>264</sup> *ibid* para 57.

<sup>265</sup> Oliver and Stothers (n 102) 550.

<sup>266</sup> *ibid* 550.

<sup>267</sup> *Sky Österreich* (n 161).

As discussed in the previous chapter, the Court did not consider the broadcasting rights held by Sky Österreich to fall under the fundamental right protection of Article 17 of the Charter. Unlike the Opinion of the AG, the judgement almost solely focused on the fair balance between the freedom to conduct a business and the freedom of information. Regarding the violation of the essence of the right, the Court stated that the provision in question does not hamper the “core content” of freedom to conduct a business as no business activity is prevented “from being carried out”<sup>268</sup>. Moreover, the Court stated in the same paragraph, the right holders of the broadcasting rights can, despite the provision, continue to use their rights as they please, for example granting the license to another economic operator on a contractual basis. The latter acknowledgment of the right holder’s position is somewhat curious because the Court had rejected the application of Article 17 of the Charter. Furthermore, in this latter statement, it seems to be more concerned with the profits of the right holder rather than the access to market.

Despite its rejection of the Article 17 the Court thus seems to at some level recognize the existence of intellectual property rights in the judgement. The reason for the rejection becomes clearer when the Court states:

”On the basis of that case-law and in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.”<sup>269</sup>

It is noteworthy that the Court focuses the attention on the different wording of Article 16 when compared to other rights that are under the Charter, recognizing the impression given by the article that national authorities have perhaps greater powers to restrict the right than other fundamental rights without similar wording in the Charter<sup>270</sup>. Moreover, the Court sees this to be in harmony with its own case law that also sees the freedom to conduct a business as a right that is perhaps not as clearly defined as other rights<sup>271</sup>.

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<sup>268</sup> *ibid* para 49. See also *Oliver* (n 253) 293.

<sup>269</sup> *ibid* para 46.

<sup>270</sup> *Groussot et al.* (n 251) 5.

<sup>271</sup> *Oliver* (n 253) 293.

All in all, even though the decisions in *Metronome Musik* and *TV2 Danmark* seemed to give the impression that both the freedom to conduct a business and right to property can, in certain situations, be restricted in a way that affects the core functions protected by the rights, after *Sky Österreich* it is clear that “essence” or “substance” of the freedom to conduct a business is greatly more prone to adjustments if need be. The view found in literature, according of which the Court recognizes the flexibility and ambiguity of the right both in its own case-law and in the Charter, is also visible in Article 17 of the Directive. It is perhaps most clearly manifested in the general idea of the Directive: as a result of the stricter liability, in practice it may no longer be possible for an online content sharing provider to engage in the market if it cannot adequately lessen the amount of third party copyright infringements present in its platform. Of course, these requirements are set for better protection of the right to intellectual property, however, it is difficult to imagine a way in which the legislator could have gone any further with the requirements set for the content sharing provider without effectively touching the very essence of freedom to conduct a business.

### 5.3 *Freedom to conduct a business and intellectual property – the balancing exercise in cases with the involvement of an online intermediary*

The first case with the involvement of an intermediary and which recognized the importance of fair balance of the rights in question was *Scarlet Extended*<sup>272</sup>. In a paragraph addressing specifically the effects of the proposed injunction on the freedom to conduct business, the Court stated:

”Accordingly, such an injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.”<sup>273</sup>

There are several things to be taken away from this paragraph. The Court looks at the proportionality of the measure both considering the protectable fundamental right itself and additionally in light of the Enforcement Directive. Firstly, it is crucial to note that, even though the Court does not talk about the violation of “essence” or “substance” of the right, it still

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<sup>272</sup> *Scarlet Extended* (n 92) para 46.

<sup>273</sup> *ibid* para 48.

considers the infringement to be “serious”. Obviously, CJEU then recognizes that the characteristics of the proposed measure are against the instructions given in the Enforcement Directive for such measures. However, from the wording used by the Court, it seems that some individual elements or the combination of these elements alone lead to an unproportioned restriction on freedom to conduct a business. These elements are the complicated, permanent and costly nature of the proposed measure.

The problems of an excessively costly measures taken by online intermediaries had already been recognized earlier in *L’Oréal v. eBay*<sup>274</sup>, even though the Court in this judgement didn’t try to find a fair balance between freedom to conduct a business and the right to intellectual property. Similarly, the prohibition of general monitoring obligation to be taken by the intermediary was affirmed to be against the Enforcement Directive in both cases<sup>275</sup>. Regarding the freedom to conduct a business, the stance of the Court was repeated in almost word for word in the *Netlog*<sup>276</sup> judgement of the following year.

If stopping the examination of the case law here, one could see a clear mismatch with the demands made for the online content sharing provider in Article 17 of the Directive. It is perhaps good to note that all intermediaries in the three aforementioned cases are different both in nature and in business activities they perform: Scarlet is an internet service provider, eBay is an electronic marketplace operator and Netlog, perhaps closest to the online content sharing provider meant in Article 17, is a runner of an online social networking platform. However, despite the different nature of these intermediaries, all three cases seemed to have a common conception of what constitutes as a “serious” violation of freedom to conduct a business. In Article 17, the only one of these elements seems to remain, and that is the costliness of the measure. Looking at the article, between the cases discussed here and the drafting of the provision, the possible complicated and permanent nature of the systems designed to crucially lessen the amount of copyright infringements seem to have ceased to be relevant. As discussed

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<sup>274</sup> *L’Oréal v. eBay* (n 141) para 139.

<sup>275</sup> *ibid* para 139, *Scarlet Extended* (n 92) para 36.

<sup>276</sup> *Netlog* (n 92) paras 44, 46 – 47.

above, the problems relating to the costliness of the measure are recognized in paragraphs 5 and 6 of the article<sup>277</sup>.

To perhaps better understand the changes that have occurred in this time period and the disparity between the abovementioned cases and the provisions in Article 17, it is useful to look further in this line of case law of the Court. An illuminating case in this regard is the judgement of *UPC Telekabel*<sup>278</sup>, which was also the first case that explicitly balanced these two fundamental rights<sup>279</sup> after *Netlog*. The Court gives a rare bit of information about the content of this right, stating:

”The freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it.”<sup>280</sup>

However, CJEU did not recognize that the injunction in question positioned towards Telekabel, an internet service provider, touched the “very substance” of its freedom to conduct a business<sup>281</sup>. The Courts indirect view seemed to be that the undetermined nature of the injunction to be taken by Telekabel to block access to the copyright infringing website helped in keeping its fundamental right of freedom to conduct a business intact. This, the Court argued, was because the intermediary could then freely choose to “put in measures” which suit him the best by considering the resources that are available to him<sup>282</sup>. Furthermore, by doing this, the intermediary can avoid liability by showcasing that all “reasonable measures” have been taken<sup>283</sup>.

It seems that the changes between the opinion of the Court in earlier case law and demands set for the intermediary in Article 17 of the Directive were thus realized here. As the intermediary was given the freedom to decide of the measure to be taken, the “complicated” and “permanent”

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<sup>277</sup> See pages 58 – 59 for this discussion.

<sup>278</sup> *UPC Telekabel* (n 146).

<sup>279</sup> *ibid* para 47.

<sup>280</sup> *ibid* para 49.

<sup>281</sup> *ibid* para 51.

<sup>282</sup> *ibid* para 52.

<sup>283</sup> *ibid* para 53.

nature of such measure was not relevant in the light of the facts of the case, as the intermediary could, in the Courts view, have complete control over these unavoidable aspects of the measure. A dissenting view was offered by AG Cruz Villalón in his Opinion<sup>284</sup>. First, he argues, the fair balance should be struck when the injunction is first ordered. If there are no specific measures to be taken by the intermediary, this balance will be considered at a much later stage, perhaps even after the measure has already taken effect<sup>285</sup>. The Advocate General then continues by stating that the intermediary must also succeed in balancing between the right of information of its customers and the intellectual property rights of the applicants, even though Telekabel as an ISP has no direct connection to the website where the actual infringement occurs<sup>286</sup>.

Even though Telekabel indeed is an ISP instead of an online content sharing provider within the meaning of Article 17 of the Directive, the point made by the AG together with the ruling of CJEU, which approved of such outcome injunction, seems to point towards a more general shift towards putting more pressure towards the service provider in solving the fair balance dilemma. This undoubtedly has consequences on the freedom to conduct a business of the service provider, as resources must now be put on functions that have perhaps before been entirely unfamiliar for the provider of the service. Now, as also pointed out in the literature, the providers are suddenly burdened with tasks that have been previously accomplished by the legislator and the Court<sup>287</sup>.

There are some similarities to be found with the Courts assessment in Telekabel regarding this balancing done by the ISP when looking at the provisions of Article 17 of the Directive. Firstly, paragraph 4 of the article is essentially an outcome prohibition, as no specific measures to be taken by the content sharing provider are introduced. Only the outcome, the unavailability of copyright protected material by “best efforts” taken by the content sharing provider, is demanded. Secondly, paragraph 7 and 9 affirm that the legitimate use of such sites, such as the use under the exceptions and limitations concerning copyright, shall not be affected by the Directive. Thus, it seems that the great power and responsibility of balancing lies even more

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<sup>284</sup> Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* EU:C:2013:781, Opinion of AG Cruz Villalón delivered on 26 November 2013.

<sup>285</sup> *ibid* para 88.

<sup>286</sup> *ibid* para 89.

<sup>287</sup> Groussot et al. (n 251) 32.

clearly than in *Telekabel* within the hands of the service provider. Obviously, some of this is explained by the more participating and committed role of the content sharing provider when compared to the role of an ISP. However, this may not lessen the impact the fair balancing exercise has for the content sharing provider as a business, as the greater responsibility has undoubtedly consequences for the core functions of the service provider.

Continuing with the ruling of *McFadden*<sup>288</sup>, the CJEU here did to some extent balance the freedom to conduct a business with the right to intellectual property. Regarding this balancing, the issue centered around the question of which kind of an injunction could a Wi-Fi service provider be given in order to prevent copyright infringements happening through the use of the Wi-Fi connection without the injunction violating the essence of freedom to conduct a business.

Regarding the option of complete termination of the internet connection the Court resolutely argued that such injunction would cause a “serious infringement” towards the freedom to conduct a business of the Wi-Fi connection provider, as the person pursuing an economic activity could no longer pursue that activity<sup>289</sup>. It is perhaps telling that, unlike AG Szpunar in his Opinion<sup>290</sup>, the Court refused to refer to the essence of the right being violated, even though it is difficult to imagine a more clear-cut example of the essence of freedom to conduct a business being infringed. Later the Court accepted the password-protection as a viable option to ensure a fair balance between the interests of the copyright holders and those of the freedom to conduct a business. This time the essence of freedom to conduct a business was referenced, albeit shortly, when CJEU stated that “marginal” technical adjustments that the business operator must do cannot constitute as the breach of the essence of exercising its activities<sup>291</sup>.

#### *5.4 Conclusions on the established fair balance between freedom to conduct a business and the right to intellectual property and its relevance regarding Article 17 of the Directive*

Based on the discussion above, it is possible to identify both some ongoing trends and clear shift in the position of CJEU when looking at its case law concerning the balancing of freedom

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<sup>288</sup> *McFadden* (n 152).

<sup>289</sup> *ibid* para 88.

<sup>290</sup> *McFadden* (n 152) EU: C: 2016:170, Opinion of AG Szpunar delivered on 16 March 2016, 131.

<sup>291</sup> *McFadden* (n 152) para 91.

to conduct a business and right to intellectual property. Firstly, it is possible to recognize certain elements of the “core functions” that the Court recognizes regarding both rights. Secondly, some understanding can be derived from these judgements concerning the essence of the rights. Thirdly, after the judgement in *Telekabel*, a major shift in the balance of these rights can be recognized. All these points will be discussed in relation to the demands set by Article 17 of the Directive.

Core activities or functions are those activities that are primarily protected by the relevant articles of the Charter. Regarding the freedom to conduct a business, it can for example mean freedom to engage in economic or commercial activity and freedom to contract<sup>292</sup>. As for the right to intellectual property, the core functions are, among other things, to freely enjoy the use of the property and to a certain extent restrict the use of such property.

It is clear both from the legislation and case-law that neither of the rights in question are absolute, that is, the core functions and activities are not absolutely protected by the Charter. As evident already in the earlier case-law, even the core activities protected by the articles of the Charter are not untouchable. However, as evident from the wording used by CJEU in *Sky Österreich*, the freedom to conduct a business is considered as a lesser right when compared to other rights protected in the Charter. Thus, it seems that the essence of the freedom to conduct a business is perhaps more flexible than the essence protected by the right to intellectual property. That is, the essence of the freedom to conduct a business seems to cover a somewhat “smaller” area and is not as easily violated as the essence of the right to intellectual property. Perhaps the greatest difference affecting the established fair balance between the protection of these two rights is the element of *activity* that can be required from the intermediary without this activity violating the essence of the right. This is in stark contrast to the right to intellectual property, as the intellectual property owner must only *passively* withstand the use of its property in certain exceptional situations.

The level of activity that can be demanded from the service provider has only been raised during the last seven years or so with the major shift happening between the *SABAM*-cases<sup>293</sup> and *Telekabel*. After the *SABAM*-cases, and to a certain extent the *L’Oréal v. eBay*, any permanent,

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<sup>292</sup> Groussot et. al. (n 251) 3.

<sup>293</sup> *Scarlet Extended* and *Netlog*.

excessively costly or overly complicated measures taken by the intermediary was deemed as too intrusive concerning the freedom to conduct a business. The fundamental shift happened in *Telekabel*, in which the Court only seemed to focus on the problems caused by the possibly costly nature of the measure demanded from the provider of the service.

The increased level of activity that can be requested from the service provider has, however, been made manifestly clear in the Directive and has perhaps went even a bit further in this regard. At least looking at paragraph 4 of Article 17 it certainly looks like there is a significant increase in the proactivity required from the online content sharing provider. This is evident in the obligation for the intermediary to obtain an authorization from the right holder and the obligation to ensure the unavailability of protected works, if the copyright holder has provided the necessary information for the intermediary. In addition to this information sharing, the activity required from the copyright holder is limited to notifications regarding alleged copyright infringements.

As in the *Telekabel*-judgement, the permanent and complicated nature of the possible mean the intermediary can use to prevent copyright infringements from occurring on its platform is no longer an issue in the Directive as long as the measure to be taken is “suitable and effective”. The cost of the measure for the intermediary, on the other hand, is still relevant in the Directive. However, it is also unclear in the Directive how the costs of the measure are calculated, as alongside direct costs related to the technical aspects of the measure there are undoubtedly indirect costs associated with implementing such measures. These indirect costs might consist of, among other things, the cost of acquiring know-how related to the balancing exercise, as the online content sharing provider has now practically been entrusted with this task. Many things have clearly changed since its ruling in *Promusicae*, where CJEU confirmed that establishing a fair balance is primarily a task of the Union.

The *Telekabel*-case is hence the most significant step towards the balance established by the legislator in Article 17 of the Directive. Thus, coupled with the fact that the position of an online service provider, the provisions of Article 17 can be seen as a continuum that has been heavily inspired by the developments in the case law. Regarding the balance between the rights in question, the leap in the perceived balance between the rights has already happened earlier, notably between the *SABAM*-cases and *Telekabel*.

## 6 CONCLUSIONS

The purpose of this paper was to evaluate whether the fair balance between competing fundamental rights set in the Article 17 of the new copyright directive is in line with the previous case law of the Union. This has been evaluated by looking at those cases of ECtHR and CJEU that have affected the position of an online service provider and the balance between intellectual property rights and the rights that are most likely to be affected by the Directive: the freedom to conduct a business and the freedom of expression and information.

During the last decade or so the position of an online service provider has become stricter regarding its liability for copyright infringing activities that have been done using its services. Even though there have been contestable cases both for and against IP-rights during this time, it is difficult to argue against the notion that the position of intellectual property as a fundamental right has also strengthened during this period. This change in the position is mostly the result of the stricter requirements that can be set for the service providers, as the providers of the services have been the target of a growing number of demands in order to protect IP-rights in the case law of CJEU. Other strong fundamental rights, such as data privacy, have had to give way for the effective enforcement of intellectual property rights. Thus, the stricter requirements set for the online content sharing provider in Article 17 of the Directive can be deemed as continuation of the example set by the Union in its case law.

Concerning the established balance between the freedom to conduct a business and right to intellectual property the position assumed by the legislator is not surprising either. That is, when put against IP-rights, the freedom to conduct a business has given more and more room for the effective enforcement of IP-rights in a steady fashion. In general, freedom to conduct a business seems to be right that is “less valuable”, as also pointed out by the Court in *Sky Österreich*. In addition, the online service provider has been subject to growingly stringent measures, as the previously troublesome “permanent and complicated” nature of the measures no longer seems to be a problem for the fair balance between the two rights.

All in all, it is safe to say that considerably more proactivity can be required from the service provider in Article 17 of the Directive than in the previous EU copyright legislation, which has focused more on the reactive measures relating to notice and takedown procedures. However, one could argue that the Directive only reaffirms the steps taken towards this more active role

by CJEU in its judgements, and thus the consequent restrictions on the freedom to conduct a business are not unprecedented. Moreover, as in the previous set of directives, any monitoring obligations set for the online service providers are still prohibited in Article 17, a situation which has also been clear in the case law. However, the type of outcome prohibition that can be required from the service provider in Article 17 seems to shift closer to this type of monitoring obligation, even though this shift has also been apparent in the case law and therefore is not unprecedented.

It has also become clear that the measures that can be required from the service provider can affect the core activities of their business without the measures violating the essence of freedom to conduct a business. Even though Article 17 only demands that the content sharing provider strives to rid its platform of infringing material with its “best efforts”, it does seem to indicate that a considerable amount of resources must be allocated to complete this requirement. Furthermore, even if the platform would be able to do this, it by no means guarantees the complete eradication of copyright infringing material, as even the best current systems designed to detect this material are far from perfect. It remains to be seen what these “best efforts” are going to be in practice. Nonetheless, national legislators should be careful not to establish zero-tolerance for copyright infringing material when implementing the Directive. Otherwise, a real risk for the violation of essence of freedom to conduct a business might occur, as for most operators of the market this would be an impossible task to accomplish.

This task is not made any easier if considering that, in practice, the online content sharing provider is now responsible for the balancing exercise between the freedom of expression and information and the intellectual property rights at least to a certain extent. Traditionally, the balancing exercise has been a competence of the Union, however, the unspecified “best efforts” and outcome prohibitions that are evident in the Directive increasingly shift this responsibility to the service provider. This will undoubtedly make the burden heavier for the provider. However, this shift in responsibility is not a sudden introduction of Article 17 but rather a gradual shift in the balance between the freedom to conduct a business and IP-rights that has occurred in the case law during the last decade.

Regarding the balance between the freedom of expression and information and intellectual property it seems that Article 17 does not follow the case law so clearly. The first major reason for this is that the Court has increasingly considered the rights of the users or the services. That is, the right to information as a fundamental right has become significantly stronger as the Court

has established that unnecessarily depriving users of the right to lawful information is an unproportioned restriction. At the same time, however, the requirements set for the service provider in Article 17 may have negative consequences for the lawful access to information if the service provider implements overly protective technologies to shield itself from liability.

Moreover, if the decision of ECtHR in *Akdeniz* and the judgement of CJEU in *Telekabel* are anything to go by, problems regarding the violation of the “essence” of freedom of information may arise. Both judgments have argued that taking away the only available mean of accessing information may constitute as a violation of this core of the right. Many content creators use certain platforms as a sole mean of communicating their works to the public, and if this service provider for example decides to cease its operations entirely within the Union, the sole mean of accessing the information also disappears. Regarding the access to information, the requirements of Article 17 might therefore lead to a situation where national courts and CJEU more often contemplate the possible violation of the essence of the right rather than the proportionality of a measure taken by an online service provider. It is difficult to argue that this “balance” achieved by the legislator in Article 17 is in line with previous case law, in which the importance of lawful access to information has been underlined by the Court on many occasions.

It is also possible that the Union is beginning to implement a more external review of the balance between freedom of expression and intellectual property rights. So far works such as parodies and reviews have been protected under internal exceptions to copyright, and Article 17 continues this familiar path. However, arguments in cases such as *Deckmyn* and *Painer* point towards a broader understanding of these exceptions. Furthermore, in a couple of recent cases the Advocate General has for the first time offered hints towards a more external review of fundamental rights instead of the current exception paradigm of copyright law. According to the AG, this review should be implemented in situations where the essence of a right is at risk of being infringed. As apparent in the discussion above, the essence of freedom to expression and information might be at risk of being violated if the information is entirely unavailable to the public. If CJEU begins to move towards the position of an external review used in ECHR, the exceptions which Article 17 relies on might not continue to represent the fair balance set by the Court.

All in all, the question of how well the provisions of Article 17 follow the case law concerning the liability of the online intermediary and the balance between the relevant fundamental rights

is twofold. On one hand, the stricter requirements set for the online content sharing provider have been gradually developing during the last decade. Similarly, the worsening position of freedom to conduct a business and the growing importance of IP-rights is in line with the case law of the last few years. On the other hand, the still unforeseen consequences that may occur regarding the freedom to conduct a business and their direct impact to the freedom of expression and information may cause significant problems for the national legislators who are striving to sustain the fair balance between the rights when implementing the Directive.

Thus, it cannot be said that Article 17 of the Directive completely fails in its representation of the established fair balance between the fundamental rights discussed in this paper, however, the article cannot be seen as a complete success either. Obviously, updating the field of copyright law after an enormous technological leap regarding third-party content sharing providers was long overdue. This rings true even if Article 17 in some parts appears to be a panicky maneuver by the legislator resulting in perhaps stricter than needed measures in order to protect intellectual property at the expense of other fundamental rights.