Tuomas Mylly*

Proportionality in the CJEU's Internet Copyright Case Law: Invasive or Resilient?

1. Introduction

How do the general principles of European Union (EU) law like proportionality fare with the ever-accelerating pace of technological and societal change?[1] Could they compensate for the lagging and incomplete responses of the legislature in fields such as internet copyright,[2] and provide flexibility to the application of the existing laws not tailored to address the emerging techno-economic questions?[3] Or could they rather provide the judiciary with unprecedented decision-making power (*gouvernement des juges*)[4] over the core information society trajectories without adequate limitations on how to rule, thus also reducing legal certainty? In particular, what should we think about the recent expansive use of fundamental rights proportionality in the case law of the Court of Justice of the European Union (CJEU) in internet copyright disputes related for example to hyperlinking and provision of anonymous free WiFi-networks? More specifically: is fundamental rights proportionality as practiced

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[1] See about the recent acceleration of technological change Erik Brynjolfsson & Andre McAfee, *The Second Machine Age. Work, Progress, and Prosperity in a Time of Brilliant Technologies* (W. W. Norton & Company 2014) and more theoretically about societal, technological and other acceleration contributions in Rosa Hartmut & William E. Scheuerman (eds.), *High-Speed Society: Social Acceleration, Power, and Modernity* (The Pennsylvania State University Press 2009) and Rosa Hartmut, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2015).

[2] See in particular Directive 2001/29/EC of the European Parliament and of the Council 22 May 2001, OJ No. L 167 of 22 June 2001, p. 10 (henceforth 'Information Society Copyright Directive'), on the harmonisation of certain aspects of copyright and related rights in the information society, and Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (henceforth 'DSM Copyright Directive').

[3] About the flexibility proportionality could introduce, see from different perspectives Enzo Cannizzaro*, Proportionality in the Law of Armed Conflict,* in *The Oxford Handbook of International Law in Armed Conflict* (Andrew Clapham & Paola Gaeta eds., Oxford University Press 2014) and Chris Thornhill, *A Sociology of Transnational Constitutions – Social Foundations of the Post-National Legal Structure* 402–404 (Cambridge University Press 2016).

[4] This is the most common critique of proportionality according to Anne Peters, *Proportionality as a Global Constitutional Principle,* in *Handbook on global constitutionalism* 262 (Anthony F Lang Jr. & Antje Wiener eds., Edward Elgar Publishing 2017).

by the CJEU a fruitful and unproblematic method with which to approach such issues, and if not, what are the alternatives?

This chapter will analyse how the CJEU operates with fundamental rights proportionality in the context of copyright and the information society. It will neither try to be comprehensive in terms of coverage nor go through the selected cases in all aspects. It will rather seek to theorize the underlying issues, especially through the notions of incommensurability, rights inflation and externalities. It will also consider the flexibility rights proportionality could bring to internet copyright. Although the focus of the case law will be on copyright, the perspectives and critical theorizations have more generic significance, as proportionality will be evaluated *as a mode of regulation* in complex transnational settings, such as the internet.

The argument of the chapter is that the CJEU resorts to fundamental rights proportionality *stricto sensu* excessively, in the absence of an adequate method. Its judgments fill in gaps in Union law with inflated rights, hence expanding the scope of EU law. Disturbingly, it does not seem to realize the structuring effects of its rulings on the digital society. The cases may be about private law relations and rights on the surface level, but through their effects, they are more about judicially regulating the digital society through rights proportionality. Rather than reflecting a conscious agenda on the part of the CJEU, the development is evolutive and could be seen as part of two related global megatrends: power shifting to the judiciary and balancing as the paradigmatic judicial method of our time.[5] In the EU, these trends are strengthened by the already traditionally creative role of the CJEU in developing Union law as well as the more recent constitutional elevation of the Charter of Fundamental Rights of the European Union[6] (Charter or EU Charter).

The problem with rights proportionality, especially in horizontal settings, is that it now operates as an epistemological bottleneck by funnelling knowledge to judicial decision-making through its own selection criteria and biases. It tends to exclude important factors from decision-making, such as legislative aims, a multiplicity of values and interests not (yet) expressed in rights language, as well as social and public goods related to the development of the information society. The chapter recognizes that rights proportionality may bring in flexibility to internet copyright and that it is not always antithetical to legislation; it could even decisively facilitate the efforts of the EU

[5] See Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004) and Alexander T. Aleinikoff, *Constitutional Law in the Age of Balancing* 96 The Yale Law Journal 943 (1987).

[6] European Union, Charter of Fundamental Rights of the European Union 389 (7 Dec 2000), OJ No. C 83 of 30 March 2010.

legislator, especially in dynamic transnational environments like the internet. These virtues however do not justify the manner in which the CJEU operates with rights proportionality in its case law.

The Advocate General opinions show that the CJEU could have decided otherwise, based for example on existing secondary law, the 'provided for by law' requirement of Article 52(1) of the EU Charter, or inclusion of systemic effects in the analysis. Advocate Generals would have required action from the legislator in the form of more precise regulation. The CJEU could have either laid more emphasis on the provisions of the applicable legislation or, where the latter are not precise enough, it could have ruled that the measure sought for is not possible, hence triggering action from the legislator. When resorting to *stricto sensu* proportionality, the CJEU could have pursued fuller analysis comprising effects on the internet infrastructure and information society.

The chapter will proceed as follows. The next sub-section will briefly discuss selected cases from the CJEU and tease out their inherent problems related to rights proportionality. Advocate General Opinions will be discussed to demonstrate that the CJEU's *stricto sensu* proportionality analysis was by no means the only alternative. After this, three critical perspectives to proportionality proving to be relevant for the studied case law will be elaborated. Before conclusions, a synthetizing discussion of proportionality will also consider the virtues of rights proportionality as a mode of regulation and consider its complex role vis-à-vis the legislature. Conclusions will seek to pull the threads together.

2. The Multiple Functions of Rights Proportionality in the CJEU Case Law

2.1 Legislation or Judicial Rights Proportionality? Scarlet's Choice

In *Scarlet Extended*,[7] a Belgian court had imposed an injunction on internet access provider Scarlet Extended (Scarlet) to install at its own cost a permanent filtering system blocking infringing content in SABAM's existing and future repertoire from its subscribers' use. It would have involved the monitoring of all electronic communications, the collection and identification of users' Internet Protocol (IP) addresses and a systematic analysis of content. It however turned out that the system

[7] *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Judgment of 24 November 2011, C-70/10, ECR I-11959 (CJEU 2011). See also *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Judgment of the Court (Third Chamber) of 16 February 2012, C-360/10, ECLI:EU:C:2011:771 (CJEU 2012). The CJEU could build its fundamental rights argumentation on some of the premises of the previous landmark ruling *Promusicae*. *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008], Judgment of the Court (Grand Chamber) of 29 January 2008, C-275/06, ECLI:EU:C:2008:54 (CJEU 2008).

could not distinguish unlawful from lawful content. As a corollary, there would also have been restrictions on legitimate content. The CJEU was confronted with a question whether such a domestic court order was consistent with the relevant EU Directives, read in the light of fundamental rights.

Only after concluding on the basis of secondary EU law alone that the injunction is contrary to the relevant directive provisions and especially the prohibition of general monitoring in Article 15 of the E-commerce Directive (2000/31), did the CJEU address the injunction from the perspective of fundamental rights. It held that national authorities and courts must strike a fair balance between the conflicting rights, and said that by issuing the injunction in question, '*the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other*' (paras 46 and 53). It seems that the CJEU based this conclusion on proportionality or alternatively on the infringement of the essence of the freedom to conduct a business.[8] A reference to *Scarlet Extended* in a subsequent case *Coty Germany*[9] suggests the latter alternative (para 35).

Effects on the customers' privacy and freedom of expression constituted secondary arguments in the CJEU's argumentation: freedom to conduct a business formed the real counterweight to the protection of intellectual property ownership. The effects of the injunction on Scarlet's freedom to conduct its business were indeed significant. Yet the judgment overemphasized freedom to conduct a business at the expense of data protection and freedom of expression.[10] As a whole, the Court's proportionality analysis was inadequate.

Perhaps the most interesting aspect of *Scarlet Extended* is that the CJEU chose not to follow the alternative argumentation model proposed by Advocate General *Villalón*. It did not consider the point made by the Advocate General that the injunction was not 'provided for by law' as required under Article 51(1) of the Charter. The Advocate General evaluated the criterion especially from the perspective of the users of Scarlet's services and, more widely, of internet users. He opined that the national law provision at issue could not, in the light of Articles 7, 8 and 11 of the

[8] Steve Peers & Sacha Prechal, *Article 52 Scope and Interpretation of Rights and Principles*, in *The EU Charter of Fundamental Rights: A Commentary* (Steve Peers et al. eds., Hart Publishing 2014).

[9] *Coty Germany GmbH v Stadtsparkasse Magdeburg*, Judgment of the Court (Fourth Chamber) of 16 July 2015, C-580/13, ECLI:EU:C:2015:485 (CJEU 2015).

[10] See in more detail Tuomas Mylly, *The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU,* in *Research Handbook on Human Rights and Intellectual Property* 127–8 (Christophe Geiger ed., Edward Elgar Publishing 2015) and Oreste Pollicino & Graziella Romeo, *Concluding remarks – Internet law, protection of fundamental rights and the role of constitutional adjudication*, in *The Internet and Constitutional Law – The Protection of Fundamental Rights and Constitutional Adjudication in Europe* 247 (Oreste Pollicino & Graziella Romeo eds., Routledge 2016).

EU Charter and in particular of the requirements relating to the 'quality of the law', be an adequate legal basis on which to adopt an injunction imposing a filtering and blocking system having broad systemic effects. He stated that the 'provided for by law' requirement must relate to deliberated and democratically legitimised law in the parliamentary sense of the term. Only the existence of such law would have made it possible to examine the other conditions in Article 52(1) of the EU Charter. The form of an injunction, lacking precise legislative conditions, could thus not be used to create a new filtering and blocking obligation affecting broadly the rights of Internet Service Providers (ISPs) and internet users. Importantly, Advocate General Villalón argued that the scope of the dispute necessarily went beyond the interests of the parties to the main action: the outcome was to be extended and generalised not only to all ISPs but also for example to social media platforms, like the *SABAM v. Netlog* case , pending at the time, demonstrated.[11]

The case was then for the Advocate General also about whether Union law precluded rightholders from multiplying requests of this type in the member states. Hence, the requested measure, presented as an injunction addressed to Scarlet Extended, was in fact designed to have a long-term effect on an unspecified number of legal or natural persons, ISPs or internet users, providers of services in the information society and users of those services (paras 61-62). The Advocate General in other words considered using substantive human rights proportionality inadequate in the absence of more detailed legislative provisions. Had the Court followed its Advocate General, the Union and its member states would have had to legislate about the relevant rights and interests in a specific manner where such generic effects are feasible: recourse to mere injunctions and *ad hoc* substantive proportionality before the court granting such an injunction would not be sufficient. Importantly, the Advocate General also realized that recourse to substantive, *stricto sensu* proportionality could be of a legislative character – enabling broad regulation of the techno-economic environment built around the internet – when such orders become repeated.

Reading the *Scarlet Extended* judgment in the light of the Advocate General's opinion reveals that the Court was faced with a paradigmatic choice: to require the legislature to act as a condition for the type of measure sought or to empower itself with substantive rights proportionality as a judicial regulation strategy. The Court chose the latter. Since the Treaty of Lisbon entered into force in December 2009, the CJEU has not made any specific reference to the 'provided for by law' requirement in a large number of the cases where it has applied Article 52(1) expressly or implicitly. As the requirement also comprises a 'quality of the law' test, its satisfaction, when raised, should be

[11] *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, Judgment of the Court (Third Chamber) of 16 February 2012, C-360/10, ECLI:EU:C:2012:85 (CJEU 2012).

analysed specifically.[12] The failure to do so goes hand-in-hand with the CJEU's unwillingness to integrate systemic considerations in its judgments. The integration of systemic effects in the analysis would expose the regulative nature of proportionality, suggesting action from the legislature rather than courts. The CJEU's denial to consider the 'provided for by law' criterion is hence logically connected to the denial to consider the systemic effects. Therefore, instead of adopting any broader frame from which to evaluate the issues, the CJEU tends to narrow down its focus to enable and legitimate substantive rights proportionality, like it did in *Scarlet Extended* by excluding not only the important argument made by the Advocate General about the wider implications of the type of order sought and the need to resort to legislation rather than injunctions, but also by limiting the range of competing rights in practice to only two.

2.2 Using Rights Proportionality to Expand the Scope of EU Copyright Law: Deckmyn's Parody

The Deckmyn ruling concerns the interpretation of the parody exception of the Information Society Copyright Directive in the light of fundamental rights.[13] The Court ruled that parody, which is only mentioned in Article 5(3)(k) of the Information Society Copyright Directive as a permitted exception to the exclusive rights of copyright owners, constitutes an autonomous concept of Union law: it must be interpreted uniformly throughout the Union. The close relation between parody and freedom of expression meant that there is hence no need to interpret the parody exception narrowly: its interpretation must secure the effectiveness and purpose of the exception. This resulted in a broad basic definition of parody, in distinction to many domestic interpretations of the parody exception. The only formal elements of parody the CJEU permitted were the evocation of the source work while displaying noticeable difference from it, and the expression of humour or mockery.

The basic definition of parody constituted only the first stage of the analysis. Significantly for rights proportionality, the Court emphasized the need to consider all circumstances and to strike a 'fair balance' between the rights of copyright owners and users in the second stage of the analysis. The real test for the permissibility of parodies became the proportionality analysis.

[12] Peers & Prechal *supra n.* 8. See also Advocate General Opinions in Promusicae and Bonnier Audio cases (referred to above), which also raise the issue of the 'quality of the law', without a positive response from the CJEU.

[13] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Judgment of the Court (Grand Chamber) 3 September 2014, C-201/13, ECLI:EU:C:2014:2132 (CJEU 2014). For a discussion of the case, see Eleonora Rosati, *Just a laughing matter? Why the decision in Deckmyn is broader than parody*, 52(2) Common Market Law Review 511–529 (2015).

Although in *Deckmyn* the CJEU concentrated on the notion of a *discriminatory message* in the second stage, this constituted only one possible consideration under the proportionality exercise.

The Court's strategy thus opens the final acceptability of parodies to varying contexts and environments, as well as evolving and contextually shifting values and interests. This could develop into a generic model for the judicial regulation of exceptions to copyright (perhaps also other intellectual property rights). By first expanding the potential scope of the exception with very broad general definition and then subjecting it to an all-things-considered proportionality analysis, the Court could in effect turn the legislative exception into a proportionality test.

Significantly, private copyright owners could assume the right to object the parody as a result of such proportionality analysis: they might become empowered to object the parody where there is 'a discriminatory message' or another similar reason outweighing the parodist's freedom of expression and other interests. The CJEU's approach hence turns the parody exception – when compared for example to the predetermined conditions of parody under Belgian law – away from *a priori* behavioural conditions of what constitutes an acceptable parody under copyright law. Only two fully relaxed formal conditions apply. Instead, their acceptability becomes a question *a posteriori* – affected by varying circumstances, values and interests as invoked by the private parties and ultimately weighted by courts in double proportionality analysis. As proportionality as a 'method' provides very limited guidance on how to weigh the values and interests, there are very few real limitations on how to rule. This is troubling, as parodies constitute an important form of political expression – also in the circumstances of *Deckmyn*.[14]

Proportionality analysis enabled the initial treatment of parody as an autonomous concept of EU law. As there was no substantive content in the mere listing of the word 'parody' as a permitted exception to copyright in the Information Society Copyright Directive and the domestic traditions of member states vary widely, the CJEU could only treat this empty notion as a concept of Union law and substantiate it by reading it through rights proportionality. Moreover, as the Union has not harmonized moral rights, fundamental rights proportionality provided the CJEU with an

[14] For an insightful discussion of the role of parody in political culture, see Robert Hariman, *Political Parody and Public Culture*, 94(3) Quarterly Journal of Speech 247 (2008). European Copyright Society reminds that "*it is important that the application of the 'fair balance' condition to the parody exception does not provide the copyright owner with the ability to control the content of parodic expression in a manner that goes beyond what is necessary in a democratic society. In particular, copyright law ought not to apply a more exacting standard than public or criminal law in this context. In general, there are laws better placed to take care of discriminatory statements, and it might be preferable to have recourse to those legal mechanisms outside of copyright law to protect against racist or other forms of hate speech*". European Copyright Society, *Limitations and exceptions as key elements of the legal framework for copyright in the European Union - Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn,* para 30, Available at SSRN: https://ssrn.com/abstract=2564772 (February 13, 2015).

opportunity to judicially legislate subject matter typically covered by moral rights. But as such judicial legislative action was based on EU Charter rights, the CJEU in effect harmonized part of the contents of moral rights with the binding force of fundamental rights. As a result, a national court cannot reach an interpretation of moral rights that would contravene EU Charter rights.

2.3 Privatizing Rights Proportionality: the Troubling UPC Telekabel Wien

In its *UPC Telekabel Wien ruling*,[15] the CJEU considered whether an *outcome prohibition* as regards an internet service provider's (ISP) obligation to block a copyright infringing website is in conformity with Union law. An outcome prohibition defines the desired outcome without detailing the means to reach it. The case was between internet access provider *UPC* Telekabel Wien (UPC Telekabel) and Constantin Film and Wega (owning rights in films). The latter companies applied for UPC Telekabel to be ordered to block the access of its customers to a website making available to the public films of Constantin Film and of Wega without their approval.

The CJEU emphasized the need to take into account the requirements that stem from the protection of the applicable fundamental rights, and to do so in accordance with Article 51 of the EU Charter. Significantly, the Court in effect entrusted UPC Telekabel with the duty to balance the rights of copyright owners, its customers and even its own freedom to conduct a business: it must choose the means satisfying the rights of all parties to an acceptable extent. An outcome prohibition at best identifies the rights of the parties and establishes some basic requirements concerning them: it does not settle the rights finally. Whether the blocking ultimately takes account of the parties' rights is not examined before the court makes its order.

The outcome prohibition endorsed by the CJEU shifts the burden of proof regarding the rights of users from the ISP at the stage of granting the injunction to the users themselves in a separate and subsequent challenge, as the CJEU required. In practice, the aggregate interest of an internet user to challenge the blocking measure is low, making user challenges unlikely. As the domestic court can evaluate the measures from the perspective of the information and data protection rights of users neither at the stage of granting the injunction nor when only copyright owners challenge the measure, information and data protection rights of users suffer collateral damage.[16]

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[15] *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Judgment of the Court (Fourth Chamber) 27 March 2014, C-314/12, ECLI:EU:C:2014:192 (CJEU 2014).

[16] Similarly Stefan Kulk, *Internet Intermediaries and Copyright Law. Towards a Future-proof EU Legal Framework* 127 (Netherlands 2018).

The CJEU appeared to *favour* outcome prohibitions to more specific injunctions, as the former is better in conformity with the ISP's freedom to conduct a business (see para 52). Some member state courts, in contrast, had opined that blocking injunctions must be specific to secure the rights of all stakeholders and for the ISP to know how to operationalize the blocking without infringing either the rights of the intellectual property owners or of its own customers.[17]

Advocate General Villalón did not favour shifting the proportionality analysis to the responsibility of the ISP either. He was of the opinion that generic injunctions were not precise enough from the perspective of fundamental rights. Advocate General Szpunar in the *Mc Fadden* opinion (discussed below) similarly opined that prohibitory injunctions formulated in general terms constitute potentially a source of significant legal uncertainty for the intermediary. He argued that the task of determining the exact measures belongs to the courts rather than to the addressee of the injunction, as it involves striking a fair balance between the fundamental rights involved (paras 118-119). He then did not deem the approach adopted in *UPC Telekabel Wien* of leaving the decision-making to the intermediary appropriate, as the very existence of appropriate measures was the subject of debate in the case (para 122). The CJEU in *Mc Fadden* did not have to directly revisit the issue, but it appears that the CJEU does not favour the Advocate General's approach.[18]

The *UPC Telekabel* judgment allows *delegation of decision-making power over fundamental rights from the judiciary to the private sphere*. After a court has given an outcome prohibition, copyright owners could control the ISP decision over the rights of others. Outcome prohibitions shift the related burden of proof from the ISP to users *ex post*. Values and interests related to the neutrality and openness of the internet will not necessarily be represented by any of the parties capable of challenging the measures.

Allocating internet intermediaries decision-making power over right proportionality creates room for private regulation. The function of public law and courts becomes to establish a zone of self-regulation for the intermediaries and copyright owners within which they may regulate the

[17] For example in the UK in *EMI Records Ltd and others v British Sky Broadcasting Ltd and others* [2013], EWHC 379 (Ch), 28 February 2013 (The UK High Court 2013).

[18] Cf. however with *Husovec*, who has argued that the CJEU's judgement in *Mc Fadden* may indicate a change with respect to whether it is permissible that a court does not address the feasibility of an injunction. Martin Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?* 128–9 (Cambridge University Press 2017). I disagree with his suggestion, as there is no clear enough language in the CJEU ruling supporting Husovec's argument. Moreover, Advocate General Szpunar in *Stichting Brein v. Ziggo BV* (*Pirate Bay*) did no more maintain the arguments he presented in *Mc Fadden*, discussed in more detail below. He instead opined that one of the three necessary conditions for accepting the blocking injunction in *UPC Telekabel* was that the ISP could choose which technical means to use in order to comply with the injunction (para 72). Opinion of Advocate General of the CJEU, *Stichting Brein v Ziggo BV and XS4All Internet BV (Pirate Bay),* the Judgment of the Court (Second Chamber) of 14 June 2017, C-610/15, ECLI:EU:C:2017:456 (CJEU 2017).

internet infrastructures and the rights of internet users. Internet users may obtain rights to challenge some of such measures, but they are hypothetical *ex post* rights, entailing costly and uncertain possibilities to challenge the measures and the fundamental rights effects they cause. The creation of a self-regulatory space for intermediaries and intellectual property right owners might also lead to automation of decision-making, to be performed on a mass-scale by computer algorithms.[19] This is already existing reality for example with regard to blocking, filtering and otherwise censoring of possibly infringing websites, content or libellous user comments.[20] The mere possibility of outcome prohibitions induces private regulation between ISPs and copyright owners: the typical terms of outcome prohibitions become to form the basis for their private bargaining over the need for and types of blocking or other technological measures. Provided they find a mutually agreeable solution, there is no need to apply for an outcome prohibition in the first place. The CJEU's endorsement of outcome prohibitions over specific injunctions hence supports privatization of copyright enforcement. As a corollary, ISPs and copyright owners may also privately regulate over user rights and traditional internet values and freedoms.

2.4 Annihilating Free WiFi in Europe With Fundamental Rights Balance: Mc Fadden

The key issue in the *Mc Fadden* case was whether a private provider of an open WiFi network is liable for third parties' copyright infringement or could be ordered through an injunction to terminate or password-protect its network to protect copyright owners from copyright violations using its network.[21] Mr Tobias Mc Fadden provided open WiFi network as part of his business activities.

The CJEU excluded Mr Mc Fadden's direct liability due to the safe harbour of Article 12(1) of the E-commerce Directive. Although such liability was not deemed possible, this did not affect the possibility of the copyright holder to seek an injunction to have the service provider

[19] A similar strategy of entrusting intermediaries with an obligation to balance multiple fundamental rights can be found for example in *Google Spain* (the right to be forgotten), as well as in the ECtHR's *Delfi* judgment (an internet news service's liability to filter abusive user comments). Case *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of the Court (Grand Chamber) 13 May 2014, C-131/12, ECLI:EU:C:2014:317 (CJEU 2014), and the case *Delfi AS v. Estonia*, Application no. 64569/09, Grand Chamber 16 June 2015 (ECtHR 2015). In both, the internet intermediary was entrusted with notable decisions-making power over privacy and freedom of expression of others.

[20] See the insightful analysis of Natasha Tusikov*, Chokepoints – Global Private Regulation on the Internet* (University of California Press 2016).

[21] *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, Judgment of the Court (Third Chamber) of 15 September 2016, C-484/14, ECLI:EU:C:2016:689 (CJEU 2016).

prevented from allowing that infringement to continue under Article 12(3) of the E-commerce Directive. Article 12(1) of the E-commerce Directive did thus not preclude such a person from claiming injunctive relief against the continuation of that infringement and the related costs.

However, it was still an open question whether fundamental rights could prevent an injunction permitted under Article 12(1) and (3) of the E-commerce Directive. The provider could end possible infringements by terminating or password-protecting the WiFi connection or by examining all communications passing through it. The Court identified the protection of property ownership under Article 17(2) of the EU Charter behind the right related to copyright, as well as access provider's freedom to conduct a business, protected by Article 16 of the Charter. Finally, the right of others to freedom of information was at stake, protected by Article 11 of the Charter.[22] A 'fair balance' had then to be struck between the multiple rights at stake (paras 81-83). The CJEU noted that establishing a fair balance between these rights rests ultimately with the national authorities and courts. However, it recognized that monitoring all of the transmitted information would be contrary to Article 15(1) of the Ecommerce Directive. [23] Moreover, terminating the internet connection completely would cause a serious infringement of the access provider's freedom to conduct a business, albeit of a secondary nature in the circumstances of the case. This would not represent fair balance between the fundamental rights to be reconciled, when also taking into account the limited infringement of copyright in question (paras 83, 87-88).

Contrary to the Opinion of Advocate General Szpunar, the CJEU held that an injunction requiring the WiFi access provider to password-protect the connection so that users can be identified, is in conformity with the requirement of a fair balance of rights. As a matter of fact, the Court suggested that nothing less would adequately secure the protection of property ownership of the copyright holders. As the two other means – termination and monitoring – were not allowed, the Court held that denying an injunction ordering password protection and identification of users would be '*to deprive the fundamental right to intellectual property of any protection*', thus being '*contrary to the idea of a fair balance*' (para 98). The remedy in question hence appears as mandatory, being part of the essence of the right to property. This means that member states would have to introduce password-protection and identification of users as an enforcement measure in their laws.[24] Leaving

[22] For unknown reasons, the Court did not consider the data protection rights of users, which would have been highly relevant both under the potential remedy of examining all communications passing through the WiFi as well as the preferred remedy of password-protecting and deanonymizing the network.

[23] 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, OJ L 178, 17.7.2000, p. 1–16.

[24] Cf. with *Martin Husovec*, who suggests that one could perhaps understand the reference to *necessary* as part of an unsuccessfully written balancing exercise, whereby the Court ended up saying that the measure is proportionate. Martin

the right owner Sony without any way to restrict the provision of Mc Fadden's open WiFi provision would '*deprive the fundamental right to intellectual property of any protection*', rendering the ban to provide an open WiFi network '*necessary in order to ensure the effective protection of the fundamental right to protection of intellectual property*'(para 99). Like in *Coty Germany*, the CJEU suggested that not accepting any of the orders considered by the national court would deprive intellectual property of any protection and jeopardize the *essence* of the protection of (intellectual) property ownership.[25]

The fact that the CJEU did not address the protection of the property interest related to Sony's claim implies that there was no meaningful 'weighing' or 'fair balancing' of the conflicting rights. The almost total lack of analysis of the countervailing rights is what makes the case a clear proof of the inadequacy of the CJEU's proportionality analysis. Whereas its analysis of intellectual property ownership as a fundamental right was detached from the applicable context, its treatment of the conflicting rights related to the open provision of WiFi connection did not consider any systemic effects. It neglected what open WiFi stand for. Its open standards enable the creation of mesh networks and other infrastructure innovation in the absence of asymmetric power to dispose over the resource.[26] Significantly, open WiFi policy contributes to the development of wireless infrastructure by opting for an internet model of innovation in the wireless space; it is distinct from the telecommunications-carrier model of network infrastructure innovation. The internet model of innovation tends to surpass its competitors.[27] Open anonymous WiFi networks constitute a commons. They offer not only ease of use for the users, but enable the creation of a community-created infrastructures based on sharing. Like *in Scarlet Extended*, the inclusion of systemic effects in the CJEU's analysis would have exposed the regulative nature of the injunction, pointing towards action by the legislator rather than the CJEU. The failure to consider systemic effects is thus connected to the CJEU's reservation of substantive decision-making powers to itself, to the exclusion of the legislature.

The judgment could trigger a shift from a mixed WiFi infrastructure with multiple providers towards one-sidedly commercial access infrastructure. Communal, small business and private individual WiFi network providers will diminish in numbers and might even disappear,

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Husovec, *Holey cap! CJEU drills (yet) another hole in the e-Commerce Directive's safe harbours*, 12(2) Journal of Intellectual Property Law & Practice 115–25 (2017).

[25] See para 89 of the *Mc Fadden* judgment, referring to *Coty Germany* and *Scarlet Extended*.

[26] As emphasized by Yochai Benkler, *Between Spanish Huertas and the Open Road: A Tale of Two Commons?,* in *Governing Knowledge Commons* 69-98 (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg eds., Oxford University Press 2014).

[27] See Yochai Benkler, *Open Wireless vs. Licensed Spectrum: Evidence from Market Adoption*, 26 Harvard Journal of Law & Technology 71 (2012).

signifying a reduction on market pluralism and communicative diversity.[28] As *infrastructure theory* emphasizes,[29] reductions of positive externalities an open governance WiFi provision model signifies are difficult to measure, not only in the context of microeconomic analysis like in infrastructure theory, but also in the context of proportionality analysis, like in the current context. This argument will be developed further below.

Overall, such prohibitory injunctions would likely lead to self-censoring on the part of open WiFi providers. This happened in Germany after open WiFi providers were found to be capable of infringing copyright indirectly in *Sommer unseres Lebens*.[30] It is pathological that the CJEU could not consider the systemic impact of its decision on the future development of open WiFi provision and the development of the information society more generally. This implies that it could not adequately address fundamental issues such as chilling effect, digital diversity or media plurality.

Importantly, Advocate General Szpunar pointed out that such an outcome was not the only alternative. He opined that an injunction ordering WiFi networks secure would not be tolerable, among others, because securing the network would likely lead to a reduction in the offering of WiFi networks due to additional investments and regulatory constraints relating to the securing of the network and the management of users. The requirement of identification would also likely dissuade some users from using the services (para 139). He importantly opined that a general obligation to make WiFi networks secure to protect copyright in the internet *could constitute a disadvantage for society as a whole and the one that could outweigh the potential benefits to copyright holders*. Finally, he argued that as WiFi access points indisputably offer *great potential for innovation*, any measures that could constrain the development of that activity should therefore be very carefully examined with regard to their potential benefits (paras 145-149). He could integrate such innovation concerns in his analysis, as he emphasized that the mechanisms enabling the fair balance of rights are contained in the Information Society and E-Commerce Directives; they provide for certain limits on certain measures taken against intermediaries (para 113).

2.5 Capturing Hyperlinking Under EU Copyright Law Through Proportionality: GS Media

[28] See more generally about communicative diversity Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* (IPR University Center 2009).
[29] Brett M. Frischmann, *Infrastructure – The Social Value of Shared Resources* (Oxford University Press 2012).
[30] See Husovec *supra n.* 18, at 4–5.

The *GS Media* case[31] concerned the interpretation of the notion of *communication to the public* in the context of hyperlinking. Communication to the public is an exclusive right of copyright owners fully harmonized in the Information Society Copyright Directive. The key issue was whether hyperlinking to protected content in the internet, which has been placed there without the authorization of the copyright owner, constitutes communication to the public. GS Media operates the website GeenStijl, which published several articles about Ms Dekker, linking to nude pictures of her stored in a server located in Australia. The pictures were the same as those published in the Playboy magazine, to which the plaintiff Sanoma Media Group owned the rights.

The CJEU had already brought hyperlinking under the communication right in *Svensson* and *BestWater*.[32] However, there was no required 'new public', as hyperlinking was to content made freely available by the copyright owner. Hence, there was no infringement of the communication right in these cases.[33] Advocate General Wathelet agreed with the sound argument of intervening member states and the Commission challenging the CJEU's previous position, maintaining that hyperlinking could not constitute transmission or retransmission and hence no communication to the public. They argued that hyperlinks do not *make available*, but merely make it easier to find and that communication to the public right should not be dependent on subjective elements such as knowledge. Direct copyright infringement is indeed commonly understood as a strict liability tort.[34] The Advocate General argued fully convincingly that hyperlinks do not 'make available' the linked works, but only facilitate their finding, and are hence not indispensable to the making available of the works in question to users (paras 54-60).

Advocate General Wathelet also warned about significant impairments to the functioning of the internet and the development of the information society. In his view, including hyperlinking within the communication to the public right could distort the '*fair balance of rights*

[31] *GS Media BV v Sanoma Media Netherlands BV and Others*, Judgment of the Court (Second Chamber) of 8 September 2016, C-160/15, ECLI:EU:C:2016:644 (CJEU 2016).

[32] *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB*, Judgment of the Court (Fourth Chamber) 13 February 2014, C-466/12, ECLI:EU:C:2014:76 (CJEU 2014) and *BestWater International GmbH v Michael Mebes and Stefan Potsch*, Order of the Court (Ninth Chamber) 21 October 2014, C-348/13, ECLI:EU:C:2014:2315 (CJEU 2014).

[33] In fact, in BestWater the links were to infringing content, but the CJEU did not for some reason recognize this. Hence, it had to explain in *GS Media* that it follows from the *reasoning* of those decisions that the Court *intended* to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder (para 41 of *GS Media*).

[34] Making communication to the pubic dependent on the defendant's knowledge brings the exclusive right in question closer to theories on accessory copyright infringement. In the *Pirate Bay* -judgment (*supra n.* 18), the CJEU referred to different indications of both actual and constructive knowledge. This shows that the knowledge element, first established in *GS Media*, is not only relevant to hyperlinking. See also Christina Angelopoulos, *Communication to the Public and accessory copyright infringement,* 76(3) The Cambridge Law Journal 496 (2017).

and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter', as mentioned in recital 31 of the Information Society Copyright Directive. He considered it clear that the posting of hyperlinks is both systematic and necessary for the current internet architecture and that as a general rule, albeit not in the circumstances of the *GS Media* case, internet users are not aware and do not have the means to verify whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder's consent. From this perspective, if users were at risk of infringing copyright whenever they post a hyperlink to works freely accessible on a website, they would hesitate to post them, the Advocate General continued. This, in turn, would be detrimental to the proper functioning and the very architecture of the internet and the information society. Hence, in his opinion, such interference in the functioning of the internet must be avoided. In any event, he considered that extending the right in question to the posting of hyperlinks to protected works freely accessible on another website would not be a matter for the Court but the European legislature to decide.

The CJEU did not follow the Advocate General. The judgment returned the issue of linking to the first element of an act of 'communication' regardless of whether or not a 'new public' is reached.[35] The decisive factor now became copyright owner's consent and the user's knowledge about such consent or absence thereof despite the fact that such knowledge is traditionally not relevant with respect to direct copyright infringement. Where a private internet user not acting for profit does not know and cannot reasonably know about the lack of copyright owner's consent, there is no infringement. This 'ought to know' standard resulted from freedom of expression considerations. They limited the reach of the preceding problematic decision to place hyperlinking to unauthorized content under the communication to the public right in the first place. However, it is a very vague standard likely leading to chilling effect in terms of linking done without profit motivation, like the Advocate General's Opinion points out.

The CJEU said that it is legitimate to expect that a person who posts such a link for profit carry out the necessary checks to ensure that the work concerned is not illegally published. In other words, a rebuttable presumption of knowledge about both the protected nature of the work and absence of copyright owner's authorization applies when linking is made for-profit. To rebut the presumption, there must have been due diligence in carrying out the necessary checks. Due to their presumed knowledge of an infringement, maintainers of websites, blogs and social media accounts

[35] However, the Court still tried to operate with the increasingly illogical notion of a 'new public'. See also Christina Angelopoulos, *Hyperlinks and Copyright Infringement*, 76(1) The Cambridge Law Journal 32 (2017).

operating 'for-profit' must now monitor the content they link to. But uncertainty prevails, as it is unclear how the non-infringing nature of any content is to be ascertained. The CJEU recognized that it is difficult to identify infringing content with respect of hyperlinkers not acting for profit. Such difficulties are caused, for example, by sub-licensing and changing contents of websites. However, the same difficulties also apply with regard to for-profit hyperlinkers. As a corollary, it is obvious that such a presumption is unrealistic and harmful in the internet environment, where linking and sharing links made by others constitute the very core of many social media and other platforms.[36]

Such chilling effects are exacerbated by the likely interpretation of the 'for-profit'-criterion. National case law from member states suggests that the definition could cover even single users monetizing a website or blog in any manner, such as through advertising, selling one's own products or services, or promotion of affiliate services. In other words, the link itself does not necessarily have to directly relate to a profit-making purpose.[37] Depending on the development of the notion of 'for-profit' in subsequent CJEU case law, internet-based communication of private individuals (but fulfilling the likely low threshold of 'for-profit') may become severely restricted.

Rights proportionality made the CJEU's capture of hyperlinking to non-authorized content under the communication right possible in the first place. It would have been too restrictive from the perspective of freedom of expression to simply include hyperlinking under the communication to the public right: the right is inherently inflexible and does not offer the means to account for specific circumstances. The CJEU's decision to 'unionize' hyperlinking under the notion of communication to the public already in *Svensson* and *BestWater* caused the need to create flexibility by judicially legislating through rights proportionality. The Court hence distinguished hyperlinking done for-profit from hyperlinking done privately and created the respective burden of proof rules favouring not-for-profit hyperlinkers, as explained above. In other words, treating hyperlinking to non-authorized content as communication to the public would not have been possible without the possibility to further judicially fine-tune the issue of hyperlinking through rights proportionality. As has been argued, a theory of indirect copyright infringement is better equipped to

[36] Cf. however with *Leistner*, who argues that the comparatively free legal development of a differentiated condition of primary liability might be met with approval, as the approach of the CJEU 'reaches a balanced, reasonable result'. Matthias Leistner, *Copyright Law on the Internet in Need of Reform: Hyperlinks, Online Platforms and Aggregators*, 12 Journal of Intellectual Property Law & Practice 136, 138 (2017).

[37] Daniel Inguanez, *Considerations on the Modernization of EU Copyright: Where Is the User?*, 12(8) Journal of Intellectual Property Law & Practice 660, 662 (2017). As Inguanez points out, most websites operated by single users, such as amateur blogs, make use of some monetizing devices in order to generate revenue, even if this is very little. Burdening such users with a monitoring obligation is tantamount to placing severe restrictions on the normal operation of the Internet.

deal with hyperlinking than the right of communication to the public.[38] However, as indirect copyright liability falls outside the scope of the Union's copyright law harmonization, the CJEU chose to unionize the copyright control of hyperlinking by restructuring the communication to the public right with rights proportionality.

2.6 Transitional Conclusions on the Case Law

The *GS Media* judgment forms a variation on the theme of using rights proportionality to judicially regulate core aspects of the internet infrastructure and the information society, while at the same time refusing to recognize the systemic impact of the rulings. Recognizing the latter effects would indeed have pointed towards the idea of leaving the issues to be legislated by the legislator rather than courts. The same problems are manifested in *Scarlet Extended*, *UPC Telekabel Wien* and *Mc Fadden*, in particular. Rights proportionality as a judicial regulation strategy hence seems to suffer from a significant inherent limitation: the Court is typically not willing to consider the systemic effects and regulative nature of its adjudication. It typically frames the issue as being restricted to clearly demarcated private rights belonging to the claimant and the defendant. Yet at the same time its judgments constitute in practice significant regulative action with considerable systemic effects.

The case law demonstrates that the CJEU's use of rights proportionality expands the scope of the Union's copyright law on multiple occasions. It stretches the exclusive rights of copyright owners to cover new phenomena such as hyperlinking to non-authorized content under the communication to the public right. Rights proportionality provided the needed flexibility for doing so by enabling judicially legislating the two different categories of hyperlinkers and imposing different conditions for their respective liability. Rights proportionality also enabled judicially legislating the responsibilities of WiFi providers, hence enabling the regulation of network technologies through rights proportionality. It also enabled privatization and ultimately automatization of decision-making as regards website blocking – a monumental and hardly reversible shift. Finally, it enabled the substantiation of the exceptions to copyright merely listed as words in the Information Society Copyright Directive and hence their treatment as autonomous concepts of Union law. In all instances, the CJEU concurred territory from the legislature, as also pointed out by Advocate Generals, but at the same time made the subject matter re-/co-regulable by confirming

[38] Maurice Schellekens, *Reframing Hyperlinks in Copyright*, 38(7) European Intellectual Property Review 401 (2016).

Union competence, a framing from which to approach the issues, the identification of the relevant rights, values and interests, as well as an example of how to balance it all.

3. Three Critical Perspectives to the CJEU's Use of Proportionality

3.1 Is There a Way out of Incommensurability?

It is not possible to perform a quantitative comparison between gains and losses for rights or the public good by means only of rational criteria, as *there is no unifying property enabling their placing on the same scale*. Balancing or weighing as a metaphor is thus misleading. The choice is typically between realising to a greater or lesser extent one principle, and realising to a greater or lesser extent a different principle, each contributing something *qualitatively* different. As *Francisco Urbina* and other critics of proportionality argue, it is this difference that needs to be taken seriously.[39] Merely focusing on considerations related to the degrees of satisfaction and non-satisfaction of values *ad hoc* misses the point whenever the principles and what they contribute to reality are in this sense *incommensurable*. Deciding *via* commensuration when the values or principles in question are incommensurable is not a valid method and cannot legitimate the CJEU's studied case law.

Due to incommensurability, already the 'balancing' of two rights involves considerable political discretion. There is no model to start with for evaluating proportionality in multiple rights situations. As *Hugh Collins* has astutely observed, the '*uncertainty generated by the need to balance a plethora of competing rights in a proportionate way is perhaps nowhere more apparent than in the EU regulation of the Internet by reference to many rights, including the protection of intellectual property, the freedom to conduct a business, freedom of expression and information, the avoidance of discrimination, and the right to a fair trial and an effective remedy*'.[40] However, the CJEU typically reduces the multiple applicable rights to two rights only, at the expense of other rights, policy aims of the applicable legislation and collective goods related to fundamental values. It typically reduces the multiplicity of rights to freedom to conduct a business and the protection of intellectual property ownership. It tends to treat information and privacy rights of users or the information rights of the

[39] See e.g. Francisco J. Urbina, *Incommensurability and Balancing*, 35 Oxford Journal of Legal Studies 575, passim (2015), Francisco J. Urbina, *A Critique of proportionality and balancing* (Cambridge University Press 2017). The analysis under this section draws partly from Urbina's work. For a critique of proportionality critics, see Kai Möller, *Proportionality: Challenging the Critics*, 10(3) International Journal of Constitutional Law 709 (2012).

[40] Hugh Collins, *The Challenges Presented by Fundamental Rights to Private Law*, in *Private Law in the 21st Century* (Kit Barker, Karen Fairweather & Ross Grantham eds., Hart Publishing 2017).

ISP as subsidiary rights at most. This was the Court's strategy for example in *Scarlet Extended* and *Mc Fadden.* It frames the conflicts through clearly definable private rights, such as property rights of copyright owners and the business rights of the ISP.

Instead of 'optimizing' the limitations of two private rights, the Court in reality *chooses between alternative future worlds*: one where open WiFi networks may be provided freely or one where copyright owners may control them (*Mc Fadden*); one where internet access providers and copyright owners may relatively freely agree over blocking and together regulate the rights of users or one where such decision-making must be in the hands of courts (*UPC Telekabel Wien*); and one where posting hyperlinks constitutes a constant copyright risk or one where this activity does not fall under copyright law in the first place (*GS Media*). These alternative futures differ in crucial aspects. They produce different societal trajectories. Such alternative futures simply cannot be 'weighed' on the same scale in the CJEU's proportionality analysis.

Even in the presence of incommensurable alternatives, there may be rational methods of deciding.[41] For example, legislation may pre-establish a hierarchy of values or interests, thus dissolving the incommensurability dilemma. A case might also be decided on the basis of an absolute right, such as human dignity. A more typical possibility in copyright contexts is based on the notion of the *essence of a right*. The CJEU resorted to this concept for example in *Coty Germany, Mc Fadden* (referred to above) and *Bastei Lübbe* with respect to intellectual property ownership.[42] The essence of a right could be seen to provide a measure of absolute protection within the scope of the otherwise relative right.[43] Deciding on the basis of the essence of a right dissolves the incommensurability dilemma by declaring the invoked sticks in the bundle of an applicable right absolute in the given circumstances. The need to balance them with other rights and public goods allegedly disappears in the context at hand. This turns the right of a party into a trump even in a horizontal setting where other parties may invoke non-absolute rights and public goods related to fundamental rights. In other words, once a court has identified an absolutely protected essence of a right in a horizontal dispute where rights conflict, the weight of the countervailing rights and public goods cannot logically change the outcome as long as none of the other rights is also absolute in nature.

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[41] As *Urbina* notes, (*supra* n. 39), deciding between incommensurable options is often needed and may be based on rational decision-making criteria.

[42] *Bastei Lübbe GmbH & Co. KG v. Michael Strotzer*, Judgement of the Court (Third Chamber) 18 October 2018, C-149/17, ECLI:EU:C:2018:841 (CJEU 2018).

[43] Jonas Christoffersen, *Human rights and balancing: The principle of proportionality,* in *Research Handbook on Human Rights and Intellectual Property* 19, 27 (Christophe Geiger ed., Edward Elgar Publishing 2015). See about the role of the essence of fundamental rights in EU law Maja Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core*, 14(2) European Constitutional Law Review 332 (2018).

Because of such a dramatic effect, recourse to this notion must be limited and always defined with care: establishing an interference with the essence should not become a shortcut of constitutional argumentation.[44] However, in *Coty Germany, Mc Fadden* or *Bastei Lübbe* we do not find any substantive argumentation why the rights invoked by trademark and copyright owners fell under the essence of intellectual property protection under Article 17(2) of the Charter. Invocation of the essence of intellectual property ownership in these cases might relate to how the CJEU framed the issues in the first place: it did so in accordance with what *James Boyle* has coined with the notion of the *Internet Threat story line*.[45] In line with this frame, intellectual property owners need specific protection against the dangers and unpredictability that anonymity in the internet signifies. The same phenomena that drive diversity in network provision, infrastructure innovation and empowerment of internet users pose a threat to copyright: open standards, anonymity, ease of access and distributed and uncontrolled user involvement in the provision of network access.

An alternative frame could have been built on the threat that aggressive intellectual property enforcement against non-infringing entities signifies for unconstrained access to the internet and the resulting impediments on openness, infrastructure innovation and the production of public and social goods. Such an alternative frame could have signified in the circumstances of *Mc Fadden* that imposing an obligation to password protect and de-anonymize open WiFi networks would interfere with the essence of the right to freedom of expression, not intellectual property ownership. Such an obligation – when generalized – would namely lead to serious impediments in accessing the internet openly and anonymously. The Advocate General's Opinion provided building blocks for such an alternative framing. The CJEU's invocation of the essence of intellectual property protection thus abolished the incommensurability problem only superficially, as alternative framing could have produced a different essence of a right. At least, it could have demonstrated that the essence of intellectual property ownership was not jeopardized. By invoking the essence of the right, the CJEU did not have to pronounce on the Advocate General's weighty counter arguments. Deciding on the basis of essence of the right hence excluded significant values and interests from the Court's reasoning by placing them outside any weighing.

This means that the essence of a right does not typically abolish the incommensurability dilemma, but rather shifts it to a preceding stage of framing the issues. It conceals the decision-making over alternative futures under the formal authority of the Court.

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[44] Similarly Maja Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core*, 14(2) European Constitutional Law Review 332, 368 (2018).

[45] James Boyle, *The Public Domain – Enclosing the Commons of the Mind* (Yale University Press 2008).

As the Advocate General opinions in the studied case law demonstrate, the CJEU had different options available to it, such as recourse to secondary law, the requirement of 'provided for by law' and relying on future legislative action. Instead, the CJEU favours proportionality *stricto sensu*: it gives it the greatest latitude to decide and argue the cases as it pleases. It does not shift decision-making power from the CJEU to domestic or Union legislators. As fundamental rights shift decision-making onto high-level constitutional principles, the CJEU does not even bother much with the terms and objectives of existing secondary legislation. But there is no robust method to decide based on proportionality, as the incommensurability objection demonstrates. The CJEU's poorly motivated recourse to the notion of the essence of a right neither provides a rescue from the incommensurability objection nor elevates the intellectual level of the Court's argumentation.

3.2 Rights Inflation or 'Loss of Rights'

The CJEU's case law is also connected to the phenomenon of rights inflation. As *Grégoire Webber* argues, inflation of rights means that the scope of rights becomes increasingly broad, hence capturing more actions under the fundamental right proportionality requirement.[46] Although the EU Charter lists no less than fifty rights and principles, the CJEU has still interpreted many of them very broadly. Symptomatically, an issue deserving broad coverage in a systematic treatise on the EU Charter is the overlaps of each right with other rights protected in the Charter.[47]

For example, according to *UPC Telekabel Wien* (referred to above), the freedom to conduct a business becomes applicable where an injunction constrains an ISP '*in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions*' (para 50). Freedom to pursue a business also comprises, among others, freedom of contract and free competition. Freedom of contract, in turn, includes the freedom to choose with whom to do business and the freedom to determine the price of a service.[48] The potential scope of freedom to conduct a business is thus extremely broad. It overlaps with the protection of property ownership and many other rights.

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[46] See about critique of rights inflation and loss of rights Grégoire C.N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009). Kai Möller similarly recognizes rights inflation but instead welcomes it in his global model of constitutional rights. See Kai Möller, The Global *Model of Constitutional Rights* 3-5 and also passim (Oxford University Press 2012).

[47] Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014).

[48] *Sky Österreich GmbH v. Österreichischer Rundfunk*, Judgment of the Court (Grand Chamber) 22 January 2013, C-283/11, ECLI:EU:C:2013:28. paras. 42–34 (CJEU 2013).

The inflation of rights has at least three types of repercussions. The broad rights: 1) increasingly overlap and conflict with each other; 2) conflict with collective goods and public policies expressed in the applicable laws both on the Union and domestic levels; and 3) may start to cover more private action under their scope as the reach of what a right captures grows.

The first effect of rights inflation, increasing overlaps and conflicts of rights, means that it is increasingly difficult to draw boundaries between rights.[49] For example, property ownership and freedom to conduct a business now increasingly overlap. Property ownership entails the protection of related procedural rights, but they are also protected separately through the notion of effective remedies. The Charter protects equality and prohibits discrimination. Freedom of expression and privacy overlap to protect expressions of personality.

As Webber argues, this development means that rights partly lose their distinctive character. Courts may draw on several rights or be selective: selection of the applicable rights becomes part of how courts frame the cases. Rights may strengthen one another, or they may pull to different directions. But as rights have partly lost their distinguishing features, they have ceased to pose specific demands in an increasing number of situations and thus lost their capacity to answer what is due to each person in the situation at hand. The alternative is that rights do provide answers, but based on framing and selection, manifesting a certain bias. This is the current EU model. To demonstrate the bias, the CJEU willingly expands the remedies at the disposal of copyright owners beyond those provided for in legislation through recourse to the protection of property ownership (*Mc Fadden*), but it does not let freedom of information or freedom of the press constitute a derogation from the reproduction and communication to the public rights to the extent these rights are not already protected by the exhaustively enumerated legislative exceptions, as recent Grand Chamber judgments demonstrate.[50]

[49] See from a critical perspective Gregoire Webber & Paul Yowell, *Introduction: Securing Human Rights through Legislation*, in *Legislated Rights: Securing Human Rights through Legislation* 13 (Gregoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W. Miller & Francisco Urbina eds., Cambridge University Press 2018). Kai Möller argues that rights can be reduced to personal autonomy, the function of more specific rights being informative. Constitutional rights hence comprehensively protect the *freedom of the right-holder to conduct his life according to his self-conception*. See Kai Möller, *The Global Model of Constitutional Rights* 90–5 (Oxford University Press 2012).

[50] *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, Judgment of the Court (Grand Chamber) 29 July 2013, C-469/17, ECLI:EU:C:2019:623 (CJEU 2019); *Spiegel Online GmbH v. Volker Beck*, Judgment of the Court (Grand Chamber) 29 July 2013, C-516/17, ECLI:EU:C:2019:625 (CJEU 2019) and *Pelham and others v. Ralf Hütter and Florian Schneider-Esleben*, Judgment of the Court (Grand Chamber) 29 July 2013, C-476/17, ECLI:EU:C:2019:624 (CJEU 2019). The judgments were delivered after completing the manuscript for this chapter. The more detailed treatment of these three important cases thus falls outside this chapter.

As rights inflation takes place at the *margins* of rights,[51] it also becomes increasingly important to distinguish between claims invoking what belongs or comes close to the core of the right in question from claims invoking what is part of the margins. Rights inflation might partly be in the background of the CJEU's increasing invocation of the notion of the essence of the right: it provides a clear-cut method to resolve conflicts of multiple rights. Alas, the CJEU missed the opportunity to argue how closely the right in question relates to the moral values forming the justification of the right in question. It rather used the essence of the right as a shortcut of argumentation. Yet rights inflation makes such discourses necessary, as the inflating margins of a right have less and less to do with the said justification, but can still be invoked as part of the right.

The *second* phenomenon caused by rights inflation is the increasing conflicts of rights with public policies expressed in the applicable laws on the EU and domestic levels. As rights become broader, increasing areas of legislation and governmental measures become potentially conflictual with them – areas that before were not seen to fall within the scope of rights. Because rights become inflated at their margins, potential conflicts with legislation become multiplied and they increasingly present a situation where a weak right located far from its essence is invoked to challenge a piece of legislation or parts of it, or to affect the interpretation of the law or its provision in question.[52] The judicature increasingly becomes involved in evaluating the conformity of legislation with rights and could overrule secondary norms or more typically change their ordinary interpretations through recourse to inflated rights, therefore burdening the legal system and shifting the division of power from the legislature to the judicature. Crucially, challenges of intellectual property directives or regulations become systematically tamed, as their provisions implement property protection of intellectual property, a right recognised under Article 17(2) of the Charter, and could hence be used to justify the legislation in question.[53]

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[51] It is also possible that the essence of the right becomes broader as part of rights inflation. The *Coty Germany*, *Mc Fadden* and *Bastei Lübbe* -judgments (all referred to above) suggest that this might be happening with respect to the protection of intellectual property ownership. However, the obvious problem with inflating the essence of multiple rights is that an increasing number of rights conflicts would become unsolvable where the essence of a right is invoked successfully on both sides of the dispute. On the other hand, inflating the essence of selected rights only would create a bias in favour of these rights. This might be happening now with regard to intellectual property ownership, should the CJEU further expand its *Coty Germany* and *Mc Fadden* line of reasoning.

[52] Kai Möller says that he agrees with Robert Alexy's influential theory of constitutional rights in that rights *do not seem to enjoy any special or elevated status over public interests, but rather operate on the same plane as policy considerations*. Kai Möller, *The Global Model of Constitutional Rights* 15 (Oxford University Press 2012).

[53] As the *Metronome Music* judgment from year 1998 with regard to the Directive on rental and lending right and *Laserdisken* judgment from year 2006 with respect to the Information Society Copyright Directive already show. *Metronome Music v. Music Point Hokamp* [1998], Judgment of the Court of 28 April 1998, C-200/96, ECLI:EU:C:1998:172 (CJEU 1998) and *Laserdisken ApS v. Kulturministeriet* [2006], Judgment of the Court (Grand Chamber) of 12 September 2006, C-479/04, ECLI:EU:C:2006:549 (CJEU 2006).

The *third* effect caused by rights inflation is that more private action enters the scope of the inflated right and could thus be seen to interfere with the right in question even where such private action is not explicitly regulated by legislation. The logic of how inflated rights extend to the private sphere is similar to that of how they extend to legislation. The preliminary question is to what extent – and how – rights affect relations between individuals either directly or indirectly – through the interpretations of private law norms. I cannot go to this complex issue here.[54]

In horizontal conflicts the shift from suitability and necessity tests to double proportionality means that the focus on the applicable legislation and its aims diminishes. Once the CJEU enters the rights balancing track, it pays scant attention to the objectives of the applicable secondary norms, as became clear for example in the *Mc Fadden*, *Deckmyn* and *GS Media* judgments. This is understandable from the perspective that fundamental rights are supposed to be hierarchically superior to the legislation at hand. Rights conceptualized as principles to be maximized imply in a horizontal situation that interference with both must be minimized. This process has been described as a double proportionality test: the justifications for interfering with both rights must be assessed according to strict scrutiny standards.[55] The other right – not the applicable background legislation – functions as the limitation to the other. The balancing of inflated rights not merely affects the interpretation of the secondary norms marginally, but might effectively replace their functions and objectives.

This may lead to awkward interpretations of the applicable norms from the perspective of their policy aims. In intellectual property contexts, future innovation might be harmed, as for example *Mc Fadden* demonstrates. Interests related to future innovation or creation are not easily expressed in rights language and hence do not enter the proportionality exercise. This is a specific problem in Union law, as there is no full-scale copyright code or well-matured private or procedural law to start with. Hence, there is often no pre-existing private law interpretation on the Union law level. Double proportionality exercise might then fill a void in Union law and create the substantive

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[54] See e.g. Vol. 3 Hugh Collins, *The Constitutionalization of European Private Law as a Path to Social Justice?,* in *The Many Concepts of Social Justice in European Private Law* 133–166 (Hans-W. Micklitz ed., Edward Elgar Publishing 2011). Marek Safjan, *The Horizontal Effect of Fundamental Rights in Private Law – On Actors, Vectors, and Factors of Influence*, in *Varieties of European Economic Law and Regulation Liber Amicorum for Hans Micklitz* 123-151 (Kai Purnhagen & Peter Rott eds., Springer 2014). Ulf Bernitz, *Horizontal Effects of Private Rights Vested by Union Law on Damages to Be Paid by Another Private Party: The Laval Case as Model*, in *The Protection of Fundamental Rights in the EU After Lisbon* (Sybe de Vries, Ulf Bernitz & Stephen Weatherill eds., Bloomsbury 2014). Dorota Leczykiewicz, *Horizontal Application of the Charter of Fundamental Rights*, 38(4) European Law Review, 479 (2013) and Matteo Fornasier, *The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?*, 23(1) European Review of Private Law, 29–46 (2015).

[55] Hugh Collins*, The Constitutionalization of European Private Law as a Path to Social Justice?, in The Many Concepts of Social Justice in European Private Law* 155 *(*Hans-W. Micklitz ed., Edward Elgar Publishing 2011*)*.

content for the legislation in the first place. This might in effect replace the legislative aims with those favoured by the CJEU when balancing the selected rights.

The legislation in question might well survive direct human rights challenges even when the legislation or measure interferes with rights, simply by fulfilling the limitations test. But the meaning and interpretation of the same legislation in a horizontal dispute might change dramatically. As rights balancing becomes the *modus operandi*, the contents of the applicable legislation cease to be the main target of analysis, and the CJEU might substitute the interpretative exercise focusing on legislation with the rights proportionality exercise.

The CJEU often operates with rights as if they were narrower in their scope: real (American type) trumps instead of actually being broad and inflated euro 'rights', constantly overlapping with other rights and public policies, typically being justifiably restricted by the policy aims of the applicable laws. This applies in particular with regard to rights like freedom to conduct a business, non-discrimination and property ownership, which are regularly limited by almost any conceivable legislation regulating markets and business activities. But even such rights might dramatically affect the interpretation of secondary Union norms or effectively constitute them in the first place in the absence of pre-existing interpretations, like in *Deckmyn*, *UPC Telekabel Wien* and *GS Media*. How the CJEU uses rights in horizontal disputes is thus not limited to finally checking that the interpretation reached within private law is also in conformity with fundamental rights.

Perhaps the CJEU should embrace and operationalize the inflated rights fully and realize that they are no trumps, that the values underlying them are incommensurable and that double proportionality analysis should also consider public policies and aims of the applicable legislation: there is no way back to narrow rights. Proportionality could then be reduced to the mere requirement of *reasoning* about which of the rights or public policies ought to take precedence in the case at hand, as *Kai Möller* has formulated it.[56] But the CJEU does not fare well with reasoning either.[57] Möller's relaxed requirement boosts the empowering effects of rights proportionality with respect to the judicature and expands the regulative potential of proportionality. The mere requirement to reason still enables very problematic outcomes and developments of case law, as the judgments of the CJEU

[56] Kai Möller, *Proportionality: Challenging the Critics*, 10 International Journal of Constitutional Law 709, 722 (2012) and Kai Möller, *The Global Model of Constitutional Rights* 139–41 (Oxford University Press 2012), saying that *assessing the relative strength of reasons* or *practical reasoning* is the most viable understanding of proportionality.

[57] In addition to the critical remarks presented in this chapter about the CJEU's reasoning, see e.g. Harri Kalimo, Trisha Meyer & Tuomas Mylly, *Of Values and Legitimacy – Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union*, 81 Modern Law Review 282 (2018).

demonstrate. Critique coming from legal scholars[58] or Advocate Generals seems to affect neither the outcomes nor the reasoning of the CJEU in any noticeable manner.

3.3 Spillover Effects or 'Externalities'

Judgements like *Mc Fadden* and *GS Media* reveal that it is difficult to predict, quantify or value longer-term impediments caused by copyright enforcement on easy access to the internet, development of open WiFi networks and internet-based communications as part of the proportionality analysis. For example, easier access to the internet, facilitation of active citizen involvement in the production and development of open standard WiFi networks and lively internet-based discussions likely lead to multiple benefits in the form of increasing equality in access to information, as well as improvements in learning and communication. These difficulties are not only caused by the structure and limitations of proportionality analysis addressed above. They also have to do with more generic problems related to externalities or '*spillovers*'.

Not only economic transactions but also court decisions cause consequences economists refer to as external effects or externalities.[59] For the present purposes, they can be defined as negative or positive consequences occurring outside the immediate parties and excluded from decision-making.[60] They are not a rarity but pervasive – the rule rather than the exception.[61] As non-market and public goods are not reflected in market prices, effects on them, in particular, become often ignored in judicial and other decision-making.[62] They do not typically form part of the interests of

[58] For example, in my understanding European intellectual property scholars seem to be broadly unanimous in their hard critique of the CJEU's hyperlinking saga, with a few exceptions (not responding to critiques) affirming the rule.

[59] Already *Arrow* noted that the social costs represented by externalities are not adequately addressed in the court procedures of civil law, as they concentrate on separate instances of application. Either there is vast repetition of the same argument in each instance of application or the costly information indicating the social costs of a particular interpretation is not collected at all. Kenneth J. Arrow, *The Economics of Information*, *Volume 4, Collected Papers of Kenneth J. Arrow* 183–184 (Basil Blackwell, USA 1984). See about the significance of external effects of legal norms also Cass R. Sunstein, *Free Markets and Social Justice* 91 (Oxford University Press, USA 1997).

[60] The term *externality* is most often used in economics. The precise definition of it and its relation to the concept of external effect is not settled. The former concept is more often used to denote external costs and the presence of a market failure situation while the latter is sometimes considered to be a broader concept. See in more detail Daniel M. Hausman, *When Jack and Jill Make a Deal,* 9(2) Social Philosophy and Policy 95–113, passim (1992), for an analysis of these definitions in economic literature.

[61] See generally Richard E. Sclove, *Democracy and Technology* 162–168 (The Guilford Press, USA 1995) and Hausman *supra* n. 60, *passim*.

[62] Public and non-market goods differ from one another by the way they create value for society. The value of public goods is realised upon consumption. Non-market goods modify the societal conditions and social interdependencies so as to increase social welfare. These can relate to facilitating an open public sphere, education or freedom to experiment with new ideas and solutions, thus also benefiting non-participants in these processes. See also Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 Minnesota Law Review, 917, 956, 964–7 and also

the parties to the dispute, who are presumably only interested in money. In any case, such effects cannot be fully internalized in the proportionality analysis involving the rights and interests of the immediate parties to the dispute also because their magnitude and trajectories they affect cannot be known with certainty. Yet such effects generally alter the social context in which they appear. They produce changing preferences and behaviour generating new external effects.

CJEU interpretations of Union norms concern the whole EU area and affect the legal systems of all member states. The externalities they produce are therefore bound to be more numerous and unpredictable than in the case of domestic court interpretations only affecting one legal system. This is the major cause of the so-called *Jack-in-the-Box* effect of CJEU case law on the domestic level.[63] Such external effects become magnified and multiplied where the judgments concern internet infrastructure and affect various issues and phenomena dependent on it. The internet constitutes the core framework for the civil society's communication and interaction, social networking and cultural production. It is not only relevant for commercial production, service provision and distribution. Court decisions focusing on the commercial issues of the internet, such as copyright enforcement, affect the same network, and regularly have spillover effects on the social and non-market phenomena dependent on the same infrastructure.

Because copyright law relies on the market mechanism to address the underproduction problem of intellectual goods, it has, as *Brett Frischmann* says, an inherent bias for encouraging intellectual goods that generate the most appropriable value in consumer markets.[64] This also applies in internet contexts. The related judgments focus on the instant commercial sphere and the related private rights of the copyright owners, consumers and the business rights of the ISP in question. The CJEU judgments demonstrate that fundamental rights proportionality does not cure this bias. Instead, it seems to worsen it. The Court also perceives the related fundamental rights through the Internet Threat storyline referred to above. Because of this, copyright decisions involving the internet – even when fundamental rights are added to the mix – focus on the instant commercial sphere and the related interests of copyright owners, consumers and business interests of intermediaries, in distinction to the more abstract conditions of creation and innovation, interests of internet users and effects on internet infrastructure and information society more generally. This suggests that the CJEU should limit its

passim (2005). See also Brett M. Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75(1) Antitrust Law Journal, 1, 16 (2008).

[63] See about this effect Thomas Wilhelmsson, *Jack-in-the-Box Theory of European Community Law*, in *Law and Diffuse Interests in the European Legal Order: Liber amicorum Norbert Reich* 177–194 (Ludwig Krämer et al. eds., Nomos Verlag, Germany 1997).

[64] Brett M. Frischmann, *Infrastructure – The Social Value of Shared Resources* 109 (Oxford University Press 2012).

decision-making in favour of the legislator through different methods, such as the 'provided for by law requirement' as also suggested by Advocate Generals.

As the benefits of the internet are generated at the ends and it is socially valuable primarily because of the wide variety of productive activities it facilitates,[65] court judgments affecting the core of the internet infrastructure, such as an obligation to filter content or restrict WiFi provision, may have detrimental effects on any activities, phenomena and developments at the ends. This means that such judgments may impose significant collateral damage on a diversity of social and public goods related to the internet.[66] Like in the case of WiFi password protection and de-anonymization requirement of *Mc Fadden*, they may set in motion dynamic responses and developments extending well beyond the timespan and interests of the parties to the immediate legal dispute where a 'fair balance of rights' is being sought. Courts may exceptionally manage to refer to such potential effects, as demonstrated by Advocate General opinions, but because such effects are not typically the concern of the parties to the legal dispute at hand and may materialize during a longer timespan – reaching and affecting undefined categories and numbers of individuals and issues – they cannot in any case be fully internalized in the balancing exercise.

4. Proportionality as a Mode of Regulation: Synthetizing Discussion

The CJEU's *stricto sensu* proportionality analysis is based on selecting incommensurable values to justify the preferred outcome. The outcome is typically not capable of being determined by objectively verifiable weights or absolute rights. Proportionality rather empowers the Court to capture new and contested issues under Union law and to judicially regulate them by legitimating its decisions with the notion of a 'fair balance of rights' and through the related values. Such proportionality does not enable one to reverse-engineer the Court's judgments and to conclude that it erred in its analysis. One is left with criticising the particular 'weights' the CJEU allocated to each identified value, exclusion of certain values or interests from argumentation, or disregard of likely consequences. This applies especially where multiple inflated rights are at stake and the effects of judgments extend unpredictably to actors and actions in the internet.

[65] *Ibid*. 334.

[66] See also Filippo Fontanelli, *The Court of Justice of the European Union and the illusion of balancing in internet-related disputes*, in *The Internet and Constitutional Law – The Protection of Fundamental Rights and Constitutional Adjudication in Europe* passim (Oreste Pollicino & Graziella Romeo eds., Routledge 2016).

Using rights proportionality places an increased demand for argument and justification.[67] At the very least, the CJEU's judgments should fulfil certain quality requirements when it resorts to fundamental rights proportionality in its case law. Its judgements should discuss the pros and cons of a certain solution for all the relevant rights, values and interests. They should also address the likely consequences in a broad enough manner. But as the preceding discussion has revealed, this is far from the way in which the CJEU reasons its decisions. It tends to reduce the multiplicity of rights and underlying values and interests to balancing between two private rights only. It pays scant attention to likely consequences, especially in the form of likely negative repercussions on public and non-market goods. Doing so more fully might reveal the regulatory nature of rights proportionality, thus speaking in favour of action from the legislature rather than the judicature. Perhaps motivated by this concern, the Court chooses to exclude such systemic considerations from its proportionality reasoning. Resorting to the essence of a right to decide exacerbates the difficulties to reach an all-things-considered interpretation, as what could form a relevant counter-argument is rendered outside any weighing and justification.

Instead of merely criticizing the line of case law, the current chapter has favoured a more fundamental critique of proportionality as a mode of regulation. But in addition to enabling the capture of new terrain under Union law and empowering the CJEU, proportionality as a mode of judicial regulation also possesses other features, discussed below.

Judicial rights proportionality offers an alternative to the classical model of law making whereby the legislation already contains a predetermined balance of values and interests, presumed to remain stable over at least some time. As the predetermined balance of interests changes, the legislation will have to be reformed accordingly. Judicial rights proportionality, in contrast, allows taking account of varying constellations of interests and changing valuations over time. It also enables adaptations to new techno-economic phenomena, such as hyperlinking, open anonymous WiFi provision or private regulation by internet intermediaries. Concrete rules guiding conduct will ultimately emerge from such combinations of values and interests, applied on a case-by-case basis in the applicable techno-economic environments. Rules based on proportionality could then be seen to incorporate a mechanism that adapts their content to the evolving legal and societal environment. In line with such ideas, rights proportionality has been seen as a law-making process that continuously adapts the content of the rule to changing social needs, circumventing the complexities of the rules

[67] In the context of proportionality in international law, see Anne Peters, *Proportionality as a Global Constitutional Principle*, in *Handbook on global constitutionalism* 262 (Anthony F. Jr. Lang & Ante Wiener eds., Edward Elgar Publishing 2016).

of change in the international legal order.[68] Although the situation of the EU legal system is different in that it has its own legislature, using judicial rights proportionality to address the emerging issues still enables faster reactions to upcoming conflicts and issues.

In other words, judicial rights proportionality allows accommodation to new situations. By calling the decision-maker to judge on the basis of an open category of evolving values and interests to be composed and reconciled on a contextual basis, proportionality seems to be one of the paradigmatic forms of regulation in the conditions of social acceleration.[69] In particular, it seems to be useful in the contexts of rapidly changing transnational environments such as the internet, which produce new types of value and interest conflicts on an accelerating pace.

Filippo Fontanelli argues that the CJEU's fundamental right based adjudication is increasingly impracticable and that the regulation of internet-based phenomena with fundamental rights implications is better left to legislators.[70] But it is equally true that the EU legislator's recent track record in reaching outcomes representing the interests of all concerned is no better. There are no signs that a well-organized copyright lobby would not succeed equally well in the future in setting the legislative agendas and affecting disproportionately the legislative outcomes. In any case, the Union's intellectual property legislation is for the foreseeable future bound to be incomplete and difficult and time-consuming to achieve. Although more future-oriented forms of legislation in the form of framework laws and delegation to the executive have been diagnosed already from early 20th Century,[71] the legislative process as such is continuously slow and hence desynchronized with the accelerating pace of technological and economic change.[72] Regulating with judicial rights proportionality may be one reaction to the desynchronization dilemma. Securing and specifying human rights in advance by legislative measures in the internet environment may in many circumstances be exceedingly illusory.[73]

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[68] Enzo Cannizzaro, *Proportionality in the Law of Armed Conflict*, in *The Oxford Handbook of International Law in Armed Conflict* 332–52 (Andrew Clapham & Paola Gaeta eds., Oxford University Press 2014).

[69] See about the discussion of acceleration in general the sources referred to in note 1.

[70] Filippo Fontanelli, *The Court of Justice of the European Union and the illusion of balancing in internet-related disputes*, in *The Internet and Constitutional Law – The Protection of Fundamental Rights and Constitutional Adjudication in Europe* 95 (Oreste Pollicino & Graziella Romeo eds., Routledge 2016).

[71] See Carl Schmitt, *The Motorized Legislator*, in *High-Speed Society: Social Acceleration, Power, and Modernity* 65–76(Rosa Hartmund & William E. Scheuerman eds., The Pennsylvania State University Press 2009) (a translation of an excerpt from Carl Schmitt, *Lage der europäischen Rechtwissenschaft*, Tübingen: Internationale Universitätsverlag, 1950). See also Carl-Göran Heidegren, *Social Acceleration, Motorized Legislation and Framework Laws,* in *The Contemporary Relevance of Carl Schmitt. Law, Politics, Theology* (Leila Brännström, Panu Minkkinen & Matilda Arvidsson eds., Routledge 2016).

[72] Rosa Hartmund, *Social Acceleration: A New Theory of Modernity,* chapter 11 (Columbia University Press 2014).

[73] Cf. with the argument by Gregoire Webber & Paul Yowell, *Introduction: Securing Human Rights through Legislation*, in *Legislated Rights: Securing Human Rights through Legislation* 1–26 (Gregoire Webber, Paul Yowell, Richard Ekins,

However, the CJEU argumentation could also 'lock-in' in the legislative situation: the EU legislator might not be able to correct the CJEU's interpretation where the Court has argued that its interpretation of the secondary norms is required by and directly based on EU Charter rights.[74] Such a restrictive effect is apparent where the CJEU invokes the essence of intellectual property (or other rights), like in *Coty Germany*, *Mc Fadden* and *Bastei Lübbe*, referred to above. It becomes impossible for the legislator to reverse the CJEU's position by weighing the applicable rights differently. For example, after the *Mc Fadden* judgement, the EU legislator could no more liberate open anonymous WiFi without interfering with what the CJEU has construed as belonging to the essence of intellectual property protection under Article 17(2) of the Charter. Such situations inhibit the chances of the legislator to re-/co-regulate and are hence problematic from the perspective of the division of power between the judiciary and the legislature.

5. Conclusion

The CJEU's frequent recourse to *stricto sensu* fundamental rights proportionality expands the power of the Court and provides limited predictability. The scant argumentation, selective recourse to fundamental rights and other deficits in argumentation connote that framing the cases in a certain way produces more predictability and explanatory potential than proportionality as a 'method'.

Fundamental rights proportionality operates as a significant epistemological bottleneck for integrating multiple applicable rights, legislative aims and infrastructure effects in decision-making. As the case law demonstrates, fundamental rights proportionality reduces the multiple applicable rights into two, excludes legislative objectives like technological innovation from the relevant considerations as being inferior to rights, and ignores the likely effects on internet infrastructure, which however affect multiple rights through the mediation of the infrastructure in question. This implies that the CJEU should show more reticence and decide on the basis of available Union legislation. When unavailable – it could decide in favour of the Union or domestic legislators, as also suggested by some of the Advocate Generals in the studied case law.

The fact that the CJEU has favoured neither existing nor future legislation to resolve the applicable issues, but has instead decided to rule on the basis of substantive proportionality, implies that it *uses rights proportionality as part of its way to judicially regulate the related markets*

Maris Köpcke, Bradley W. Miller & Francisco Urbina eds., Cambridge University Press 2018). See also the other chapters of the book, all emphasizing the need to secure rights primarily through legislative measures, not through rights proportionality in adjudication.

[74] See more closely Mylly *supra* n. 10, 127–8.

and issues. This mode of regulation might enable the accommodation of contextually changing and continuously evolving circumstances, technologies and business practices from the perspective of correspondingly varying and evolving background values and interests, as discussed above. This is in contrast with classical regulation where the weighing of the values and interests constitutes part of the notoriously slow legislative procedure, resulting in a predetermined balance of values and interests of the resulting provisions with typically more limited focus and less responsive with regard to techno-economic and societal change, including evolution of the background values and interests as part of this development. Proportionality might thus seem to fare better in the conditions of economic, technological and societal acceleration, especially in the context of constantly and rapidly evolving digital and other technologies, as it is in many contexts unrealistic to expect that the legislator could react to the upcoming conflicts before the judiciary.

But the flexibility and responsiveness of rights proportionality towards societal and techno-economic change comes with the price of *gouvernement des juges:* the CJEU structures and reorients important societal and techno-economic trajectories through recourse to rights proportionality.