

Pekka Savola

**Internet Connectivity Providers as
Involuntary Copyright Enforcers**

Blocking Websites in Particular

Doctoral dissertation to be presented for public examination, by due permission of the Faculty of Law at the University of Helsinki in Porthania Hall PIII, on the 10th of April, 2015 at 12 o'clock

Publications of IPR University Center 13
IPR University Centerin julkaisuja 13



IPR University Center
Svenska handelshögskolan
Arkadiankatu 7
00100 Helsinki
www.iprinfo.com

ISBN 978-952-67874-5-9
ISBN 978-952-67874-6-6 (PDF)
ISSN 1796-8194

Copyright 2013–2015 as follows. Articles have been reproduced with permission.

Overview: Pekka Savola
Article I: Pekka Savola
Article II: Finnish Lawyers' Society and Pekka Savola
Article III: Finnish Lawyers' Society and Pekka Savola
Article IV: Pekka Savola and Sweet & Maxwell
Article V: Max Planck Institute for Innovation and Competition and Pekka Savola
Article VI: Pekka Savola

© 2015 Pekka Savola. All rights reserved.
Cover design: Karoliina Korte

Oy Nord Print Ab
Helsinki 2015

Preface

The first peal for this dissertation was struck in June 2012 when I discussed my post-graduate studies in technology with Raimo Kantola. He suggested that the topical issue of website blocking might be interesting as I could apply both technical and legal expertise. Indeed, I wrote a technical licentiate thesis in 2012 but persisted with the legal perspective. This is the result.

I would like to thank my supervisor Taina Pihlajarinne, who has been very supportive and has given feedback throughout the project, even in the midst of not one, but two, maternity leaves. That is a feat – especially in a project that lasted for about two years. The preliminary examiners Marcus Norrgård and Tuomas Mylly also deserve credit for their feedback and prior contributions which have been inspirational for my research. I also thank Marcus for agreeing to act as my opponent. Other key people are acknowledged in the articles. Nonetheless, a few highlights are appropriate. Tapani Lohi has always given exceptional feedback and guidance even on subjects outside his field of research; such generosity cannot be witnessed in silence. Martin Husovec has been a most insightful international correspondent. Numerous discussions with Panu Minkkinen and Raimo Siltala provided insights into the methodology and structure of research. And, again, without Raimo Kantola I would not have written a dissertation – at least on this topic, and certainly not on intellectual property. Finally, colleagues, friends, and family have also been important. You know who you are.

This dissertation has been supported by a research grant from Jenny and Antti Wihuri Foundation and language verification and publication grants from Finnish Lawyers' Society and University of Helsinki. University of Helsinki has also provided facilities during my research leave. Roschier Attorneys Ltd supported my master's thesis, which influenced the approach in this study. CSC-IT Center for Science Ltd, which has employed me for the last 15 years, has also always been supportive.

Now, a concluding (or an initial) thought, as inspired by Ronald Dworkin:

The courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer form of law within and beyond the law we have.

The focus on both legal policy and seeking the best interpretation of law has been both a doctrinal and philosophical journey. I have sought a better future than the one offered by a legal realist looking merely at the majority of national case law. The pursuit of this 'law's dream' has been one driving force in this study. I hope it comes true and you like the prospect.

With these reflections while training on the bench in the District Court of Helsinki,
9 March 2015
Pekka Savola

Abstract

This article-based dissertation examines the involuntary role of Internet connectivity providers in copyright enforcement in the EU, and in particular injunctions ordering user-end providers to block access to websites facilitating infringement. The main method is doctrinal legal scholarship supplemented by a socio-legal study of legal policy, seeking answers to the ‘why’ questions underlying the law.

Copyright enforcement measures using providers include website blocking, disconnecting the website or the user, subscriber information disclosure, and notice or graduated response mechanisms. There are also dozens of other options for enforcement, and the IPR holder may select the optimal one(s). In international settings, this can be further optimised by the choice of jurisdiction, the applicable law, and characterisation of the infringement. These provide opportunities for ‘gaming the system’.

Enforcement proceedings are problematic because typically only the copyright holder and possibly the provider are represented in court. Nobody is responsible for arguing for the users or website operators. The court should take their interests into account on its own motion. Unfortunately, many courts have not yet recognised this responsibility. Even this dual role as both the defender of unrepresented parties and judge is less than ideal and improvement is called for.

All the enforcement mechanisms must be compatible with EU fundamental rights, as well as the national ones. A proportionality evaluation procedure is suggested, consisting of identifying the context, the interests of different parties, and applicable principles as well as formulating the evaluation criteria and applying them in a proportionality test. In the test, the legitimacy of the objective, suitability for the purpose, necessity and balancing need to be critically assessed. The underlying goal of copyright enforcement has implications for how the scale tilts. Ineffective enforcement mechanisms can be more easily accepted if the goal of symbolic, educational or politically motivated enforcement is deemed legitimate. However, if the goal is to decrease the impact of infringement, greater efficiency and economically quantifiable results may be required. A proportionate mechanism does not necessarily exist in any particular case.

Current enforcement legislation is a product of heavy lobbying by the copyright industry. This has led to the legislators being inundated with copyright ideology and proprietary bias. In consequence, the legislation fails to take the more general public policy interests and the rights of others into account adequately. The pressure is on rationalising rather than expanding the role of connectivity providers. This background context also calls for a critical approach to interpreting the law. Such an approach might help in achieving more rational and balanced justifications and conclusions.

Contents

Abstract	iii
Contents	v
List of Publications	vii
Abbreviations	ix
Bibliography	xi
1 Introduction	1
2 Approach	3
2.1 Objectives and scope	3
2.2 Methodology	6
2.3 On research neutrality	11
2.4 Sources and material	14
2.5 Fields of study	16
3 Foundations	19
3.1 Online intermediaries as copyright enforcers	19
3.1.1 Online copyright enforcement in context	19
3.1.2 Liability exemptions and obligations	21
3.1.3 Enforcement mechanisms	24
3.1.4 Website blocking injunction	32
3.2 The impact of EU law and ECHR	40
3.2.1 The impact and interaction in general	40
3.2.2 Proportionality and the intensity of review	45
3.2.3 Proportionality in EU law	51
3.3 The rights and interests of different parties	59
3.3.1 Fundamental rights at stake	59
3.3.2 Finding a balance	62
3.3.3 The level of protection	65
3.4 IPR enforcement principles	66
3.4.1 General observations	66
3.4.2 Multi-faceted IPR enforcement principles	67
3.5 Proportionality evaluation procedure	72

4 Findings	75
4.1 Summary of publications	75
4.1.1 Plethora of means and strategies	75
4.1.2 Expansion of copyright enforcement in lawmaking	77
4.1.3 Subscriber identity disclosure: a slippery slope	79
4.1.4 Liability for user-generated content as grounds for blocking	80
4.1.5 International constraints and shopping opportunities	81
4.1.6 Proportionality of website blocking	84
4.2 Patterns and trends	86
4.2.1 The procedural situation in court	87
4.2.2 Balancing the burden and incentives	89
4.2.3 Why have online intermediaries become more involved?	93
4.2.4 Where are we heading with online enforcement?	97
4.2.5 A case against a more active role for ISPs	102
5 Conclusions	107
5.1 The research question	107
5.2 The evolving role of Internet intermediaries	110
5.3 Doctrinal findings	111
5.4 Policy considerations	113
Table of Cases	115
Appendix: original publications	119
Article I	119
Article II	142
Article III	188
Article IV	211
Article V	221
Article VI	250

List of Publications

This dissertation consists of this overview and the following original publications, to be referred to by Roman numerals:

- I Savola, 'Tekijänoikeus Internetissä – suojaamisen keinot ja strategiat,' 42 *Oikeus* 49–70 (1/2013) [Translation: 'Copyright in the Internet – The Means and Strategies of Enforcement']
- II Savola, 'Valtakamppailu lainvalmistelussa: internet-operaattorit tekijänoikeuden täytäntöönpanijoina,' 47 *Oikeustiede–Jurisprudentia XLVII:2014* 203–48 [Translation: 'Legislative Power Struggle to Expand Copyright Enforcement through Internet Service Providers']
- III Savola, 'Tunnistamistietojen luovuttamismääräykset ja telepakkokeinot,' 111 *Lakimies* 886–906 (5/2013) [Translation: 'Injunctions to provide telecoms metadata vis-à-vis telecoms coercive measures']
- IV Savola, 'Blocking Injunctions and Website Operator's Liability for Copyright Infringement for User-Generated Links,' 36 *European Intellectual Property Review (EIPR)* 279–88 (5/2014)
- V Savola, 'The Ultimate Copyright Shopping Opportunity: Jurisdiction and Choice of Law in Website Blocking Injunctions,' 45 *International Review of Intellectual Property and Competition Law (IIC)* 287–315 (3/2014)
- VI Savola, 'Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers,' 5 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)* 116–38 (2/2014)

Abbreviations

ACTA Anti-Counterfeiting Trade Agreement

AG Advocate General

CLJ Cambridge Law Journal

CJEU Court of Justice of the European Union

CJTL Columbia Journal of Transnational Law

CLSR Computer Law & Security Review

ColumJLA Columbia Journal of Law & the Arts

CommsL Communications Law: Journal of Computer, Media & Telecommunications

CTLR Computer and Telecommunications Law Review

CMLR Common Market Law Review

CUP Cambridge University Press

CYELS Cambridge Yearbook of European Legal Studies

DG Directorate-General

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

EEA European Economic Area

EHRLR European Human Rights Law Review

EIPR European Intellectual Property Review

EJLT European Journal of Law and Technology

EJLS European Journal of Legal Studies

ELJ European Law Journal

ELR European Law Review

EntLR Entertainment Law Review

EUCFR Charter of Fundamental Rights of the European Union

- EuConst** European Constitutional Law Review
- IEEE** Institute of Electrical and Electronics Engineers
- IFPI** International Federation of the Phonographic Industry
- IIC** International Review of Intellectual Property and Competition Law
- IJLIT** International Journal of Law and Information Technology
- ILQ** International & Comparative Law Quarterly
- IPQ** Intellectual Property Quarterly
- IPR** Intellectual Property Rights
- IRLCT** International Review of Law, Computers and Technology
- ISP** Internet service provider
- JCER** Journal of Contemporary European Research
- JCMS** Journal of Common Market Studies
- JEPP** Journal of European Public Policy
- JFT** Juridiska Föreningens Tidskrift
- JIPITEC** Journal of Intellectual Property, Information Technology and Electronic
Commerce Law
- JIPLP** Journal of Intellectual Property Law & Practice
- LJ** Law Journal
- LR** Law Review
- OECD** Organisation for Economic Co-operation and Development
- OJ** Official Journal
- OJLS** Oxford Journal of Legal Studies
- OUP** Oxford University Press
- SSRN** Social Science Research Network
- TEU** Treaty on the European Union
- TFEU** Treaty on the Functioning of the European Union
- TRIPS** Trade-Related Aspects of Intellectual Property Rights
- UNESCO** United Nations Educational, Scientific and Cultural Organization
- VandJETL** Vanderbilt Journal of Entertainment & Technology Law
- WIPO** World Intellectual Property Organization

Bibliography

All online sources last accessed 9 March 2015.

- Aarnio A, *The Rational as Reasonable: A Treatise on Legal Argumentation* (D Reidel Publishing 1987).
- *Laintulkinnan teoria* (WSOY 1989).
- *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics* (Ashgate 1997).
- *Essays on the Doctrinal Study of Law* (Springer 2011).
- Alexander L, ‘Legal Objectivity and the Illusion of Legal Principles’ in Klatt M (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012).
- Alexy R, *A Theory of Constitutional Rights* (Rivers J tr, OUP 2002).
- Anagnostaras G, ‘Balancing conflicting fundamental rights: The Sky Osterreich paradigm’ (2014) 39 ELR 111.
- Anderson N, ‘100 years of Big Content fearing technology—in its own words’ (12 October 2009) (<http://arstechnica.com/tech-policy/2009/10/100-years-of-big-content-fearing-technology-in-its-own-words/>).
- ‘“Straightforward legal blackmail”: A tale of P2P lawyering’ (7 June 2010) (<http://arstechnica.com/tech-policy/2010/06/straightforward-legal-blackmail-a-tale-of-p2p-lawyering/>).
- Andersson Schwartz J and Larsson S, ‘The Justifications of Piracy: Differences in Conceptualization and Argumentation Between Active Uploaders and Other File-sharers’ in Fredriksson M and Arvanitakis J (eds), *Piracy: Leakages from Modernity* (Litwin Books 2014).
- Angelopoulos C, ‘Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe’ [2013] IPQ 253.
- ‘Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape’ (2014) 9 JIPLP 812.
- Barak A, *Proportionality: Constitutional Rights and their Limitations* (Kalir D tr, CUP 2012).
- Barber NW, ‘Legal Pluralism and the European Union’ (2006) 12 ELJ 306.
- Barents R, ‘The Precedence of EU Law from the Perspective of Constitutional Pluralism’ (2009) 5 EuConst 421.
- Bellan A, ‘Intellectual Property Liability of Consumers, Facilitators and Intermediaries: The Position in Italy’ in Heath C and Kamperman Sanders A (eds), *Consumers, Facilitators, and Intermediaries: IP Infringers or Innocent Bystanders?* (Kluwer Law International 2012).
- BEREC, ‘A view of traffic management and other practices resulting in restrictions to the open Internet in Europe (BoR (12) 30)’ (29 May 2012) (http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/45-berec-findings-on-traffic-management-practices-in-europe).

- Besselink LFM, 'The Protection of Fundamental Rights Post-Lisbon' (2012) (http://www.fide2012.eu/index.php?doc_id=94).
- 'The parameters of constitutional conflict after *Melloni*' (2014) 39 ELR 531.
- Blevins J, 'Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms' (2013) 34 *Cardozo LR* 1821.
- Bobek M, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' (2012) 14 *CYELS* 529.
- Bomhoff J, 'The Rights and Freedoms of Others': The ECHR and Its Peculiar Category of Conflicts Between Individual Fundamental Rights' in Brems E (ed), *Conflicts Between Fundamental Rights* (SSRN Version, Intersentia 2008).
- Bonadio E, 'File Sharing, Copyright and Freedom of Expression' (2011) 33 *EIPR* 619.
- Bridy A, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89 *Oregon LR* 81.
- Cámara Águila P, 'Enforcement of IPRs' in Synodinou T.-E (ed), *Codification of European copyright law: Challenges and perspectives* (Kluwer Law International 2012).
- Canor I, 'My brother's keeper? Horizontal Solange: "An ever closer distrust among the peoples of Europe"' (2013) 49 *CMLR* 383.
- Carrier M, 'Amicus Curiae Brief on *Viacom v. YouTube*, in the U.S. Court of Appeals for the Second Circuit' (7 April 2011) (<http://docs.justia.com/cases/federal/appellate-courts/ca2/10-3270/327>).
- Chilton AS and Posner EA, 'An Empirical Study of Political Bias in Legal Scholarship' [2014] University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No 696.
- Claes M, 'The European Union, its Member States and their Citizens' in Leczykiewicz D and Weatherill S (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013).
- Clark B and Schubert M, 'Odysseus between Scylla and Charybdis? The ECJ rules in *L'Oréal v eBay*' (2011) 6 *JIPLP* 880.
- Cohen-Eliya M and Porat I, *Proportionality and Constitutional Culture* (CUP 2013).
- Collins H, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Micklitz H.-W (ed), *Constitutionalization of European Private Law* (OUP 2014).
- Colombi Ciacchi A, 'European Fundamental Rights, Private Law, and Judicial Governance' in Micklitz H.-W (ed), *Constitutionalization of European Private Law* (OUP 2014).
- Comandé G, 'The Fifth European Union Freedom: Aggregating Citizenship ... around Private Law' in Micklitz H.-W (ed), *Constitutionalization of European Private Law* (OUP 2014).
- Commission, 'A Single Market for Intellectual Property Rights' (Communication) COM(2011) 287 final.
- 'Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States' (Commission staff working document) SEC(2010) 1589 final.
- 'Commission Work Programme 2015: A New Start' (Communication) COM(2014) 910 final.
- 'Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan' (Communication) COM(2014) 392/2.

- ‘Synthesis Report on Stakeholders’ Dialogue on Illegal Up- and Downloading 2009–2010’.
- Cook J, ‘Norway Has Figured Out How to Solve The Problem Of Music Piracy’ (27 January 2015) (<http://uk.businessinsider.com/norway-music-piracy-statistics-2015-1>).
- Cotterrell R, *Law’s Community: Legal Theory in Sociological Perspective* (OUP 1995).
- Coudert F and Werkers E, ‘In the Aftermath of the Promusicae Case: How to Strike the Balance?’ (2008) 18 IJLIT 50.
- Council of Europe Committee of experts on cross-border flow of Internet traffic and Internet freedom (MSI-INT), ‘Draft Recommendation of the Committee of Ministers to member States on free flow of information on the Internet’ (16 June 2014) ([http://www.coe.int/t/dghl/standardsetting/media/MSI-INT/MSI-INT\(2014\)06_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/MSI-INT/MSI-INT(2014)06_en.pdf)).
- Council of the European Union, ‘EU Human Rights Guidelines on Freedom of Expression Online and Offline’ (12 May 2014) (http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf).
- Craig P, *EU Administrative Law* (2nd edn, OUP 2012).
- Craig P and de Búrca G, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011).
- Daly M, ‘Is there an entitlement to anonymity? A European and international analysis’ (2013) 35 EIPR 198.
- Davies G, ‘Subsidiarity: The wrong idea, in the wrong place, at the wrong time’ (2006) 43 CMLR 63.
- De Beer J and Clemmer CD, ‘Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?’ (2009) 49 Jurimetrics 375.
- De Boer N, ‘Addressing rights divergences under the Charter: *Melloni*’ (2013) 49 CMLR 1083.
- De Vries SA, ‘The Protection of Fundamental Rights within Europe’s Internal Market after Lisbon – An Endeavour for More Harmony’ in de Vries S, Bernitz U, and Weatherill S (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart 2013).
- Dimita G, ‘Six Characters in Search of Infringement: Potential Liability for Creating, Downloading and Disseminating .Torrent Files’ (2012) 7 JIPLP 466.
- Dinwoodie GB, ‘Secondary Liability for Online Trademark Infringement: The International Landscape’ (2014) 37 ColumJLA 463.
- Dixon AN, ‘Liability of users and third parties for copyright infringements on the Internet: Overview of international developments’ in Strowel A (ed), *Peer-to-peer file sharing and secondary liability in copyright law* (Edward Elgar 2009).
- Dougan M, ‘The Impact of the General Principles of Union Law upon Private Relationships’ in Leczykiewicz D and Weatherill S (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013).
- Drexel J, Grosse Ruse-Khan H, and Nadde-Phlix S (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer 2014).
- Dworkin R, *Taking Rights Seriously* (Duckworth 1978).
- *Law’s Empire* (Fontana Press 1986).
- EDRI, ‘Danish court orders a UK company to block Danish IP addresses’ (3 December 2014) (<https://edri.org/danish-court-orders-uk-company-to-block-danish-ip-addresses/>).

- Edström J and Nilsson H, 'The Pirate Bay Verdict – Predictable, and Yet...' (2009) 31 EIPR 483.
- Edwards L, 'The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights' (2011) (http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf).
- European Observatory on Counterfeiting and Piracy, 'Injunctions in Intellectual Property Rights' (2011) (http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf).
- European Parliament, 'European Parliament rejects ACTA' (4 July 2012) (<http://www.europarl.europa.eu/news/en/news-room/content/20120703ipr48247/html/European-Parliament-rejects-ACTA>).
- Farrand B, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (Routledge 2014).
- 'Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement' [2015] OJLS (Advance access).
- Feiler L, 'Website Blocking Injunctions under EU and U.S. Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?' [2012] TTLF Working Papers 13.
- Feldman R, *The Role of Science in Law* (OUP 2009).
- Fischman Afori O, 'Proportionality – A New Mega Standard in European Copyright Law' (2014) 45 IIC 889.
- Fontanelli F, 'Implementation of EU Law through Domestic Measures after *Fransson*: the Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large' (2014) 39 ELR 682.
- Frosio G, 'AGCOM Regulation Challenged before the Italian Constitutional Court: An Update' (3 February 2015) (<http://cyberlaw.stanford.edu/blog/2015/02/agcom-regulation-challenged-italian-constitutional-court-update>).
- 'Spanish Court Criminalizes Linking to Copyright Infringing Materials and Reverses Consolidated Case Law' (3 February 2015) (<http://cyberlaw.stanford.edu/blog/2015/02/spanish-court-criminalizes-linking-copyright-infringing-materials-and-reverses>).
- Future of Copyright, 'EU copyright reform in fast lane: New legislative proposals coming soon' (12 September 2014) (<http://www.futureofcopyright.com/home/blog-post/2014/09/12/eu-copyright-reform-in-fast-lane-new-legislative-proposals-coming-soon.html>).
- Gasser U and Schulz W, *Governance of Online Intermediaries: Observations From a Series of National Case Studies* (The Berkman Center for Internet & Society Research Publication Series 2015-5, 2015).
- Geiger C, 'Fundamental rights, a safeguard for the coherence of intellectual property law?' (2004) 35 IIC 268.
- 'Constitutionalising' intellectual property law? The influence of fundamental rights on intellectual property in the European Union' (2006) 37 IIC 371.
- 'Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope' (2009) 31 EIPR 113.

- ‘The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP law’, in Dinwoodie GB (ed), *Intellectual Property Law: Methods and Perspectives* (SSRN Version, Edward Elgar 2013).
- ‘Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach’, in Torremans P (ed), *Research Handbook on Cross-Border Enforcement of Intellectual Property* (SSRN Version, Edward Elgar 2015).
- Geiger C and Izyumenko E, ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression’ (2014) 45 IIC 316.
- Gerards J, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17 ELJ 80.
- ‘Judicial Argumentation in Fundamental Rights Cases – the EU Courts’ Challenge’, in Neergaard U and Nielsen R (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJØF Publishing 2012).
- Giblin R, ‘Evaluating Graduated Response’ (2014) 37 ColumJLA 147.
- ‘When ISPs Become Copyright Police’ (2014) 18 IEEE Internet Computing 84.
- Godt C, ‘Intellectual Property and European Fundamental Rights’ in Micklitz H.-W (ed), *Constitutionalization of European Private Law* (OUP 2014).
- Goldsmith J and Wu T, *Who Controls the Internet? Illusions of a Borderless World* (OUP 2006).
- Goold PR, ‘The Evolution of Normative Legal Scholarship: The Case of Copyright Discourse’ (2013) 5 EJLS 23.
- Greenawalt K, *Law and Objectivity* (OUP 1992).
- Greer S, ‘Constitutionalizing Adjudication under the European Convention on Human Rights’ (2003) 23 OJLS 405.
- Griffiths J, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (2013) 28 ELR 65.
- ‘Enforcement of intellectual property and the right to a fair trial’, in Geiger C (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).
- Grosheide W, ‘General introduction’ in Grosheide W (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar 2010).
- Groussot X, ‘Rock the KaZaA: Another Clash of Fundamental Rights’ (2008) 45 CMLR 1745.
- ‘Constitutional Dialogues, Pluralism and Conflicting Identities’, in Avbelj M and Komárek J (eds), *Constitutional pluralism in the European Union and beyond* (Hart 2012).
- Groussot X, Pech L, and Thor Petursson G, ‘The Reach of EU Fundamental Rights on Member State Action after Lisbon’ in de Vries S, Bernitz U, and Weatherill S (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart 2013).
- Günther P and Norrgård M, ‘Blocking Websites: Copyright Enforcement Online and Responsibilities of Internet Intermediaries in Europe’ [2014] JFT 97.
- Habermas J, *Between Facts and Norms: Contributions to a discourse theory of law and democracy* (Rehg W tr, Polity Press 1996).
- Haggart B, *Copyright: The Global Politics of Digital Copyright Reform* (University of Toronto Press 2014).
- Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014).
- Hamburger T and Gold M, ‘Google, once disdainful of lobbying, now a master of Washington influence’ (12 April 2014) (<http://www.washingtonpost.com/politics/>

- [how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74_story.html](#)).
- Harbo T.-I, 'The Function of the Proportionality Principle in EU Law' (2010) 16 ELJ 158.
- Hargreaves I, *Digital Opportunity: Review of Intellectual Property and Growth* (2011).
- Haunss S, *Conflicts in the Knowledge Society: The Contentious Politics of Intellectual Property* (CUP 2013).
- Haunss S and Kohlmorgen L, 'Lobbying or politics? Political claims making in IP conflicts' in Haunss S (ed), *Politics of Intellectual Property* (Edward Elgar 2009).
- 'Conflicts about intellectual property claims: The role and function of collective action networks' (2010) 17 JEPP 242.
- Headdon T, 'Beyond liability: On the availability and scope of injunctions against online intermediaries after L'Oreal v Ebay' (2012) 34 EIPR 137.
- Heinonen T, 'Konstitutionaalinen konflikti Suomessa' in Heinonen T and Lavapuro J (eds), *Oikeuskulttuurin eurooppalaistuminen. Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Suomalainen Lakimiesyhdistys 2012).
- 'Valtiosääntöoikeus ja oikeuslähdeoppi', in Heinonen T and Lavapuro J (eds), *Oikeuskulttuurin eurooppalaistuminen. Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Suomalainen Lakimiesyhdistys 2012).
- Helfer LR, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 Harvard International LJ 1.
- Helman L, 'Pull too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement' (2010) 19 Texas Intellectual Property LJ 111.
- Hemmo M, *Sopimus ja delikti: tutkimus vahingonkorvausoikeuden vastuumuodoista* (Lakimiesliiton Kustannus 1996).
- Herr RE, 'The Right to Receive Information under Article 10 of the ECHR: An Investigation from a Copyright Perspective' [2011] JFT 193.
- Hesselink M, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15 ELJ 20.
- Högberg SK, 'The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law' (2006) 106 Columbia LR 909.
- Honkasalo P, 'Criminal Proceedings against the Administrators of a BitTorrent Tracker: Finreactor KKO 2010:47' (2010) 32 EIPR 591.
- Hörnle J, 'On whose side does the internet access provider stand? Blocking injunctions against communication service providers. Case C-314/12, UPC Telekabel Wien GmbH v Constantin Film' (2014) 19 CommsL 99.
- Horsley T, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 JCMS 267.
- Hughenoltz B, 'Why the Copyright Directive is Unimportant, and Possibly Invalid' (2000) 22 EIPR 501.
- 'The dynamics of harmonization of copyright at the European level', in Geiger C (ed), *Constructing European Intellectual Property: Achievements and new perspectives* (Edward Elgar 2013).
- Hughes J, 'On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models' (2005) 22 Cardozo Arts & Entertainment LJ 725.
- Husa J, *Oikeusvertailu* (Lakimiesliiton Kustannus 2013).

- Huscroft G, Miller BW, and Webber G (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014).
- Husovec M, 'Injunctions against Innocent Third Parties: The Case of Website Blocking' (2013) 4 JIPITEC 116.
- 'Austrian Supreme Court Confirms Open-Ended Website Blocking Injunctions [UPC Telekabel Wien]' (1 August 2014) (<http://www.husovec.eu/2014/08/austrian-supreme-court-confirms-open.html>).
- 'CJEU allowed website-blocking injunctions with some reservations' (2014) 9 JIPLP 631.
- 'Munich Court Asks CJEU about Injunctions Against Operators of Open WiFis' (13 October 2014) (<http://www.husovec.eu/2014/10/munich-court-asks-cjeu-about.html>).
- Husovec M and Peguera M, 'Much Ado About Little: Privately Litigated Internet Disconnection Injunctions' (2015) 46 IIC 10.
- Hyland M, 'The seductive interface between adult entertainment and Norwich Pharmacal relief' (2013) 18 CommsL 56.
- Hynönen K, 'No More Mere Conduit? Abandoning Net Neutrality and its Possible Consequences on Internet Service Providers' Content Liability' (2013) 16 The Journal of World Intellectual Property 72.
- Iglesias Sánchez S, 'The Court and the charter: The impact of the entry into force of the Lisbon treaty on the ECJ's approach to fundamental rights' (2012) 49 CMLR 1565.
- Iglezakis I, 'The Legal Struggle in the EU against Online Piracy' in Synodinou T.-E (ed), *Codification of European copyright law: challenges and perspectives* (Kluwer Law International 2012).
- Intellectual Property Office, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (9 February 2015) (<https://www.gov.uk/government/publications/international-comparison-of-approaches-to-online-copyright-enforcement>).
- Jääskinen N, *Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia* (Unigrafia 2008).
- Jans JH, 'Proportionality Revisited' (2000) 27 Legal Issues of Economic Integration 239.
- Jestaedt M, 'The Doctrine of Balancing – its Strengths and Weaknesses' in Klatt M (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012).
- Jie Hua J, *Toward A More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (Springer 2014).
- Jones J, 'Internet Pirates Walk the Plank with Article 10 kept at Bay: Neij and Sunde Kolmisoppi v Sweden' (2013) 35 EIPR 695.
- Kaisto J, *Lainoppi ja oikeusteoria: Oikeusteorian perusteista aineellisen varallisuusoikeuden näkökulmasta* (Edita 2005).
- Karaganis J, 'Rethinking Piracy' in Karaganis J (ed), *Media Piracy in Emerging Economies* (Social Science Research Council 2011).
- Karhu J, 'Perusoikeudet ja oikeuslähdeoppi' (2003) 101 Lakimies 789.
- Keller P, 'Leaked draft of Commission copyright white paper based on flawed assumptions' (25 June 2014) (<http://www.communia-association.org/2014/06/25/leaked-draft-of-commission-copyright-white-paper-based-on-flawed-assumptions/>).
- Kennedy D, *A Critique of Adjudication: {fin de siècle}* (Harvard University Press 1997).

- Kennisland, 'Barnier and Kroes in a copyright reform stand-off' (18 July 2014) (<http://www.kennisland.nl/filter/opinies/barnier-and-kroes-in-a-copyright-reform-stand-off>).
- Kierkegaard SM, 'Taking a sledgehammer to crack the nut: The EU Enforcement Directive' (2005) 21 CLSR 488.
- Kioupis D, 'Criminal Liability on the Internet' in Stamatoudi IA (ed), *Copyright enforcement and the Internet* (Kluwer Law International 2010).
- Kohl U, 'The rise and rise of online intermediaries in the governance of the Internet and beyond – connectivity intermediaries' (2012) 26 IRLCT 185.
- Kopko DW, 'Looking for a Crack to Break the Internet's Back: The Listen4ever Case and Backbone Provider Liability Under the Copyright Act and the DMCA' (2003) 8 Computer Law Review and Technology Journal 83.
- Koskeniemi M, *From Apology to Utopia: The structure of international legal argument* (Reissue with new epilogue, CUP 2005).
- Kroes N, 'Our single market is crying out for copyright reform' (2 July 2014) (http://europa.eu/rapid/press-release_SPEECH-14-528_en.htm).
- Kühling J, 'Fundamental Rights' in von Bogdandy A and Bast J (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2010).
- Kumm M, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German LJ 341.
- 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos G (ed), *Law, Rights And Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007).
- La Rue F, Report of the Special Rapporteur on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet (United Nations Human Rights Council (A/HRC/17/27), 2011).
- Ladenburger C, 'The Protection of Fundamental Rights Post-Lisbon' (2012) (http://www.fide2012.eu/index.php?doc_id=88).
- Lakivaliokunnan lausunto 22/2014.
- Lakivaliokunnan lausunto 5/2005.
- Lavapuro J, *Uusi perustuslakikontrolli* (Suomalainen Lakimiesyhdistys 2010).
- Leczykiewicz D, 'Horizontal application of the Charter of Fundamental Rights' (2013) 38 ELR 479.
- Leistner M, 'Structural aspects of secondary (provider) liability in Europe' (2014) 9 JIPLP 75.
- Lemley MA and Reese R, 'Reducing Digital Copyright Infringement without Restricting Innovation' (2004) 56 Stanford LR 1345.
- Lemley MA and Volokh E, 'Freedom of Speech and Injunctions in Intellectual Property Cases' (1998) 48 Duke LJ 147.
- Lenaerts K, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 ILQ 873.
- 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 375.
- Leubsdorf J, 'The Standard for Preliminary Injunctions' (1978) 91 Harvard LR 525.
- Levin M, 'A Balanced Approach on Online Enforcement of Copyrights' in Axhamn J (ed), *Copyright in a Borderless Online Environment* (Norstedts Juridik 2012).

- Lichtman D, 'Uncertainty and the Standard for Preliminary Relief' (2003) 70 University of Chicago LR 197.
- Liikenne- ja viestintävaliokunnan mietintö 10/2014.
- Lim PH and Longdin L, 'P2P online file sharing: transnational convergence and divergence in balancing stakeholder interests' (2011) 33 EIPR 690.
- Lindroos-Hovinheimo S, *Despairing justice and the ethics of legal interpretation* (Uni-grafia 2011).
- Litman J, *Digital Copyright* (Prometheus Books 2006).
- Lodder A and van der Meulen N, 'Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time' (2013) 4 JIPITEC 130.
- Lynskey O, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: *Digital Rights Ireland*' (2014) 51 CMLR 1789.
- MacCormick N, *Questioning Sovereignty* (OUP 1999).
- Mak C, 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in Micklitz H.-W (ed), *Constitutionalization of European Private Law* (OUP 2014).
- Mann RJ and Belzley SR, 'The Promise of Internet Intermediary Liability' (2005) 47 William & Mary LR 239.
- Manner M, Siniketo T, and Polland U, 'The Pirate Bay Ruling – When The Fun and Games End' (2009) 20 EntLR 197.
- Marguery T, 'European Union fundamental rights and member states action in EU criminal law' (2013) 20 Maastricht Journal 282.
- Marini-Balestra F and Tremolada R, 'Enforcement of Online Copyright in Italy: The New Regulation Adopted by the Italian Communications Authority' [2014] IPQ 143.
- Martinico G and Pollicino O, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Suprenational Laws* (Edward Elgar 2012).
- Martin-Prat M, 'The Future of Copyright in Europe' (2014) 38 ColumJLA 29.
- Masnick M, 'Anti-Piracy Group Says: 'Child Porn Is Great' Since It Gets Politicians To Block File Sharing Sites' (28 April 2010) (<https://www.techdirt.com/articles/20100427/1437179198.shtml>).
- Massey R, 'Independent service providers or industry's secret police? The role of the ISPs in relation to users infringing copyright' (2008) 19 EntLR 160.
- Matulionyte R and Lankauskas M, 'BitTorrent Loses Again: A Recent Lithuanian BitTorrent Case and What It Means for the Construction of E-Commerce Directive' (2013) 4 JIPITEC 179.
- Mayr S, 'Putting a Leash on the Court of Justice? Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule' (2013) 5 EJLS 8.
- McIntyre TJ, 'Child abuse images and cleanfeeds: Assessing internet blocking systems' in Brown I (ed), *Research Handbook on Governance of the Internet* (Edward Elgar 2013).
- Michaels R, 'Why We Have No Theory of European Private Law Pluralism' in Niglia L (ed), *Pluralism and European Private Law* (Hart 2013).
- Micklitz H.-W, 'Monistic Ideology versus Pluralistic Reality: Towards a Normative Design for European Private Law' in Niglia L (ed), *Pluralism and European Private Law* (Hart 2013).

- Micklitz H.-W, 'Introduction' in Micklitz H.-W (ed), *Constitutionalization of European Private Law* (OUP 2014).
- Mielityinen S, *Vahingonkorvausoikeuden periaatteet* (Edita 2006).
- Minero G, 'Case Note on "UPC Telekabel Wien"' (2014) 45 IIC 848.
- Montero E and van Enis Q, 'Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?' (2011) 27 CLSR 21.
- Muir E, 'The fundamental rights implications of EU legislation: some constitutional challenges' (2014) 51 CMLR 219.
- Mylly T, 'Intellectual property and fundamental rights: Do they interoperate?' in Bruun N (ed), *Intellectual Property Beyond Rights* (WSOY 2005).
- *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Information Power* (IPR University Center 2009).
- 'Criminal enforcement and European Union law', in Geiger C (ed), *Criminal Enforcement of Intellectual Property* (Edward Elgar 2012).
- 'The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU' in Geiger C (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).
- Nagel T, *The View from Nowhere* (OUP 1986).
- Neergaard U and Wind M, 'Studying the EU in Legal and Political Sciences Scholarship' in Neergaard U and Nielsen R (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJØF Publishing 2012).
- Neuvonen R, *Sananvapauden sääntely Suomessa* (Lakimiesliiton Kustannus 2012).
- Niemi MI, 'Objective Legal Reasoning Without Objects' in Husa J and Van Hoecke M (eds), *Objectivity in Law and Legal Reasoning* (Hart 2013).
- Nixon R, 'Report Reveals Wider Tracking of Mail in U.S.' (27 October 2014) (<http://www.nytimes.com/2014/10/28/us/us-secretly-monitoring-mail-of-thousands.html>).
- Nordemann JB, 'Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach' (2011) 2 JIPITEC 37.
- Norrgård M, *Interimiska förbud i immaterialrätten* (Kauppakaari 2002).
- 'The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property Rights' (2005) 6 ERA Forum 503.
- 'Varningsbrev på Internet – några kommentarer angående ett aktuellt lagförslag' [2010] JFT 638.
- 'Blocking Web Sites – Experiences from Finland', in Axhamn J (ed), *Copyright in a Borderless Online Environment* (Norstedts Juridik 2012).
- Norros O, *Vahingonkorvaus arvopaperimarkkinoilla* (WSOYpro 2009).
- OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives: Forging partnerships for advancing policy objectives for the Internet economy, part II* (DSTI/ICCP(2010)11/FINAL, 2011).
- Ofcom, "'Site Blocking" to reduce online copyright infringement' (27 May 2010) (<http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>).
- Ohly A, 'Three principles of European IP enforcement law: effectiveness, proportionality, dissuasiveness' in Drexl J and others (eds), *Technology and Competition, Contributions in Honour of Hanns Ullrich* (SSRN version, Larcier 2009).
- Ohly A and Pila J (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013).

- Ohm P, 'The Rise and Fall of Invasive ISP Surveillance' [2009] University of Illinois LR 1417.
- Ojanen T, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' in Nuotio K, Melander S, and Huomo-Kettunen M (eds), *Introduction to Finnish Law and Legal Culture* (Publications of the Faculty of Law University of Helsinki 2012).
- Oksanen V, 'Tekijänoikeustrollaus tuli Suomeen - mutta vain hetkeksi?' (1 September 2014) <<http://www.tivi.fi/blogit/uutiskommentti/tekijanoikeustrollaus%20tuli%20suomeen%20mutta%20vain%20hetkeksi/a1007908>>.
- Oliver P, 'The Protection of Privacy in the Economic Sphere Before the European Court of Justice' (2009) 46 CMLR 1443.
- Örücü E, 'Developing Comparative Law' in Örücü E and Nelken D (eds), *Comparative Law: A Handbook* (Hart 2007).
- O'Sullivan KT, 'Enforcing copyright online: Internet provider obligations and the European Charter of Human Rights' (2014) 36 EIPR 577.
- Palomino I, 'The Spanish hunt for websites providing hyperlinks' (19 January 2015) <<http://the1709blog.blogspot.com/2015/01/the-spanish-hunt-for-websites-providing.html>>.
- Paramythiotis Y, 'Website blocking in Greece: how does it work there?' (28 January 2015) <<http://ipkitten.blogspot.com/2015/01/website-blocking-in-greece-how-does-it.html>>.
- Patry W, *How to Fix Copyright* (OUP 2011).
- Pech L, 'Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Domingues*' (2012) 49 CMLR 1841.
- Peguera M, 'Converging Standards of Protection from Secondary Liability for Trademark and Copyright Infringement Online' (2014) 37 ColumJLA 609.
- Perustuslakivaliokunnan lausunto 15/2006.
- Peukert A, 'Intellectual Property as an End in Itself?' (2011) 33 EIPR 67.
- 'Why do 'good people' disregard copyright on the Internet?', in Geiger C (ed), *Criminal Enforcement of Intellectual Property* (Edward Elgar 2012).
- 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature', in Geiger C (ed), *Research Handbook on Human Rights and Intellectual Property* (2015).
- Pihkala J, 'EUT:n ratkaisujen vaikutuksia piratismien torjumisen näkökulmasta' [2014] Defensor Legis 970.
- Pihlajarinne T, 'Eurooppalaisen tuomioistuinkäytännön hyödyntäminen immateriaalioikeuden tutkimuksessa' (2012) 110 Lakimies 547.
- *Internetvälittäjä ja tekijänoikeuden loukkaus* (Lakimiesliiton Kustannus 2012).
- Pirker B, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013).
- Poort J and others, 'Baywatch: Two approaches to measure the effects of blocking access to The Pirate Bay' (2014) 38 Telecommunications Policy 383.
- Popelier P and Van De Heyning C, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 EuConst 230.
- Poscher R, 'The Principles Theory: How Many Theories and What is their Merit?' in Klatt M (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012).

- PRS for Music, 'Report reveals the six business models behind online copyright infringement' (18 July 2012) (<http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/Reportrevealssthesixbusinessmodelsbehindonlinecopyright.aspx>).
- Raitio J, 'Eurooppaoikeuden yleisten oikeuseriaatteiden horisontaaliset vaikutukset ja perusoikeuskirjan 51(1) artiklan tulkinta' [2014] Defensor Legis 110.
- Rantou M, 'The growing tension between copyright and personal data protection on an online environment: The position of Internet Service Providers according to the European Court of Justice' (2012) 3 EJLT.
- Reichel J, 'European Legal Method from a Swedish Perspective – Rights, Compensation and the Role of the Courts' in Neergaard U, Nielsen R, and Roseberry L (eds), *European Legal Method – Paradoxes and Revitalization* (DJØF Publishing 2011).
- Reinboth S and Passi M, 'Luvan puhelinkuunteluun voi saada keyyin perustein' (31 August 2014) (<http://www.hs.fi/kotimaa/Luvan+puhelinkuunteluun+voi+saada+keyyin+perustein/a1409368131412>).
- Rivers J, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174.
- 'Proportionality and discretion in international and European law', in Tsagourias N (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007).
- 'Proportionality, Discretion and the Second Law of Balancing', in Pavlakos G (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007).
- Rizzuto F, 'The liability of online intermediary service providers for infringements of intellectual property rights' (2012) 18 CTRLR 4.
- Rosas A, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 Jurisprudence 1269.
- Rosas A and Armati L, *EU Constitutional Law: An Introduction* (2nd edn, Hart 2012).
- Rosati E, '2015: The year of blocking injunctions?' (2015) 10 JIPLP 147.
- Rott P, 'The Court of Justice's Principle of Effectiveness and its Unforeseeable Impact on Private Law Relationships' in Leczykiewicz D and Weatherill S (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013).
- Samuel G, *Epistemology and Method in Law* (Ashgate 2003).
- Sandfeld Jacobsen S and Salung Petersen C, 'Injunctions against mere conduit of information protected by copyright: A Scandinavian perspective' (2011) 42 IIC 151.
- Sankari S, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013).
- Sarmiento D, 'CILFIT and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe' in Maduro MP and Azoulai L (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).
- 'The Silent Lamb and the Deaf Wolves: Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law' in Avbelj M and Komárek J (eds), *Constitutional pluralism in the European Union and beyond* (Hart 2012).
- 'Who's afraid of the charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 CMLR 1267.
- email correspondence to author (13 May 2014).
- Sauter W, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 CYELS 439.

- Savola P, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (Licentiate of Science (Technology) thesis, 2013).
- ‘Internet-operaattori ja perusoikeudet’, in Lohi T (ed), *Oikeustiede–Jurisprudentia XLVI:2013* (Suomalainen Lakimiesyhdistys 2013).
- ‘Taustamusiikki asiakastilassa yleisölle välittämisenä – tekijänoikeuslaki EU-oikeuden puristuksessa’ [2014] *Defensor Legis* 47.
- ‘Tekijänoikeuden vaikutus Internet-linkittämiseen erityisesti EU-oikeuden valossa’, in Korpisaari P (ed), *Viestintäoikeuden vuosikirja 2014* (Forum Iuris, forthcoming 2015).
- Savola P and Neuvonen R, ‘KHO 2013:136 – Verkkotunnusluettelon julkistamisen katsottiin edesauttavan lapsipornon levittämistä’ (2014) 112 *Lakimies* 114.
- Scheinin M, ‘Perusoikeuskonfliktit’ in Heinonen T and Lavapuro J (eds), *Oikeuskulttuurin eurooppalaistuminen. Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Suomalainen Lakimiesyhdistys 2012).
- Schellekens MHM, ‘Liability of internet intermediaries: A slippery slope?’ (2011) 8 *SCRIPTed* 154.
- Schmitz S and Ries T, ‘Three songs and you are disconnected from cyberspace? Not in Germany where the industry may ‘turn piracy into profit’ (2012) 3 *EJLT*.
- Sell SK, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (CUP 2003).
- Senden H, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011).
- Senftleben M, ‘Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions’ (2013) 4 *JIPITEC* 87.
- Seuba X, ‘Checks and Balances in the Intellectual Property Enforcement Field: Reconstructing EU Trade Agreements’ in Geiger C (ed), *Constructing European Intellectual Property: Achievements and new perspectives* (Edward Elgar 2013).
- Sherman B and Wiseman L (eds), *Copyright and the Challenge of the New* (Kluwer Law International 2012).
- Siltala R, *Oikeustieteen tieteenteoria* (Suomalainen Lakimiesyhdistys 2003).
- *Oikeudellinen tulkintateoria* (Suomalainen Lakimiesyhdistys 2004).
- *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer 2011).
- Sims A, ‘The denial of copyright protection on public policy grounds’ (2008) 30 *EIPR* 189.
- Sivistysvaliokunnan lausunto 5/2014.
- Sivistysvaliokunnan mietintö 26/2014.
- Smith J and Sharp C, ‘The right to obtain information of wrongdoing versus an individual’s data protection rights: The UK Supreme Court considers Norwich Pharmacal relief’ (2013) 35 *EIPR* 170.
- Smits JM, ‘Plurality of Sources in European Private Law, or: How to Live with Legal Diversity?’ in Neergaard U and Nielsen R (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJØF Publishing 2012).
- Sorvari K, *Vastuu tekijänoikeuden loukkauksesta* (WSOY 2005).
- Stamatoudi IA, ‘Data Protection, Secrecy of Communications and Copyright: Conflicts and Convergences – The Example of *Promusicae v. Telefonica*’ in Stamatoudi IA (ed), *Copyright enforcement and the Internet* (Kluwer Law International 2010).

- Still V, *DRM och upphovsrättens obalans* (IPR University Center 2007).
- Stone Sweet A and Mathews J, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 CJTL 72.
- Strowel A, 'The 'Graduated Response' in France: Is It the Good Reply to Online Copyright Infringements?' in Stamatoudi IA (ed), *Copyright enforcement and the Internet* (Kluwer Law International 2010).
- Strowel A and Hanley V, 'Secondary liability for copyright infringement with regard to hyperlinks' in Strowel A (ed), *Peer-to-peer file sharing and secondary liability in copyright law* (Edward Elgar 2009).
- Swartout CM, 'Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement' (2011) 31 *Northwestern Journal of International Law & Business* 499.
- Swarup A, 'Rethinking American Cyanamid: Procedural and timely justice' (2012) 31 *Civil Justice Quarterly* 475.
- Syrjänen J, *Oikeudellisen ratkaisun perusteista* (Suomalainen Lakimiesyhdistys 2008).
- The Citizen Lab, 'Routing Gone Wild: Documenting Upstream Filtering in Oman via India' (12 July 2012) (<https://citizenlab.org/2012/07/routing-gone-wild/>).
- Timonen P, 'Tutkijan ja tuomarin oikeuslähdeoppi: Oikeuslähdeopin eräiden lähtökoh-tien tarkastelua' (1989) 87 *Lakimies* 666.
- TorrentFreak, 'Pirate Bay Moves to The Cloud, Becomes Raid-Proof' (17 October 2012) (<http://torrentfreak.com/pirate-bay-moves-to-the-cloud-becomes-raid-proof-121017/>).
- 'Pirate Site Blocking Legislation Approved by Norwegian Parliament' (1 May 2013) (<http://torrentfreak.com/pirate-site-blocking-legislation-approved-by-norwegian-parliament-130501/>).
- 'Immunity Resurrected by Anti-Censorship Supporters' (11 August 2014) (<http://torrentfreak.com/immunity-resurrected-by-anti-censorship-supporters-140810/>).
- 'Lawyers Sent 109,000 Piracy Threats in Germany During 2013' (4 March 2014) (<http://torrentfreak.com/lawyers-sent-109000-piracy-threats-in-germany-during-2013-140304/>).
- 'MPAA Prepares to Bring Pirate Site Blocking to the U.S.' (11 December 2014) (<http://torrentfreak.com/mpaa-prepares-to-bring-pirate-site-blocking-to-the-u-s-141211/>).
- 'Swedish Police Raid The Pirate Bay, Site Down' (9 December 2014) (<http://torrentfreak.com/swedish-police-raid-the-pirate-bay-site-offline-141209/>).
- 'The Soaring Financial Cost of Blocking Pirate Sites' (19 October 2014) (<http://torrentfreak.com/the-soaring-financial-cost-of-blocking-pirate-sites-141019/>).
- 'UK ISPs Agree to Send Out Music & Movie Piracy Warnings' (9 May 2014) (<http://torrentfreak.com/uk-isps-agree-to-send-out-music-movie-piracy-warnings-140509/>).
- 'UK ISPs Quietly Block More Torrent Site Proxies' (23 June 2014) (<http://torrentfreak.com/uk-isps-quietly-block-torrent-site-proxies-140623/>).
- 'The Pirate Bay Caught Up In a Hosting Whac-A-Mole' (17 February 2015) (<http://torrentfreak.com/pirate-bay-caught-up-in-a-hosting-whac-a-mole-150217/>).
- 'The Pirate Bay is Back Online!' (31 January 2015) (<http://torrentfreak.com/pirate-bay-back-online-150131/>).

- ‘U.S. ‘Strikes’ Scheme Fails to Impact Piracy Landscape’ (11 January 2015) (<http://torrentfreak.com/u-s-strikes-scheme-fails-to-impact-piracy-landscape-150111/>).
- Torres Pérez A, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009).
- ‘Melloni in Three Acts: From Dialogue to Monologue’ (2014) 10 *EuConst* 308.
- Tridimas T, ‘The Court of Justice and Judicial Activism’ (1996) 21 *ELR* 199.
- *The General Principles of EU Law* (2nd edn, OUP 2006).
- Trstenjak V and Beysen E, ‘The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU’ (2013) 38 *ELR* 293.
- Tsoutsanis A, ‘Privacy and piracy in cyberspace: justice for all’ (2013) 8 *JIPLP* 952.
- Tuori K, *Critical legal positivism* (Ashgate 2002).
- *Ratio and Voluntas: The Tension Between Reason and Will in Law* (Ashgate 2011).
- Tushnet MV, ‘Following the Rules Laid Down: Critique of Interpretivism and Neutral Principles’ (1983) 96 *Harvard LR* 781.
- Twining W, *Law in Context: Enlarging A Discipline* (OUP 1997).
- UNESCO, *Fostering Freedom Online: The Role of Internet Intermediaries* (2015).
- Välimäki M, ‘Liability of Online Intermediary for Copyright Infringement’ (Master’s Thesis, University of Helsinki 1999).
- Van Bockel B and Wattel P, ‘New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson’ (2013) 38 *ELR* 866.
- Van Eecke P, ‘Online service providers and liability: A plea for a balanced approach’ (2011) 48 *CMLR* 1455.
- Van Hoecke M, ‘Legal Doctrine: Which Method(s) for What kind of Discipline?’ in Van Hoecke M (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011).
- ‘Objectivity in Law and Jurisprudence’, in Husa J and Van Hoecke M (eds), *Objectivity in Law and Legal Reasoning* (Hart 2013).
- Van Gestel R and Micklitz H.-W, ‘Revitalizing Doctrinal Research in Europe: What About Methodology?’ in Neergaard U, Nielsen R, and Roseberry L (eds), *European Legal Method – Paradoxes and Revitalization* (DJØF Publishing 2011).
- Verbiest T and others, *Study on the Liability of Internet Intermediaries: Final report (Markt/2006/09/E)* (2007).
- Vilanka O, *Article 27 of the Universal Declaration of Human Rights and Internet: A Study Evaluating Role of Prosumers, Authors and Corporations in the Information Society* (Unigrafia 2014).
- Viljanen V.-P, *Perusoikeuksien rajoitusedellytykset* (WSLT 2001).
- Von Bogdandy A and others, ‘Reverse Solange – Protecting the essence of fundamental rights against EU Member States’ (2013) 49 *CMLR* 489.
- Voorhoof D, ‘Freedom of expression and the right to information: Implications for copyright’ in Geiger C (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).
- Vranken JB, ‘Methodology of Legal Doctrinal Research: A Comment on Westerman’ in Van Hoecke M (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011).
- Vuopala A, *Luvattomien verkkojaketun vähentämiskeinojen arviointia. Selvitykset lainvalmistelun tueksi* (OKM:n työryhmämuistioita ja selvityksiä 2013:13, Ministry of Education and Culture 2013).

- Walker N, 'Constitutionalism and Pluralism in Global Context' in Avbelj M and Komárek J (eds), *Constitutional pluralism in the European Union and beyond* (Hart 2012).
- Walkila S, *Horizontal Effect of Fundamental Rights: Contributing to the 'Primacy, Unity and Effectiveness of European Union Law'* (2015).
- Weckström K, *A Contextual Approach to Limits in EU Trade Mark Law* (IPR University Center 2011).
- Wesselingh EM, 'Website Blocking: Evolution or Revolution? 10 Years of Copyright Enforcement by Private Third Parties' in *Internet, Law and Politics. A Decade of Transformations. Proceedings of the 10th International Conference on Internet, Law & Politics, Barcelona, 3–4 July, 2014* (UOC-Huygens Editorial 2014).
- Wesselingh EM, Cristina A, and Tweebloom N, *To Block or Not to Block?* (2014) (<http://ssrn.com/abstract=2273453>).
- Westerman PC, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Van Hoecke M (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011).
- Wilhelmsson T, 'Legal Integration as Disintegration of National Law' in Petersen H and Zahle H (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995).
- Yu PK, 'Digital Copyright and Confuzzling Rhetoric' (2011) 13 VandJETL 881.
- 'Digital copyright enforcement measures and their human rights threats', in Geiger C (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).
- Zahle H, 'The Polycentricity of the Law or the Importance of Legal Pluralism for Legal Dogmatics' in Petersen H and Zahle H (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995).
- Zemer P, 'Rethinking copyright alternatives' (2006) 16 IJLIT 137.
- Zweigert K and Kötz H, *Introduction to Comparative Law* (Weir T tr, 3rd edn, OUP 1998).

Chapter 1

Introduction

As the importance of the Internet has grown, there has also been an increasing tendency to oblige intermediaries to perform web filtering and aid in enforcing public policies and the rights of other persons. This has concerned intellectual property rights infringement, defamation, gambling, extremism, child abuse, and other objectionable content. The targeted intermediaries have been, inter alia, social media networking services, auction websites, search engines, and hosting and connectivity providers.¹

Since intermediaries are typically faultless third parties with respect to the dispute between right holders and infringers, passive or neutral intermediaries are generally exempt from liability within varying constraints.² To balance the lack of liability, a court may issue an injunction stopping or preventing a specific infringement.³

¹ See eg Patrick Van Eecke, 'Online service providers and liability: A plea for a balanced approach' (2011) 48 CMLR 1455, 1461, 1497–1501; Uta Kohl, 'The rise and rise of online intermediaries in the governance of the Internet and beyond – connectivity intermediaries' (2012) 26 IRLCT 185, 192–93, 200. See also Arno Lodder and Nicole van der Meulen, 'Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time' (2013) 4 JIPITEC 130, paras 3, 5, 10, 57; Etienne Montero and Quentin van Enis, 'Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?' (2011) 27 CLSR 21, 22; OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives: Forging partnerships for advancing policy objectives for the Internet economy, part II* (DSTI/ICCP(2010)11/FINAL, 2011) 30–84; UNESCO, *Fostering Freedom Online: The Role of Internet Intermediaries* (2015) 19–25; Intellectual Property Office, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (9 February 2015) (<https://www.gov.uk/government/publications/international-comparison-of-approaches-to-online-copyright-enforcement>) 15–16.

² Martin Husovec, 'Injunctions against Innocent Third Parties: The Case of Website Blocking' (2013) 4 JIPITEC 116, paras 1, 18, 24; Søren Sandfeld Jacobsen and Clement Salung Petersen, 'Injunctions against mere conduit of information protected by copyright: A Scandinavian perspective' (2011) 42 IIC 151; Kohl (n 1) 191; Lucas Feiler, 'Website Blocking Injunctions under EU and U.S. Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?' [2012] TTLF Working Papers 13, 45–46. On different models of intermediary liability, see UNESCO (n 1) 40–43; Urs Gasser and Wolfgang Schulz, *Governance of Online Intermediaries: Observations From a Series of National Case Studies* (The Berkman Center for Internet & Society Research Publication Series 2015-5, 2015) 4–6.

³ 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 [2000] OJ L178/1, Arts 12–15. See also Van Eecke (n 1) 1464.

The motivation for retaining some degree of actionability has been that the service provider may be best placed to bring such infringing activities to an end.⁴ Further, intermediaries may be irresistible from the regulatory perspective, because the infringers may be too numerous or anonymous, or be located in other jurisdictions beyond the reach of the legislator.⁵ On the other hand, broad liability for activities that intermediaries cannot and need not control or monitor would result, inter alia, in stifling of innovation, preventive censorship, and increased operating costs.⁶

IPR holders thus desire to leverage third parties in mitigating the infringement of their rights. On the other hand, third parties want to avoid or limit such obligations, which would also often be carried out at their own expense. In addition, user interests in freedom of information and data protection are affected, and the rights of operators of allegedly infringing services or innocent by-standing operators who are harmed as collateral damage are also impacted. Beyond each of these, one can also identify divergent public policy interests. This dilemma of finding balanced solutions in the face of these conflicting rights forms the crux of the examination in this study.

This is an academic dissertation consisting of peer-reviewed publications and this overview. The overview provides an analytical introduction, discussion and conclusions in a forward-looking manner from selected perspectives. The six articles are briefly summarised in Chapter 4. The approach has varied from traditional doctrinal legal scholarship to socio-legal studies. Constitutional evaluation of fundamental rights aspects has also been important.

This study is structured as follows. In Chapter 2 the objective and scope are formulated. The methods, sources, and material, and research process questions are also addressed. Chapter 3 describes the theoretical and practical foundations of this study, including intermediaries as copyright enforcers, the impact of EU law and the ECHR, the interests at stake, IPR enforcement principles, and the proportionality evaluation procedure as a whole as a summary. Chapter 4 summarises the original publications, in particular the key results, and analyses and develops further the findings based on the foundations of the previous chapter. Chapter 5 concludes this study.

⁴ See Recital 59 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

⁵ This also allows enforcement of local policies on foreign sites. See Kohl (n 1) 186, 190–91, 193; Husovec, ‘Injunctions against Innocent Third Parties’ (n 2) para 25; Feiler (n 2) 71–74; Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (OUP 2006) 65–85.

⁶ Van Eecke (n 1) 1465; Kohl (n 1) 191; Montero and van Enis (n 1) 28–29; Martin Senftleben, ‘Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions’ (2013) 4 JIPITEC 87, para 6; Marianne Levin, ‘A Balanced Approach on Online Enforcement of Copyrights’ in Johan Axhamn (ed), *Copyright in a Borderless Online Environment* (Norstedts Juridik 2012) 152.

Chapter 2

Approach

2.1 Objectives and scope

The objective of this study is to analyse the emerging role of Internet connectivity providers as a means of copyright enforcement in the EU. The method is doctrinal legal scholarship, primarily using a constitutional perspective. The study also discusses legal policy and seeks to understand the patterns underlying the law.

Internet connectivity providers have been singled out for study.¹ Providers are especially attractive for research because they are faultless third-party intermediaries. This provides an opportunity to consider the particularities of copyright enforcement that are distinct from those applying to infringers.² Further, connectivity providers also differ from other types of providers, in particular hosting providers. Therefore, so-called ‘mere conduit’ connectivity providers are more passive and have a wider liability exemption in the EU than hosting providers.³ Until recently, most of the research and case law has focused on hosting providers, and distinguishing connectivity providers will bring forth new and more detailed perspectives.⁴

¹ These are often also called ‘access providers’. ‘Access providers’ is however a misleading and overly narrow term, because the issues also concern connectivity between access providers, not just providing ‘the last mile’ access to Internet subscribers. The main difference between these is the direct contractual relationship with the end-user. See Arno Lodder and Nicole van der Meulen, ‘Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time’ (2013) 4 JIPITEC 130, paras 19–20, and whether Internet backbone operators are intermediaries, see Lucas Feiler, ‘Website Blocking Injunctions under EU and U.S. Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?’ [2012] TTLF Working Papers 13, 20.

² In consequence, this study differs significantly from the tradition of research focusing on the preliminary injunctions between IPR holders and alleged infringers, for which see eg Marcus Norrgård, *Interimiska förbud i immaterialrätten* (Kauppakaari 2002) and references in Section 3.1.4 and n 96 therein.

³ This is substantiated in Section 3.1.2.

⁴ The perspective is also very topical; see Eleonora Rosati, ‘2015: The year of blocking injunctions?’ (2015) 10 JIPLP 147.

The focus is on involuntary involvement. The right holders have advocated a more extensive role and mechanisms, but providers have usually been opposed to these suggestions, wanting to stay out of being forced to monitor and police the activities of their users. The mechanisms advocated would often also be implemented at the provider's expense.⁵ Providers may share the common objective with IPR holders of proactively managing the data transmitted in their network. While some have voluntarily shifted towards being active enforcers, this is not yet commonplace.⁶ Involuntary involvement typically occurs through a court order (eg, a website blocking or a subscriber information disclosure order) or through a legislative act such as an obligation to implement a warning letter mechanism. This study concentrates particularly on court orders.⁷

The research focus is on copyright.⁸ Most of this study would apply as-is to IPR enforcement in general (eg, patent or trademark infringement). However, there are also significant differences, in particular concerning the legality of private use and the parties with an interest in issues, justifying the narrower focus.

Particular attention is paid to a specific means of enforcement, the website blocking injunction.⁹ This is motivated by explicit legislation in the Infosoc Directive¹⁰ and Enforcement Directive¹¹ and the case law within the EU in recent years. General automated filtering systems intended to detect and block illegal material are not

⁵ This is discussed in Section 4.2.2 and Article II (at 237–39).

⁶ One example of a common goal is limiting the amount of peer-to-peer network traffic in order to manage network congestion. See eg Jeremy de Beer and Christopher D Clemmer, 'Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?' (2009) 49 *Jurimetrics* 375, 376, 389; Enrico Bonadio, 'File Sharing, Copyright and Freedom of Expression' (2011) 33 *EIPR* 619, 627–28. However, being active in managing communications has been argued to endanger the provider's liability exemptions; see Kalle Hynönen, 'No More Mere Conduit? Abandoning Net Neutrality and its Possible Consequences on Internet Service Providers' Content Liability' (2013) 16 *The Journal of World Intellectual Property* 72.

⁷ The specific issues of administrative blocking procedures are not examined; see Section 3.1.4 and n 72 therein.

⁸ For simplicity, 'copyright' also includes so-called related rights of producers, performers, etc. See Chapter 1 on providers being targeted with other kinds of obligations.

⁹ 'Website blocking' is a simplified term implying blocking access to a specific technical resource using an identifier such as an IP address or DNS name. Obviously, other sites rather than typical websites could also be targeted and other technical means could also be used. Essentially, the term includes any target that could reasonably be blocked by a connectivity provider; the term is used as a synonym for 'Internet resource'. It seems unnecessary to define it more precisely. On the technical background, see eg Feiler (n 1) 6–11; Ofcom, "Site Blocking" to reduce online copyright infringement' (27 May 2010) (<http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>) 17–45; Pekka Savola, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (Licentiate of Science (Technology) thesis, 2013) 67ff.

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Art 8(3).

¹¹ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16, Arts 9(1)(a) and 11.

covered.¹² The focus is on the user end providers resulting in ‘decentralised’ and national enforcement. Injunctions to disconnect an infringing user are covered only very briefly. Other means such as subscriber information disclosure and graduated response or warning letter mechanisms are not obligatory in EU legislation and are in consequence domestic solutions.¹³ Nonetheless, those mechanisms are still briefly covered to observe the more general trends in leveraging connectivity providers in copyright enforcement.

The present concern is the phenomenon at the EU level, as well as the interaction between EU and domestic legal systems. That is, instead of a detailed study of the law of one or a few countries, the intention is to understand the implications of EU law, its impact on national legal orders, and the applicability of national case law in the EU context.¹⁴ In consequence and in particular in this overview, the specifics of Finnish law are of less importance.

With this scope of study, the research question can be more precisely formulated as follows: *On what conditions and why may an Internet connectivity provider be forced to participate in online copyright enforcement?* This can be further divided into sub-questions:

1. How may Internet connectivity providers be used for copyright enforcement and how do these mechanisms fit into the general copyright enforcement landscape?
2. What are the requirements and considerations to be evaluated, in particular with regard to fundamental rights, in order to issue a website blocking order?
3. What motivations can be observed in the expansion of copyright enforcement through providers?
4. What trends can be discerned as general observations and conclusions?

The research question and the corresponding sub-questions encompass the whole study. It is not possible to completely address them in this overview. In consequence, the focus here is on providing an introduction, the methodological context, theoretical and practical framework, summarising key findings, making observations on more general trends and, finally, drawing conclusions.

¹² Sometimes ‘filtering’ and ‘blocking’ are used interchangeably. In this context automated filtering systems need to inspect the content of communications with some heuristics and make a decision whether to prevent the communications or not. With blocking, the targets are usually specified manually with the granularity of a whole site. See eg Opinion in C-70/10 *Scarlet Extended* EU:C:2011:255, paras 44–52.

¹³ This is substantiated in Section 3.1.3 and n 46 therein.

¹⁴ While some Articles (in particular, II and III) have studied Finland in detail, others have used a more detached and international approach. This is underlined in particular in Article VI, which considers the case law from all EU states.

The first, introductory sub-question was discussed from a more general perspective first in Article I, and as an update, partially in Article II. The enforcement mechanisms used were discussed throughout the articles, in particular Article III (on disclosure requests) and Article VI (website blocking). The second sub-question was examined in Articles IV, V, and in particular VI. The third sub-question was examined in Article II. The fourth sub-question was discussed in particular in Articles II and VI and is revisited at the end of this overview.

Sub-questions 1, 2, and in part 4 can be answered using traditional legal scholarship, from within the law. On the other hand, sub-questions 3 and in part 4 must be answered with sociological and political observations by analysing legal policy and lawmaking. These two lines of questions support each other: the former develop arguments for interpretation and help in understanding the law as it is; the latter propose ways to understand the ‘why’ of the law and the phenomenon at the more general level.¹⁵

2.2 Methodology

The quest for methodology begins from terminology. In the continental tradition, normative ‘legal doctrine’ or doctrinal study of law refers to an internal inquiry using the concepts of the legal system. On the other hand, in some parts of the English-speaking world, ‘legal science’ as a concept is either bizarre – and ‘legal scholarship’ is used as a catch-all instead – or might refer to a mixed bag of other descriptive non-legal disciplines that study the law from an independent theoretical framework.¹⁶

Van Hoecke illustrates the legal doctrine with various disciplines: a) hermeneutic (textual interpretation like a literary researcher), b) argumentative (focusing more on the arguments, rather than the interpretation as such), c) empirical (employing existing information, for example, judicial practice as in legal realism), d) explanatory (explaining the ‘why’ of rules and other legal concepts), e) axiomatic (formally using logic and legal concepts), f) logical (implying a moderated version of purely axiomatic discipline), and g) normative (taking normative positions and making choices even

¹⁵ On the importance of ‘why’ questions in legal research, see the discussion below on methodology and Rob van Gestel and Hans-Wolfgang Micklitz, ‘Revitalizing Doctrinal Research in Europe: What About Methodology?’ in Ulla Neergaard, Ruth Nielsen, and Lynn Roseberry (eds), *European Legal Method – Paradoxes and Revitalization* (DJØF Publishing 2011) 70–71.

¹⁶ See eg Pauline C Westerman, ‘Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law’ in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 94, 110. Yet there are more choices than choosing between a doctrinal approach and an external approach, see Jan BM Vranken, ‘Methodology of Legal Doctrinal Research: A Comment on Westerman’ in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 118–20 with references.

at the risk of subjectivity).¹⁷ In this study, the focus is more on argumentative than hermeneutic and normative elements: balancing and the lack of one right answer emphasises the importance of argumentation. Further, a hermeneutical or logical study is not possible due to the lack and terseness of authoritative and normative material.¹⁸

In the traditional Finnish (and to a degree continental) view, the goal of legal doctrine or ‘doctrinal study of law’ must be to systematise and/or provide interpretative suggestions on legal norms from the perspective of a judge. In other words, a doctrinal study that does not provide a substantiated resolution would not be useful either for courts or for other scholars.¹⁹ Some differences between researchers and judges in legal sources, methods, and values are acceptable, however.²⁰

Nowadays, the conception of legal scholarship is broader. There are more legal methods and doctrinal study can also be conducted from different vantage points.²¹ There are also a number of justifiable models of interpretation; each individual, whether a scholar or a judge, might balance these in a slightly different manner. For example, Siltala demonstrates this with ten ‘frames of interpretation’.²² Indeed, van Gestel and Micklitz have put it aptly:

European doctrinal legal research should be *freed from the role model and research methods of the judge* as its sole point of reference and look for answers to the question of what can be the added value of a legal scholarship that goes beyond being a service to legal practice.²³

They conclude that academic legal research should primarily be engaged with questions such as trying to understand what is behind the law on a certain subject,

¹⁷ Mark Van Hoecke, ‘Legal Doctrine: Which Method(s) for What kind of Discipline?’ in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart 2011) 4–10, 17. Van Hoecke mostly dismisses explanatory and axiomatic disciplines.

¹⁸ However, there are some differences in emphasis between the articles; for example, Article II had a more empirical focus, and the latter part of this overview also includes explanatory elements.

¹⁹ See eg Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Argumentation* (D Reidel Publishing 1987) 14–16; Aulis Aarnio, *Laintulkinnan teoria* (WSOY 1989) 57; Aulis Aarnio, *Essays on the Doctrinal Study of Law* (Springer 2011) 19–22.

²⁰ See Aarnio, *Laintulkinnan teoria* (n 19) 59–61; Jussi Syrjänen, *Oikeudellisen ratkaisun perusteista* (Suomalainen Lakimiesyhdistys 2008) 181–82. For a critique and differences in the roles, see Martijn Hesselink, ‘A European Legal Method? On European Private Law and Scientific Method’ (2009) 15 ELJ 20, 21–23; Geoffrey Samuel, *Epistemology and Method in Law* (Ashgate 2003) 113–20 Raimo Siltala, *Oikeudellinen tulkintateoria* (Suomalainen Lakimiesyhdistys 2004) 346–55, 534–40; Pekka Timonen, ‘Tutkijan ja tuomarin oikeuslähdeoppi: Oikeuslähdeopin eräiden lähtökohtien tarkastelu’ (1989) 87 Lakimies 666, 670–71; Janne Kaisto, *Lainoppi ja oikeusteoria: Oikeusteorian perusteista aineellisen varallisuus oikeuden näkökulmasta* (Edita 2005) 347–48.

²¹ See eg Vranken (n 16) 113 fnn 6–7; Raimo Siltala, *Oikeustieteen tieteenteoria* (Suomalainen Lakimiesyhdistys 2003) 103ff; Hesselink (n 20) 27ff. Aarnio seems to maintain relatively strict rules on what would qualify as legal dogmatics, while accepting the possibility of other forms of legal scholarship; see Aulis Aarnio, *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics* (Ashgate 1997) 75–78.

²² Raimo Siltala, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (Springer 2011); Siltala, *Oikeudellinen tulkintateoria* (n 20) 335–39, 344.

²³ Van Gestel and Micklitz (n 15) 70 (emphasis in the original, citation omitted).

why the lawmakers operate as they do, and why the law says what it says. In contrast, legal practitioners focus on dealing with legal problems and do not have time to look for answers to these ‘why’ questions.²⁴

The primary argument is that legal scholarship needs to go beyond legal practice. One way to accomplish this would be to examine the issues in more depth, and focus on those arguments that have been absent in the legal practice. Another way, as also reflected in the stance on ‘why’ questions, is to apply methods whose object of interest is more extensive than merely the surface layer of legal provisions.²⁵ I agree with and employ both perspectives: the former with an approach of tight scrutiny and the latter using socio-legal study as well.

On the former, I employ intense and even critical scrutiny in order to accomplish more than a descriptive study.²⁶ In particular, in examining case law and the literature I seek to uncover insufficiently substantiated interpretations and illuminate under-represented perspectives. Instead of merely neutral examination from established institutional premises, the selected approach emphasises the necessity of scholarship to remain critical, exceeding legal realism and serving only the needs of the legal practise.²⁷ One specific means is provided by so-called critical constitutionalism, where fundamental rights analysis provides a heuristic methodology ‘capable of distinguishing and weighing constitutionally relevant rights, interest positions and values’ in the context of a particular case.²⁸ This also provides an opportunity to identify and as appropriate challenge the ‘structural proprietarian bias’ of interpretations related to IPR and apply constitutionalism through fundamental rights to copyright law.²⁹

²⁴ See van Gestel and Micklitz (n 15) 70–71; Ulla Neergaard and Marlene Wind, ‘Studying the EU in Legal and Political Sciences Scholarship’ in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJØF Publishing 2012) 270, 277–79. Similarly in Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (OUP 1995) 25–26: ‘Sociological analysis of law has as its sole unifying objective the attempt to remedy the assumed inadequacy of lawyers’ doctrinal analyses of law.’ Beyond this, sociological analysis may have a variety of aims. In Hesselink (n 20) 31–32, it is noted that multi-disciplinary research takes into account different perspectives and will lead to more informed and balanced judgement.

²⁵ One can draw on the law’s deeper levels in the interpretation of surface-level legal material. This also enables non-subjectivist criticism of this material. According to Tuori, ‘[a] central part of this critical work consists in *disclosure of the often implicit social theoretical assumptions on which these doctrines are based*’ (emphasis added). See Kaarlo Tuori, *Critical legal positivism* (Ashgate 2002) 320. On the various objects of research and interests of knowledge in various forms of legal scholarship, see Siltala, *Oikeustieteen tieteenteoria* (n 21) 126–29, 137.

²⁶ Similarly, Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Information Power* (IPR University Center 2009) 200, calls for the necessity of extending constitutionalism in the form of critical discourses challenging the branch of law specific developments. Likewise, van Gestel and Micklitz (n 15) 38–39, 71, require that doctrinal legal scholarship should avoid being lured into ‘herd behaviour’ and start asking critical questions.

²⁷ For example, Siltala, *Oikeustieteen tieteenteoria* (n 21) 141–44 calls the former ‘an analytical-descriptive approach’.

²⁸ Juha Karhu, ‘Perusoikeudet ja oikeuslähdeoppi’ (2003) 101 *Lakimies* 789, 803; Mylly, *Intellectual Property and European Economic Constitutional Law* (n 26) 151.

²⁹ *Ibid*, 112–13, 201ff, 378, and more recently, Tuomas Mylly, ‘The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU’ in Christophe

Therefore, the critique, when applied, is inherent and internal to the law and by the law. That is, the yardstick of justification is defined by the constitutional principles, fundamental rights and other ‘core values’ of the legal system rather than by external factors.³⁰ These findings could be used to improve the robustness of reasoning while still reaching the same conclusions or to reach other conclusions. All in all, I attempt to provide the ideal (*sollen*) interpretation supported by the most authoritative sources.

One could also call the method a form of modern European IPR doctrinal scholarship, where it is characteristic to examine broadly the legal provisions, principles of EU law, fundamental rights, technological aspects as well as business models and market requirements.³¹ Indeed, in interpretative or even materially unregulated situations such as ones studied here, answers to legal questions cannot be discerned based on textual interpretation. Sources such as *travaux préparatoires* are typically not very helpful either, because they provide little or no additional context that would help in discerning the legislator’s intent.³² Also more generally, Hesselink notes that European legal culture is less formal, dogmatic and positivistic than national cultures in Europe have been. This leads to the legal method admitting more substantial arguments.³³

In this study, providing an explicit resolution in many situations would require difficult balancing based on case-by-case dependent facts. This applies in particular to proportionality evaluation between numerous competing interests. With the researcher’s prerogative, I have not usually posed the research question so as to attempt to seek an explicit answer like a judge. Rather, I have sought principles and considerations and contemplated a balance between them. Applying them in a specific

Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 126ff.

³⁰ That is, according to Koskeniemi, such interpretations could be those that best reflect the legal system’s internal value coherence (see n 49). See also Tuori, *Critical legal positivism* (n 25) 304–07. In some parts of this study, there is also a suggestion of unmasking rather than normative criticism, ie, being satisfied with exposing and explicating issues rather than indicating a desirable direction of change; see Kaarlo Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law* (Ashgate 2011) 27–28, 70.

³¹ This is also discussed in Section 2.4 (on the number and difficulty of identifying the legal sources and on empirical uncertainty). For example, Marcus Norrgård, ‘The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property Rights’ (2005) 6 ERA Forum 503, 511–14 calls for balancing based on inter alia fundamental rights, context-sensitivity, and the comparative method. See also eg Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013); Taina Pihlajarinne, ‘Eurooppalaisen tuomioistuinkäytännön hyödyntäminen immateriaalioikeuden tutkimuksessa’ (2012) 110 Lakimies 547, 551, 556.

³² On the impossibility of semantic interpretation, see n 46 onward.

³³ Hesselink (n 20) 31. For example, case law and legal scholarship as sources of law do not depend on formal recognition, but merely on whether they are convincing in substance. Similarly Van Hoecke, ‘Legal Doctrine: Which Method(s) for What kind of Discipline?’ (n 17) 12, separates authoritative and normative sources.

case would be an adjudicative task. While I often make an explicit determination, on some occasions I have left the issue open.³⁴

Methods of comparative law have also been applied in this overview and in particular in Articles IV and VI. Husa characterises the methods to different degrees. The first degree consists of comparison in law drafting. The second means applying an external metric such as economic effectiveness. The third implies comparison within a field of law using an independent conceptual framework or a normative object of interest. The inquiry in the fourth degree is internal to comparative law, seeking explanations to differences and similarities; it is also possible that there is no normative or particular national or supranational object of interest. Finally, the fifth degree implies developing comparative law methods and theories.³⁵ In this study, the method is also used to identify similarities and differences within a certain field of law.³⁶ However, one needs to be sensitive to the differences in traditions of each legal system.³⁷ The main import of national court rulings has been a source of inspiration for patterns and arguments.³⁸ Therefore, national court rulings have not been given much normative value: the rulings and particularly their conclusions are not used to argue for a specific interpretation one way or another.³⁹ Because the object of interest is not trying to predict the outcome of future judgements, the value of arguments and patterns in national judgements is of a more general kind.⁴⁰ All in all, in Husa's

³⁴ In contrast, I go further than 'de sententia ferenda' research, in which one characteristically needs to consider many conflicting principles, analogies, and practical reasons. In that context, choosing among multiple acceptable interpretative options is a matter of purposefulness rather than legality. See eg Olli Norros, *Vahingonkorvaus arvopaperimarkkinoilla* (WSOYpro 2009) 12. That in turn provides more explicit proposals than 'argument-developing dogmatic study', where the lack of sufficient legal support prevents any answer; see eg Mika Hemmo, *Sopimus ja delikti: tutkimus vahingonkorvausoikeuden vastuumuodoista* (Lakimiesliiton Kustannus 1996) 10–11 and critically Norros (n 34) 14–15.

³⁵ Jaakko Husa, *Oikeusvertailu* (Lakimiesliiton Kustannus 2013) 172–73.

³⁶ Esin Örüçü, 'Developing Comparative Law' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 46.

³⁷ Pihlajarinne, 'Eurooppalaisen tuomioistuinkäytännön hyödyntäminen immateriaalioikeuden tutkimuksessa' (n 31) 554. Because of harmonisation of substance provisions, the most significant differences concern procedural law and legal traditions; see also eg Örüçü (n 36) 51, 57; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 24–25.

³⁸ Hesselink (n 20) 39. Similarly, according to Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 ILQ 873, 879 and Zweigert and Kötz (n 37) 15, 20, the methodology is used for 'enriching the supply of solutions'. Likewise, see Pihlajarinne, 'Eurooppalaisen tuomioistuinkäytännön hyödyntäminen immateriaalioikeuden tutkimuksessa' (n 31) 551, 555, 558 and on obtaining awareness of foreign solutions, see Örüçü (n 36) 55.

³⁹ Pihlajarinne, 'Eurooppalaisen tuomioistuinkäytännön hyödyntäminen immateriaalioikeuden tutkimuksessa' (n 31) 555–56.

⁴⁰ I do not commit to so-called legal realism as a frame of interpretation, and therefore judgements from national courts are of less importance. The question of sources of law will be expanded in Section 2.4. More generally on analytical legal realism, see eg Siltala, *Law, Truth, and Reason* (n 22) 145–63; Aarnio, *Reason and Authority* (n 21) 62–74.

typology, the comparison occurs at the third and fourth degree due to the object of interest surpassing normative inquiry.

Doctrinal study has been used to a greater or lesser extent in all Articles except II, in which the perspective has been socio-legal study as applied to law drafting, using in particular critical legislative theory and Pierre Bourdieu's power theories.⁴¹ Article IV examines the case law in the United Kingdom almost exclusively. Article VI surveys the case law from all EU/EEA states from a particular perspective. A normative focus and providing explicit resolutions is strongest in Articles III and V, while Articles IV and VI are more argumentative and more issues had to be left open for case-by-case consideration.

2.3 On research neutrality

European legal research should start with a disclosure of ideological preconceptions and, in consequence, the selection of methods. Van Gestel and Micklitz submit that this is a major lesson to be learned from the instrumental use of the law: by those who want to change the society through law, or those who want to preserve the status quo using the law.⁴² Specifically, they observe that questioning the 'apolitical' character of law started from the 1960s and 70s and that the law cannot be disconnected from all sorts of implicit preconceptions that determine one's perspective. This requires self-reflection and self-control of one's own premises. They submit that methodology assists in getting a hold of these preconceptions, challenges one to make the implicit assumptions explicit, and raises awareness and openness to alternative explanations.⁴³

In science, this view is by no means new. For example Nagel states that 'there is no view from no-where', meaning that no study can be completely neutral and detached from the object of study.⁴⁴ Therefore, the experiences and background of a scholar will perforce affect the study. However, legal scholars, particularly in doctrinal study of law, have typically simply taken being neutral and objective as given.⁴⁵

⁴¹ Bourdieu's theory was present in Article I, but not yet in a fully substantiated manner.

⁴² See van Gestel and Micklitz (n 15) 70. Similarly, in Hesselink (n 20) 35 '[a]rticulating one's version of a legal method may contribute to making the legal debate more transparent'; the importance of this increases in international contexts as the communities are less homogeneous. As a summary of the law as an instrumental tool in the service of a group or individual interest, see Tuori, *Ratio and Voluntas* (n 30) 25–28.

⁴³ See van Gestel and Micklitz (n 15) 36–37. For example, on legal scholarship conducted reflecting the political bias of U.S. law professors, see Adam S Chilton and Eric A Posner, 'An Empirical Study of Political Bias in Legal Scholarship' [2014] University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No 696.

⁴⁴ See Thomas Nagel, *The View from Nowhere* (OUP 1986) 67. Applying it to the legal scholar's position, see Siltala, *Oikeustieteen tieteenteoria* (n 21) 610–11.

⁴⁵ For recently raised questions about the standards of objectivity in legal scholarship, see Chilton and Posner (n 43).

I agree with this approach that questions the inherently apolitical nature of law and legal scholarship. The law and legal interpretation are affected by values, except in trivial cases of subsumption.⁴⁶ This can be observed in particular in the weight afforded to specific interests in a balancing situation.⁴⁷ It is admitted that the valuation of incommensurable rights and principles is difficult.⁴⁸ Nonetheless, any suggestion enjoying at least some degree of inter-subjective support among other researchers could be argued to be the one that most appropriately implements the legal system's values and fundamental rights.⁴⁹ Specifically, there are many scenarios where the applicable legal sources such as the law provisions or *travaux préparatoires* do not provide sufficient guidance for interpretation. In consequence, neither a scholar nor a judge can be truly and completely objective and unmoved in trying to ascertain the guidelines for weighing the balance in a difficult situation.⁵⁰

⁴⁶ Hesselink (n 20) 33: 'Today nobody believes [...] that answering questions of law is a matter of mere logical deduction without any value judgement.' Also, Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 369, states that '[i]n all moderately problematic cases, value-judgments are needed which do not emerge necessarily from authoritative pre-existing material', and the rationality of legal discourse depends on being able to control these additional value judgements rationally. On the impossibility of neutral literal interpretation, see eg Susanna Lindroos-Hovinheimo, *Despairing justice and the ethics of legal interpretation* (Unigrafia 2011), and on semantic interpretation, see Kaisto (n 20) 245ff. As a summary of positions on ideological influences in adjudication, see eg Duncan Kennedy, *A Critique of Adjudication: {fin de siècle}* (Harvard University Press 1997) 31–37, 157ff.

⁴⁷ See Alexy (n 46) 365–66: 'Which solution is regarded as correct after having balanced the interests depends upon value-judgments, which are themselves not controllable by the balancing procedure.' Earlier, in Mark V Tushnet, 'Following the Rules Laid Down: Critique of Interpretivism and Neutral Principles' (1983) 96 *Harvard LR* 781, 824, 'The theory of neutral principles is initially attractive because it affirms the openness of the courts to all reasonable arguments drawn from decided cases. But if the courts are indeed open to such arguments, the theory allows judges to do whatever they want.'

⁴⁸ See eg Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013) 21 fn 37; Janneke Gerards, 'Judicial Argumentation in Fundamental Rights Cases – the EU Courts' Challenge' in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJØF Publishing 2012) 29 fn 10; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, CUP 2012) 482; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *CLJ* 174, 201.

⁴⁹ Van Hoecke, 'Legal Doctrine: Which Method(s) for What kind of Discipline?' (n 17) 10, 18. Indeed, a Dworkinian argument would be that the 'right' solution could only be grasped by those who understand the legal system's internal value coherence correctly, but Koskenniemi rejects this as utopian; see Martti Koskenniemi, *From Apology to Utopia: The structure of international legal argument* (Reissue with new epilogue, CUP 2005) 55–56. Commenting on this, Tuori, *Ratio and Voluntas* (n 30) 169–70, also observes the uncontrollability of judges' policy-based choices in weighing and balancing.

⁵⁰ See eg Koskenniemi (n 49) 25, 42, 50, 57, 597; Tuori, *Ratio and Voluntas* (n 30) 26–27; Nagel (n 44) 67–68, 138ff; Chilton and Posner (n 43) 27–29; Mark Van Hoecke, 'Objectivity in Law and Jurisprudence' in Jaakko Husa and Mark Van Hoecke (eds), *Objectivity in Law and Legal Reasoning* (Hart 2013) 7. Kent Greenawalt, *Law and Objectivity* (OUP 1992) 205–06 summarises thus: 'A harder question is posed by the worry that far from being objective, balancing is actually highly subjective. [...] The fundamental concerns are (1) that the way interests are to be balanced are formulated is extremely arbitrary, and (2) that no basis exists to weigh the competing interests objectively.' Greenawalt submits that courts often are overtly and unconsciously manipulative in the characterisation of interests, and that conscientious judges try to assess the weight reasonably in accord with the basic premises of the legal system.

While I question the putative and inherent neutrality of law and legal scholarship, the degree to which this affects reasoning is a different issue. That is, the capacity to use the law for instrumental purposes does not yet suggest whether and when it is used in this manner. In science, sensitivity in avoiding unconscious and/or undisclosed bias is needed. If methodology is properly disclosed, even politically motivated advocacy research would also be acceptable. Indeed, a significant but typical pitfall would be offering biased and value-laden interpretative recommendations without realising it. As observed, discussing presuppositions is necessary in order to reflect on and to control the researcher's argumentation.

As for my value base as a researcher, I appreciate freedom of expression and privacy; compromising them begins a slide toward an Orwellian society. Liberalism also supports freedom to conduct a business. For example, imposing obligations on third-party intermediaries to advance private interests of others seems doubtful and requires appropriate justification, especially when conducted at the expense of the third party. While the law is an instrument by which rights and responsibilities can be assigned to private parties, this needs to be accomplished in a manner that best benefits everyone. The innovative potential of new and sometimes disruptive technology is also crucial for the evolution rather than stagnation of the society. While intellectual property is necessary, its goal should be to offer incentives for creation, evolution, and re-use. From that perspective, excessive rewards may be detrimental. Over the last decades, IPR holders have been successful in advocating and accomplishing their agenda in legislation; the result and its implication have sometimes been called a structural proprietarian bias. I want to be cognisant of such possibility and resist such bias as far as it seems justified. In consequence, I would prefer to find an appropriate balance to online copyright enforcement that takes into account all the aforementioned values instead of merely, for instance, IPR holders' desire for strong IPR protection. Further discussion and the basis for these values is beyond the scope of this study; these are merely offered as indicators of the researcher's perspective.⁵¹

⁵¹ For example, Hesselink observes that since nobody will be able to consider all possible insights and balance them in a rational and objective way, it is necessary to rely on our own set of values and prejudices. He calls this an eclectic contemporary method, following Duncan Kennedy. See Hesselink (n 20) 32; Kennedy (n 46) 15. Somewhat differently, Matti Ilmari Niemi, 'Objective Legal Reasoning Without Objects' in Jaakko Husa and Mark Van Hoecke (eds), *Objectivity in Law and Legal Reasoning* (Hart 2013) 79–80, argues that a legal scholar applying a principle of justice would 'unquestionably not' apply his personal beliefs, but would appeal to the values of society and its objective values. Whether the scholar's argumentation is well-founded or credible is another issue.

2.4 Sources and material

The intended audience of this study is researchers in the EU in the fields of the Internet, copyright, and to some degree, constitutional and EU law. To this end, I refer to sources not written in English only selectively.⁵² However, being an academic submission in Finland, certain references are unavoidable in particular in this chapter.⁵³

While the focus is mainly on the EU perspective, partial examination of the national context is necessary as a case in point. This concerns in particular the issues which lack uniform EU-wide solutions. Using Finnish and focusing on Finland was natural in an article-based dissertation in examining national legislative processes, subscriber information disclosure and the powers of public authorities (Articles II and III).⁵⁴ On the other hand, the emphasis on the UK in Article IV was predicated by the existence of commonly understood, substantiated and publicly available series of case law.⁵⁵

The sources of law, ie, what arguments are more authoritative than others, could be a topic of its own.⁵⁶ Legal polycentricity, constitutionalisation, and Europeanisation have shaken at least the traditional Nordic organisation of legal sources and their authoritative value.⁵⁷ This has several implications. While private law pluralism has not yet had a major impact on IPR enforcement – given that it is essentially regulatory rather than akin to ‘traditional’ private law – constitutional pluralism has multiplied the number of applicable legal orders.⁵⁸ Coherence and controllability of reasoning

⁵² The European focus also makes it natural to employ The Oxford University Standard for Citation of Legal Authorities (OSCOLA) as the citation and formatting style.

⁵³ Fortunately, there has been little discussion in Finnish (or Swedish) on the main subject matter.

⁵⁴ Examining the intricacies of one relatively small jurisdiction would probably not have been possible in an international journal. Finnish law has also been used in other Articles when it has offered a helpful example. In hindsight, Article I could have been written in English as well.

⁵⁵ The length limitations and the focus of the journal chosen also influenced the choices made.

⁵⁶ On Nordic theory of the sources of law, see eg Henrik Zahle, ‘The Polycentricity of the Law or the Importance of Legal Pluralism for Legal Dogmatics’ in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth 1995) 189–90.

⁵⁷ See eg Neil Walker, ‘Constitutionalism and Pluralism in Global Context’ in Mate Avbelj and Jan Komárek (eds), *Constitutional pluralism in the European Union and beyond* (Hart 2012); NW Barber, ‘Legal Pluralism and the European Union’ (2006) 12 ELJ 306; Tuuli Heinonen, ‘Valtiosääntöoikeus ja oikeuslähdeoppi’ in Tuuli Heinonen and Juha Lavapuro (eds), *Oikeuskulttuurin eurooppalaistuminen. Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Suomalainen Lakimiesyhdistys 2012). See also Tuomas Ojanen, ‘The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism’ in Kimmo Nuotio, Sakari Melander, and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Publications of the Faculty of Law University of Helsinki 2012) 99, 102–04; van Gestel and Micklitz (n 15) 67; Tuori, *Ratio and Voluntas* (n 30) 242–45, 293; Jane Reichel, ‘European Legal Method from a Swedish Perspective – Rights, Compensation and the Role of the Courts’ in Ulla Neergaard, Ruth Nielsen, and Lynn Roseberry (eds), *European Legal Method – Paradoxes and Revitalization* (DJØF Publishing 2011) 262–70; Hesselink (n 20) 39–42; Karhu (n 28) 800–06.

⁵⁸ According to Christine Godt, ‘Intellectual Property and European Fundamental Rights’ in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 215, ‘in contrast to the founding principles of private law, private autonomy and contractual freedom, IP is in essence regulatory’. On legal pluralism, see eg Zahle (n 56) 195–98; Thomas Wilhelmsson, ‘Legal Integration as Disintegration of National Law’ in Hanne Petersen and Henrik Zahle (eds), *Legal*

also becomes more difficult, because the applicable legal sources are more diverse and cannot be predetermined as before.⁵⁹ In consequence, sources of law doctrines are nowadays less and less useful; for example, Hesselink argues that ‘these different sources cannot (or can no longer) be distinguished’.⁶⁰ Further, given the focus on EU law, the importance and authority of CJEU case law requires a different approach from traditional Nordic research centred on *travaux préparatoires* and secondarily national case law.⁶¹

A study on interpreting a specific EU law provision naturally shifts the focus from national to EU perspective.⁶² This is particularly apparent in Articles V and VI. This is supported by comparing and examining how particular EU law provisions are implemented and interpreted in Member States. As observed in methodology, a significant number of sources, some of them also non-legal nature, need to be consulted.⁶³ Empirical uncertainty also complicates the judicial determination of the best approach. Uncertainty concerns such matters as the impact of infringement and the effectiveness of enforcement mechanisms.⁶⁴ This requires taking into account

Polycentricity: Consequences of Pluralism in Law (Dartmouth 1995). On constitutional pluralism, see previous note. For a summary of attempts at private law pluralism, see eg Ralf Michaels, ‘Why We Have No Theory of European Private Law Pluralism’ in Leone Niglia (ed), *Pluralism and European Private Law* (Hart 2013) 158–59; Hans-W Micklitz, ‘Monistic Ideology versus Pluralistic Reality: Towards a Normative Design for European Private Law’ in Leone Niglia (ed), *Pluralism and European Private Law* (Hart 2013) 42–51; Jan M Smits, ‘Plurality of Sources in European Private Law, or: How to Live with Legal Diversity?’ in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJØF Publishing 2012) 74–75.

⁵⁹ For example, Barber (n 57) 329, notes that ‘inconsistent rules of recognition are at the heart of the pluralist model’, and Janneke Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17 ELJ 80, 81, ‘new ways have to be found to determine who is authorised to provide the final interpretation of [norms of co-existing legal orders]’. On inconsistency and dealing with it, see Barber (n 57) 309–14. Also, Jääskinen notes that the pluralism between EU and national law implies that in ultimate conflicts a coherent legal system including both of them cannot be construed. However, he further notes that the highest courts have not portrayed these ultimate conflicts as such, and that judicial practice does not require the assumption that the legal system is coherent. See Niilo Jääskinen, *Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia* (Unigrafia 2008) 157. For a somewhat different account, see René Barents, ‘The Precedence of EU Law from the Perspective of Constitutional Pluralism’ (2009) 5 EuConst 421, 431–37, 446. Cf. on ultimate conflicts and restraint related to the EU, Neil MacCormick, *Questioning Sovereignty* (OUP 1999) 108–12; Barber (n 57) 323–28; Tuuli Heinonen, ‘Konstitutionaalinen konflikti Suomessa’ in Tuuli Heinonen and Juha Lavapuro (eds), *Oikeuskulttuurin eurooppalaistuminen. Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Suomalainen Lakimiesyhdistys 2012); Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 62–69. The conflicts will be briefly revisited in the context of Case C-399/11 *Melloni* EU:C:2013:107 in Section 3.2.3 and n 198 therein onward.

⁶⁰ Hesselink (n 20) 31 (referring to case law and legal scholarship).

⁶¹ Tuori, *Ratio and Voluntas* (n 30) 243. For a comparable Swedish perspective, see Reichel (n 57) 252, 269–70. Indeed, within the scope of EU law, the CJEU can also be seen as a major developer of the law, bypassing the national legislators; see Tuori, *Ratio and Voluntas* (n 30) 243.

⁶² Similarly, see Leonard FM Besselink, ‘The Protection of Fundamental Rights Post-Lisbon’ (2012) (http://www.fide2012.eu/index.php?doc_id=94) 47.

⁶³ See n 33.

⁶⁴ Courts will be faced with ‘epistemic balancing’ as described in Section 3.2.2.

non-legal materials such as studies of effectiveness of enforcement mechanisms and economic analyses of the impact of infringement.

Article I used both international and domestic sources. Articles II and III focused on Finnish law, and obviously Finnish sources were prevalent. In particular, in Article II a large amount of legislative preparatory law drafting materials and statements by interest groups were studied and evaluated. Nonetheless, these were also contrasted to international literature. Article IV examined mainly UK case law and the related literature. Article V focused on harmonised EU law, in particular the Brussels I and Rome II Regulations.⁶⁵ Article VI went further and examined website blocking case law from the CJEU and all EU/EEA states. All in all, a substantial amount of material has been researched and towards the end the focus has become increasingly European.

2.5 Fields of study

This study draws upon research on multiple fields of law. The underlying theme is IPR and copyright. The study is extensively tempered by constitutional evaluation and fundamental rights, in particular in this overview and Articles III and VI. The research and in particular Articles V and VI concentrate largely on EU law. All research could also be considered to contribute to Internet or telecommunications law. Article V delves into private international law and the procedural law of international jurisdiction. Article III also examines the issues of data protection and procedural and police law for coercive measures and information disclosure. Article II and to a lesser degree Article I applies socio-legal study to online copyright enforcement lawmaking.

The study is also interdisciplinary. My earlier thesis provided a technical perspective, the implications of which have also impinged into this study.⁶⁶ Articles I and Article II in particular also make a brief excursus into the field of policy and sociology.⁶⁷

⁶⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40.

⁶⁶ See Savola, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (n 9). For example, this background was beneficial in Article III in examining peer-to-peer networking, in Article V in examining various kinds of Internet connectivity providers and ways of providing access, and in Article VI in articulating considerations on technical burden and the effectiveness of blocking.

⁶⁷ The empirical part of the articles is not very substantial. In consequence, labelling the former as 'law in context' (see eg William Twining, *Law in Context: Enlarging A Discipline* (OUP 1997) 54) and the latter socio-legal study would seem more appropriate than as full-fledged sociology and law research.

In decision-making there is always some empirical and epistemological uncertainty. Here, these issues are particularly troublesome in proportionality evaluation, eg, with the seriousness of infringement and the effectiveness of mitigating measures.⁶⁸ Uncertainty can in part be addressed by research from other disciplines (such as technology) using scientific insights as input to ‘help craft legal rules within the proper parameters of a legal inquiry’.⁶⁹

It is customary to briefly assess the tradition of dissertations and where the study fits in. In Finland, Sorvari wrote an extensive analysis of online copyright infringement, even though the coverage of intermediary liability was limited and the issues have obviously evolved since then.⁷⁰ Still analysed the imbalance in copyright and digital rights management as a way to control that balance.⁷¹ Likewise, Mylly examined the imbalance and power related to IPR in general from the perspective of constitutional and competition law.⁷² His critical perspectives have been an inspiration to this study. Vilanka’s recent dissertation confirms the imbalance in copyright legislation in general, but the focus is quite different.⁷³ Norrgård wrote on preliminary injunctions in intellectual property law. While the study was on procedural law and actions against infringers rather than third parties, inter alia the legal principles and balancing models submitted might be of more general applicability.⁷⁴ Finally, Lindroos’s dissertation on EU trademark law also included an article on the liability of Internet service providers.⁷⁵ Other dissertations on copyright and IPR in general have not considered the issues at stake here, in particular intermediaries.

All in all, there have been no equivalent studies in Finland, although there have been a couple of articles and short monographs on Internet intermediaries.⁷⁶ Therefore, it is difficult to identify any single research tradition which this study continues. The critical approach and constitutional perspective is most similar to Mylly’s work. However, the context is closer to one small piece of Sorvari’s study and emphasises balancing of principles like Norrgård.

⁶⁸ See Article VI (paras 72–77, 86–87).

⁶⁹ Robin Feldman, *The Role of Science in Law* (OUP 2009) 169. That is, Feldman frowns on blind deference to other disciplines.

⁷⁰ Katariina Sorvari, *Vastuu tekijänoikeuden loukkauksesta* (WSOY 2005).

⁷¹ Viveca Still, *DRM och upphovsrättens obalans* (IPR University Center 2007).

⁷² Mylly, *Intellectual Property and European Economic Constitutional Law* (n 26).

⁷³ Olli Vilanka, *Article 27 of the Universal Declaration of Human Rights and Internet: A Study Evaluating Role of Prosumers, Authors and Corporations in the Information Society* (Unigrafia 2014).

⁷⁴ Norrgård, *Interimiska förbud i immaterialrätten* (n 2). While the detailed procedural and material considerations could be useful, a different focus in this study precludes such an evaluation here.

⁷⁵ Katja Weckström, *A Contextual Approach to Limits in EU Trade Mark Law* (IPR University Center 2011).

⁷⁶ See Taina Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (Lakimiesliiton Kustannus 2012) and an early contribution, Mikko Välimäki, ‘Liability of Online Intermediary for Copyright Infringement’ (Master’s Thesis, University of Helsinki 1999).

In a European perspective, a number of somewhat similar studies are in progress, notably by Christina Angelopoulos,⁷⁷ Martin Husovec,⁷⁸ Kevin T. O'Sullivan,⁷⁹ and Ellen Wesselingh⁸⁰. Articles from them have been useful. At least one finished but non-public and more general dissertation exists, by Jaani Riordan.⁸¹ Some dissertations exist in the partially related fields.⁸² In consequence, this study has focused on other forms of research. In particular, I have engaged in discussion with the authors of recently published articles.

⁷⁷ 'The European Harmonisation of Intermediary Civil Liability for Online Copyright Infringement: A Tort-Inspired Approach' at Institute for Information Law (IViR), The Netherlands.

⁷⁸ 'Injunctions Against Innocent Third Parties', at International Max Planck Research School for Competition and Innovation (IMRS-CI).

⁷⁹ 'Digital Rights for the Information Age: Developing a Rights Based Regulatory Framework for the Enforcement of Intellectual Property Online', at University College Cork, Ireland.

⁸⁰ The still tentative topic is on copyright enforcement on the Internet, concentrating on the interaction between technology and law, at Leiden University, The Netherlands.

⁸¹ 'The Liability of Internet Intermediaries' (2013) at Magdalen College, University of Oxford. A book with the same title is forthcoming from OUP in 2015. Likewise, a broad and somewhat descriptive study exists from Hong Kong; see Jerry Jie Hua, *Toward A More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (Springer 2014).

⁸² For example, Farrand has written on power struggles over copyright (Benjamin Farrand, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (Routledge 2014)) and Benedikt Pirker on proportionality analysis (Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013)); both have been beneficial to this study.

Chapter 3

Foundations

This chapter provides an introduction to the theoretical and practical foundations upon which the study has been based, particularly the essentials necessary to understand the articles and follow-up discussion. However, the discussion is quite advanced and the theory has also been developed and expanded. Elementary knowledge of copyright, EU and constitutional rights law and Internet technology is assumed. To ensure readability of this overview without consulting the articles, some repetition has also been necessary. The focus is on the major topics that are fundamental to the whole study.¹

Section 3.1 describes briefly the context of copyright enforcement through intermediaries, the conditions of obligations in general, and summarises the means of copyright enforcement using connectivity providers. Section 3.2 examines how EU law and the ECHR affect the national law on copyright enforcement and the impact of fundamental rights when interpreting enforcement provisions. Section 3.3 examines the rights and interests of different parties at stake. Section 3.4 discusses the role of IPR enforcement principles in interpretation. Finally, Section 3.5 summarises and demonstrates how the foundations create a coherent picture by describing a more generally applicable proportionality evaluation procedure. Chapter 4 then summarises key findings of the articles and continues the discussion initiated here.

3.1 Online intermediaries as copyright enforcers

3.1.1 Online copyright enforcement in context

An extremely brief summary and contextualisation may be called for. There are many ways to enforce copyright: the traditional approach has been to target the infringer(s). The means have included damage claims and injunctions to stop or

¹ On the other hand, for example, the socio-legal framework and private international law were discussed in the corresponding articles and will not be repeated here.

prevent infringement.² Further, a broad concept of infringer allows IPR holders more options for enforcement. For example in the USA, facilitators such as the creators of peer-to-peer networking software have been found to infringe through secondary liability standards. More extensive liability for various third parties has also been argued.³ Even if the third-parties have been subject to some obligations in the offline environment,⁴ online environment has brought further options for enforcement that have previously been unavailable or difficult in particular when it comes to prevention rather than ex-post mitigation.⁵

In particular, online intermediaries such as Internet platforms or connectivity providers have been leveraged in one way or another.⁶ Direct means include using the provider's customer data to identify the subscriber whose connection has been used for a particular infringing act and suing them or otherwise trying to change their usage patterns ex-post. Indirect means include website blocking injunctions or other measures that try prevent undesirable behaviour ex-ante. As a requirement for avoiding liability, some types of intermediaries have been assigned 'duties of care' and they have had to implement mechanisms such as a notice-and-takedown procedure or content filtering. Because some approaches have not been successful or have turned out to public relations (PR) disasters – such as mass litigation against users in the USA – IPR holders have, as appropriate, adjusted their approach and chosen some other means of enforcement.⁷

That said, we can move on to examine the specifics of provider responsibilities in more detail. Section 3.1.2 discusses and contrasts these in general, while Section 3.1.3 examines only connectivity providers and Section 3.1.4 merely website blocking.

² On injunctions, see n 96 and references.

³ See eg Mark A Lemley and R Anthony Reese, 'Reducing Digital Copyright Infringement without Restricting Innovation' (2004) 56 *Stanford LR* 1345; Ronald J Mann and Seth R Belzley, 'The Promise of Internet Intermediary Liability' (2005) 47 *William & Mary LR* 239.

⁴ For example, freezing assets (eg, 'Mareva injunction' in the UK), disclosing information (eg, 'Norwich Pharmacal order' in the UK), or involvement of freight carriers in customs procedures; see Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 [2013] OJ L181/15.

⁵ The reasons for increased involvement of connectivity providers are discussed in Section 4.2.3. On the evolution of enforcement measures, see eg Peter K Yu, 'Digital copyright enforcement measures and their human rights threats' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 462–67.

⁶ See eg John Blevins, 'Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms' (2013) 34 *Cardozo LR* 1821, 1827–29. Some intermediaries were also referred to in Section 1.

⁷ These approaches are elaborated in Article I and summarised in Section 4.1.

3.1.2 Liability exemptions and obligations

While Internet service providers are not liable for information transmitted or stored, they may be subject to various obligations.⁸ As connectivity and hosting providers provide a different kind of service, the conditions and scope of potential obligations also differ.⁹

The liability exemption of connectivity providers is based on neutrality, passivity and the technical nature of automatic communication. This implies a lack of knowledge and control over the information transmitted. Deliberate collaboration in order to undertake illegal acts is not exempted.¹⁰

The exemption of hosting providers is conditional on the lack of awareness or knowledge of illegal activities or facts or circumstances from which illegality is apparent. Upon obtaining awareness of illegal material, hosting providers also need to act expeditiously to remove or disable access to it. The exemption does not apply if the provider has authority or control over the user and the content.¹¹ The awareness of facts relating to illegality appears to have been the grounds for excluding the operators of sites such as The Pirate Bay from the hosting defence; even if material on the site might not infringe, its role in overall infringing activities has been apparent.¹²

⁸ 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 [2000] OJ L178/1, Arts 12–14; Martin Husovec, ‘Injunctions against Innocent Third Parties: The Case of Website Blocking’ (2013) 4 JIPITEC 116, paras 4–6; Martin Husovec and Miquel Peguera, ‘Much Ado About Little: Privately Litigated Internet Disconnection Injunctions’ (2015) 46 IIC 10, 13, 15–16; Christina Angelopoulos, ‘Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape’ (2014) 9 JIPLP 812, 813; Urs Gasser and Wolfgang Schulz, *Governance of Online Intermediaries: Observations From a Series of National Case Studies* (The Berkman Center for Internet & Society Research Publication Series 2015-5, 2015) 4–6.

⁹ On these differences, see Opinion in C-324/09 *L’Oréal v eBay* EU:C:2010:757, paras 138–46, correctly questioning the application of the liability exemptions of connectivity providers to hosting providers in Joined Cases C-236–238/08 *Google France* EU:C:2010:159, paras 113–14. Also see Patrick Van Eecke, ‘Online service providers and liability: A plea for a balanced approach’ (2011) 48 CMLR 1455, 1481–83.

¹⁰ [E-Commerce Directive \(n 8\)](#) Recitals 42–44 and Art 12. The provisions and their impact will be further clarified when the CJEU answers the nine questions posed in Case C-484/14 *Mc Fadden*; see Martin Husovec, ‘Munich Court Asks CJEU about Injunctions Against Operators of Open WiFis’ (13 October 2014) (<http://www.husovec.eu/2014/10/munich-court-asks-cjeu-about.html>).

¹¹ [E-Commerce Directive \(n 8\)](#) Recital 46 and Art 14.

¹² For a summary, see references in Article IV (at 285) and Dimitris Kioupis, ‘Criminal Liability on the Internet’ in Irini A Stamatoudi (ed), *Copyright enforcement and the Internet* (Kluwer Law International 2010) 247–49. When torrent files are no longer served on the site and only ‘Magnet’ links being used, the website operators may no longer have knowledge of the copyrighted material, see Ellen Marja Wesselingh, ‘Website Blocking: Evolution or Revolution? 10 Years of Copyright Enforcement by Private Third Parties’ in *Internet, Law and Politics. A Decade of Transformations. Proceedings of the 10th International Conference on Internet, Law & Politics, Barcelona, 3–4 July, 2014* (UOC-Huygens Editorial 2014) 62. This will have an impact on proportionality evaluation. See also eg Rita Matulionyte and Mindaugas Lankauskas, ‘BitTorrent Loses Again: A Recent Lithuanian BitTorrent Case and What It Means for the Construction of E-Commerce Directive’ (2013) 4 JIPITEC 179; Gaetano Dimita, ‘Six Characters in Search of Infringement: Potential Liability for Creating, Downloading and Disseminating .Torrent Files’ (2012) 7 JIPLP 466.

In *L'Oréal v eBay*, the awareness (rather than neutrality) became more important and a standard of diligent economic operator (arguably rather a high threshold) was established as to when illegality should become apparent.¹³ If the exemptions do not apply, this does not yet imply the operator is liable; rather, national rules on primary and secondary liability must be consulted.¹⁴

This interpretation on apparent illegality is inapplicable to connectivity providers, because their liability exemption is not tied to knowledge or awareness.¹⁵ Their role is more passive, neutral, and automatic, and the transmitted data is transitory. They also have no obligation to act upon obtaining awareness of illegality,¹⁶ unless explicitly required by national law as provided by Article 15(2) of the E-Commerce Directive.¹⁷

As examples of activities which do not apply to connectivity providers, hosting providers may be subjected to 'duties of care' in order to detect and prevent certain types of illegal activity.¹⁸ National legislation may also establish procedures targeting hosting providers governing the removal or disabling access to information (ie, notice-and-takedown mechanisms).¹⁹

¹³ Case C-324/09 *L'Oréal v eBay* EU:C:2011:474, paras 120–23. Van Eecke (n 9) 1467 reads this to mean that *any* diligent economic operator should have been able to note the illegality, implying a threshold slightly lower than 'manifestly illegal content'. For similar earlier trends, see Thibault Verbiest and others, *Study on the Liability of Internet Intermediaries: Final report (Markt/2006/09/E)* (2007) 36–47.

¹⁴ Van Eecke (n 9) 1463–64 fn 46; Husovec and Peguera (n 8) 17.

¹⁵ Cf. Francesco Rizzuto, 'The liability of online intermediary service providers for infringements of intellectual property rights' (2012) 18 *CTLR* 4, 13–14, submits the opposite argument by generalisation and analogous interpretation. For the reasons stated, this seems unconvincing. Indeed, since the E-Commerce Directive, there have been few serious claims (and no rulings) to establish a connectivity provider's liability for information transmitted. Matthias Leistner, 'Structural aspects of secondary (provider) liability in Europe' (2014) 9 *JIPLP* 75, 77–78, also seems to support 'balanced and differentiated interpretation of Articles 12 to 15'.

¹⁶ Similarly in *Newzbin2* [2011] EWHC 1981 (Ch), para 145.

¹⁷ Such duties exist in close to 10 EU states; for example, Belgium and Italy. See Verbiest and others (n 13) 72–73. At least in Italy, failure to comply has also led to finding the connectivity provider liable. See Alberto Bellan, 'Intellectual Property Liability of Consumers, Facilitators and Intermediaries: The Position in Italy' in Christopher Heath and Anselm Kamperman Sanders (eds), *Consumers, Facilitators, and Intermediaries: IP Infringers or Innocent Bystanders?* (Kluwer Law International 2012) 92, 96–97.

¹⁸ *E-Commerce Directive* (n 8) Recital 48. These cannot amount to general monitoring, but rather refer to notification systems or imprecise notifications; see Etienne Montero and Quentin van Enis, 'Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?' (2011) 27 *CLSR* 21, 29; Martin Senftleben, 'Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions' (2013) 4 *JIPITEC* 87, paras 49–50. Leistner (n 15) 79 and Senftleben (n 18) para 59, also observe the follow-up problem: the duty to prevent future infringements might (but should not) effectively constitute a general monitoring obligation. Generally see also Jan Bernd Nordemann, 'Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach' (2011) 2 *JIPITEC* 37. Cf. Leistner (n 15) 88–89, seems to consider the violation of reasonable duties of care to prevent infringements a significant European factor and standard for the providers' secondary liability. His discussion seems to have an implicit hosting provider focus.

¹⁹ *E-Commerce Directive* (n 8) Article 14(3). See Van Eecke (n 9) 1484–85.

The prohibition on imposing general monitoring obligations applies to all types of providers. Likewise, a general obligation to seek facts or circumstances indicating illegal activity is forbidden. However, monitoring (in a fairly narrow sense) ‘in a specific case’ by orders of national authorities are possible.²⁰ Court or administrative authority may also require termination of present or prevention of specific future infringement:

[12(3)]. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement.

[15(1)]. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.²¹

In *UPC Telekabel Wien*, the Advocate General suggested that a specific kind of generic blocking order would not amount to a general monitoring obligation but would be prohibited on other grounds.²² Instead, the CJEU allowed such an order, but imposed rather severe requirements regarding judicial review.²³

In summary, the requirements for obligations are stricter and the exemption is broader when comparing connectivity providers to hosting providers. The acceptable measures and obligations differ, with the former usually being more restrictive than the latter. This implies that exemptions afforded to hosting providers will probably apply to connectivity providers as well, but obligations might not be applicable. In any case, careful analysis of similarities and divergences is needed. Issuing orders grounded on duties of care or knowledge assumed by a diligent economic operator would not be appropriate either.

²⁰ [E-Commerce Directive \(n 8\)](#) Recital 45 and Art 15(1). Art 18 also requires provision of court measures ‘designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.’ See [Montero and van Enis \(n 18\)](#) 28–29. An example of ‘specific monitoring’ is a temporary request targeted at a specific user and a site to tackle a specific illegal activity, for example using wire-tapping. See [ibid](#), 30 fn 68–69.

²¹ [E-Commerce Directive \(n 8\)](#) Recital 45 and Arts 12(3), 13(3) and 14(3). On the other hand, it is not clear whether a potential future infringement would qualify for pre-emptive relief. See [Husovec and Peguera \(n 8\)](#) 14–15.

²² Opinion in *C-314/12 UPC Telekabel Wien* EU:C:2013:781, para 78. The AG did note that if the connectivity provider needed to search for duplicate DNS entries for the same site, this would amount to forbidden monitoring. On the value of AG Opinions for interpretation, see eg [Michal Bobek, ‘A Fourth in the Court: Why Are There Advocates General in the Court of Justice?’](#) (2012) 14 *CYELS* 529.

²³ The issue of what kind of order might constitute a general monitoring obligation was left open. See [Martin Husovec, ‘CJEU allowed website-blocking injunctions with some reservations’](#) (2014) 9 *JIPLP* 631, 634.

3.1.3 Enforcement mechanisms

Overview

Internet connectivity providers can be used as means of enforcement in various ways, including in particular:

1. blocking access at the user end,
2. disconnecting the website, and
3. providing subscriber information disclosure or automated mechanisms or disconnecting the user.

The apparent purpose is to decrease the degree of user infringement directly or indirectly. In website blocking at the user end, the means are directed at the infringing service with the indirect goal of affecting user behaviour. In website disconnection, the direct target is the operator of the infringing service, and the source connectivity provider is used as a means to achieve that end. In the third option, the user end connectivity provider is leveraged in order to target users directly. The means may vary and include at least 3a) disclosing personal data on infringing subscribers (information disclosure) for civil or criminal litigation, 3b) automated notification mechanisms, 3c) automated graduated response mechanisms, and 3d) disconnecting the user with an injunction.²⁴ A sketch is provided in Figure 3.1, demonstrating which mechanisms are most applicable to which providers.²⁵

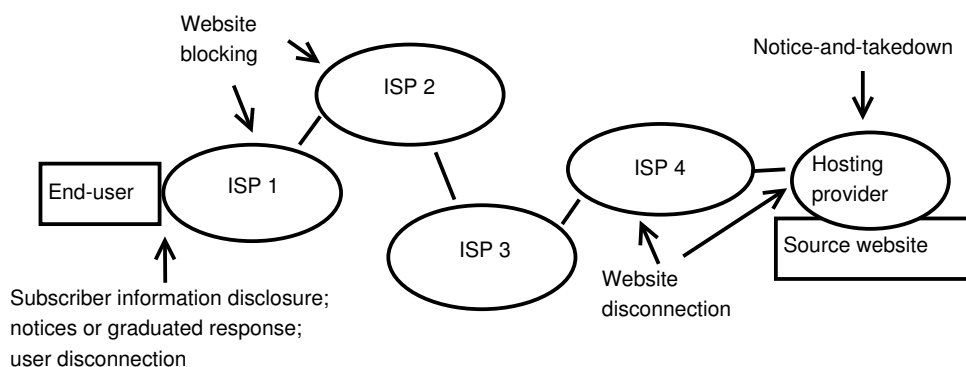


Figure 3.1: Different mechanisms as applied to different providers

As a special case of website blocking,²⁶ Norway has adopted legislation that also allows ‘impeding access’ to a website.²⁷ This might be implemented by rate-limiting

²⁴ These were summarised in Article I. Legislative efforts in Finland were discussed in Article II. Article III described 3a). Articles IV, V and VI focused on 1). Articles V and VI included some discussion of 2) as well.

²⁵ For comparative purposes, the figure also includes a hosting provider and the related notice-and-takedown procedure.

²⁶ The term ‘website’ is intentionally somewhat opaque. See Section 2.1 and n 9 therein.

²⁷ Norwegian Copyright Act, Section 56c. In English, see eg TorrentFreak, ‘Pirate Site Blocking Legislation Approved by Norwegian Parliament’ (1 May 2013) (<http://torrentfreak.com/pirate-site->

access to the targeted website down to a crawl. This is indistinguishable from blocking when applied to indexing or other low-volume websites.²⁸ Applying it to video streaming sites or peer-to-peer users sharing content might be feasible in theory. However, the large number of targets and their rate of change makes applying the measure impractical and impossible.²⁹ In consequence, these mechanisms are unlikely to get traction, and further examination is unnecessary.

Impact on EU fundamental freedoms, ie, the free movement of people, goods, services, and capital, seems to be minimal or at best arguable. Specifically, two scenarios could be argued. First, if the laws of Member States differed on which websites are illegal and eligible for blocking with the result that a legitimate business in another Member State would be blocked. However, there have been only a few cases in which indexing sites have been considered legal.³⁰ Typically, linking to metadata or infringing content in peer-to-peer networks has been considered infringing as making available as per Article 3 of the Infosoc Directive and/or contributing to infringement; an infringement and liability of the website operator is deemed a prerequisite of blocking the website.³¹ The second scenario of fundamental freedoms would occur in intra-EU blocking, that is, if blocking in another Member State rather than in the source Member State was considered detrimental to the internal market.³² All in

blocking-legislation-approved-by-norwegian-parliament-130501/). In Finland introducing such a mechanism was also investigated in Anna Vuopala, *Luvattomien verkkojakelelun vhentmiskeinojen arviointia. Selvitykset lainvalmistelun tueksi* (OKM:n tyryhmmuistioita ja selvityksi 2013:13, Ministry of Education and Culture 2013) 81–85 as described in Article II (at 228–31), but it was rejected in the final bill because of the lack of support and uncertain usefulness; see Hallituksen esitys eduskunnalle laiksi tekijnoikeuslain muuttamisesta (HE 181/2014), 30–31.

²⁸ This is because only a little data needs to be communicated and therefore the limit would need to be very low, comparable to complete blocking. Potential benefits can be realised only with high-volume targets. For example an illegal distribution of a copyrighted Blu-Ray video might be two gigabytes in size. This is in the order of 100,000 times more data than a simple web page.

²⁹ Further, in Finland, all IPR holders also opposed the rate-limiting orders, preferring to use website blocking instead. Essentially nobody advocated them. See Article II (at 229 and 231).

³⁰ Until 2015 and the passing of a new law, there had been conflicting judgements from Spain; see Giancarlo Frosio, 'Spanish Court Criminalizes Linking to Copyright Infringing Materials and Reverses Consolidated Case Law' (3 February 2015) (<http://cyberlaw.stanford.edu/blog/2015/02/spanish-court-criminalizes-linking-copyright-infringing-materials-and-reverses>) and references; Irene Palomino, 'The Spanish hunt for websites providing hyperlinks' (19 January 2015) (<http://the1709blog.blogspot.com/2015/01/the-spanish-hunt-for-websites-providing.html>). In The Netherlands, in *Ziggo and XS4ALL* 200.105.418-01, paras 4:7–4:8, the only infringing content on The Pirate Bay and the grounds for requested blocking (which was then denied) was considered to be the covers, artwork and such material. On this interpretation, sites which do not include such material would be legal. In Greece, blocking was also rejected due to disproportionality, linking not being infringing and other somewhat dubious grounds; see Yannis Paramythiotis, 'Website blocking in Greece: how does it work there?' (28 January 2015) (<http://ipkitten.blogspot.com/2015/01/website-blocking-in-greece-how-does-it.html>).

³¹ See Article IV and further in Section 3.1.4.

³² Lucas Feiler, 'Website Blocking Injunctions under EU and U.S. Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?' [2012] TTLF Working Papers 13, 67–69, 71, sees the possibility of market fragmentation and creating barriers to legitimate trade. Similarly, although in a different context, Maria Martin-Prat, 'The Future of Copyright in Europe' (2014) 38 ColumJLA 29, 45, writes that mechanisms of mutual recognition must be

all, while interpretations of IPR protection with regard to illegality and the website operator's liability differ, it appears that operating a website with user-generated links or content that leads to infringing activities is at the very least suspect in all or almost all Member States.

Certain general patterns are examined next and enforcement options 2) and 3) are briefly discussed. Because this study concentrates on blocking access at the user end, it is covered more extensively in Section 3.1.4.

Disconnecting the website

A hosting provider may be ordered to shut down a website. However, since sites may be operated without a hosting provider, or targeting the hosting provider may be difficult, a connectivity provider may also be ordered to block access to the site. The website might even be a direct subscriber of the provider. When this happens close to the source, and in particular when a contractual relationship exists, this is referred to as disconnecting the website. The practical difference is that with disconnection the website becomes unreachable to everyone; with website blocking, the website is unreachable only to the users of those providers that have implemented access blocking.

Because actions against infringing customers at the source are more likely to be proportionate and the issues differ, this case is not legally very interesting beyond the point of deeming the site infringing in the first place.³³ Indeed, the most important issue from the perspective of this study is whether and in what cases disconnecting the website may be deemed a possible, preferable or even required alternative to blocking at the user end. This is referred to as subsidiarity, meaning the availability of alternative, 'primary' measures, and, if so, the requirement or lack thereof to use them first before resorting to 'secondary' or 'subsidiary' measures.³⁴ The key issue is how this is taken into account in proportionality evaluation.

Disconnecting the website has both drawbacks and advantages compared to blocking at the user end.³⁵ The main advantage is its potential efficacy. Disconnection can

established to 'ensure that an act covered by an exception in one member state is also recognized as permitted in another member state'.

³³ See Article VI (para 43).

³⁴ This is unrelated to the legislative (political) subsidiarity referred to in Consolidated version of the Treaty on the European Union [2012] OJ C326/1, Art 5. Even at the risk of confusion, the term is used because it seems to have been relatively well established. See eg Arno Lodder and Nicole van der Meulen, 'Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time' (2013) 4 JIPITEC 130, paras 37, 71; European Observatory on Counterfeiting and Piracy, 'Injunctions in Intellectual Property Rights' (2011) (http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf) 9. Alternatively, one could use a less succinct formulation such as 'hierarchical position of remedy in our enforcement systems'; see Husovec, 'Injunctions against Innocent Third Parties' (n 8) para 44.

³⁵ For discussion, see also *Cartier* [2014] EWHC 3354 (Ch), paras 199–204.

be quite effective, and working around a properly formulated disconnection order requires changing providers. In particular, users cannot circumvent blocking through proxies or using other mechanisms.³⁶ Another major advantage is aggregation and procedural economy, since there is no need to seek enforcement actions separately in all the user-end states and against dozens or hundreds of user-end connectivity providers, but one or a few providers close to the source.³⁷ Further, the issues of choice of law and jurisdiction can be minimised if an order is given in the state where the infringing site or its operator is located.³⁸

The main drawback is that an insistent website operator might switch providers and continue as it were from elsewhere. However, such an operator is probably resourceful and will find ways to circumvent blocking at the user end. Cloud-based virtualised services may make it easier to manage such switching.³⁹ In case of The Pirate Bay, disconnecting the website has resulted in a game of ‘cat and mouse’ with disconnections at least in Sweden, Germany and the Netherlands. There has also been pressure on ISPs to reject it as a customer.⁴⁰ While this strategy might not suffice against the most persistent offenders, it might be adequate in most cases.⁴¹ A further but rather minor drawback is that a national IPR holder organisation might need to initiate proceedings abroad, in a foreign court. However, it is difficult to

³⁶ See Article V (at 305) and Article VI (paras 73–77), and eg Joost Poort and others, ‘Baywatch: Two approaches to measure the effects of blocking access to The Pirate Bay’ (2014) 38 *Telecommunications Policy* 383; Ellen Marja Wesselingh, Arona Cristina, and Nicole Tweebloom, *To Block or Not to Block?* (2014) (<http://ssrn.com/abstract=2273453>). For detail on user and operator circumventability, see eg Pekka Savola, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (Licentiate of Science (Technology) thesis, 2013) 99–106, 205; Taina Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (Lakimiesliiton Kustannus 2012) 133–35.

³⁷ This is particularly true if the cost of updating the list of blocked websites is high. However, if the update process is streamlined and the costs of updating are borne by the providers, pursuing and updating blocking against numerous intermediaries may indeed be the most beneficial option for the IPR holder; see *Cartier* (n 35) paras 202–04.

³⁸ See Article V (at 302–03).

³⁹ TorrentFreak, ‘Pirate Bay Moves to The Cloud, Becomes Raid-Proof’ (17 October 2012) (<http://torrentfreak.com/pirate-bay-moves-to-the-cloud-becomes-raid-proof-121017/>). However, the site went down in December 2014 after a police raid in Sweden; see TorrentFreak, ‘Swedish Police Raid The Pirate Bay, Site Down’ (9 December 2014) (<http://torrentfreak.com/swedish-police-raid-the-pirate-bay-site-offline-141209/>). This indicates that it may indeed be efficient to target the sites at the source, even if the site came back online after 1,5 months and the availability has been somewhat sporadic since then; see TorrentFreak, ‘The Pirate Bay is Back Online!’ (31 January 2015) (<http://torrentfreak.com/pirate-bay-back-online-150131/>); TorrentFreak, ‘The Pirate Bay Caught Up In a Hosting Whac-A-Mole’ (17 February 2015) (<http://torrentfreak.com/pirate-bay-caught-up-in-a-hosting-whac-a-mole-150217/>).

⁴⁰ See Article VI (para 43). For Sweden, see para 52. For Germany, see para 63 and note 143 in particular. See also Christopher M Swartout, ‘Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement’ (2011) 31 *Northwestern Journal of International Law & Business* 499, 517–18. On the other hand, access to The Pirate Bay has been blocked in a number of other countries, see Article VI (paras 27ff).

⁴¹ Indeed, the main argument appears to be that sooner or later the services would be moved to a jurisdiction which could only be targeted through website blocking; see *Cartier* (n 35) paras 201–02.

see this as a major obstacle, especially when practically only the major IPR holders have the resources and interest to pursue blocking at all, and they are (or have active collaboration with) international organisations.⁴²

In *UPC Telekabel Wien*, the Advocate General opined that subsidiarity would affect proportionality. If possible, the primary infringer or infringer's provider should be targeted. This would be the case in particular if an upstream provider is located in the EU.⁴³ While the CJEU did not take a stance on proportionality evaluation in the minimalist answer issued, this still seems like a reasonable approach.⁴⁴

Targeting the subscribers directly

Article 8 of the Enforcement Directive concerning the right of information has been argued to oblige Member States to legislate a mechanism allowing subscriber information disclosure requests in order for the IPR holder to contact those users it has found conducting infringing activities on the Internet.⁴⁵ However, *Promusicae* held that while national legislation may provide such a mechanism if fundamental rights are adequately balanced, there is no mandate to do so. The judgement seemed to implicitly accept that Article 8 might cover requests aimed at innocent third-party intermediaries, which *LSG* later confirmed. However, because the information requested was personal data, according to Article 8(3)(e) of the Enforcement Directive the provision is without prejudice to the data protection legislation. In consequence, the CJEU afforded national legislators and courts leeway on how to strike the balance between these rights, even by not providing the means at all.⁴⁶ Indeed, the reasoning

⁴² See Article VI (para 84 and its notes 191–92 in particular). As noted, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Art 8(2) does not require a Member State to provide for an injunction against infringers (which is admittedly slightly different from this context) except when infringement occurs on its territory.

⁴³ *UPC Telekabel Wien (Opinion)* (n 22) para 57. See Article VI (paras 42, 84) for further references.

⁴⁴ In Case C-314/12 *UPC Telekabel Wien* EU:C:2014:192, paras 33–45, the CJEU only argued that user end providers should not be categorically excluded from the scope of injunctions. On the principle of effectiveness, see n 73. There has been variance in national case law on the role of subsidiarity. See Article VI (para 42). For example, Feiler (n 32) 47 argues that being 'best placed to bring infringing activities to an end' requires IPR holders to at least establish that an alternative would be impractical or less effective.

⁴⁵ See eg Pilar Cámara Águila, 'Enforcement of IPRs' in Tatiana-Eleni Synodinou (ed), *Codification of European copyright law: Challenges and perspectives* (Kluwer Law International 2012). For commentary, see also Ioannis Iglezakis, 'The Legal Struggle in the EU against Online Piracy' in Tatiana-Eleni Synodinou (ed), *Codification of European copyright law: challenges and perspectives* (Kluwer Law International 2012). The Commission has held that Article 8 also includes intermediaries such as Internet service providers, but that applicability may be restricted by privacy requirements. See Commission, 'Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States' (Commission staff working document) SEC(2010) 1589 final 11.

⁴⁶ Case C-275/06 *Promusicae* EU:C:2008:54, paras 58–60, 70; Case C-557/07 *LSG* EU:C:2009:107, para 41. The approach and Swedish way of conducting multifactor assessment was later accepted in Case C-461/10 *Bonnier Audio* EU:C:2012:219, paras 57–60. For commentaries, see eg

in *LSG* included a healthy dose of scepticism: ‘the Court *did not immediately rule out the possibility* that Member States may, pursuant to Article 8(1) of Directive 2004/48, place Internet access providers under a duty of disclosure’ (emphasis added).⁴⁷

Subscriber information disclosure has been used successfully at least in Finland, Sweden, Austria, The Netherlands, Germany, France, Ireland, and the UK.⁴⁸ Attempts have been unsuccessful because of data protection at least in Belgium, Spain, and Italy.⁴⁹ In some countries such as Ireland and the UK, disclosure has been made subject to safeguards.⁵⁰ Indeed, safeguards are a good idea given the typical lack of user representation in the court.⁵¹ This is particularly true for so-called ‘copyright trolling’, where inter alia insinuations of potential publicity of legal proceedings for distribution of ‘sensitive’ material are used to coax subscribers to discreetly settle the issue for, say, 500–2000 euro.⁵²

Irini A Stamatoudi, ‘Data Protection, Secrecy of Communications and Copyright: Conflicts and Convergences – The Example of *Promusicae v. Telefonica*’ in Irini A Stamatoudi (ed), *Copyright enforcement and the Internet* (Kluwer Law International 2010); Marianna Rantou, ‘The growing tension between copyright and personal data protection on an online environment: The position of Internet Service Providers according to the European Court of Justice’ (2012) 3 EJLT, 8–9; Alexander Tsoutsanis, ‘Privacy and piracy in cyberspace: justice for all’ (2013) 8 JIPLP 952, 953–54; Xavier Groussot, ‘Rock the KaZaA: Another Clash of Fundamental Rights’ (2008) 45 CMLR 1745. In particular, *ibid.*, 1749–50, 1756–57, 1764, echoing AG Opinion, argued that disclosing personal traffic data for civil proceedings should not have been possible.

⁴⁷ *LSG* (n 46) para 41. In that case, the CJEU did not take a stance on proportionality or the balance of fundamental rights except by requiring that they must be ensured.

⁴⁸ Verbiest and others (n 13) 77–79; Stamatoudi (n 46) 225–28; Maureen Daly, ‘Is there an entitlement to anonymity? A European and international analysis’ (2013) 35 EIPR 198, 201–07; Tsoutsanis (n 46) 955; Van Eecke (n 9) 1491–92; *Bonnier Audio* (n 46); *Alles kann besser werden* BGH I ZB 80/11.

⁴⁹ Verbiest and others (n 13) 81–82; Cámara Águila (n 45) 188–89; Bellan (n 17) 97–100; Commission, ‘Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States’ (Commission staff working document) SEC(2010) 1589 final, 12–13; Van Eecke (n 9) 1492; Fanny Coudert and Evi Werkers, ‘In the Aftermath of the *Promusicae* Case: How to Strike the Balance?’ (2008) 18 IJLIT 50, 60–61.

⁵⁰ In Ireland, the information could only be used for copyright infringement litigation and the public disclosure of the information was limited (*Eircom* [2005] IEHC 233; Verbiest and others (n 13) 78–79). In the UK, the court has inter alia participated in drafting the letters to be sent to the alleged infringers and a Consumer Focus representative has also argued before the court; see *Golden Eye* [2012] EWCA Civ 1740, paras 11–13, 21–23, 27; Mark Hyland, ‘The seductive interface between adult entertainment and Norwich Pharmacal relief’ (2013) 18 CommsL 56.

⁵¹ This is briefly discussed in nn 216–217 and further elaborated in Section 4.2.1.

⁵² In the UK House of Lords, this has been called ‘straightforward legal blackmail’, see Nate Anderson, ‘“Straightforward legal blackmail”: A tale of P2P lawyering’ (7 June 2010) (<http://arstechnica.com/tech-policy/2010/06/straightforward-legal-blackmail-a-tale-of-p2p-lawyering/>). Other types of similar behaviour are also commonplace. This has occurred at least in the US, the UK, Germany and recently in Finland as well. See previous notes and *Golden Eye* (n 50); Sandra Schmitz and Thorsten Ries, ‘Three songs and you are disconnected from cyberspace? Not in Germany where the industry may ‘turn piracy into profit’ (2012) 3 EJLT, 5; TorrentFreak, ‘Lawyers Sent 109,000 Piracy Threats in Germany During 2013’ (4 March 2014) (<http://torrentfreak.com/lawyers-sent-109000-piracy-threats-in-germany-during-2013-140304/>); Swartout (n 40) 500, 509–13; Ville Oksanen, ‘Tekijänoikeustrollaus tuli Suomeen - mutta vain hetkeksi?’ (1 September 2014) (<http://www.tivi.fi/blogit/uutiskommentti/tekijanoikeustrollaus%20tuli%20suomeen%20mutta%20vain%20hetkeksi/a1007908>). Traditionally, mass litigation has not generated revenue. For

Automated notification and graduated response mechanisms are not required by EU legislation or even optional in the same sense.⁵³ The former display or send warnings to customers seen to be participating in infringing activities as identified by IPR holders. The latter include increasingly aggressive sanctions (eg, warnings, an administrative fine, throttling the speed of the Internet connection, or disconnection from the Internet). However, Article 2(1) of the Enforcement Directive requires that a Member State may provide stronger enforcement only ‘in accordance with Article 3’, ie, the IPR enforcement principles to be examined in Section 3.4. Because the mechanisms concern enforcement of harmonised copyright, such national measures could also be classified as being of remedial nature. Further, these mechanisms concern EU legislation on privacy and data protection.⁵⁴ In consequence, the national mechanisms are within the scope of EU law, resulting inter alia in the applicability of the EUCFR.⁵⁵ This has meant that the national courts may (and in certain cases, are also obliged to) make a preliminary reference request to the CJEU on whether these mechanisms have struck a fair balance between rights or include features which are incompatible with EU law.⁵⁶

With various notice mechanisms, the IPR holders monitor Internet usage (eg, peer-to-peer networks for certain copyrighted works). When they detect potentially infringing activity, they craft a complaint that is sent to the user-end provider, to be forwarded to the subscriber.⁵⁷ Experiences of non-escalating ‘notice and notice’ systems are limited. This measure has been used or proposed in a few countries, but it has typically been felt that such a system would not be effective enough and/or worth the cost or the violation of the rights of others.⁵⁸ On the other hand, there are

example, over five years the Recording Industry Association of America spent 90 million dollars in legal fees only to recoup 2.5 million. See Article I (at 54) and Swartout (n 40) 506–07. On the other hand, these more egregious approaches seek to generate profit, possibly in addition to the preventive effect.

⁵³ *Ibid*, 500–01 deems that the ‘conventional system of private enforcement against primary infringers’ has been a failure for major IPR holders, and has observed a trend toward a ‘regulatory model of internet intermediary liability’, ie, imposing obligations such as graduated response systems.

⁵⁴ The applicability of EU fundamental rights to the derogations foreseen in the E-Privacy Directive (2002/58/EC) when transposing the Enforcement Directive could be read between the lines in *Bonnier Audio* (n 46) paras 55–56 and Orla Lynskey, ‘The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: *Digital Rights Ireland*’ (2014) 51 CMLR 1789, 1811.

⁵⁵ With regard to subscriber information disclosure requests in the UK, for example, the applicability of Article 3 Enforcement Directive has been accepted in *Golden Eye* (n 50) para 18 and the EUCFR in *RFU v Viagogo* [2012] UKSC 55, paras 28–32. See Joel Smith and Christopher Sharp, ‘The right to obtain information of wrongdoing versus an individual’s data protection rights: The UK Supreme Court considers Norwich Pharmacal relief’ (2013) 35 EIPR 170.

⁵⁶ Similarly, see n 75 on the obligation to refer cases to the CJEU when there is doubt about the discretion granted to the domestic legislator.

⁵⁷ This is complicated by the subscriber usually not being liable for Internet use by others; this cannot be elaborated here, however. See eg Article III (at 887 fn 7) and references.

⁵⁸ See eg Lilian Edwards, ‘The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights’ (2011) <<http://www.wipo.int/export/sites/www/copyright/>

some experiences from graduated response mechanisms. In the EU, a statutory system exists in France and a court-approved or voluntary system in Ireland. Subscriber disconnections have been rejected at least in Germany and the European Parliament and shunned by the United Nations Human Rights Special Rapporteur.⁵⁹ There have been various claims on the efficacy of the graduated response mechanisms, but so far rigorous research has been inconclusive at best. Giblin has concluded that ‘there is no evidence demonstrating a causal connection between graduated response and reduced infringement’. For example, while the monitored peer-to-peer traffic has decreased, users have moved on to other means of infringement which are not being monitored.⁶⁰

User disconnection using an injunction has been relatively rare in case law. While the national implementation of Article 8(3) of the Infosoc Directive has been used as the legal basis for issuing such orders at least in Finland and Spain, it is not obvious that such a possibility needs to be provided by domestic legislation.⁶¹ In particular, the proportionality of such an order is in doubt, owing to the severe impact on the subscriber’s fundamental rights, which include in particular the freedom of expression through access to the Internet and the right to a fair trial. The consequences of the

en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf) 29–30; Marcus Norrgård, ‘Varningsbrev på Internet – några kommentarer angående ett aktuellt lagförslag’ [2010] JFT 638. The inadequacy of ‘notice and notice’ mechanisms without any escalation was also discussed in Article II (at 211–12, 229) and then affirmed in Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014), 29. In consequence, no further exploration is warranted.

⁵⁹ A statutory basis exists in the UK, but adoption has not started as of this writing. For a summary, see eg Yu, ‘Digital copyright enforcement measures and their human rights threats’ (n 5) 467–71; Rebecca Giblin, ‘Evaluating Graduated Response’ (2014) 37 ColumJLA 147, 153–59, 166–75; Alain Strowel, ‘The ‘Graduated Response’ in France: Is It the Good Reply to Online Copyright Infringements?’ in Irini A Stamatoudi (ed), *Copyright enforcement and the Internet* (Kluwer Law International 2010); Edwards (n 58) 30–49; Schmitz and Ries (n 52); Frank La Rue, Report of the Special Rapporteur on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet (United Nations Human Rights Council (A/HRC/17/27), 2011) 21; Coudert and Werkers (n 49) 54–56.

⁶⁰ Giblin, ‘Evaluating Graduated Response’ (n 59) 183ff, esp. 207–08 and for a summary, Rebecca Giblin, ‘When ISPs Become Copyright Police’ (2014) 18 IEEE Internet Computing 84, 84–85. See also TorrentFreak, ‘U.S. ‘Strikes’ Scheme Fails to Impact Piracy Landscape’ (11 January 2015) (<http://torrentfreak.com/u-s-strikes-scheme-fails-to-impact-piracy-landscape-150111/>). For a similar, more general pattern of unreliability of the research on piracy, see Ian Hargreaves, *Digital Opportunity: Review of Intellectual Property and Growth* (2011) 69–76; Benjamin Farrand, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (Routledge 2014) 113–17.

⁶¹ See Husovec and Peguera (n 8) 21ff; Pekka Savola, ‘Internet-operaattori ja perusoikeudet’ in Tapani Lohi (ed), *Oikeustiede–Jurisprudentia XLVI:2013* (Suomalainen Lakimiesyhdistys 2013) 154–56. Feiler (n 32) 47ff argues that Article 8(3) and the ‘best placed’ in Recital 59 implies that the intent is not to cover actions in the same state, because the local jurisdiction offers preferable alternatives to addressing the problem. See also Section 3.1.4. Given the differences from website blocking, it seems most convenient to cover user disconnections here even though the same legal basis may be applied to both actions.

lack of representation in court are particularly harsh in this case. Disproportionality is also manifest, because less drastic measures can usually be pursued instead.⁶²

3.1.4 Website blocking injunction

This study focuses in particular on website blocking injunctions at the user end. Ideally, extensive coverage would be useful. However, a concern for brevity and avoiding repetition of the articles precludes this. Therefore, the subjects already addressed in the articles are only listed as an introduction and are summarised later in Section 4.1.

First it is necessary to describe the legal basis of injunctions.⁶³ The second element is the grounds for an injunction, ie, what sites may be eligible for blocking.⁶⁴ Discussion will be quite brief.

The third and quintessential part is proportionality evaluation.⁶⁵ Effectiveness and cost or burden in general are crucial. If blocking is ineffective, it cannot mitigate the economic losses of IPR holders; such blocking would only have symbolic value.⁶⁶ On the other hand, if blocking is cheap, non-intrusive, and precise, it usually does not have major immediate impact on providers and users. The more intrusive, expensive or infocused blocking becomes, the stronger its justification and effectiveness needs to be in order to be proportionate. Indeed, the underlying objective may in practice be

⁶² In Finland, subscriber information is disclosed at an earlier point in the proceedings. Therefore, it is difficult to see how contacting the subscriber would not (in all likelihood) resolve the issue; suing the user would also be possible. On the other hand, in Spain subscriber information disclosure was not available in civil proceedings and a criminal investigation would have been needed. It is not obvious why that would not have been more appropriate. Further, the court should have rejected the disconnection request because it appears to be more disproportionate than the already rejected information disclosure. However, the appeals court did not even consider proportionality, and comparatively, in Finnish courts the evaluation of proportionality has also been marginal. For lengthier discussion, see Husovec and Peguera (n 8); Savola, 'Internet-operaattori ja perusoikeudet' (n 61) 154–56. In contrast to the five 'routine' ex-parte disconnection decisions in Finland, in *Disconnection and temporary seizure* District Court of Oulu decisions of 14 February and 27 March 2008 (H 08/1438) it was held that the court could not evaluate the impact of disconnection on the subscriber's fundamental rights ex-parte, while also taking into account the legislator's intent that ex-parte injunctions are a special case; the request was denied after receiving the written statement. In general, most issues with subscriber disconnection as the final step in graduated response systems are also applicable here; see n 59 with references.

⁶³ This expands slightly on the coverage in Article VI (paras 6–7, 24–26).

⁶⁴ This was already covered, although largely from the UK perspective, in Article IV. The conditions and international implications were also scrutinised in Article V. Some discussion of this as a proportionality evaluation criterion was also present in Article VI.

⁶⁵ This was the sole subject, and was extensively covered in Article VI and is summarised in Section 4.1. This chapter has also significantly expanded the theoretical and practical framework of proportionality evaluation; only the conclusions could be included in Article VI (paras 3–4).

⁶⁶ On similar criticism, see eg Angelopoulos, 'Are blocking injunctions against ISPs allowed in Europe?' (n 8) 819–21: 'It is possible that the court is simply insisting that a symbolic 'do something' gesture must be made to establish that the intermediary is opposed to piracy, even if it cannot achieve real results.' Further, she characterises the open-ended order as 'an obligation to do the least useless thing the intermediary can think of that is also respectful of the rights of others'.

decisive in how the balancing scale tilts. However, it is not possible to examine this here except by expanding the analysis in Section 4.2.

The fourth element includes procedural requirements and national modalities. A number of issues surfaced in the articles, among others, relating to the procedural situation in court and different conceptions of preliminary injunctions.⁶⁷ Further, domestic legislation may include additional factors.⁶⁸ Such substantive national rules can be examined in the context of proportionality evaluation or under local procedural rules depending on their characteristics. This could be a very lengthy topic, and in-depth discussion is not possible.

Legal basis

Article 8(3) of the Infosoc Directive includes a mandating rule, obliging Member States to provide an opportunity for copyright injunctions against intermediaries.⁶⁹ ‘Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.’

The lack of fault and liability leads Husovec and Peguera to call these ‘obligatory co-operation remedies’.⁷⁰ According to Recital 59, the conditions and modalities are to be determined in national legislation. Essentially identical provisions also exist for other intellectual property rights *in fine* of Article 9(1)(a) and 11 of the Enforcement Directive (2004/48/EC).⁷¹ Indeed, the E-Commerce Directive allows national law to provide specific injunctions against connectivity providers in Article 12(3), while prohibiting general monitoring obligations in 15(1). In consequence, blocking is

⁶⁷ See eg Article VI (para 66).

⁶⁸ For example, in Finland, the Copyright Act includes a special provision 60c(4) on the inviolability of third party communications: ‘An injunction to discontinue issued pursuant to this section shall not prejudice the right of a third person to send and receive messages.’ In other jurisdictions, this aspect has typically been considered even without an explicit legal rule during proportionality analysis. Yet, in Sweden and Denmark, for example, these third party interests had not been adequately taken into account. See Article VI (paras 51–52, 54, 102).

⁶⁹ For discussion on the scope of injunctions, see Husovec and Peguera (n 8) 13–16.

⁷⁰ *Ibid*, 20–21. In contrast, Jaana Pihkala, ‘EUT:n ratkaisujen vaikutuksia piratismiin torjumisen näkökulmasta’ [2014] Defensor Legis 970, 972 argues that the provider is not a third party, but rather something more, an intermediary whose services are used to infringe copyright, which justifies reasonable measures through injunction. Obviously completely unrelated parties could not be issued an injunction in the first place. As will be discussed in Section 4.2.3, responsibilities are issues of policy and do not necessarily follow from the status of intermediary.

⁷¹ The former governs interlocutory injunctions, the latter injunctions awarded after infringement has been established in court. The Infosoc Directive does not explicitly require interlocutory injunctions (see Leistner (n 15) 76), and in consequence a provision was added to the Enforcement Directive; see Commission, ‘Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States’ (Commission staff working document) SEC(2010) 1589 final, 15.

almost exclusively ordered by a court based on the details and modalities of national legislation.⁷²

The national rules must be designed in such a way that the objective pursued by the directive may be achieved; that is, the principle of effectiveness is ensured.⁷³ While it has not been decisively established that website blocking orders targeting a user-end provider must be provided for by national implementation of Article 8(3), the CJEU has held that such orders may be compatible with EU law.⁷⁴

National law may specify the grounds for proportionality evaluation or leave issuing the order completely to the court's discretion. While this may give the national court leads on what to evaluate, it is important to note that EU law provides the minimum (and maximum) level of protection to various competing rights. This will perforce affect the court's discretion and evaluation.⁷⁵

As an example of national law on blocking injunctions,⁷⁶ the Finnish Copyright Act (404/1961, as amended by 679/2006) Section 60c(1):⁷⁷ '[...] the court [...] may order

⁷² Injunctions under the Enforcement Directive are ordered by a judicial authority, while 'injunction' seems to imply this in the Infosoc Directive as well. See Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16, Recital 23. **E-Commerce Directive (n 8)** Article 12(3) allows 'requir[ing] the service provide to terminate or prevent an infringement' by 'administrative authority' as well. This raises the question of whether this also applies to website blocking, as recently introduced in Italy and conducted by AGCOM. As an uncritical commentary, see Federico Marini-Balestra and Riccardo Tremolada, 'Enforcement of Online Copyright in Italy: The New Regulation Adopted by the Italian Communications Authority' [2014] IPQ 143, and in contrast, Giancarlo Frosio, 'AGCOM Regulation Challenged before the Italian Constitutional Court: An Update' (3 February 2015) (<http://cyberlaw.stanford.edu/blog/2015/02/agcom-regulation-challenged-italian-constitutional-court-update>). It is not possible to discuss this here.

⁷³ *L'Oréal v eBay* (n 13) para 136; *Husovec and Peguera* (n 8) 16. In particular, this has been used to argue that if user-end providers were completely excluded from the scope of potential intermediaries, copyright protection would be 'substantially diminished'. See *LSG* (n 46) para 45; *UPC Telekabel Wien* (n 44) paras 33–35. On effectiveness as a meta-rule in choosing between arguable alternative norm interpretations, see also Stefan Mayr, 'Putting a Leash on the Court of Justice? Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule' (2013) 5 EJLS 8, 17–18.

⁷⁴ 'Not precluded' in *UPC Telekabel Wien* (n 44) para 64; *Husovec*, 'CJEU allowed website-blocking injunctions with some reservations' (n 23) 631. That is, the requirement might be fulfilled by other kinds of injunction as well.

⁷⁵ The maximum level of protection is reached at least when other competing rights would end up being infringed by overprotection; see *Husovec and Peguera* (n 8) 16–20, 31. This is substantiated in Section 3.3.2 and in particular nn 223 and 227. Further, for example, according to German Constitutional Court (*Transposition of EU law 1 BvL 3/08*), a preliminary reference to the CJEU is required if a national court needs to determine the exact scope of discretion of the Member State implementing EU law. See Daniel Sarmiento, 'Who's afraid of the charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50 CMLR 1267, 1301 fn 128.

⁷⁶ For more examples, see eg *Verbiest and others* (n 13) 53–56.

⁷⁷ Further details are provided in this and a number of subsections of the law. In the proposed bill, *Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta* (HE 181/2014), final injunctions, interlocutory injunctions with a known website operator and injunctions regarding unknown websites are differentiated into distinct Sections. The consideration of unreasonability also explicitly includes the users. Nonetheless, there are no major changes from this perspective.

[... the] intermediary to discontinue [...] unless this can be regarded as unreasonable in view of the rights of the person making the material available to the public, the intermediary and the author.’ In the preparatory papers of the Constitutional Law Committee of the Parliament, it was noted *inter alia* that the order can be given only if doing so is not unreasonable for the parties. The constitutional proportionality (*stricto sensu*) also requires that the order must not affect communication to the public more than strictly necessary for protecting copyright.⁷⁸ The Law Committee also stated that third parties must not suffer from the dispute, and that the prohibition on endangering legal communications is inviolable.⁷⁹

On the other hand, many countries have transposed Article 8(3) in a very minimal fashion, almost verbatim, and without substantial additional details or modalities.⁸⁰ Finland is one of the few examples of rather detailed legislation. Indeed, domestic legislation has not typically exercised the option of providing modalities and even *travaux préparatoires* may be lacking. In consequence, national constitutional systems usually provide little additional input to the evaluation.

Grounds for blocking

Which websites may be eligible for blocking? Strangely enough, there has been little critical scrutiny of this issue. This is particularly troublesome in the context of peer-to-peer networking related sites which only index and host user-uploaded descriptions and links to third-party trackers. This is because such sites include no or very little content that would as such infringe copyright.⁸¹

There have been a few cases of peer-to-peer indexing websites where no infringement has been found. On the other hand, the precise grounds for blocking have not necessarily been elaborated by a national court. When website operator liability has been held, it has typically been based either on secondary liability (assisting in the main infringement by users, for example, in Sweden) or as joint criminal liability (for example, in Finland). However, direct infringement of ‘making available’ right has occasionally also been found.⁸² All in all, courts seem to have had difficulty in

⁷⁸ Perustuslakivaliokunnan lausunto 15/2006, 2. The committee acts in a role similar to most constitutional courts and its statements are relatively significant in the interpretation of the law.

⁷⁹ Lakivaliokunnan lausunto 5/2005, 10.

⁸⁰ This is the case at least in the UK, Ireland, The Netherlands, Belgium, and Austria, as observed during the research in Article VI.

⁸¹ See Article IV (at 280, 285) and Article VI (paras 70–72). Also see *Dimita* (n 12). On the other hand, *Ziggo and XS4ALL* (n 30) held that only the images of artworks, covers, etc. constituted infringement and as such were insufficient grounds for blocking the site; see n 30.

⁸² See Article IV (at 285) and n 30. On the conditions of ‘actual knowledge’ and *mens rea*, see eg *Kioupis* (n 12) 247–49. For accounts of these cases in English, see eg Jerker Edström and Henrik Nilsson, ‘The Pirate Bay Verdict – Predictable, and Yet...’ (2009) 31 EIPR 483; Mikko Manner, Topi Siniketo, and Ulrika Polland, ‘The Pirate Bay Ruling – When The Fun and Games End’ (2009) 20 EntLR 197; Pessi Honkasalo, ‘Criminal Proceedings against the Administrators of a BitTorrent

identifying and articulating a sound legal basis on which to base the liability of the operators whose actions are instinctively deemed illicit. For example, Angelopoulos calls this ‘legal gymnastics that fail to convince’.⁸³ While for a legal realist the liability and eligibility of blocking seems to be given, more thorough scrutiny would be appropriate from an ideal perspective.

The liability of website operators does not necessarily arise, given that blocking may be sought prior to or instead of targeting the infringer. Therefore, there may not be a court decision on the illegality of the website (as in the case of *The Pirate Bay*).⁸⁴ Further, given that the website operator is not typically represented in the proceedings, the interests must be taken into consideration in some other way. These pose difficulties for courts which are more accustomed to typical adversarial proceedings.⁸⁵

Demarcating websites as eligible and ineligible for blocking, or more precisely identifying the conditions of eligibility, is beyond the scope of this study in particular when it comes to liability for indirect linking.⁸⁶ However, it seems obvious to require liability as a basis; otherwise, any website would be in scope. One additional special case is worth mentioning, however. Given that there are hundreds or even thousands of site-specific or generic proxy sites offering ways to circumvent website blocking (such as using www.pirateproxy.net to access www.thepiratebay.se), one may wonder what would be required to block these proxies, or even websites providing instructions

Tracker: Finreactor KKO 2010:47’ (2010) 32 EIPR 591; Matulionyte and Lankauskas (n 12). In Finnish, see eg Savola, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (n 36) 154–76. As was observed in Article IV (at 284), the conceptions of secondary liability vary greatly across jurisdictions; see Allen N Dixon, ‘Liability of users and third parties for copyright infringements on the Internet: Overview of international developments’ in Alain Strowel (ed), *Peer-to-peer file sharing and secondary liability in copyright law* (Edward Elgar 2009).

⁸³ See Article IV (at 286) and Christina Angelopoulos, ‘Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe’ [2013] IPQ 253, 256. Similarly, Tuomas Mylly, ‘Criminal enforcement and European Union law’ in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property* (Edward Elgar 2012) 215, wonders how well these constructs fit the *nullum crimen, nulla poena* principle: ‘These Nordic cases stretch the doctrines of copyright and criminal law to enable the criminal condemnation of services intuitively regarded as ‘illegal distribution.’

⁸⁴ Basing injunctions on earlier judgements may also be problematic, because the structure, activities, and/or operators may have changed in the meanwhile. This has occurred, for example, with *The Pirate Bay*. See eg Savola, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (n 36) 166–69, and on the changing role of administrators and moderators, see TorrentFreak, ‘The Pirate Bay is Back Online!’ (n 39); TorrentFreak, ‘The Pirate Bay Caught Up In a Hosting Whac-A-Mole’ (n 39).

⁸⁵ For further discussion, see n 94 and references therein.

⁸⁶ Given that the EU case law is far from settled, this would be a topic for a thesis of its own. For preliminary considerations, see Article IV, Section 4 and n 8 therein, and Pekka Savola, ‘Tekijänoikeuden vaikutus Internet-linkittämiseen erityisesti EU-oikeuden valossa’ in Päivi Korpisaari (ed), *Viestintäoikeuden vuosikirja 2014* (Forum Iuris, forthcoming 2015).

on how to circumvent blocking.⁸⁷ In practice, the further ‘removed’ the site is from the main infringement, the harder it will be to prove that the operator is participating in infringing activities. In consequence, the chances of ineligibility increase. Freedom of expression would also imply that some threshold must be met when it comes to merely providing instructions or hosting generic sites. Yet in practice these issues may not materialise, since it is quite probable that many such proxy sites share IP addresses with other third-party hosts. It has been held that this would disqualify blocking – except with more advanced methods – because of inappropriate collateral damage.⁸⁸ The huge number of these sites may also make pursuing these not worthwhile.⁸⁹

Finally, the characterisation of the illegality of the website also affects the measures adopted. If visiting the site does not infringe as such, the primary objective must be to affect only the infringing activity. In such a case, denying access to those users who are unlikely to use the website for infringing purposes would lack legitimacy. Examples of such use might include technical machine-to-machine communications, government officers, researchers, and even possibly enterprise users. On the other hand, the strict requirement of affecting only infringing users might be untenable, because distinguishing users and their activities precisely would require a system as intrusive and burdensome as the one rejected in *Scarlet Extended*. This might substantiate imposing restrictions only for consumer broadband connections or in some other limited manner. In summary, one should aim at identifying the infringing activities and then the required steps to mitigate them while preserving other activities.⁹⁰

⁸⁷ See discussion in Article IV (at 287). In comparison, in a case of the Supreme Administrative Court of Finland, instructions on how to circumvent the blocking of child abuse websites was used as one very questionable ground for blocking such a site; see Pekka Savola and Riku Neuvonen, ‘KHO 2013:136 – Verkkotunnusluettelon julkistamisen katsottiin edesauttavan lapsipornon levittämistä’ (2014) 112 Lakimies 114, 117. Yet another difficulty raised in Article IV concerns multiple layers of linking (see eg Alain Strowel and Vicky Hanley, ‘Secondary liability for copyright infringement with regard to hyperlinks’ in Alain Strowel (ed), *Peer-to-peer file sharing and secondary liability in copyright law* (Edward Elgar 2009) 98–104); this cannot be further elaborated here.

⁸⁸ See Article VI (paras 86–88 and references); Wesselingh (n 12) 72.

⁸⁹ As discussed in Article IV (at 287 fnn 110–11), typically proxy site operators have been targeted directly rather than through blocking access to them; see TorrentFreak, ‘UK ISPs Quietly Block More Torrent Site Proxies’ (23 June 2014) (<http://torrentfreak.com/uk-isps-quietly-block-torrent-site-proxies-140623/>). The measures have sometimes lacked lasting effect, however; see TorrentFreak, ‘Immunity Resurrected by Anti-Censorship Supporters’ (11 August 2014) (<http://torrentfreak.com/immunity-resurrected-by-anti-censorship-supporters-140810/>).

⁹⁰ See Article VI (para 71).

Procedural requirements and national modalities

Article 9 of the Enforcement Directive includes a number of requirements for national legislators on provisional measures.⁹¹ These require (with some simplification) in the corresponding sub-paragraphs that:⁹²

- (3) the applicant may be required to provide evidence that it is the IPR holder in question, and the right is being infringed or such infringement is imminent;
- (4) in appropriate cases, measures may be ordered ex-parte in particular when any delay would cause irreparable damage to the IPR holder. In such a case, the parties will be informed after execution at the latest and measures will be reviewed after notification;
- (5) measures are revoked or cease to have effect unless proceedings are initiated on the merits of the case within a reasonable period of at most 31 days;
- (6) measures may be subject to requiring an appropriate security or an equivalent assurance for possible prejudice caused in the event of (7);
- (7) when measures are revoked, lapse, or are deemed unfounded, the applicant may be ordered to pay compensation for any injury caused.

These include some ambiguities that are due to trying to apply the same generic provisions against infringers and intermediaries without fully considering which are appropriate in what combinations. These ambiguities may also infest national provisions but cannot be addressed here. One specific example is provided. The term ‘defendant’ might refer to the intermediary and/or the infringer. In particular, in Art 9(4) it would seem strange, given the amount of technical detail needed, that the injunction could be issued without hearing the intermediary.⁹³ If so, in Art 9(5) it would not be clear what qualifies as a decision on the merits. On the other

⁹¹ There are no requirements for final injunctions in Article 11. Some national legislations (such as Finland) have adopted some of them to apply to both kinds of injunction.

⁹² See eg *Cámara Águila* (n 45) 188–89. Many of these have strong similarities to Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, Article 50, yet the novelty is that these are also available against third-party intermediaries; see Commission, ‘Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States’ (Commission staff working document) SEC(2010) 1589 final, 13 fn 31.

⁹³ In contrast, according to Finnish *travaux préparatoires* the intermediary must always be heard. On the other hand, the argument in *UPC Telekabel Wien* (n 44) para 52 seemed to be that a generic blocking order better satisfies the provider’s freedom to conduct a business, because the provider has more flexibility in choosing the best means to achieve the required outcome; see also Husovec, ‘CJEU allowed website-blocking injunctions with some reservations’ (n 23) 632. This ignores the provider’s interest in legal certainty that results in the provider usually preferring a specific order provided that it has participated in drawing up the terms. Nonetheless, this implies that at least specific ex-parte injunctions are likely incompatible with the provider’s fundamental rights.

hand, in many countries, separate proceedings have not been initiated.⁹⁴ In practice, this source of variation manifests itself in at least three related aspects: 1) whether a ‘decision on the merits’ is made and in which proceedings, 2) the conditions of having to hear the infringer and, more generally 3) how the interests and fair trial requirements of unrepresented parties are taken into account.⁹⁵

It is not possible to cover national procedural modalities here in detail.⁹⁶ During the evaluation of national case law, recurring issues were effectiveness (or lack thereof), the impact of subsidiarity, the effect on the third parties, implementation costs, the specificity of the order, the procedure for updating the blocking list, and the special conditions of interlocutory injunctions.⁹⁷ Suffice it merely to list a number of points from Finnish law⁹⁸ in order to demonstrate the multitude of issues to be resolved.⁹⁹ The first four transpose Articles 9(4)–(7) of the Enforcement Directive almost verbatim, with an interpretation that the main infringer rather than the provider is ‘the defendant’. The others are issues observed from the case law or from the provisions. If national rules do not include explicit provisions, solutions must be found in more general procedural principles or law.¹⁰⁰

1. Conditions of preliminary vs ordinary injunctions;

⁹⁴ See Article IV (at 287) and Article V (at 290 and 307) including references.

⁹⁵ The interests of different parties are briefly discussed in Section 3.3 nn 216–217. These issues will also be revisited in Section 4.2.1.

⁹⁶ Vast literature exists on proceedings against infringers, but its applicability to innocent third parties is doubtful (see n 100). It is not possible to examine the differences and similarities between these in this study. In general, see eg European Observatory on Counterfeiting and Piracy (n 34); John Leubsdorf, ‘The Standard for Preliminary Injunctions’ (1978) 91 Harvard LR 525; Mark A Lemley and Eugene Volokh, ‘Freedom of Speech and Injunctions in Intellectual Property Cases’ (1998) 48 Duke LJ 147; Marcus Norrgård, *Interimiska förbud i immaterialrätten* (Kauppakaari 2002); Douglas Lichtman, ‘Uncertainty and the Standard for Preliminary Relief’ (2003) 70 University of Chicago LR 197; Aditya Swarup, ‘Rethinking American Cyanamid: Procedural and timely justice’ (2012) 31 Civil Justice Quarterly 475.

⁹⁷ See Article VI (para 66 and in particular note 151).

⁹⁸ A submitted bill would expand the provision to also cover blocking targets where the website operator is anonymous and cannot be discerned and to make a few other clarifications, also changing section numbering; see Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014). Most importantly, blocking orders against anonymous website operators would have a limited duration of at most one year; on the other hand, the practical burden of implementation costs was shifted from the applicant to the provider; see Sivistysvaliokunnan mietintö 26/2014, 6.

⁹⁹ For more elaborate discussion, see eg Savola, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (n 36); Marcus Norrgård, ‘Blocking Web Sites – Experiences from Finland’ in Johan Axhamn (ed), *Copyright in a Borderless Online Environment* (Norstedts Juridik 2012); Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 36) 51–61, 140–48. In general, and from a procedural perspective on preliminary injunctions against IPR infringers, see Norrgård, *Interimiska förbud i immaterialrätten* (n 96).

¹⁰⁰ Søren Sandfeld Jacobsen and Clement Salung Petersen, ‘Injunctions against mere conduit of information protected by copyright: A Scandinavian perspective’ (2011) 42 IIC 151, 151 submit that a proper implementation of Art 8(3) requires rules ‘which take into due consideration the special aspects related to enforcement of copyright on the internet through [internet connectivity providers]’. Therefore, general procedural rules might be inadequate. In particular, on the failure of the safeguards of preliminary injunctions, see *ibid*, 174.

2. the requirement to sue the main infringer;
3. the requirement of a security (eg, a 'cross-undertaking') to cover potential costs;
4. legal costs in various scenarios depending on merits;
5. specificity and the procedure for making changes to the order;
6. duration of the injunction;
7. appeals procedure (especially regarding preliminary ex-parte injunctions);
8. using 'pain of fine' to ensure compliance; and
9. implementation costs.

A number of these are complicated by the intermediary's lack of liability and even the legality of implementing blocking without a court order. Therefore, having to bear the legal costs, for example, may be a difficult issue, to be revisited in general in Section 4.2.

3.2 The impact of EU law and ECHR

3.2.1 The impact and interaction in general

This section examines European constitutional law as the theoretical framework of fundamental rights evaluation of copyright enforcement. The key outcome is to ensure the basis of fundamental rights analysis and proportionality balancing that is applied in this study. First this section examines how EU law and the ECHR affect the interpretation of copyright enforcement in particular in a national setting. The crucial issues are the precedence, the most useful and authoritative legal sources, and the interaction between legal orders. Section 3.2.2 discusses the concept of proportionality, in this context meaning the evaluation and balancing while interpreting the law in a particular case. Section 3.2.3 moves on to examine the legal basis of proportionality in EU law and focuses in particular on the implications of proportionality of national measures within the scope of EU law, such as website blocking injunctions.

EU law and domestic interpretation

The Court of Justice of the European Union has adopted three different forms of supremacy: 1) to answer definitively all questions of European law, 2) determine what constitutes European law, and 3) exert primacy over all conflicting rules of national

law.¹⁰¹ However, there are also signs of self-restriction and sensitivity in how far the CJEU is willing to go with the pursuit of primacy.¹⁰² As one significant tool, the CJEU applies various interpretative methods and the case-by-case selection among them is also a strategic choice.¹⁰³ Another strategic approach is that the CJEU chooses how extensively it wants to answer a preliminary reference request from a domestic court. Options include a detailed answer, a half-answer by issuing some instructions but leaving the determination to the national court, and avoiding the question.¹⁰⁴ The CJEU typically answers as narrowly as possible, leaving the rest to be filled in in a later ruling. Such silent judgements serve as a way to grant a varying degree of deference to domestic courts and legislation.¹⁰⁵

Courts in Member States have an obligation to interpret the national law so far as possible in the light of the wording and purpose of EU legislation.¹⁰⁶ This also includes a second layer: the domestic implementation of directives must not conflict with fundamental rights or other principles of EU law either.¹⁰⁷ Therefore, in order to

¹⁰¹ See NW Barber, 'Legal Pluralism and the European Union' (2006) 12 ELJ 306, 323. See also Daniel Sarmiento, 'CILFIT and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe' in Miguel Poiars Maduro and Loic Azoulai (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010). Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart 2012) 67–68, distinguish 'primacy' from 'supremacy', the latter referring to a strict hierarchical sense and invalidation by the CJEU, but most scholars seem to use them interchangeably. Cf. René Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism' (2009) 5 EuConst 421, 423, deems 'primacy' to imply a hierarchy and being the first in rank and uses 'precedence' instead.

¹⁰² See eg Giuseppe Martinico and Oreste Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar 2012) 239–41.

¹⁰³ In the context of fundamental rights cases, Janneke Gerards, 'Judicial Argumentation in Fundamental Rights Cases – the EU Courts' Challenge' in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method – in a Multi-Level EU Legal Order* (DJØF Publishing 2012) 34–59, 69, discusses meta-teleological, autonomous, and consensus interpretation, with deference as an additional means of enhancing the legitimacy of supra-national adjudication. More extensively, see eg Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011).

¹⁰⁴ Daniel Sarmiento, 'The Silent Lamb and the Deaf Wolves: Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law' in Mate Avbelj and Jan Komárek (eds), *Constitutional pluralism in the European Union and beyond* (Hart 2012) 286. Further choices include proceeding without AG opinion when the Court considers that 'the case raises no new point of law' or deciding the matter with a reasoned order if the answer should already be obvious; see Rules of Procedure of the Court of Justice [2012] OJ L265/1, Articles 59(2) and 99; [Art 20\(5\) of Protocol 3 TEU \(n 34\)](#).

¹⁰⁵ Sarmiento, 'The Silent Lamb and the Deaf Wolves' (n 104) 291. On the CJEU not being explicit in its selection of review and deference, see Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 ELJ 80; Gerards, 'Judicial Argumentation' (n 103) 62–64; Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013) 246. See also Xavier Groussot, 'Constitutional Dialogues, Pluralism and Conflicting Identities' in Mate Avbelj and Jan Komárek (eds), *Constitutional pluralism in the European Union and beyond* (Hart 2012) 338–39.

¹⁰⁶ Case 14/83 *Von Colson* EU:C:1984:153, para 26; Case C-106/89 *Marleasing* EU:C:1990:395; Joined Cases C-397/01 to C-403/01 *Pfeiffer* EU:C:2004:584, paras 113, 117.

¹⁰⁷ *Promusicae* (n 46) para 68; *UPC Telekabel Wien* (n 44) para 46; Rosas and Armati (n 101) 74. Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in

discern the true nature and extent of enforcement obligations, it is essential to always examine CJEU jurisprudence first and only then national legislation, preparatory materials and case law.¹⁰⁸ As an indication of aforementioned ‘silent answers’ and as will be seen, the CJEU sometimes leaves significant scope to national courts to interpret the relevant conflicting rights, possibly with qualifications (as in *Promusicae*). In some other cases, such as *Scarlet Extended*, the CJEU has observed an imbalance between conflicting rights, and has adjudicated itself that a fair balance has not been struck.¹⁰⁹ These balancing approaches are also indicative of how injunction remedies may be fine-tuned by acknowledging competing interests.¹¹⁰

The approach in *Promusicae* is less intrusive towards national law and involves national courts more in fundamental rights dialogue.¹¹¹ The CJEU usually aims to assume an interpretation upon which all (or most) could agree.¹¹² Indeed, when ruling on the compatibility of domestic law provisions with EU law, the CJEU adopts a comparative approach by examining the requirements and priorities of national legal orders and ‘gauging the temperature’ to ascertain the acceptability of its decision for the whole EU.¹¹³ Therefore, a comparative methodology is also useful for enriching

Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 121–22, describes this as the ‘double indirect horizontal effect of EU fundamental rights’. The first layer corresponds to interpreting EU directives in the light of the Charter of the Fundamental Rights of the European Union [2000] OJ C364/1, and the second layer national implementation being consistent with EU fundamental rights.

¹⁰⁸ See Section 2.4 and n 61 therein. The CJEU may often bypass the national legislator; see Kaarlo Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law* (Ashgate 2011) 243.

¹⁰⁹ Leonard FM Besselink, ‘The Protection of Fundamental Rights Post-Lisbon’ (2012) (http://www.fide2012.eu/index.php?doc_id=94) 23. Similarly on the CJEU examining only the first layer in *Promusicae*, and focusing on the second layer in *Scarlet Extended*, see Colombi Ciacchi (n 107) 123.

¹¹⁰ Christine Godt, ‘Intellectual Property and European Fundamental Rights’ in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 233. Similarly, on the necessity of dynamism, and in consequence balancing, because copyright law must strike a balance between competing interests, especially when it comes to copyright enforcement, see Orit Fischman Afori, ‘Proportionality – A New Mega Standard in European Copyright Law’ (2014) 45 IIC 889, 892, 899, 906.

¹¹¹ Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 112–17; Clemens Ladenburger, ‘The Protection of Fundamental Rights Post-Lisbon’ (2012) (http://www.fide2012.eu/index.php?doc_id=88) 16, 43, also giving further examples. For criticism of rejecting AG opinions providing a solution in the first phase, see eg *ibid*, 43 fn 198; Peter Oliver, ‘The Protection of Privacy in the Economic Sphere Before the European Court of Justice’ (2009) 46 CMLR 1443, 1482–83.

¹¹² Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (n 111) 113. Gerards, ‘Judicial Argumentation’ (n 103) 58, refers to this as a ‘negative’ manner of autonomous interpretation: providing a narrow interpretation or no interpretation at all because of a lack of European consensus.

¹¹³ Koen Lenaerts, ‘Interlocking Legal Orders in the European Union and Comparative Law’ (2003) 52 ILQ 873, 898. While the signs of this may not be clearly apparent in the decision (even, ‘too visible signs’ may be erased), it is typical for AG Opinions to include this kind of analysis (*ibid*, 874–76).

the supply of solutions by offering ‘the scholar of critical capacity the opportunity of finding the better solution for this time and place’.¹¹⁴

Finally, international IPR agreements, the TRIPS agreement¹¹⁵ in particular, concluded by both Member States and the EU are taken into due regard in interpretation. However, these do not have direct effect and the legality of EU measures is not reviewed against them.¹¹⁶ Nonetheless, directives must be interpreted, so far as possible, in a manner consistent with the international law that the directive is intended to implement, in particular the Berne Convention, the WIPO Copyright Treaty, and the TRIPS agreement.¹¹⁷ In this context, the TRIPS agreement and other treaties have only limited impact since there are no explicit provisions on remedies against Internet intermediaries and the CJEU has held that the treaties do not require them as such.¹¹⁸

The relative importance of EUCFR in contrast to ECHR

There has been ample literature on the constitutionalisation of IPR.¹¹⁹ Godt submits that the ‘EUCFR is likely to become a central tool for the framing of conflicts in the

¹¹⁴ *Ibid*, 879, citing Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 15. The comparative method is applied in Article VI in particular.

¹¹⁵ [Agreement on Trade-Related Aspects of Intellectual Property Rights 15 April 1994](#).

¹¹⁶ See eg Rosas and Armati (n 101) 60–61, 84.

¹¹⁷ *Promusicae* (n 46) para 60; Joined Cases C-403/08 and C-429/08 *FAPL* EU:C:2011:631, para 189.

¹¹⁸ For example, in *Promusicae* (n 46) para 60, it was held that ‘while [the international agreements] require the effective protection of intellectual property rights and the institution of judicial remedies for their enforcement, they do not contain provisions which require those directives to be interpreted as compelling the Member States to lay down an obligation to communicate personal data in the context of civil proceedings’. There have been provisions on proposed or adopted bi- or multilateral trade agreements, but these mainly try to expand the measures elsewhere instead of directly affecting the EU. Therefore, the trade agreements are not crucial in this study. See eg Xavier Seuba, ‘Checks and Balances in the Intellectual Property Enforcement Field: Reconstructing EU Trade Agreements’ in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and new perspectives* (Edward Elgar 2013); Josef Drexl, Henning Grosse Ruse-Khan, and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer 2014).

¹¹⁹ See eg Fischman Afori (n 110); Willem Grosheide, ‘General introduction’ in Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar 2010) 19–31; Jonathan Griffiths, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (2013) 28 ELR 65; Alexander Peukert, ‘Intellectual Property as an End in Itself?’ (2011) 33 EIPR 67; Enrico Bonadio, ‘File Sharing, Copyright and Freedom of Expression’ (2011) 33 EIPR 619; Christophe Geiger, ‘Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope’ (2009) 31 EIPR 113; Christophe Geiger, ‘Constitutionalising intellectual property law? The influence of fundamental rights on intellectual property in the European Union’ (2006) 37 IIC 371; Tuomas Mylly, ‘Intellectual property and fundamental rights: Do they interoperate?’ in Niklas Bruun (ed), *Intellectual Property Beyond Rights* (WSOY 2005). For three conceptions of constitutionalism, see Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Information Power* (IPR University Center 2009) 377–79 (describing inward-looking self-referential development, constitutionalisation based on economic analysis, and accommodation with fundamental rights) and as a more recent critical reading, see Tuomas Mylly, ‘The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).

modern information society'.¹²⁰ Indeed, the most important source of law seems to be gradually shifting from the national and ECHR systems to the EU when within the scope of EU law.¹²¹

Is the ECHR still relevant to this study? While the freedom of expression has been deemed to cover copyright-infringing communications as well, the ECtHR has granted national courts a particularly wide margin of appreciation when balancing two conflicting rights.¹²² This finding for these two specific rights is somewhat surprising, given that the freedom of expression has typically been subject to more scrutiny and the right to property is weaker than the other rights.¹²³ The approach to non-commercial copyright infringement also remains to be seen.¹²⁴ Husovec has also speculated whether open-ended injunctions satisfy the requirements for legal certainty and quality of the law.¹²⁵ The ECtHR is also appreciative in cases of blatant overblocking with a website operator as a victim.¹²⁶ Finally, the ECHR does not include a specific provision on the connectivity provider's freedom to conduct a business.¹²⁷

¹²⁰ Godt (n 110) 235. There are two discourses struggling over whether the balance of IP and other rights should be interpreted narrowly as exceptions or (supporting this view) broadly as protecting the subjective rights of others (*ibid.*, 212–13). Further, four layers of constitutionalisation are identified: 1) impact on substantive private law, 2) the emergence of new remedies, 3) new forms of standing, and 4) new institutional design for solving conflicts as summarised in Hans-W Micklitz, 'Introduction' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 18–19.

¹²¹ See eg Ladenburger (n 111) 53.

¹²² For evaluations of the ECHR in this context, see eg Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 IIC 316; Dirk Voorhoof, 'Freedom of expression and the right to information: Implications for copyright' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015); Sandfeld Jacobsen and Salung Petersen (n 100) 176–80; Joseph Jones, 'Internet Pirates Walk the Plank with Article 10 kept at Bay: Neij and Sunde Kolmisoppi v Sweden' (2013) 35 EIPR 695; *Kolmisoppi v Sweden* (2013) 4 EHRLR 425 ; *Ashby Donald v France* App no 36769/08 (ECtHR, 10 January 2013) para 41. On Finland, see eg Riku Neuvonen, *Sananvapauden sääntely Suomessa* (Lakimiesliiton Kustannus 2012) 161–65; Robin Elizabeth Herr, 'The Right to Receive Information under Article 10 of the ECHR: An Investigation from a Copyright Perspective' [2011] JFT 193, 210–11.

¹²³ See eg, on the former Pirker (n 105) 203–04, on the latter Steven Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 OJLS 405, 428, 433; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174, 195, noting 'lower-ranking rights such as property'.

¹²⁴ On the two cases mentioned in n 122, like Geiger and Izyumenko (n 122) 339, Jones (n 122) 700, has speculated that 'the commercial nature of copyright infringement was too weighty a consideration for the court to disregard'.

¹²⁵ Husovec, 'CJEU allowed website-blocking injunctions with some reservations' (n 23) 634; Husovec, 'Injunctions against Innocent Third Parties' (n 8) paras 40–41, also referring to Opinion in C-70/10 *Scarlet Extended* EU:C:2011:255, paras 99–114.

¹²⁶ See *Yildirim v Turkey* App no 3110/10 (ECtHR, 18 December 2012). The targeted website operator might also claim that its right to a fair trial has been violated; see eg Husovec, 'Injunctions against Innocent Third Parties' (n 8) paras 34–36 and in general Jonathan Griffiths, 'Enforcement of intellectual property and the right to a fair trial' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015). However, in a recent inadmissible complaint, *Akdeniz v Turkey* App no 20877/10 (ECtHR, 11 March 2014), an Internet user was deemed not to be a 'victim' of website blocking.

¹²⁷ Instead, this would need to be argued through property protection for example.

At least three different justification paradigms for the level of review can be observed from the IPR case law of the ECtHR: 1) the rule of law (a high threshold, preventing only arbitrary excesses of state power and clear violations of national law), 2) enforcement (interpreting the state as having a positive obligation to provide enforcement mechanisms and inadequacy as being open to challenge), and 3) balancing (interpreting the ECHR as providing both a minimum and maximum level on domestic IPR protection standards). Signs of all of these approaches are visible in IPR disputes reviewed by the ECtHR, but Helfer submits that the rule of law paradigm offers the strongest justification for the ECHR.¹²⁸

In summary and as a result of the low intensity of review, the CJEU has been a more active developer of rights and the constitutionalisation of IPR than the ECtHR, and it will also be of most interest here.

3.2.2 Proportionality and the intensity of review

Introduction to the various forms of proportionality

There are at least three different ways to apply proportionality: 1) proportionality considerations in lawmaking, 2) constitutional proportionality review of enacted laws or decisions, and 3) proportionality evaluation in decision-making, in particular when interpreting legal rules. This study examines only the third aspect.

In the first sense, evaluation is needed in lawmaking to ensure the compatibility with constitutional law.¹²⁹ In the second sense, ex-post constitutional review (constitutional balancing) in courts determines the constitutional validity of a primary decision, for example, an administrative action, legislative act, or judgement. The evaluation has obvious similarities with the first sense because the review implies how the evaluation should have been done in the first place. In the third sense, so-called interpretive balancing, the decision-maker needs to reconcile different principles and rules when interpreting a statute during decision-making, and adjudication in particular.¹³⁰

¹²⁸ Laurence R Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 *Harvard International LJ* 1, 36–51. More generally, Greer (n 123) 405, 432, suggests in a somewhat similar fashion: a) the rights principle, b) the democracy principle, and c) the priority of rights over public interests.

¹²⁹ On Finland, see n 146. On the first two conceptions, see eg Grant Huscroft, Bradley W Miller, and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014). In European context, the subsidiarity principle of Art 5 TEU (n 34) also has similar qualities, being essentially a political principle in the pre-legislative arena. It is not applicable as a self-enforcing restraint of the CJEU's actions (Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 *JCMS* 267, 267, 276, 278). However, the principle fails even in the former attempt; see Gareth Davies, 'Subsidiarity: The wrong idea, in the wrong place, at the wrong time' (2006) 43 *CMLR* 63, Horsley (n 129) 274.

¹³⁰ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, CUP 2012) 4, 72–75, 92–93; Pirker (n 105) 42.

Most academic contributions on constitutional law discuss only the second and possibly by implication the first. In consequence, the literature needs to be read in its context. Most arguments apply as is also to the third aspect. However, at least the discussion of the ‘zone of proportionality’, meaning the leeway afforded to the primary decision-maker, needs to be critically evaluated, because the court is solely responsible for making a proportionate decision, not just reviewing the proportionality of a decision made by some other body.¹³¹ In the same vein, Rivers identifies four forms of discretion: structural, policy-choice, cultural, and empirical.¹³² Yet only evidential discretion (to be elaborated later) seems immediately applicable to interpretive balancing. In summary, it is argued that more scrutiny is needed in interpretive balancing scenarios; the distinction and implications of these two forms of balancing will be elaborated later in the context of intensity of review.

In both the second and third sense, proportionality evaluation is the means of assessing the precedence of conflicting principles and values in a particular case.¹³³ This is of utmost importance here since in almost all cases making an interpretation requires balancing competing interests. Generally speaking, the more immediate the interference is or could be, the more intensely the issue should be scrutinised.¹³⁴

Proportionality evaluation is usually depicted as three or four steps. The initial and sometimes omitted step is the *legitimacy* of the objective pursued.¹³⁵ The first two main stages are the *suitability* and *necessity* of means of achieving the objective, ie,

¹³¹ This implies that the court must be convinced it has made the right decision, not just an arbitrary decision among many proportionate alternatives. It is not possible to go into the discussion of whether ‘one right answer’ exists or not. Suffice it to say that while multiple right answers are possible, at least ideally the courts usually want to investigate the issue and substantiate their decision so as to be convinced they have made the right decision. If they are unsure, they look further and dig deeper. See eg Ronald Dworkin, *Law’s Empire* (Fontana Press 1986) 245–50, 255, 269; Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 287–90.

¹³² See Julian Rivers, ‘Proportionality and discretion in international and European law’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007) 114ff. Structural discretion refers to the lack of one right answer in any problem involving two or more competing rights. Policy-choice discretion refers to ‘the range of possible policy options which are both necessary and balanced’. Cultural discretion refers to the difficulty in assigning values to some comparable scale, and in particular respecting diversity in international inter-cultural settings. Evidential discretion refers to the probabilities of outcomes happening and the reliability of factual judgements.

¹³³ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 58; Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in George Pavlakos (ed), *Law, Rights And Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007) 136–37.

¹³⁴ Rivers, ‘Proportionality and Variable Intensity of Review’ (n 123) 177.

¹³⁵ See eg Pirker (n 105) 16; Wolf Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) 15 *CYELS* 439, 448; Barak (n 130) 245–302, referring to it as ‘proper purpose’; Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *CJTL* 72, 75. Cf. Jürgen Kühling, ‘Fundamental Rights’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2010) 503–07, depicts the legitimacy and the legal basis separately from the actual proportionality analysis, observing different steps in German, CJEU and ECtHR contexts.

that the goal can be achieved and there are no better means. The third, the actual balancing part is *proportionality* in the narrow sense (*stricto sensu*), ie, whether the burden of the means is excessive in relation to the objective sought.¹³⁶ Different courts may evaluate or emphasise only some of them in certain contexts.¹³⁷

Proportionality evaluation in more depth

These criteria are firmly entrenched in the first and second sense of proportionality evaluation especially in the continental tradition. The role in the third sense is less clear; for example, Barak suggests using only balancing *stricto sensu*, but I see no need for such blanket restriction.¹³⁸ In practice, essentially similar criteria have been applied to interpretation of EU law, the ECHR, and in national supreme courts.¹³⁹ On the other hand, if the law includes specific criteria to evaluate, those are of primary interest.¹⁴⁰ Nonetheless, the criteria usually correspond to the four-step test, and in any case considering the steps is useful even without any normative implications.

Some cautionary remarks on how the four steps have typically been applied in traditional constitutional review may be appropriate. Legitimacy requires the limitations to be for a ‘proper purpose’. Most purposes have typically been accepted, and Barak, for example, has submitted that the limitation of one constitutional right to advance another always provides sufficient justification (at this point).¹⁴¹ Likewise, suitability only requires a rather low probability of at least partially fulfilling the objective, and therefore rules out few means.¹⁴² In turn, necessity requires that there are no other less impacting means capable of fulfilling the objective at least to the same degree.¹⁴³ In the end, in almost every case one would need to employ proportionality

¹³⁶ See n 135. For examples of a three-step test, see Alexy (n 133) 397–402; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 526; Tor-Inge Harbo, ‘The Function of the Proportionality Principle in EU Law’ (2010) 16 ELJ 158, 165. For example, Kühling (n 135) 505, prefers to examine legitimacy separately from proportionality in order to carve out the objectives pursued better. While the approach is slightly different, this underlines the requirement for careful review all the same.

¹³⁷ See eg Pirker (n 105) 384–86; Kühling (n 135) 505–06.

¹³⁸ Barak (n 130) 4.

¹³⁹ On the applicability of Article 52 EUCFR, see Section 3.2.3; on the ECHR, see n 147; and on national courts, see eg *RFU v Viagogo* (n 55) paras 44–45; *Cartier* (n 35) paras 184–87.

¹⁴⁰ See n 75 and the following discussion.

¹⁴¹ Barak (n 130) 537–38. See also Rivers, ‘Proportionality and Variable Intensity of Review’ (n 123) 188 on the importance of precisely formulating the objective.

¹⁴² *Ibid.*, 188–89. Barak (n 130) 303, 539, observes that ‘All that is required is that the contribution of the means to the fulfilment of the legislative purpose is more than minimal, and that the probability that the legislative purpose is actually achieved is not merely theoretical.’

¹⁴³ *Ibid.*, 317, 540–41. According to Rivers, ‘Proportionality and Variable Intensity of Review’ (n 123) 189, 198–200, ‘one has to identify a third option which is *as effective* in protecting [the interest] but *less intrusive* on other rights’ (emphasis in the original). If the objective has been formulated as seeking the maximal amount of realisation of an interest, the most effective means is automatically ‘necessary’ even if another means would be almost as efficient yet much less intrusive on other rights. In other words, the test seeks Pareto-optimal solutions; see Pirker (n 105) 26–27

evaluation *stricto sensu*, in which the inadequacies of the previous steps can still be considered.¹⁴⁴ In summary, the traditional way to structure the constitutional proportionality review of acts and decisions has been somewhat toothless against formulating the objective as seeking a maximal effect (maximalist objective), even while slightly less extensive effect might otherwise allow better solutions. The first three steps are typically fulfilled right away. In consequence, their main import on many occasions is to serve as a reminder of what needs to be carefully examined in the final phase.¹⁴⁵

National constitutional evaluation usually also employs a simplified four-step test model. Jumping straight into balancing unless a gross error has been made in suitability or necessity is typical. Again, the manner in which the objective is formulated may also make it difficult to contest suitability and necessity.¹⁴⁶ The evaluation by the ECtHR and its margin of appreciation doctrine suffers from similar pitfalls: the prevalence of proportionality evaluation *stricto sensu* leads to very case-by-case based adjudication and lack of systematic focus.¹⁴⁷ Indeed, both CJEU and ECtHR case law can be criticised for its lack of normative criteria, weighting without a scale, unforeseeability, and ultimately the lack of adequate justification (reasoning).¹⁴⁸

fn 71; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013) 18–19; Rivers, ‘Proportionality and Variable Intensity of Review’ (n 123) 198.

¹⁴⁴ Cohen-Eliya and Porat (n 143) 18–19. According to Barak (n 130) 344, 351, the examination will focus on the purpose of limitation and the limited right, rather than the means of achieving the purpose; the previous three steps focus on the purpose and the means of achieving it.

¹⁴⁵ Indeed, there have been suggestions (eg, *ibid*, 528–47) on how proportionality evaluation could be improved by making it more robust against these deficiencies.

¹⁴⁶ As noted above, the suitability test usually excludes only measures which are clearly and totally irrelevant. Also, even a much less restrictive measure is deemed insufficient unless it fully satisfies the legislative objective. See Pirker (n 105) 130; Barak (n 130) 315–16. In Finland, the Constitutional Law Committee does not appear to apply the full proportionality test; see Veli-Pekka Viljanen, *Perusoikeuksien rajoitusedellytykset* (WSLT 2001) 210–14; Juha Lavapuro, *Uusi perustuslakikontrolli* (Suomalainen Lakimiesyhdistys 2010) 250.

¹⁴⁷ The ECtHR does require some evidence of rational decision-making, however. See Pirker (n 105) 225, 231–32; Patricia Popelier and Catherine Van De Heyning, ‘Procedural Rationality: Giving Teeth to the Proportionality Analysis’ (2013) 9 *EuConst* 230, 241–44, 251–54.

¹⁴⁸ See eg Alexander Peukert, ‘The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (2015) 134–36, 139. Justification is obviously not enough: according to Alexy (n 133) 100–01, ‘a balancing of principles is rational when the preferential treatment to which it leads can be rationally justified’. Jürgen Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy* (William Rehg tr, Polity Press 1996) 259, seems to doubt balancing because of the risk of ‘irrational rulings’ because there are no rational standards for balancing, and ‘weighing takes place either arbitrarily or unreflectively’. Alexy (n 133) 401–02, 405, responds by agreeing that rationality is not guaranteed in every case, but is made possible; and that publicly available reasoned judgements are a reflective exercise. He further observes, *ibid*, 365–66, that the solution depends on value judgements which are not controllable by the balancing procedure, but balancing is an open procedure, which will lead to openness of the legal system. A similar transparency argument is advocated by Stone Sweet and Mathews (n 135) 89 and Barak (n 130) 458.

The intensity of proportionality evaluation

The crucial point of departure in evaluation is the extent and intrusiveness of proportionality analysis and particular interests (eg, economic integration) being focused on (if any). Pirker calls this pre-balancing.¹⁴⁹ How judicial proportionality evaluation is justified affects this level. Justifications include norm theory, moral argumentation, practical reasoning, and procedural democracy. Each and all have their pitfalls. Pirker submits that the last one, representing the values neglected in the democratic process, forms the strongest basis.¹⁵⁰ In consequence, the justification models implicitly or explicitly affect the rigour of review, for example, as reluctance or deference.¹⁵¹ While in interpretive balancing the validity of norms is not in doubt,¹⁵² interpreting rules still requires evaluation of proportionality, reasonableness, or some other defined requirements prior to making a decision.

Courts and in particular the CJEU have not shied away from far-going interpretations that some might consider to belong to the legislature. Proportionality evaluation has also been leveraged in such judicial activism.¹⁵³ As will be seen later, the CJEU applies a different metric to EU and domestic measures, resulting in different levels of discretion.¹⁵⁴ However, certain sensitive issues have been afforded more leeway based on procedural and democratic arguments and in order to avoid constitutional conflicts.¹⁵⁵ Indeed, signs of proportionality evaluation in the second sense are also

¹⁴⁹ Pirker (n 105) 13, 70ff.

¹⁵⁰ *Ibid.*, 79, 83–84. See also Popelier and Van De Heyning (n 147) 245ff. This is particularly noteworthy in the ‘constitutional balancing’ model or where courts act in two tiers (such as national and EU courts), leading to some reluctance. For the reluctance of the CJEU, see Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (n 111) 113, 171; Elise Muir, ‘The fundamental rights implications of EU legislation: some constitutional challenges’ (2014) 51 CMLR 219, 243 and n 155.

¹⁵¹ On the ‘sufficient reasonableness threshold’ and the requirement to closely assess each individual situation, see Pirker (n 105) 64 and on ‘zone of proportionality’ Barak (n 130) 417. For example, Kühling (n 135) 506 submits that broad discretion and a margin of appreciation must be granted to sovereign authorities, especially when it comes to evaluating suitability and necessity.

¹⁵² Pirker (n 105) 45ff, 64.

¹⁵³ Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013) 53, 138. For general discussion, see Takis Tridimas, ‘The Court of Justice and Judicial Activism’ (1996) 21 ELR 199.

¹⁵⁴ Groussot, ‘Constitutional Dialogues, Pluralism and Conflicting Identities’ (n 105). With national measures, the intensity seems to depend on the underlying value for which the Member State claims regulatory autonomy. For example, protectionism has a higher bar than public or national security. Further, narrow interpretation and burden of proof requirements alongside strict use of the ‘necessity’ test have raised the bar of domestic measures, especially in the context of the internal market. See Pirker (n 105) 262, 271; Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (n 105) 91–93.

¹⁵⁵ Examples being the accession of EU to the ECHR and respecting the constitutional identities of Member States, as in Case C-36/02 *Omega Spielhallen* EU:C:2004:614 and more recently Case C-208/09 *Sayn-Wittgenstein* EU:C:2010:806; Muir (n 150) 243; Kühling (n 135) 507–08; Pirker (n 105) 252–55; Groussot, ‘Constitutional Dialogues, Pluralism and Conflicting Identities’ (n 105) 336–40; Besselink, ‘The Protection of Fundamental Rights Post-Lisbon’ (n 109) 46; Martinico and Pollicino (n 102) 240–41. Still on criticism of Case C-399/11 *Melloni* EU:C:2013:107, see n 198 onward.

apparent on how national and supranational courts interact by providing (or not) the national courts with discretion on the matter.¹⁵⁶ More generally, objectives on which there is no European consensus may indicate a lower degree of review.¹⁵⁷ Indeed, the European multilevel system is characterised by permitting the co-existence of many different polities and private law values.¹⁵⁸

Finally, the implications of uncertainty also affect balancing and the intensity of scrutiny. This is characterised in Alexy's second law of balancing on empirical and normative epistemic discretion: 'The more intensive the interference in a constitutional right is, the greater must be the certainty of its underlying premises.' This requires evidence-based lawmaking and judgements, with the level of intensity depending on the level of interference.¹⁵⁹ Rivers expands on this in case of empirical doubt: 1) there may be uncertainty on the seriousness of the infringements in question, 2) the relative abstract weight of values, and 3) the relative concrete weight, ie, how multiple scales correlate to each other.¹⁶⁰ In consequence, Rivers reformulates Alexy's balancing rule as follows: 'The greater the chance that one principle may be seriously infringed, the greater must be the reliability of the legislature's assessment that a competing interest will be realised to a sufficiently great extent.'¹⁶¹ Further, Rivers provides illustrative examples of questions that courts face when reviewing proportionality:

- (1) How idealistic should courts be in seeking to maximise the balance of rights and the public interest and thus constrain policy choice? (2) To what extent should international courts permit cultural variation in abstract conceptions of rights? (3) In what circumstance should courts demand that primary decision-takers put more procedural resources into establishing matters of empirical fact? (4) When may the court ignore trivial gains to

¹⁵⁶ Pirker (n 105) 240–42.

¹⁵⁷ Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (n 105) 94–95. The same may apply to cases where no scientific consensus exists, see *ibid*, 96–97. See also n 112 on abstaining from making an autonomous interpretation when lacking consensus.

¹⁵⁸ Giovanni Comandé, 'The Fifth European Union Freedom: Aggregating Citizenship ... around Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 68. The balance may be legitimately resolved differently in other legal systems, see Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (n 111) 80.

¹⁵⁹ According to Alexy (n 133) 417–20, both the absolute requirement of certainty and basing interferences on highly dubious prognoses must be rejected. He considers that the legislature's competence (or lack thereof) to assess empirical facts belongs to knowledge-based discretion rather than structural discretion, ie, the evaluation of suitability and necessity (*ibid*, 399–400). Pirker (n 105) 27, notes that the burden of proof is essential, given epistemic limitations: how sure can one be that a measure has or will have particular effects? Article II (at 214, 222) observes inequalities between parties in producing evidence that may also increase hierarchy. Likewise in EU context, see Benjamin Farrand, 'Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement' [2015] OJLS (Advance access), 6–8. It might be impossible to iron out these inequalities in adjudication; see Julian Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007) 182.

¹⁶⁰ *Ibid*, 170, 177–78. On epistemic balancing, see also n 132.

¹⁶¹ *Ibid*, 181–83. Rivers focused on both constitutional evaluation of legislative acts and decisions of a primary decision-taker in the executive branch.

rights in the context of necessity review? (5) How insistent should courts be that they hear all the arguments for and against the policy in question?¹⁶²

In conclusion, Rivers suggests that the proper role of the second law of balancing should be to guide the courts in determining the intensity of review. First, more serious limitations of rights require closer review and a smaller scope of structural discretion. Second, more serious limitations require devoting more procedural resources to establishing the factual basis. Third, more serious limitations require the courts to identify and reject only slight gains to the enjoyment of rights.¹⁶³ A scholar or judge should also contemplate the aforementioned questions bearing in mind that the degree of discretion should likely be narrower and the necessity of requiring sufficient evidence higher when making a proportionate decision in the first place compared to reviewing proportionality of decisions made by others.

3.2.3 Proportionality in EU law

Different types of measures

The justification, depth and criteria of evaluation differ significantly depending on what is being evaluated. One can distinguish EU measures (including legal acts, eg, directives), national measures within the scope of EU law, and purely national measures. EU-related Member State measures include the implementation of directives and acts which impact either the internal market, equality, or discrimination issues.¹⁶⁴ This study examines only national measures within the scope of EU law; the others are mentioned briefly for comparison and to set them apart from the main topic.

An EU measure is typically required to be ‘manifestly inappropriate’ with regard to the objective sought to be rejected. Broad discretion is granted to the Union legislature, particularly on policy issues and in practice the use of the least restrictive means is not required.¹⁶⁵ Procedural guarantees and protection of fundamental rights have

¹⁶² These questions cannot be answered the same way either and some questions admit a degree of discretion, but the degree differs from case-to-case. See *ibid*, 186.

¹⁶³ *ibid*, 187; Rivers, ‘Proportionality and Variable Intensity of Review’ (n 123) 177.

¹⁶⁴ Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 590ff; Bas Van Bockel and Peter Wattel, ‘New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after *Åkerberg Fransson*’ (2013) 38 ELR 866, 873–75, 877; Verica Trstenjak and Erwin Beysen, ‘The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU’ (2013) 38 ELR 293, 303–06. Cf. previously applicability to the implementation of directives was also deemed controversial; see Kühling (n 135) 498.

¹⁶⁵ See eg Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (n 105) 97–100; Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 143–45; Sauter (n 135) 449–51; Pirker (n 105) 250–52; Georgios Anagnostaras, ‘Balancing conflicting fundamental rights: The Sky Österreich paradigm’ (2014) 39 ELR 111, 118–20. See eg Case C-283/11 *Sky Österreich* EU:C:2013:28. Also see Jan H Jans, ‘Proportionality Revisited’ (2000) 27 *Legal Issues of Economic Integration* 239, 248; Craig (n 164) 591–92.

narrowed the discretion lately, however.¹⁶⁶ All in all, the metrics used in these cases are not applicable in this context except in the inverse: if an EU measure deemed manifestly inappropriate, a similar national measure might be as well.

In contrast, domestic measures, especially ones deterring citizenship, economic integration or fundamental rights have been more rigorously evaluated in the harmonised areas.¹⁶⁷ The CJEU evaluation of such measures has traditionally focused on necessity and identifying the least restrictive means for attaining national objectives without undue impact on the fundamental freedoms, that is, the free movement in the internal market. As was observed, the kind of online copyright enforcement studied here has at best arguable impact on fundamental freedoms. Therefore, the case law on proportionality of fundamental freedoms, even when compared to fundamental rights, is also not applicable.

There are a number of bases of the proportionality requirement. These include a specific treaty provision such as Article 36 TFEU¹⁶⁸ on defences justifying national measures that impede cross-border trade, Article 5(4) TEU on the proportionality and subsidiarity of EU measures, Article 52(1) of the EU Charter of Fundamental Rights, and general principles of law.¹⁶⁹ The first two are typically relevant only in internal market derogations and EU measures, which were deemed out of scope. That is, proportionality could be relevant in this context through the latter two.

In the Lisbon Treaty, fundamental rights gained an independent legal basis as EUCFR and Article 6(1) and 6(3) TEU, with the EUCFR applying to all cases within the scope of EU law.¹⁷⁰ In consequence, the former use of legal principles of law has been essentially replaced by EUCFR references and the importance of proportionality as a principle of law has diminished.¹⁷¹ These two sources are highly congruent.¹⁷²

¹⁶⁶ Sauter (n 135) 451–52; Pirker (n 105) 254–55; Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (n 105) 100–01. The EUCFR has also been a basis for striking down EU legislative acts, see eg Ladenburger (n 111) 8; Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, 393 referring to Joined Cases C-92/09 and C-93/09 *Volker, Schecke and Eifert* EU:C:2010:662, and recently, Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238, para 69. Indeed, Mylly, *Intellectual Property and European Economic Constitutional Law* (n 119) 167–68, argues Arts 2–3 and 6 TEU (n 34) that providing fundamental rights – and not the internal market – is the core aim of the Union.

¹⁶⁷ Sauter (n 135) 453ff; Pirker (n 105) 256ff; Tridimas, *The General Principles of EU Law* (n 165) 195ff; Craig (n 164) 617ff; Sara Iglesias Sánchez, ‘The Court and the charter: The impact of the entry into force of the Lisbon treaty on the ECJ’s approach to fundamental rights’ (2012) 49 *CMLR* 1565, 1592–96.

¹⁶⁸ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

¹⁶⁹ Tridimas, *The General Principles of EU Law* (n 165) 136–38; Craig (n 164) 591, 617; Pirker (n 105) 235.

¹⁷⁰ See n 184. See also Iglesias Sánchez (n 167) 1579–80; Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1270, 1274, 1283–84; Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (n 166) 378, 393.

¹⁷¹ See eg Iglesias Sánchez (n 167) 1599 fn 168; Ladenburger (n 111) 5 fn 17 including the references.

¹⁷² This is pragmatic and desirable in order to avoid the development of two separate systems of protection of EU fundamental rights. See Trstenjak and Beysen (n 164) 307. The CJEU remains free to identify further fundamental rights not listed in the EUCFR; see Ladenburger (n 111) 4.

Therefore, it is sufficient to focus on the proportionality and limitations based on the EUCFR.

The test for necessity and suitability, as well as a limitations clause is provided at the end of Article 52(1) EUCFR (emphasis added):

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

The first sentence requires a legal basis and honouring the very essence of rights as absolute prerequisites.¹⁷³ The steps of proportionality are similar to the ECHR limitation clauses and the four-step test described in Section 3.2.2. Notably legitimacy is implicitly based on the word ‘genuinely’, and suitability is embedded within ‘necessary’ and genuinely meeting the objectives.¹⁷⁴ These evaluation criteria should be kept in mind in interpretative situations.¹⁷⁵

Proportionality of national EU-scoped measures

Delving deeper, national measures may be divided into three to five categories.¹⁷⁶ The first concern statutes implementing EU law, that is, fulfilling the positive obligations of EU legislation. These are often referred to as *Wachauf*-like scenarios or as Member

¹⁷³ On the ‘very essence’ being infringed in ECtHR case law, usually resulting in not having to do a full analysis of proportionality, see Rivers, ‘Proportionality and Variable Intensity of Review’ (n 123) 184–87.

¹⁷⁴ Kühling (n 135) 504–05. For example, disproportionality was established in Case C-390/12 *Pfleger* EU:C:2014:281, paras 54–56, because the restrictions did not genuinely meet the purposes of the declared objective and were therefore unsuitable.

¹⁷⁵ Recently, Kevin T O’Sullivan, ‘Enforcing copyright online: Internet provider obligations and the European Charter of Human Rights’ (2014) 36 *EIPR* 577, 581–83, has argued that Article 52 has a very limited role to play in evaluating the appropriateness of ISP’s freedom to conduct a business, essentially because of Article 3 of the [Enforcement Directive \(n 72\)](#) and Article 12(3) of [E-Commerce Directive \(n 8\)](#) already incorporate such a balance. This is a counter-majoritarian view and I do not find it justified, although in practice the conclusion may often be the same. Such critical perspectives to constitutionalisation are discussed and rejected in Monica Claes, ‘The European Union, its Member States and their Citizens’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013) 39–40. Similarly, Husovec and Peguera (n 8) 17–19, 31 hold that the injunctions that do not pass the Article 52 limitations test ‘would go beyond the maximum ceiling allowed’. This aspect will be discussed in more detail in Sections 3.3.2 and 3.4.

¹⁷⁶ See Michael Dougan, ‘The Impact of the General Principles of Union Law upon Private Relationships’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013) 75; Xavier Groussot, Laurent Pech, and Gunnar Thor Petursson, ‘The Reach of EU Fundamental Rights on Member State Action after Lisbon’ in Sybe de Vries, Ulf Bernitz, and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart 2013) 113; Trstenjak and Beysen (n 164) 304–08. On a historically different division, see Opinion in C-427/06 *Bartsch* EU:C:2008:297, para 69 and Muir (n 150) 228.

States acting as agents of the EU.¹⁷⁷ In the area of shared competence, national measures are deemed to be in this category when the EU has exercised its competence and the implementation time limit (if applicable) has expired. After the deadline, all domestic provisions that fall within the scope of pertinent EU rights will come under EU law.¹⁷⁸ The second category, *ERT*-type cases, apply when Member States use the grounds of public interest *inter alia* for derogating from EU law, especially in the context of fundamental freedoms.¹⁷⁹ Besselink considers autonomous effect (meaning direct applicability and effect) in a field covered by EU law a third scenario, but it is not necessary to distinguish it from the first category here.¹⁸⁰ Further, Van Bockel and Wattel have suggested an additional category of cases where the EU has a financial interest as per Article 325 TFEU.¹⁸¹ The final ones are purely national measures, which do not concern EU obligations and do not violate EU law.¹⁸²

¹⁷⁷ Case 5/88 *Wachauf* EU:C:1989:321; Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (n 166) 378–82; Groussot, Pech, and Thor Petursson (n 176); Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1270–71, 1275; Van Bockel and Wattel (n 164) 873–74; Sonya Walkila, *Horizontal Effect of Fundamental Rights: Contributing to the ‘Primacy, Unity and Effectiveness of European Union Law’* (2015) 150–52.

¹⁷⁸ See Case C-147/08 *Römer* EU:C:2011:286, paras 63–64. Likewise, yet considering this as a scenario separate from ‘implementation’, see Laurent Pech, ‘Between judicial minimalism and avoidance: The Court of Justice’s sidestepping of fundamental constitutional issues in *Römer* and *Domingues*’ (2012) 49 CMLR 1841, 1850, 1864–65. This is also argued to apply before the transposition deadline if it can be proven that a specific domestic measure implements the EU provision (*ibid*, 1865 fn 84, referring to Case C-144/04 *Mangold* EU:C:2005:709, para 75). See also Tony Marguery, ‘European Union fundamental rights and member states action in EU criminal law’ (2013) 20 Maastricht Journal 282, 287–88. Once EU legislation enters into force, there are ‘softer’ requirements for not adopting measures which would compromise the result of the EU law provisions (*ibid*).

¹⁷⁹ Case C-260/89 *ERT* EU:C:1991:254; Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (n 166) 383–85; Groussot, Pech, and Thor Petursson (n 176); Trstenjak and Beysen (n 164); Walkila (n 177) 152–53. On approval and contrary views, see Ladenburger (n 111) 17 fn 89. More recently, such an impact was found in *Pfleger* (n 174) paras 35–36. While the context may differ, in the end both *Wachauf* and *ERT* concern the issue of whether EU obligations are adequately honoured in the legal system. Similarly in Juha Raitio, ‘Eurooppaoikeuden yleisten oikeusperiaatteiden horisontaaliset vaikutukset ja perusoikeuskirjan 51(1) artiklan tulkinta’ [2014] Defensor Legis 110.

¹⁸⁰ Besselink, ‘The Protection of Fundamental Rights Post-Lisbon’ (n 109) 44, referring to certain personal data provisions as adjudicated by the CJEU.

¹⁸¹ Van Bockel and Wattel (n 164) 877–78. In particular, they deem Case C-617/10 *Åkerberg Fransson* EU:C:2013:105 an example of this, because the link with implementation measures was somewhat tenuous. At least for now it seems to be sufficient to consider this as belonging to the first category. Somewhat similarly, Walkila (n 177) 154–57, 162, 165 proposes a notion of ‘a sufficient connection to EU law’ to serve as the determining factor, requiring a concrete and relevant presence of an EU legal norm other than the EUCFR provision, as supported by Case C-206/13 *Siragusa* EU:C:2014:126, paras 24–26; for criticism on vagueness, see Filippo Fontanelli, ‘Implementation of EU Law through Domestic Measures after *Fransson*: the Court of Justice Buys Time and “Non-preclusion” Troubles Loom Large’ (2014) 39 ELR 682. Allan Rosas, ‘When is the EU Charter of Fundamental Rights Applicable at National Level?’ (2012) 19 Jurisprudence 1269, 1284 also submits a practical rule of identifying a norm of EU law *in concreto*.

¹⁸² Examples include income tax and immigration policies with respect to the third country nationals when the freedom of movement has not been exercised; see Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (n 166) 386–87; Rosas (n 181) 1281; Van Bockel and Wattel (n 164) 875–77; Raitio (n 179) 113–14.

It is important to identify the scenarios in which EU fundamental rights apply, possibly in addition to national constitutional rights. Until recently, the material scope of the EUCFR and in particular the interpretation of ‘implementing Union law’ in Article 51(1) was debatable.¹⁸³ Now it has been decisively established in *Åkerberg Fransson* that EU fundamental rights apply within the whole scope of EU law (emphasis added):

Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, *situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable*. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.¹⁸⁴

In consequence, the EUCFR applies to all of the above categories except for purely national measures, even though the precise criteria for ‘the scope of EU law’ have so far remained somewhat vague.¹⁸⁵ Further, the applicability of the EUCFR or lack thereof can be illustrated by examining triggering rules, ie, the actual norm of EU law applied. The first are mandating rules that require Member States to use a specific means to attain a goal. The level of discretion afforded to Member States may vary.¹⁸⁶ The second are optioning rules in an area regulated by EU law, but where Member States have a choice about whether to implement measures or not. If this discretion is used, the national provisions fall within EU law.¹⁸⁷ The third are remedial rules that are required for effectively exercising EU rights before national courts.¹⁸⁸ All in all, any national measure that jeopardises the effectiveness of EU law in any manner

¹⁸³ See eg Pech (n 178); Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1270ff; Muir (n 150) 228–29.

¹⁸⁴ *Åkerberg Fransson* (n 181) para 21. See Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1278; Van Bockel and Wattel (n 164) 871–72. However, what precisely ‘within the scope of EU law’ means may still be argued, of which see Fontanelli (n 181). Ladenburger (n 111) 15–17 previously argued against accepting ‘any theoretically construable nexus’, requiring a sufficiently specific link between the national act at issue and an actual norm of EU law applied (cf. n 181).

¹⁸⁵ For example, Fontanelli (n 181) 694–95, 699 examines the case law that has followed *Åkerberg Fransson* and concludes that several roughly synonymous criteria have been put forward as to when EU law does *not* apply, but no conclusions can be drawn on when it applies. It seems unnecessary to explore these here in detail.

¹⁸⁶ Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1279–81. In contrast, Dougan (n 176) 75–81 examines separately the context where the trigger is a provision of a treaty or directive. An example is website blocking injunctions as required by *Infosoc Directive* (n 42) Art 8(3).

¹⁸⁷ Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1281–82. See Joined Cases C-411/10 and C-493/10 *NS* EU:C:2011:865, para 68 and Case C-105/03 *Pupino* EU:C:2005:386, paras 55–56. Cf. Ladenburger (n 111) 18 fn 98, accepts this for ‘options or derogations foreseen in the directive’ but not when adding national provisions not induced by the directive. *NS* (n 187) paras 64–69, however, confirms that discretionary power (in the context of a Regulation) may still be an instance of implementation of EU law.

¹⁸⁸ Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1282–85. Walkila (n 177) 152 explicitly mentions national measures that have connection to the enforcement of EU legislation. See eg Case C-279/09 *DEB* EU:C:2010:811 and Case C-199/11 *Otis* EU:C:2012:684. Examples are the most essential procedural rules relating to IPR enforcement.

falls within the scope of EU law.¹⁸⁹ On the other hand, exclusionary rules restrict the applicability of EU law from certain areas.¹⁹⁰ The same result is also incurred by purely domestic measures, where the rights afforded by EU law cannot be identified and where the CJEU has no jurisdiction.¹⁹¹

Fundamental rights unquestionably apply in the vertical relation between a private party and a state authority. Given that according to Article 51(1) EUCFR, the provisions are addressed to, inter alia, Member States, those unaccustomed to constitutional law might claim that the EUCFR has no impact in cases which concern a conflict between private parties.¹⁹² This would be incorrect due to so-called horizontal effect of fundamental rights. That is, courts must apply the EUCFR to the interpretation of principles and existing norms as the organs of state (indirect horizontal effect).¹⁹³ Therefore the only excluded form of ‘direct’ horizontal effect is imposing obligations or finding violations directly based on the EUCFR.¹⁹⁴ On the other hand, direct horizontal effect based on general principles of law has been accepted in restricted cases (eg, certain kinds of age and gender discrimination) and this might also apply to some EUCFR provisions.¹⁹⁵ These situations are not relevant in this study, however.

¹⁸⁹ Van Bockel and Wattel (n 164) 878.

¹⁹⁰ Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1285. Examples are the ‘shall not apply’ provisions in EU legislation. According to Fontanelli (n 181) 692–93, these need to be distinguished from ‘not precluded’ provisions, by which domestic measures may be adopted, but the EUCFR still applies.

¹⁹¹ Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1286–87; Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (n 166) 386–87. This may also concern cases of the rights or lack thereof associated with EU citizenship, see Case C-256/11 *Dereci* EU:C:2011:734. See also n 182. Here, examples are those features of copyright that are not legislated by the EU, such as moral rights (*Infosoc Directive* (n 42) Recital 29).

¹⁹² Besselink, ‘The Protection of Fundamental Rights Post-Lisbon’ (n 109) 17–19 distinguishes the addressees of obligations, the manner of rights, and the legal remedy. Being a direct assignee is typically rejected, but a varying degree of indirect effect is accepted. Further, on the importance of horizontal situations and the difficulty in separating the private and public spheres in IPR, see Mylly, ‘Intellectual property and fundamental rights: Do they interoperate?’ (n 119) 193–94. On difficulties in general, see eg Hugh Collins, ‘On the (In)compatibility of Human Rights Discourse and Private Law’ in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 38ff.

¹⁹³ Dorota Leczykiewicz, ‘Horizontal application of the Charter of Fundamental Rights’ (2013) 38 ELR 479, 490–92. In general, see Walkila (n 177). Kühling (n 135) 493–94 notes that a Member State’s duty to protect rights may also be invoked against private parties without having the private parties bound by fundamental rights.

¹⁹⁴ See the table of four categories in Groussot, Pech, and Thor Petursson (n 176) 113; Trstenjak and Beysen (n 164) 307–09. On the difference being more formalistic than substantive, see Walkila (n 177) 227. More forcefully, Alexy (n 133) 363 observes that the ‘horizontal effect will in the final analysis always be direct’; such direct horizontal effect can only be denied by denying any form of horizontal effect whatsoever. In a similar fashion, Mattias Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 German LJ 341, 357, 359, concludes that ‘[a] doctrine of indirect horizontal effect, then, seems to have much the same consequences, substantively and institutionally, as the embrace of a doctrine of direct horizontal effect.’

¹⁹⁵ See eg Pech (n 178) 1866ff; Groussot, Pech, and Thor Petursson (n 176) 111–12; Muir (n 150) 230–32; Dougan (n 176) 81–86; Raitio (n 179) 112.

Comparatively within the ECHR, states have ‘at least some degree of leeway in choosing whether to frame basic conflicts in terms of opposing fundamental rights or through alternative conceptualisations’.¹⁹⁶ Bomhoff also argues that defamation by and of a private individual, for example, cannot be translated into a conflict between individual rights and collective interests.¹⁹⁷ As will be discussed in Section 3.3, the same would apply to IPR infringement.

The precedence of EU fundamental rights over national fundamental rights

When a provision of EU law leaves no discretion to the national bodies (‘complete determination’), national fundamental rights are displaced. That is, EU law and its fundamental rights determine the level of protection entirely.¹⁹⁸ The second, more typical scenario concerns the co-existence of national and EU fundamental rights (‘partial determination’), where national law may provide higher protection if doing so does not compromise the primacy, unity, and effectiveness of EU law.¹⁹⁹ Even so, national fundamental rights may still be displaced if they compromise EU law.²⁰⁰ In the third case, derogation, a higher level of protection through national fundamental rights is likely possible as long as it is in balance with the fundamental freedom.²⁰¹

¹⁹⁶ Jacco Bomhoff, ‘The Rights and Freedoms of Others’: The ECHR and Its Peculiar Category of Conflicts Between Individual Fundamental Rights’ in Eva Brems (ed), *Conflicts Between Fundamental Rights* (SSRN Version, Intersentia 2008) 23. *ibid*, 7, ‘[The ECtHR] is generally quick to opt for an alternative ground for limitation’, in this case ‘public morals’ instead of ‘the rights of others’. Further, in *ibid*, 4, in a system where the conflicts are pervasive, the ECtHR has had ‘great difficulty in finding consistent and convincing ways of dealing with cases of conflicting rights’.

¹⁹⁷ *Ibid*, 10.

¹⁹⁸ The exhaustive grounds of non-execution of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2000] OJ L190/1 in *Melloni* (n 155) para 61 is an example of this. In general, see Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1289–93; Van Bockel and Wattel (n 164) 879; Muir (n 150) 234–35. If ‘constitutional identity’ of a Member State is at stake, which was not the case in *Melloni*, more leeway might be granted; see n 155. As to tensions caused by such an approach, see Leonard FM Besselink, ‘The parameters of constitutional conflict after *Melloni*’ (2014) 39 ELR 531; Aida Torres Pérez, ‘*Melloni* in Three Acts: From Dialogue to Monologue’ (2014) 10 EuConst 308; Iris Canor, ‘*My brother’s keeper?* Horizontal Solange: “An ever closer distrust among the peoples of Europe”’ (2013) 49 CMLR 383 and n 203.

¹⁹⁹ Åkerberg Fransson (n 181) para 29. See Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1294–95; Van Bockel and Wattel (n 164) 871, 879; Nik de Boer, ‘Addressing rights divergences under the Charter: *Melloni*’ (2013) 49 CMLR 1083, 1096.

²⁰⁰ Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1295. In national constitutional discussion, it is more typical to reject and/or heavily criticise this approach. See also nn 198 and 203. On Finland, see eg Tuuli Heinonen, ‘Konstitutionaalinen konflikti Suomessa’ in Tuuli Heinonen and Juha Lavapuro (eds), *Oikeuskulttuurin eurooppalaistuminen. Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Suomalainen Lakimiesyhdistys 2012) and Savola, ‘Internet-operaattori ja perusoikeudet’ (n 61) 137 fn 28 and references.

²⁰¹ Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1297–98; de Boer (n 199) 1096. Sarmiento notes that the margin involved in justifying derogations is very different because free movement rules occupy a privileged position. However, the majority opinion appears to be that the conflict of a fundamental right and a freedom should be evaluated on the same basis and without precedence; see Trstenjak and Beysen (n 164); Sybe A de Vries, ‘The Protection of Fundamental Rights within

In this study, only the partial determination applies. That is, the primacy of EU law implies that measures that would be disproportionate according to EU law must also be deemed disproportionate at the domestic level (eg, the finding of disproportionality in *Scarlet Extended* cannot be overruled based on national fundamental rights).²⁰² Conversely, measures which are explicitly deemed proportionate at the EU level must be proportionate at the national level (eg, the generic blocking order in *UPC Telekabel Wien*, if provided by national law, cannot be rejected outright based on national fundamental rights).²⁰³

This overlap is depicted in Figure 3.2, where disproportionality is depicted with (A), explicit proportionality with (B), and the margin as (C). That is, the proportionality is evaluated in purely national situations merely according to the national fundamental rights (D). Given the partial determination situation in copyright enforcement, in the area where the national and EU rectangles overlap, nationally proportionate mechanisms could be deemed disproportionate at the EU level (A1). Inversely nationally disproportionate mechanisms could still be deemed proportionate at the EU level (B1), ie, national fundamental rights could be ‘overruled’. On the other hand, if the primacy, unity and effectiveness of EU law is not compromised, ‘better’ protection based on national fundamental rights could in some cases influence the interpretation of the implementation of EU law (C1).²⁰⁴

This demonstrates that in practice fundamental rights systems usually need to be applied cumulatively, although possibly with some ‘layers’ prevailing over others. That is, from the national perspective, an eye needs to be kept on the discretion allowed by EU law.²⁰⁵ Further, the conflict of multiple fundamental rights exhibits a

Europe’s Internal Market after Lisbon – An Endeavour for More Harmony’ in Sybe de Vries, Ulf Bernitz, and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart 2013) 87; Walkila (n 177) 226.

²⁰² Case C-70/10 *Scarlet Extended* EU:C:2011:771, para 53.

²⁰³ See Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1294–95; Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (n 166) 376. Such primacy also over national fundamental rights has caused some tension between national constitutional and supreme courts and the CJEU as to who is the final guardian against violation or misbalancing of fundamental rights. See eg *Solange II* BVerfGE 73, 339; Armin Von Bogdandy and others, ‘Reverse Solange – Protecting the essence of fundamental rights against EU Member States’ (2013) 49 CMLR 489. On a different approach, ‘horizontal solange’, see Canor (n 198).

²⁰⁴ For example, Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1294–95 argues that the EUCFR would need to be applied if the level of its protection is superior to national fundamental rights, yet also that the EUCFR could only exceptionally displace national fundamental rights. The former demonstrates a problem when evaluating conflicting rights, because some rights might be deemed ‘superior’ in the EUCFR while others might not. On the latter, Besselink, ‘The parameters of constitutional conflict after *Melloni*’ (n 198) 546–47 describes conditions for diversity but that ‘primacy, unity and effectiveness’ has ‘the potential to become a magic formula’. Torres Pérez, ‘*Melloni* in Three Acts: From Dialogue to Monologue’ (n 198) 328 argues that it should be for the CJEU, rather than domestic courts, to balance the issue on a case-by-case basis. Also according to de Boer (n 199) 1096, 1103 it is a crucial issue how ‘primacy, unity, and effectiveness’ will be interpreted in future cases. This cannot be explored in depth here.

²⁰⁵ Ladenburger (n 111) 24.

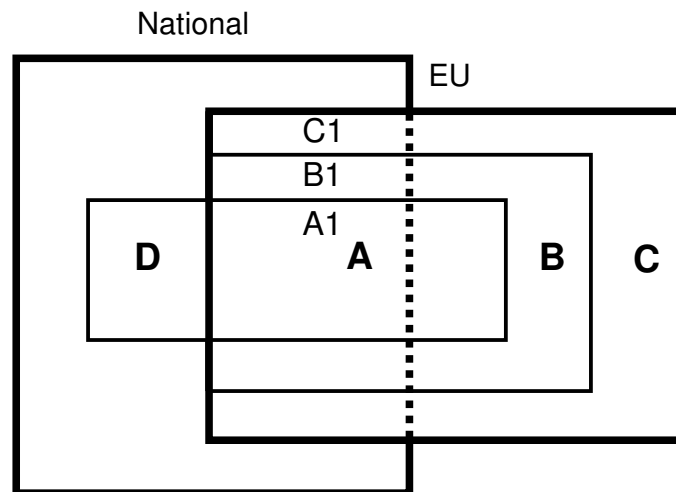


Figure 3.2: Overlap and primacy in proportionality of national measures

difficulty for evaluation, because ‘better protection’ of one right usually implies worse protection of other rights. This difficulty, to be elaborated in Section 3.3, is illustrated by Ladenburger:

Particularly in situations of colliding rights, it can become a daunting task for a national [...] judge to assess which margin, if any, a norm of Union law may leave for applying rights other than those of the Charter, and then to identify the various applicable fundamental rights and their meaning pursuant to the case of law of the Strasbourg, Luxembourg and the national constitutional courts.²⁰⁶

3.3 The rights and interests of different parties

3.3.1 Fundamental rights at stake

The courts’ role is to interpret fundamental rights in specific circumstances rather than in the abstract. This focuses the inquiry on ‘the question of what interests parties have in applying a particular fundamental right’, ie, to more specific interests rather than merely rights in general.²⁰⁷

The state implements an enforcement mechanism or imposes an order at the request of and to further the private interest of an IPR holder. This essentially portrays a horizontal clash of interest as a vertical one. For example, in website blocking the basis for applying the EUCFR and proportionality analysis is the vertical provision in Article 8(3) of the Infosoc Directive and the corresponding Enforcement Directive provisions. This avoids portraying the balancing situation as a horizontal fundamental rights conflict, which might more easily invite parties to contest the horizontal direct

²⁰⁶ *Ibid*, 25–26.

²⁰⁷ Besselink, ‘The Protection of Fundamental Rights Post-Lisbon’ (n 109) 21. In consequence, both terms are mentioned to underline the need for more depth rather than simply abstract rights.

and/or indirect effect of the directives.²⁰⁸ The EUCFR is likewise applied to other mechanisms, as they fall within the scope of EU law. Nonetheless, both public and private interests affecting the evaluation of these provisions should be considered and distinguished.

The private interests at stake are very significant. So far the CJEU has had a tendency to resolve these issues as limitations of fundamental rights rather than as a matter of secondary legislation.²⁰⁹ The protection of property and the right to effective remedy of IPR holders (Articles 17 and 47 EUCFR), the freedom of expression of users (or information, Article 11 EUCFR), privacy and the protection of personal data (Articles 7 and 8 EUCFR), the freedom of intermediaries to conduct a business (Article 16 EUCFR), and the website operator's rights (such as the right to a fair trial, Article 47 EUCFR) may be impacted.²¹⁰ As will be observed, the users and website operators are typically not consulted, and their interests must be otherwise considered.²¹¹

An associated public interest can usually also be detected behind each private interest – and likewise public interests are affected by the most prominent private interests. There may also be other public interests. For example, in *UPC Telekabel Wien* freedom of expression in general and the democracy principle were explicitly accepted as public values to be afforded protection.²¹² Other so-called collective goods or social functions may also be identified; these may limit excessive tendencies of IPR through fundamental rights balancing.²¹³ States must also provide adequate protection against

²⁰⁸ Daniel Sarmiento, email correspondence to author (13 May 2014). Nonetheless, even if the situation was considered horizontal, the EUCFR could be applied to the interpretation of existing provisions; see Section 3.2.3.

²⁰⁹ Husovec, 'CJEU allowed website-blocking injunctions with some reservations' (n 23) 632, although in *Scarlet Extended* (n 202) para 40 it was held that the secondary legislation prohibited such general monitoring; fundamental rights evaluation did not change this finding; see Mylly, 'The constitutionalization of the European legal order' (n 119) 114–16; Article VI (para 31 note 59). The interpretation of substance provisions of secondary legislation is discussed in Section 3.1 and principles in Section 3.4.

²¹⁰ *Scarlet Extended* (n 202) paras 46–52; *UPC Telekabel Wien* (n 44) paras 47, 49–50, 55–56 and *UPC Telekabel Wien (Opinion)* (n 22) paras 81–82. On copyright (now) being placed on a level playing field alongside other fundamental rights and 'construction of a broader conceptual arena where conflicting rights can openly vie against each other on equal terms', see Angelopoulos, 'Are blocking injunctions against ISPs allowed in Europe?' (n 8) 814 and references. In contrast, Mylly, 'The constitutionalization of the European legal order' (n 119) 116, 130–31 calls for recognising some rights as more important than others.

²¹¹ Sandfeld Jacobsen and Salung Petersen (n 100) 181.

²¹² *UPC Telekabel Wien* (n 44) para 56, more explicitly in *UPC Telekabel Wien (Opinion)* (n 22) paras 82, 108. In particular, the measures should only affect illegal material according to *Yildirim v Turkey* (n 126).

²¹³ See eg Mylly, 'Intellectual property and fundamental rights: Do they interoperate?' (n 119) 190–93; Christophe Geiger, 'Fundamental rights, a safeguard for the coherence of intellectual property law?' (2004) 35 IIC 268, 270; Christophe Geiger, 'The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP law' in Graeme B Dinwoodie (ed), *Intellectual Property Law: Methods and Perspectives* (SSRN Version, Edward Elgar 2013) 10–11, 19–20. Different conceptions of the social function also affect the conclusions derived (*ibid*). In general, see Geiger, 'Constitutionalising' intellectual property law?' (n 119) 385–89, 397–406. The social function of property rights is also acknowledged in Case C-280/93 *Germany*

the conduct of private parties that violate the rights of others to avoid being in breach of EU law. This includes providing access to effective remedies for infringement.²¹⁴ What precisely ‘effective’ requires is open to debate.²¹⁵

The website operator’s rights have usually been given little weight. The right to a fair trial in particular is impacted especially if the operator actually wanted to appear in court. So far, the operators have typically remained anonymous, evaded the summons (if any), and have not asserted their rights. Indeed, in practice the rights are relevant in the case of assertion. However, procedural rules typically require that courts must still consider operator interests to some degree, because they are not otherwise represented. This may also incur delays and complexity in case management.²¹⁶

Typically only the IPR holder and the intermediary are parties to the proceedings.²¹⁷ This provides for a further argument against treating this case as a horizontal conflict of interest: private party autonomy cannot be asserted, given that not all the affected parties are present or even summonsed.²¹⁸ Further, even if parties to the proceedings

v Council EU:C:1994:367, para 78. See also Griffiths, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (n 119) 67.

²¹⁴ The principle of effective remedies at least traditionally applies only to procedural and remedial situations. Given that there are specific provisions of injunctions in substantive law, the applicability of the principle is questionable; see Section 3.2.3 and Leczykiewicz (n 193) 486–87, also referring to Case 222/86 *Unectef v Heylens* EU:C:1987:442, para 14; Case 222/84 *Johnston v Chief Constable* EU:C:1986:206, para 18. More generally, the principle of effectiveness has been argued to possibly result in unexpected legal obligations, unexpected remedies, and unexpected lack remedies, the extent of which depend on the methods of interpretation at the national level; see Peter Rott, ‘The Court of Justice’s Principle of Effectiveness and its Unforeseeable Impact on Private Law Relationships’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013) 186–88, 196. In general, see also Tridimas, *The General Principles of EU Law* (n 165) 450–52.

²¹⁵ Article 47 EUCFR could be argued to apply if a Member State fails to protect the substantial rights at issue; however, this should only occur in exceptional cases; see Chantal Mak, ‘Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters’ in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 243, 253. For example, being able to file a request to impose orders to an intermediary established in the state for activities occurring outside EU territory might be sufficient, as supported by *UPC Telekabel Wien (Opinion)* (n 22) para 57; see n 43. In contrast, it would be paradoxical if ‘effectiveness’ required that requests be granted.

²¹⁶ From the procedural perspective, this was briefly discussed previously in n 94. See Husovec, ‘Injunctions against Innocent Third Parties’ (n 8) paras 33–38, and in UK case law the court’s acknowledged duty to consider unrepresented parties; see Article VI (paras 48–49) and *Dramatico Entertainment (no 2)* [2012] EWHC 1152 (Ch), para 11. On websites funded by advertisement income being within the scope of the E-Commerce Directive and being subject to the requirements of Article 5 on providing particular contact information, see Case C-291/13 *Papasavvas* EU:C:2014:2209, paras 26–30.

²¹⁷ See Article III (at 893–95) and as a case for restraint, Article IV (at 287); Sandfeld Jacobsen and Salung Petersen (n 100) 171–75. Like *ibid*, 173–74, Daly (n 48) 201, observes that the ISP usually has no incentive to fight such applications. This will be discussed further in Section 4.2.1.

²¹⁸ Similarly in *Godt* (n 110) 215, ‘in contrast to the founding principles of private law, private autonomy and contractual freedom, IP is in essence regulatory’. See also Micklitz, ‘Introduction’ (n 120) 17.

were in agreement, they could not dispose of public interest or the rights of others.²¹⁹ These varying interests are illustrated in Table 3.1. While the private/public division is somewhat problematic, for example because the public interest is dictated by particular private interests, the table illustrates different perspectives without any normative implications.²²⁰

Table 3.1: Private and public interests for the stakeholders

	Private interests	Public interests
IPR holder	Protection of property, effective protection	Sufficient protection, innovation policy, culture
Connectivity provider	Freedom to conduct a business (and protection of property)	Market economy, network neutrality
User	Freedom of expression, protection of personal data	Democracy, freedom of expression in general, culture
Website operator	Freedom of expression, fair trial (and business freedom)	Enforcing national policies on foreign sites

3.3.2 Finding a balance

In fundamental rights conflicts, higher protection offered to one party's interest usually implies lower protection to another person's interest.²²¹ Further, comparison between the level of protection offered to multiple rights is usually difficult. It may also be difficult to compare the balance between legal systems (such as national and EU fundamental rights systems). That is, the level of protection of EU law, or more precisely the emphasis on the right balance, might differ from the national

²¹⁹ By contrast, basing blocking increasingly on private agreements seems to have been on the rise, especially in the USA, the UK, and Ireland; see Annemarie Bridy, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89 Oregon LR 81; Intellectual Property Office, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (9 February 2015) (<https://www.gov.uk/government/publications/international-comparison-of-approaches-to-online-copyright-enforcement>) 6.

²²⁰ The private/public division is already being reformulated through EUCFR (Mak (n 215) 232), 'gradually fading away' (Micklitz, 'Introduction' (n 120) 5, similarly in Walkila (n 177) 227), or 'often difficult to separate' (Myly, 'Intellectual property and fundamental rights: Do they interoperate?' (n 119) 193); see also Claes (n 175) 43–44; Walkila (n 177) 255, 262.

²²¹ That is, few if any cases can be addressed with a Pareto improvement, making at least someone better off without making anyone else worse off. Instead, a Kaldor-Hicks improvement is needed, trading off one interest with smaller societal benefit to another with bigger benefit; see Husovec, 'Injunctions against Innocent Third Parties' (n 8) para 27; Besselink, 'The Protection of Fundamental Rights Post-Lisbon' (n 109) 46; Ladenburger (n 111) 25. Fundamental rights conflicts can be classified as 1) between one person's different rights, 2) between the same right of different persons, and 3) between different rights of different persons, with only the last usually being of particular interest. See Martin Scheinin, 'Perusoikeuskonfliktit' in Tuuli Heinonen and Juha Lavapuro (eds), *Oikeuskulttuurin eurooppalaistuminen. Ihmisoikeuksien murroksesta kansainväliseen vuorovaikutukseen* (Suomalainen Lakimiesyhdistys 2012) 127–32.

fundamental rights system. For example, if the same case had been decided based on national fundamental rights alone, a different prevailing right might have been chosen. Nonetheless, the primacy of EU law usually prevails in such a case.²²² In consequence, the national court must remain within the minimum and maximum constraints and the guidelines for proportionality provided by EU law.²²³ Ideally, one could identify how various rights should be balanced from CJEU case law. The scarcity of relevant rulings and the terseness of the reasoning makes this difficult, however.²²⁴

The CJEU has had a tendency to only provide partial answers in these IPR enforcement cases, affording national legislation and courts rather wide discretion. EU case law also typically only provides hints as to how to balance the total rather than just one right at a time. Therefore, the CJEU essentially only provides a number of constraints, allowing the issues to be dealt with in national systems.²²⁵ Further, the approach of the CJEU with open-ended orders in *UPC Telekabel Wien* appeared to pass the ‘hot potato’ of evaluation and figuring out how the balance could be achieved to the intermediaries.²²⁶

From the perspective of the CJEU, Figure 3.3 demonstrates the deference that results in a discernible zone of proportionality between minimum protection (inner circle) and maximum protection (outer circle) for the national law. That is, the maximum protection implies the threshold when another right would be infringed

²²² See the earlier discussion on overlapping fundamental rights systems starting from n 198 and Sarmiento, ‘Who’s afraid of the charter?’ (n 75) 1296. Similarly on difficulty of ‘multi-level’ balancing, see Besselink, ‘The Protection of Fundamental Rights Post-Lisbon’ (n 109) 24, 46, though calling for ‘creating the necessary space’ and ‘taking into account locally differentiated preferences’ as increasing the legitimacy of balancing values.

²²³ See Husovec, ‘Injunctions against Innocent Third Parties’ (n 8) paras 7–8; Peukert, ‘The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature’ (n 148) 134; Husovec and Peguera (n 8) 16–20, 31; *UPC Telekabel Wien* (n 44) paras 46–47. Even though according to Article 2, the Enforcement Directive is a minimum directive for the benefit of IPR holders, fundamental rights and Article 3 may in some cases restrict more extensive protection provided by national law.

²²⁴ For criticism of the CJEU’s succinct reasoning in the context of IPR, see eg Mylly, ‘Intellectual property and fundamental rights: Do they interoperate?’ (n 119) 210–13; Griffiths, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (n 119) 74, 76–78; Peukert, ‘The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature’ (n 148) 134; Angelopoulos, ‘Are blocking injunctions against ISPs allowed in Europe?’ (n 8) 815, 818. AG Opinions are a bit better in this respect, but their authoritative value is suspect, especially when the CJEU does not adopt the solution proposed and/or uses different arguments. In general, see Bobek (n 22).

²²⁵ On the different styles of answering and the associated deference, see Section 3.2.1 and more precisely n 107 onward.

²²⁶ Angelopoulos, ‘Are blocking injunctions against ISPs allowed in Europe?’ (n 8) 817–18. This ‘a rather tall order’ was criticised as being difficult to achieve. Such shifting of responsibility is also likely to result in the provider choosing the cheapest and the easiest path by accepting the requests of IPR holders. Likewise and going further in criticism, see Mylly, ‘The constitutionalization of the European legal order’ (n 119) 121–22. This role is also discussed in Section 5.2.

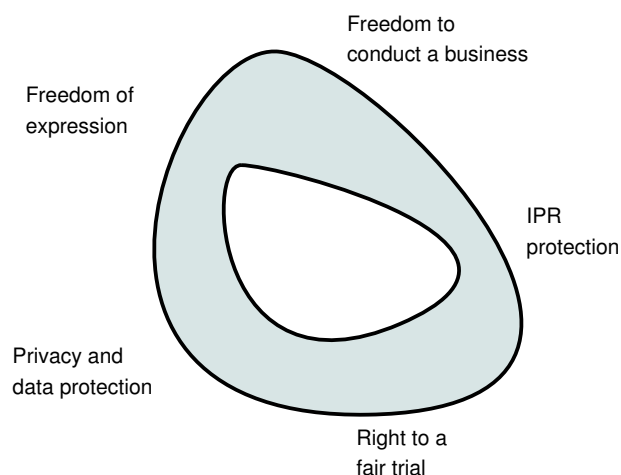


Figure 3.3: Minimum and maximum limits of rights in balancing

through underprotection.²²⁷ Because the exact balance of various interests differs from case to case, the limits may have their maximums and minimums at different spots. In consequence, instead of two uniform circles, the case law ‘stretches’ the limits in various directions.

Another issue is how the fundamental rights of various parties are taken into account in interpretation. Specifically, do they have independent argumentative power or are they only the final guardians against the most egregious violations in secondary legislation? The majoritarian view is that the rights in the EUCFR as well as the limitations clause of Article 52 do provide input for interpreting the secondary legislation.²²⁸ On the other hand, O’Sullivan has recently essentially argued that secondary legislation already incorporates the rights at issue and the focus must be on discerning the interpretation of IPR enforcement principles to be examined in Section 3.4.²²⁹ While I disagree with the general premise that the impact of fundamental

²²⁷ The margin was also illustrated in the overlap of norms; see Figure 3.2 in Section 3.2.3. For general discussion of binding minimum and maximum limits of injunctive relief in this context, see n 223 and references.

²²⁸ As noted, the CJEU has had a tendency to resolve these issues as interpretations of fundamental rights rather than through secondary legislation. See Husovec, ‘CJEU allowed website-blocking injunctions with some reservations’ (n 23) 632. Since then, Husovec and Peguera (n 8) 18 have submitted that even if there was no fundamental rights issue, the inadmissibility of very ineffective blocking should also be possible. In this way, ‘socially wasteful enforcement practices can be outright prevented’. Further, although it is mostly political, see Council of the European Union, ‘EU Human Rights Guidelines on Freedom of Expression Online and Offline’ (12 May 2014) (http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf) 2, 5, 18, claiming that blocking access to websites for copyright protection could constitute a disproportionate restriction of freedom of opinion and expression, referring to a three-part proportionality test with similarities to that employed by the CJEU. See Husovec and Peguera (n 8) 30–35 for more discussion, and Mylly, ‘The constitutionalization of the European legal order’ (n 119) 128–30 on criticism of constitutionalism if it is only used as ‘window-dressing’.

²²⁹ O’Sullivan (n 175) 581–83.

rights would essentially be exhausted during the legislative phase, this may only be an issue of nuance when it comes to the conclusion.²³⁰

3.3.3 The level of protection

Intellectual property rights are not absolute, and it is impossible to protect them completely using enforcement.²³¹ Therefore, trying to find the least restrictive means to eliminate or even to provide maximal protection against IPR infringement seems misguided. This was emphasised in *Scarlet Extended* and affirmed in *UPC Telekabel Wien* very explicitly:²³²

There is, however, nothing whatsoever in the wording of [Article 17(2) EUCFR stating that ‘Intellectual property shall be protected’] or in the Court’s case-law to suggest that that [intellectual property] right is inviolable and must for that reason be absolutely protected.

A better question is to ask what degree of IPR enforcement is deemed appropriate when balanced against other issues, in particular other fundamental rights.²³³ However, even formulating the goal as seeking the most effective protection possible within the constraints imposed by other fundamental rights does not really take any stance on the balance of rights and only avoids defining the actual goal.²³⁴ This reflects the

²³⁰ That is, it might not matter that much whether the conclusion is presented as ‘Article 3 of the Enforcement Directive, to be interpreted in the light of the EUCFR, should be interpreted as imposing certain limitations on the interpretation of the law’ rather than more directly as ‘the EUCFR imposes certain limitations on the interpretation of the law’.

²³¹ For example, Lemley and Reese (n 3) 1389–90, with references, describe how infringement has always been a feature of the IPR landscape, how ‘content industries merely need sufficient incentive to create new works’, and that ‘weeding out all infringement is not cost-effective’, ‘would impose in dramatic social costs to gain dubious benefits’, and that ‘the real policy question is how to bring infringement down to manageable level [...] in conjunction with attractive and reasonably priced alternatives’.

²³² *Scarlet Extended* (n 202) para 43; *UPC Telekabel Wien* (n 44) para 61. Also similarly in *UPC Telekabel Wien (Opinion)* (n 22) paras 75–76, 79–81. For earlier discussion, see eg Mylly, ‘Intellectual property and fundamental rights: Do they interoperate?’ (n 119) 200.

²³³ See n 231 and Lemley and Reese (n 3) 1374 fn 111: ‘Even if it was legally possible, it simply was not economically rational to stop the end users’ and ‘the optimal level of infringement is likely greater than zero’. See also Feiler (n 32) 74–75, for instance. One way to answer this is to conclude that rights are in some cases practically unenforceable. Alternatively, whether the extension to enforcement is justified must be evaluated. See Husovec, ‘Injunctions against Innocent Third Parties’ (n 8) para 26; Alexandra Sims, ‘The denial of copyright protection on public policy grounds’ (2008) 30 EIPR 189. Compare this to n 128 on ECtHR models of justification in IPR disputes: in that context, the rule of law paradigm (prohibiting only excessive national solutions) seemed to be stronger than enforcement or balancing paradigm.

²³⁴ With such an ambiguous ‘maximalist’ formulation, any mechanism providing more than a marginal increase in IPR protection would automatically pass the suitability test; see Barak (n 130) 305. On problems with maximalist formulations, see eg Mylly, *Intellectual Property and European Economic Constitutional Law* (n 119) 205.

underlying (and unresolved) policy issue on the level and constraints on enforcement an IPR holder is entitled to.²³⁵

Rather than trying to find the most effective means in general, one should survey the means and their trade-offs, including effectiveness, cost, restrictions on others' rights, and other impacts. The appropriate balance between some degree of enforcement using a specific means and other rights can then be considered. For example, in *UPC Telekabel Wien* imposing a generic website blocking order incurred judicial review requirements to the national procedure in order to ensure proportionality evaluation. This was noted more explicitly in the Advocate General's Opinion that proportionality cannot be evaluated if the necessary measures could not be reviewed.²³⁶ In contrast, another prediction of the practical consequences has been that generic blocking orders will become more commonplace, because requesting and imposing them seems easier and more effective for the court and the IPR holders.²³⁷ However, if courts are aware of the resulting requirements for the procedural law, they might continue to prefer specific orders – or even stop issuing generic ones.²³⁸

3.4 IPR enforcement principles

3.4.1 General observations

Since there are many different conceptions of the meanings of legal principles, a clarification may be in order.²³⁹ The most significant issue here is that principles may be directly posited by enactment or created indirectly.²⁴⁰ In this context, the principles

²³⁵ This question 'what amounts to a reasonable level of enforcement' is difficult even in the *de lege ferenda* sense. For example, Hargreaves (n 60) 81 refers to a form of the cost-benefit framework developed by WIPO, but observes that the data to evaluate it is lacking.

²³⁶ *UPC Telekabel Wien (Opinion)* (n 22) paras 66, 81–86, 88. This was also submitted by the Commission.

²³⁷ Mylly, 'The constitutionalization of the European legal order' (n 119) 122.

²³⁸ Similarly, see Husovec, 'CJEU allowed website-blocking injunctions with some reservations' (n 23) 633; Angelopoulos, 'Are blocking injunctions against ISPs allowed in Europe?' (n 8) 820–21.

²³⁹ For example, Ralf Poscher, 'The Principles Theory: How Many Theories and What is their Merit?' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) describes numerous principle theories being about 1) the concept of law, 2) norms, 3) adjudication, 4) argumentation, or 5) fundamental rights doctrine. Tuori, *Ratio and Voluntas* (n 108) 189 distinguishes decision principles, interpretation principles, general legal principles, source principles, and legislative background principles; Aulis Aarnio, *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics* (Ashgate 1997) 177–78 has a similar yet somewhat different classification. For Finnish summaries, see eg Janne Kaisto, *Lainoppi ja oikeusteoria: Oikeusteorian perusteista aineellisen varallisuus oikeuden näkökulmasta* (Edita 2005) 72–78; Sampo Mielityinen, *Vahingonkorvaus oikeuden periaatteet* (Edita 2006) 60ff.

²⁴⁰ For example, principles for Dworkin are a joint product of legal rules, decisions, and moral principles. For Alexy, principles can be created either directly or indirectly. In 'indirect' conceptions, legal principles may be treated as distinct from legal rules. For a summary, see Larry Alexander, 'Legal Objectivity and the Illusion of Legal Principles' in Matthias Klatt (ed), *Institutionalized*

are directly posited and therefore constitute legal rules.²⁴¹ For simplicity, they could also be called ‘principle-like rules’.²⁴²

In this context, principles are best conceived as Alexy’s optimisation requirements, meaning that they can be satisfied to varying degrees. The appropriate degree depends on what is factually and legally possible. The legal possibilities are determined by the opposing principles and other rules.²⁴³ As was discussed in Section 3.2.2, the epistemic question and certainty of what is factually possible and its predicted impact are also crucial here. Dworkin’s model is somewhat similar to Alexy’s, but he emphasises rights triumphing over policy considerations.²⁴⁴ While balancing is not a panacea, it adds structure to adjudication, increases the transparency and rationality of decisions and seems to be better than the alternatives.²⁴⁵

Finally, it is important to identify the principles in both EU and national law that would apply to the interpretation of the legal basis and rights and interests in question. Further, national principles may need to be interpreted differently within the scope of EU law from applying them to purely domestic measures: this will be the case with copyright enforcement.²⁴⁶

3.4.2 Multi-faceted IPR enforcement principles

From EU perspective, the foremost source is applying the EUCFR and the general principles of law.²⁴⁷ However, these are typically so generic that ‘intermediate’ principles would be useful in making the application more concrete.²⁴⁸ In the context of IPR

Reason: The Jurisprudence of Robert Alexy (OUP 2012) 118–23; Tuori, *Ratio and Voluntas* (n 108) 189.

²⁴¹ In consequence, some of the more philosophical and/or theoretical discussions regarding rules versus principles do not apply. See eg Aarnio, *Reason and Authority* (n 239) 174–86.

²⁴² See eg Pirker (n 105) 51–52; Aarnio, *Reason and Authority* (n 239) 179–80; Kaisto (n 239) 78.

²⁴³ Alexy (n 133) 47–48; Pirker (n 105) 48–51. Balancing can still be useful even though one can certainly disagree with some parts of Alexy’s theory, such as the prima facie equal footing of all the relevant interests and the possibility and reasonableness of assigning weights to interests with mathematical precision; see, Matthias Jestaedt, ‘The Doctrine of Balancing – its Strengths and Weaknesses’ in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 163–65. Also, in Pirker (n 105) 44: ‘One may wonder whether such a representation of reality by means of seemingly objective mathematical formulae adds much to the understanding of what an adjudicator actually has to do to reach a satisfactory resolution to a value conflict.’ For other critiques, see eg *ibid*, 31–38, 44; Lavapuro (n 146) 94–103, 112–19, 250–52.

²⁴⁴ Dworkin, *Taking Rights Seriously* (n 131) xi, 83–84, 90–93; Pirker (n 105) 19. This has similarities to the argument by Habermas (n 148) 256ff.

²⁴⁵ For criticism and replies, see eg Barak (n 130) 481ff; Jestaedt (n 243).

²⁴⁶ See Section 3.3.2 and more precisely n 222.

²⁴⁷ The latter not being that relevant anymore, see n 171 onward. As observed in Husovec, ‘CJEU allowed website-blocking injunctions with some reservations’ (n 23) 632, the CJEU has had a tendency to resolve these issues as balancing the fundamental rights rather than as a matter of interpreting secondary legislation. This may be due to the ambiguous nature of principles and deference afforded to national courts.

²⁴⁸ In the *de lege ferenda* context, proposals have been made, for example, for a new more balanced TRIPS agreement also incorporating explicit balancing principles. See eg Marianne Levin, ‘A

enforcement, these can be found in the Infosoc and Enforcement Directives.²⁴⁹ On the other hand, these principles do not exhaust the general application and argumentative power of the EUCFR.²⁵⁰

UPC Telekabel Wien applied Recital 9 as a requirement to ensure ‘a high level of protection’ to argue that website blocking orders may be imposed on user-end providers. This embeds the idea of the principle of effectiveness, since categorically excluding all such providers would substantially diminish the level of protection.²⁵¹ This may be read as endorsing at least some degree of effectiveness, especially when reasonable alternatives do not exist. While this may be convincing for subscriber information disclosure requests, the argument does not fully apply to website blocking, since blocking or disconnecting the website could technically be implemented by other providers as well.²⁵²

When it comes to website blocking, the Infosoc Directive does not provide explicit guidance on how to balance Article 8(3) injunctions. While Art 8(1) particularly requires effective and dissuasive *sanctions* against *infringers*, these do not apply to faultless intermediaries. Recitals are essentially the only, yet unhelpful source of

Balanced Approach on Online Enforcement of Copyrights’ in Johan Axhamn (ed), *Copyright in a Borderless Online Environment* (Norstedts Juridik 2012) 159–60 with references.

²⁴⁹ The directives have a number of recitals that could be read to support either weaker or stronger enforcement (see n 268). Here, the focus is on explicit statutory provisions rather than non-binding and ambiguous recitals. In contrast, Ladenburger (n 111) 9 describes the Commission’s legislative requirement, adopted later, that ‘fundamental rights recitals’ must be elaborated, including where appropriate, even the solutions found to respect the rights. A section on how the obligations have been met must also be included in the Explanatory Memorandum.

²⁵⁰ Cf. O’Sullivan (n 175) 581–83, who argues for interpreting the obligations for ISPs solely through secondary legislation, rather than the rights and limitations of the EUCFR. According to him, the EUCFR has a role to play ‘where a judge over-steps the mark by going outside the criteria of Article 3 of the Enforcement Directive’, reducing it to a safety-valve against erroneous judicial discretion. As we saw, this approach must be rejected.

²⁵¹ *UPC Telekabel Wien* (n 44) paras 33–35, with references to the earlier case law (for which, see n 73). A ‘high level’ of protection is however dubious for arguing for an essentially ‘even higher’ level of protection, because the previously adopted standards are already ‘high’ or even arguably too high. See eg Bernt Hugenholtz, ‘The dynamics of harmonization of copyright at the European level’ in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and new perspectives* (Edward Elgar 2013) 275–76; Geiger, ‘Constitutionalising’ intellectual property law?’ (n 119) 376–81; Griffiths, ‘Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law’ (n 119) 68; Farrand, *Networks of Power in Digital Copyright Law and Policy* (n 60) 93–94. Further, Martin-Prat (n 32) 32 notes that there *was* (emphasis added, meaning at the time of adoption) general acceptance of a high level of protection, but that future copyright reviews ‘may be very different in that respect’. For critically of maximalist tendencies and on Recital 9 as having become an ‘institutionalized dogma’ for the CJEU, see Mylly, ‘Intellectual property and fundamental rights: Do they interoperate?’ (n 119) 200, 206–07 and Mylly, ‘The constitutionalization of the European legal order’ (n 119) 119. On different readings of ‘high’ or ‘low’ protection, Marcus Norrgård, ‘The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property Rights’ (2005) 6 ERA Forum 503, 507–11 and n 268.

²⁵² In *LSG* (n 46) para 45, this ‘the only possibility’ argument seemed to be decisive for subscriber information disclosure requests, because the user-end connectivity provider was the only one with the required information. On different options, see Section 3.1.3 and Figure 3.1 in particular.

interpretation. Looking further, it seems reasonable to conclude that the principles of the Enforcement Directive can also be applied to the identical copyright injunctions given that the same provisions also exist in that directive.²⁵³

Article 3 of the Enforcement Directive applies to (all) measures, procedures and remedies necessary to ensure the enforcement of IPRs covered by the Directive.²⁵⁴ These shall be ‘fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays’, and also ‘effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse’.²⁵⁵

Since it is challenging to realise all of these at the same time, case-by-case balancing will be needed.²⁵⁶ This should be understood to require considering the general characteristics of different kinds of services (ie, conducting typology), rather than focusing on non-generalisable individual patterns.²⁵⁷ In Table 3.2, these are classified as ‘Pro-IPR’, ‘Neutral’ and ‘Contra-IPR’ principles. However, it must be noted that in different interpretative contexts, for example, against any infringer or a third party, the principles could have an entirely different meaning and, in consequence, this classification serves only as a simplified illustration.²⁵⁸ For example, ‘not unnecessarily costly or complicated’ could also be construed to mean that the procedure should be easy and cheap for the IPR holder (rather than that the injunction must not be too burdensome to the intermediary).²⁵⁹ Similarly, it could be argued that in some cases it would be disproportionate for the right holder to be denied an injunction

²⁵³ An alternative interpretation would be that given that the Enforcement Directive does not prejudice the Infosoc Directive, the injunctions issued could in some cases be different. While strictly speaking such a reading is possible, the interpretation of identical provisions should not depend on which directive is used as the legal basis.

²⁵⁴ The chapter is titled ‘Measures, procedures and remedies’, Section ‘General provisions’, and Article ‘General obligation’. For example, Sylvia Mercado Kierkegaard, ‘Taking a sledgehammer to crack the nut: The EU Enforcement Directive’ (2005) 21 CLSR 488, 491 has characterised these as ‘safeguards against misuse of the new measures’ due to ‘[a] big problem created by the lack of proportionality’, because the directive applies to every kind of infringement, even minimal, based on the broad scope of Article 2. Likewise, Mylly, *Intellectual Property and European Economic Constitutional Law* (n 119) 267 has criticised the directive as reflecting ‘one-sided proprietary logic’.

²⁵⁵ On a recent evaluation of these in a national setting, see *Cartier* (n 35) paras 158–91 and as summarised in n 265. Cf. the case on trademark infringement, in which the AG did not see that EU law would impose any specific requirements beyond the efficacy, dissuasiveness and proportionality required by Article 3(2); see *L’Oréal v eBay (Opinion)* (n 9) para 180. In that context, however, dissuasiveness could be interpreted as being directed against the infringer or as the requirement of the hosting provider to honour the obligations and requirements of the liability exemption; ie, the repercussions of failure to comply with acting upon awareness of illegality.

²⁵⁶ On case-by-case consideration, see *Enforcement Directive* (n 72) Recital 17.

²⁵⁷ See Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 36) 157. That is, evaluating each case strictly on its own would lead to legal uncertainty and the case law would not be developed.

²⁵⁸ The interpretations have been taken mainly from *Scarlet Extended* (n 202).

²⁵⁹ *Ibid* para 48. For example, Pihkala (n 70) 978 argues that ‘not costly’ means that the implementation costs should be borne by the provider.

(rather than that the injunction must strike a fair balance between protection of IPR and other rights).²⁶⁰ On the other hand, the ‘effectiveness’ requirement could also be read negatively to mean that non-effective mechanisms must be rejected.²⁶¹ Yet another reading is that at least seriously discouraging measures would be required, even if implementing them incurred significant cost to the provider.²⁶² A positive and more widely held reading is that effective mechanisms should be provided, but ineffective ones may be also acceptable (*maius includit minus*), provided that a fair balance between rights is struck.²⁶³ Likewise, ‘no barrier to legitimate trade’ could also be construed to imply reluctance against intra-EU market fragmentation by imposing different requirements on website operators in a patchwork of jurisdictions.²⁶⁴ It will remain to be seen how interpretations will develop in the case law.²⁶⁵

As was already observed, according to Article 2(1), a Member State may provide stronger enforcement only ‘in accordance with Article 3’, ie, the balance must be maintained.²⁶⁶ In practice, this may be somewhat toothless as a yardstick of evaluation because of the discretion in interpretation of ambiguous principles including that of ‘fair balance’.²⁶⁷ In theory, it is a very significant provision. In any case, the most

²⁶⁰ *Scarlet Extended* (n 202) paras 49–53.

²⁶¹ Such reasoning is assumed by Feiler (n 32) 61–62, and is supported in Husovec, ‘CJEU allowed website-blocking injunctions with some reservations’ (n 23) 633, based on *UPC Telekabel Wien* (n 44) para 63, arguing that ‘blocking injunctions must be probably so effective that they at least partially prevent and ‘seriously discourage’ access to a targeted website’ (emphasis in Husovec).

²⁶² This seems implicit in, for example, Gemma Minero, ‘Case Note on “UPC Telekabel Wien”’ (2014) 45 IIC 848, 850.

²⁶³ However, the one-sided argument in O’Sullivan (n 175) 581–82 that effectiveness should be judged solely from the perspective of the IPR holder, and ineffectiveness would likewise raise no proportionality issue for the ISP must be rejected.

²⁶⁴ See Feiler (n 32) 68–69 and on the (non-)applicability of restrictions on fundamental freedoms, n 32 and corresponding text. This could possibly be read between the lines in *UPC Telekabel Wien (Opinion)* (n 22) para 57 (see n 43).

²⁶⁵ In *Cartier* (n 35) paras 158–91, the national court made essentially the following interpretations on trademark infringement: *necessary* requires considering whether less onerous alternative measures are available (para 162); *effectiveness* is an important factor for proportionality, but it does not require the IPR holder to show that injunction would reduce the overall amount of infringement as long as the measure is not wholly ineffective; substitutability is also a factor of proportionality (164, 173, 176); *dissuasive* refers to the dissuasive effect on the third parties (178); *not unnecessarily complicated or costly* does not bar even complex or costly measures completely provided that they are proportionate (181); *avoidance of barriers to legitimate trade* means that the measures must be strictly targeted so that they do not affect lawful communications (182); *fair and equitable* refers to a proportionate balance (183); *proportionate* requires proportionality analysis according to the criteria established (189–90, of these see Section 4.1.6 and n 19 therein); *safeguards against abuse* in this case implied that anyone affected could apply to vary or discharge the order, users should be notified of blocking on a web page if possible, and that duration of blocking should be limited (262–65).

²⁶⁶ See n 55 and corresponding text. See also Norrgård, ‘The Role Conferred on the National Judge’ (n 251) 506. Further, as discussed in Section 3.3.2, other fundamental rights also limit the extent of maximum protection.

²⁶⁷ Angelopoulos, ‘Are blocking injunctions against ISPs allowed in Europe?’ (n 8) 815, 818. For example, Kierkegaard (n 254) 491 submits that Article 3 is too abstract and will result in different implementations in each EU country.

important implication of Article 2(1) is that it will, alongside other grounds, oblige the evaluation of non-mandatory national measures (such as graduated response or subscriber information disclosure) against these principles and EU fundamental rights.

Table 3.2: Enforcement principles when applied to third parties

Pro-IPR	Neutral	Contra-IPR
effective dissuasive no time-limits no delays	fair equitable not abusible no barriers to trade	proportionate not complicated not costly

Norrgård observed in 2005 that the national judge could reasonably adopt both a weak or strong enforcement ideology based on the discretion granted by the Enforcement Directive.²⁶⁸ Balanced interpretation was suggested based on the principles of Article 3, fundamental rights, context-sensitivity, and the comparative method.²⁶⁹ These have since then materialised in CJEU case law. Similarly, Ohly later underlined the need for proportionality to balance effectiveness and dissuasiveness, referring to taking due account of the specific characteristics of the case as noted in Recital 17.²⁷⁰

To conclude, it is important to note that both the Infosoc and Enforcement Directives have primarily been geared toward infringers. For example, applying the principles of effectiveness and dissuasiveness against a faultless intermediary is questionable.²⁷¹ Indeed, in his Opinion in *L'Oréal v eBay*, Advocate General Jääskinen was not convinced that the identical scope of injunctions available against the intermediary and the infringer would be a reasonable interpretation of Article 11 of the Enforcement Directive.²⁷² Context-sensitivity of Recital 17 and arguments by Norrgård and Ohly would also suggest caution with regard to third-party injunctions.²⁷³ Further,

²⁶⁸ Norrgård, 'The Role Conferred on the National Judge' (n 251) 507–11. Norrgård's argument was also referred to in *L'Oréal v eBay (Opinion)* (n 9) para 171, repeated in Birgit Clark and Maximilian Schubert, 'Odysseus between Scylla and Charybdis? The ECJ rules in *L'Oréal v eBay*' (2011) 6 JIPLP 880, and now applied in the new context of the 'Scylla and Charybdis of technical limits and legal requirements' in Angelopoulos, 'Are blocking injunctions against ISPs allowed in Europe?' (n 8) 820.

²⁶⁹ Norrgård, 'The Role Conferred on the National Judge' (n 251) 511–14.

²⁷⁰ Ansgar Ohly, 'Three principles of European IP enforcement law: effectiveness, proportionality, dissuasiveness' in Josef Drexler and others (eds), *Technology and Competition, Contributions in Honour of Hanns Ullrich* (SSRN version, Larcier 2009) 7–8, 11, 15.

²⁷¹ Cf. Toby Headdon, 'Beyond liability: On the availability and scope of injunctions against online intermediaries after *L'Oréal v eBay*' (2012) 34 EIPR 137, 139, seems to implicitly accept dissuasiveness with respect to intermediaries. He interprets it in the context of disobeying the court order and being in contempt of the court. On the other hand, in *Cartier* (n 35) paras 178–79 this was deemed to refer to the general dissuasive effect against the potentially infringing third parties such as the public. See also n 255.

²⁷² *L'Oréal v eBay (Opinion)* (n 9) paras 176–77. In contrast, in *Cartier* (n 35) para 173 greater effectiveness against intermediaries than infringers was not required; this was not substantiated.

²⁷³ Norrgård, 'The Role Conferred on the National Judge' (n 251) 514. Actually, Norrgård describes only four types of infringers covered by the directive (and not third parties at all) as imposing

the notions attached to injunctions are different and comparisons difficult between infringers and intermediaries as well as between legal systems.²⁷⁴

3.5 Proportionality evaluation procedure

In order to demonstrate and summarise the foundations presented in this chapter, an approach to evaluating proportionality is formulated. It also illustrates the necessity and interaction of the prior examination. Further, the procedure could also be useful in other kinds of research. National interpretation of a copyright enforcement statute is used as a generic example.²⁷⁵ The steps are as follows:

1. identifying the context and depth of evaluation,
2. identifying the interests of various parties,
3. identifying the principles of EU, and if applicable, national law,
4. formulating the criteria to be used in evaluation, and
5. applying the criteria in a four-step proportionality test and producing a reasoned opinion.

The initial step is to identify the context of measures, proportionality evaluation, and fundamental rights systems. Identification is necessary because purely domestic, EU-scoped, and EU measures are evaluated differently. Further, the applicable legal basis and fundamental rights systems (domestic, EU, or both) must be discerned. The relevance and importance (or lack thereof) of ECtHR case law to the matter in hand should also be analysed. Identifying the category (implementation, derogation, etc.) at issue will be helpful in navigating the ocean of case law and literature. It is also essential to see whether a horizontal aspect of fundamental rights application is present, and if so, what kind and whether this has any impact on the evaluation. Finally, as a crucial pre-balancing step, the desired intensity of evaluation needs to be

considerations for the context. Not mentioning third parties such as intermediaries serves as a reminder of the number of different applicable contexts.

²⁷⁴ For examples of differences in approach between tort law -centric and *in rem* actions, see Husovec, 'Injunctions against Innocent Third Parties' (n 8) paras 12–19.

²⁷⁵ Examples from related fields include evaluating the constitutional legality or interpreting 1) a graduated response mechanism or administrative blocking orders from the perspective of EU fundamental rights and IPR enforcement principles; 2) domestic data retention legislation that in some countries replaced the implementations of the invalidated Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54; or 3) the fully harmonised 'making available' right of the Infosoc Directive when it comes to the liability for creating hyperlinks.

considered. In summary, one should be able to answer the somewhat opaque question ‘what kind of proportionality evaluation will be performed?’

In the provided example, the context is a domestic implementation of EU legislation or a mechanism otherwise within the scope of EU law. In this case both national and EU fundamental rights apply, but the primacy of EU law may lead to diverging interpretations compared to purely domestic measures. The most relevant legal basis for proportionality evaluation is Article 52 EUCFR. Proportionality in this context differs from the tradition of evaluation of EU measures (eg, legality of directives) or derogations from the internal market rules. In this context, the ECtHR has granted rather wide margin of discretion, and its case law is not very useful at present. When it comes to the horizontal effect, there are no restrictions to applying the fundamental rights to interpreting provisions; direct obligations are not imposed solely based on the EUCFR. Finally, the intensity of evaluation depends on the object of interest. If the goal is to predict the outcome of judgements, lesser amount of review may be adequate. On the other hand, more idealistic or constitutional research might call for stricter scrutiny. In any case, one cannot sidestep the issue of proportionality without any consideration.

In the second step, the stakeholders and their rights and interests must be identified. This includes both private and public interests. The private/public consideration may also trigger further evaluation of horizontal or vertical relations. After this step one should be able to answer the question ‘what are the rights and interests being balanced?’

An example of rights and interests was described in Section 3.3. The multitude and conflicts result in limits for minimal and maximal protection of each right, because strong protection of one right at some point implies that another right will be infringed through underprotection. Identifying different aspects of rights and interests is necessary in order to grasp the big picture; rather than framing the issue solely as protection of IPR, the impact as a whole requires consideration.

In the third step, one must identify the applicable principles, whether statutory or not. These would in turn affect the interpretation of the legal basis and rights and interests concerned. Depending on the case, both EU and national principles may apply. However, national principles may need to be interpreted differently within the scope of EU law compared to applying them to purely domestic measures. Therefore, identifying the context is a prerequisite for considering the applicable principles. After this step, one should be able to answer the question ‘what intermediate principles apply to the interpretation of this case?’

An example of principles was examined in Section 3.4, which in EU context were found in Article 3 of the Enforcement Directive. These provide more input to the

evaluation of the aforementioned rights.²⁷⁶ Given that here both national and EU law apply, national principles (if any) may also be relevant. However, they must be interpreted through the lens of EU law and EU fundamental rights.

In the fourth step, one must formulate the criteria for evaluating proportionality. While the previous two steps of identifying the interests and principles may be somewhat opaque, this is a much more concrete and context-specific task. The task is required in order to provide depth and justification in the evaluation. For example, simply enumerating the fundamental rights at stake and producing conclusions would be insufficient. This also helps in avoiding the inflation, reduction to ‘window-dressing’, or one-sided examination of the fundamental rights.²⁷⁷ Based on this step, one should be able to answer the question ‘what are the concrete factors to consider when assessing proportionality in this case?’

Various criteria have been suggested for evaluation; whichever ones are used is beside the point.²⁷⁸ The key is to identify more precise criteria for evaluation and to improve justification.²⁷⁹

The final step is applying the criteria in the light of the legal basis, interests and rights, and principles at issue and conducting a proportionality evaluation. This also links back to the issue of intensity of scrutiny. Formulating the criteria usually helps in uncovering many sensitive spots. The four-step test provides a basis for consideration: one must assess the legitimacy of the objective, the suitability of the means, the necessity in the form of the least restrictive means, and finally proportionality as a whole. In addition to these perspectives, other legislated criteria (if any) may also be examined. Especially when conducting an interpretive balancing exercise, one should be careful to remain critical at each step, and also to keep in mind the previous steps in the ultimate *stricto sensu* proportionality evaluation stage.

Here Article 52 EUCFR results in criteria essentially matching the traditional four-step proportionality evaluation; further requirements (if any) of EU or national law or case law may also be considered as appropriate. Instead of just declaring a conclusion proportionate or not, such more precise sub-tests as established in constitutional scholarship significantly improve the depth of justification.²⁸⁰

All in all, the proposed steps in the evaluation procedure seek to ensure that each substantial part that needs to be considered is identified and given appropriate scrutiny.

²⁷⁶ As an example of such detailed evaluation, see *Cartier* (n 35) paras 158–265.

²⁷⁷ On these and other dangers, see Mylly, ‘The constitutionalization of the European legal order’ (n 119) 128–30.

²⁷⁸ See eg Article VI (paras 65–69) and Section 4 and n 19 therein.

²⁷⁹ As a thorough example, see *Cartier* (n 35) paras 189–265.

²⁸⁰ As a similar assessment of proportionality, see *ibid*, 184ff.

Chapter 4

Findings

First, Section 4.1 summarises each publication, focusing on key results. Section 4.2 then provides a synthesis and more general discussion based on Section 4.1 and the foundations examined in the previous chapter. Most findings are presented in this and the previous chapter; only more general conclusions will be provided in Chapter 5.

4.1 Summary of publications

4.1.1 Plethora of means and strategies

Article I provided a taxonomy of the means of enforcement and the first glimpse of the enforcement strategies of IPR holders.

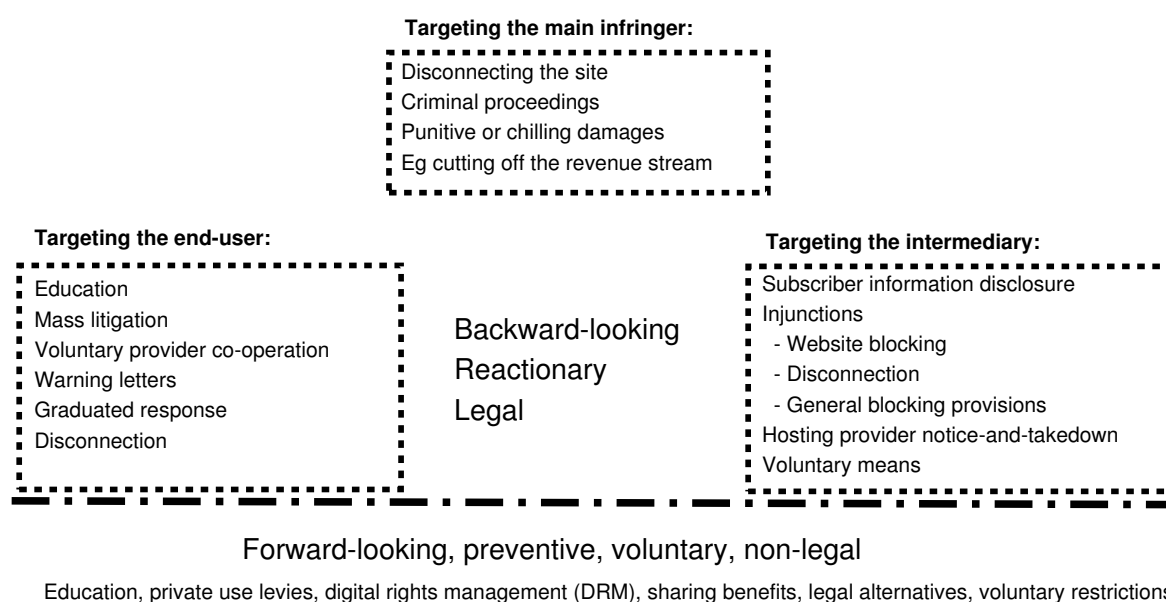


Figure 4.1: Classification of the means of enforcement

The means were divided into preventive and reactive. These are illustrated in Figure 4.1.¹ Preventive ones aim to mitigate impacts, are typically voluntary, or are of non-legal nature. The following were submitted: 1) education, 2) private use levies, 3) digital rights management, 4) sharing benefits such as advertising income, 5) legal alternatives, and 6) the provider's voluntary restrictive measures.

Reactive means could target either the end-users, the main infringer or an intermediary.² The measures targeting end-users were mass litigation, warning letter, and graduated response mechanisms. The goal in the first was general prevention by raising the risk of being caught infringing. In the latter two, the attempt to educate the user was also prevalent. All of these required some form of support from the legislation, at least as a legal basis for obtaining subscriber identification from the connectivity provider.

Targeting the source of infringement was another strategy. This included disconnecting the site, using criminal proceedings and/or claiming high damages or compensation, or affecting the operator in some other way, such as by cutting off the revenue stream and the business model through financial transactions or advertisement providers. Because so many different parties could be deemed an infringer (eg, downloading user, uploading user, the user who links to infringing material, the website operator, or the hosting provider), the IPR holder was again presented with a choice of which party or parties to pursue. If the website operator was identifiable and reachable, targeting him/her was often preferable. This would have a preventive effect on others and infringement could be stopped with one action. The operator's identity could possibly also be established using an information disclosure request targeting the website's provider or by the police. Failing that, the site could be disconnected through intermediaries.

Finally, Internet intermediaries could also be targeted, through 1) a subscriber information disclosure order, 2) a website blocking order, 3) notice-and-takedown against a hosting provider, 4) more general blocking such as provisions that could also be used for defamation, or 5) using voluntary means (eg, similar to filtering child abuse images).

While there were some overlaps and problems with classification, the taxonomy should still be useful in the abstract and in discerning the strategic and tactical approaches to enforcement.

¹ The former, forward-looking measures try to reduce infringement ex-ante. The latter, backward-looking measures mitigate infringement ex-post.

² Similarly, on division to 'demand-side' and 'supply-side' measures, and also separately to educative/preventive and mitigating/punitive; see Intellectual Property Office, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (9 February 2015) (<https://www.gov.uk/government/publications/international-comparison-of-approaches-to-online-copyright-enforcement>) 2–3, 17–18.

Several themes were introduced that would recur in subsequent articles. First, the plurality and overlapping nature of means and strategies provided ‘shopping’ opportunities to IPR holders to choose the best means in each case. Second, distribution of expenses for measures where the intermediary action is required was crucial. Third, the ineffectiveness of costly measures suggested that the ultimate reasons for copyright enforcement might be other goals, such as a power struggle against service providers.

4.1.2 Expansion of copyright enforcement in lawmaking

Article II provided a detailed analysis of the IPR holders’ position and activism in advocacy to expand enforcement through Internet connectivity providers.³ This was examined from the perspective of legal policy and sociology using critical legislative theories and Bourdieu’s power analysis. The focus was on the process of preparing government bills in the phase before parliamentary hearings, ie, the earliest and most important part of legal drafting. While there has been literature on imbalance of copyright in general – including the context of lawmaking – a study focusing on intermediaries is novel, as is the approach of applying Bourdieu and legislative theories in this context.

It was observed that there were dozens of IPR holder stakeholders, and they have also assumed a dominant position in various preparatory bodies. Internet service providers, the industry and the users lack coherence, resources, and long-term commitment to compete with them on equal terms. The goal of IPR holders appeared to be to introduce new means of enforcement and expand current ones at the expense of providers.

It turned out that even moderate ineffectiveness of enforcement mechanisms was not a major problem for IPR holders, since if existing ones were to turn out to be inadequate, it would later be used to argue for making them stronger. Indeed, further reasons for IPR holder activism were submitted. First, the symbolic value of copyright enforcement was that they must be seen to be ‘doing something’ for the benefit of the public (ie, that ‘piracy cannot be tolerated’), for their own constituents (eg, the artists), and to legitimise their further legislative proposals. The second goal was to try to educate the infringing users, but it was shown that this attempt was also in vain,

³ For similar research from a slightly more general perspective, see Benjamin Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ [2015] OJLS (Advance access); Benjamin Farrand, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (Routledge 2014). According to Farrand, the keys to successful lobbying are the early supply of ‘right’ information to the policymakers, the ability to frame the issues early in the process, and the low political salience of the issue (ie, ‘quiet politics’). If the issue gets more public attention, even otherwise foregone legislative conclusions may be overturned, as was seen with the ACTA. See Farrand, ‘Lobbying and Lawmaking in the European Union’ (n 3) 6–11.

because the users were cognisant of their illegal acts. The final explanation, and the major finding here, was that this was also a political struggle in the legislative field. On the other hand, having to develop new business models was actively resisted.

Advocating a strong copyright ideology and increasing the responsibility of third-party intermediaries seemed to be the top priorities for IPR holders. Success in these would be more important than any specific activities. This would increase the IPR holders' power in further struggles. It was further submitted that the issue of implementation costs had so far only been important in principle and from the perspective of further obligations. That is, if the connectivity provider could be made to bear its own costs, perhaps subsequent and more expensive mechanisms could also be implemented at its expense. In order to shift the balance of profits and costs toward the equilibrium, it was submitted that IPR holders should be fully responsible for the costs of third parties. This would focus the requests on the most important cases and allow employment of the most appropriate mechanisms. These issues would be revisited during the evaluation of legitimacy of enforcement objectives in Article VI.

In Finland, copyright law drafting is supported by a 40-person negotiating board dominated by the right holders. It is obvious that such bodies cannot legitimise the lawmaking process and having equal standing is impossible. In a way, this increases the power of civil servants in charge of drafting the bills. This is also sub-optimal because IPR holders can use their information power to feed the officials with those pieces of information and advocacy research that support their own agenda. In such a scenario, avoiding unbalanced results would require attention and critical appraisal from the law-drafting officials. It will remain to be seen whether this will result in a rejuvenation of smaller preparatory expert bodies. Further, it was striking – compared to the other complex topics – how little input is sought from supposedly neutral experts such as academia.⁴

The article was a follow-up to the legal policy considerations introduced in Article I. The focus was solely on connectivity providers and law drafting. The specific details of enforcement mechanisms suggested or advocated were of less importance in this context.⁵ Trying to ascertain the goals of enforcement attempts through intermediaries was one aspect which was also simultaneously considered from the doctrinal perspective in the proportionality evaluation in Article VI.

⁴ In turn, on the academics turning to address the public through popularisation and this leading to democratic discourse instead, see eg Patrick R Goold, 'The Evolution of Normative Legal Scholarship: The Case of Copyright Discourse' (2013) 5 *EJLS* 23, 28–32.

⁵ However, it is worth noting that in the final government bill, *Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta* (HE 181/2014), 29–31, 47, the proposals on impeding access, warning letter mechanisms, and expanding blocking to cover other providers using an administrative order were rejected as ineffective, uncertain or lacking judicial review.

4.1.3 Subscriber identity disclosure: a slippery slope

Article III provided a detailed analysis of the provisions of Finnish law relating to disclosure of identification data, in particular from the fundamental rights perspective. These were also contrasted to the provisions of the Coercive Measures Act such as traffic metadata monitoring. Both disclosure to private individuals and public authorities were examined.

In disclosing identification data in the context of copyright infringement, one theoretical issue was how the conflicting fundamental rights should be evaluated and, in particular, how vertical and horizontal dimensions would be taken into consideration. It was submitted that the interests are horizontal and at least that the vertical relation cannot be used in a negative fashion. That is, copyright infringement being a crime should not be used as an argument to justify a privacy violation because the interest behind such criminalisation is of a private nature. This turned out to be a recurring issue to be addressed again in evaluating the proportionality of website blocking.

Another particular issue was the type of subscriber information disclosure proceedings where the user's interests are not represented unless the connectivity provider wanted to expend its resources to champion such a cause. In consequence, nobody provides the court with arguments about why the request should be rejected. A similar problem is observed in the context of website blocking, where likewise the website operator and the users are not directly represented.

In Finnish law, subscriber information disclosure in civil proceedings requires that the subscriber 'makes material protected by copyright available to the public to a significant extent'. The evaluation of the significant extent has been very flexible, and even temporarily sharing one recently published music album on the BitTorrent network has been considered to qualify. Out of roughly 100 requests per year (over 500 in total), only one has been rejected (in 2012). This flexible and overly inclusive interpretation of this threshold was heavily criticised.

Another generic thread was the powers of public authorities. Particularly noteworthy was that copyright infringement by sharing an album may be a copyright offence, punishable by up to two years in prison. In the new Coercive Measures Act, this qualifies for the use of metadata by public authorities as per data retention legislation that was supposed to only concern 'serious crime'.⁶ The second noteworthy and heavily criticised observation concerned special provisions in the Police Act, originally

⁶ The directive was subsequently invalidated. Especially with regard to its supposed goal of fighting organised crime and terrorism, see Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238, paras 41–42, 51; Orla Lynskey, 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: *Digital Rights Ireland*' (2014) 51 CMLR 1789. Finland will continue using data retention with some restrictions as a national solution. See Liikenne- ja viestintävaliokunnan mietintö 10/2014.

intended *inter alia* for obtaining phone numbers to reach plaintiffs. The provision has been used to disclose subscriber identification data and other information from intermediaries and companies without a court order as would have been required using traffic metadata monitoring as per the Coercive Measures Act.

4.1.4 Liability for user-generated content as grounds for blocking

Article IV explored linking as copyright infringement from the perspective of the website operator, and particularly the UK case law on website blocking. A website operator's liability for user-generated content and hyperlinks in particular was an essential topic in considering which sites are eligible for blocking. Specifically, most peer-to-peer networking indexing sites that have been blocked have only included user-added descriptions and metadata, and a link to an external tracker, from which the information on the users sharing copyright-infringing pieces of files could be found. This indirect linking would result in difficulty in establishing the website operator's direct or secondary liability for running the site. However, it was observed that most case law was not bothered by these details and the lack of a fully convincing legal basis for blocking.

First, the liability for linking was analysed using the recent CJEU judgement, *Svensson*.⁷ The ruling did not explicitly address the case of unauthorised original communication to the public, and *BestWater* also skimmed over that part of the preliminary reference question; hopefully, hints could be gleaned from the pending *C More Entertainment* on circumventing a pay-wall.⁸ However, strictly speaking this did not occur here, as the user-generated content might only include a link to a tracker, instead of a file including a copyrighted work. In the end, it was submitted that direct infringement of the making available right would be an ill fit in this context.

Another key issue was the non-harmonised secondary liability for copyright infringement. This might be a more appropriate legal basis in this context. However, the lack of harmonisation has led to broadening the applicability of direct liability to scenarios in which it does not fit very well. A risk of further expansion was also apparent.⁹ This also has significant impact on the legal basis of website blocking, because if the operator does not infringe or contribute to infringement, there are no

⁷ Case C-466/12 *Svensson* EU:C:2014:76.

⁸ See Case C-348/13 *BestWater* EU:C:2014:2315 and pending Case C-279/13 *C More Entertainment*. There are a number of practical problems if the linker needs to ensure that the original act has been authorised or otherwise bear liability; this cannot be discussed here, however. See Pekka Savola, 'Tekijänoikeuden vaikutus Internet-linkittämiseen erityisesti EU-oikeuden valossa' in Päivi Korpisaari (ed), *Viestintäoikeuden vuosikirja 2014* (Forum Iuris, forthcoming 2015).

⁹ From EU case law, see eg Case C-306/05 *SGAE v Rafael Hoteles* EU:C:2006:764, Case C-162/10 *PPI v Ireland* EU:C:2012:141, but also Case C-135/10 *SCF v Del Corso* EU:C:2012:140. In general, see Pekka Savola, 'Taustamusiikki asiakastilassa yleisölle välittämisenä – tekijänoikeuslaki EU-oikeuden puristuksessa' [2014] *Defensor Legis* 47.

grounds to block the site. The lack of harmonisation of secondary liability means that the applicability of decisions in other jurisdictions is also limited by differences in concepts. Further, whether the CJEU has competence to adjudicate these cases (except by applying direct liability) was doubtful or at least uncertain.

The article also argued briefly for restraint in imposing blocking orders because of the procedural situation in court, as already noted earlier in Article III. The specifics for blocking proxy sites were also discussed, and caution was advised the further removed the blocked site was from the main infringement. This was due to the freedom of expression considerations and the challenges in proving sufficient participation in infringing acts (eg, *mens rea*).

The article made a contribution to evaluating the basis for blocking. It also included a comparative perspective. Unfortunately, the focus had to be kept on recent UK case law, and it was not possible to conduct a more extensive comparison. On the other hand, the Finnish perspective had already been examined¹⁰ and the subject would be touched on again from the continental perspective in Article VI.

4.1.5 International constraints and shopping opportunities

Article V delved in depth into the issues of private international law and jurisdiction concerning copyright infringing websites and blocking access to them.

First, the article observed significant flexibility in localising infringing acts. In consequence, the website operator could be sued almost anywhere and under any law at all.¹¹ Several observations were made that differed from the traditionally established view. It was argued that there may be ways to avoid a distributive application of multiple laws to a globally available website with a different characterisation of infringement, ie, where and how the infringement is deemed to occur.¹² It was also

¹⁰ Pekka Savola, *Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta* (Licentiate of Science (Technology) thesis, 2013) 154–76.

¹¹ As described in the article, this was affirmed in Case C-170/12 *Pickney* EU:C:2013:635, in contrary to the AG Opinion. The solution was later endorsed in Case C-360/12 *Coty* EU:C:2014:1318, para 55, despite the AG's puzzlement of the approach and offering an alternative resolution to the case (see Opinion, paras 66–70). Again, Opinion in C-441/13 *Pez Hejduk* EU:C:2014:2212 essentially suggested abandoning the *Pinckney* doctrine for ubiquitous Internet infringement and adopting an entirely new interpretation. That is, only the court of the state where the causal event took place would have the special jurisdiction for 'delocalised' damages as per Article 5(3) of the Brussels I regulation. The CJEU, however, persisted with the earlier approach (Case C-441/13 *Pez Hejduk* EU:C:2015:28, para 32). The CJEU also clarified in *ibid*, para 37 that the jurisdiction only applies to damages caused in the forum state. On previous multiple accepted jurisdictions, practical difficulties, legal uncertainties, and the need to adopt an entirely new approach to interpreting Article 5(3) on specific kinds of Internet infringements, see in particular *Pez Hejduk (Opinion)* (n 11) paras 20, 39, 42, 44.

¹² As a case in point, a UK online store was ordered by a Danish court to block access by Danish users for online copyright infringement occurring in Denmark. On the other hand, previously in 2013 the court refused to order connectivity providers to block access to such webstores, because proceedings against the source were deemed preferable. See EDRI, 'Danish court orders a UK

observed that the chosen law might not, at least explicitly, always include a strict territorial limitation. For example, damages and compensation based on Finnish copyright law do not seem to be restricted to acts that occur in Finland. Further, forum and choice of law shopping opportunities were particularly interesting in this case, because the law applicable to the main infringement also applies to determining the extent of secondary liability. For example, it might be lucrative to apply the law where the liability is as general as possible, and the damages and compensation are the highest.

This preliminary examination allowed turning to the main topic, imposing a website blocking order on an Internet connectivity provider. The court where the Internet connectivity provider has domicile has global jurisdiction for ordering blocking, but it was still argued that the applicable law of a particular state cannot be applied to communications that do not go through that state.¹³ For example, Finnish copyright law should not be used to impose an order on a Finnish ISP to block access to a site in Sweden for those users that reside in, say, Estonia and whose communications do not go through Finland (see Customer3 in Figure 4.2). However, depending on which act is characterised as the main infringement, another law could be successfully applied. On the other hand, if the targeted website was located in Sweden, Swedish copyright law could be used to block all access provided that the order could be implemented there. In the example scenario, an Estonian court might or might not have jurisdiction to block access, depending on whether the ISP has a branch in that state. If the answer was affirmative, the jurisdiction might be limited only to orders affecting that state, or the applicable law would limit its cross-border applicability.¹⁴

One significant argument was that the special jurisdiction on liability for wrongful acts in Article 5(3) of Brussels I regulation¹⁵ is not a legal basis applicable for issuing

company to block Danish IP addresses' (3 December 2014) (<https://edri.org/danish-court-orders-uk-company-to-block-danish-ip-addresses/>); *Voga Ltd* Maritime and Commercial Court judgement of 12 November 2014 (A-25-14).

¹³ A Council of Europe committee is working on a recommendation on jurisdiction. Paragraph 2.2 of the draft version requires states to, inter alia, 'ensure that orders to block illegal content [...] do not have impact beyond their national boundaries'; see Council of Europe Committee of experts on cross-border flow of Internet traffic and Internet freedom (MSI-INT), 'Draft Recommendation of the Committee of Ministers to member States on free flow of information on the Internet' (16 June 2014) ([http://www.coe.int/t/dghl/standardsetting/media/MSI-INT/MSI-INT\(2014\)06_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/MSI-INT/MSI-INT(2014)06_en.pdf)) 3. This draft recommendation goes further than the one suggested. As an example of so-called upstream filtering affecting other states, see The Citizen Lab, 'Routing Gone Wild: Documenting Upstream Filtering in Oman via India' (12 July 2012) (<https://citizenlab.org/2012/07/routing-gone-wild/>); UNESCO, *Fostering Freedom Online: The Role of Internet Intermediaries* (2015) 71–72.

¹⁴ Cf. when the provider does not even have a branch in a particular state, in practice it may still be subjected to local obligations; for example, on Facebook being forced to remove objectionable content in various jurisdictions, see *ibid*, 26.

¹⁵ Likewise in Art 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

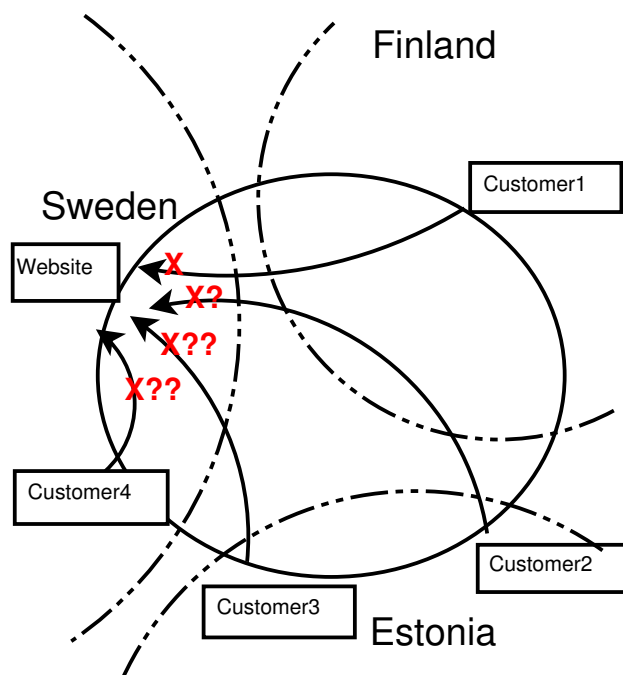


Figure 4.2: International scenarios of an ISP ordered to block access to a website

website blocking injunctions. This was because the ISP has not committed any wrongful act, the object of this kind of injunction is not to establish liability of the defendant, and there are no damages to be claimed. In practice, this may not be very significant, given that interim relief is still possible and there are many other ways to establish international jurisdiction. However, in earlier case law on patent infringement Article 31¹⁶ for extraterritorial cases had been rejected, suggesting the use of a local court instead.¹⁷ Enforcement might be possible even if it might be questionable if a third party does not object. In the example above, an Estonian court could possibly claim global jurisdiction for protective measures and impose a global blocking order on the branch operating in Estonia. The ISP might not object and risk being fined for non-compliance. This would also be indicative of issues of a particular procedural situation in court.

The article also touched upon the case of implementing website blocking through transit ISPs, that is, major global connectivity providers that provide access to smaller national or global ISPs. Examples of transit providers are AT&T, Sprint, Verizon Business, Sprint, TeliaSonera International Carrier, NTT Communications, and Level 3 Communications. If domiciled in the EU, a single court would have EU-wide jurisdiction to impose blocking orders, but again, depending on where the website is

¹⁶ Likewise in Art 35 of the recast Brussels I regulation.

¹⁷ While in Case C-616/10 *Solvay v Honeywell* EU:C:2012:445 Article 31 was accepted as a basis for cross-border injunction, many commentaries have emphasised the specifics of the case (eg, the defendant companies operating in a number of states) and have not made broad interpretations based on the case.

located and how the infringing act is characterised, one or multiple laws might need to be applied to accomplish comprehensive blocking.

So far website blocking has had only a national focus. That is, a blocking order sought from a local court at the user end has only attempted to block access from that state. While the situation appears to be straightforward, a key point was the precise wording of the blocking order, because in many cases the ISPs are also operating in other states. For example, the Finnish orders seemed to be inadvertently too broad, also affecting communications that did not go through Finland.

All in all, the article provided a glance at the intricacies of private international law and jurisdiction in this context. In hindsight, the complexity and the number of issues observed would have sufficed as a thesis in its own right and not all the scenarios could be fully analysed. The article demonstrated that courts will need to be cognisant of the international implications even in simpler cases. The article also demonstrated the general trend of flexibility that affords the right holders significant advantages in the characterisation of acts, choice of forum, and choice of law. These shopping opportunities revisited the theme of Article I where a large number of different enforcement mechanisms and strategies were discussed. The international considerations would also have an impact on the evaluation of proportionality in Article VI.

4.1.6 Proportionality of website blocking

Article VI provided a detailed overview of website blocking case law in the EU and analysed in particular the proportionality of such orders. In a way, it was the cornerstone of this study.

The article first summarised the legal foundations of blocking, including different interpretations of providers and the related liability exemption provisions. Restrictions imposed by the prohibition of the general monitoring obligation were also discussed. The private and public interests at stake were summarised, and IPR enforcement principles both in EU and national law were described. The coverage was by necessity limited or included only the conclusions; these foundations are more extensively covered in Chapter 3.

A major contribution in the article was an analysis of CJEU case law and a systematic coverage of all cases from EU/EEA countries from the perspective of proportionality.¹⁸ The article attempted to discern the grounds (or lack thereof) courts have used

¹⁸ A simultaneously conducted but more superficial contribution is Ellen Marja Wesselingh, 'Website Blocking: Evolution or Revolution? 10 Years of Copyright Enforcement by Private Third Parties' in *Internet, Law and Politics. A Decade of Transformations. Proceedings of the 10th International Conference on Internet, Law & Politics, Barcelona, 3–4 July, 2014* (UOC-Huygens Editorial 2014); another simultaneous review is Petteri Günther and Marcus Norrgård, 'Blocking Websites: Copy-

to analyse proportionality. These findings and views from the literature were used to construct criteria for assessing proportionality.

The criteria submitted were 1) degree and basis of illegality, 2) effectiveness, 3) negative burden on the provider, 4) subsidiarity, and 5) avoiding collateral damage.¹⁹ The basis of illegality linked back to Article IV and suggested that the type and severity of infringement was relevant in consideration of the extent and invasiveness of the mitigating measures used. The effectiveness required considering the objective of blocking: if the goal of blocking was construed as preventing economic losses, the means used must indeed help in that regard. On the other hand, if for example the symbolic value of copyright enforcement was emphasised, a lesser degree of effectiveness might be acceptable.²⁰ The negative burden required minimising detrimental impacts (eg, legal and implementation expenses and restrictions on network technology) to the connectivity provider. Subsidiarity emphasised targeting the problem at its source first, provided that it was possible to do so. The implication was that at least intra-EU measures should only be used as a last resort if at all. Avoiding collateral damage referred to the prohibition of impacting legal communications and imposed requirements on the blocking mechanisms under consideration to avoid overblocking and other negative effects. It could also preclude blocking completely if there was no appropriate mechanism that could be used in a particular case. For example, proxies and less prominent sites that share an IP address with a third party might be ineligible for blocking using IP address based mechanisms – and the more advanced mechanisms might be overly burdensome for the provider. In that case, the result might be that all forms of blocking would be disproportionate for one reason or another.

These criteria should be evaluated in a proportionality test consisting of evaluating 1) the legitimacy of the objective, 2) suitability for the purpose, 3) necessity, ie, using the least restrictive means, and 4) proportionality, ie, weighing the burden against the objective. Analysis in courts seemed either to have focused mainly only on the last one, or the analysis may have been omitted completely. Which objectives were accepted as

right Enforcement Online and Responsibilities of Internet Intermediaries in Europe' [2014] JFT 97, 113–19.

¹⁹ Since then new criteria have been adopted by Arnold J in *Cartier* [2014] EWHC 3354 (Ch), paras 189–265 and re-applied the copyright context in *1967 Ltd* [2014] EWHC 3444 (Ch), para 27. These were: i) the comparative importance of the rights and justifications for interfering with them, ii) the availability of less onerous alternative measures, iii) the efficacy of the measures and in particular whether they will seriously discourage the users from accessing the target websites, iv) the costs and in particular implementation costs, v) the dissuasiveness of the measures, vi) the impact of the measures on lawful Internet users, and in addition, the substitutability of other websites for the target websites. As a brief comparison with my submission, i) corresponds to a prior step and is partially discussed in 1); ii) is discussed in 4); iii) corresponds to 2); iv) corresponds to 3); v) is also discussed in 2); vi) is discussed in 5); and substitutability is examined in 2) and 4).

²⁰ This legitimacy perspective was also linked to the legal policy discussion in Article I and in particular Article II.

legitimate had major implications for the subsequent evaluation of proportionality as well as the previous proportionality criteria.

More precisely, the objective should be formulated at a sufficiently high level so as not as such to stipulate the means to achieve the goal. On the other hand, the objective should be both realistic and measurable. An objective of ‘stopping infringement’ would be unacceptable as impossible, and simply ‘reducing infringement’ unmeasurable and in consequence difficult to evaluate and balance. Further, a closer examination revealed an essential underlying issue: is the goal of enforcement entirely economic (to mitigate losses and create gains), or does it also serve the symbolic value of even ineffective enforcement, education or political struggles by IPR holders? It was submitted that the law does not explicitly require provision of symbolic copyright enforcement and attempts to educate the users and these could even be at odds with the intent of legislation.

Next, the accepted objectives influence the potentially suitable means for that purpose. The economic objective requires effectiveness, but symbolic value of enforcement, education attempts, and political struggles may also be ‘suitable’ even in the face of ineffectiveness. Likewise, the objective also affects whether it is possible to identify alternative, less restrictive means to achieve an essentially similar result. If efficient enforcement is deemed to be the goal, blocking on the user side should be only used when there are no viable alternatives.

Finally, whether the burden is excessive in terms of the objective must be balanced. The preceding three steps provide arguments to take into account. This was also often the only step which courts focus on in practice, sometimes with unfortunate results. Here the burden and costs on other parties seemed crucial. However, the valuation of public and private interests and what objectives are considered legitimate was deemed to have decisive influence on the evaluation of the balance.

4.2 Patterns and trends

As the analysis moves from specifics to general issues, the focus of discussion also slowly shifts from doctrinal scholarship to legal policy considerations and *de lege ferenda*.

First, two recurring and quite specific issues, the procedural situation in court and balancing the burden and cost are discussed. The focus then shifts to the more general and forward-looking issues: why the intermediaries have become more involved, where we are heading, and a case against the more active role of service providers. These pave the way to moving on to conclusions in the next chapter.

4.2.1 The procedural situation in court

As was discussed in Sections 3.1.4 and 3.3,²¹ the complexity of the procedural situation in court depends on the national modalities as summarised based on Articles IV, V and to lesser degree VI.²²

All the enforcement actions discussed include a special procedural situation. That is, typically only the IPR holder (as claimant or plaintiff) and connectivity provider are parties in court.²³ Users or main infringers (eg, website operators) are typically not represented. This raises the question of how their interests and fair trial requirements are taken into account.

In subscriber information disclosure cases there is typically nobody to argue on behalf of the subscriber. Courts may not even have explicitly considered this issue.²⁴ These problems are exacerbated when the user's Internet connection is disconnected in a similar fashion without asking for a statement.²⁵ On the other hand, a similar situation in disclosing wire-tapping metadata or search warrants include at least some procedural safeguards.²⁶ This situation needs improvement, especially in the face of increased 'copyright trolling' bordering on blackmail and extortion.²⁷

Some connectivity providers have been active advocates in arguing for the interests of their users. This has occurred as long as the goals coincide. Nonetheless, this is not a sufficient guarantee of adequate representation. For example, Daly and others have observed that '[c]onsequently there is a real risk that hearings to disclose user identities will be determined based entirely on the case of the plaintiff as there is generally no incentive for the ISP to fight such applications.'²⁸

²¹ Specifically, see nn 94 and 216–217 in the previous chapter.

²² As noted in Article II, the lack or weakness of user representation is also striking in the legislative field, but that is out of scope here.

²³ The formal position of the provider may be 'defendant' or something else; the latter Finnish procedural detail is summarised in Article V (at 308).

²⁴ A formalistic reason might be that such a structural issue is one of policy and immaterial to adjudication. Such reasoning should be rejected as being at the very least dubious from the fundamental rights perspective. Another reason may be a feeling of impotence or lack of resources to address the case properly. Finally, the opportunity to defend oneself at the subsequent proceedings might be deemed sufficient.

²⁵ In a Spanish case, the provider did not even respond or arrive at court; see Martin Husovec and Miquel Peguera, 'Much Ado About Little: Privately Litigated Internet Disconnection Injunctions' (2015) 46 IIC 10, 25, 29. On issues from Finland, see Pekka Savola, 'Internet-operaattori ja perusoikeudet' in Tapani Lohi (ed), *Oikeustiede–Jurisprudencia XLVI:2013* (Suomalainen Lakimiesyhdistys 2013) 154–56. In contrast, in a single case, *Disconnection and temporary seizure* District Court of Oulu decisions of 14 February and 27 March 2008 (H 08/1438), the subscriber submitted a written statement on the proportionality of disconnection and the request was later rejected.

²⁶ Issues with these 'one-party proceedings' were elaborated in Article III (at 893–95). On the other hand, in Ireland and the UK for example, courts have instituted some safeguards, and a consumer representative has also argued before the court. See Section 3.1.3 and n 50 therein.

²⁷ See Section 3.1.3 and in particular n 52 therein.

²⁸ Maureen Daly, 'Is there an entitlement to anonymity? A European and international analysis' (2013) 35 EIPR 198, 201, similar to Søren Sandfeld Jacobsen and Clement Salung Petersen, 'In-

Similar considerations also apply to the website blocking injunction, with some variation.²⁹ The provider usually has own incentive to contest a new kind of obligation. This is true in particular if it has a chance of success, delaying the application, deferring subsequent requests, or winning sympathy from users. Therefore, it can use supporting arguments from the user or operator perspectives to augment its own.

Yet in both kinds of case, at the latest when new requests are routinely approved despite counter-arguments (if any), the provider usually gives up, no longer wanting to expend its resources for, *inter alia*, legal services. This has been the approach in Finland to subscriber information disclosure requests for a long time now. This has also been observed in the UK for website blocking after the initial proceedings. Providers have fallen back to a neutral position or have not participated actively in the proceedings. The reasons may be to save their expenses, avoid having to pay the plaintiffs' legal costs if their arguments fail, or to make the point that it is not their role to argue for users or infringers before the court.³⁰ In summary, providers have argued vigorously to date in most new kinds of cases but this is not guaranteed to continue, because doing so will generate unrecoverable expenses.

At least UK courts have explicitly taken the view that they have a duty to consider the interests of unrepresented parties on their own motion.³¹ The Supreme Court of Finland has also held in the context of coercive measures that the courts have a duty to protect the interests of the suspect and third parties when they cannot do so themselves.³² Even this is not completely satisfactory: it is sub-optimal for the court to

junctions against mere conduit of information protected by copyright: A Scandinavian perspective' (2011) 42 IIC 151, 173–74. Indeed, this risk has materialised as discussed below.

²⁹ See eg Sandfeld Jacobsen and Salung Petersen (n 28) 171–75.

³⁰ See Article VI (para 48). On legal costs, see *Newzbin2 (No 2)* [2011] EWHC 2714 (Ch), paras 53–55. On the lack of participation, see eg *Dramatico Entertainment* [2012] EWHC 268 (Ch), para 7; *Emi v Sky* [2013] EWHC 379 (Ch), para 90; *Paramount v Sky* [2013] EWHC 3479 (Ch), para 3; *Cartier* (n 19) para 4; *1967 Ltd* (n 19) paras 3, 26; Husovec and Peguera (n 25) 25, 33; Urs Gasser and Wolfgang Schulz, *Governance of Online Intermediaries: Observations From a Series of National Case Studies* (The Berkman Center for Internet & Society Research Publication Series 2015-5, 2015) 15. On saving costs in general, see also Martin Senftleben, 'Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions' (2013) 4 JIPITEC 87, para 67.

³¹ See Article VI (para 48) and specifically *Dramatico Entertainment (no 2)* [2012] EWHC 1152 (Ch), para 11.

³² This concerns the secret surveillance proceedings in particular. This has not (at least yet) been explicitly endorsed in these injunctions. Probably it will not be, given that there is nobody to appeal these decisions (see below). See Article III (893–94 fn 43); *Coercive measures* KKO 2009:54, para 9. Going even further, and perhaps too far in general, Husovec and Peguera (n 25) 29 argue that the court as a public authority 'should not enter any favourable decision if any of the perceptibly affected parties is somehow unrepresented in the proceedings'.

have to assume the role of both the defender and judge.³³ At the very least, it should be possible to contest the legality afterwards.³⁴

UPC Telekabel Wien was interesting in this respect. Essentially it was held that users must be able to assert their rights before the court unless the court had evaluated the reasonableness of blocking from their perspective.³⁵ This forces the court to either act as an evaluator or to shift the responsibility to the provider while also affording the users *locus standi* before the court.³⁶ This may also suggest that the practice in the UK and Ireland by which the terms of the blocking order are agreed between the IPR holders and providers, but not at least publicly and explicitly evaluated by the court might be insufficient.³⁷ Further, this also raises doubts on the appropriateness of voluntary enforcement measures.

Finally, the lack of proper representation and incentive for appeal suggests that for the court it might be better to err on the side of restraint than on over-activism. That is, the IPR holder can always appeal if the request is denied. On other hand, the provider is unlikely to do so because of the expenses and others are not represented and cannot do so. Otherwise, few cases will end up being considered by higher instances or the CJEU, leading to under-developed case law.³⁸

4.2.2 Balancing the burden and incentives

Another recurring theme in many articles and this overview has been how the burden of online copyright enforcement (in particular, cost) and the associated incentives should be balanced. What costs should be borne by the IPR holder and what by the provider (or a public authority), assuming that it is not in practice possible to claim costs from infringers?

³³ Likewise, there has been publicity in Finland that secret surveillance has been granted with insufficient substantiation. See Susanna Reinboth and Minna Passi, 'Luvan puhelinkuunteluun voi saada kevyin perustein' (31 August 2014) (<http://www.hs.fi/kotimaa/Luvan+puhelinkuunteluun+voi+saada+kevyin+perustein/a1409368131412>).

³⁴ In Finland, coercive measures such as wire-tapping can be appealed afterwards and the possibility of review bodies is being investigated; see Article III (at 894 fn 48). The chance for judicial review is required by ECHR case law; see, for example, *Ravon and others v France* App no 18497/03 (ECtHR, 21 February 2008).

³⁵ Case C-314/12 *UPC Telekabel Wien* EU:C:2014:192, para 57. See Article VI (para 36).

³⁶ On the reaction to the domestic ruling, see Martin Husovec, 'Austrian Supreme Court Confirms Open-Ended Website Blocking Injunctions [*UPC Telekabel Wien*]' (1 August 2014) (<http://www.husovec.eu/2014/08/austrian-supreme-court-confirms-open.html>). In contrast, in the Finnish bill submitted – on specific rather than generic orders – only the applicant, provider or website operator may request modifying or discharging the order. Others such as the users or affected third parties cannot. See Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014), 55–56, 59. In contrast, the Law Committee noted that the operator could identify him/herself before the court and request that the order be discharged; see Lakivaliokunnan lausunto 22/2014, 4.

³⁷ See Article VI (para 48); *Dramatico Entertainment (no 2)* (n 31) para 13.

³⁸ See Article IV (at 287).

In many countries, costs are borne by the providers or occasionally shared with the IPR holders or reimbursed by the state.³⁹ On the other hand, in Finland IPR holders will need to pay all implementation and legal costs for subscriber information disclosure requests.⁴⁰ Later, a now lapsed legislative proposal on a notice-and-notice mechanism would also have required reimbursement of all costs. IPR holders deemed the costs prohibitive, saying they would not send any warning letters.⁴¹ Similarly, in the UK, IPR holders would pay providers an annual fixed amount for operating expenses and 75% of the investment for the upcoming graduated response mechanism.⁴²

Website blocking typically needs to be implemented at the provider's expense. In Finland, so far everyone has also had to bear their own legal costs.⁴³ The general pattern in European website blocking case law has been that the implementation costs, usually of the order of 5000–10000 euro for the initial investment and a smaller amount for changes in the blocked targets, are borne by the providers. Everyone typically also needs to cover their own 10–30 times larger legal expenses, although depending on jurisdiction and court's discretion, the lack of merit might shift these costs around.⁴⁴ However, some courts have admitted that depending on circumstances, proportionality might require that in the future all or some costs would need to be paid

³⁹ Intellectual Property Office (n 2) 4, 24.

⁴⁰ This approach to implementation costs was explicitly adopted in *travaux préparatoires* in order to focus requests on the appropriate (significant) cases only. In case law, legal costs have been subsumed under the label of implementation costs. See Article II (at 211–12).

⁴¹ Such 'unused' mechanisms are not unheard of. For example, a warning letter system in New Zealand resulted in little use. This also demonstrates inefficiency in lawmaking, particularly in a field such as copyright where struggles between parties are commonplace. A lot of time and energy was wasted in preparatory work when the result would be an unused law. See Article II (at 211–12, 239 fn 158).

⁴² TorrentFreak, 'UK ISPs Agree to Send Out Music & Movie Piracy Warnings' (9 May 2014) (<http://torrentfreak.com/uk-isps-agree-to-send-out-music-movie-piracy-warnings-140509/>). In contrast, in France the graduated response system is mainly publicly funded, which has also led to criticism; see eg Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 ColumJLA 147, 155–56; Rebecca Giblin, 'When ISPs Become Copyright Police' (2014) 18 IEEE Internet Computing 84, 86.

⁴³ See Article II (at 211) and Article VI (para 55 and in particular note 120). In the submitted bill, Hallituksen esitys eduskunnalle laiksi tekijänoikeuslain muuttamisesta (HE 181/2014), 59, in the proposed Section 60f, the implementation costs for blocking of websites with identifiable operators which can be sued would have been practically borne by the providers, but against anonymous operators solely by the applicants. However, the Education and Culture Committee overturned the proposal and shifted the costs (in practice) in this case as well to providers; see Sivistysvaliokunnan mietintö 26/2014, 4, 6.

⁴⁴ See Article VI (paras 78–80); *Newzbin2 (No 2)* (n 30) paras 32, 53–55. For recent estimates of the cost of blocking in the UK, see *Cartier* (n 19) paras 61–65; TorrentFreak, 'The Soaring Financial Cost of Blocking Pirate Sites' (19 October 2014) (<http://torrentfreak.com/the-soaring-financial-cost-of-blocking-pirate-sites-141019/>), and on the division of costs, see *Cartier* (n 19) paras 239–53. In consequence, implementation costs have been insignificant compared to the issue of legal costs. For example, *ibid*, paras 54, 60 report that an unopposed application for a single website costs around 14000 GBP, and annual monitoring 3600 GBP.

by the IPR holders.⁴⁵ In contrast, the cost for the more advanced blocking techniques as implemented in the UK also covering parental controls and preventing child abuse have been reported to be several orders of magnitude higher; even in the dozens of millions in investment and a million euros in annual operations.⁴⁶

The allocation of costs is a modality left to the domestic legislation.⁴⁷ It is argued that the further removed the connectivity provider is from the blocked website, the less justified it is to require the provider to participate actively and at its own expense in copyright enforcement. Essentially the approach adopted in case law constitutes partially shifting the costs of enforcement to the intermediaries.⁴⁸ The most convincing argument for the major providers to bear their implementation costs is that so far the costs have been insignificant and only important in principle and as a precedent. From that perspective, for a court it may have been the simplest to deem them normal costs of carrying out Internet connectivity business.⁴⁹ On the other hand, arguing that the connectivity provider would profit from infringement as an increased demand of broadband connections and therefore should participate in or be responsible for preventing infringing use of its services is not very convincing.⁵⁰ Likewise, the technical ability to do something is an understandable, but not very convincing reason for a major role in policing the Internet. This is the case especially when there are others who are equally or more able to act or are ‘closer’ to infringement.⁵¹

Further, there have been arguments that various kinds of online intermediaries are ‘least cost avoiders’ in an economic sense. Due to the difficulties of otherwise addressing undesirable behaviour, arguably it would make sense to allocate the

⁴⁵ Opinion in C-314/12 *UPC Telekabel Wien* EU:C:2013:781, para 106; *Newzbin2 (No 2)* (n 30) paras 32–33.

⁴⁶ For details, see *Cartier* (n 19) paras 38–51.

⁴⁷ See Article VI (para 78 and in particular note 176); *Newzbin2 (No 2)* (n 30) paras 30–31. This also appears to be the approach in national case law on legal costs; there have been only a few cases where providers have been ordered to pay some legal expenses even if the request has been granted (see n 44). According to Article 14 of the Enforcement Directive, as a general rule, the unsuccessful party should bear the reasonable costs of the successful party, unless equity does not allow that. Applying this principle as-is to third-party intermediaries seems questionable, and even if an intermediary was deemed a ‘party’ in this context, equity could prevent applying the principal rule.

⁴⁸ See Taina Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (Lakimiesliiton Kustannus 2012) 59–60, 147; Martin Husovec, ‘Injunctions against Innocent Third Parties: The Case of Website Blocking’ (2013) 4 JIPITEC 116, paras 47–50; Blayne Haggart, *Copyright: The Global Politics of Digital Copyright Reform* (University of Toronto Press 2014) 23.

⁴⁹ See eg *Newzbin2 (No 2)* (n 30) para 32. More recently, see *Cartier* (n 19) paras 239–53, where Arnold J essentially held that there would be no problem as long as all the providers have to bear costs; the costs would either be absorbed by the providers or passed on to their subscribers. In that sense, Internet subscribers as a whole would pay for the cost of copyright enforcement.

⁵⁰ See more in Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 48) 25, 60. Actually, heavy infringers typically use a disproportionate amount of network resources and are therefore bad customers for the provider.

⁵¹ See further in Section 4.2.3. See also Section 3.4.2 and n 252 therein for the inapplicability of the ‘the only possibility’ argument of Case C-557/07 *LSG* EU:C:2009:107, para 45 when it comes to website blocking.

responsibility for wrongful conduct to the least cost avoider. This would replace a fault-based standard with a form of ‘gatekeeper responsibility’ by shifting the burden of preventing harm to the party for which doing so is cheapest.⁵² This is a tort law concept from the U.S., and it is not a very good fit in this context for various reasons. Most important of all, since the connectivity provider is a faultless third party, concepts related to torts and negligence are not immediately applicable. This approach would also result in stifling of innovation and shift costs. Further, it is not obvious that the connectivity provider is really the least cost avoider, because it does not have precise knowledge of the content and its authorised uses (eg, lawful licenses or whether a license is needed at all) or legal uses (eg, applicability of a copyright exception), possibly in contrast to certain kinds of hosting providers more intimate with the content. Finally the predominance of secondary liability and economic considerations in the U.S does not suggest that these can be transplanted as-is to the different legal systems in the EU.⁵³

In contrast, the IPR holder is the sole beneficiary if an enforcement action were to be successful (ie, reduce infringement and increase sales). This imbalance of incentives motivates the IPR holders to seek maximally effective and expensive mechanisms first through lobbying legislators, and subsequently from connectivity providers and courts. This would be exacerbated if the providers were to bear the costs of such orders, causing a so-called moral hazard by one party taking risks, the burden of which is borne by others. On the other hand, requests might be rationalised if the IPR holder was required to compensate the costs. Likewise, moral hazard may also be argued to apply in the inverse by ‘rewarding’ third parties from lack of action or knowledge.⁵⁴ Further, deploying more effective means might be possible if the IPR holder feels it is economically justified, because doing so would be less burdensome (ie, costly) on the provider. This might also result in IPR holders and providers developing a healthier dialogue.⁵⁵

⁵² See eg Ronald J Mann and Seth R Belzley, ‘The Promise of Internet Intermediary Liability’ (2005) 47 William & Mary LR 239.

⁵³ For a summary, see eg Michael Carrier, ‘Amicus Curiae Brief on *Viacom v. YouTube*, in the U.S. Court of Appeals for the Second Circuit’ (7 April 2011) (<http://docs.justia.com/cases/federal/appellate-courts/ca2/10-3270/327>). It is not possible to discuss the law and economics aspect of preventing copyright infringement. Cf. Graeme B Dinwoodie, ‘Secondary Liability for Online Trademark Infringement: The International Landscape’ (2014) 37 Colum.JLA 463, 493 fn 178 submits that injunctions under the Enforcement Directive are ‘clearly motivated by that kind of principle’, because intermediaries are sometimes best placed to bring infringement to an end. However, while this may have implications for actionability, it suggests nothing on the distribution of costs. This principle was also referred to in *Cartier* (n 19) para 251. See also Husovec and Peguera (n 25) 20.

⁵⁴ For example, on ‘willful blindness’ in secondary liability standards, see Sverker K Högberg, ‘The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law’ (2006) 106 Columbia LR 909, 940–47.

⁵⁵ See Article II (at 239).

These observations contribute especially to the legal policy discussion on what should be a reasonable distribution of expenses and how to adjust the incentives of copyright enforcement. Apart from a minimal threshold, it appears that the incentives and costs would be most appropriately balanced when the IPR holder has to compensate most or all expenses. This would align the benefits of enforcement with the associated risks and burden. Depending on the constraints imposed by the legislation, these considerations may also be useful in doctrinal scholarship.

4.2.3 Why have online intermediaries become more involved?

Upping the level of discussion a bit, the role of online intermediaries has evolved over the years. It is not possible to cover the history here, but a few observations on recent trends are in order.⁵⁶ Why has this evolution occurred? Several reasons are suggested:

1. The capability to act exists and has improved;
2. illegality on the Internet needs to be addressed somehow and previous strategies have not been sufficient;
3. ISPs have had difficulty in resisting the emergence of new obligations;
4. an increased role is also irresistible for unrelated public policy reasons; and
5. some ISPs also have an incentive of their own to do the same.

First, the abilities are obviously essential.⁵⁷ In contrast, should a traditional post office or mail delivery company be required to block mail or packages delivered to certain persons or premises or after screening make decisions based on the envelope or the contents? This is essentially what is required of (or advocated for) Internet connectivity providers. Yet for traditional mail, there has been aversion to introducing such mechanisms even if they were technically possible.⁵⁸ In the Internet context,

⁵⁶ This discussion is continued more generally in Section 5.2.

⁵⁷ For example, Fanny Coudert and Evi Werkers, 'In the Aftermath of the Promusicae Case: How to Strike the Balance?' (2008) 18 IJLIT 50, 71 put it: '[...] ISPs have enormous power of control. If they were to be obliged to screen, monitor, filter or in any way interfere with content passing through their systems, the consequences would be considerable.' Also on the ability to act, see Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 48) 60, Günther and Norrgård (n 18) 123 and Commission, 'Synthesis Report on Stakeholders' Dialogue on Illegal Up- and Downloading 2009–2010', 5, 7 where the rightholders 'consider that ISPs [should] bear a specific responsibility to address infringement because they operate the networks used by the infringers' and that 'ISPs have the capability to exercise significant control over the traffic generated by their subscribers'.

⁵⁸ Monitoring mail envelopes is actually a widespread form of surveillance in the U.S.; see Ron Nixon, 'Report Reveals Wider Tracking of Mail in U.S.' (27 October 2014) (<http://www.nytimes.com/2014/10/28/us/us-secretly-monitoring-mail-of-thousands.html>). Likewise, Haggart (n 48) 68 asks whether a telephone company should be responsible for two people using their telephone system to plan a murder, and that this is in the end a political question. By contrast, various automatic voice recognition technologies could be deployed to monitor and then prevent or provide evidence of various civil and criminal activities committed or planned over the phone.

such basic capacities have existed (to varying degrees), boosted by a vibrant market in enterprise solutions for such products. Therefore, when technical means exist, it is straightforward to argue for deploying and using them in the networks of connectivity providers.⁵⁹ Resistance seems to require more sophisticated and convincing arguments than that doing so is ‘practically impossible’ or ‘against the freedom of expression’.⁶⁰ This brings us to the next three points.

Second, there is undeniably a lot of illegality on the Internet and there must be some way of addressing at least its most serious forms. Whether copyright infringement, and particularly its minor forms, is sufficiently serious in the spectrum of civil or criminal activity is another question. Nonetheless, the key point is how and what parties should be targeted. As has been examined, the portfolio of applicable enforcement mechanisms and targeted intermediaries has grown and IPR holders have adjusted their strategy in the interest of seeking optimal solutions from their perspective.⁶¹ In contrast, the connectivity providers in the U.S. have been practically immune to website blocking requests and the sky has not fallen. Rather, the focus has been more on the infringers, facilitators, and to a degree hosting providers.⁶² Currently it seems like swimming against the tide to argue for completely rejecting all forms of involvement.⁶³ In consequence, the question is more about ‘which’, ‘when’, ‘what’, and ‘how’ rather than ‘whether’ providers should have some role. This emphasises the focus on the issues of proportionality. But why have connectivity providers in particular been targeted with these responsibilities? This is discussed in the following points.

⁵⁹ However, there has been significant success in arguing that so-called deep-packet inspection systems would be in many ways too burdensome and intrusive; see Case C-70/10 *Scarlet Extended* EU:C:2011:771.

⁶⁰ As an example of the practical impossibility argument, see *ibid*, paras 21–22, where the appointed technical expert concluded that ‘despite numerous technical obstacles, the feasibility of filtering and blocking the unlawful sharing of electronic files *could not be entirely ruled out*’ (emphasis added). In the domestic court, the provider was ordered to implement such ‘almost impossible’ mechanism; this was overturned in the CJEU.

⁶¹ If one solution (eg, suing the users in the U.S.) has not been very successful, IPR holders have tried adopting a different approach, in particular by increasing the role of intermediaries.

⁶² See eg Article V (at 304 fn 89); Lucas Feiler, ‘Website Blocking Injunctions under EU and U.S. Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?’ [2012] TTLF Working Papers 13, 46; Daniel W Kopko, ‘Looking for a Crack to Break the Internet’s Back: The Listen4ever Case and Backbone Provider Liability Under the Copyright Act and the DMCA’ (2003) 8 *Computer Law Review and Technology Journal* 83, 116–17; Haggart (n 48) 138–39; Patrick Van Eecke, ‘Online service providers and liability: A plea for a balanced approach’ (2011) 48 *CMLR* 1455, 1501. See also n 111. Yet on recent attempts, see TorrentFreak, ‘MPAA Prepares to Bring Pirate Site Blocking to the U.S.’ (11 December 2014) <<http://torrentfreak.com/mpaa-prepares-to-bring-pirate-site-blocking-to-the-u-s-141211/>>.

⁶³ Similarly Farrand, *Networks of Power in Digital Copyright Law and Policy* (n 3) 169–70, 179 observes that the discourses of the protection of copyright being ‘fundamental’ and intermediary responsibility are not challenged, calling this ‘micro-resistance’ in contrast to more successful macro-level resistance.

Third, ISPs have had difficulty in resisting new obligations. Traditionally, they have not been very active or prominent in lobbying activities.⁶⁴ For example, Geiger wrote in 2006: ‘Furthermore, the concrete design of the law in recent years was characterised more by the protection of private interests (legislators being put under pressure by strong lobby groups) than by systematic reasoning.’⁶⁵ Also, established early lobbying, early information provisioning and frame setting usually prevails unless the issue becomes ‘high profile’, ie, gets significant public attention that forces the politicians to pay attention.⁶⁶ That is, it is difficult to exceed the IPR holders in lobbying or provide disruptive framing in such a manner that it would excite the public. In consequence, it has been relatively straightforward to extend the role using both ‘divide and conquer’ and ‘slippery slope’ tactics. In the former, ISPs and possibly other interest groups such as consumers have been heterogeneous and undivided.⁶⁷ In the latter, a piecemeal approach to new requirements has made it more difficult to argue against the ever expanding role.⁶⁸

Fourth, governments also have public policy reasons for using powerful monitoring and enforcement capabilities in other contexts. For example, Van Eecke observes that ‘[w]e are therefore witnessing the “perfect storm”, where the fight against anti-terrorism, child pornography, obscene content and intellectual property infringements

⁶⁴ This is discussed in Article II. On increasing emphasis, see eg Tom Hamburger and Matea Gold, ‘Google, once disdainful of lobbying, now a master of Washington influence’ (12 April 2014) (http://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politics-google-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74_story.html). In general, see, for example, Haggart (n 48) 67–69; Farrand, *Networks of Power in Digital Copyright Law and Policy* (n 3) 118, 127–29, 183; Farrand, ‘Lobbying and Lawmaking in the European Union’ (n 3) 16–17; Sebastian Haunss, *Conflicts in the Knowledge Society: The Contentious Politics of Intellectual Property* (CUP 2013); Sebastian Haunss and Lars Kohlmorgen, ‘Conflicts about intellectual property claims: The role and function of collective action networks’ (2010) 17 JEPP 242, 257; Sebastian Haunss and Lars Kohlmorgen, ‘Lobbying or politics? Political claims making in IP conflicts’ in Sebastian Haunss (ed), *Politics of Intellectual Property* (Edward Elgar 2009) 107–09; Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (CUP 2003) 7–8, 99; Bernt Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’ (2000) 22 EIPR 501, 501.

⁶⁵ Christophe Geiger, ‘“Constitutionalising” intellectual property law? The influence of fundamental rights on intellectual property in the European Union’ (2006) 37 IIC 371, 378, citing earlier tendencies noted in studies by Laddie, Gerhardt, Gyertyánfy, Quaedvlieg, and Hilty.

⁶⁶ Farrand, ‘Lobbying and Lawmaking in the European Union’ (n 3) 7, 26.

⁶⁷ Certain types of intermediaries (eg, connectivity providers) might also argue that the obligations are imposed on other kind of intermediaries (eg, hosting providers, search engines, or payment or advertisement providers). In general, Marianne Levin, ‘A Balanced Approach on Online Enforcement of Copyrights’ in Johan Axhamn (ed), *Copyright in a Borderless Online Environment* (Norstedts Juridik 2012) 147–48, 156 observes that everyone just wants to strengthen their own position, and that the fight over Internet access and control being primarily a battle for big IPR holders and ISPs.

⁶⁸ See eg Maurice HM Schellekens, ‘Liability of internet intermediaries: A slippery slope?’ (2011) 8 SCRIPTed 154; Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 48) 162. These were explored at length in Article II.

shifts online intermediaries from their unengaged middlemen status.⁶⁹ To these one could also add mundane criminal investigation and protecting public interests, for example, by upholding national gambling monopolies.⁷⁰ When the government also wants to involve intermediaries, private interest groups can ride on their coattails – or the other way around.⁷¹ A concrete example of this is provided by the UK, where the push for parental controls (ie, pornographic filters enabled by default) and the fight against child abuse have forced the providers to invest millions of euro into blocking technologies. As a result, it has been straightforward to apply these also in copyright and trademark infringement contexts, even without having to imburse implementation costs.⁷² With some exaggeration, governments and IPR holders share the common objective of opposing liberal and open Internet policies by compromising users and subjugating ISPs.⁷³

Fifth, in some jurisdictions ISPs are also interested in applying similar controlling and policing for selfish reasons.⁷⁴ Such reasons include traffic management (throttling) to avoid investments in network infrastructure or targeting the users with advertisements or services of their own.⁷⁵ This also provides a capability for acting,

⁶⁹ Van Eecke (n 62) 1499. See also Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 48) 150, on government roles Gasser and Schulz (n 30) 9–11, and references in Chapter 1.

⁷⁰ The data retention legislation, now invalidated by *Digital Rights Ireland* (n 6) is a good example of the former; see n 6. In Finland, there are about 250 different criminal offences that, if committed online, may qualify for using data retention metadata (see Article III, at 899 fn 74), including copyright offences via online filesharing (see Article III, at 908). The metadata outside the data retention regime can also be used in other contexts such as civil proceedings. As a further example related to both perspectives, IPR holders in Finland lobbied (unsuccessfully) for a legislative change to enable the use of data retention metadata in civil litigation (see the briefs in Sivistysvaliokunnan lausunto 5/2014).

⁷¹ See eg Mike Masnick, 'Anti-Piracy Group Says: 'Child Porn Is Great' Since It Gets Politicians To Block File Sharing Sites' (28 April 2010) (<https://www.techdirt.com/articles/20100427/1437179198.shtml>); TJ McIntyre, 'Child abuse images and cleanfeeds: Assessing internet blocking systems' in Ian Brown (ed), *Research Handbook on Governance of the Internet* (Edward Elgar 2013) 295–97, 302.

⁷² See *Cartier* (n 19) paras 28–29, 38–50, 252. Requiring such investments would likely not be proportionate in countries which do not have such blocking regimes.

⁷³ Similarly in Pheoh Hoon Lim and Louise Longdin, 'P2P online file sharing: transnational convergence and divergence in balancing stakeholder interests' (2011) 33 *EIPR* 690, 691, 698 on 'coercing ISPs into a sentry or policing role to assist right holders to track down and sue persistent or repeat infringers'. For example, Haggart (n 48) 132, 136 refers to 'unholy alliances' (in that context, with ISPs and IPR owners against users).

⁷⁴ Jeremy de Beer and Christopher D Clemmer, 'Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?' (2009) 49 *Jurimetrics* 375, 375–76 observes 'events in several jurisdictions demonstrate a new trend away from a passive-reactive approach toward an active-preventative approach instead' and to a voluntary shift away to being active enforcers. These patterns have been more prevalent outside Europe, however.

⁷⁵ See Article III (at 887–88) and eg Paul Ohm, 'The Rise and Fall of Invasive ISP Surveillance' [2009] *University of Illinois LR* 1417, 1422–37. For example, according to BEREC, 'A view of traffic management and other practices resulting in restrictions to the open Internet in Europe (BoR (12) 30)' (29 May 2012) (http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/45-berec-findings-on-traffic-management-practices-in-europe) 21–22, in Europe some restrictions are in place in 21% of wireline and 36% of wireless broadband subscribers.

as mentioned above. A case can be made that employing such existing means of copyright enforcement would not be disproportionate. In consequence, some ISPs may share objectives with IPR holders and co-operation might be beneficial.⁷⁶

4.2.4 Where are we heading with online enforcement?

Do we know yet where we are with enforcement and how it is expected to develop in the future? Lim and Longdin have observed three distinct phases in the ‘moral panics’ related to copyright enforcement. Such panics are by no means new.⁷⁷ Here the first stage includes ‘strenuous lobbying’ to keep traditional business models intact through strengthened enforcement and investigative mechanisms. Indeed, ‘[d]raconian penalties and intrusive tracking methods are best regarded as signs of futility rather than success’. The second stage includes a consumer/user backlash that may give the initially panicked legislators cause for thought, possibly leading to rationalising enforcement mechanisms. In the third final stage, belated evolution of new business models offer users alternatives to infringing activity.⁷⁸

Various stakeholders would obviously have different answers to these questions. So far, most IPR holders have been stuck in the first stage, lobbying for stricter enforcement rather than adapting to the new market structures and consumption habits.⁷⁹ For example, producers in Finland have been unwilling to lower the prices

⁷⁶ Heavy peer-to-peer users are not ideal customers, as they use a disproportionate amount of bandwidth; see Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 48) 25, and in many countries the enforcement regime is based on co-operation; see Intellectual Property Office (n 2) 6. Nonetheless, active and visible participation in suing your own customers may have significant negative PR consequences and be a bad business decision. See eg Article I (at 53); Justin Hughes, ‘On the Logic of Suing One’s Customers and the Dilemma of Infringement-Based Business Models’ (2005) 22 *Cardozo Arts & Entertainment LJ* 725; Lilian Edwards, ‘The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights’ (2011) (http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf) 25–26.

⁷⁷ Lim and Longdin (n 73) 690, 698. Almost every technology (radio, TV, theatres, VHS tapes, Internet, etc.) has invoked similar suppressive reactions and doomsday scenarios. See Article II (at 232 fn 115) and Jessica Litman, *Digital Copyright* (Prometheus Books 2006) 106–08; William Patry, *How to Fix Copyright* (OUP 2011) 141ff; Peter K Yu, ‘Digital Copyright and Confuzzling Rhetoric’ (2011) 13 *VandJETL* 881, 887–90; Brad Sherman and Leanne Wiseman (eds), *Copyright and the Challenge of the New* (Kluwer Law International 2012); Nate Anderson, ‘100 years of Big Content fearing technology—in its own words’ (12 October 2009) (<http://arstechnica.com/tech-policy/2009/10/100-years-of-big-content-fearing-technology-in-its-own-words/>).

⁷⁸ Lim and Longdin (n 73) 690, 698. More generally, Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Information Power* (IPR University Center 2009) 262–65, 274–75 describes common market, reconciliation, and proprietarian phases, and that (in 2009) ‘the time was not yet ripe to pronounce the emergence of a fourth phase in European intellectual property protection’. It is argued that there have been significant improvements since then, in particular in the context of enforcement, as also discussed, although more critically, in Tuomas Mylly, ‘The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 112–26.

⁷⁹ Levin (n 67) 149–50.

or increase offerings in the interest of reducing piracy. Indeed, IPR holders have considered it inappropriate to require reform of their business model unless effective means of online copyright enforcement are provided at the same time.⁸⁰ No doubt there have been some trials and attempts at innovation, but the major IPR holders have not yet given up on advocating stronger enforcement. In summary, their preferred stage requires no further argument.

However, in academia most commentators have been critical for quite a while.⁸¹ It is no surprise that they have generally advocated rationalisation of enforcement, sought alternatives, and advocated the evolution of business models. A typical example is provided by Geiger:

The strategies adopted in recent years to combat unauthorised uses of copyright works on the Internet show very uncertain results. This should lead to an in-depth discussion of possible alternatives. More fundamentally, the experience of recent years raises the question of whether it is always appropriate to respond to technological changes by strengthening the protection of copyright and its enforcement mechanisms.⁸²

Further, the contribution by an expert study group led by Professor Ian Hargreaves is interesting as it was a commissioned and independent pre-legislative review in the UK. It also suggested rationalising enforcement. The report argued that ‘investment to date in stronger enforcement has not significantly reduced piracy’.⁸³ The report also advocated the inevitability of change, observing that ‘[c]ompeting with the free [alternatives] will be an ongoing feature of the business challenge’ and ‘what rights

⁸⁰ See Article II (at 232 fn 114) and references, in particular Anna Vuopala, *Luvattomien verkkojaketun vähentämiskeinojen arviointia. Selvitykset lainvalmistelun tueksi* (OKM:n työryhmämuistioita ja selvityksiä 2013:13, Ministry of Education and Culture 2013) 25, 53. Similarly, in Commission, ‘Synthesis Report on Stakeholders’ Dialogue on Illegal Up- and Downloading 2009–2010’, 5, ‘the rightholders consider that legal offers alone are not likely to reduce piracy’, while ISPs call for more attractive legal offers at fair conditions.

⁸¹ For a summary, see Farrand, *Networks of Power in Digital Copyright Law and Policy* (n 3) 46, 50, 175. On the other hand, citing Phil Zemer, ‘Rethinking copyright alternatives’ (2006) 16 *IJLIT* 137, 140, legislators are deemed to be ‘hostages of strong lobby groups whose interests usually prevail over those of the general public’. More critically and earlier in 2000 Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’ (n 64) 501 wrote that ‘The unprecedented lobbying, the bloodshed, the vilification, the media propaganda, the constant hounding of EC and government officials, certainly suggested [that the Infosoc Directive] was [‘a vitally important dossier’].’ For the history of influencing the Infosoc and Enforcement Directives, see Farrand, ‘Lobbying and Lawmaking in the European Union’ (n 3) 11–16. On ignoring the academic views in lawmaking, see Goold (n 4) 27–29.

⁸² Christophe Geiger, ‘Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach’ in Paul Torremans (ed), *Research Handbook on Cross-Border Enforcement of Intellectual Property* (SSRN Version, Edward Elgar 2015) 22.

⁸³ Ian Hargreaves, *Digital Opportunity: Review of Intellectual Property and Growth* (2011) 77–78, also citing Joe Karaganis, ‘Rethinking Piracy’ in Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council 2011) 30: ‘Despite the stream of lawsuits and site closures, we see no evidence — and indeed very few claims — that these efforts have had any measurable impact on online piracy. The costs and technical requirements of running a torrent tracker or indexing site are modest, and new sites have quickly emerged to replace old ones.’

holders face is a particular form of challenge shared by many businesses, namely how to construct a distinctive product offering that consumers are willing to pay for'.⁸⁴

The Hargreaves Report concluded that 'we need a combination of enforcement, education and a big push to expand the legitimate market for digital content' and that '[e]mphasising enforcement as an alternative to improved digital licensing and modernised copyright law is the wrong approach'.⁸⁵

In summary, the academic efforts are indicative of the second stage, with a hope projected at the legislators of moving towards the third. This brings us to the more practical question of what the position adopted by legislators, EU legislators in particular is.⁸⁶

Given the Commission's monopoly of legislative initiatives, its views are the most important.⁸⁷ An increasing pressure for change has been recognised. For example, Ladenburger writes (in an unofficial capacity):

In the coming years, 'the digital internal market' is prone to become a major reference field [... where] an increasing challenge will be to find the right balance between the protection of intellectual property rights [...] and fundamental rights invoked by businesses and users wishing to reap more fully the potentials of the internet [...]⁸⁸

This and the related challenges and deficiencies have also been acknowledged in the IPR strategy white paper of 2011: 'so far, the EU's IP enforcement framework has not been reconciled with the new digital environment'. Further strengthening IPR enforcement in parallel with general reflection of EU policies and development of

⁸⁴ Hargreaves (n 83) 80. This has also been voiced more generally and forcefully, for example, by Yu, 'Digital Copyright and Confuzzling Rhetoric' (n 77) 890: 'Given the continuous evolution of our economy, the [copyright] industry has yet to convince us why its business model deserves to be singled out for protection while other equally important industries had to adapt to technological change.' Likewise on IPR enforcement biasing large well-established organisations which also focus on the short-term preservation of their business models, see Haggart (n 48) 59.

⁸⁵ Hargreaves (n 83) 81. Also on greater availability of legal alternatives, see Intellectual Property Office (n 2) 14. As a case in point, in Norway music 'piracy' has been essentially eliminated without enforcement actions with the rise of various legal streaming alternatives; see James Cook, 'Norway Has Figured Out How to Solve The Problem Of Music Piracy' (27 January 2015) (<http://uk.businessinsider.com/norway-music-piracy-statistics-2015-1>).

⁸⁶ National legislators seem typically very sympathetic to IPR holders, possibly because they are inundated with copyright ideology and through participation in various international pro-IPR bodies. See Article II (at 225 fn 97, 236–37) and eg Mylly, *Intellectual Property and European Economic Constitutional Law* (n 78) 260; Sell (n 64) 7, 99.

⁸⁷ However, as has been observed in IPR legislative efforts (see eg Farrand, 'Lobbying and Lawmaking in the European Union' (n 3) 22–28), the EU parliament has also intervened in some circumstances and essentially halted or changed proposals in the face of major public protests.

⁸⁸ Clemens Ladenburger, 'The Protection of Fundamental Rights Post-Lisbon' (2012) (http://www.fide2012.eu/index.php?doc_id=88) 39. In a similar fashion, later, Maria Martin-Prat, 'The Future of Copyright in Europe' (2014) 38 ColumJLA 29, 29, the head of the copyright department in the Commission, writes that 'a rational review of copyright rules is required to maintain the legitimacy and robustness of the system in Europe' and that this needs to be done at the European rather than at the national level.

attractive legal offers of digital content was however still on the agenda.⁸⁹ At that point, a review of the Enforcement Directive was under way. One goal was to respect all fundamental rights of the EUCFR and tackle the infringements at their source in co-operation with intermediaries.⁹⁰

The action plan of July 2014, ‘aiming at renewing the consensus on the enforcement of IPR’, includes 10 steps. A major trend appears to be the shift to a new ‘follow the money’ model intended to target the revenue stream of commercial-scale infringement.⁹¹ It is also noteworthy that the communication does not include any identifiable actions against Internet connectivity providers. According to Kroes,

We agreed that focusing on ordinary users would be heavy-handed, disproportionate, and ineffective. We agreed that new powers were not the answer either. Instead we will pursue non-legislative measures, under existing powers, focused on large-scale commercial infringements. That is the right way forward.⁹²

This was echoed in the mission statements of the Juncker commission, calling for drafting new legislative proposals on modernisation of copyright within the first six months, and then adopted in the Commission 2015 work programme as modernisation of EU copyright legislation to support a connected digital single market.⁹³

The lack of coherence and active steps may have been partially due to the number of Commission departments involved. For example, Communications Networks, Content & Technology (DG CONNECT) oversaw the Digital Agenda, Internal Market and Services (DG MARKT) IPR and its enforcement, and Trade (DG TRADE) international treaties including IPR. It is obvious that they have had different views and priorities on how to proceed.⁹⁴

⁸⁹ Commission, ‘A Single Market for Intellectual Property Rights’ (Communication) COM(2011) 287 final, 6.

⁹⁰ *Ibid*, 19 (as was also observed above by Ladenburger (n 88) 39): ‘Any amendments should have as their objective tackling the infringements at their source and, to that end, foster cooperation of intermediaries, such as internet service providers, while being compatible with the goals of broadband policies and without prejudicing the interests of end-consumers.’

⁹¹ Commission, ‘Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan’ (Communication) COM(2014) 392/2, 1.

⁹² Neelie Kroes, ‘Our single market is crying out for copyright reform’ (2 July 2014) (http://europa.eu/rapid/press-release_SPEECH-14-528_en.htm). In addition to enforcement perspective, Kroes (Former VP of Commission responsible for the Digital Agenda) also called for a more balanced and reformed copyright: ‘But even that approach to enforcement cannot stand alone. It must be accompanied by wider and significant reform. It would be highly regrettable if the current Commission could not achieve that.’

⁹³ Future of Copyright, ‘EU copyright reform in fast lane: New legislative proposals coming soon’ (12 September 2014) (<http://www.futureofcopyright.com/home/blog-post/2014/09/12/eu-copyright-reform-in-fast-lane-new-legislative-proposals-coming-soon.html>); Commission, ‘Commission Work Programme 2015: A New Start’ (Communication) COM(2014) 910 final 6.

⁹⁴ See eg Kennisland, ‘Barnier and Kroes in a copyright reform stand-off’ (18 July 2014) (<http://www.kennisland.nl/filter/opinies/barnier-and-kroes-in-a-copyright-reform-stand-off>). The specific implications of the 2015 work programme remain to be seen. The emphasis on fast-track modernisation is striking, but it is not yet clear which changes this might imply to copyright enforcement. Cf. Martin-Prat (n 88) 31, 38 observes that typical advocates for copyright review

This is illustrated in the internal draft of the still unpublished copyright white paper of June 2014 and its public follow-up. The white paper was from the enforcement perspective unambitious and looked like the ‘traditional canon’, for example, in noting that ‘rights that cannot be enforced are of no (economic) value’. Effective cross-border court orders were deemed necessary because of difficulty in enforcement. According to the white paper, ‘the key challenge to tackle was to rapidly identify and tackle the source of such activities with the assistance of intermediaries, in particular the most harmful commercial-grade infringements that seek to generate profits’.⁹⁵ As a way forward, ‘enhancing due diligence obligations for all the actors in the value chain of digital content distribution could be considered’. Intermediaries ‘could be encouraged to pro-actively help in addressing the commercial offer of copyright-infringing content on the internet’. This could be achieved using means that should be ‘proportionate and balanced, and would help uphold the reward function of copyright for the creative industries’. Clarification on the requirements and articulation of the various fundamental rights interests involved could be provided. These potential activities would be in addition to the ‘follow the money’ approach.⁹⁶ The striking focus on observing, evaluation, ‘coulds’ and still open activities – similar to the earlier IPR strategy communication of 2011 – suggests that the Commission had not yet committed to any particular direction and was watching the events unfold and the world move on.

It remains to be seen whether this approach is going to remain – or indeed, whether the white paper has been abandoned altogether. The earlier IPR enforcement action plan, inter-departmental consultations, and the new 2015 work programme for modernising EU copyright imply that at least the main focus has shifted away from enforcement and strengthening it in particular.⁹⁷

In summary, there appear to be signs of all stages from Commission white papers. Enforcement no longer appears to be an exclusionary approach or a priority, but is always – at least on paper – balanced against other priorities such as the evolution of business models or modernising cross-border licensing. Since the 2011 IPR strategy, there have been signs of focus on tackling the issues at their source. This would be in contrast to enforcement through user-end connectivity providers. For example, in

have maintained that there is no need to review the E-Commerce and Enforcement Directives; on the other hand, the rightholders have requested such review to enhance enforcement.

⁹⁵ Paul Keller, ‘Leaked draft of Commission copyright white paper based on flawed assumptions’ (25 June 2014) (<http://www.communia-association.org/2014/06/25/leaked-draft-of-commission-copyright-white-paper-based-on-flawed-assumptions/>) 17. The release in July 2014 was postponed to September in order to attempt to build greater consensus in inter-departmental consultations; see Kennisland (n 94). However, the continued delay suggests that the paper may have been abandoned.

⁹⁶ Keller (n 95) 18.

⁹⁷ On a slightly different take, see Eleonora Rosati, ‘2015: The year of blocking injunctions?’ (2015) 10 *JIPLP* 147.

the draft white paper enforcement should be done ‘with assistance of intermediaries’, which might imply disconnecting the website as the primary approach. However, there were still some alarming signs of considering more sophisticated forms of enforcement and increased responsibility for Internet service providers, especially in the draft white paper. The modernisation of EU copyright in 2015 work programme will also likely ripple some effects to the enforcement.⁹⁸ Regardless of the approach, ‘the proof is in the pudding’. That is, white papers matter a great deal less than the completed and approved explicit actions, legislative acts in particular.

4.2.5 A case against a more active role for ISPs

We have explored the reasons why ISPs have involuntarily become more active in enforcing activities. Here it is argued that this is undesirable at least in general and more so as the intensity of enforcement increases. There are many somewhat interconnected reasons for this, including in particular:

1. approaches have not been successful or impact assessments have been lacking;
2. the goals pursued lack legitimacy; and
3. approaches have overly burdensome negative consequences.

The first reason is that the mechanisms have not been adequately effective compared to their economic and social cost.⁹⁹ For example, while website blocking in its most simplistic forms could be conducted with relative ease, its cost, expansion and at best moderate efficiency are somewhat discouraging. The seriousness of problems increases with the more advanced and automated mechanisms. For example, Giblin has been very explicit in her critique of graduated response mechanisms:

So, what happens when ISPs become copyright police? The evidence suggests that the answer is “very little.” Tens of millions of dollars of largely public money has gone toward implementing the various graduated responses, in experiments that are now several years long, but evidence is surprisingly lacking that they’re doing anything to achieve copyright’s underlying aims. The evidence simply does not support the big claims that have been made about the success and efficacy of graduated response.¹⁰⁰

Given that many approaches have been failures, should we not employ better mechanisms instead? The answer would be affirmative if a non-intrusive and yet more

⁹⁸ According to Martin-Prat (n 88) 45, improving the internal market ‘also implies examining whether the current system of enforcement of rights is equipped to function across borders’.

⁹⁹ See earlier discussion on this, for example, at n 83 and Hargreaves (n 83) 77–78 on ineffectiveness and the lack of evidence-based lawmaking.

¹⁰⁰ Giblin, ‘When ISPs Become Copyright Police’ (n 42) 86. See also TorrentFreak, ‘U.S. ‘Strikes’ Scheme Fails to Impact Piracy Landscape’ (11 January 2015) (<http://torrentfreak.com/u-s-strikes-scheme-fails-to-impact-piracy-landscape-150111/>).

effective mechanism was devised. This has proved to be challenging. Therefore, in practice one should also be willing to accept the negative answer that a proportionate mechanism may not exist.¹⁰¹ Indeed, resisting the urge to answer ‘yes’ to this line of questioning has been observed by Giblin:

Rights holders might well use this lack of effect to argue that current ISP policing measure don’t go far enough, and push for ISPs to do yet more to police their users. No doubt right holders would like to do so: IFPI has already proposed deep-packet inspection by ISPs as a not “overly burdensome or expensive” solution to piracy.¹⁰²

The second reason concerns the lack of legitimacy. In previous sections, the problems of strong lobbying and even bias in the legislative processes were discussed.¹⁰³ In *de lege ferenda* sense, this can be argued to provide a case against more such favourable and one-sided legislation. This is also underlined from a different perspective in private enforcement mechanisms.¹⁰⁴

The lack of legitimacy also concerns a more specific topic, the objective of copyright enforcement. This applies both to adjudicative situations in proportionality analysis as well as imbalance in legislative efforts. When the measures are ineffective, the goals of conducting enforcement anyway through intermediaries seem to be 1) the symbolic value of copyright enforcement, 2) the importance of winning in a power struggle against Internet service providers as a matter of principle and in order to acquire further obligations in the future, and 3) vain attempts to educate already-cognisant users. None of these are very convincing as justification.¹⁰⁵ This is emphasised when

¹⁰¹ This was argued as one possibility in Article VI (paras 76, 87). Two specific reasons for rejection might be inefficiency and the lack of a proportionate mechanism which would not cause collateral damage (such as blocking third-party sites). Similarly, on the reality that there may not be a mechanism satisfying the criteria required in *UPC Telekabel Wien*, see Julia Hörnle, ‘On whose side does the internet access provider stand? Blocking injunctions against communication service providers. Case C-314/12, UPC Telekabel Wien GmbH v Constantin Film’ (2014) 19 CommsL 99, 100; Christina Angelopoulos, ‘Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape’ (2014) 9 JIPLP 812, 819.

¹⁰² Giblin, ‘When ISPs Become Copyright Police’ (n 42) 86. This ‘ineffectiveness is a sign that more effective measures must be used’ argument was also observed in Article I (at 51 and 65) and Article II (at 238). Similarly earlier Rohan Massey, ‘Independent service providers or industry’s secret police? The role of the ISPs in relation to users infringing copyright’ (2008) 19 EntLR 160, 160 writes of IFPI eloquently speaking of ‘the wind of change blowing through the music industry, heralding a new dawn of ISP responsibility and co-operation, backed by a collective will on the part of national legislatures to mandate that responsibility’. See also Günther and Norrgård (n 18) 123, referring to Commission, ‘Synthesis Report on Stakeholders’ Dialogue on Illegal Up- and Downloading 2009–2010’, 7.

¹⁰³ This was thoroughly examined in Article II. In this chapter, see eg nn 64 and 81 and the corresponding text.

¹⁰⁴ Giblin, ‘When ISPs Become Copyright Police’ (n 42) 86: ‘Digital technologies and Internet distribution have brought huge challenges [...]. However, this does not justify public policy responses that are expensive and ineffective, or private enforcement that bypasses democratic lawmaking processes and safeguards.’

¹⁰⁵ However, some degree of symbolic law enforcement may admittedly also be in the public policy interest. Since Article II, it has been suggested by Kevin T O’Sullivan, ‘Enforcing copyright online: Internet provider obligations and the European Charter of Human Rights’ (2014) 36 EIPR 577,

conducted at the expense of connectivity providers instead of as regulated by law and fully compensated by the IPR holders. The approaches essentially externalise the risks and costs of enforcement to ISPs, yet the IPR holders solely reap the alleged benefits of such activities.¹⁰⁶

The third reason concerns negative impacts or the implications of such measures. In addition to the general issues related to freedom of expression, freedom to conduct a business, and other such rights, a couple of more specific concerns should be examined. Specifically, increasing the evaluative role of ISPs in making judgement calls would turn them into judges, incur costs, and also undermine privacy. In order to prevent these problems, ISPs would need to become more conservative, resulting in suppressing even legal communications or services, and stifling innovation in order to play safe.¹⁰⁷

For example, Levin articulates this as: ‘there is an obvious danger that ISPs would be obliged to actively evaluate the activities of their clients in order to insulate them from legal liability for contributory copyright infringement and involvement in costly legal proceedings’, resulting in only ‘permissive innovation’ and impediment to development.¹⁰⁸ On the other hand, Levin also argues that ISPs cannot act as if they were blind. While neither filtering nor blocking is a sustainable solution, she argues for a review that would nuance the rules on the liabilities of ISPs as a part of the solution. However, the role of enforcement should still fall on the IPR holders, not intermediaries.¹⁰⁹ In a similar vein, Coudert and Werkers put it thus (emphasis added):

ISPs should not be converted into judges and be asked to evaluate, on their own, the lawfulness of downloaded content. Users’ fundamental rights, such as their right to privacy, but also their right to a fair trial, could, as a result, end up seriously diminished.

580 that the objective is to ‘shape the behaviour of those engaged in piracy online’ and blocking forms a limb of a greater strategy of deterrence by negatively impacting piracy and raises the transaction costs of infringers. It is not obvious how this would be a strong argument for this kind of enforcement.

¹⁰⁶ These were examined in Section 4.2.2 and Articles II and VI. On general indifference and ignoring the law, see eg Alexander Peukert, ‘Why do ‘good people’ disregard copyright on the Internet?’ in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property* (Edward Elgar 2012); Jonas Andersson Schwartz and Stefan Larsson, ‘The Justifications of Piracy: Differences in Conceptualization and Argumentation Between Active Uploaders and Other File-sharers’ in Martin Fredriksson and James Arvanitakis (eds), *Piracy: Leakages from Modernity* (Litwin Books 2014).

¹⁰⁷ This discussion is continued more generally in Section 5.2.

¹⁰⁸ Levin (n 67) 152. Similarly, Gasser and Schulz (n 30) 7–8, 12–13 describe the issue of ‘incentive structures’ for providers leading to ‘over-compliance’; providers may be quick to take down even legal content in order to avoid costs and potential liability, and that the provider should not be put in the position of whether to remove content or not; similarly in Peter K Yu, ‘Digital copyright enforcement measures and their human rights threats’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 463.

¹⁰⁹ Levin (n 67) 167, 169. Within this ‘nuancing’, it is submitted that those who have a more direct link to the infringement should also have a bigger role in addressing the issue. See Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (n 48) 59–60, 147 and n 48.

*Turning ISPs into assistants of copyright societies and right holders in their battle for the protection and enforcement of copyrights against piracy on the Internet will have a baleful influence on the freedom of communication and the right to privacy of their clients, giving way to massive monitoring of electronic communications for the sake of private interests.*¹¹⁰

Van Eecke, citing inter alia De Beer and Clemmer, has also made similar observations on the alarming trends on ISPs in general, not just connectivity providers:

Based on the State and the EU level, we foresee that the trend to force online intermediaries into a policing role and to monitor their users *ex ante* will continue to increase, based on national rules that increase the general duty of care of service providers while simultaneously targeting end-users. Neither the service providers, nor the end-users, nor the European industry would benefit from this shift from passive-reactive to active-preventative.¹¹¹

If the trend to blocking continues, it is inevitable that the likelihood of collateral damage in the form of blocking third party websites will increase. It may also be challenging or impossible to verify in advance whether the implementation of blocking will affect other sites.¹¹² Further, the more advanced mechanisms avoiding these risks might be significantly more burdensome for the providers. This constitutes a risk that courts might be overly sensitive to blocking requests and the acceptable level of burden might start shifting upward.

Comparatively, in the U.S. there have been arguments in particular against open-ended secondary liability standards – which are more applicable to hosting providers than connectivity providers – and the negative implications of unforeseeability. Most fundamentally, Blevins observes that the liability of Internet platforms should be both narrow and clear.¹¹³ Lack of clarity increases the grey area surrounding the line of liability, leading to over-deterrence by risk-averse actors.¹¹⁴ Further, uncertainty ‘outsources’ enforcement costs to Internet platforms, incentivising them to become co-enforcers of copyrights.¹¹⁵ He observes that the rules are too broad if they effectively shift the burden of monitoring and enforcement to platforms.¹¹⁶ Finally, enforcement

¹¹⁰ Coudert and Werkers (n 57) 71.

¹¹¹ Van Eecke (n 62) 1501; de Beer and Clemmer (n 74) 389, 404. Van Eecke also compares the situation to online intermediaries enjoying an ‘almost absolute form of protection’ in the U.S. with the flourishing state of U.S. services.

¹¹² This concerns IP address based blocking in particular, because one needs to know a priori whether the website shares an IP address with some other site. This information can be obtained reliably only from the hosting provider or the website operator. On average, the vast majority of websites do share the address – yet most blocked sites are not typical average websites – and this has also led to inadvertent overblocking. See Article IV (at 287); *Cartier* (n 19) para 67; Hörnle (n 101) 160.

¹¹³ John Blevins, ‘Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms’ (2013) 34 *Cardozo LR* 1821, 1876.

¹¹⁴ *Ibid*, 1877.

¹¹⁵ *Ibid*, 1824.

¹¹⁶ *Ibid*, 1874.

against Internet platforms may succeed merely by increasing the potential costs of enforcement proceedings. IPR holders in particular ‘prefer statutory interpretations that impose vague fact-intensive standards’, resulting in costly and lengthy proceedings which would be prohibitive for Internet platform companies.¹¹⁷

Indeed, Lemley and Reese and also Helman observe the same problems with secondary liability standards: the former two with the option of litigation against makers of technology (facilitators) stifling innovation, the latter against hosting providers as ‘deep-pocket defendants’ and as gatekeepers against direct infringement.¹¹⁸

These U.S. perspectives are not directly applicable in this EU context, because their focus was on hosting providers and the extensions of secondary liability.¹¹⁹ Nonetheless, these demonstrate the issue of uncertainty. Here it comes up particularly when the provider decides whether to participate and how in the legal proceedings.¹²⁰ The lack of opposing arguments in court results in judges accepting the requests more easily, leading to various implications such as the stifling of innovation and increasing the gatekeeper role. Further, as an analogue of going after ‘deep-pocket defendants’ one could submit going after ‘local and technologically capable defendants’, ie, the local providers instead of remote providers or infringers.

¹¹⁷ Blevins (n 113) 1824–25.

¹¹⁸ Mark A Lemley and R Anthony Reese, ‘Reducing Digital Copyright Infringement without Restricting Innovation’ (2004) 56 *Stanford LR* 1345, 1349–50; Lital Helman, ‘Pull too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement’ (2010) 19 *Texas Intellectual Property LJ* 111, 155–65.

¹¹⁹ See eg Miquel Peguera, ‘Converging Standards of Protection from Secondary Liability for Trademark and Copyright Infringement Online’ (2014) 37 *ColumJLA* 609, 610–13.

¹²⁰ General blocking orders that leave the implementation choice to the provider could also increase uncertainty; see Hörnle (n 101) 162. However, it has been argued that the provider can use the judicial review requirement to mitigate this uncertainty. See Article VI (para 34, particularly note 70).

Chapter 5

Conclusions

First, the research question is addressed in Section 5.1.¹ The main focus is on three more general aspects of the conclusions. In Section 5.2, general observations are made on the evolving role of Internet intermediaries and the history thereof. Section 5.3 summarises certain key findings of doctrinal legal scholarship. These are indicative of an ideal interpretation of the law. Section 5.4 introduces a few considerations of legal policy. These suggest why the law is as it is and what changes might be appropriate. Because these are based on earlier chapters, the formulation is both concise and incomplete.²

5.1 The research question

The research question encompassing the whole study was formulated as follows: *On what conditions and why may an Internet connectivity provider be forced to participate in online copyright enforcement?* This was further divided into sub-questions:

1. How may Internet connectivity providers be used for copyright enforcement and how do these mechanisms fit into the general copyright enforcement landscape?
2. What are the requirements and considerations to be evaluated, in particular with regard to fundamental rights, in order to issue a website blocking order?
3. What motivations can be observed in the expansion of copyright enforcement through providers?
4. What trends can be discerned as general observations and conclusions?

¹ However, discussion is quite brief, given that the question reflected the whole study, rather than just this overview.

² That is, only a few issues can be mentioned here. For a full account, the main text should be consulted. The text also provides hints on potential topics for future research.

As was stated in Section 2.1, it is not possible to fully substantiate the answers to these questions in this overview. All the questions were already addressed or at least touched upon in the articles, summarised in Section 4.1.

The first introductory sub-question was addressed in Article I and as an update in Article II. The applicable enforcement mechanisms were discussed in particular in Articles III and VI. In short, connectivity providers may be leveraged in multiple ways, the most common and significant ones being website blocking and subscriber information disclosure. There are also some instances of automated monitoring and notification systems as well as user disconnection. These are in contrast to a large number of other means directed against infringers or users at large. Given that the provider is a faultless third party, the basis for these measures differs in many respects from actions against infringers. These differences require one to be alert and to consider issues such as the rights of various parties and the appropriate interpretation of IPR enforcement principles, as well as subsidiarity and the objective during proportionality evaluation.

The second sub-question was examined in Articles IV, V and in particular VI. The framework of fundamental rights and proportionality evaluation was expanded in this overview and finally a more general proportionality evaluation procedure was submitted. The requirements for imposing a blocking injunction are the legal basis, the grounds for injunction, ie, conditions of eligibility of blocking a website, proportionality evaluation, and procedural requirements and national modalities. In the proportionality evaluation procedure, inter alia the rights and interests at stake need to be examined, the interpretation of IPR enforcement principles in this context identified, more precise evaluation criteria formulated, and a proportionality test conducted. The more specific criteria for proportionality of website blocking suggested are 1) degree and basis of illegality, 2) effectiveness, 3) negative burden on the provider, 4) subsidiarity, and 5) avoiding collateral damage.

The third sub-question was examined in Article II. It is suggested that there are more, and perhaps even stronger, motives for pursuing enforcement through intermediaries than belief in efficacy. The first is the symbolic value of copyright enforcement. That is, IPR holders want to be seen 'doing something' for the benefit of the public, their own constituents, and to legitimise further legislative proposals. Secondly, a vain attempt to educate already-cognisant infringing users can be discerned. Finally and perhaps most importantly, there appears to be a political struggle in the legislative arena, that is, advocating strong copyright ideology and fighting off calls to evolve outdated business models. In this struggle, increasing the responsibility of third-party intermediaries is crucial, especially if enforcement can be done at their expense. Success invites further proposals; one could always do more. On the other hand, failure

and the lack of impact can be argued to warrant further extensions or trying again, with the hope that the next steps are more efficient in curbing ‘piracy’.³

The fourth sub-question was discussed in Articles II and VI in particular and also revisited in Section 4.2. Enforcement through connectivity providers has been a major approach in trying to tackle Internet infringement. However, in recent years, the criticism and calls for legitimacy have increased, particularly since the protests and rejection of the ACTA by the European Parliament in July 2012.⁴ The publication of a new IPR strategy in July 2014 was also indicative of a possible shift in enforcement to a ‘follow the money’ approach; the strategy did not involve any identifiable actions on connectivity providers. Still, another early version of the Commission white paper suggested continuation and even expansion of the responsibility of intermediaries, although this has likely been superseded by the new 2015 work programme including modernising EU copyright. It remains to be seen what the final resolution will be. In any case, pressure clearly seems to be mounting to find new ways to enhance the availability of legal offerings and to seek new, less contested means of copyright enforcement.⁵ It will be particularly interesting to see which third party intermediaries – for example, search engines, social media sites, domain registries, payment and advertisement intermediaries – will be in a key position in the future.⁶

³ A more appropriate and realistic take would be that ineffectiveness is a warning sign that other approaches might also prove to be ineffective. This also suggests that the root cause may be elsewhere and the focus should be on understanding and then addressing it.

⁴ European Parliament, ‘European Parliament rejects ACTA’ (4 July 2012) (<http://www.europarl.europa.eu/news/en/news-room/content/20120703ipr48247/html/European-Parliament-rejects-ACTA>); Blayne Haggart, *Copyright: The Global Politics of Digital Copyright Reform* (University of Toronto Press 2014) 252–55; Patrick R Goold, ‘The Evolution of Normative Legal Scholarship: The Case of Copyright Discourse’ (2013) 5 EJLS 23, 28–29; Benjamin Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ [2015] OJLS (Advance access); Benjamin Farrand, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (Routledge 2014) 190–94, and on earlier failed attempts to challenge the Infococ and Enforcement Directives, see eg *ibid*, 197–98; Farrand, ‘Lobbying and Lawmaking in the European Union’ (n 4) 11–17. In particular Farrand argued that a key success factor was framing the problems as issues of democracy rather than as more abstract problems in enforcing intellectual property. Nonetheless, Haggart (n 4) 66 submits that the rising consumer interest has the potential to inject greater recognition of societal effects of copyright into legislative deliberations.

⁵ Similarly on the enforcement measures being insufficient and the need to improve the attractiveness of legal alternatives, see Petteri Günther and Marcus Norrgård, ‘Blocking Websites: Copyright Enforcement Online and Responsibilities of Internet Intermediaries in Europe’ [2014] JFT 97, 129. Intellectual Property Office, ‘International Comparison of Approaches to Online Copyright Infringement: Final Report’ (9 February 2015) (<https://www.gov.uk/government/publications/international-comparison-of-approaches-to-online-copyright-enforcement>) 8 also describes online copyright enforcement as a complex phenomenon, to which many factors contribute to, for instance enforcement measures in other jurisdictions, technological development, and the availability and affordability of legal services.

⁶ 86% of sites depend on advertisements, and many also on online payment facilities. See PRS for Music, ‘Report reveals the six business models behind online copyright infringement’ (18 July 2012) (<http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/Reportrevealssthesixbusinessmodelsbehindonlinecopyright.aspx>).

5.2 The evolving role of Internet intermediaries

A few concluding observations should be made on the evolving role of Internet intermediaries and connectivity providers in particular. The first wave of enforcement targeted naturally the hosting providers and other such intermediaries which had or arguably should have had knowledge of the content. At first, this included mainly a passive notice-and-takedown regime, but later there has been an expansive trend to include also some responsibility for preventing future infringement. At that point, connectivity providers were not seriously disturbed, and their role was to act as mere conduit and nothing else. Their increased involvement started with requests to provide subscriber information for litigation against infringing users,⁷ and once the genie was out of the bottle, arguments for further actions began to appear in the earnest.

Specifically, starting from around 2005 and increasingly in the 2010's, there has been increased focus on expanding the role of connectivity providers in parallel with other activities, such as targeting hosting providers, search engines, and the revenue stream of infringing sites. The relative merits and success in these enforcement attempts remains a mystery; reliable research is lacking. In any case, there has been a paradigm shift from completely content-wise neutral connectivity providers to some form of actionability. While the use of deep-packet inspection and more advanced mechanisms for filtering communications has typically been rejected, except when such systems are already used for other purposes, the possibility for website blocking using manually given orders has become relatively commonplace.

Connectivity providers have successfully fought back attempts that they should be liable for their users' infringing communications, and this is rarely, if ever, even argued nowadays. In contrast, for hosting providers the awareness of illegality may more easily cause liability. In consequence, connectivity providers have not had to assume the role of 'Internet police' by preventing user infringement (at the risk of their personal loss). Likewise, they have not had to act as an 'Internet judge' by making decisions which content is legal and which needs to be blocked. On the other hand, for example, hosting providers have had to adopt such roles unless they conform to all, even clearly incorrect notice-and-takedown requests.

When it comes to subscriber information disclosure and to some degree also website blocking, connectivity providers have been offered the role of an 'Internet champion', to argue on behalf of the users. Some providers have been more willing to take on such a role, while most have, at least after the first cases, given up. In consequence, no one might argue against the requests of IPR holders.

⁷ Notably the uptake of peer-to-peer networking in 1999-2000 was unanticipated and the notice-and-takedown regime could not address that form of infringement.

Last, an interesting new role, an ‘Internet fundamental rights judge’, has been offered by the CJEU in *UPC Telekabel Wien*. If a generic order blocking order is given by the court, the *provider* is assigned responsibility for ensuring that the implementation achieves an appropriate fundamental rights balance between different competing interests. One can wonder if the provider is capable and willing to make such evaluation in an impartial fashion, and should not the responsibility be borne by a public authority responsible for making such decisions (ie, a court)? In all likelihood, the provider may not be up to the task and it may have significant incentive to perform in a cost-efficient, and not in a fundamental rights balancing manner. On the other hand, such shifting of responsibility can be avoided if courts keep to their role as the judge and issue only specific orders where the balance has already been struck. This seems like a more appropriate approach.

5.3 Doctrinal findings

Copyright enforcement through connectivity providers is only one approach in the toolbox of numerous measures IPR holders may use. It is up to the IPR holder to choose which one(s) it pursues. There are a number of ways to address ubiquitous Internet infringement with an international character. The IPR holder has the advantage of selecting the forum, applicable law and characterising the infringement. However, the availability of these opportunities does not mandate the court to grant such requests; one possible answer is that the action requested must be sought elsewhere.⁸

In both subscriber information disclosure requests and website blocking injunctions typically only the IPR holder and the provider are parties to the proceedings. Even the provider may elect not to participate for various reasons. In consequence, the interests of users and website operators are not usually directly or even indirectly represented and there may be nobody to argue why the IPR holder’s request should be rejected. This has similarities to court proceedings on secret surveillance or search warrants. In consequence, the court must take the interests of unrepresented parties into account on its own motion in order to respect and protect their fundamental rights and fair trial requirements. Ideally, some further forms of representation, review and appeal would be possible. All in all, this special procedural situation requires that the judge be sensitive and critical in evaluating the requests of IPR holders.

⁸ As specific examples, according to Article 8(2) of the Infosoc Directive, a Member State has obligation to provide remedies against infringers only when the infringement occurs in its territory; occurrence abroad is unspecified. Neither is there an explicit requirement to grant website blocking injunctions against intermediaries as per Art 8(3), but doing so is subject to local legislation and such things as proportionality requirements. It has been argued that in some cases proportionality might require that the IPR holder pursue the infringer or target another intermediary in a foreign court.

Only infringing websites are subject to blocking. This requires that the website operator's infringing acts (including sufficient incitement, participation or contribution) must have a legal basis and be adequately substantiated. This is particularly important if this issue is addressed 'merely' as a preliminary question in conjunction with website blocking injunction proceedings with the operator not being represented, rather than in proceedings against the website operator.

When it comes to international jurisdiction, Art 5(3) of Brussels I regulation, or correspondingly Art 7(2) of the recast Brussels I regulation, ie, special jurisdiction on tort, delict and quasi-delict, is likely inapplicable to website blocking injunctions. However, there are plenty of other legal bases for international jurisdiction. Further, it is argued that a court may only apply a specific law to those communications that go through the territory of the state whose law is applied. This requires care in formulation when providers operating in multiple states are imposed a blocking order.

Proportionality of orders should be evaluated against EU fundamental rights and IPR enforcement principles as well as, secondarily, the domestic equivalents. Domestic means, such as warning letter or graduated response mechanisms, are also within the scope of EU law and must comply with the same requirements. More specific evaluation criteria must also be established. In the context of website blocking, five are proposed: 1) degree and basis of illegality, 2) effectiveness, 3) negative burden on the provider, 4) subsidiarity, and 5) avoiding collateral damage. These should be evaluated in the four-step proportionality test consisting of the legitimacy of the objective, suitability for the purpose, necessity, and proportionality in the narrow sense.

In general, the more significant the negative economic impact infringements cause to the IPR holder, the stronger the enforcement mechanisms that should be available. Inversely, the more costs or constraints blocking causes to the provider, and the more it is impacting freedom of information of the users or other parties, the more significant the losses must be to IPR holder to justify blocking. Specifically, effectiveness and costs (or burden in general) are very important. If blocking is ineffective, it cannot mitigate the economic losses of IPR holders. Such blocking would only have symbolic value. On the other hand, if blocking is cheap, non-intrusive, and precise, it usually does not have an immediate major impact on providers and users. The more intrusive, expensive or vague blocking becomes, the stronger its justification and effectiveness needs to be in order to be proportionate. It is also possible that no proportionate mechanism exists to block a specific target.

The objective(s) which are accepted as legitimate may have a major impact on proportionality. Blocking may be portrayed as a technical measure aimed at reducing the economic losses caused by infringement by increasing sales. The legitimacy of this objective requires substantial impact and effectiveness. On the other hand, if it is

accepted that IPR holders may legitimately compel connectivity providers (at their expense) to perform vain attempts at educating users, make symbolic gestures of enforcement, or political moves to increase their own power, inefficient mechanisms might be considered more readily acceptable as well. While some degree of symbolic private law enforcement may be accepted – the degree might vary by jurisdiction – these alternative justifications for copyright enforcement should be critically assessed in evaluating proportionality.

5.4 Policy considerations

The large number of enforcement mechanisms and ways how to apply them, for example, in international settings, provides IPR holders with various strategies and a number of opportunities to choose the one that is best for them, ie, ‘game the system’. This implies unpredictability and lack of legal certainty for other parties. Some simplification might be warranted; however, the specifics would be a topic for future research.

Legislators and the early lawmaking processes seem to be particularly receptive (or: vulnerable) to professional lobbying activities from parties such as IPR holders. In the later phases, imbalance was also observed when IPR holder representatives typically form a majority of various preparatory bodies, boards, or parties that are called to comment at committee hearings. This should be balanced. One possibility is to drastically reduce the number of IPR holder representatives on these bodies. Given that IPR holders conduct active coordination, dozens of ‘parroted’ responses are unnecessary. In any case, the legislators should be more critical and focus on evidence-based lawmaking rather than being led by advocacy research. The legislators and in particular sectoral legal draftsmen should also be critical of their own preconceptions, recognising that they are the representatives of the public good rather than proponents of copyright ideology.

The procedural situation in court should be made more robust by improving the safeguards, at least to be similar to the secret surveillance proceedings. Yet even this is not enough, given the shortcomings noted in the latter. Further, alternatives to ‘one-sided proceedings’ should be examined. Clarification of the Enforcement Directive is also needed on whether and how the infringer must be heard during or after issuing interlocutory injunctions against intermediaries. More generally, distinguishing, clarifying and researching the differences between injunctions against infringers versus third parties would be most welcome.

The rules on liability and in particular the secondary liability of website operators with user-generated content are not clear. Liability has been found on grounds which are not completely convincing and which make the demarcation between legal and

illegal difficult and unpredictable. This results in legal uncertainty and may stifle innovation for new kinds of services. The problem is particularly severe when it comes to criminal liability.

Private international law and jurisdiction issues of online copyright infringement are a mess, and it is no surprise that a number of academic efforts have made suggestions on how to overhaul the legislation. This should be encouraged. The CJEU could also take a role in this respect. This might require rejecting the fallacy of ‘national’ copyright and damages delimited by territoriality, given European harmonisation and conventions, and embracing more pragmatic solutions. Specifically, one should aim at a more predictable set of jurisdictions and choices of law, and explicitly endorsing the idea that one may be required to go abroad and sue in a foreign court, in contrast to practically always accepting the jurisdiction of a local court. This would reinforce Pan-European justice system and increase legal certainty.⁹

The four-step proportionality test should be further developed to better ‘defend’ against maximalist formulation tendencies and cases of balancing multiple conflicting rights. Currently all cases essentially fall back to the final proportionality *stricto sensu* stage. More research would also be welcome on how the proportionality test should be applied in interpretative situations, rather than the traditional focus on constitutional review of primary decisions or acts.

The objectives of copyright enforcement should be more clearly articulated in legislation. This comes up in the proportionality evaluation. In particular, it is unclear what degree of effectiveness and economically quantifiable impact is required and whether merely symbolic copyright enforcement attempts are acceptable.

⁹ AGs have suggested such approaches in a number of cases, the latest being *Pez Hejduk* but the CJEU has chosen not to adopt them. See Section 4.1 and n 11 therein.

Table of Cases

- 1967 Ltd [2014] EWHC 3444 (Ch), [85](#), [88](#)
- Akdeniz v Turkey App no 20877/10 (ECtHR, 11 March 2014), [44](#)
- Åkerberg Fransson (C-617/10) EU:C:2013:105, [54](#), [55](#), [57](#)
- Alles kann besser werden BGH I ZB 80/11, [29](#)
- Ashby Donald v France App no 36769/08 (ECtHR, 10 January 2013), [44](#)
- Bartsch (Opinion in C-427/06) EU:C:2008:297, [53](#)
- BestWater (C-348/13) EU:C:2014:2315, [80](#)
- Bonnier Audio (C-461/10) EU:C:2012:219, [28–30](#)
- C More Entertainment (C-279/13), [80](#)
- Cartier [2014] EWHC 3354 (Ch), [26](#), [27](#), [47](#), [69–71](#), [74](#), [85](#), [88](#), [90–92](#), [96](#), [105](#)
- Coercive measures KKO 2009:54, [88](#)
- Coty (C-360/12) EU:C:2014:1318, [81](#)
- DEB (C-279/09) EU:C:2010:811, [55](#)
- Dereci (C-256/11) EU:C:2011:734, [56](#)
- Digital Rights Ireland (Joined Cases C-293/12 and C-594/12) EU:C:2014:238, [52](#), [79](#), [96](#)
- Disconnection and temporary seizure District Court of Oulu decisions of 14 February and 27 March 2008 (H 08/1438), [32](#), [87](#)
- Dramatico Entertainment [2012] EWHC 268 (Ch), [88](#)
- Dramatico Entertainment (no 2) [2012] EWHC 1152 (Ch), [61](#), [88](#), [89](#)
- Eircom [2005] IEHC 233, [29](#)
- Emi v Sky [2013] EWHC 379 (Ch), [88](#)
- ERT (C-260/89) EU:C:1991:254, [54](#)
- FAPL (Joined Cases C-403/08 and C-429/08) EU:C:2011:631, [43](#)
- Germany v Council (C-280/93) EU:C:1994:367, [60](#)
- Golden Eye [2012] EWCA Civ 1740, [29](#), [30](#)
- Google France (Joined Cases C-236–238/08) EU:C:2010:159, [21](#)

- Johnston v Chief Constable (222/84) EU:C:1986:206, 61
- Kolmisoppi v Sweden (2013) 4 EHRLR 425, 44
- L'Oréal v eBay (Opinion in C-324/09) EU:C:2010:757, 21, 69, 71
- L'Oréal v eBay (C-324/09) EU:C:2011:474, 22, 34
- LSG (C-557/07) EU:C:2009:107, 28, 29, 34, 68, 91
- Mangold (C-144/04) EU:C:2005:709, 54
- Marleasing (C-106/89) EU:C:1990:395, 41
- Mc Fadden (C-484/14), 21
- Melloni (C-399/11) EU:C:2013:107, 15, 49, 57
- Newzbin2 [2011] EWHC 1981 (Ch), 22
- Newzbin2 (No 2) [2011] EWHC 2714 (Ch), 88, 90, 91
- NS (Joined Cases C-411/10 and C-493/10) EU:C:2011:865, 55
- Omega Spielhallen (C-36/02) EU:C:2004:614, 49
- Otis (C-199/11) EU:C:2012:684, 55
- Papasavvas (C-291/13) EU:C:2014:2209, 61
- Paramount v Sky [2013] EWHC 3479 (Ch), 88
- Pez Hejduk (Opinion in C-441/13) EU:C:2014:2212, 81
- Pez Hejduk (C-441/13) EU:C:2015:28, 81
- Pfeiffer (Joined Cases C-397/01 to C-403/01) EU:C:2004:584, 41
- Pfleger (C-390/12) EU:C:2014:281, 53, 54
- Pickney (C-170/12) EU:C:2013:635, 81
- PPI v Ireland (C-162/10) EU:C:2012:141, 80
- Promusicae (C-275/06) EU:C:2008:54, 28, 41, 43
- Pupino (C-105/03) EU:C:2005:386, 55
- Ravon and others v France App no 18497/03 (ECtHR, 21 February 2008), 89
- RFU v Viagogo [2012] UKSC 55, 30, 47
- Römer (C-147/08) EU:C:2011:286, 54
- Sayn-Wittgenstein (C-208/09) EU:C:2010:806, 49
- Scarlet Extended (Opinion in C-70/10) EU:C:2011:255, 5, 44
- Scarlet Extended (C-70/10) EU:C:2011:771, 58, 60, 65, 69, 70, 94
- SCF v Del Corso (C-135/10) EU:C:2012:140, 80
- SGAE v Rafael Hoteles (C-306/05) EU:C:2006:764, 80
- Siragusa (C-206/13) EU:C:2014:126, 54
- Sky Österreich (C-283/11) EU:C:2013:28, 51
- Solange II BVerfGE 73, 339, 58

- Solvay v Honeywell (C-616/10) EU:C:2012:445, [83](#)
- Svensson (C-466/12) EU:C:2014:76, [80](#)
- Transposition of EU law 1 BvL 3/08, [34](#)
- Unectef v Heylens (222/86) EU:C:1987:442, [61](#)
- UPC Telekabel Wien (Opinion in C-314/12) EU:C:2013:781, [23](#), [28](#), [60](#), [61](#), [65](#), [66](#),
[70](#), [91](#)
- UPC Telekabel Wien (C-314/12) EU:C:2014:192, [28](#), [34](#), [38](#), [41](#), [60](#), [63](#), [65](#), [68](#), [70](#),
[89](#)
- Voga Ltd Maritime and Commercial Court judgement of 12 November 2014 (A-25-14),
[82](#)
- Volker, Schecke and Eifert (Joined Cases C-92/09 and C-93/09) EU:C:2010:662, [52](#)
- Von Colson (14/83) EU:C:1984:153, [41](#)
- Wachauf (5/88) EU:C:1989:321, [54](#)
- Yildirim v Turkey App no 3110/10 (ECtHR, 18 December 2012), [44](#), [60](#)
- Ziggo and XS4ALL 200.105.418-01, [25](#), [35](#)

Appendix: original publications

TEKIJÄNOIKEUS INTERNETISSÄ – SUOJAAMISEN KEINOT JA STRATEGIAT

Tiivistelmä: Tekijänoikeuden noudattamisen varmistaminen (suojaaminen) Internetissä on viime aikoina herättänyt runsaasti keskustelua. Keskustelun ja keinovalikoiman jäsentämiseksi ja kokonaisuuden hahmottamiseksi esitetään taksonomia ja analysoidaan keinoja ja strategioita. Erilaisia keinoja voidaan hahmottaa lähemmäs parikymmentä, ja niitä voidaan jaotella eri tavoin esimerkiksi ennaltaehkäiseviin ja jälkikäteisiin oikeudellisiin keinoihin. Tämän lisäksi voidaan tarkastella teknisiä estomenetelmiä ja niiden kohdistamista. Jälkikäteiset keinot voivat kohdistua käyttäjiin, loukkaajiin ja Internet-välittäjiin. Keinovalikoima muodostaa moninaisen ja monilta osin lainsäädännössä päällekkäisen vyyhdin, joista oikeudenhaltija voi muun muassa omien strategisten intressien ja kustannusvastuun määräytymisen perusteella valita mieleisensä keinon ja kohteen. Keinoja ja strategioita arvioidaan myös Bourdieun käsittein kamppailuna tekijänoikeuden kentän herruudesta. Oikeudenhaltijoilla todetaan olevan vahva asema tekijänoikeuden tukinnallisen sisällön määrittämisessä ja lainsäädäntöön vaikuttamisessa.

Asiasanat: Internet, tekijänoikeus, piratismi, oikeuspolitiikka, Pierre Bourdieu

I. Johdanto

Tekijänoikeudet ja tekijänoikeuspolitiikka tietoverkossa ja erityisesti vertaisverkkopalveluissa on ollut viime aikoina esillä monin eri tavoin. Käyttäjäpään Internet-yhteydentarjoajille (teknisille välittäjille) annettiin keskeyttämismääräyksiä The Pirate Bay -sivustolle pääsyn estämiseksi.¹ Tekijänoikeustoimikunta ehdotti muutoksia estomenettelyn helpottamiseksi.² Kesällä 2012 opetus- ja kulttuuriministeriö julkaisi keskustelumuiston tekijänoikeuspolitiikasta, siitä saatiin elokuussa lausunnot, ja asiasta on sittemmin keskusteltu myös tekijänoikeusfoorumissa.³ Hankkeiden osalta on kuitenkin epäselvää, kuinka niissä tullaan etenevänsä. Jo aiemmin lanseerattiin kansallinen IPR-strategia, ja hallitusohjelmassa esitettiin yleisluontoisia tavoitteita muun muassa hyvitysmaksujärjestelmästä, lainsäädännön kehittämisestä ja lainsäädännön täytäntöönpanon tehostamisesta.⁴ Tämä osaltaan aiheuttaa painetta saada jotakin aikaiseksi hallituskauden aikana. Vastaavasti komission IPR-strategiasa tähdätään tehokkaiisiin sisämarkkinoihin muun ohella lisensointia helpottamalla. Lisäksi mainitaan muun muassa kansalaisten valistaminen, loukkausten käsittely niiden lähteellä ja Internet-yhteydentarjoajien kanssa tehtävän yhteistyön edistäminen.⁵

1 Elisa Oyj:n osalta HelHO 15.6.2012 (S 11/3097), DNA Oy:n ja TeliaSonera Finland Oyj:n osalta HelKO 11.6.2012 ja 28.6.2012 (H 11/51554 ja H 11/48307). Kommentaarit ks. Savola 2013a; Norrgård 2012; Pihlajarinne 2012b.

2 OKM 2012a; OKM 2012b. Lausunnotokierroksen jälkeen asia on ollut jäissä odottaen tekijänoikeuspolitiikan ratkeamista.

3 OKM 2012c. Muistiossa referoidaan myös aiempaa tekijänoikeuspolitiikkamuistiot ja lausuntoja (OKM 2012c, s. 25–33).

4 OKM 2012c, s. 16–17.

5 KOM(2011) 287 lopullinen, s. 10–14, 20–21.

Toisaalta kansalaisaktiivisuuden jälkeen Euroopan parlamentti 4.7.2012 torjui Anti-Counterfeiting Trade Agreement (ACTA) -sopimuksen, vaikka sopimus ei ollut voimassa olevaan oikeuteen nähden edes kovin merkittävä. Ns. Chisugate -tapaus popularisoi ja problematisoi tekijänoikeuden valvontaan liittyviä säännöksiä ja käytäntöjä.⁶ Tekijänoikeuslakiin huomattavia muutoksia esittävä ”Järkeä tekijänoikeuslakiin” -kansalaisaloite keräsi hetkessä yli 10000 sähköistä kannatusilmoitusta.⁷ Tekijänoikeuden rajoittaminen ei ole aivan poikkeuksellista, sillä esimerkiksi Kanadassa kuluttajan asemaa parannettiin vastikään useilla eri tavoin.⁸ Jo aiemmin tekijänoikeuden on todettu edellyttävän tasapainottamista muiden intressien kanssa.⁹

Nyt näyttäisi olevan käsillä pysähtyneisyyden ja jopa osin kyseenalaistamisen vaihe. Tekijänoikeuspolitiikan hahmottelu voidaan nähdä mahdollisuutena, vaikka kovin suuria linjanvetoja tuskin onkaan luvassa. Opetus- ja kulttuuriministeriössä on meneillään verkkopiiratismiin liittyvien vaihtoehtojen ratkaisujen kokonaiskartoitus ja arviointi.¹⁰ Artikkelissa esitän sekä yleiskatsauksen että kriittisiä arvioita pyrkien aktivoimaan tätä keskustelua.

2. Suojaamisen keinot ja strategiat

2.1. Keinojen taksonomia

Tietoverkossa tapahtuviin tekijänoikeuden loukkauksiin on mahdollista vaikuttaa monilla eri tavoin. Keinovalikoimaa ei ole juurikaan systematisoitu, jolloin kokonaisuuden hahmottaminen hankaloituu ja keinot ja tutkimukset jäävät irrallisiksi. Pyrin tässä yhdenlaiseen jäsenyntykseen. Hyödynnän osaltaan *Edwardsin* vaihtoehtokeinojen jäsenystä.¹¹ Varsinaisten keinojen osalta olen eritellyt keinoja vielä niiden kohteen (käyttäjä, loukkaaja tai välittäjä) näkökulmasta ja tämän lisäksi teknisen kohdistamisen ja estomenetelmän avulla. Jaottelu ei ole tietyistä päällekkäisyyksistä johtuen täysin ongelmaton, mutta se toiminee kuitenkin riittävänä kannustimena taksonomioiden jatkokehittelylle.

Ensimmäiseksi pääkategoriaksi voidaan hahmottaa ennaltaehkäisevät, vapaaehtoiset tai vaikutuksia hyvittävät keinot. Käsittelen näitä luvussa 3. Toiseksi pääkategoriaksi voidaan hahmottaa jälkikäteiset, reagoivat tai oikeudelliset keinot, joiden kohteena voi olla käyttäjä, varsinainen loukkaaja (lähde) tai välittäjä (esimerkiksi Internet-yhteydentarjoaja). Käsittelen näitä vastaavasti luvuissa 4–6.

Jälkikäteisillä keinoilla voidaan pelkistäen tavoitella käyttäjien käyttötapojen muuttamista, lähteen (loukkaajan) sammuttamista tai välittäjien verkossa tapahtuvaa käytön estämistä. Välittäjään kohdistuvat vaatimukset voidaan jakaa vielä käyttäjän selvittämiseen, pääsyn estämiseen ja aineiston poistamiseen. Teknisiä estotoimia käytettäessä voidaan esto-

6 EFFI 2012. Asian selostus ja problematisointi ks. *Savola* 2013b, s. 37, 45–47.

7 Kansalaisaloite 2013.

8 *Geist* 2012.

9 Kokoavasti ks. esim. *Savola* 2013b, s. 23–24; *Pihlajarinne* 2012b, s. 31–46; *Kemppinen* 2011, erit. s. 54–62.

10 OKM 2012c, s. 21.

11 *Edwards* 2011, s. 62–70. Vrt. vastaava erittely ks. *Reynolds* 2008, s. 988–1008.

kohteita systematisoida edellisistä riippumattomasti vielä estotoimenpiteen kohteen (esimerkiksi www-sivu, seurantalpalvelu, hakukone tai käyttäjä) ja teknisen estomenetelmän (esimerkiksi IP-, DNS- tai hakukone-esto) perusteella. Näitä en voi käsitellä tässä tarkemmin.¹²

2.2. Strategiat ja kamppailu tekijänoikeuden kentällä

Tarkastelen keinojen rinnalla myös oikeudenhaltijoiden strategioita. Strategialla tarkoitan keinojen valintaa ja niihin liittyvää sisällöllistä vaikuttamista muun muassa lainsäädännön, lainkäytön ja esitutinnan saralla. Havainnollistan tätä myös *Bourdieu*n valtateoreettisella viitekehysellä.

Oikeudenhaltijat ovat nähneet Internet-yhteydentarjoajiin kohdistuvan vastuun kasvattamisen ja sivustoille pääsyn estämisen periaatteellisesti tärkeäksi tavoitteeksi, vaikka tämä onkin tunnustettu tehottomaksi keinoksi loukkausten torjumisessa.¹³ Internet-piratismiin on nähty viisi strategista lähestymistapaa: alasotto, ansaintamallien murtaminen, tutkinta, lobbaus ja oikeudenkäynnit. Yhteistyötä, kumppanuuksia ja tietojenvaihtoa lainsäätäjien, tuomareiden ja poliisi- ja syyttäjälaitoksen kanssa pidettiin ensiarvoisen tärkeänä. Kyseisiä tahoja tulisi kouluttaa, jotta he pystyisivät vastaamaan tosiasiallisiin tarpeisiin.¹⁴

Bourdieu'n oikeuden kentällä kamppaillaan vallasta määritellä oikeuden tulkinnallinen sisältö.¹⁵ Tätä kamppailua käydään niin lainsäätämässä, soveltamisessa kuin oikeustieteessäkin. Osallistujat pyrkivät taloudellisen tai kulttuurisen pääomansa lisäämiseen; myös osallistuminen edellyttää tätä pääomaa.¹⁶ Oikeudenhaltijat etujärjestöineen ovat tässä vahvoilla, koska heillä on paljon taloudellisia resursseja muun muassa vaikuttamiseen (lobbaamiseen), omaa positiota pönkittävien tutkimusten teettämiseen, muiden toimijoiden kanssa tehtävään kansainväliseen yhteistyöhön ja oikeudellisen asiantuntemuksen käyttämiseen ja kerryttämiseen. Tiedollinen ylivoima luo eräänlaisen asiantuntija-aseman, jonka saavuttaminen edellyttää panostuksia, joihin muilla toimijoilla, lainsäätäjällä mukaan luettuna, ei ole mahdollisuutta. Tätä pääomaa käyttäen kentän osallistujista pyritään sulkemaan pois maallikot ja tekijänoikeuden traditionaaliseen tulkintaan vihkiytymättömät toimijat.¹⁷ Vahva positio on myös johtanut siihen, että osa muista toimijoista on luopunut kamppailusta tällä kentällä, keskittyen esimerkiksi popularisointiin.

Oikeudenhaltijoiden tekijänoikeuden sekä yleisen vallan ja politiikan kentille ulottuvan valtakamppailun päämääränä on vahvan tekijänoikeusideologian edistäminen. Tämä tarkoittaa lainsäädännön tiukentamista, keinovalikoiman monipuolistamista ja uusia tulkintoja. Tämä myös pönkittää sekä oikeudenhaltijoiden että heidän etujärjestöjensä vaikutusvaltaa. Mikäli estot ja tekijänoikeuden laajennukset hyväksytään, oikeudenhaltijat voivat aina keksiä uusia. Jos jokin vaatimus ei menesty, tätä voi käyttää argumenttina oikeussuojan heikkoudelle ja tarpeelle tehostaa ja korjata lainsäädäntöä.

12 Laajemmin ks. *Savola* 2013a, erit. s. 68–72, 154 ss.

13 *TorrentFreak* 2012g.

14 *TorrentFreak* 2012f.

15 Aiemmin tarkastelua on kohdistettu muun muassa työoikeuteen (*Ylhäinen* 2005) ja oikeudenalajaotukseen.

16 *Ylhäinen* 2010, s. 159–162; *Ylhäinen* 2005, s. 120–122; *Bourdieu – Wacquant* 1995, s. 36–39, 125–129; *Bourdieu* 1987, s. 808–809, 823–825.

3. Ennaltaehkäisevät keinot

Keinoja, joita voitaisiin luonnehtia esimerkiksi ennaltaehkäiseviksi, loukkausten vaikutuksia vähentäviksi, vapaaehtoisiksi tai ei-oikeudellisiksi, voidaan hahmottaa seuraavasti:¹⁸

1. valistaminen, tiedotus ja propaganda
2. hyvitysmaksujärjestelmät
3. digitaaliset oikeudenhallintajärjestelmät (DRM)
4. mainostulojen jakaminen oikeudenhaltijan kanssa
5. lailliset jakopalvelut
6. välittäjän vapaaehtoiset rajoitustoimenpiteet.

Valistamiseen, tiedottamiseen ja niiden ääri-ilmiöihin liittyy monia kysymyksiä, varsinkin se, kuka valistusta toteuttaa ja mistä lähtökohdista. Tietyntyyppisen yleisen tekijänoikeusdiskurssin luominen, kuten myös yhteistyö poliisi-, lainsäädäntö- ja lainkäyttöelinten kanssa ja näiden kouluttaminen on osa oikeudenhaltijoiden globaalia strategiaa.¹⁹ Nämä tukevat oikeudenhaltijoiden kamppailua tekijänoikeuden kentällä: tarkoituksena on ylläpitää määräävää positiota laintulkinnan ja käytännön asiantuntijana ja vaikuttaa tulkintoihin. Tiedotuksen "privatisoitumista" voidaan problematisoida edellä mainituista syistä ja koska se on omiaan korostamaan vastakkainasetteluita.²⁰ Kansalaisten valveuttaminen on mainittu myös komission IPR-strategiassa.²¹

Tekijänoikeuslain (404/1961, jäljempänä TekL) 2 a luvussa (26 a – h §) säädetään hyvitysmaksujärjestelmästä, jolla on tarkoitus korvata tekijöille sallitusta yksityiskopioinnista johtuvia tulonmenetyksiä. Maksu kohdistuu analogisiin ja digitaalisiin tallennuslaitteisiin ja digitaalisiin tallennuslaitteisiin. Maksun uudistamiseksi on perustettu hanke, maksun kattavuutta on esitetty laajennettavaksi ja asiasta on saatu lausunnot.²² Asiallisesti hyvitysmaksujärjestelmät voidaan hahmottaa myös pakkolisensoinniksi.²³ Hyvitysmaksujärjestelmän laajentaminen ja oikeuttamisperuste voidaan kyseenalaistaa muun ohella siksi, ettei sen piiriin kuulu yksityiskopiointi laittomasta lähteestä. Hyvitysmaksujärjestelmää halutaan laajentaa, mutta ilmeisesti sen perusteena olevaa yksityiskopiointioikeutta supistaa tai ainakin pitää sellaisenaan. Kysymys yksityiskopioinnin ja hyvitysmaksujärjestelmien suhteesta on käsillä myös vireillä olevassa EUT:n *ACI Adam* -ennakkoratkaisupyynnössä.²⁴

Digitaalisilla oikeudenhallintajärjestelmillä tekijät voivat vapaammin kehittää erilaisia lisensointimalleja. Tehokkaiden suojausjärjestelmien murtaminen on kielletty, eikä näin purettua aineistoa saa kopioida edelleen. DRM-lisensointia ovat vierastaneet sekä useat sisältöpalvelujen tarjoajat että kuluttajat. Se ei olekaan suuremmin menestynyt ja monessa aiemmassa käytössä siitä on luovuttu.²⁵

17 Vrt. *Ylhäinen* 2010, s. 167–168; *Ylhäinen* 2005, s. 122; *Bourdieu – Wacquant* 1995, s. 136, *Bourdieu* 1987, s. 821–825, 835.

18 *Edwards* 2011, s. 62–70. Osin vastaavia ratkaisuja esittäen ks. *Reynolds* 2008, s. 988–1008.

19 *TorrentFreak* 2012f; *TorrentFreak* 2012g.

20 Ongelmallisuudesta peruskoululaisten oppimateriaalin kontekstissa ks. esim. *Nokkonen* 2011.

21 KOM(2011) 287 lopullinen, s. 19–20.

22 Hankerekisteri 2012; *Leikola* 2012.

23 *Edwards* 2011, s. 62. Hyvitysmaksujärjestelmän laajennuksesta ks. *Lewen* 2008, s. 197–200; *Oksanen* 2008, s. 76–78.

24 EUT (vireillä), *ACI Adam* (C-435/12); *Savola* 2013a, s. 151, 172, 215.

25 *Edwards* 2011, s. 62–64; *Lewen* 2008, s. 200–202; *Oksanen* 2008, s. 64–70. Applen DRM:stä vetäytymisestä ks. *Katyal* 2009, s. 401–403.

Eräissä palveluissa (esimerkiksi YouTube) on myös mahdollista jakaa tekijälle osa kyseiseen aineistoon kohdistuvista mainostuloista, jos oikeudenhaltija alasottovaatimuksen asemesta päättääkin, että aineistolla on enemmän markkina- tai muuta arvoa.²⁶ Tällaista tulonjakomallien kehittelyä voidaan pitää hyvin tervetulleena. YouTuben laaja käyttö virallisten musiikkivideoiden jakeluun osoittaa ainakin joidenkin oikeudenhaltijoiden kiinnostusta ja mahdollisuuksia hyödyntää uusia markkinointikanavia niiden tukahduttamisen sijaan. Toisaalta toisten oikeudenhaltijatahojen vaatimuksesta tallennuspalvelujen tarjoajiin kohdistuvat vastuuvausedellytykset ovat myös kiristyneet.

Laillisia jakopalveluita on kokeiltu laajamittaisesti jo ainakin vuodesta 2001 lukien (Apple iTunes). Tämä on myös houkutelut markkinoille muita tahoja (esimerkiksi Amazon, Sony ja Netflix) sekä uusia tulokkaita (mm. Spotify, last.fm), jotka usein toimivat osin mainosrahoitteisesti. Useat mobiilioperaattorit ovat myös markkinoineet puhelin- ja liittymäpaketteja, joihin sisältyy musiikin käyttöoikeus.²⁷ Eräänä hidasteena tällaisten palveluiden yleistymiselle on ollut oikeudenhaltijoiden haluttomuus tätä edellyttävään lisensiointimalliin tai vaikeus sopia riittävästä korvauksista.²⁸ Joissain yhteyksissä on myös väläytelty ajatusta hyvitysmaksua vastaavasta pakkolicensiointimallista.²⁹ Useat lailliset palvelut ovat saaneet varsin suuren maksavan asiakaskunnan, vaikka kannattavuus onkin saattanut olla kyseenalainen. Vaikka palvelut eivät lopulta menestyisikään, ne voisivat edistää luovaa tuhoa (Schumpeter), joka edesauttaisi uuden aikakauden tekijänoikeuden syntymisessä.

Oikeudenhaltijat ovat pyrkineet välittäjien kanssa sopimusperusteisesti estotoimenpiteiden käyttämiseen, käyttäjien informoimiseen, varoittamiseen tai oikeuteen haastamiseen.³⁰ Välittäjän omilla rajoitustoimenpiteillä viitataan erityisesti yleisluontoisiin verkon suurteho- käytön rajoituksiin tai vertaisverkkopalvelujen jarruttamiseen. Nämä toimet saatetaan joissakin tapauksissa kokea ns. verkon neutraliteetti -keskusteluissa ongelmallisiksi. Varsinkin langattomissa verkoissa estoja on toteutettu varsin usein ja nimenomaan verkko-operaattorin omista intresseistä käsin verkon tukkeutumisen estämiseksi ja verkkoinvestointien välttämiseksi.³¹ Tämän lisäksi välittäjillä on intressi laajentaa liiketoimintaansa tekijänoikeuden alaista sisältöä hyödyntäviin palveluihin. Näiltä osin välittäjillä ja oikeudenhaltijoilla on yhteisiä intressejä. Oikeudenhaltijoilla on kuitenkin myös lyhytnäköinen intressi saada välittäjät omalla kustannuksellaan suorittamaan estotoimenpiteitä tai olemaan välikätenä välittäjän asiakkaiden ”jahtaamisessa”. Pitkälle vietyä etenkin viimeksi mainittua on vaikea sovittaa yhteen välittäjän asiakkaiden tyytyväisenä pitämisen kanssa.³² Näyttää ilmeiseltä, että oikeudenhaltijoiden ja välittäjien intresseissä on niin paljon vastakkaisuutta, että vapaaehtoiset, pitkälle menevät järjestelyt ovat hyvin haasteellisia. Oikeudenhaltijalle tämä voisi sinänsä olla kohtalaisen tehokasta ja halpaakin, mutta edellyttäisi toiminnan mukauttamista ja osin omista tavoitteista luopumista. Tämä ei edistäisi oikeudenhaltijoiden valtapositiota.³³

26 Edwards 2011, s. 66–67. Esim. YouTube-markkinointihyödyistä musiikkituottajille ks. Masnick 2012.

27 Edwards 2011, s. 64–66.

28 Masnick 2012.

29 Edwards 2011, s. 67–70.

30 Ks. esim. Zilkha 2010, s. 698–713.

31 BEREK 2012, s. 21–22; Pihlajarinne 2012b, s. 25; Edwards 2011, s. 26–27; Zilkha 2010, s. 705–706.

32 TorrentFreak 2012b; Edwards 2011, s. 26–27; Zilkha 2010, s. 689, 705.

33 Ks. välittäjien vastuun lisäämisen periaatteellinen tärkeys alaviitteessä 13.

Strategioista yhteenvedona voidaan todeta, että käyttäjiin kohdistuva valistus on lyhyellä tähtämellä tehontonta, mutta pidemmällä aikajänteellä onnistuessaan koululaisten asenneilmapiiriin vaikuttaminen parantaa positiota. Tähän liittyy ilmeisesti ainakin osin toteutunut epäonnistumisen ja vastareaktion riski. Yhteistyö oikeusviranomaisten kanssa voi olla myös lyhyellä tähtämellä hedelmällistä. Hyvitysmaksut ovat oikeudenhaltijoiden näkökulmasta hyödyllisiä, jos niiden perusteena olevaa yksityiskopiointioikeutta pystytään supistamaan tai pitämään samana. Digitaaliset oikeudenhallintamekanismit (DRM) voisivat tilanteesta riippuen olla suojakeinoina tehokkaita, mutta kuluttajien hyljeksiminä ne eivät ole kovin käyttökelpoisia. Yksi syy vastustukseen lienee se, että DRM pitää vallan tiukasti oikeudenhaltijalla, sillä se voi kontrolloida lisensointimalleja, muuttaa niitä tarvittaessa, lukita käyttäjät ja estää sen intressien kanssa kilpailevia käyttötapoja. Hyötyjä jaettaessa ja massalisensoiduissa laillisissa palveluissa oikeudenhaltija saa toivomaansa pienemmän korvauksen ja joutuu palveluntarjoajaan nähden valtanäkökulmasta alisteiseen asemaan. Välittäjien vapaaehtoiset ja omista lähtökohdistaan suorittamat rajoitustoimenpiteet voivat olla kohtalaisen tehokkaita ja oikeudenhaltijan näkökulmasta jopa ilmaisia, mutta ne edellyttäisivät kompromisseja ja vetäytymistä tekijänoikeuden kentällä.

4. Käyttäjään kohdistuvat keinot

4.1. Tavoitteena yleispreventiivinen vaikutus

Käyttäjiin voidaan yrittää kohdistaa suoria keinoja silloin, kun käyttäjät toimivat itsekkin lainvastaisesti. Käsittelen kysymystä kuka on loukkaaja ja mitkä teot ovat loukkaavia jäljempänä. Tarkastelen tässä välittömiä, käyttäjiin kohdistuvia toimenpiteitä. Yleisesti ottaen toimenpiteiden tarkoituksena voidaan hahmottaa rangaistus- tai korvausuhan kautta yleispreventiivinen, muiden käyttäjien käyttäytymistä ohjaava vaikutus, sillä keinojen käyttö aiheuttaa huomattavasti enemmän kuluja kuin tuloja.³⁴ Tältä osin keinovalikoima on kiinteässä kytköksessä edellä käsiteltyihin ennaltaehkäiseviin ja käyttäytymiseen kohdistuvaan vaikuttamiseen liittyviin keinoihin. Erilaisiksi keinoiksi voidaan hahmottaa 1) massakanteet käyttäjiä vastaan, 2) varoitusten menettely ja 3) asteittaisen puuttumisen keinot.³⁵

4.2. Massakanteet

Massakanteilla tarkoitetaan laajamittaista oikeudellisten toimenpiteiden kohdistamista käyttäjiin. Niitä ja niihin liittyvää julkisuutta voitaisiin kutsua myös pelottelutaktiikaksi. Taloustieteellisesti ilmaistuna keinoilla osaltaan pyritään nostamaan käyttäjien kokemaa riskiä kiinnijäämisestä.³⁶ Verkossa onkin uutisoitu runsaasti tiedostojen jakamisesta aiheutuneista kor-

34 *DeBriyn* 2012, s. 85, erit. alaviitteet 42 ja 45. Esim. viidessä vuodessa RIAA käytti 90 miljoonaa oikeudellisiin palveluihin saaden vain 2,5 miljoonaa dollaria korvauksia.

35 Korvausuhasta ja kanteista ks. esim. *DeBriyn* 2012, s. 84–100; *Edwards* 2011, s. 25–26; *Swartout* 2011, s. 504–513; *Zilkha* 2010, s. 669–689; *Reynolds* 2008, s. 980–986.

36 *Oksanen* 2008, s. 71–74; *Oksanen – Välimäki* 2007.

vausvaatimuksista ja -oikeudenkäynneistä. Samalla kun jakaminen assosioidaan lataamiseen, saadaan lataaminenkin näyttämään rikolliselta toiminnalta. Kuolleet isoäidit tai henkilöt, jotka eivät olleet koskaan koskeneet tietokoneeseen, eivät säästyneet vahingonkorvauskanteilta.³⁷ Vaatimuksissa ei myöskään aina näytetty, että liittymän haltija olisi itse oikea loukkaaja, tai että kyse olisi edes loukkauksesta.³⁸ Summaaristen alasottovaatimusten tunnistamis- ja kohdentamismenetelmät ovat myös aiheuttaneet vääriä ilmoituksia, ja muun muassa verkkotulostinten on väitetty jakavan aineistoa vertaisverkossa.³⁹

Korvausvaatimukset ovat olleet varsin tuntuvia, ja niillä onkin merkittävä pelotevaikutus. Korvausvaatimukseen liittyvä painostuselementti, epätasapainoinen neuvotteluasema ja salaiset sovinnot ovat oikeusturvan kannalta ongelmallisia.⁴⁰ Yhdysvalloissa esimerkiksi *Tenenbaum*-tapauksessa 30 kappaleen jakaminen johti 675000 dollarin korvaukseen.⁴¹ Joulukuussa 2008 Recording Industry Association of America (RIAA) ilmoitti lopettavansa käyttäjiin kohdistuvat massakanteet, siirtyvänsä Internet-palveluntarjoajien kanssa tehtäviin sopimuksiin ja keskittyvänsä erityisen vakaviin tapauksiin.⁴² Massakanteiden käyttö lienee aktivoitumassa Kanadassa.⁴³ Massakannemalli näyttää aktivoituneen myös Saksassa, jossa yritykset ovat rekrytoineet opiskelijoita etsimään verkosta laitonta musiikkia, lataamaan, koekuuntelemaan sitä ja keräämään asiasta tarpeelliset todisteet (esimerkiksi kuvaruutukaappaukset).⁴⁴

4.3. Varoituskirjemenettely

Muutamissa maissa on käytössä varoitusmenettely, jonka avulla tekijänoikeusjärjestö voi Internet-yhteydentarjoajan kautta lähettää käyttäjälle huomautuskirjeen. Tällaista menettelyä koskeva lakiehdotus oli esillä Suomessakin, mutta se raukesi eduskuntakauden vaihtuessa. Menettelyn hyödyllisyyttä yksistään on epäilty. Kuitenkin eräiden tutkimusten mukaan 33–70 % käyttäjistä ilmoittaisi lopettavansa varoituksen saatuaan.⁴⁵ Varoituskirjeiden käyttö saattaisi kuitenkin täydentää ja toimia massakanteita osaltaan ehkäisevänä keinona. *Päivärinte* on analyysissään katsonut, että Suomessa ehdotettu varoituskirjemalli ei olisi kovin tehokas eikä se täyttäisi perusoikeuksien yleisiä rajoitusedellytyksiä.⁴⁶

37 Ks. esim. *Orlowski* 2005.

38 Ks. *Ylivieska-Raahan käräjäoikeus* 14.5.2012 (L 11/3769), jonka mukaan avoimen WLAN-yhteyden omaavan liittymän haltijan ei näytetty itse toteuttaneen loukkausta eikä hän ollut vastuussa siitä, jos liittymässä oli jollakin DirectConnect-tiedostonjako avoimena. Vastaavasti Yhdysvalloissa, ks. *Stoltz* 2012. Sittemmin DC++-käyttäjä on tuomittu hyvityksiin langattomasta verkosta huolimatta asiassa ilmenneisiin tosiseikkoihin ja näyttöenenemmysperiaatteeseen tukeutuen, ks. *Itä-Suomen hovioikeus* 4.10.2012 (S 12/306), s. 1–2.

39 Tästä ja teknisistä haasteista yleisemmin ks. *Piatek* ym. 2008.

40 *DeBriyn* 2012, s. 97–110.

41 *Future of Copyright 2012b*; *Zilkha* 2010, s. 685–688. Määrää oli tarkoitus leikata 90 %:lla, mutta ilmeisesti prosessioikeudellinen virhe esti tämän.

42 *DeBriyn* 2012, s. 84–85. Ks. myös alaviite 35.

43 *TorrentFreak* 2012i.

44 *Essers* 2012; *Weber* 2012. Yhdysvaltalaisista piraattimetsästyksen keinoista ks. *Katyal* 2009, s. 403–411.

45 HE 235/2010 vp; *Päivärinte* 2011, s. 53–74; *Norrgård* 2010. Kansainvälisesti ks. *Edwards* 2011, s. 29–30.

46 *Päivärinte* 2011, s. 72–74.

4.4. Asteittaisen puuttumisen keinot

Eräissä maissa on otettu käyttöön asteittaisen puuttumisen keinoja eli esimerkiksi ns. ”three strikes” -menettely. Tämä lienee seurausta hiukan pehmeämmästä linjasta eli pyritään välttämään massakanteista tuttuja julkisuusmielessä ikäviä vääriä hälytyksiä. Toisaalta merkittävimpiin tapauksiin reagoimalla halutaan säilyttää osa käyttäjiin kohdistuvasta pelotevaikutuksesta. Ensimmäisenä vaiheena on useimmiten edellä mainittu varoittaminen. Keinoista on tiettävästi säädetty ainakin Ranskassa, Yhdistyneessä kuningaskunnassa, Etelä-Koreassa, Taiwanissa, Kiinassa, Chilessä ja Uudessa-Seelannissa sekä vapaaehtoisuuteen perustuen Irlannissa. Malli on torjuttu tiettävästi Saksassa ja Euroopan parlamentissa.⁴⁷ Eri-tyisesti useimpiin menettelyihin liittyvää Internet-yhteyden määräaikaista katkaisemisesta on kritisoitu tarpeettomana ja perusoikeuksien kannalta kyseenalaisena, kuuluuhan järjestelmään usein mahdollisuus sakko- tms. maksuihin.⁴⁸

Ranskan otettua käyttöön tällaisen ns. Hadopi-lain International Federation of the Phonographic Industry (IFPI) tutkimusten mukaan tiedostonjakajien osuus väheni vuodessa 26 %. Kyselyn mukaan 50 % tiedon tai huomautuksen saaneista lopetti jakamisen ja lisäksi 22 % vähensi sitä. IFPI:n tutkimuksen mukaan 10 % vertaisverkkokäyttäjistä oli saanut huomautuksen. Etelä-Koreassa 70 % ensimmäisen ja 70 % jäljelle jäävistä huomautuksen saaneista lopettaa loukkaukset.⁴⁹ Ranskassa kahden vuoden aikana IP-osoitteita on selvitetty noin kolme miljoonaa, ensimmäisiä varoituksia on lähetetty 1,15 miljoonaa, toisia noin 103000 ja kolmansia 340 kappaletta. Oikeustapauksia on kymmenkunta ja ensimmäinen sakkotuomio annettiin vastikään.⁵⁰ Lain tehokkuudesta ja sen toimeenpanemiseksi perustetun viraston kustannuksista on kuitenkin herännyt ministeritasolla epäilyjä.⁵¹ Uudessa-Seelannissa pelkän lain voimaantulon väitettiin vähentäneen elokuvien latausta puoleen, vaikka yhtäkään ilmoitusta ei vielä ollut lähetetty.⁵²

Myös toisenlaista menettelyä on esitetty muun muassa Yhdysvalloissa. Tekijänoikeudelliset asiat voitaisiin ratkaista erillisessä hallinnollisessa menettelyssä vaihtoehtoisessa riidanratkaisumenettelyssä verkkotunnuksia ja tavaramerkkejä koskevaa Uniform Dispute Resolution Policy (UDRP) mukailleen.⁵³

4.5. Keinojen vertailua

Varoitusmenettelyn ja asteittaisen puuttumisen keinojen käyttöalitiuden määrittelee hyvin pitkälti se, millaisia korvauksia välittäjät saavat toimenpiteistä periä. Uudessa-Seelannissa

47 *Bridy* 2011, s. 727–736; *Edwards* 2011, s. 31; *Päivärinne* 2011, s. 60–61. Ks. laajemmin *Swartout* 2011, s. 520–534; *Benabou* 2010, s. 170–182; *Strowel* 2010, s. 147–162. Kanteiden haitoista ks. *DeBriyn* 2012, s. 92–110; *Zilkha* 2010, s. 689–705. Komissio ei ole toistaiseksi puuttunut menettelyihin, vaikka onkin korostanut muun muassa asiaan liittyviä käyttäjien laajakaistaintressejä ja perusoikeuksia. Ks. KOM(2011) 287 lopullinen, s. 19.

48 Katkaisemisesta ks. *Savola* 2013b, s. 25–27. Kokoavasti ks. esim. *Edwards* 2011, s. 26–49, 71–72.

49 IFPI 2012, s. 9, 17, 20.

50 Future of Copyright 2012c; *Reitman* 2012.

51 Future of Copyright 2012a.

52 *TorrentFreak* 2012e.

53 *Bridy* 2011, s. 731–733. Myös Norjassa esitettiin hallinnollisen puuttumisen vaihtoehto (OKM 2012a, s. 46).

tämä on ilmeisesti 25 Uuden-Seelannin dollaria huomautukselta. Eri oikeudenhaltijatahot haluaisivat sen olevan huomattavasti alhaisempi, 2 dollaria tai ”pennejä”. Internet-yhteydentarjoajat ovat esittäneet, että menetelmän rakentamiseen on kulunut yli puoli miljoonaa dollaria ja näin ollen yhdestä huomautuksesta korvattavien kustannusten tulisi olla noin 100 dollaria. Elokuvatuottajat eivät ole lähettäneet yhtään ilmoitusta. Tämä on ilmeisesti johtanut siihen, että menetelmä ei ole tosiasiasa käytössä.⁵⁴ Suomessa ehdotetun varoituskirjemenettelyn yhteydessä kuluista olisivat vastanneet oikeudenhaltijat, mutta kustannuksista olisi tullut sopia etukäteen.⁵⁵

Massakanteiden käyttö riippuu lähinnä tunnistamistietojen luovuttamisedellytyksistä, tähän liittyvistä oikeudenhaltijoille aiheutuvista kustannuksista ja keinojen strategisesta valinnasta. Massakanteet ovat tehokkaasti vähentäneet jakamista tai ainakin vieneet sitä maan alle. Massakanteista saadut korvaukset eivät ole kattaneet niistä aiheutuneita kustannuksia, mutta niiden tarkoituksena onkin ollut käyttäytymiseen vaikuttaminen. Keinon pelotevaikutus on myös huomattava. Varoitusmenettely ilman muita seuraamuksia olisi todennäköisesti varsin tehoton, kustannuksia aiheuttava ja sanktioiden puuttuessa myös valtapositiota näkertävä. Kovenevat keinot sisältävät laajemman sanktioarsenaalin ja ovat siksi tehokkaampia ja oikeudenhaltijoiden valtaa edistäviä, mutta toisaalta ne myös aiheuttavat suurempia kustannuksia monivaiheisuuden vuoksi.

5. Loukkaavan lähteen sammuttaminen

5.1. Kuka on loukkaaja

Ensiksi on syytä tarkastella loukkaavia tekoja ja loukkaajaa. Lain säännökset sisältävät vain yleiset raamit, ja tulkinnanvaraisten säännösten sisällön selvittämisessä tuomioistuimien keskeisessä roolissa.⁵⁶ Loukkaustapoja ovat muun muassa julkinen tai suljettu vertaisverkkokäyttö, jaetut tallennuspalvelut (ns. cyberlocker) ja tietojenvaihto irrotettavilla tallennusmedioilla (ns. sneakernet).⁵⁷ Tässä yhteydessä kiinnostavin on vertaisverkkokäyttö. Siihen liittyvät vaikeimmat kysymykset koskevat vastuuta ja sen kohdentamista vaihtoehtojen ja rinnakkaisten loukkaajien kesken. Useimmiten vaatimuksia halutaan kohdistaa sellaiseen loukkaajaan tai avunantajaan, johon kohdistaminen on tehokkainta. Mahdollisia loukkaajatahoja voidaan hahmottaa seuraavasti:⁵⁸

1. aineiston verkosta lataava käyttäjä
2. aineiston verkkoon jakava käyttäjä
3. aineistoon osoittaneen linkin asettanut käyttäjä
4. sen sivuston ylläpitäjä, jolle linkki on asetettu
5. (vastuuvapauden estyessä) sivuston tallennuspalvelun tarjoaja.

54 TorrentFreak 2012e.

55 HE 235/2010 vp, s. 19–20 (kustannukset yleensä), 25–26 (kustannukset varoitusten lähettämisestä).

56 Eri tulkintamalleista ja niiden karikoista ks. *Norrgård* 2005, erit. s. 511–514.

57 TorrentFreak 2012f.

58 Laajemmin ks. *Savola* 2013a, s. 154–176.

Lataaja ei sallitun yksityiskopioinnin puitteissa syyllisty rangaistavaan tekoon, vaikka teko sinänsä loukkaakin tekijänoikeutta, ja voi johtaa hyvitys- tai vahingonkorvausvelvollisuuteen. Useimmissa tapauksissa lienee selvää, että jakaja on loukkaaja.⁵⁹ Linkittäjä saattaisi myös olla loukkaaja. Linkkisivuston ylläpitäjän toimiminen loukkaajana on konstruoitu oikeuskäytännössä osallisuusoppien avulla.⁶⁰

Vaatimuksia halutaan kohdistaa ylläpitäjään monesta syystä. Ensinnäkin keskeisimmän kohteen valinnalla saatetaan toivoa, että kokonaisloukkaus loppuisi. Toiseksi yksittäisten käyttäjien selvittäminen voi olla työlästä tai lakien puitteissa jopa mahdotonta. Mikäli käyttäjiä on hyvin suuri määrä, tällöin ei välttämättä myöskään saavutettaisi kokonaisloukkauksen loppumista palvelevaa tavoitetta. Tässä mielessä tarve keskitettyihin toimenpiteisiin on ymmärrettävä ja ehkä tarpeellinenkin. Ongelmallista tämä on kuitenkin siksi, että lainsäädännöllinen perusta on huomattavasti löyhemmällä pohjalla kuin toisiin loukkaajiin, erityisesti jakajiin, vaatimuksia kohdistettaessa. Epävarmuus korostuu sitä enemmän, mitä heikompi kytkös sivuston ylläpidon ja loukkauksen välillä on.⁶¹

Sivuston ylläpitäjän (joka voi toimia tekijänä, avunantajana tai vastuusta vapaana) ja tallennuspalvelun tarjoajan raja voi olla hiuksenhieno.⁶² Useimmiten esitetäänkin vähintään väitteitä toimimisesta ainoastaan palveluntarjoajana siten ehdollisen vastuuvapauden piirissä. Väitteet eivät ole tiettävästi menestyneet.⁶³

5.2. Loukkaajan henkilötietojen selvittäminen

Palvelun ylläpitäjällä ei ole lähtökohtaista velvollisuutta julkaista henkilö- tai yhteystietojaan. Joitakin tietoja saattaa olla julkaistu esimerkiksi julkisissa verkkotunnus- tai IP-osoiterekistereissä (whois-tiedot). Kuitenkin mikäli kyse on tavallisesti vastiketta vastaan suoritetusta palvelusta, on tietoyhteiskunnan palvelun tarjoajalla velvollisuus eräiden tunnist- ja yhteystietojen julkaisemiseen (laki tietoyhteiskunnan palvelujen tarjoamisesta (458/2002), jäljempänä sähkökauppalaki tai SähköKL, 2.1,4 §, 7 §).⁶⁴ Palvelun ei tarvitse olla nimenomaisesti sen käyttäjille vastikkeellinen, mutta sillä on oltava taloudellista merkitystä ja sen on liityttävä taloudelliseen toimintaan. Puhtaasti mainosrahoitteinen palvelu voi olla tässä mielessä kaupallinen palvelu.⁶⁵ Kuitenkaan esimerkiksi vertaisverkkopalvelun seurantalpalvelimen ylläpitäjää ei ole syytä pitää sellaisena organisoituna tietoyhteiskunnan palvelun tarjoajana,

59 Useimmat vertaisverkko-ohjelmistot jakavat ladatessaan ja aiemmin ladattua aineistoa. Tämä on mahdollista estää tai sitä voi rajoittaa. Tästä syystä puhdas lataaminen ja jakava lataaminen on erotettava toisistaan (Savola 2013a, s. 37–38).

60 Aineistokuvauksen lisääjästä ks. KKO:2010:48. Ylläpitäjistä ja käyttäjistä ks. KKO:2010:47.

61 Laajemmin ks. *Pihlajarinne* 2012b, s. 72–90.

62 Vastaavasti ks. *Pihlajarinne* 2012b, s. 17–18, jossa myös verrataan aiempaan ”staattisempaan” katsantoon (Sorvari 2005, s. 58–68). Ks. myös *Oesch* ym. 2007, s. 192–202. Ks. esim. *Edwards* 2011, s. 55–61; *Van Eecke* 2011, s. 1465–1487.

63 Näin myös Finreactor-tapauksessa, ks. KKO:2010:47, 29–32 kohta; OKM 2012a, s. 41–42; *Pihlajarinne* 2012a, s. 104–105.

64 Vrt. laajemmin OKM 2012a, s. 57, 64. Sen mukaan laittomissa palveluissa sähkökauppalain ja muun lain vastaisesti piilotetaan henkilötietoja, mikä estää henkilöiden oikeudellisen vastuun toteuttamisen. Käsitys perustuu nähdäkseni virheelliseen arvioon palveluiden kaupallisesta luonteesta tai oletuksesta, että kaikki loukkaavat verkkosivustot olisivat tässä mielessä kaupallisia.

65 HE 194/2001 vp, s. 28.

jolla olisi velvollisuutta julkaista yhteystietoja ainakaan silloin, kun aineistojen vaihto tapahtuu vastikkeetta.⁶⁶

Ylläpitäjä voisi olla saatavissa selville esimerkiksi välittäjään kohdistetulla tunnistamistietojen selvittämishakemuksella tai mahdollisesti poliisin esitutkinnallisin keinoin. Muuten koska henkilötietojen julkaisuvelvollisuutta ei ole, henkilöiden selvittäminen voi olla ongelmallista oikeudellisen vastuun toteuttamisen näkökulmasta. Haastehakemuksessa on ilmoitettava asianosaisten nimet. Tunteettomia henkilöitä vastaan ei voi nostaa kannetta. Aiemmat ylläpitäjät voivat lopettaa toimintansa.⁶⁷ Vastaajan väite siitä, että kanne on kohdistettu väärään henkilöön, ei useinkaan ole asialegitimaation puuttumista tarkoittava prosessiväite, vaan asiaväite siitä, ettei kantaja voi saada vastaajaa vastaan kanteen hyväksyvää tuomiota. Varallisuus oikeudellisissa asioissa kuten tekijänoikeudellisissa vahingonkorvausvaatimuksissa väärään vastaajaan kohdistaminen johtaisi kanteen hylkäämiseen tältä osin.⁶⁸

5.3. Lähteen sammuttaminen

TekL 56 g §:n mukaan jos joku loukkaa tekijänoikeutta, tuomioistuin voi kieltää häntä jatkamasta tai toistamasta tekoa. TekL 60 b §:n mukaan tekijällä tai hänen edustajallaan on loukkauksen jatkamisen kieltämiseksi oikeus ajaa kannetta sitä vastaan, joka saattaa tekijänoikeutta loukkaavaksi väitettyä aineistoa yleisön saataviin ja sen hyväksyessään määrättävä lopettamisesta. Näitä varsinaisia kieltotuomioita voidaan antaa vain varsinaista loukkaajaa, ei esimerkiksi välittäjää vastaan.⁶⁹ Käytännössä estämisen lopputuloksen kannalta kieltotuomiolla ja keskeyttämismääräyksellä ei ole kuitenkaan juuri eroa. Lähteen sammuttaminen voi tapahtua myös sähkökauppalaan tallennuspalvelujen tarjoajaan kohdistuvan vapaaehtoisen (korvausuhkaisen) alasottomenettelyn avulla. Vaatimus on ensiksi kohdistettava sisällön tuottajaan (SähköKL 20.2 §).⁷⁰ Alasottomenettelyä täydentää tallennuspalvelujen tarjoajaan kohdistettu estomääräysmenettely (SähköKL 16 §). Lisäksi tuomioistuin voi määrätä keskeyttämään julkaistun verkkoviestin jakelun, jos viestin sisällön perusteella on ilmeistä, että sen pitäminen yleisön saatavilla on säädetty rangaistavaksi (laki sananvapauden käyttämisestä joukkoviestinnässä (460/2003), jäljempänä SananvapL, 18 §).

5.4. Rikosvastuu ja korkeat hyvitykset

Kun ylläpitäjä Suomessa tuomitaan tekijänä, hänet on katsottu hyvitysvelvolliseksi palvelun kautta yleisön saataville saatetusta aineistosta. Avunantajaan ei kohdistu TekL 57 §:n mukaista hyvitysvelvollisuutta. Tätä on kutsuttu *yksi maksaa kaikkien puolesta* -periaatteeksi.⁷¹ Tätä voidaan verrata käyttäjien pelottelutaktiikkaan: kun linkkisivustojen ylläpitokin on kyseenalaista ja uhkana ovat suuret hyvityskorvaukset, potentiaaliset ylläpitäjät jättävät

66 Helsingin hallinto-oikeus 23.2.2011 (Dnro 06180/09/7506), s. 7–9.

67 Esim. The Pirate Bayn osalta ilmeisesti ainakaan osa ei ole tehnyt ylläpitotoimia, ks. TorrentFreak 2012c.

68 *Frände* ym. 2012, s. 406–411.

69 OKM 2012a, s. 57.

70 HE 194/2001 vp, s. 44.

71 *Hatanmaa* 2011.

mahdollisesti laillisenkin palvelun perustamatta. Kohtuuttomat korvaukset voivat olla Euroopan ihmisoikeussopimuksen 10 artiklan vastaisia, jos ne johtaisivat sananvapauden käytön rajoittamiseen (ns. hiljennysvaikutus).⁷²

Kysymyksiä on herättänyt erityisesti hyvityskorvausten suuri määrä ja laskentaperuste.⁷³ Tapauksessa KKO:2010:47 jakelutavasta ja ansiotoiminnan puuttumisesta johtuen korkein oikeus perusti hyvityksen määrän arvioon ja tapauskohtaiseen harkintaan. Tämä oli 15 % vähittäismyyntihinnasta muiden kuin musiikkitiedostojen osalta ja 25 % musiikkitiedostojen tukkumyyntihinnoista eli yhteensä noin 420 000 euroa korkoineen. Laskuperusteena oli ilmeisesti teosten latausmäärä.⁷⁴ Turun hovioikeudessa vastikään tuomittiin kahdelle ylläpitäjälle maksettavaksi yli 800 000 euron hyvitykset.⁷⁵ Hyvityksen perusteena oli laillisen Internet-latauksen 1,20 euron kappalehinta, erillisten kappaleiden arvioitu määrä 8000, keskiarvokäyttäjämäärä 1000 ja arvio, että joka kymmenes käyttäjä olisi ladannut teoksen. Hyvityksessä huomioitiin 85 % näiden tulosta tekijänoikeusjärjestön kehittämän laskentakaavan mukaisesti.⁷⁶

Edellä mainitut esimerkit kuvastavat TekL 57 §:n mukaisen kohtuullisen hyvityksen erityispiirteitä. Korvauksena on suoritettava vahingon täysi määrä, ei enempää.⁷⁷ Kyse on selvästi kohtuullisuudesta nimenomaan oikeudenhaltijan näkökulmasta. Niin ikään jos hyvityksenä on korvattava ”vahingon täysi määrä”, jolla viitataan oletettuihin saamatta jääneisiin myyntituloihin, kyse on usein vahingonkorvausta ankarammasta seurauksesta. Vahingonkorvauksen määräämisen edellytyksenä nimittäin on, että kantaja pystyy näyttämään toteen vahingon syntymisen, vahingon määrän ja syy-yhteyden toiminnan ja vahingon välillä. Hyvityskorvauksia vastaavat vahingonkorvausvaatimukset menestyisivät todennäköisesti heikosti, jos niitä jouduttaisiin arvioimaan näistä lähtökohdista.⁷⁸ Asianomistajatahon itsensä kehittämän hyvityksen laskentakaavan soveltamista tuomioistuimessa ja vahingonkorvauksellisista periaatteista irrotetun ja näitä laajemman hyvityskorvauksen käyttöä voidaan pitää esimerkkinä merkittävästä voitosta tekijänoikeuden kentällä tapahtuvassa valtakamppailussa.

5.5. Muunlainen vaikuttaminen ja yhteenveto

OiNK- ja SurfTheChannel-tapauksissa ylläpitäjiin kohdistettiin muita kuin tekijänoikeuslain mukaisia vaatimuksia (“conspiracy to defraud”). Ensimmäisessä tapauksessa epäilty va-

72 Savola 2013a, s. 130–131.

73 Laajasti hyvityskorvauksesta ks. Sorvari 2007, s. 281–297.

74 KKO:2010:47, 33–43 kohta; Hatanmaa 2011.

75 Hovioikeustasolla on vireillä ainakin toinen vastaava asia, ks. EspooKO 7.12.2011 (R 10/969), valitus HelHO (R 12/496).

76 TurHO 6.7.2012 (R 11/720), s. 5, 8. TurHO ei ratkaisussaan käsitellyt kysymystä puolta sivua pidemmältä, todeten hyvityksen kohtuulliseksi. Ks. Länsi-Uudenmaan käräjäoikeus 20.1.2011 (R 10/729), s. 17, 26–28.

77 Haarmann 2005, s. 363–364.

78 Sorvari 2007, s. 297–315; Haarmann 2005, s. 362–366; Sorvari 2005, s. 348–362. Esimerkkinä ratkaisu KKO:1999:115: ”[yhtiöt olivat viitanneet] ohjelmistojen laittomasta kopioinnista ja levittämisestä ohjelmistoteollisuudelle yleisesti aiheutuviin menetyksiin. Sen sijaan yhtiöt eivät ole yksilöineet sitä vahinkoa, joka niille on nimenomaan A:n toiminnasta aiheutunut, tai esittäneet siitä mitään selvitystä. Näin ollen asiassa ei voida katsoa näytetyksi, että A:n toiminnasta olisi aiheutunut yhtiöille sellaista tekijänoikeuslain 57 §:n 2 momentin mukaan korvattavaa vahinkoa, jonka määrä voitaisiin arvioida oikeudenkäymiskaaren 17 luvun 6 §:n nojalla.”

pautettiin, jälkimmäisessä tuomittiin.⁷⁹ Suomessa *pelastakaa pedofiilit* -jutussa parodiasivuston väitettiin loukkaavan tekijänoikeutta. Pääsyn estämistä vaadittiin ja esto toteutettiin sähkökauppalain eikä tekijänoikeuslain nojalla. Hakijan ratkaisussa saattoi olla kyse strategisesta valinnasta, sillä tämä ”lainvalinta” oli hakijan näkökulmasta edullisempi. Ruotsissa PowerBits-tapauksessa ylläpitäjä todettiin syylliseksi tekijänoikeuden loukkaamisen avunantoon sekä kirjanpito- ja verorikoksiin, koska hän ei ollut merkinnyt sivustolta saatuja lahjoituksia tuloksi.⁸⁰ Italialainen tiedostonjakosivustojen ylläpitäjä pidätettiin tekijänoikeusloukkausten lisäksi muun muassa veronkierrosta, väärennyksestä, petoksesta ja käyttäjätietokannan myymisestä epäiltynä.⁸¹ The Pirate Bay -palvelun yhdestä ylläpitäjästä annettiin kansainvälinen pidätysmääräys ja hänet palautettiin Ruotsiin tietomurrosta epäiltynä.⁸² Näin ollen varsinkin silloin, jos on epävarmuutta tekijänoikeudellisten vaatimusten menestymisestä, on usein pyritty saamaan aikaan toivottu vaikutus muilla perusteilla.⁸³

Ylläpitäjien tulolähteisiin on myös pyritty vaikuttamaan sulkemalla verkkomaksamiseen liittyviä tilejä (esimerkkinä PayPal) tai rajoittamalla ylläpitäjien mahdollisuuksia hankkia mainostuloja kohdistamalla estoja mainostoimittajiin.⁸⁴ Joitakin verkkotunnuksia on myös otettu haltuun. Myös estäminen hakukoneista on vähentänyt sivuston kävijämääriä.

Yhteenvedona voidaan todeta, että oikeudenhaltijat ovat oikeusteitse kohdistaneet vaatimuksia sivustojen ylläpitäjiin. Kyse on useimmiten ollut osaltaan myös julkisen vallan ajamista rikosprosessista. Pääsääntöisesti ennemmin tai myöhemmin kanteet ovat menestyneet, vaikka eräissä tapauksissa palvelujen ylläpitäjiä on myös vapautettu syytteistä ja korvausvelvollisuudesta. Asiassa huomionarvoista on ollut se, että vaikka varsinaisia loukkaajia ovat useimmiten olleet palvelun käyttäjät, ylläpitäjä on silti joutunut vastaamaan ja korvaamaan vahinkoja myös käyttäjien puolesta. Ratkaisuilla lienee ollut varoittava vaikutus, mutta ilmeisestikään tämä ei ole merkittäväällä tavalla vähentänyt vastaavia sivustoja Internetissä.

6. Välittäjään kohdistuvat keinot

6.1. Välittäjän vastuuvapaudesta

Internet-yhteydentarjoajaan ei voi kohdistaa vahingonkorvaus- tms. vaatimuksia välitetyn aineiston johdosta, mutta säännös ei estä kielto- tai estomääräysten antamista (SähköKL 13, 19 §). Tallennuspalvelun tarjoaja on vastuuvapauden piirissä toimiessaan viipymättä tallentamansa tiedon saannin estämiseksi saatuaan tuomioistuimen määräyksen, tekijänoikeusloukkauksesta määrämuotoisen ilmoituksen tai tosiasiallisesti tiedon eräistä rikoksista. Tässä kyse on esimerkiksi www-sivuja tarjoavasta yrityksestä, joka saa vastuuvapauden sisällön

79 BBC 2012; TorrentFreak 2010.

80 TorrentFreak 2012a.

81 TorrentFreak 2012d.

82 TorrentFreak 2012h.

83 TorrentFreak 2012f.

84 TorrentFreak 2012f.

suhteen näin ollen vain ehdollisesti. Tietoisuus lainvastaisesta sisällöstä voi johtaa siihen, ettei vastuuvapauten voi vedota.⁸⁵

6.2. Tunnistamistietojen selvittäminen

TekL 60 a §:n mukaisesti oikeudenhaltijalla on oikeus tuomioistuimen määräyksellä saada yhteystiedot sellaisesta teleliittymästä, josta tekijän oikeuksien suojan kannalta merkittävässä määrin saatetaan yleisön saataviin tekijänoikeudella suojattua aineistoa ilman tekijän suostumusta. Oikeudenhaltijan on korvattava luovuttamismääräyksen täytäntöönpanosta aiheutuneet kulut sekä mahdollinen vahinko. Tietävästi kaikki hakemukset on hyväksytty.⁸⁶ Korvaussäännöksen laajuudella on haluttu kohdistaa selvittäminen merkittäviin tapauksiin.⁸⁷ SananvapL 17 §:ssä säädetään samalla tavoin rangaistavaksi säädettyjen verkkoviestien julkaisemisen osalta. Poliisi voi saada myös Internet-palveluntarjoajilta tunnistamistietoja liittymästä tai laitteesta, jos tietoja yksittäistapauksessa tarvitaan poliisille kuuluvan tehtävän suorittamiseksi (poliisilaki 493/1995, jäljempänä PolL, 36.2 §). Tämä ei edellytä merkittävyyssynnyksen täyttymistä.⁸⁸

6.3. Tekijänoikeudellinen estomääräys

TekL 60 c §:n mukaan tuomioistuin voi määrätä välittäjän keskeyttämään tekijänoikeutta loukkaavaksi väitetyn aineiston saattamisen yleisön saataviin. Määräyksen kohdetta ja ylläpitäjää on pääsääntöisesti kuultava. Hakijan on nostettava loukkaajaa vastaan TekL 60 b §:n mukainen kieltokanne. Mikäli kanne ei menesty, hakija on velvollinen korvaamaan välittäjän kuluja. Määräyksen on oltava kaikille osapuolille kohtuullinen eikä se saa vaarantaa kolmannen oikeutta lähettää ja vastaanottaa viestejä. Määräys voidaan antaa kanteen käsitteilyn yhteydessä tai sitä voidaan hakea etukäteen. Etukäteen haettuna kanne on nostettava kuukauden kuluessa keskeyttämismääräyksen antamisesta tai se raukeaa. Kuluja voi myös hakea korvattavaksi pääasian yhteydessä. Keskeyttämismääräykset voivat kohdistua ja ovatkin kohdistuneet myös teknisiin välittäjiin.⁸⁹ EUT:n *Scarlet*-ratkaisusta ilmenee, että automaattiset estojärjestelmät eivät välttämättä ole EU-oikeuden mukaisia. EUT:ssa vireillä olevassa *UPC Telekabel Wien* -ennakkoratkaisupyynnössä on kyse yksittäisen estomääräyksen edellytyksistä.⁹⁰ En voi tässä artikkelissa tarkemmin syventyä näiden herättämiin kysymyksiin.⁹¹

Tekijänoikeustoimikunta on mietinnössään ehdottanut TekL 56 g §:n soveltamisalaa laajennettavaksi siten, että sen perusteella välittäjiinkin olisi mahdollista kohdistaa lopullisia kiel-

85 KKO:2010:47, 29–32 kohta; HE 194/2001 vp, s. 40–41; OKM 2012a, s. 41–42; *Innanen – Saarimäki* 2012, s. 259–262; *Pihlajarinne* 2012a, s. 104–105; *Pihlajarinne* 2012b, s. 67–100; *Edwards* 2011, s. 55–61; *Van Eecke* 2011, s. 1465–1487.

86 HelKO 11.6.2012 (H 11/51554), s. 14; *Järvinen* 2009.

87 LaVL 5/2005 vp, s. 9.

88 Laajemmin ja kriittisesti ks. *Savola* 2013b, s. 36–40, 45–47.

89 Ks. alaviite 1.

90 EUT 24.11.2011, *Scarlet* (C-70/10); EUT (vireillä), *UPC Telekabel Wien* (C-314/12).

91 Laajemmin ks. *Savola* 2013a; *Savola* 2013b, s. 67–73.

tomääräyksiä.⁹² Keskeisimpiä vaikutuksia ehdotuksella olisi pääasiakannekytköksen poistuminen, välittäjän ehdoton vastuu kaikista omista kuluista ja *kolmannen viestintämahdollisuuksien vaarantaminen* -kriteerin poistuminen. Säännösehdotuksesta tehtiin yleisluontoinen, tosin ns. perusteluilla säätäen kysymyksiä käsiteltiin kohtalaisen kattavasti. Lausunnoissa asian jatkovalmisteluun nostettiin lukuisia kysymyksiä muun muassa perusoikeuksista, teknisestä toimivuudesta, prosessuaalisista säännöksistä, prosessista ja eston täytäntöönpanosta aiheutuvista kuluista ja niiden jakautumisesta. Erityisesti useissa lausunnoissa katsottiin, että hakijan tulee olla vähintään yhteisvastuullinen täytäntöönpano- ja oikeudenkäyntikuluista.⁹³

Pelkästään välittäjiin kohdistuvissa The Pirate Bay -estoissa väitettyjen oikeudenkäyntikuluvaatimusten perusteella voidaan arvioida, että kunkin operaattorin osalta oikeudenhaltijoille syntyy kaikissa muutoksenhakuasteissa oikeusprosessista yhteensä suuruusluokaltaan 100 000 euron oikeudenkäyntikulut.⁹⁴ Kun Euroopan tasolla kyse on ollut 50–100 välittäjästä, voidaan arvioida, että operaatioiden kustannukset ovat olleet ainakin viisi miljoonaa euroa. On ilmeistä, ettei kustannuksia tulla koskaan saamaan palvelun ylläpitäjiltä ja että ne jäävät tekijänoikeusjärjestöjen ja viime kädessä tuottajayhtiöiden ja tekijöiden itsensä kannettaviksi. Tämän käänköpuoli on myös se, että operaattoreiden vastaavat kustannukset ainakin Suomen lain mukaisesti jäävät rasittamaan operaattoreita. Estot tuskin täyttävät tarkoitustaan, koska esimerkiksi Google-haulla “The Pirate Bay” toisena osamana esiintyy välityspalvelimia luetteleva sivusto ja kolmantena UnblockedPiratebay.com-sivusto.⁹⁵ Estojen vähintäänkin toissijainen tarkoitus lienee ilmeisesti edellä kuvattu kamppailu tekijänoikeuden kentällä tai strateginen periaatteellinen päätös keinon käyttämisestä.

6.4. Korvausuhkainen alasotto ja estomääräys

Tallennuspalvelun tarjoajaa voidaan vaatia estämään tekijänoikeutta loukkaavan aineiston saanti lähettämällä tälle määrämuotoisen ilmoituksen (ns. alasottomenettely) (SähköKL 20–25 §).⁹⁶ SähköKL 16 §:n mukaisesti tuomioistuin voi määrätä tallennuspalvelujen tarjoajan sakon uhalla estämään tallentamansa tiedon saannin, jos tieto on ilmeisesti sellainen, että sen sisällön pitäminen yleisön saatavilla tai sen välittäminen on säädetty rangaistavaksi tai korvausvastuun perusteeksi. Määräys raukeaa pääsääntöisesti kolmen kuukauden kuluttua, mikäli perusterikoksesta ei nosteta syytettä tai vahingonkorvauskannetta tämän kuluessa. Estotuomio tulee voimaan heti ja pysyy voimassa mahdollisen kumoamishakemuksen tai valituksen ollessa vireillä. Lähtökohtaisesti palvelun ja sisällön tuottajaa on kuultava ennen määräyksen antamista, ellei asian kiireellisyys välttämättä muuta vaadi. Estomääräyksen voi periaatteessa kohdistaa vain tallennusvälittäjään, vaikka oikeuskäytännössä, asiaa perustelematta, se on myös kohdistettu nimipalveluntarjoajaan.⁹⁷ Tältä osin menettely lienee

92 OKM 2012a, s. 53–69, vrt. eriävä mielipide s. 119–127. Ks. kommentaari *Pihlajarinne* 2012b, s. 130–148.

93 OKM 2012b, s. 5–15. Ehdotuksen tulevaisuudesta ks. alaviite 2.

94 HelKO 26.10.2011 (H 11/20937), s. 2; HelHO 15.6.2012 (S 11/3097), s. 1, 5.

95 Kokeiltu 29.1.2013.

96 Ks. lähemmin esim. *Hyyrynen* 2009.

97 Ns. pelastakaa pedofiilit -tapaus. Ks. HelHO 29.5.2008 (R 07/3400); *Poropudas* 2008.

perustunut tekniikan väärinymmärrykseen.

6.5. Verkkoviestin jakelun keskeyttämismääräys

SananvapL 18 §:n mukaan tuomioistuin voi määrätä lähettimen, palvelimen tai muun sellaisen laitteen ylläpitäjän keskeyttämään julkaistun verkkoviestin jakelun, jos viestin sisällön perusteella on ilmeistä, että sen pitäminen yleisön saatavilla on säädetty rangaistavaksi. Sovellettavuutta rajaa muun muassa se, mikä katsotaan verkkoviestiksi ja se, mikä on palvelin tai muu sellainen laite. Verkkoviesti edellyttäneen jonkinasteista yksilöintiä.⁹⁸ Laite rajautuu siihen palvelimeen, jolle viesti on tallennettu ja josta se saatetaan yleisön saataville, eli käytännössä tallennuspalvelun tarjoajaan.⁹⁹

Fin-tv.com -tapauksessa käräjäoikeus hylkäsi Internet-yhteystarjoajiin kohdistetun vaatimuksen ulkomailla sijaitsevan palvelun estämiseksi.¹⁰⁰ Sivustolla väitettiin jaettavan mm. suomalaisia elokuvia ilman tekijänoikeuksien haltijoiden lupaa. Käräjäoikeus katsoi muun ohella, että 1) teknisillä välittäjillä ei ole vaikutusmahdollisuuksia kyseiseen ulkomailla sijaitsevaan palveluun, 2) ne eivät ole lähettimen, palvelimen tai muun sellaisen laitteen ylläpitäjiä, 3) teknisiin välittäjiin kohdistuu vastuuvapaus, 4) teknisten välittäjien käytettävissä olevat menetelmät estämiseksi ovat käytännössä tehotomia ja 5) vaatimuksessa ei ollut riittävästi yksilöity, minkä verkkoviestien jakelua pyydettiin keskeytettäväksi.¹⁰¹ Kolmas osaperustelu lienee kuitenkin hylättävä, koska kiello- ja keskeyttämismääräykset ovat nimenomaisesti teknisiinkin välittäjiin kohdistuvina sallittuja (SähköKL 19 §).¹⁰²

6.6. Vapaaehtoiset estokeinot

Internet-yhteydentarjoajat voivat elinkeinovapauden nojalla tarjota palveluja myös sisällöltään rajoitettuna.¹⁰³ Laajemmin ilmaistuna yhteyden tarjoaminen perustuu yleensä sopimukseen, ja ainakaan sopimusehtojen puitteissa Internet-yhteydentarjoajilla ei ole velvollisuutta tarjota suodattamatonta Internet-yhteyttä ja niillä on myös oikeus keskeyttää pääsy esimerkiksi selvästi lainvastaisiin viesteihin.¹⁰⁴ Erityislailla on kuitenkin luonteeltaan toteavasti todettu, että Internet-yhteydentarjoajilla on oikeus estää pääsy lapsipornosivustoille (laki lapsipornografian levittämisen estotoimista, 1068/2006, 3 §). Poliisi ylläpitää salassa pidettävää listaa sivustoista sekä tuottaa ilmoituksen, joka eston aktivoituessa näytetään (4–6 §). Listalle on tarkoitettu lisättäväksi vain ulkomaisia sivustoja (1 §).¹⁰⁵

98 Perustuslakivaliokunta katsoi soveltamisalan laajaksi, mutta korosti viestin selvää rikollista luonnetta ja tuomioistuimen suhteellisuusharkintaa (PeVM 14/2002 vp, s. 7).

99 *Innanen – Saarimäki* 2012, s. 334–337, 339–340; *Pihlajarinne* 2012b, s. 127–128.

100 HelKO 29.4.2011 (R 11/3075); *Pihlajarinne* 2012b, s. 127–128.

101 HelKO 29.4.2011 (R 11/3075), s. 2, 4.

102 Vastaavasti *Pihlajarinne* 2012b, s. 127–129. Laajemmin ks. *Savola* 2013b, s. 74.

103 HE 99/2006, s. 12.

104 PeVM 14/2002 vp, s. 7; HE 99/2006, s. 12; *Innanen – Saarimäki* 2012, s. 337. Vrt. toisin tekijänoikeustojen mietinnössä, jonka mukaan VML 68 § (puhelinverkon liittymäsopimuksen tekijän oikeus valita sisältöpalvelujen tarjoaja) olisi esteenä palveluntarjoajan estoille (OKM 2012a, s. 60). Laajemmin ks. *Savola* 2013b, s. 64–66. Ks. myös alaviite 31.

105 HE 99/2006 vp, s. 1. Säädos on monin tavoin ongelmallinen, ks. *Savola* 2013b, s. 66.

6.7. Yhteenveto ja vertailua

Oikeudenhaltijat ovat oikeusteitse kohdistaneet vaatimuksia myös välittäjiin. Vaatimusten kohteena on usein tallennuspalvelun tarjoaja, mutta muun muassa The Pirate Bay -tapauksessa vaatimuksia on kohdistettu teknisiin välittäjiin käyttäjä- ja lähdepäässä. Käyttäjöpään teknisiin välittäjiin kohdistuvat estomääräykset ovat tiettävästi voimassa Suomen lisäksi kuudessa Euroopan maassa ja muutamissa muissa maissa. Joissakin maissa vaatimukset on hylätty ja suurella osalla Euroopan maita niitä ei ole edes esitetty.¹⁰⁶ Samanaikaisesti on ajettu lainsäädäntöuudistuksia linjan tiukentamiseksi ja joissakin maissa piratismiin vastaista toimintaa varten on myös erityisyksiköitä (Italian poliisi ja Ranskan Hadopi-virasto).

Kaikissa välittäjään kohdistuvissa tai välittäjän tietoja hyödyntävissä keinoissa (varoituskirjeet, asteittaisen puuttumisen keinot, käyttäjien tunnistamistietojen selvittäminen ja estot) on oikeastaan keskeisintä kustannusten jakautuminen. Mikäli oikeudenhaltijat ovat joutuneet korvaamaan välittäjille aiheutuvia kustannuksia, menetelmät ovat saattaneet jäädä hyvin vähälle käytölle.¹⁰⁷ On epäselvää, missä määrin Internet-yhteydentarjoajalla on velvollisuus osallistua oikeudenhaltijoiden yksityisten intressien ajamiseen. Muun muassa *Pihlajarinne* on korostanut toissijaisperiaatteen merkitystä ja esittänyt, että mitä enemmän välittäjä hyöttyy välillisesti loukkauksista, sitä vahvemmat perusteet valvontakustannuksiin osallistumisvelvollisuudelle olisi.¹⁰⁸ Välittäjille velvollisuuksien perustamiseen tulisi suhtautua varauksella varsinkin, jos niistä hyödyt tulevat oikeudenhaltijoille ja he eivät ole korvausvelvollisia aiheutuneista kustannuksista ja haitoista. TekL 60 a §:n esitöitä mukailleen korvausvelvollisuus olisi omiaan suuntaamaan resursseja merkittäviin ja tarkoituksenmukaisiin tapauksiin. Korvausvelvollisuus voisi myös mahdollistaa tarkoituksenmukaisempien ja tehokkaampien estokeinon käytön.

Käyttäjöpään välittäjiin kohdistuvat estot ovat tehottomia ja kalliita, mutta ne edistävät oikeudenhaltijoiden valta-asemia, varsinkin jos keinojen tehottomuuden johdosta saadaan hyväksyttyä tiukempaa lainsäädäntöä. Lähdevälittäjään kohdistuvat keinot ovat varsin tehokkaita ja kustannuksiltaan kohtuullisia, mutta ne edellyttävät oikeudenhaltijoilta aktiivisia toimenpiteitä ja uusia prosesseja sivustojen siirtymisten seuraamiseksi. Lähteen alasotto on niin ikään varsin tehokasta ja siihen liittyvät ankarat rangaistukset ja suuret korvaukset lisäävät pelotevaikutusta ja valtaa.

7. Lopuksi

Olen edellä käsitellyt eri keinoja ja strategioita ja arvioinut niitä myös kriittisesti. Yleisesti ottaen on huomionarvoista eri tahojen (mm. käyttäjät, yritykset, välittäjät ja oikeudenhaltijat) intressien vastakkaisuus. Niin ikään huomionarvoista on oikeudenhaltijatahojen hyvin vahva positio tekijänoikeuden, vallan ja politiikan kentillä. Kyseiset tahot ovat varsin pitkälle

¹⁰⁶ Estot ovat voimassa Itävallassa, Belgiassa, Italiassa, Tanskassa, Alankomaissa ja Yhdistyneessä kuningaskunnassa. Tällainen esto on torjuttu muun muassa Irlannissa, Norjassa, Saksassa ja Espanjassa (*Savola* 2013a, s. 145–148).

¹⁰⁷ Uuden-Seelannin kokemuksista varoituskirjeistä ks. alaviite 54.

¹⁰⁸ *Pihlajarinne* 2012b, s. 156–159. Vrt. suurtehoikäyttäjien kustannuksista välittäjälle ks. alaviite 31.

onnistuneet vaikuttamaan lainsäädäntöön, ja ilmeisesti myös soveltamiseen ja täytäntöönpanoon. Esimerkiksi kuluttajien tosiasialliset vaikutusmahdollisuudet lainsäädäntöprosessissa ovat olleet niukat, ja lainkäytössäkin oikeudenhaltijoiden tiedollinen ylivoima aiheuttaa epätasapainoa muihin tahoihin nähden.

Keinovalikoiman kokonaisuutta olisi syytä selkeyttää. Säännösten päällekkäisyys on joutanut ja voi johtaa edelleen ”lainvalintatilanteisiin”, joissa hakijan omasta positiosta käsin valitaan edullisin säännös. Lainvalmistelussa tulisi erityisesti pyrkiä konkreettiseen dialogiin eri menetelmistä aiheutuvista kustannuksista ja niiden korvaamisesta, ja päättää näistä hyvissä ajoin jo ennen lausuntokierrosta. Esimerkiksi varoituskirjemenettelyä koskeneessa hallituksen esityksessä mainittiin neuvotteluvollisuus kustannuksista ennen toimenpiteitä. Mikään ei kuitenkaan takaisi sitä, että neuvotteluissa päädyttäisiin osapuolia tyydyttävään ratkaisuun. Edellytysten olemassaolo pitäisikin ratkaista ennen lainvalmistelua tai sen aikana. Näin voitaisiin välttää ulkomailla havaittu ilmiö käyttämättä jäävistä laeista.

Abstract in English

COPYRIGHT IN INTERNET – THE MEANS AND STRATEGIES OF ENFORCEMENT

Taxonomy is provided for about two dozen different preventive and reactive means for copyright enforcement in Internet. Reactive means can be targeted against direct infringers, users, or intermediaries (e.g. Internet connectivity providers). The wide array of means provides the right holders various forum shopping opportunities. The strategies of the right holders are also varied, and do not necessarily correspond to efficient enforcement mechanisms. Strategies are also based on principles and a power struggle in Bourdieu’s juridical field of copyright law. The winner gains the monopoly to set the legal agenda and to define the interpretation of copyright law.

Keywords: Internet, copyright, piracy, legal policy, Pierre Bourdieu

Lähteet

VALTIOPÄIVÄASIAKIRJAT

PeVM 14/2002 vp. Hallituksen esitys laiksi sananvapauden käyttämisestä joukkoviestinnässä ja eräksi siihen liittyviksi laeiksi (HE 54/2002 vp).

LaVL 5/2005 vp. Hallituksen esitys laeiksi tekijänoikeuslain ja rikoslain 49 luvun muuttamisesta (HE 28/2004 vp).

HE 194/2001 vp. Hallituksen esitys eduskunnalle laiksi tietoyhteiskunnan palvelujen tarjoamisesta ja eräksi siihen liittyviksi laeiksi.

HE 99/2006 vp. Hallituksen esitys eduskunnalle laiksi lapsipornografian levittämisen estotoimista.

HE 235/2010 vp. Hallituksen esitys eduskunnalle laeiksi tekijänoikeuslain 60 a §:n ja sähköisen viestinnän tietosuojalain muuttamisesta (rauennut).

EUROOPAN UNIONIN VIRALLISAINEISTO

Euroopan komission tiedonanto. Teollis- ja tekijänoikeuksien sisämarkkinat (”IPR-strategia”). KOM(2011) 287 lopullinen. EUVL C 68, 6.3.2012, s. 28–34.

OIKEUSKÄYTÄNTÖ, YLIKANSALLISET TUOMIOISTUIMET

EUT 24.11.2011, *Scarlet* (C-70/10).

EUT (vireillä), *UPC Telekabel Wien* (C-314/12).

EUT (vireillä), *ACI Adam* (C-435/12).

OIKEUSKÄYTÄNTÖ, YLEISET TUOMIOISTUIMET

KKO:1999:115.

KKO:2010:47.

KKO:2010:48.

Helsingin hovioikeus 29.5.2008 (R 07/3400).

Helsingin hovioikeus 15.6.2012 (S 11/3097), KKO 29.10.2012: ei valituslupaa.

Itä-Suomen hovioikeus 4.10.2012 (S 12/306). Ei lainvoimainen.

Turun hovioikeus 6.7.2012 (R 11/720), KKO 29.10.2012: ei valituslupaa.

Länsi-Uudenmaan kärjäoikeus 20.1.2011 (R 10/729) – TurHO 6.7.2012 (R 11/720).

Helsingin kärjäoikeus 29.4.2011 (R 11/3075).

Helsingin kärjäoikeus 26.10.2011 (H 11/20937) – HelHO 15.6.2012 (S 11/3097).

Espoon kärjäoikeus 7.12.2011 (R 10/969), valitus vireillä HelHO (R 12/496).

Ylivieska-Raahen kärjäoikeus 14.5.2012 (L 11/3769).

Helsingin kärjäoikeus päätökset 11.6.2012 ja 28.6.2012 (H 11/51554), HelHO 8.2.2013 (S 12/1850):
lopputulosta ei muuteta.

Helsingin kärjäoikeus päätökset 11.6.2012 ja 28.6.2012 (H 11/48307), HelHO 12.2.2013 (S 12/2223):
lopputulosta ei muuteta.

OIKEUSKÄYTÄNTÖ, HALLINTOTUOMIOISTUIMET

Helsingin hallinto-oikeus 23.2.2011 (Dnro 06180/09/7506), valitus vireillä KHO:ssa (Dnro 0875/3/11).

MIETINTÖJÄ JA MUUTA VIRALLISAINEISTOA

Leikola, Markus: Ratkaisumalli yksityisen kopioinnin hyvitysmaksulle (10.5.2012). Opetus- ja kulttuuriministeriön asettaman ratkaisuneuvottelijan raportti, 2012.

OKM: Tekijänoikeustoimikunnan Mietintö. Vastauksia digiajan haasteisiin. Opetus- ja kulttuuriministeriön työryhmämuistioita ja selvityksiä 2012:2, *2012a*.

OKM: Lausuntotiivistelmä – ratkaisuja digiajan haasteisiin 2012:2, *2012b*.

OKM: Tekijänoikeuspolitiikka 2012. Keskustelumuistio, *2012c*.

KIRJALLISUUS

Benabou, Valérie-Laure: The Chase: The French Insight into the 'Three Strikes' System. Teoksessa Stamatoudi, Irini A. (toim.): Copyright enforcement and the Internet. Kluwer Law International. 2010, s. 163–182.

Bourdieu, Pierre: The Force of Law: Toward a Sociology of the Juridical Field. The Hastings Law Journal. Vol 38, s. 805–853.

- Bourdieu, Pierre – Wacquant, Loïc J.D.*: Refleksiiviseen sosiologiaan. Tutkimus, käytäntö ja yhteiskunta. Joensuu University Press. 1995.
- Bridy, Annemarie*: Is Online Copyright Enforcement Scalable? *Vanderbilt Journal of Entertainment & Technology Law*. Vol 13. No 4. Summer 2011, s. 695–737.
- DeBriyn, James*: Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages. *UCLA Entertainment Law Review*. Vol 19. Issue 1. 2012, s. 79–112.
- Frände, Dan – Havansi, Erkki – Helenius, Dan – Koulu, Risto – Lappalainen, Juha – Lindfors, Heidi – Niemi, Johanna – Rautio, Jaakko – Virolainen, Jyrki*: Prosessioikeus. 4. uud. p. WSOYpro. 2012.
- Haarmann, Pirkko-Liisa*: Tekijänoikeus ja lähioikeudet. 3. uud. p. Talentum. 2005.
- Hatanmaa, Joni*: Vertaisverkon ylläpitäjä vastuussa käyttäjien toimista - yksi maksaa kaikkien puolesta. *IPRinfo* 1/2011.
- Hyyrynen, Outi*: Ilmoitusmenettely ja välittäjän vastuu tekijänoikeuden loukkauksesta. Teoksessa Oesch, Rainer – Heiskanen, Hanna – Hyyrynen, Outi (toim.): Tekijänoikeus ja digitaalitalous. WSOYpro. 2009, s. 117–132.
- Innanen, Antti – Saarimäki, Jarkko*: Internetoikeus. 2. uud. p. Edita. 2012.
- Katyal, Sonia K.*: Filtering, Piracy Surveillance and Disobedience. *Columbia Journal of Law & the Arts*. Vol 32. Issue 4. 2009, s. 401–426.
- Kemppinen, Heikki*: Uusi tekijänoikeus? Näkemyksiä tekijänoikeuden suhteesta perus- ja ihmisoikeuksiin. Pro gradu -tutkielma. Valtiosääntöoikeus. Oikeustieteellinen tiedekunta. Helsingin yliopisto. 2011.
- Lewen, Ulric M.*: Internet File-sharing: Swedish Pirates Challenge the U.S. *Cardozo Journal of International and Comparative Law*. Vol 16. 2008, s. 173–206.
- Nokkonen, Ilmari*: ”Suksi mafioso kuuseen ja tunge varastettu musasi syvälle!”: Tekijänoikeusalan etujärjestöjen peruskoululaisille tuottaman oppimateriaalin tekijänoikeusdiskurssien problematisointia. Pro gradu -tutkielma. Valtiotieteellinen tiedekunta. Helsingin yliopisto. 2011.
- Norrgård, Marcus*: The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property Rights. *ERA Forum* 4/2005, s. 503–514.
- Norrgård, Marcus*: Varningsbrev på Internet – några kommentarer angående ett aktuellt lagförslag. *JFT* 6/2010, s. 638–650.
- Norrgård, Marcus*: Blocking Web Sites – Experiences from Finland. Teoksessa Axhamn, Johan (toim.): Copyright in a Borderless Online Environment. *Norstedts Juridik*. 2012, s. 171–184.
- Oesch, Rainer – Pihlajarinne, Taina – Vesala, Juha – Raappana, Heikki – Tikkanen, Julia*: IPR-sopimukset, kilpailu ja suojan toteuttaminen - immateriaalioikeuksien hyödyntäminen. Edita. 2007.
- Oksanen, Ville*: Five Essays on Copyright in the Digital Era. Turre Publishing. 2008.
- Oksanen, Ville – Välimäki, Mikko*: Theory of Deterrence and Individual Behavior. Can Lawsuits Control File Sharing on the Internet? *Review of Law & Economics*. Vol 3. No 3. 2007, s. 693–714.
- Piatek, Michael – Kohno, Tadayoshi – Krishnamurthy, Arvind*: Challenges and directions for monitoring P2P file sharing networks – or: why my printer received a DMCA takedown notice. *Proceedings of the 3rd conference on Hot topics in security (HOTSEC'08)*. 2008.
- Pihlajarinne, Taina*: Lupa linkittää – toisen aineiston hyödyntämisen tekijänoikeudelliset rajat. Lakimiesliiton kustannus. 2012, 2012a.
- Pihlajarinne, Taina*: Internetvälittäjä ja tekijänoikeuden loukkaus. Lakimiesliiton Kustannus. 2012, 2012b.
- Päivärinne, Jussi*: Digitaalinen piratismi internetympäristössä – internetvalvonta ja käyttäjien yksityisyyden suoja. Pro gradu -tutkielma. Kauppaoikeus. Oikeustieteellinen tiedekunta. Turun yliopisto. 2011.
- Reynolds, Daniel*: The RIAA Litigation War On File Sharing and Alternatives More Compatible with Public Morality. *Minnesota Journal of Law, Science and Technology*. Vol 9. 2008, s. 977–1008.
- Savola, Pekka*: Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta. Tekniikan lisensiaattityö. Aalto-yliopisto. 2013, 2013a.

- Savola, Pekka*: Internet-operaattori perusoikeuksien subjektina ja objektina. Pro gradu -tutkielma. Valtiosääntö-oikeus. Oikeustieteellinen tiedekunta. Helsingin yliopisto. 2013, 2013b.
- Sorvari, Katariina*: Vastuu tekijänoikeuden loukkauksesta erityisesti tietoverkkoympäristössä. WSOY. 2005.
- Sorvari, Katariina*: Tekijänoikeuden loukkaus. WSOYpro. 2007.
- Strowel, Alain*: The 'Graduated Response' in France: Is It the Good Reply to Online Copyright Infringements? Teoksessa Stamatouli, Irini A. (toim.): Copyright enforcement and the Internet. Kluwer Law International. 2010, s. 147–162.
- Swartout, Christopher M.*: Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement. *Northwestern Journal of International Law & Business*. Vol 31. 2011, s. 499–536.
- Van Eecke, Patrick*: Online service providers and liability: A plea for a balanced approach. *Common Market Law Review*. Vol 48. Issue 5. 2011, s. 1455–1502.
- Ylhäinen, Marjo*: Työoikeuden kentällä. *Oikeus* 2/2005, s. 116–129.
- Ylhäinen, Marjo*: Pierre Bourdieu ja oikeuden valta. Teoksessa Kotkas, Toomas – Lindroos-Hovininheimo, Susanna (toim.): Yhteiskuntateorioiden oikeus. *Episteme-sarja*. Tutkijaliitto. 2010, s. 151–190.
- Zilkha, Genan*: The RIAA's Troubling Solution to File-Sharing. *Fordham Intellectual Property, Media & Entertainment Law Journal*. Vol 20. 2010, s. 667–714.

MUITA LÄHTEITÄ

- BBC: Surfthechannel owner faces jail after copyright conviction (27.6.2012).
- BEREC: A view of traffic management and other practices resulting in restrictions to the open Internet in Europe (29.5.2012). *BoR* (12) 30.
- Edwards, Lilian*: Role and Responsibility of the Internet Intermediaries in the Field of Copyright. *WIPO Studies*. 2011.
- EFFI: Apulaisoikeusasiamiehen päätös Chisugatesta - lakimuutos tarvitaan (12.12.2012).
- Essers, Loek*: German ISPs must hand over file sharer info to rights holders, high court rules (14.8.2012).
- Future of Copyright: New French Minister of Culture highly critical of HADOPI and France's anti-piracy policy (7.8.2012), 2012a.
- Future of Copyright: Tenenbaum filesharing case: \$675,000,- damages for copyright infringement upheld (27.8.2012), 2012b.
- Future of Copyright: French Three Strikes Act results in 14 court cases in two years (7.9.2012), 2012c.
- Geist, Michael*: Canadian Copyright Reform In Force: Expanded User Rights Now the Law (7.11.2012).
- Hankerekisteri: Hyvitysmaksujärjestelmän uudistaminen. Asiakirjat. Hankenumero OKM028:00/2012.
- IFPI: Digital Music Report 2012.
- Järvinen, Petteri*: Näin piraatti kärehtää. *Tietokone* 8/2009, s. 42.
- Kansalaisaloite*: Järkeä tekijänoikeuslakiin (23.1.2013). Asiakortti OM 14/52/2013.
- Masnick, Mike*: Sony Music Exec: The Internet Is Full Of Opportunities & Not A Problem; Intransigent Collection Societies, However... (27.2.2012).
- Orlowski, Andrew*: RIAA sues the dead (5.2.2005).
- Poropudas, Timo*: Hovioikeus teki nimipalvelusta sensuroijan (2.6.2008).
- Reitman, Rainey*: French Anti-Piracy Law Claims First Victim, Convicted of Failing to Secure His Internet Connection (13.9.2012).
- Stoltz, Michael*: Copyright Trolls' Bogus "Negligence" Theory Thrown Out Of Court Again (6.9.2012).
- TorrentFreak: OiNK Admin Found Not Guilty, Walks Free (15.1.2010).

TorrentFreak: BitTorrent Admin Jailed For Tax Evasion On Site Donations (5.6.2012), 2012a.
TorrentFreak: Comcast Wins Protest Against "Shake Down" of BitTorrent Pirates (22.6.2012), 2012b.
TorrentFreak: Pirate Bay Founder Fined For 'Continued Involvement' In The Site (27.6.2012), 2012c.
TorrentFreak: Filesharing Admin Arrested for Selling User Database (12.7.2012), 2012d.
TorrentFreak: Studios: Movie Piracy Halved After Sending Zero Infringement Notices (23.7.2012), 2012e.
TorrentFreak: Leaked Report Reveals Music Industry's Global Anti-Piracy Strategy (25.7.2012), 2012f.
TorrentFreak: Leaked RIAA Report: SOPA/PIPA "Ineffective Tool" Against Music Piracy (27.7.2012), 2012g.
TorrentFreak: Pirate Bay Founder Officially Arrested For Tax Hack, Denies Accusations (16.9.2012), 2012h.
TorrentFreak: Canada Set For Mass BitTorrent Lawsuits, Anti-Piracy Company Warns (27.11.2012), 2012i.
Weber, Sara: Der Piraten-Jäger (21.5.2012). UniSPIEGEL 3/2012.

Pekka Savola

**VALTAKAMPPAILU
LAINVALMISTELUSSA:
INTERNET-OPERAATTORIT
TEKIJÄNOIKEUDEN
TÄYTÄNTÖÖNPANIJOINA**

Sisällys

1 JOHDANTO	207
2 OPERAATTORIN TÄYTÄNTÖÖNPANOROOLIN MUOTOUTUMINEN	210
3 LAINVALMISTELU TEORIAN VALOSSA.....	212
3.1 Lainvalmistelu ja eri tahojen intressit.....	212
3.2 Lainsäädäntökenttä Bourdieun valtateoriassa.....	215
4 OPERAATTOREIDEN VÄLINEELLISTÄMISEN ANALYYSI.....	217
4.1 Toimielimet ja niiden rooli	217
4.1.1 Tekijänoikeuden valmistelu- tai tulkintaelimet.....	217
4.1.2 Siirtyminen valmisteluun virkatyönä.....	223
4.2 Toimijat ja positiot	225
4.2.1 Viranomaiset ja asiantuntijat	225
4.2.2 Eturyhmät.....	227
4.2.3 Lähitarkastelussa viimeisin estoesitys	228
4.3 Valta-asetat ja urat	232
4.3.1 Positioiden suhteet ja valtarakenteet	232
4.3.2 Oikeudenhaltijoiden yhtenäisyys ja vallan kierre.....	234
4.3.3 Henkilöiden sitoutuminen tekijänoikeusideologiaan.....	236
4.3.4 Kamppailun päämäärät.....	237
5 LOPUKSI.....	239
LÄHTEET.....	242
OIKEUSTAPAUKSET	247
LEGISLATIVE POWER STRUGGLE TO EXPAND COPYRIGHT ENFORCEMENT THROUGH INTERNET SERVICE PROVIDERS	248

Valtakamppailu lainvalmistelussa: internet-operaattorit tekijänoikeuden täytäntöönpanijoina

1 JOHDANTO¹

Tekijänoikeuslain (TekL, 404/1961) vuonna 2006 voimaan tulleen muutoksen jälkeen internet-yhteyspalveluja tarjoaviin välittäjiin (internet-operaattori) on voitu kohdistaa velvoitteita, joilla edistetään tekijänoikeuden noudattamista ja täytäntöönpanoa^{2,3}. Näitä velvoitteita ovat tuomioistuimen oikeudenhaltijan hakemuksesta määräämä tunnistamistietojen luovuttaminen (TekL 60 a §) ja verkkosivuston estäminen (TekL 60 c §), mutta muitakin on valmisteilla.⁴ Keinoja perustellaan sillä, että internet-operaattoreilla on joissakin tilanteissa parhaat edellytykset lopettaa kolmansien osapuolten suorittama tekijänoikeuden loukkaus.⁵ Koska internet-operaattorit eivät ole vastuussa käyttäjien siirtämästä aineistosta tietoyhteiskunnan palvelujen tarjoamisesta annetun lain (SähköKL⁶, 458/2002) 13 §:n nojalla, operaattorit ovat vastustaneet tehottomina pitämiään keinoja ja vaatineet oikeudenhaltijoita korvaamaan niistä aiheutuvat kulut. Vastaavasti oikeudenhaltijat haluavat ottaa käyttöön ja laajentaa keinoja ilman, että he joutuisivat korvaamaan niistä aiheutuneita kustannuksia. Tästä intressiristiriidasta aiheutuu valtakamppailua lainvalmistelussa ja -soveltamisessa.

¹ Artikkelin tausta on aiemmin esittämissäni hahmotelmissa (*Savola 2013a; Savola 2013b*). Näiden jatkokehittely sai alkunsa Risto Kankaan johtamassa oikeussosiologian jatko-opintoseminaarissa talvella 2013. Kiitän anonymisiä arvioijia, Tapani Lohea, Taina Pihlajarinnettä, Riku Neuvosta, Timo Harrikaria ja Sabine Frerichsiä keskusteluista ja palautteesta.

² Termille ”enforcement” ei ole hyvää suomenkielistä vastinetta. Sellaiseksi näyttää vakiintuneen termi täytäntöönpano. Tämä poikkeaa käsitteen perinteisestä asiayhteydestä, jossa kyse on mm. tuomioistuimen päätöksen toteuttamisesta esimerkiksi ulosottoviranomaisen toimesta.

³ Muutoksella implementoitiin ns. tietoyhteiskuntadirektiivi (2001/29/EY).

⁴ Ks. laajemmin OKM 2013:13. Näistä lisää jäljempänä.

⁵ Tietoyhteiskuntadirektiivin 59 johdantolause.

⁶ Säädöksellä implementoitiin ns. sähkökauppadirektiivi (2000/31/EY).

Tekijänoikeutta koskevista tuomioistuinasioista valtaosa on ollut mainittuja hakemusasioita, ja säännöksiä onkin sovellettu kohtalaisen usein.⁷ Oikeudenhaltijat ovat hakeneet tuomioistuimelta esimerkiksi määräykset, joilla kolme suurinta operaattoria on määrätty estämään pääsy The Pirate Bay -sivustolle. Aiemmin myös muutaman kotitalouden internet-yhteys on katkaistu.⁸ Tunnistamistietojen luovuttamisella ja sitä seuraavilla vaatimuksilla on pyritty kuluttajien vertaisverkkojakamisen lopettamiseen.⁹ Hakemuksia on tehty vuosittain noin sata.¹⁰

Tarkastelen artikkelissani lainvalmistelussa tapahtuvaa valtakamppailua, kun internet-operaattoreita käytetään tekijänoikeuden täytäntöönpanon välineinä. Näkökulma on oikeuspoliittinen ja -sosiologinen. Tätä näkökulmaa vasten lainvalmistelulla on soveltamistilanteita huomattavasti laajempi vaikutus oikeuden sisältöön. Tämä on myös hedelmällisempi maaperä tutkimuskohteen tarkastelulle. Keskityn intressiryhmiin, mutta käsittelen suppeammin myös lainvalmistelijoiden asennoitumista tekijänoikeuden kehittämiseen ja eri intressiryhmien kantojen yhteensovittamista. Menetelminä hyödynnän erityisesti kriittistä lainsäädäntöteoriaa ja *Bourdieu*n viitekehystä.¹¹ Lähestymistapa on kirjallisuuteen nojautuen teoreettinen ja valmisteluaineiston osalta myös empiirinen.¹²

Yleisesti ottaen tekijänoikeuden alalla oikeudenhaltijat ovat olleet pitkään aktiivisia. Oikeudet ovat hyvin laajoja ja tekijänoikeuden rajoitukset (poikkeukset oikeuksista) ovat verrattain suppeita. Erityissäätelyä on myös syntynyt runsaasti, esimerkiksi muilta oikeudenaloilta puuttuvat siviilioikeudelliset täytäntöönpanokeinot. Intressien voimakkuus ja vastapuolten hajanaisuus ovatkin johtaneet kokonaistarkastelussa oikeudenhaltijoille hyvin myönteiseen lainsäädäntöön. Tähän liittyvää ekspansiota ja valtakamppailuja on kuvattu jo aiemminkin.¹³ Yleistä tekijänoikeuden valtakamp-

⁷ Ks. HE 124/2012 vp s. 29, jossa kaikkien immateriaalioikeudellisten riita- ja hakemusasioden vuosittaiseksi määräksi arvioitiin noin 100, eli suurin piirtein sama määrä kuin pelkästään tunnistamistietojen luovuttamismääräyksiä.

⁸ OKM 2013:13 s. 40; *Savola*, OTJP 2013 s. 154–156.

⁹ OKM 2013:13 s. 42.

¹⁰ OKM 2013:13 s. 38. Markkinaoikeuteen tuli vajaan yhdeksän kuukauden aikana 1.9.2013–21.5.2014 vireille 66 hakemusta (22 vuonna 2013, 44 vuonna 2014), joista yksi peruutettiin ja muut hyväksyttiin (Reima Jussila/MAO 21.5.2014). Marraskuussa 2012 annettiin ensimmäinen ja tiettävästi ainoa hylkäävä päätös, ks. *Savola*, LM 2013 s. 895 av. 51; Helsingin käräjäoikeus 28.11.2012 (H 12/57279).

¹¹ Aiemmin laajemmasta näkökulmasta ks. *Savola* 2013b.

¹² Empiirisellä tarkoitetaan tässä laajan käytännön aineiston läpikäyntiä ja sen analysointia. Aineistosta ks. luku 4.1.1 ja sen alaviitteet 73–79.

¹³ Ks. esim. *Mylly* 2013; *Levin* 2012 erit. s. 136–137; *Patry* 2011; *Mylly*, LM 2004 erit. s. 246–250; *Litman* 2001. Ks. myös teoksen *Mylly ym. (toim.)* 2007 kirjoitukset, erit. s. 111 ss.; *Välimäki*, LM 2004; *Koulu* 2004.

pailua ei voida asian laajuuteen nähden käsitellä enemmälti. Artikkelissa tarkastellaankin vain viime aikoina esillä ollutta internet-operaattoreiden täytäntöönpanoroolin kasvattamiseen liittyvää vaikuttamista.

Tarkastelun kohteena on kansallista eduskuntakäsittelyä edeltävä lainvalmistelu. Hallituksen esityksen antamisen jälkeisellä valiokuntavaiheella on keskimäärin vain vähäinen merkitys lain sisältöön, joten se on rajattu pois tutkimuksesta.¹⁴

Kansalliset säännökset perustuvat EU-oikeuteen ja kansainvälisiin sopimuksiin. Tältä osin olennaiset ratkaisut on jätetty kuitenkin kokonaan kansalliselle lainsäätäjälle.¹⁵ Yleisluontoisuudesta johtuen kansallisille täytäntöönpanosäännöksille asetettavia reunaehtoja, arviointikriteerejä ja rajoituksia voidaan (yrittää) hakea EU-tuomioistuimen oikeuskäytännöstä.¹⁶ Toisaalta minimitasoa ei ole asetettu, eikä jäsenvaltion tarjoamien täytäntöönpanokeinojen riittävyys ole ollut EU-tuomioistuimen käsiteltävänä. Koska oikeuskäytäntö ei aseta tiukkoja edellytyksiä tai huomattavia rajoituksia kansalliselle sääntelylle, marginaali on toistaiseksi varsin suuri. Näin ollen tässä artikkelissa on riittävää keskittyä kansallisiin lainsäädäntöratkaisuihin.

EU-lainsäädännön uudistamissykli on hyvin pitkä. Etujärjestöt voivat pyrkiä EU-päätöksenteossa vaikuttamaan Suomen neuvottelukantoihin, eurooppalaisten kattojärjestöjen kautta, itsenäisesti lobbaamalla tai avoimissa kuulemistilaisuuksissa. Tehokkainta vaikuttaminen on silloin, kun keinoja käytetään rinnakkain.¹⁷ Niin ikään viemällä valittuja oikeustapauksia määrätietoisesti EU-tuomioistuimeen voitaisiin saavuttaa vastaavia tuloksia, ja se onkin intressiryhmille lainvalmisteluun vaikuttamisen ohella toinen strateginen keino.¹⁸ Näillä tavoilla EU-tasolla vaikuttaminen vaatii merkittävästi aikaa ja resursseja.¹⁹ Tässä artikkelissa aikaperspektiivi on lyhyempi ja tarkastelu kohdistuu vain kansalliseen vaikuttamiseen.

Tutkimuskysymys on: millaisessa lainvalmistelun valtakamppailussa internet-operaattoreihin kohdistuvat tekijänoikeudelliset täytäntöönpanovelvoitteet muotoutuvat? Kyse on erityisesti intressiryhmien koostumuksen, dynamiikan ja tavoitteiden sekä lainvalmistelijan toimintatapojen vaikutuk-

¹⁴ Tästä vielä lyhyesti luvussa 4.1.1.

¹⁵ Ks. jäljempänä esitettävä tietoyhteiskuntadirektiivin 8(3) artikla ja 59 johdantolause.

¹⁶ Ks. erityisesti *Promusicae* (C-275/06); *LSG v Tele2* (C-557/07); *L'Oréal v Ebay* (C-324/09); *Scarlet Extended* (C-70/10); *UPC Telekabel Wien* (C-314/12). Yhteenvetona ks. esim. *Savola* 2014; *Husovec* 2013; *Kohl* 2012; *Van Eecke* 2011.

¹⁷ *Hyvärinen* 2008 s. 367–371.

¹⁸ Ks. esim. *Bouwen – McCown* 2007.

¹⁹ EU-lainvalmisteluun vaikuttamisesta enforcement-direktiivin yhteydessä ks. esim. *Haunss – Kohlmorgen* 2009; *Haunss – Kohlmorgen* 2010 ja yleisemmin ks. esim. *Farrand* 2014 erit. s. 117–128.

sen tutkimisesta. Kysymykseen vastaaminen edellyttää tutkimuskohteena olevien velvoitteiden hahmottamista sekä lainvalmistelukäytännön ja -teorian esittämistä. Täytäntöönpanoroolin muotoutumista esitellään lyhyesti luvussa 2, ja luvussa 3 esitetään teoreettinen viitekehys valtakamppailusta lainvalmistelussa ja *Bourdieu*n valtateoreettisesta ns. lainsäädäntökentästä. Lisäksi on kartoitettava relevantit toimijat ja niiden positiot, valtasuhteiden väliset rakenteet, kamppailukentän suhde vallan kenttään sekä tarkasteltava toimijoiden uraa kentällä.²⁰ Nämä käydään läpi luvun 4 analyysissä. Lopuksi luvussa 5 esitetään johtopäätökset.

2 OPERAATTORIN TÄYTÄNTÖÖNPANOROOLIN MUOTOUTUMINEN

Säännökset tunnistamistietojen luovuttamisesta ja estomääräyksestä (TekL 60 a–d §) ovat saaneet alkunsa varsin poikkeuksellisella tavalla, vasta eduskuntavaiheessa. Niiden syntymekanismia on hyvä tarkastella lyhyesti esimerkkinä poikkeuksellisesta valmistelusta ja koska säännökset loivat pohjan velvoitteiden laajentamisesityksille. Tarkastelu taustoittaa myöhempää esitystä ja kytkee alkuperäiset keinot uudempiin ehdotuksiin. Koska tutkimusintressi ei ole lainopillinen, tässä ei keskitytä säännösten tarkempaan sisältöön vaan yleiskatsaukseen ja muotoutumisprosessiin.

Hallituksen esityksessä tietoyhteiskuntadirektiivin implementoimiseksi katsottiin tältä osin riittävän, että tekijänoikeuslakiin lisättäisiin viittaussäännös SähköKL:n säännöksiin.²¹ Direktiivin 8(3) artiklan vaatimus on suppea ja yleisluontoinen: ”Jäsenvaltioiden on varmistettava, että oikeudenhaltijoilla on mahdollisuus hakea kieltoa tai määräystä sellaisia välittäjiä vastaan, joiden palveluita kolmas osapuoli käyttää tekijänoikeuden tai lähioikeuden rikkomiseen”.²² Eduskunnan lakivaliokunnan asiantuntijakuulemisissa oikeudenhaltijat esittivät viittaussäännöksen korvaamista laajemmalla ja pysyvällä estomääräysmenettelyllä, koska ne epäilivät säännöksen soveltuvuutta internet-yhteyspalveluja tarjoaviin operaattoreihin.²³ Tässä vaiheessa oli kyse vain estämisestä, eikä kukaan

²⁰ *Bourdieu – Wacquant* 1995 s. 132–133.

²¹ HE 28/2004 vp s. 44–46, 134.

²² Direktiivin 59 johdantolauseen mukaan tämän yksityiskohdat on jätettävä kansallisesti määriteltäviksi. Johdantolauseen ja ns. enforcement-direktiivin (2004/48/EY) 3 artiklasta ilmenevien periaatteiden keskinäinen punninta jättää myös laajan kansallisen marginaalin. Ks. esim. *Norrgård* 2005.

²³ LaVL 5/2005 vp, lausunnot: GRAMEX, Teosto, Kopiosto, Tuotos, TTVK ja Kuvasto.

ollut ehdottanut erityistä säännöstä tunnistamistietojen luovuttamiseksi. Oikeusministeriö, Viestintävirasto ja operaattorit kritisoivat järjestöjen ehdotusta. Ehdotus ei olisi edellyttänyt ns. pääasiakannetta vaan turvaamistoimiratkaisu olisi jäänyt pysyväksi. Lisäksi turvaamistoimi olisi myönnetty ilmeisesti hyvin vähäisin edellytyksin, eikä ehdotettu säännös olisi myöskään turvannut riittävästi vastapuolen oikeuksia.²⁴ Lainvalmistelun jatkuessa skenaario toteutuikin Helsingin käräjäoikeuden ja hovioikeuden hylätessä yksittäisen turvaamistoimihakemuksen.²⁵

Noin vuosi viimeisten kuulemisten jälkeen huhtikuussa 2005 sivistysvaliokunnassa esiteltiin ilmeisesti opetusministeriössä (vastuuministeriö), oikeusministeriössä ja liikenne- ja viestintäministeriössä virkatyönä ja sidosryhmiä kuulematta laaditut säännökset.²⁶ Ne hyväksyttiin lakivaliokunnassa ja sivistysvaliokunnassa lähes sellaisenaan ilman sidosryhmien kuulemisia.²⁷ Lainsäädäntövaihe huomioiden säännösten kirjoittaminen tyhjistä oli merkittävä asiallinen laajennus, lähes 400 sanaa. Tunnistamistietojen luovuttamisesta oikeudenhaltijoiden on korvattava kaikki kulut, mutta estämisen kuluista operaattori vastaa pääsääntöisesti itse.²⁸

Sittemmin on valmisteltu muitakin ehdotuksia operaattoreiden täytäntöönpanoroolin kasvattamiseksi. Vuonna 2009 valmistuneessa virkamies-työryhmän selvityksessä esitettiin, että oikeudenhaltijat voisivat lähettää internet-operaattoreiden kautta liittymänhaltijoille huomautuskirjeitä, mikäli oikeudenhaltijat valvontaoperaatioissaan huomaisivat liittymää käytettävän tekijänoikeuden loukkaukseen.²⁹ Lausuntokierroksen jälkeen tämä johti hallituksen esitykseen, joka kuitenkin raukesi eduskuntakauden vaihtuessa.³⁰ Hanketta kritisoitiin monella tavoin,³¹ mutta tässä valtakamp-

Muissa lausunnoissa tätä ei käsitelty. Eri toimijatahoja esitellään laajasti jäljempänä luvussa 4.

²⁴ LaVL 5/2005 vp, oikeusministeriön lausunto 4.5.2004; Viestintäviraston lausunto 13.5.2004; Elisa Oyj:n lausunto 14.5.2004 ja TeliaSonera Finland Oyj:n lausunto 28.5.2004.

²⁵ LaVL 5/2005 vp s. 8; *Siiki* 2009 s. 176; Helsingin käräjäoikeus 21.12.2004 (04/22468).

²⁶ SiVM 6/2005 vp, Ficom ry:n lausunto 2.5.2005.

²⁷ SiVM 6/2005 vp, TTVK:n lausunto 1.4.2005 s. 7, koontitaulukko: asiantuntijalausunnoissa tehtyjä muutosehdotuksia (versio 2, 8.5.2005) s. 98–106, opetusministeriö: pykälien muotoiluehdotukset 31.5.2005 s. 21. Ficom ry:n ilmeisesti oma-aloitteisesti lähettämässä, 2.5.2005 päivätyssä lausunnossa esitettyjä huomioita ei juurikaan noteerattu. Tietosuojavaltuutettu katsoi pyydytyssä, 24.5.2005 päivätyssä lausunnossaan säännösten edellyttävän jatkovalmistelua tai jopa poistamista esityksestä. Opetusministeriö esitti, että säännökset tulisi muotoilla tältä osin lakivaliokunnan ehdottamalla tavalla.

²⁸ LaVL 5/2005 vp s. 9–10.

²⁹ OPM 2009:21. Oikeusministeriön edustaja katsoi lausumassaan ehdotuksen ennenaikaiseksi.

³⁰ HE 235/2010 vp.

³¹ Ks. esim. *Norrgård*, JFT 2010.

pailun kannalta keskeisintä oli erimielisyys kustannusten korvaamisesta. Hallituksen esityksen mukaan oikeudenhaltijoiden olisi pitänyt korvata kulut kokonaan, arviolta 60–250 euroa huomautuskirjeeltä. Oikeudenhaltijat totesivat myöhemmin, etteivät ne tulisi näin korkeilla hinnoilla kirjeitä lähettämään.³² Heidän mielestä operaattorin tulisi vastata ainakin osittain kustannuksista, mitä on väläytetty myös uudessa vuoden 2013 taustaselvityksessä.³³

Vastaavasti oikeudenhaltijoiden vuonna 2004 tekemä esitys laajemmasta estomenettelystä konkretisoitui, kun tekijänoikeustoimikunnan vuoden 2012 mietintö päättyi samansuuntaiseen malliin. Kritiikkiä aiheutti muun muassa kulukysymyksen jättäminen jatkovalmisteluun.³⁴ Huomattavasti jatkokehitelty, mutta vastaavasti kritisoitu HE-luonnos lähetettiin lausunnoille 13.12.2013. Siinä esitettiin uutena keinona myös hidastamismääräys. Esitystä käsitellään laajemmin jäljempänä.³⁵

3 LAINVALMISTELU TEORIAN VALOSSA

3.1 Lainvalmistelu ja eri tahojen intressit

Perinteisesti lakien säätäminen on hahmotettu järkeen ja tutkimustietoon perustuvaksi rationaaliseksi päätöksenteoksi (rationaalisen valinnan teoria). Toisen teorian mukaan lainvalmisteluun vaikuttavat eri ryhmien intressit, valta-asetelmat ja institutionaaliset tekijät (yksityisten intressien tai julkisen valinnan teorit).³⁶ Kohtaamastaan kritiikistä huolimatta rationaalinen malli on hallinnut hahmotustapaa lainvalmistelun tutkimuksen ja valtionhallinnon säädöspolitiikan piirissä.³⁷ Näitä teorioita on kehitelty eteenpäin institutionaalis-realistisessa lainlaadintakäsityksessä, jossa korostetaan lainlaadinnan instrumentalismia, polkuriippuvuutta, tiedon ja asiantuntemuksen merki-

³² OKM 2013:13 s. 63, 68, 110. Vastaavasti esimerkiksi Uudessa-Seelannissa kustannusten vuoksi elokuvatuottajat eivät ole lähettäneet ainuttakaan ilmoitusta ja musiikkituottajien ilmoitukset ovat jääneet vähäisiksi (*Giblin* 2014 s. 160, 162).

³³ OKM 2013:13 s. 68, 110.

³⁴ OKM 2012:2 s. 65; OKM lausuntotiivistelmä 22.5.2012 s. 1, 5–15. Vastaavalla tavalla myöhemmässä esityksessä kuluvastuun jakautuminen jätettiin tuomioistuimen harkittavaksi – ilman arviointikriteerejä (OKM 2013:13 s. 81).

³⁵ OKM 2013:13; Hankerekisteri OKM056:00/2013. HE-luonnoksen lausunnoista ks. luku 4.2.3.

³⁶ *Pakarinen* 2012 s. 49, 74, 84–85. Vastaavasti *Rantala* 2011 s. 13–19.

³⁷ *Pakarinen* 2011 s. 6; *Tala ym.* 2011 s. 11–12.

tystä, epävarmuutta ja erimielisyyksien ratkaisemista.³⁸ Normatiivisessa sääntelyteoriassa tarkastellaan parhaan ohjauskeinon löytämistä tietyn yhteiskuntapoliittisen tavoitteen saavuttamiseksi, kun taas positiivisessa sääntelyteoriassa tutkitaan niitä tekijöitä, jotka tosiasiallisesti vaikuttavat lainsäätäjän valintoihin. Yleisen edun asemasta eturyhmien, poliitikoiden ja virkamiesten intressit voivat olennaisesti vaikuttaa lainsäädännön sisältöön.³⁹ Erilaisia ja keskenään ristiriitaisiakin malleja on siis useita.

Ranskalainen *Pierre Bourdieu* (1930–2002) tarkasteli muiden tutkimuskohteidensa ohella ”byrokratian kenttää” eli valtion ja sen toimielinten toimintaa.⁴⁰ Viranomaista ei tulisi nähdä neutraalina, yleisen edun tuntevana ja sitä tavoittelevana tahona tai rationaalisenä työkaluna yleisen edun toteuttamisessa.⁴¹ Valtion monopoli fyysiseen ja symboliseen väkivaltaan johtaa väistämättä kamppailuun monopolin herruudesta ja siihen liittyvistä eduista.⁴² Alistetut hyväksyvät tiedostamatta (ns. doksa) valtiossa valtaa pitävien ja valtakoneiston hyväksikäytön avulla toteutetun symbolisen väkivallan.⁴³ Yleisen edun vartijoilta edellytetään neutraaliutta ja yhteiskunnallisen perspektiivin säilyttämistä, mutta sosiologisessa tarkastelussa tämä ideaali on hurskastelua ja ristiriidassa todellisuuden kanssa.⁴⁴ *Bourdieu*n valtateoria vastaa näin ollen lainsäädäntöteorioista yksityisten intressien teoriaa ja positiivista sääntelyteoriaa.⁴⁵

Lainsäädäntöteoriassa valtasuhteista johtuvaksi rakenteelliseksi lainvalmisteluun osallistumisen esteeksi on hahmotettu se, että ”jokin ryhmä kykenee käyttämään lakiuudistuksessa omaa lainsäädäntövaltaansa muita ryhmiä voimakkaammin”.⁴⁶ Oikeuspoliittiset kysymykset lakien neutraliteetista, syntymekanismista ja taustavoimista jäävät usein vähemmälle huomiolle.⁴⁷ Havaitusti nämä ilmenevät hiukan eri tavalla muotoiltuina sekä lainsäädäntöteoriassa että *Bourdieu*n analyysissä. Tämä ideaalisten käsitysten kyseenalaistaminen on myös tämän tutkimuksen lähtökohta.

³⁸ *Tala ym.* 2011 s. 12–13.

³⁹ *Pakarinen* 2012 s. 49; *Mähönen – Määttä* 2002 s. 187, 189. Vastaavasti ks. *Koulu* 2004 s. 1–5.

⁴⁰ *Bourdieu* 1994.

⁴¹ *Bourdieu* 1994 s. 2. Vastaavasti säädettyjen lakien uskotaan usein olevan neutraaleja välineitä, joiden avulla valtiot voivat ohjata ja valvoa kansalaisten käyttäytymistä sekä yhteiskunnallista kehitystä (*Houtsonen* 2002 s. 156).

⁴² *Bourdieu* 1994 s. 16.

⁴³ *Bourdieu* 1994 s. 15.

⁴⁴ *Bourdieu* 1994 s. 17–18.

⁴⁵ Rationaalisen valinnan teoria onkin nimenomaisesti todettu *Bourdieu*n hahmotustavalle vastakkaiseksi (*Bourdieu – Wacquant* 1995 s. 153–154).

⁴⁶ *Pakarinen* 2011 s. 74.

⁴⁷ *Houtsonen* 2002 s. 157–158.

Tarkastelu kohdistuu sekä intressiryhmiin että siihen, onko lainvalmistelijan toiminnassa havaittavissa piirteitä, jotka olisivat omiaan vahvistamaan tai neutraloimaan eturyhmien vaikutusmahdollisuuksia.

Etujärjestöjen intressinä on laaja valmistelu, väljät toimeksiannot, itsenäiset työryhmät ja lainvalmistelijan rooli mekaanisena lakitekstien kirjoittajana.⁴⁸ Sen sijaan jos lainvalmistelu olisi rationaalista toimintaa, eturyhmien tehtävänä olisi lähinnä lainvalmistelijan roolia korostava lainvalmistelun tietopohjan laajentaminen.⁴⁹ Eturyhmät voivat vaikuttaa tarjoamalla lainsäätäjälle vaihtohyödykkeenä tietoa.⁵⁰ Epätasapainoa syntyy, kun eri osapuolilla ei ole yhtäläisiä resursseja tiedon tuottamiseen, sillä tietoja ei ole luonnollisesti valittu ja esitetty puolueettomasti.⁵¹ Tämä korostaa eri intressiryhmien keskenään erilaisia vaikutusmahdollisuuksia. Yksinkertaistaen heikkoon tai ylityöllistettyyn lainvalmistelijaan vaikutetaan tekemällä itse lakiehdotukset, vahvaan ”voittamalla” muut osallistujat tuottamalla omaa kantaa tukevia tietoja ja tutkimustuloksia.

OECD:n arvioinnin mukaan Suomessa yleinen lainvalmistelun kuulemistapa suosii vain järjestäytyneitä ryhmiä, ja se syrjäyttää liian helposti vähemmän vaikutusvaltaiset sidosryhmät ja erityisesti ne kansalaiset, joiden etua mikään sidosryhmä ei aja.⁵² Sidosryhmien mahdollisuus osallistua näennäisesti lainvalmisteluun ja esittää lausuntoja onkin eri asia kuin tosiasiallinen vaikuttaminen. Kyse on oikeastaan siitä, miten lainvalmistelijat suhtautuvat sidosryhmien kantoihin ja eri- ja samanmielisyyden hallinnointiin ja miten yleistä etua tai lainvalmistelijan neutraliteettia voidaan arvioida.⁵³ Ratkaisuja perustellaan usein esimerkiksi enemmistön tai valtaosan tukemalla kannalla, mutta tämä voi johtaa strategiseen keinotteluun. Tällöin keskeiseksi kriteeriksi tulisi edustajatahojen määrä eikä esitettyjen argumenttien laatu tai edustamattomien tahojen intressit.⁵⁴ Ongelmallista on, jos lainvalmistelija tekee ratkaisunsa lausuntojen määrän perusteella tai vetäytyy lausuntojen määrään viittaavan fasadiperustelun taakse.

⁴⁸ *Tala ym.* 2011 s. 7. Vastaavasti oikeudenhaltijat olivat vahvoja taustavaikuttajia direktiiveissä ja ACTA-sopimuksessa, ks. *Farrand* 2014 s. 118, 128–129, 183 viitteinen

⁴⁹ *Pakarinen* 2012 s. 85–86; *Pakarinen* 2011 s. 7, 43.

⁵⁰ *Bouwen – McCown* 2007 s. 425; *Bouwen* 2002.

⁵¹ Tiedon epäneutraaliudesta ja strategisista hyödyntämiskeinoista ks. *Tala ym.* 2011 s. 12. Vastaavasti epätasapainosta ja asiantuntijuudesta ks. *Farrand* 2014 s. 17 ja alaviite 126.

⁵² OECD 2010 s. 71–72; *Ahtonen – Keinänen* 2012 s. 5.

⁵³ *Rantala* 2011 s. 100–117, 194 ss; *Pakarinen* 2011 s. 24, 41. Erimielisyyksien hallinnoinnista ks. esim. *Tala ym.* 2011 s. 12–13; *Ahtonen – Keinänen* 2012 s. 11.

⁵⁴ *Rantala* 2011 s. 159–160, 193. Vastaavasti keskenään ristiriitaisten sidosryhmien mielipiteiden keskinäisen painoarvon määrittämisestä, ks. *Ahtonen – Keinänen* 2012 s. 2.

3.2 Lainsäädäntökenttä Bourdieun valtateoriassa

Bourdieu keskittyi oikeuden kenttää analysoidessaan lainsoveltajien ja oikeustieteilijöiden välisiin kamppailuihin esitellen muun muassa käytännön ja teoreettisen lähestymistavan vastakkainasetteluita.⁵⁵ Oikeuden kentällä käydään jatkuvaa valtakamppailua lain oikeasta tulkinnasta.⁵⁶ Kentällä tarkoitetaan jonkin merkityksellisen asian (pääoman) ympärille rakentuvaa sosiaalisten suhteiden tilaa. Pääoma on sosiaaliseen peliin osallistumisen edellytys ja tavoittelun kohde. Kentällä käytävää peliä ohjaavat pelaajien sisäistämät säännönmukaisuudet eli tieto siitä, miten peliä pelataan, mutta toisaalta kentällä kamppaillaan myös sääntöjen sisällöstä ja kentän rajoista. Kamppailu kohdistuu myös siihen, millainen pääoma on kentällä hallitsevassa asemassa. Kyse on ennen kaikkea kulttuurillisten ja sosiaalisten voimien tarkastelusta. Oikeuden kentän juridinen pääoma onkin tiedollista ja taidollista, kulttuurista pääomaa.⁵⁷ Kaikki kentät ovat alisteisia taloutta ja politiikkaa edustavalle vallan kentälle.⁵⁸

Kentän peliin osallistuminen edellyttää osallistumishalua (intressi), pääoman hallintaa ja pelin tajua. Oikeuden kentän kamppailuihin voivat tosiasiasa osallistua vain juridista pääomaa omaavat, oikeustieteellisen koulutuksen saaneet henkilöt. Henkilöiden tapa ja näkökulma todellisuuden hahmottamiseen ilmenee ns. habituksessa, joka muodostuu opintojen ja ammatin harjoittamisen aikana. Oikeuden kentällä habitukseen on sisäistetty muun muassa oikeudellisten ajattelun traditioiden ja ilmaisutapojen tuntemus, tietoisuus mahdollisista toimintatavoista ja ymmärrys oikeudellisesta argumentaatiosta. Se myös osaltaan yhdistää ryhmää, ylläpitää identiteettiä ja tekee eron ryhmän ulkopuolisiin.⁵⁹ Tällä tavoin niin ikään pyritään sulkemaan kentältä ulos muut toimijat.⁶⁰

Lainvalmistelua ja lain säätämistä ei voida nähdäkseni tarkastella oikeuden kentän avulla, koska kyse ei ole oikeussääntöjen tulkinnasta vaan niiden luomisesta. Myös kentän osallistujat ovat osin eri tahoja: oikeuden kentällä tuomioistuimilla on keskeinen asema eikä poliitikoilla ole sinne asiaa. Lainvalmistelussa tuomioistuimilla on vähäisempi, yleensä pidättyväinen asiantuntijarooli. Poliitikoilla voi olla huomattava vaikutus lakeihin

⁵⁵ *Ylhäinen* 2010 s. 169–170; *Bourdieu* 1987 s. 821–824.

⁵⁶ *Ylhäinen* 2010 s. 167; *Bourdieu* 1987 s. 817–818.

⁵⁷ *Ylhäinen* 2010 s. 159–160; *Bourdieu – Wacquant* 1995 s. 125–128, 148–149.

⁵⁸ *Ylhäinen* 2010 s. 161–162; *Bourdieu* 1987 s. 823–824.

⁵⁹ *Ylhäinen* 2010 s. 162–163, 171–172; *Bourdieu* 1987 s. 818–819; *Terdiman* 1987 s. 811–812.

⁶⁰ *Ylhäinen* 2010 s. 167–168; *Bourdieu* 1987 s. 828–829, 832.

ja he myös viime kädessä tekevät kaikki päätökset.⁶¹ Päätösten perusteet voivat olla myös poliittisia, eikä oikeus ohjaa lakien säätämistä samalla tavoin kuin se ohjaa lainoppia ja lainkäyttöä.

Edellä mainituista syistä on mielestäni syytä erottaa tämä ns. lainsäädäntökenttä oikeuden kentästä. Myös virkamiesten toimintaa analysoivan byrokratian kentän näkökulma on liian suppea, koska tässä päähuomio kohdistuu intressiryhmiin. Lainsäädäntökentän pääomaksi voidaan hahmottaa vaikutusvalta: se on tavoittelun kohde, mutta myös edellytys (tosiasialliselle) osallistumiselle. Jos tarkastellaan poliittisen ohjauksen ”alapuolista” tasoa, kentällä on myös samankaltaisia piirteitä.⁶² Lainvalmistelijat, lausuntojen laatijat ja työryhmiin osallistuvat ovat miltei poikkeuksetta oikeustieteellisen koulutuksen saaneita henkilöitä. Keskeisimmistä lainsäädäntökentän toimijoista vain poliitikot ja heidän avustajansa eivät yleensä kuulu juristiprofession.⁶³ Valmistelussa käytetään oikeudellista kieltä, käsitteitä, ilmaisutapoja ja mekanismeja. Tämä takaa juristeille etulyöntiaseman muihin osallistujiin nähden. Vastaavasti esitetään oikeudellista argumentaatiota vetoamalla esimerkiksi perusoikeuksiin, kansallisiin tai eurooppalaisiin säädöksiin, tuomioistuinratkaisuihin ja hallitusohjelmakirjauksiin. Tekijänoikeuslaki on myös hyvin monimutkainen ja valmisteluun osallistuu lähes yksinomaan lakimiehiä. Edellä *Bourdieu*n kuvaamalla tavalla tällä käytännössä tehdään ero ulkopuolisiin ja suljetaan pois muut kuin tekijänoikeuteen vihkiytyneet juristit. Profioiden samankaltaisuus oikeuden tulkintakentällä ja valmistelussa lisää niin ikään kenttien keskinäistä riippuvuutta.

Lainsäädäntökenttä lienee parhaiten kuvattavissa oikeuden kenttään vahvasti kytköksissä olevana politiikan osakenttänä.⁶⁴ Lainvalmistelijoiden toimintaa voidaan mallintaa osin myös byrokratian kentän avulla. Oikeuden kentän tavoin – tai poliittisista vaikutteista johtuen jopa vahvemmin – lainsäädäntökenttä monilta osin vastaa (homologia) politiikan ja yleisen vallan kenttää.⁶⁵

⁶¹ Vastaavasti ks. *Tuori* 2000 s. 150.

⁶² Vastaavasti ks. *Tuori* 2000 s. 149–151. *Tuori* tarkastelee erityisesti sitä, mikä erottaa poliittisen argumentaation oikeudellisesta.

⁶³ Esimerkiksi oikeusministeriön lainvalmisteluosaston 40:stä lainvalmisteluun osallistuvasta henkilöstä 38 oli juristeja (Raili Paananen/OM 1.10.2013). Niin ikään viimeisimmän tekijänoikeustoimikunnan kokoonpanossa (21 henkilöä) vain kolmella ei ollut oikeustieteellistä tutkintoa. Vastaavasti OKM:n seitsemästä tekijänoikeuden alan henkilöstä, pois lukien sihteerit, vain projektitutkijalla oli muu kuin oikeustieteellinen koulutus. (Lakimiesmatrikkeli 2014.)

⁶⁴ Tätä kuvastaa myös yleinen politiikan oikeudellistumiskehitys.

⁶⁵ *Ylhäinen* 2010 s. 166; *Bourdieu* 1987 s. 850–851.

4 OPERAATTOREIDEN VÄLINEELLISTÄMISEN ANALYYSI

4.1 Toimielimet ja niiden rooli

4.1.1 Tekijänoikeuden valmistelu- tai tulkintaelimet

Lainsäädäntöön voi vaikuttaa ennen varsinaisen valmistelun aloittamista (esivalmistelu), hallituksen esityksen laatimisvaiheessa (perusvalmistelu, lausuntomenettely ja jatkovalmistelu) tai eduskuntavaiheessa. Yleisesti ottaen etujärjestöt ovat kokeneet eduskuntakuulemiset vaikuttamisen kannalta ajankohdaltaan liian myöhäisiksi, ja painopiste on aiemmassa edunvalvonnassa. Aika ennen työryhmän perustamista on katsottu kaikkein tärkeimmäksi valmisteluvaiheeksi. Sama pätee myös pysyviin komiteoihin, toimikuntiin ja neuvottelukuntiin. Järjestäytyneet ja institutionalisoituneet ryhmät, kuten oikeudenhaltijajärjestöt, hallitsevat ja ovat vahvassa asemassa tällaisessa epämuodollisessa ja useimmiten dokumentoimattomassa vuorovaikutuksessa.⁶⁶

Yleisesti ottaen ainoastaan vastaavan ministeriön ja riippumattomien asiantuntijoiden kuulemisella on tilastollista merkitystä eduskunnan valiokunnan kannanmuodostukseen. Muilla ministeriöillä tai eturyhmillä ei keskimäärin ole vaikutusta.⁶⁷ Tämä korostaa tarvetta vaikuttaa vastuuministeriön edustajiin. Tekijänoikeusasiat käsitellään sivistysvaliokunnassa, jossa oikeudenhaltijat ovat kuultavina tahoina vahvasti tai jopa lähes yksinomaan edustettuina.⁶⁸ Valiokunnassa voidaan lähinnä tehdä pieniä muutoksia ja myöhemmin oikeuslähteenä hyödynnettäviä kirjauksia. Tilanteen muuttuminen tai valmistelussa avoimeksi jääneet kysymykset tosin korostavat valiokunnan roolia, kuten ilmeni vuoden 2004–2005 valmistelussa.⁶⁹ Valiokuntavaiheen toissijaisen merkityksen ja tähän liittyvän aineiston vähyyden vuoksi artikkelissa on rajauduttu eduskuntakäsittelyä edeltäviin vaiheisiin.

Taulukoissa 1 ja 2 on esitetty eri tahojen osallistumista tekijänoikeuden valmistelu- tai tulkintaelimiin sekä niiden antamia lausuntoja nyt käsillä olevista aiheista. Taulukoissa on yhdistetty suuri määrä erilaisia tietoja. Tässä esitetään taulukon rakenne lyhyesti, ja sisältöön paneudutaan myö-

⁶⁶ Pakarinen 2012 s. 75–76; Pakarinen 2011 s. 40; Tala ym. 2011 s. 2, 4, 7.

⁶⁷ Ahtonen – Keinänen 2012 s. 21. Epäselvää on, onko näin myös tekijänoikeuden alalla.

⁶⁸ Yleisesti ks. esim. Peltomäki 2013b.

⁶⁹ Pakarinen 2011 s. 53–54. Oikeuslähteenä käyttämisestä ks. Ahtonen – Keinänen 2012 s. 12.

hemmissä alaluvuissa.⁷⁰ Eräitä yleisiä havaintoja esitetään kuitenkin heti taulukoiden esittelyn jälkeen.

Tahot on jaettu ”ryhmiin” eli eräänlaiseen taustakontekstiin.⁷¹ Ryhmä-jaon tarkoituksena on helpottaa hahmottamaan eri toimijaleirien sisäisiä ja ulkoisia samankaltaisuuksia ja eroja. Ryhmät voisi tietyiltä osin hahmotella toisinkin.⁷² Lihavoinnilla on korostettu tahoja, jotka ovat muita aktiivisempia tai vaikutusvaltaisempia.

Seuraavassa kolmessa sarakkeessa on lueteltu tahon edustajien lukumäärä kussakin elimessä. ”Nvk” viittaa 40-henkiseen tekijänoikeusasioiden neuvottelukuntaan, ”Tmk” 21-henkiseen tekijänoikeustoimikuntaan ja ”TN” 16-henkiseen tekijänoikeusneuvostoon varajäsenineen.⁷³ Vastaavasti ”SiVM” viittaa eduskunnan sivistysvaliokunnassa täytäntöönpanokeinoja käsiteltäessä kuultujen asiantuntijoiden lukumäärään.⁷⁴ Taulukoihin on sisällytetty kaikki kolmessa ensimmäisessä elimessä edustetut tahot.⁷⁵ Terminologian yksinkertaistamiseksi jäljempänä ”työryhmä” kattaa myös komiteat eli tekijänoikeusasioiden neuvottelukunnan ja tekijänoikeustoimikunnan.

Seuraavissa sarakkeissa on tarkasteltu tahojen suhtautumista lainsäädäntöhankkeisiin. ”+” tarkoittaa myönteistä, ”-” kielteistä ja ”X” neutraalia suhtautumista. Lukutapa on subjektiivinen ja voimakkaasti yksinkertaistava, jopa polarisoiva; suluissa oleviin kantoihin sisältyy tavallista enemmän tulkintaa tai ehdollisuutta. Kantoja viimeisimpään estoesitykseen on havainnollistettu yksityiskohtaisemmin luvussa 4.2.3. Ehdotusta on lausunnoissa harvoin vastustettu täydellisesti. Kielteiseksi suhtautumiseksi on luokiteltu sellainen kritiikki, jossa hanketta pidetään tarpeettomana, jatkovalmistelun

⁷⁰ Taulukoiden on tarkoitus esittää tietoa tiivistetyssä ja systematisoidussa muodossa, ei niinkään toimia yhteenvetona tekstiesitykselle. Näin ollen olen katsonut parhaaksi esittää taulukon ensimmäisessä loogisessa asiayhteydessä. Tässä vaiheessa lukijan oletetaan tutustuvan taulukkoon vain pääpiirteittäin ja muodostavan yleiskäsityksen tahoista ja ryhmittymistä. Yksityiskohtia mm. valmisteluelimistä ja lausuntokannoista oletetaan tarkasteltavan vasta myöhemmin, kun tekstissä niitä käsitellään.

⁷¹ Taho on kirjattu tietävästi tosiasiallisen edustuksen mukaan (tästä ks. alaviite 144).

⁷² ”Hyödyntäjällä” tarkoitetaan sekä käyttäjä- että oikeudenhaltijaroolin omaavaa tahoja, esimerkkinä mediatalo (*Oesch* 2009 s. 7 vrt. toisenlainen hahmottelu tekijänoikeustoimikunnasta mts. 14). Tarvetta erotella näitä oikeudenhaltijoista ei ehkä tässä tutkimuksessa olisi. Oikeudenhaltijaksi luokittelu on tehty laajentavasti mukaan lukien muun ohella asianajotoimistot, jotka tyypillisesti edustavat oikeudenhaltijoita.

⁷³ Hankerekisteri OKM044:00/2012 (Tekijänoikeusneuvosto), OPM012:00/2010 (Tekijänoikeustoimikunta 2010–2011), OKM037:00/2014 (Tekijänoikeusasioiden neuvottelukunta).

⁷⁴ SiVM 6/2005 vp sisältäen liiteaineistot. Myös lakivaliokunnan aineisto on käyty läpi (LaVL 5/2005 vp).

⁷⁵ Pois on jätetty sivistysvaliokunnan kuulemia tämän tarkastelun ulkopuolisiin asioihin osallistuneita tai yksittäisiä tahoja (yhteensä 23 kpl).

tarvetta korostetaan tai esitystä vastustetaan tai keskeisiin ehdotuksiin kohdistetaan huomattavaa kritiikkiä. Myönteiseksi on luokiteltu myös laajennuksia esittävä lausunto. Neutraalia (X) on käytetty vain poikkeuksellisesti, lähinnä kun taho ei ole halunnut lausua mitään.

Taulukko 1. Toimijat eri elimissä ja lausunnonantajina.

Taho	Ryhmä	Nvk	Tmk	TN	SiVM	Kirje	Kirje/HE	Estot	Estot/HE
Opetus- ja kulttuuriministeriö	Lainsäädäntö	3	1		4				
Oikeusministeriö	Lainsäädäntö	1	1	2		-	X	(-)	-
Liikenne- ja viestintäministeriö	Lainsäädäntö	1	1		1	+	-	(-)	-
Työ- ja elinkeinoministeriö	Lainsäädäntö	1	1					-	-
Ulkoasiainministeriö	Lainsäädäntö	1							(-)
Sisäasiainministeriö	Lainsäädäntö					-	+		X
Helsingin käräjäoikeus	Oikeuslaitos						+	+	+
Markkinaoikeus	Oikeuslaitos								-
Yliopistot/oikeustiede	Asiantuntija	1	1	4	2	-			
IPR University Center	Asiantuntija	1			1		-		(-)
Tietosuojavaltuutettu	Käyttäjä	1			2				(-)
Viestintävirasto	Käyttäjä					-		-	(-)
Kilpailu- ja kuluttajavirasto	Käyttäjä	1	1			-	-	(-)	(-)
Kuluttajaliitto ry	Käyttäjä					-	-	-	
Tietoyhteisk. kehittämiskeskus ry	Käyttäjä	1							-
EFFI ry	Käyttäjä	1			1			-	-
Piraattipuolue rp	Käyttäjä					-	-	-	
Kansallinen audiovis. instituutti	Käyttäjä	1							
Kansalliskirjasto	Käyttäjä	1		1	1				
Valtion taidemuseo	Käyttäjä			1	1				
Suomen Yrittäjät	Teollisuus	1	1	1	1				
Elinkeinoelämän keskusliitto	Teollisuus	1	1	1	1	-		(+)	(-)
Nokia Oyj	Teollisuus	1			1				
Kauppa liitto ry	Teollisuus			1			+	+	
Teknoliateollisuus ry	Teollisuus			1				-	-
Keskuskauppakamari	Teollisuus							-	(-)
STTK ry	Teollisuus							-	-
Ficom ry	Välittäjä	1	1	1	1	-	-	-	-
Elisa Oyj	Välittäjä				1	-	-	-	-
Finnet-liitto	Välittäjä					-			-
DNA	Välittäjä						-	-	-
Teliasenera Finland Oyj	Välittäjä				1	-	-	-	-

Sarake ”kirje” viittaa vuonna 2009 valmistuneeseen ns. huomautuskirjemenettelyä koskevaan esiselvitykseen ja siitä annettuihin lausuntoihin. Kannat on arvioitu lausuntotiivistelmän perusteella.⁷⁶ ”Kirje/HE” viittaa samaa menettelyä koskevaan hallituksen esitysluonnokseen. Kannat on arvioitu pääosin hallituksen esityksen valmisteluvaiheita koskevan luvun perusteella, mutta myös esitysluonnoksesta annettujen lausuntojen perusteella.⁷⁷ ”Estot” viittaa tekijänoikeustoimikunnan vuonna 2012 valmistuneen mietinnön estomenettelyn laajentamista koskevaan osaan. Kantoja

⁷⁶ OPM 2009:21; OPM lausuntotiivistelmä 27.11.2009; Hankerekisteri OPM016:00/2009.

⁷⁷ HE 235/2010 vp; Hankerekisteri OKM001:00/2010.

on arvioitu lausuntotiivistelmän ja lausuntojen perusteella.⁷⁸ ”Estot/HE” viittaa 13.12.2013 lausuntokierrokselle lähetettyyn em. mietinnöstä jatko-kehiteltyyn HE-luonnokseen ja sen taustaselvitykseen. Kantoja on arvioitu lausuntojen perusteella ja niitä eritellään tarkemmin luvussa 4.2.3.⁷⁹ Taulukoista on jätetty pois lausuntotiivistelmässä mainitsemattomia, yksittäisiä tai irrelevantteja tahoja (17 kpl).

Taulukko 2. Hyödyntäjät ja oikeudenhaltijat elimissä ja lausunnonantajina.

Taho	Ryhmä	Nvk	Tmk	TN	SiVM	Kirje	Kirje/HE	Estot	Estot/HE
Sanoma Oyj	Hyödyntäjä	1	1	1	1	X		+	+
Yleisradio	Hyödyntäjä	1	1	1	1	-	X		+
Viestinnän Keskusliitto	Hyödyntäjä	1	1	1	1	+			+
MTV Media	Hyödyntäjä	1	1	1	1	+	+	+	+
Markkinointiviest. Toimistojen Liitto	Hyödyntäjä				1			-	
Mainostajien Liitto	Hyödyntäjä				1				
Aalto-yliopisto	Hyödyntäjä	1			1				
Teosto ry	Oik.haltija	1	1	1	2	+	+	+	+
Kopiosto ry	Oik.haltija	1		1	2	+		+	+
Sanasto ry	Oik.haltija	1		1		+	+		+
Tuotos ry	Oik.haltija	1			1		+		+
Kuvasto ry	Oik.haltija			1	1		+		+
Gramex ry	Oik.haltija		1		2	+	+	+	+
TTVK ry	Oik.haltija				2	+	+	+	+
Suomen Kirjailijaliitto ry	Oik.haltija	1	1		1		+		+
Suomen Näyttelijäliitto ry	Oik.haltija	1		1	1				+
Suomen Journalistiliitto ry	Oik.haltija	1	1	1	1			(-)	(-)
Suomen Muusikkojen Liitto ry	Oik.haltija	1	1	1	1			+	+
Teatteri- ja mediatyöntekijät ry	Oik.haltija	1	1	1	1			(+)	
Suomen tietokirjailijat ry	Oik.haltija	1			1			+	+
Suomen Taiteilijaseura ry	Oik.haltija	1							+
Näytelmäkirj. ja Käsikirj. ry	Oik.haltija	1			1			(+)	
Säveltäjät ja Sanoittajat ELVIS ry	Oik.haltija			1	1	+	+		+
Kääntäjien ja tulkkien liitto ry	Oik.haltija				1	+			+
Suomen Säveltäjät ry	Oik.haltija				1		+		+
Luovan työn tekijät ja yrittäjät	Oik.haltija	1				+			+
IFPI/Musiikkituottajat ry	Oik.haltija	1	1	1			+	+	+
Suomen Musiikkikustantajat ry	Oik.haltija			1			+		+
Suomen Filmikamari ry	Oik.haltija	1				+	+		+
Jarmo Puskala/elokuvakäsikirj.	Oik.haltija	1							
Ääni- ja kuvatalennetuottajat ry	Oik.haltija				1	+	+		
Suomen Anti-piratismiyhdistys ry	Oik.haltija					+	+	+	
Elokvatuottajien keskusliitto ry	Oik.haltija					+	+		+
MUU ry	Oik.haltija							(-)	+
Tuotanto Oy Säihky	Oik.haltija			1					
Arkkitehtitsto Heikkilä&Kauppinen	Oik.haltija			1					
Pekka Tarkela/Aatsto Borenius	Oik.haltija		1						
Asianajotoimisto Susiluoto	Oik.haltija			1	1				

⁷⁸ OKM 2012:2; Hankerekisteri OPM012:00/2010; OKM lausuntotiivistelmä 22.5.2012, s 1, 5–15.

⁷⁹ Hankerekisteri OKM056:00/2013; OKM 2013:13.

Tässä vaiheessa voidaan esittää eräitä huomioita taulukoiden tietosisällöstä. Jäljempänä tullaan tarkastelemaan lähemmin eri tahojen edustusta ja sen jakautumista eri valmisteluelimissä. Niin ikään eri tahojen suhtautumista esillä olleisiin lainsäädäntöhankkeisiin tarkastellaan lähemmin. Taulukoista voidaan havaita oikeudenhaltijoiden vahva edustus kaikissa elimissä. Edustus on joissain tapauksissa jopa vahvempi kuin muilla ryhmillä yhteensä. Keskeisiä, lähes kaikissa elimissä edustettuja tahoja on myös runsaasti. Vastaavasti oikeudenhaltijat ovat olleet aktiivisia eri hankkeista lausueissaan ja kannat ovat olleet pitkälti samansuuntaisia. Muut tahot ovat lausuneet hajanaisemmin. Seuraavaksi siirryn tarkastelemaan lähemmin mainittuja toimielimiä.

Tekijänoikeustoimikunnassa arvioidaan muun muassa tekijänoikeuslainsäädännön uudistamistarpeita ja Suomen kantaa kansainvälisiin asioihin. Toimikunta nimettiin yleensä kahdeksi vuodeksi kerrallaan ja sillä oli yleisluontoisia, 15 vuoden ajan lähes sellaisenaan säilyneitä tehtäviä. Vuodesta 2012 lukien toimikuntaa ei ole asetettu. Viimeisin toimikunta (2010–2011) laati sittemmin jatkojalostetun mietinnön mm. estomenetelmien laajentamisesta. Mietintöön sisältyi operaattoreiden edustajan vahva eriävä mielipide. Toimikunnassa oli puheenjohtajan ja neljän ministeriön edustajan lisäksi 16 varsinaista jäsentä. Oikeudenhaltijoilla oli kahdeksan edustajaa ja hyödyntäjillä neljä. Operaattoreilla oli yksi edustaja ja yleisellä elinkeinoelämällä kaksi. Kokoonpano oli hyvin vahvasti kallellaan oikeudenhaltijoiden suuntaan, ja mietintöä väritti vastakkainasettelu eikä yhteisymmärrystä löydetty. Lainvalmistelussa tärkeää olisi löytää hyväksyttävissä oleva ratkaisu. Tässä ei tällä erää onnistuttu. Lausuntojen kirjo myös viittaa siihen, että työ jäi kesken eikä toimikunta pystynyt löytämään täysin tasapainoista ratkaisua.⁸⁰

Tekijänoikeusasioiden neuvottelukunta on 40 hengen laajapohjainen elin, jonka tarkoituksena on keskustella tekijänoikeusasioista. Neuvottelukunta asetettiin ensimmäisen kerran vuosiksi 2012–2013 ja tehtäväkuvauksen perusteella se on korvannut tekijänoikeustoimikunnan. Edustetut tahot olivat identtisiä sittemmin vuosille 2014–2015 asetetussa neuvottelukunnassa.⁸¹ Asetuspäätöksessä nyt nimenomaisesti todetaan, että ”neuvottelukunta voi päättää, että tiettyjä kysymyksiä käsitellään valmistelevasti neuvottelukunnan jäsenistä ja muista asiantuntijoista koostuvassa pienryhmässä”,

⁸⁰ Jos muuta ei ole todettu, jäljempänä lukujen 4.1–4.2 analyysissä on käytetty edellä mainittujen taulukoiden lähdeaineistoja.

⁸¹ Neuvottelukunta asetettiin olennaisesti samanlaisena, koska ”jäsenistöltä on tullut siitä positiivista palautetta” (Anna Vuopala/OKM, 19.2.2014). Jäljempänä kuvatuksi olenaisempaa olisivat kuitenkin aliedustettujen ja edustamattomien tahojen, eivät jäsenten näkemykset.

”neuvottelukunnan työn tueksi voidaan teettää selvityksiä” ja että ”neuvottelukunta voi lisäksi tehdä ministeriölle esityksiä selvityksistä, tutkimuksista ja kehittämishankkeista”. Pienryhmien hyödyntäminen olisikin välttämätöntä, sillä kokoonpanon laajuudesta, neuvottelukunnan asialistoista ja aineistoista voi päätellä, että se on ainakin toistaiseksi toiminut lähinnä opetus- ja kulttuuriministeriön (OKM) tiedotuskanavana.⁸² Toimikuntaa vastaavalla tavalla oikeudenhaltijoilla on 16 edustajaa, hyödyntäjillä viisi, operaattoreilla yksi ja elinkeinoelämällä kolme. Käyttäjillä on toimikuntaan verrattuna hiukan laajempi, vaikkakin intresseiltään hajanainen edustus.

OKM järjestää lisäksi vuosittain avoimen tekijänoikeusfoorumin laajempaa tekijänoikeuspoliittista keskustelua ja yhteydenpitoa varten. Käsiteltäviä asioita ovat hallitusohjelmaan kirjatut lainmuutosesitykset ja muut ministeriössä vireillä olleet asiat.⁸³ Neuvottelukunnan tavoin foorumissa on kyse lähinnä tiedottamisesta ja yleisen tason vuoropuhelusta, jolla ei ole muuta tai kovin merkittävää konkreettista vaikutusta lakivalmistelun sisältöön.

Tekijänoikeusneuvosto (TekL 55 §) avustaa OKM:ää tekijänoikeutta koskevien asioiden käsittelyssä ja antaa lausuntoja tekijänoikeuslain soveltamisesta. Se tarjoaa tuomioistuimiin nähden vaihtoehtoisen tavan ratkoa tekijänoikeudellisia kiistoja. Se on sisällytetty tarkasteluun kokonaiskuvan saamiseksi ja koska se vahvistaa valmisteluelimiin liittyviä havaintoja. Tekijänoikeusasetuksen (574/1995) 19 §:n mukaan neuvostossa tulee olla edustettuna keskeiset tekijänoikeuslaissa säädettyjen oikeuksien haltijat sekä suojakohteiden käyttäjät. Neuvostoon kuuluu kolmen asiantuntijan lisäksi 13 eturyhmien edustajaa sekä varajäsenet. Intressiryhmistä noin kolme neljännestä (19/26) edustaa oikeudenhaltijoita tai media-alaa, teollisuutta neljä, museoita/arkistoja kaksi, operaattoreita yksi ja kuluttajia ei kukaan. Tasapainoisempi kokoonpano olisi legitimitetin kannalta välttämätön, varsinkin kun lausunnoilla on tosiasiallista oikeuslähdeopillista merkitystä.⁸⁴

Oikeudenhaltijatahojen lukumäärä ja vahva edustus eri työryhmissä johtaa helposti niiden etuja myötäilevään lainsäädäntöön. Lainvalmistelijalta edellytettäisiin rohkeita ratkaisuja, jottei hän joutuisi eturyhmien määrällisen tai ”tiedollisen” johdattelun uhriksi. Tilanne on hankala. Luvussa 3.1 kuvatusti valmisteluelinten epätasapainoisuus johtaa ongelmallisiin tuloksiin. Toisaalta lainvalmistelija tarvitsisi tukea objektiivisen tiedon kerryttämisessä. Mikäli tämä ei ole mahdollista, tasapainoisessa asetelmassa esitetyt subjektiiviset näkemyksetkin voisivat vielä johtaa kohtalaiseen lopputulokseen. Tästä esitetään esimerkkejä jäljempänä.

⁸² OKM 2014.

⁸³ OKM 2013.

⁸⁴ Tätä epätasapainoa on kritisoinut voimakkaasti mm. *Mylly* (2013).

Yleisesti ottaen lainvalmistelun ongelmaksi on havaittu työryhmien tarkoitushakuiset tai yksipuoliset kokoonpanot ja epäinformatiiviset kuulemistilaisuudet.⁸⁵ Kritiikki soveltuu myös pysyvämpiin komiteoihin kuten tekijänoikeustoimikuntaan ja tekijänoikeusasioiden neuvottelukuntaan. Yksipuolisuus ja liiallinen laajapohjaisuus on ainakin ilmeistä, eikä tällainen laajakaan kokoonpano takaa valmistelun legitimitettä. Epäselvää tosin on, missä määrin tämä johtuu siitä, ettei ole pystytty tunnistamaan tarpeeksi toisia intressejä edustavia, dialogiin halukkaita ja kykeneviä tahoja. Tätä ongelmaa käsitellään laajemmin jäljempänä luvussa 4.3.1.

4.1.2 Siirtyminen valmisteluun virkatyönä

Tekijänoikeustoimikunta kasvoi ensin 21-henkiseksi ja vuodesta 2012 lukien sen korvasi 40-henkinen neuvottelukunta. Vuoden 2007 loppuun saakka kokoonpano oli suppeampi. Viimeisimmässä oli neljä henkilöä opetusministeriöstä, kolme muista ministeriöistä (liikenne- ja viestintäministeriö (LVM), työ- ja elinkeinoministeriö (TEM) ja oikeusministeriö (OM)) ja kaksi tekijänoikeuteen perehtynyttä oikeustieteen tutkijaa.⁸⁶ Tällainen kokoonpano olisi voinut vielä olla valmisteluelimenä toimintakykyinen. On ilmeistä, ettei myöskään tekijänoikeusasioiden neuvottelukunnalla tai tekijänoikeusfoorumilla ole tehtävistä tai kokoonpanon laajuudesta ja painottumisesta johtuen konkreettista lisäarvoa lainvalmistelussa. Tällaisilla valmisteluelimillä tavoiteltu lainvalmistelun legitimitetti jää näennäiseksi. Kompromissinmuodostuksen menettelyehtojen tulisi olla sellaisia, jotka suovat kaikille merkityksellisille intresseille mahdollisuuden ottaa osaa neuvotteluihin, ja samalla varmistetaan intressien välinen valtatasapaino.⁸⁷ Tasapainoinen, päätöksentekoon tähtäävä asioiden käsittely ei ole mahdollista, ja toisaalta oikeudenhaltijoiden näkemykset saataisiin selville ilman kyseisiä elimiäkin.

Tekijänoikeuselinten laajeneminen ja yksisuuntaistuminen on merkki tosiasiallisen valmistelun ja päätöksenteon siirtymisestä entistä enemmän lainvalmistelijoille ja kulisseihin. Toisaalta neuvottelukunnan asettamispäätökseen lisätty pienryhmätyöskentelyn ja selvitysten teettämisen mahdollisuus viittaa tarkoitukseen hyödyntää varsinaisessa valmistelussa pienempiä *ad hoc* -ryhmiä.⁸⁸ Foorumeiden ja valmistelutahojen moninai-

⁸⁵ Pakarinen 2012 s. 75; Pakarinen 2011 s. 35.

⁸⁶ Hankerekisteri OPM122:00/2005.

⁸⁷ Ks. Tuori 2000 s. 114, jossa vedetään yhteen Jürgen Habermasin tutkimuksia.

⁸⁸ Tästä huolimatta ongelmana on neuvottelukunnan painottuminen. Pienryhmiä voidaan lisäksi käyttää vain, jos neuvottelukunta niin päättää.

suus mahdollistaa nimellisen kuulemisen ja puheenvuorojen käytön, mutta tosiasiallinen kuuleminen ja vaikutusmahdollisuudet jäävät arvoitukseksi. Laajapohjaisuutta olennaisempaa olisi työryhmien työskentelyn laatu.⁸⁹ Yleisesti ottaen noin puolet hallituksen esityksistä laaditaan pelkästään virkatyönä, joka soveltuu parhaiten pienten ja teknisluontoisten lakiuudistusten valmisteluun. Muita on ensin työstetty työryhmässä tai toimikunnassa.⁹⁰ Nyt tarkasteltavat muutosehdotukset olivat verraten merkittäviä. Niin ikään luonnoksista ja selvityksistä pyydetään lausuntoja sadoiltakin tahoilta, mutta lausuntojen arviointi ja yhteensovittaminen jää usein epäselväksi tai sattumanvaraiseksi.⁹¹

Virkamiesvalmistelussa tapahtuvaan lausuntojen arviointiin ja yhteensovittamiseen liittyviä haasteita voidaan tarkastella esimerkin valossa. 13.12.2013 laaditussa hallituksen esitysluonnoksessa (HE-luonnos) aiempia valmisteluvaiheita kuvattiin seuraavasti. HE-luonnoksen mukaan suurin osa lausunnonantajista katsoi, että piratisminvastaisia oikeuskeinoja on tarvetta lisätä varsinkin silloin, kun loukkaajat ovat tuntemattomia tai sijaitsevat ulkomailla. Niin ikään ”asian jatkovalmistelua kannatettiin laajasti ja vain muutama lausunnonantaja katsoi, ettei toimenpiteitä voisi hyväksyä missään muodossa”.⁹² Lausuntoja ja taulukon 1 ”Estot”-saraketta tarkasteltaessa ilmenee, ettei tämä aivan pidä paikkaansa. Asian jatkovalmistelua esitettyltä pohjalta vastustettiin nimenomaisesti laajemmin. Kritiikki esitettyjä operaattoreihin kohdistettavia ja niiden kustannuksella toteutettavia keinoja vastaan oli myös laajaa. HE-luonnos antaakin myönteisemmän kuvan lainvalmistelun aiemmista vaiheista kuin aiempi lausuntotiivistelmä.⁹³

Suuri osa lausunnonantajista toki kannatti estoja: olivathan oikeudenhaltijat yhtenäisesti kannattaneet niitä. Tämä korostui seuraavassa vaiheessa, jossa kaksinkertainen määrä oikeudenhaltijoita antoi lausunnon. Tällöin lausuminen oli laajempaa myös verrattuna aiempaan HE-luonnokseen (”Kirje/HE”). Niin ikään useat lausunnonantajat kannattivat jatkovalmistelua. Tämä lienee kuitenkin useimmiten tulkittava kritiikiksi ja eufemismiksi sille, että esitystä on olennaisella tavalla muutettava. Eräisiin kysymyksiin HE-luonnoksessa olikin muotoiltu ratkaisuja, mutta keskeiset ongelmat muun muassa kuluvaluusta jäivät edelleen ratkaisematta.

⁸⁹ Ahtonen – Keinänen 2012 s. 8; Pakarinen 2011 s. 74.

⁹⁰ Pakarinen 2011 s. 14, 31–32.

⁹¹ Vrt. tuntemattomien tai tavoittamattomissa olevien tekijöiden teoksia (orpoteoksia), suoja-ajan pidennystä ym. koskevassa lainmuutoksessa lausuntoja saatiin 74 taholta, ja niitä käsiteltiin lähes lakonisesti vajaassa puolessa sivussa (HE 73/2013 vp s. 16).

⁹² OKM HE-luonnos 13.12.2013 s. 18–19. Samansuuntaisesti OKM 2013:13 s. 35.

⁹³ Ibid. vrt. OKM lausuntotiivistelmä 22.5.2012.

Puolentoista vuoden hiljaiselon jälkeen poliittisen ohjauksen vuoksi asia oli saatava kiireellisesti eduskunnan käsiteltäväksi.⁹⁴ Tarve viedä hanke eteenpäin myös ilmeisesti vaikutti siihen, että aiempia kriittisiä vaiheita oli tarpeen silotella konfliktien avoimen käsittelyn asemasta. Tämä vaikuttaa kyseenalaiselta tavalta ohittaa ilmeinen erimielisyys. Tällaisen lähestymistavan riskinä on, että hankkeen etenemistä perusteltaisiin määrällisin perustein eli lausuntojen valtaosan (ts. oikeudenhaltijoiden) kannoilla.⁹⁵

Aiempi esimerkki virkatyönä kiireessä jopa ilman nimellistä kuulemista tehdystä valmistelusta oli luvussa 2 esitelty TekL 60 a–d §:n valmistelu valiokuntavaiheessa vuosina 2004–2005. Asiassa olisi ollut mahdollista ottaa aikalisä. Ilmeisesti eduskunnan valiokunnassa ja aika ajoin myös OKM:ssä vallitsee uskomus, joka täytyy hyväksyä, eli bourdieulaisittain ortodoksia: tekijänoikeutta on suojattava yhä vahvemmin keinoin.⁹⁶ Toisaalta direktiivin implementointiin ja hallitusohjelman toteuttamiseen liittyy myös poliittisia paineita, vaikka ne eivät sisällöllisiä ratkaisuja sanelisikaan.

Valmistelutavan muutoksiin liittyy kuvattuja riskejä, jotka ovat ilmeisesti esimerkkien valossa osin realisoituneetkin. Lainvalmistelijan rooliin tulisi kiinnittää lainsäädäntöteorian ja Bourdieun byrokratian kentän valossa huomiota. Varsinkin erimielisyyden hallinnoinnin sudenkuopat, kuten ratkaisujen perusteleminen määrällisillä argumenteilla, tulisi välttää. Valmistelu olisi muussa tapauksessa omiaan antamaan vaikutelman valmistelijoiden asennoitumisesta hyvin tekijänoikeusmyönteiseen ideologiaan.⁹⁷

4.2 Toimijat ja positiot

4.2.1 Viranomaiset ja asiantuntijat

Tekijänoikeusasioista vastaa ja niitä valmistelee opetus- ja kulttuuriministeriö. Työ- ja elinkeinoministeriö vastaa teollisoikeudellisista asioista ja vuonna 2007 käytiin keskustelua tekijänoikeusasioiden vastuuministeriöstä. Tämän seurauksena TEM osallistuu aikaisempaa vahvemmin valmis-

⁹⁴ Hallitusohjelmakirjaus ja kulttuuriministerin toimeksianto 7.10.2013, ks. OKM 2013:13 s. 132, 138. Aiemmin toimikunnan mietinnöstä (OKM 2012:2) annettujen lausuntojen jälkeen painopiste oli yli vuoden ajan yleisemmän tason tekijänoikeuspolitiikassa, eikä näkyvää konkreettista valmistelua tapahtunut.

⁹⁵ Tällaisen erimielisyyden hallintatavan kritiikistä ks. luku 3.1.

⁹⁶ Bourdieu 1987 s. 839, 851; Terdiman 1987 s. 812. Ks. esim. HE 235/2010 vp s. 3–4; OKM 2012:2 s. 36–37; SiVM 11/2010 vp s. 8.

⁹⁷ Ks. esim. immateriaalioikeudellisten kansainvälisten sopimusten neuvottelussa ilmenevästä virkamiesten ideologiasta ja vaikeudesta vastustaa oikeudenhaltijoiden vaatimuksia, Mylly 2009 s. 260; Sell 2003 s. 7.

teluun.⁹⁸ Ministeriöiden roolit heijastuvat suhtautumisessa ehdotuksiin. Karkeasti ottaen TEM on kannattanut markkinaehtoisia ratkaisuja eli oikeudenhaltijoiden liiketoimintamallien uudistamista. Liikenne- ja viestintäministeriö vastaa muun muassa viestintämarkkinoiden ja viestinnän tietosuojan sääntelystä, ja kuuntelee herkemällä korvalla operaattoreita. Oikeusministeriö toimii hankkeissa lainsäädäntökonsulttina ja teknisenä apuna ja kritisoi puutteellista selvittämistä.⁹⁹

Aiemmin täytäntöönpanokeinoja on käsitelty käytännössä yksinomaan Helsingin käräjäoikeudessa. Lakiehdotuksista lausueessaan käräjäoikeus on suhtautunut menettelyihin yleensä suotuisasti. Se on kiinnittänyt huomiota erityisesti soveltamistilanteiden selkeyttämiseen ottamatta kantaa perustavanlaatuisiin tai oikeuspoliittisiin kysymyksiin. Syyskuussa 2013 uusien riita- ja hakemusasioiden käsittely siirtyi markkinaoikeuteen. 13.12.2013 päivätyistä HE-luonnoksesta annetussa lausunnossa markkinaoikeus kritisoi puutteellista selvittämistä ja esitti huomattavan määrän yksityiskohtaisia huomioita.¹⁰⁰

Tunnistamistietojen luovuttamisella ja huomautuskirjemenettelyllä on vahva kytkös yksityisyyden suojaan, ja tietosuojavaltuutettu on usein lausunut esityksistä kriittisesti. Viestintävirasto kantaa LVM:n ohella huolta internetin teknisestä toimivuudesta ja operaattoreiden sääntelystä ja on usein kritisoinut ehdotuksia. Kilpailu- ja kuluttajavirastolla (KKV) on laajempaa edustusta elimissä. Lausunnot ovat keskittyneet kuluttajansuojakysymyksiin.¹⁰¹ Oikeustieteen piiristä on vain haja-edustusta valmisteluelimissä ja lausuntoja on annettu niukalti IPR University Centeriä lukuun ottamatta; edustus painottuu tekijänoikeusneuvostoon eli soveltamistilanteisiin.

Herää kysymys, mistä oikeustieteen asiantuntijoiden hyödyntämisen vähyys johtuu. Muilla aloilla tieteellisillä asiantuntijoilla on keskeinen rooli erityisesti eduskunnan valiokunnissa. Tekijänoikeuden alalla jostakin syystä näin ei ole, vaikka tekijänoikeus on korostetun monimutkainen ala. Asiantuntijoiden rooli olikin merkittävämpi aiemman, suppeamman tekijänoikeustoimikunnan aikaan, ja nyt edustus on merkittävää ainoastaan tekijänoikeusneuvostossa. Mahdollisia syitä on useita. Oikeudenala on ehkä liian pieni kannatellakseen kovin laajaa asiantuntijajoukkoa. Suuri osa muuten pätevistä asiantuntijoista on hakeutunut muihin kuin tieteellisiin tehtäviin ja toimii esimerkiksi lainvalmistelussa, tuomioistuimissa,

⁹⁸ Oesch 2009 s. 13. Esimerkkinä ministeriöiden välisestä valtapiirikamppailusta ks. *Koulu* 2004 s. 21–22.

⁹⁹ Ks. esim. OKM lausuntotiivistelmä 22.5.2012 s. 10, 12, 14; OPM 2009:21 s. 29–30.

¹⁰⁰ Jos muuta ei ole todettu, luvun 4.2 analyysissä on käytetty luvun 4.1 taulukoiden lähdeaineistoja.

¹⁰¹ Kuluttajaviranomaisten roolista yleisesti ks. Oesch 2009 s. 20.

oikeudenhaltijajärjestöissä tai asianajosektorilla. On myös mahdollista, että asiantuntijoiden näkemykset poikkeavat paljon toisistaan ja näin ollen esimerkiksi lausuntopyyntöön vastatessa yliopiston tai tiedekunnan näkemyksen muodostaminen olisi haastavaa. Lisäksi yliopiston lausunnon tyyppillisesti antaa hallinto, ei tiedekunta tai tutkijat. Niin ikään edes tiedekuntatasolla ei välttämättä ole myöskään halua ottaa keskitetysti kantaa oikeuspoliittisiin kysymyksiin. Lopuksi tiedontarpeen on ehkä koettu kohdistuvan enemmän esimerkiksi liiketoimintaan kuin säännöksiin tai tieteelliseen tutkimukseen. Havaittavissa on, että oikeudenhaltijoita pidetään alan asiantuntijoina. Riskinä on, että lainvalmistelija tai sivistysvaliokunta eristäytyisi kuvitellen omaavansa parhaan tietämyksen asioista.¹⁰²

4.2.2 Eturyhmät

Vain operaattoreiden eturyhmällä Ficom ry:llä on edustusta kaikissa elimissä. Operaattorit suhtautuvat lausunnoissaan hankkeisiin lähes aina kriittisesti. Suomen Yrittäjät ja Elinkeinoelämän keskusliitto (EK) ovat keskeisimmät yleistä elinkeinoelämää edustavat tahot.¹⁰³ EK ja Keskuskauppakamari ovat olleet lausunnoissaan kohtalaisen kriittisiä, mutta niiden edustamien tahojen erilaisten kantojen vuoksi eivät aivan yhtä kärkkäitä kuin edellä mainitut. STTK ja Teknologiateollisuus ilmeisesti kuuluvat Ficom ry:n muodostamaan elinkeinoelämän rintamaan.

EFFI ry suhtautuu tekijänoikeusasioihin kriittisesti, ja se on ollut taustavoimana myös Järkeä tekijänoikeuteen -kansalaisaloitteessa. Sen lausunnot ovat usein myös provokatiivisia, mitä voidaan pitää poikkeavana. Lainsäädäntökentän omaksuttuja pelisääntöjä ajoittain rikkoen se on ajautunut osittain kentän ulkopuolelle. Piraattipuolue on ollut vastaavalla tavalla kriittinen, mutta senkin painoarvo on jäänyt vähäiseksi. Erinäisille kirjastoille ja arkistoille on eri elimissä varattu edustusta, mutta niillä ei ole intressiä nyt tarkasteltaviin asioihin. Tietoyhteiskunnan kehittämiskeskus

¹⁰² Tähän viittaa esimerkiksi se, että orpoteoksia, suoja-ajan pidennystä ym. koskevassa käsittelyssä sivistysvaliokunnassa kuultiin tai lausunnon antoi OKM:n valmistelijan lisäksi 14 oikeudenhaltijoiden tai media-alan edustajaa, EK ja Kansalliskirjasto (SiVM 6/2013 vp). Vastaavasti *Sell* 2003 s. 99: ”To a certain extent IP law is reminiscent of the Catholic Church when the Bible was in Latin. IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy. IP law is highly technical and complex, obscure even to most general attorneys.” Vastaavasti oikeudenhaltijoiden asiantuntijuudesta ja sen suomista vaikutusmahdollisuuksista ks. *Farrand* 2014 s. 2–3, 17, 129.

¹⁰³ Yleisellä elinkeinoelämällä ei välttämättä ole kovin suurta intressiä tässä tarkasteltaviin kysymyksiin, mutta keskeisempiä eturyhmiäkään ei ole ilmeisesti kyetty löytämään. Elinkeinoelämällä ja työmarkkinajärjestöillä on ilmeisesti tästä syystä kaiken kaikkiaan vahva edustus lainvalmistelussa, ks. *Peltomäki* 2013a.

(TIEKE) on ollut aiempaa merkittävämpi toimija käyttäjien edustamisessa.¹⁰⁴ Kuluttajaliitto on Kilpailu- ja kuluttajaviraston tavoin pidättäytynyt laajemmalla kritiikiltä.

Oikeudenhaltijatahoja on lukematon määrä, koska kaikilla taiteenaloilla ja tuotantoportailla on yksi tai useampia eturyhmiä. Ne ovat myös saaneet vahvan edustuksen eri toimielimissä. Perinteisesti Yleisradio on esittänyt enemmän kritiikkiä kuin kaupalliset toimijat, mutta asetelma näyttää muuttuneen. Myös ”teollisuus”-ryhmään luokiteltu Kaupan liitto on selvästi oikeudenhaltijoille myönteinen. Se edustanee lähinnä tahoja, jotka myyvät oikeudenhaltijoiden tuotoksia. Toisaalta Markkinointiviestinnän Toimistojen Liitto ja Suomen Journalistiliitto ovat varauksellisempia kuin oikeudenhaltijat keskimäärin.

4.2.3 Lähitarkastelussa viimeisin estoesitys

Tarkastelen vielä tarkemmin 13.12.2013 päivätystä hallitusesitysluonnoksesta annettuja lausuntoja eri tahojen tarkempien kantojen selvittämiseksi. Taulukoissa 3 ja 4 esitetään pelkistetyksi lausunnoista ilmeneviä kantoja.¹⁰⁵ Taulukoissa yhteisinä sarakkeina ovat kolme ensimmäistä: hidastamissäänönksen epätarkoituksenmukaisuus, loukkaajaan kohdistettavasta kanteesta erilliset itsenäiset estot ja vaatimus estojen helposta kohdistamisesta kaikkiin operaattoreihin. Muuten näkökulmat jakautuivat niin merkittävästi, että olennaiset kohdat on esitelty kummassakin erikseen. Taulukossa 3 toisen lausunnon tukeminen on mainittu erikseen, koska epäsuoran tuen huomiointi johtaisi + / – -merkkejä täynnä olevaan taulukkoon.¹⁰⁶

Oikeudenhaltijat ja Yleisradio olivat tukiviittaukset mukaan lukien käytännössä yksimielisiä lukuun ottamatta Suomen journalistiliittoa (22 kpl).¹⁰⁷ Lausuntoja oli koordinoitu: 15 (noin 2/3) lausunnossa oli suora, tukea osoittava viittaus Tekijänoikeuden tiedotus- ja valvontakeskus ry:n (TTVK) lausuntoon ja lisäksi mahdollisesti muihin lausuntoihin.¹⁰⁸ Vaikka nimenomaisesti mainituissa asioissa oli painotuseroja, sisällöllisen yhtenäisyyden perusteella yhteistyö oli kaiken kaikkiaan ilmeistä.

¹⁰⁴ Tämä lienee seurausta painotuksesta, joka syntyi vuosina 2003–2011 kansanedustajana toimineen Jyrki Kasvin siirtymisestä TIEKEN tutkimus- ja kehittämisjohtajaksi.

¹⁰⁵ ”Tyhjä” Sanoma ja Suomen Journalistiliitto eivät lausuneet taulukkoon valituista aiheista.

¹⁰⁶ Tähdellä merkitty tuki tarkoittaa, että tuki- tai viittauslausuma on rajoitettu johonkin osa-alueeseen.

¹⁰⁷ Suomen Journalistiliitto katsoi, että sananvapauden ydinalueella estomääräyksen ei tulisi olla mahdollinen ja sananvapausarviointia olisi muutenkin lisättävä.

¹⁰⁸ LYHTY 5 kpl, Musiikkituottajat, Teosto, Kuvasto ja Suomen taiteilijaseura kukin 1 kpl.

Taulukko 3. Oikeudenhaltijoiden ja hyödyntäjien kantoja esitysluonnokseen.

Taho	Hidastus turhaa	Itsenäinen esto	Estot kaikille	Tehok. keinot	Huom.kirje	Tuki
Sanoma Oyj						
Yleisradio	+	+		+		TTVK
Viestinnän Keskusliitto	+	+			+	
MTV Media	+				+	
Teosto ry	+				+	TTVK, LYHTY
Kopiosto ry	+	+	+	+	+	TTVK
Sanasto ry	+	+	+	+	+	TTVK *
Tuotos ry	+	+	+	+	+	TTVK *, IFPI
Kuvasto ry	+	+			+	TTVK *
Gramex ry	+	+	+	+	+	TTVK
TTVK ry	+	+	+	+	+	
Suomen Kirjailijaliitto ry		+		+	+	
Suomen Näyttelijäliitto ry	+	+	+	+	+	TTVK *
Suomen Journalistiliitto ry						
Suomen Muusikkojen liitto ry	+	+		+		LYHTY, TTVK
Suomen tietokirjailijat ry	+	+		+	+	
Suomen Taiteilijaseura ry	+	+		+	+	
Säveltäjät ja Sanoittajat ELVIS	+	+	+	+	+	TTVK, LYHTY
Kääntäjien ja tulkkien liitto ry	+	+	+	+	+	
Suomen Säveltäjät ry					[+]	Teosto, TTVK *
Luovan työn tekijät ja yrittäjät	+	+	+	+	+	TTVK
IFPI/Musiikkituottajat ry	+	+	+	+	+	
Suomen Musiikkikustantajat ry						TTVK
Suomen Filmikamari ry						TTVK, LYHTY
Elokuvatuottajien keskusliitto ry						TTVK, LYHTY
MUU ry					+	Kuvasto, ym.

Yksittäisiä poikkeuksia lukuun ottamatta jokainen lausui suoraan tai viittauksen kautta seuraavaa. Hidastamismääräys on oikeuspoliittisesti kyseenalainen ja estomääräykseen nähden toissijaisena käytännössä tarpeeton. Välittäjiä vastaan tulee voida antaa itsenäisiä ja loukkaajaan kohdistetuista toimenpiteistä riippumattomia estomääräyksiä. Lainvoimaiset estomääräykset tulee voida laajentaa muitakin operaattoreita koskeviksi. Estämisen ja mahdollisen hidastamisen tulee olla tehokasta, ja keinoilla tulee voida estää tai hidastaa mikä tahansa loukkaava sivusto. Huomautuskirjemenettely tulee lisätä hallituksen esitykseen ja sen tulisi sisältää myös seurannan ja/tai eskalointikeinot. Vain Gramex ja TTVK nimenomaisesti esittivät tunnistamistietojen luovuttamiseen liittyvän säilyttämisaajan pidentämistä, mutta viittauksen kautta pidentämisesitys sisältyi laajasti muihinkin lausuntoihin. Vastaavia sanamuotoja hidastamismääräyksen kyseenalaisuudesta käyttivät myös Sanoma, MTV Media ja Viestinnän Keskusliitto. Kaksi ensimmäistä korostivat myös operaattoreiden vastuun lisäämistä. Kaksi viimeksi mainittua tukivat myös kirjemenettelyä.

Selvää on, että oikeudenhaltijat olivat käsitelleet kantaa lausuntopyyntöön yhdessä ja yhteisistä linjoista saavutettiin yhteisymmärrys.

Keskeisten toimijoiden tuottama materiaali tukee ja helpottaa oikeudenhaltijoiden lausuntojen laatimista. On myös ilmeistä, että oikeudenhaltijat ovat edellä luvussa 4.1.2 kuvastusti tehneet ”ryhtiliikkeen” ja panostaneet lausuntojen määrään. Tällä on saatettu haluta vaikuttaa edellä mainitulla tavoin määrällisesti lainvalmisteluun. TTVK:n ohella taustavoimana on syytä mainita yhteistyöprojekti ”Luovan alan tekijät ja yrittäjät” (LYHTY), jossa on mukana 15 oikeudenhaltijajärjestöä sekä välillisesti niiden jäsenjärjestöjä.¹⁰⁹

LYHTY-projektissa toimii erilaisia työryhmiä, joista tässä merkittävimpiä ovat lausuntoja valmisteleva lausuntotyöryhmä ja hallitusohjelmaan vaikuttava hallitusohjelmatyöryhmä.¹¹⁰ Tämäkin havainnollistaa yhteistyötä ja toisaalta sitä, että tällaisissa asioissa lukemattomien järjestöjen kuuleminen tai edustus valmisteluelimissä on oikeastaan tarpeetonta. Samat kannat käyvät joka tapauksessa ilmi koordinoidusta vastauksesta.

Taho	Hidastus turhaa	Itsenäinen esto	Estot kaikille	Lähteellä	Lailliset sisällöt	Kulut	Valmistelussa puutteita
Oikeusministeriö	X					+	+
LVM	+				+	(+)	
TEM	+	(-)			(+)	+	
Ulkoasiainministeriö						X	(+)
Helsingin kärjäoikeus	(X)						
Markkinaoikeus	X		-			(+)	+
IPR University Center	+						+
Tietosuojavaltuutettu						(+)	(+)
Viestintävirasto			-				
KKV					+		
TIEKE	+			+	+	+	
EFFI ry	+						+
EK	+		(+)		+		
Teknologiateollisuus ry	+				+		
Keskuskauppakamari	(+)	(-)		+		+	
STTK ry	+			+	+		(+)
Ficom ry	+	-				+	+
Elisa Oyj	+	-	+	+	+	+	(+)
Finnet-liitto	+		-	+		+	
DNA	X	-				+	
Teliasonera Finland Oyj	+	-				+	

Muiden tahojen lausunnot jakautuivat enemmän. Kukaan ei pitänyt hidastamismääräystä tehokkaana tai tarkoituksenmukaisena keinona.¹¹¹ Itsenäisiä kieltomääräyksiä vastustivat kaikki operaattorit ja lisäselvityksiä edellyttäen

¹⁰⁹ LYHTY 2014.

¹¹⁰ Gramex vuosikertomus 2011, Liite 1: LYHTY toimintakertomus 2011 s. 19–20.

¹¹¹ Helsingin kärjäoikeus kuitenkin kategorisesti kannatti esitystä suppeassa lausunnossaan, vaikka näki toteutuksen haasteellisena.

TEM ja Keskuskauppakamari. Yksittäisen estomääräyksen laajentamista muita operaattoreita koskevaksi nimenomaisesti vastustivat Viestintävirasto ja markkinaoikeus.¹¹² Kilpailunäkökulmasta yhtäläisyyttä kannattivat Elisa ja EK. Elisa, Finnet-liitto, TIEKE, STTK ja Keskuskauppakamari katsoivat, että toimet tulisi kohdistaa varsinaisiin loukkaajiin ongelman lähteellä. LVM, TEM, KKV, TIEKE, EK, Teknologiateollisuus, STTK ja Elisa katsoivat, että ongelmaan pitäisi puuttua ensisijaisesti tai yksinomaan laillisia sisältöjä kehittämällä. Kaikki operaattorit, Keskuskauppakamari, TIEKE, TEM, OM ja markkinaoikeus kritisoivat varsin suoraan operaattoreiden kustannusvastuuta. Epäsuoraa kritiikkiä on havaittavissa myös LVM:n, tietosuojavaltuutetun ja ulkoasiainministeriön lausunnoista. Muun muassa OM ja markkinaoikeus kritisoivat voimakkaasti puutteellista valmistelua. Myös tietosuojavaltuutettu toi esiin puutteita ja kehityskohteita. Vastaavasti IPR University Center esitti lähtökohdaksi myös aiemmassa mietinnössä esillä ollutta mallia. Viestintävirasto katsoi, että keinojen tehokkuus olisi valitettavan heikko.

Myös operaattoreiden vastauksista käy ilmi jonkin asteinen koordinointi. Eri käyttäjätahoista on havaittavissa hienoista ryhmittymistä samaan rintamaan työmarkkinajärjestöjen kanssa. Lausuntojen perusteella tämä on kuitenkin huomattavasti pienimuotoisempaa ja vähemmän ilmeistä kuin oikeudenhaltijatahojen välinen yhteistyö. Selvää on, että osallistuvien tahojen määrä on huomattavasti suurempi kuin esitettyjen näkemysten määrä. Tässä mielessä lausunnot ja työryhmät eivät tietyn pisteen jälkeen enää laajenna lainvalmistelijan tietopohjaa.

Voidaan todeta, että mikään taho ei kannattanut hidastamismääräystä ensisijaisesti tai oikeastaan lainkaan. Sen sijaan oikeudenhaltijat ja hyödyntäjät esittivät ”yhtenäisillä nuoteilla” HE-luonnosta huomattavasti laajentavia ehdotuksia, joihin ei luonnollisesti voitu esittää vastalauseita, koska kyseiset ehdotukset eivät olleet lausuntopyyntönsä kohteena. Operaattorit sinänsä kannattivat nykyisten säännösten selkeyttämistä, mutta vain omista lähtökohdistaan ja heille edullisempaan suuntaan. Muut pääosin vastustivat, kritisoivat tai kyseenalaistivat selvityksiä hiukan poikkeavin painotuksin, joista vahvimmat yhteiset tekijät näyttivät olevan kustannusjako ja voimavarojen väärä kohdentaminen. Luonnollisesti viranomaistahot olivat lausunnoissaan keskimäärin pidättyväisempiä eräitä poikkeuksellisen kriittisiä lausuntoja lukuun ottamatta.

¹¹² Esimerkkimalli oli, että Viestintävirasto voisi määrätä eston kaikkia operaattoreita koskevaksi (OKM 2013:13 s. 79–80, 124). Vähäinen lausuntojen määrä selittyy sillä, että malli oli jo pääosin hylätty HE-luonnosta laadittaessa.

4.3 Valta-asetmat ja urat

4.3.1 Positioiden suhteet ja valtarakenteet

Toimijoiden välinen suhde voidaan hahmottaa oikeudenhaltijoiden ja erityisesti suurten tekijänoikeusjärjestöjen kamppailuksi internet-operaattoreita ja käyttäjiä vastaan; tässä kamppailussa taiteilijat ovat sivuosassa.¹¹³ Oikeudenhaltijat ovat jatkuvasti pyrkineet sisällöllisiin laajennuksiin. Intressiä liiketoimintamallien kehittämiseksi ei ole kuin pakon edessä.¹¹⁴ Tämä ei ole kuitenkaan uutta, sillä kaikki teknologiset muutokset on lähes poikkeuksetta nähty uhkina, jotka täytyy estää.¹¹⁵ Tekijänoikeusjärjestöt ovatkin painottaneet lainsäädännön vahvistamista ja/tai vahvistamisen välttämättömyyttä liiketoimintamallien uudistumiselle. Muutoksia vastustavat pitävät liiketoiminnan ja tarjonnan uudistamista ensisijaisena tai ainoana reagoititapana digitalisoitumisen haasteisiin.¹¹⁶ Reagoinnin vaiheiksi on esitetty 1. paniikki ja ylireagointi täytöntöönpanokeinoja tehostamalla, 2. täytöntöönpanokeinojen rationalisointi ja 3. liiketoimintamallien vastentahtoinen kehittyminen.¹¹⁷ Suomessa ollaan nähdäkseni siirtymässä toiseen vaiheeseen.

Oikeuspoliittisesti kysymys on siitä, onko täytöntöönpanokeinojen tehostaminen asianmukainen reagoititapa vanhentuvien liiketoimintamallien ylläpitämiseen. Rakenteellinen vastakkainasettelu on ilmeinen. OKM on luovunut näiden vastakkaisten näkemysten välimaastossa ollen kuitenkin useimmiten lähempänä oikeudenhaltijoita. Positioitumiseen ovat mahdollisesti vaikuttaneet myös kansainvälisten sopimusten ja direktiivien asettamat reunaehdot. Kuitenkin on todettava, ettei EU-oikeuskäytännön valossa ole ilmeistä, että Suomella olisi velvollisuus laajentaa keinoja esitetyllä tavalla.

¹¹³ Levin 2012 s. 156. Yleisemmin ks. Mylly 2013.

¹¹⁴ Tuottajien ei ole kannattanut alentaa laillisten verkkopalveluiden hintoja piratismiin vähentämisen toivossa vaan siirtää kustannukset hintoihin (OKM 2013:13 s. 25). Vastavasti ”oikeudenhaltijoiden mielestä on ollut väärin edellyttää markkinoiden kehitystä, ellei samalla tarjota riittäviä ja tehokkaita keinoja valvoa oikeuksia tietoverkossa” (mts. 53). Vrt. 39 % kuluttajista lopettaisi laittoman käytön, jos lailliset palvelut olisivat halvempia ja 32 %, jos lailliset palvelut olisivat kattavampia (mts. 27). Samoin liiketoimintamallien muutostarpeesta ja keinojen tehostamisen vaikutuksettomuudesta ks. Hargreaves 2011 s. 78–79; Patry 2011 s. 256 ss.

¹¹⁵ Levin 2012 s. 136–137; Patry 2011 s. 141 ss; Yu 2011 s. 887–890; Litman 2001 s. 106–108. Aiempia muospaineita ja voimakasta vastustusta ovat aiheuttaneet muun muassa radio, televisio, elokuvateatterit, VHS-nauhat, internet, ym. (ibid.) Kuvaavasti Yu (2011 s. 890) on todennut: ”Given the continuous evolution of our economy, the [copyright] industry has yet to convince us why its business model deserves to be singled out for protection while other equally important industries had to adapt to technological change.”

¹¹⁶ OKM 2013:13 s. 53; Levin 2012 s. 147–148, 150, 156–157.

¹¹⁷ Lim – Longdin 2011 s. 698.

Oikeudenhaltijat ja erityisesti tekijänoikeusteollisuus ja tekijänoikeusjärjestöt ovat hyvin vahvoja toimijoita.¹¹⁸ Niiden toiminta perustuu kansainväliseen yhteistyöhön.¹¹⁹ Kollektiivisesti lupia hallinnoivien järjestöjen (Teosto, Kopiosto, Sanasto, Tuotos, Kuvasto ja Gramex) asema on vakiintunut ja niillä on monopoliasema tekijöiden ja lähioikeuksien haltijoiden edustajina ja rahavirtojen käsittelijöinä.¹²⁰ Tämä lisää niiden vaikutusvaltaa sekä taloudellista ja oikeudellista pääomaa. Pääomaa voidaan käyttää vaikuttamiseen oikeuden, politiikan ja lainsäädännön kentillä, omaa positiota pönkittävien tutkimusten teettämiseen, kansainväliseen yhteistyöhön ja oikeudellisten asiantuntijoiden käyttämiseen. Tämä luo myös kulttuurista pääomaa: laajojen verkostojen vuoksi tekijänoikeusjärjestöt ovat tietoisia kehitystrendeistä ja ovat osallisia oikeusprosesseissa.¹²¹ Muilla tahoilla, lainsäätäjä mukaan luettuna, ei ole resursseja vastaaviin selvityksiin. Pääomaan liittyvä tiedollinen ja taloudellinen ylivoima sulkee pois maallikot ja tekijänoikeuden perinteiseen tulkintatapaan vihkiytymättömät toimijat.¹²²

Mahdollisia tasapainottamisyriä hankaloittaa se, että on vaikea tunnistaa tarpeeksi monia riittävän korkean profiilin omaavia ja dialogiin halukkaita ja kykeneviä muita tahoja. Yksi mahdollinen reagointitapa olisi rajoittaa merkittävästi yhtenäisten kantojen vuoksi tarpeettoman laajaa oikeudenhaltijoiden edustusta.¹²³ Bourdieun mukaan kentän peliin osallistuminen edellyttää intressiä, pääomaa ja pelin tajua; osallistuminen edellyttää myös kentälle sopimattomista lähestymistavoista luopumista.¹²⁴ Vaikka oikeudenhaltijat saattaisivatkin haluta käydä asiallista dialogia vastapuolen kanssa, tämä ei ole helppoa, koska selkeitä ja yhteisiä pelisääntöjä noudattavia tahoja ei juuri ole. Tähän vaikuttaa osaltaan oikeudenalan pienuus, monimutkaisuus ja oikeudenhaltijatahon vakiintunut asema.¹²⁵

¹¹⁸ Mylly 2013; Savola 2013b s. 51, 63, 65–66; Levin 2012 s. 147–150, 155–156; Oesch 2009 s. 16–17.

¹¹⁹ Näin erityisesti esimerkiksi Musiikkituottajat IFPI (OKM 2013:13 s. 37). Yksityiset intressit olivat myös hyvin vahvasti kansainvälisen TRIPS-sopimuksen taustalla (*Sell* 2003 s. 7, 99).

¹²⁰ Ks. Oesch 2009 s. 16–17.

¹²¹ Vastaavasti esimerkiksi TRIPS-sopimuksen valmistelussa menestymisen syyksi on katsottu oikeudenhaltijoiden taloudellisten resurssien lisäksi useiden eri kanavien hyödyntäminen, IPR-asioiden vahva osaaminen ja tiedollinen ylivoima, jolla monimutkaiset asiat voitiin muokata poliittiseen diskurssiin sopiviksi (*Sell* 2003 s. 8; Haunss – Kohlmorgen 2009 s. 107–109).

¹²² Ylhäinen 2010 s. 159–162; Bourdieu – Wacquant 1995 s. 36–39, 125–129; Bourdieu 1987 s. 808–809, 823–825.

¹²³ Tämä voisi olla yksi tapa tasapainottaa eri intressien välisiä neuvotteluja, ks. alaviite 87.

¹²⁴ Vrt. esim. EFFI ry:n toiminta luvussa 4.2.2.

¹²⁵ Molemminpuolisista ongelmista dialogissa ks. Yu 2011 s. 884: ”Although both sides

Harvoilla muilla kuin oikeudenhaltijoilla on mahdollisuutta ylläpitää tekijänoikeudellista erityisasiantuntemusta. Avoin kamppailu tällaista ”Goljattia” vastaan vaatisi monipuolisia ja laajoja resursseja, pitkäjänteisyyttä ja rohkeutta. Niin ikään kansainväliset velvoitteet ovat niin laajoja, että kansallisessa lainsäädännössä ja vaikuttamisessa vapausasteita on monilta osin niukasti. Kansallisella tasolla toimivien vastapuolten (esim. EFFI) turhautuminen voi olla heijastumaa myös tästä johtuvasta voimattomuudesta. Siinä mielessä on ymmärrettävää, että jotkin tahot haluavat toimia ainakin osittain popularisoinnin tai sissisodan hengessä eivätkä lainsäädäntökentällä. Vastaavasti oikeustieteilijöiden käymä keskustelu on Suomessa kohtalaisen vähäistä ja lainvalmistelu näyttää etäännyneen siitä: vaikka huomionarvoista keskustelua käytäisiinkin, se ei juuri heijastu lainvalmisteluun. Toisaalta myös oikeudenhaltijoiden vaikuttamistoiminnan kulmakivenä hyödynnetään omia tutkimuksia ja lähtökohtia, jotka eivät useinkaan kestäisi tieteellistä tarkastelua.¹²⁶ On niin ikään ymmärrettävää, jos muilla ja erityisesti oikeustieteilijöillä ei ole kiinnostusta osallistua tällaiseen politikointiin tai mediapeliin.

4.3.2 Oikeudenhaltijoiden yhtenäisyys ja vallan kierre

Tekijöiden, tekijänoikeusteollisuuden ja etujärjestöjen näkemykset ja edut voivat olla ristiriidassa keskenään, ja yleisesti ottaen sisäinen valtakamppailu on väistämätöntä.¹²⁷ Tässä artikkelissa tarkasteltavissa asioissa suhtautuminen on kuitenkin ollut poikkeuksellisen yhtenäistä, toisin kuin eräillä muilla tekijänoikeuden sektoreilla. Näissä asioissa operaattorit ovat myös vastavoimana oikeudenhaltijoille. Tavanomaisesti poliittisesti yhtenäinen tekijänoikeusteollisuus on kerännyt voittoja hajanaisen yleisön kustannuksella.¹²⁸

Valtaapitävillä on taipumus varmistaa, että ne pysyvät vallassa jatkossakin. Eturyhmien valtapositio voikin johtaa ns. sääntelyloukkuun, jossa jonkin yksittäisen ryhmän etuja suosivalla sääntelyllä on taipumus jatkossakin

have advanced a wide variety of arguments to support their positions, each side has yet to convince the other; oftentimes they *talk past, rather than to, each other*. The resulting *debate is highly polarized and emotion-laden*” (kursiivi lisätty, lähdeviittaukset poistettu).

¹²⁶ Ks. esim. alaviite 133. Vastaavasti intressit puetaan legalistis-teknisten argumenttien taakse, joista ”tunnetusti paras on vetoaminen ’oikeussuojaan’” (Koulu 2004 s. 7). Kyseenalaisesti laadittujen tilasto- ym. tietojen välittämisestä lainvalmistelijalle ks. Farrand 2014 s. 115, 119. Politisoiminen ja popularisointi näyttää olleen tehokas keino vastustaa muutoksia (ks. alaviite 129), kun akateeminen kritiikki jää usein merkityksettömäksi (Farrand 2014 s. 162, 175).

¹²⁷ Mylly 2013; Pakarinen 2012 s. 85.

¹²⁸ Kellomäki 2010 s. 67–68. Vastaavasti vastapuolten hajanaisuudesta enforcement-direktiiviä säädettäessä ks. Farrand 2014 s. 127; Haunss – Kohlmorgen 2010 s. 257.

suosia kyseistä ryhmää. Intressiryhmän menestystä lainvalmistelukamppailuissa on todettu parantavan muun muassa ryhmän yhtenäisyys, kilpailijoiden puute, hyvät taloudelliset resurssit, ryhmän jäsenten kuuluminen keski- ja yläluokkaan, oman alan uudistuksen ajaminen, osittaisuudistuksen ajaminen, vähäinen medianäkyvyys, vallitsevan oikeustilan puolustaminen ja yhteiskunnallisilla uhilla pelotteleminen.¹²⁹

Tällä tekijänoikeuden osa-alueella useimmat edellä mainitut kriteerit täyttyvät: oikeudenhaltijat ovat äärimmäisen yhtenäinen ryhmä, mutta toisaalta operaattorit toimivat osittaisena, vaikkakin merkittävästi heikompana vastavoimana.¹³⁰ Järjestöillä on hyvät taloudelliset resurssit vaikuttamiseen, ja osittaisuudistukset kohdistuvat omaan fokusoituun alaan. Toiminnan perusteet ovat vallitsevan oikeustilan mukaisia, ja laajennuksia esitettäessä vedotaan siihen, kuinka aiemmat keinot eivät ole olleet riittäviä loukkausten torjumisessa. Useimpien uudistusten näkyvyys valtamedioissa on ollut viime aikoja lukuun ottamatta vähäinen.¹³¹ Kantoja perustellaan usein oikeudenloukkausten aiheuttamilla merkittävillä yhteiskunnallisilla taloudellisilla tappioilla ja esimerkiksi taiteilijoiden toimeentulon vaarantumisella¹³², vaikka tosiasiaa loukkausten taloudellinen merkitys on alle 0,1 % BKT:sta.¹³³ Tekijänoikeusalan tappiot eivät kuvasta yhteiskunnallista vaikutusta kokonaisuudessaan.¹³⁴ Lisäksi taloudelliset vaikutukset vähenevät olennaisesti vain jos laitton toiminta loppuu kokonaan, eikä esimerkiksi vertaisverkkokäyttö vain siirry toiselle sivustolle.¹³⁵ Toivotut vaikutukset eivät olekaan toteutuneet.¹³⁶ Toteutumista esitetyillä uusilla tai tehostetuilla keinoilla ei voi myöskään pitää realistisena.

¹²⁹ Pakarinen 2012 s. 49–50 viitteineen. Vastaavasti tekijänoikeudessa hankkeet ovat menneet läpi kun ne tehty kaikessa hiljaisuudessa (ks. *Culpepper* 2011); vastarinta muutoksia kohtaan on ollut tehokkainta silloin, kun asia on saatu popularisoitua valtamediaa kiinnostavalla tavalla (*Farrand* 2014 s. 9, 17, 198).

¹³⁰ On olemassa myös kansainvälisesti vahvoja välittäjätahoja, kuten Google.

¹³¹ Viime aikojen uutisoinnista ks. esim. *Koistinen* 2013a; *Koistinen* 2013b; *Peltomäki* 2013b; *Sorjanen* 2014.

¹³² Esimerkiksi luovan työn tekijöiden ja yrittäjien projektin teettämän selvityksen mukaan luvattomien tiedostojen levittämisen on arvioitu aiheuttaneen vuonna 2009 noin 350 miljoonan euron menetykset sekä yhteiskunnallisia vahinkoja (OKM 2012:2 s. 36–37). Ongelman vakavuutta on korostettu myös muuten (ibid. ja SiVM 10/2010 vp s. 8).

¹³³ *Hargreaves* 2011 s. 73–74. Edellisen alaviitteen tutkimusten luvut ovat metodologisesti kyseenalaisia ja tulokset epäluotettavia (ibid.). Tekijänoikeusalojen osuus BKT:sta (eri arvioissa noin 2–4 %) on vähemmän relevantti mittari. Vastaavasti ks. esim. *Yu* 2011 s. 918–923. Yleisesti ks. esim. *Collier* 2014.

¹³⁴ *Patry* 2011 s. 67–70; *Kellomäki* 2010 s. 67–68.

¹³⁵ OKM 2013:13 s. 26, 135. Siirtyminen toisille sivustoille ja estojen kiertäminen on havaittu merkittäviksi tekijöiksi tehottomuuteen, ks. *Poort ym.* 2014 s. 396.

¹³⁶ OKM 2013:13 s. 121.

4.3.3 Henkilöiden sitoutuminen tekijänoikeusideologiaan

Sivistysvaliokunta on todennut, että ”tekijänoikeuslainsäädäntöön perehtyneiden asiantuntijoiden on heidän kertomansa mukaan osin vaikea saada selkoa lain sisällöstä”.¹³⁷ Tekijänoikeuden monimutkaisuuden vuoksi sitä on myös toisen alan juristien vaikea hallita. Työryhmiin osallistuvilla onkin usein työhistoriaa tai muuta taustaa tekijänoikeuden alalta.¹³⁸ Tällaisen ”vihkiytymisen” tosiasiallinen edellyttäminen aiheuttaa sisäänpäin lämpiämistä ja ”hajuaistin turtumista”.¹³⁹ Se voi myös johtaa siihen, että tekijänoikeuden suojaamisen vahvistamista pidetään itsestäänselvyytenä (doksana).

Niin tekijänoikeudessa kuin IPR-asioissa yleensäkin työpaikkoja on lähinnä oikeudenhaltijoilla ja niitä palvelevissa asianajotoimistoissa.¹⁴⁰ Tekijänoikeuden ala on varsin kapea. Voidaan arvioida, että noin 1 % lakimiehistä on erikoistunut tekijänoikeuteen.¹⁴¹

Oikeustieteessä tekijänoikeuteen kohdistuvia kriittisimpiä puheenvuoroja kuullaan pääosin toisen oikeudenalan piiristä ja yleisemmin alasta taloudellisesti tai muuten riippumattomilta tahoilta.¹⁴² Vihkiytymättömät henkilöt ja lausunnot voidaan pyrkiä bourdieulaisittain rajaamaan kentän ulkopuolelle esimerkiksi ”ymmärtämättömyytenä”.¹⁴³

¹³⁷ Sivistysvaliokunnan kirje opetusministeriölle 18.2.2003 (*Välimäki*, LM 2004 s. 255). Vastaavasti kansainvälisesti ks. alaviite 102. Samansuuntaisesti ja vielä pidemmälle menen esimerkiksi *Herikko Hietanen*: ”Poikkeuksiin tehdyt poikkeukset ja loputtomat pykälien ja kansainvälisten sopimusten ristiinviittaukset pitävät huolen siitä, että Suomessa on alle viisi ihmistä, jotka hallitsevat monimutkaisen tekijänoikeuslainsäädännön kokonaisuudessaan.” (*Sorjanen* 2014.). Vastaavasti ks. *Farrand* 2014 s. 2–3.

¹³⁸ Ks. luku 3.2 ja erityisesti alaviite 63.

¹³⁹ *Mylly* 2013.

¹⁴⁰ Oikeudenhaltijoita lähellä olevilta tekijänoikeuslakimiehiltä eli alan ”ylipapistolta” (ks. alaviite 102) ei voi juuri odottaa kriittisiä kannanottoja.

¹⁴¹ Ääriesimerkistä ”alle viisi ihmistä” ks. alaviite 137. Helsingin yliopiston oikeustieteellisen tiedekunnassa suoritettiin vuonna 2013 259 OTM-tutkintoa (Tiedekuntaneuvoston pöytäkirja 28.1.2014 s. 4). E-thesis-palvelusta löytyy vuodelle 2013 kirjattuja sähköisiä tiivistelmiä tai kokotekstejä 229 kpl. Vastaavasti kirjaston tietokantojen päivitys oli vielä tätä kirjoittaessa kesken ja sieltä tutkielmia löytyi 209 kpl. Näistä tekijänoikeuteen liittyviä eri haku- ja asiasanoilla etsittäessä oli viisi. Vuodelta 2012 tutkielmia löytyi vastaavasti kaksi ja vuodelta 2011 kaksi. Varsinkin vain paperimuodossa olevia tutkielmia on varmasti jäänyt huomaamatta. Vastaavasti oikeustieteen tohtorin tutkinnon suoritusoikeuksia oli 7.3.2014 myönnetty yhteensä 428 henkilölle. Näistä 67:n pääaine on kauppaoikeus ja neljän pääaine on tekijänoikeus. Muissa pääaineissa on myös muutama tekijänoikeuteen kiinteästi liittyvä tutkimus. Havainnot lienevät kansallisesti edustavia. Luultavaa on, että myöhemmissä uravaiheissa tapahtuu huomattavasti enemmän siirtymistä toisille aloille ja yleisempiin juridisiin tehtäviin kuin kynnyksen ylittävää sisääntuloa. Näistä saadaan arvio korkeintaan 1–2 %:n erikoistumisesta.

¹⁴² Esim. *Mylly* 2013; *Mylly ym.* (toim.) 2007 erit. *Lavapuron* artikkeli; *Mylly*, LM 2004; *Välimäki*, LM 2004; *Koillinen – Lavapuro* 2002.

¹⁴³ *Mylly* 2013 vrt. siinä viitattu *Oeschin* Järkeä tekijänoikeuslakiin -aloitteeseen kohdistama

Henkilökiertoa tapahtuu erityisesti OKM:n, oikeudenhaltijoiden ja niitä tukevien asianajotoimistojen välillä.¹⁴⁴ Tutkijoiden työllistymismahdollisuudet muualla rajoittuvat yksittäisiin paikkoihin ja vaihtoehdoksi jää siirtyminen toisiin tai yleisempiin juridiikan alan tehtäviin. Näillä seikoilla näyttää olevan vaikutusta alan toimijoiden tekijänoikeusideologian ja habituksen muotoutumiseen. Pienen alan sisältä käsin ei ole myöskään viisasta vähentää tekijänoikeuskentän painoarvoa ja vaikuttavuutta äänekkäillä puheenvuoroilla. Kansallisesti alalla vallitseekin sisäinen pidättyväisyys ja kritiikin kohdentamattomuus.¹⁴⁵

4.3.4 Kamppailun päämäärät

Mistä kamppailaan tai bourdieulaisittain mihin lainsäädäntökentällä saavutettua pääomaa (vaikutusvaltaa) hyödynnetään? Kansainvälisesti oikeudenhaltijat ovat nähneet estomääräykset periaatteellisesti tärkeänä asiana, vaikka verkkoon päätyneessä sisäisessä esityksessä niiden myönnettiinkin olevan tehottomia loukkausten torjunnassa.¹⁴⁶ Vastaavasti varoituskirjennettelyiden tehokkuus on kansainvälisissä tutkimuksissa jäänyt epäselväksi tai jopa osoittamatta.¹⁴⁷ Kun estojen tehokkuus on kyseenalainen¹⁴⁸, ja niitä halutaan toteuttaa satojen tuhansien eurojen kustannuksista huolimatta,¹⁴⁹ oikeudenhaltijoiden päämääränä on ilmeisesti edistää vahvaa tekijänoikeusideologiaa tiukentamalla lainsäädäntöä, lisäämällä keinoja ja tuottamalla

puheenvuoro.

¹⁴⁴ Esimerkiksi OKM:n johtaja *Jukka Liedes* toimi ennen virkamiesuraa vuosina 1970–1980 muun ohella Gramexissa ja sen hallituksen puheenjohtajana. Lisäksi hän on toiminut kymmeniä vuosia muun muassa (oikeudenhaltijoiden kansoittaman) Suomen tekijänoikeudellisen yhdistyksen hallituksen puheenjohtajana, kansainvälisen ALAI-tekijäryhmän Suomesta raportoivana toimenpanelevan komitean jäsenenä ja lukuisissa muissa vastaavissa tehtävissä. Asianajaja *Pekka Tarkela* toimi ennen asianajotoimisto Boreniukselle siirtymistään viiden vuoden ajan opetusministeriössä. Viestinnän keskusliiton *Satu Kangas* toimi 16 vuotta Teoston ja sitä ennen neljä vuotta opetusministeriön palveluksessa. Asianajotoimisto Procopé & Hornborgin *Lauri Rechart* toimii myös Musiikkituottajien toiminnanjohtajana. Hänen koko työhistoriansa koostuu toimimisesta tekijänoikeusjärjestöissä (Musiikkituottajat ja Gramex) tai niiden lukuun. Teoston *Martti Kivistö* on toiminut koko uransa tekijänoikeusjärjestöissä, muun muassa Kopiostossa ja TTVK:ssa. (Lakimiesmatrikkeli 2014.)

¹⁴⁵ Kansainvälisesti oikeustieteessä kritiikkiä ja vaikuttamista esiintyy huomattavasti enemmän, jopa valtaosin. Ks. esim. European Copyright Society 2013 vrt. ALAI report and opinion 2013. Keskustelu näistä on jatkunut oikeuskirjallisuudessa. Aiemmasta oikeustieteellisestä direktiiveihin kohdistetusta kritiikistä ks. esim. *Farrand* 2014 s. 41–42, 46, 162 viitteineen.

¹⁴⁶ *TorrentFreak* 2012.

¹⁴⁷ OKM 2013:13 s. 133–134; *Giblin* 2014 s. 183 ss.

¹⁴⁸ *Poort ym.* 2014; *Savola, OTJP* 2013 s. 195–196.

¹⁴⁹ *Savola* 2013b s. 63.

uusina oikeudellisia tulkintoja.¹⁵⁰ Tämä myös pönkittää niiden vaikutusvaltaa. Mikäli keinot hyväksytään, voidaan kehittää uusia, tehokkaampia keinoja tai uusia kohteita. Jos vaatimukset hylätään, tätä voidaan käyttää argumenttina oikeussuojan heikkoudelle ja tarpeelle korjata lainsäädäntöä.¹⁵¹

Käyttäjiin tunnistamistietojen luovuttamisen kautta kohdistettujen toimien tavoitteena ei ole korvausten saaminen. Tarkoituksena on käydä julkisuus- ja mielikuvasotaa: nostamalla pelotetta kiinnijäämisestä pyritään saamaan ihmiset ajattelemaan, ettei piratismi kannata.¹⁵² Reagointia on perusteltu siten, ettei piratismia voi katsoa läpi sormien, sillä se kävisi liian kalliiksi. Etujärjestön toiminta-ajatus onkin ”jotain meidän täytyy tehdä”.¹⁵³ Toisaalta on kysyttävä, onko tämä ”jotain” yhteiskunnan kannalta tehokasta, tarpeellista ja oikeutettua.¹⁵⁴ Tämä pätee myös näillä motiiveilla esitettyihin lainsäädäntöehdotuksiin. Ehdotusten poliittinen uskottavuus ja tarve edellyttänevät myös aktiivisuutta täytäntöönpanokeinojen käytössä. On kuitenkin syytä tarkastella kriittisesti sitä, kuinka pitkälle meneviä ja millä perusteilla esitettyjä täytäntöönpanokeinoja hyväksytään.

Operaattoreihin kohdistuvilla keinoilla pyritään vastuuttamaan operaattorit piratismiin estotoimiin. Oikeudenhaltijoille olisi hyödyllistä lisätä nimenomaan operaattoreiden kustannuksella toteutettavia keinoja, koska tämän jälkeen ”kaltevaa pintaa” pitkin niitä voidaan myöhemmin syventää ja lisätä; kutakin yksittäistä pientä muutosta voi olla vaikea vastustaa.¹⁵⁵ Kustannuskysymyksellä on näin ollen myös suuri periaatteellinen merkitys kummallekin osapuolelle. Kansainvälisesti hakukoneyhtiöt ja tallennusalustat ovat joutuneet ottamaan käyttöön yhä moninaisempia keinoja, mutta toistaiseksi internet-yhteydentarjoajat ovat perustellusti välttäneet niiltä.¹⁵⁶

¹⁵⁰ Savola 2013b s. 65.

¹⁵¹ Ks. esim. Savola 2013b s. 51 ja esitetyt laajennukset luvussa 4.2.3.

¹⁵² OKM 2013:13 s. 14–15, 42–43; Koistinen 2013b.

¹⁵³ Koistinen 2013a. Vastaavasti aiemmin The Pirate Bay -palveluun liittyen *Beaumont* 2009: ”Given that such legal action does not appear to be producing the desired effect of stemming the tide of copyrighted material, it begs the question as to why the industry continues to fight these battles in court. Mark Mulligan [Analyst with Forrester Research] believes that the answer is quite simply because it has to be seen to be doing something. [... Writing in his blog]: ‘If the music industry isn’t seeing to be taking action then it effectively turns on a green light to the illegal sector.’”

¹⁵⁴ Mm. symbolisen tekijänoikeusvalvonnan legitimitietistä suhteellisuusarvioinnissa ks. Savola 2014.

¹⁵⁵ Yksittäisillä sinänsä perusteltavilla laajennuksilla voidaan päätyä lopulta kokonaisuutena hyväksymättömään lopputulokseen (*Schellekens* 2011). Vastaavasti riskistä laajentumiseen muille kuin immateriaalioikeuden aloille ks. *Pihlajarinne* 2012 s. 150.

¹⁵⁶ Ks. esim. OKM 2013:13 s. 47–48. Yhteydentarjoajien vastuu- ja toimintavapaus (SähköKL 13 §) on esimerkiksi tallennusvälittäjiä laajempi (15–16, 20 §).

Vastaavasti operaattorit vastustavat teknisesti ongelmallisia tai kohdentamisen osalta epämääräisiä keinoja ja erityisesti kustannuksia. Kyse on siitä, missä määrin operaattorin tulisi edistää oikeudenhaltijan liiketoiminnallisia intressejä.¹⁵⁷ Tämä johtaisi keinotteluun, koska oikeudenhaltijoiden intressissä olisi yhä vain laajentaa keinoja. Toisaalta tulisi varmistaa, että operaattoreille korvattavat kustannukset ovat todellisia, kohtuullisia ja perustuvat oikeudenhaltijoiden tarpeisiin.

Täyden kuluvastuun malli edistäisi sopimista vastakkainasettelun asemesta. Oikeudenhaltijat voisivat itse kontrolloida keinojen käyttöä ja kohdentamista eikä niiden myöskään kannattaisi ehdottaa uusia keinoja, elleivät ne olisi valmiita niitä kustantamaan.¹⁵⁸ Kuluvastuu varmistaa, että keinoja esitetään ja käytetään järkevästi.¹⁵⁹ Lisäksi myös tehokkaammat keinot ovat mahdollisia, jos intressi on riittävä. Intressi punnitsisi oikeudenhaltijan uskoa keinojen tehokkuuteen ja vaikutukseen suhteessa niistä aiheutuviin kustannuksiin. Kyse onkin pohjimmiltaan siitä, kenen tulisi kantaa riski keinojen tehottomuudesta. Koska oikeudenhaltijat saavat väitetyt hyödyt keinoista, olisi perusteltua katsoa, että niiden tulee myös kantaa tähän liittyvä riski.¹⁶⁰ Kovin kestävää ei olisi se, että riskit ja kustannukset ulkoistetaan internet-operaattoreille, mutta mahdolliset hyödyt kerätään itselle.

5 LOPUKSI

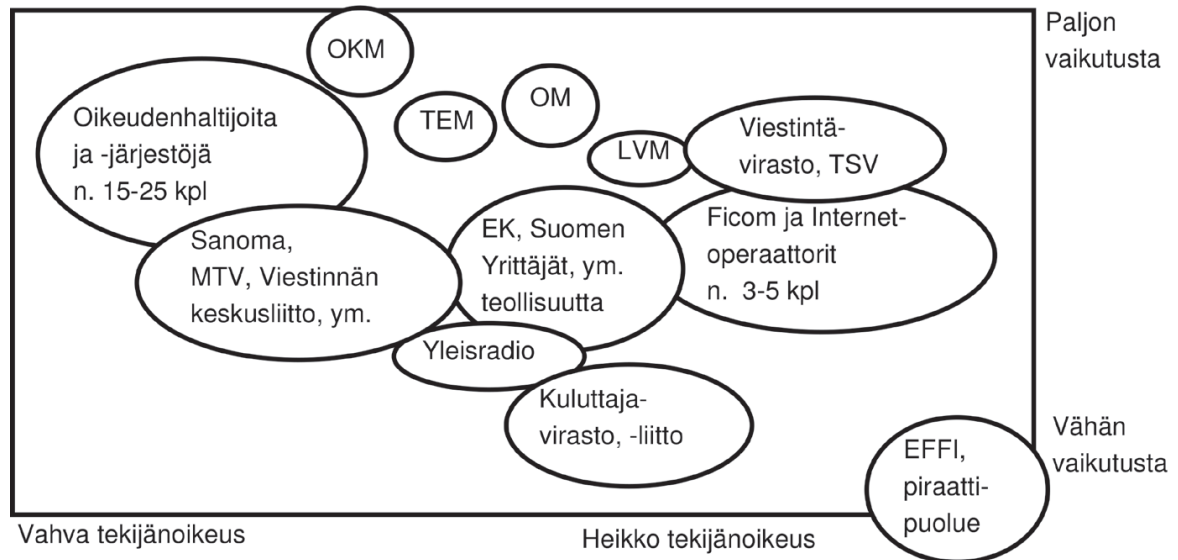
Kaaviossa 1 on hahmoteltu edellisen luvun analyysin perusteella kentän toimijoita ja niiden suhteellisia valta-asemia. Vaaka-akselilla on kuvattu suhtautumista tekijänoikeuteen ja pystyakselilla vaikutusvaltaa kamppailussa. Tällä tekijänoikeuden sektorilla yhtenäisiä oikeudenhaltijoilla on vastavoimia – vaikkakin hajanaisia – tavallista enemmän. Varsinkin vaikutusvalta on vaikeasti mitattavissa. Arviot ovat näin ollen subjektiivisia ja korkeintaan suuntaa antavia.

¹⁵⁷ Vastaavasti ks. LaVL 5/2005 vp s. 9. Sinänsä yhteisiäkin intressejä on, sillä monilla operaattoreilla on esimerkiksi lisäpalveluita, jotka kärsivät piratismista.

¹⁵⁸ Kirjemenettely on esimerkki tehottomuudesta valmistelussa. Voimavaroja tuhlaamaan, jos perustavista kysymyksistä (kustannusten määrä, kohdentuminen ja maksuhalukkuus) ei – mielellään jo esivalmistelussa – ole päästy yhteisymmärrykseen. Ks. myös alaviite 32. Vrt. Isossa-Britanniassa on useamman vuoden kestäneen valmistelun jälkeen päädytty malliin, jossa oikeudenhaltijat maksavat operaattoreille 75 % kirjemenettelyn perustamiskustannuksista ja korvausta järjestelmän operoimisesta (TorrentFreak 2014).

¹⁵⁹ Täysi kuluvastuu tunnistamistietojen luovuttamisesta on nimenomaisesti tarkoitettu suuntaamaan toimia tarkoituksenmukaisiin tapauksiin (LaVL 5/2005 vp s. 9).

¹⁶⁰ Ks. *Pihlajarinne* 2012 s. 147; *Savola*, OTJP 2013 s. 199.



Kaavio 1. Kentän toimijoiden positiot ja valtasuhteet.

Laajapohjaiset ja oikeudenhaltijoista muodostuneet valmisteluelimet näyttävät tulleen tiensä päähän ja lainvalmistelu siirtyneen enemmän virkatyönä tehtäväksi. Tämä ei ole täysin toivottava kehityspiirre, sillä lainvalmistelun laatu kärsii. Parempi olisi käyttää laajemmin neutraaleja asiantuntijoita ja tasapainottaa edustusta valmisteluelimissä. Niissä asioissa, joissa oikeudenhaltijat ovat yksimielisiä, 1–2 yhteistä edustajaa riittäisi tehokkaan työryhmän toimintaan. Jää nähtäväksi, onko viranomaisvalmistelussa kyse vain väliaikaisesta ilmiöstä vai laajemmasta muutoksesta – tai enteileekö se suppeampien asiantuntijapainotteisten valmisteluelinten paluuta. Niin ikään tieteellisten asiantuntijoiden kuulemisen vähäisyys on merkille pantavaa. Myös erimielisyyden hallinointiin olisi toivottavaa saada läpinäkyvyyttä ja määrälliset lausuntojen arviointikriteerit tulisi eksplisiittisesti hylätä. Lainvalmistelijan rooli etenkin virkatyönä tehtävässä valmistelussa onkin hyvin merkittävä ja siihen tulisi kiinnittää huomiota.

Lainvalmistelijoiden kriittisyys eturyhmiltä tulevia paineita vastaan olisi vahvan poliittisen ohjauksen ohella ainoa tapa muidenkin intressien laajaan huomioimiseen ja tasapainoiseen sääntelyyn. Tämä olisi tiettyyn pisteeseen asti tavoiteltavaa myös kansantaloudellisesta näkökulmasta.¹⁶¹ Poliittinen ohjaus voi kuitenkin vaihtaa suuntaa nopeasti. *Jyrki Kataisen* hallitusohjelman mukaan lainsäädäntöä on kehitettävä ja sen täytäntöönpanoa tehostettava. Tämä johti loppuvuonna 2013 puolentoista vuoden hiljai-

¹⁶¹ *Kellomäki* 2010 s. 65 ss. *Farrand* siteeraa tekijänoikeuden tutkijoiden yhä enenevässä määrin kriittistä konsensusta (2014 s. 50): ”In today’s copyright culture, more than ever, legislators are no longer the primary arbiters of public policy. Instead, they are hostages of strong lobby groups whose interests usually prevail over those of the general public.” (*Zemer* 2006 s. 140.).

selon jälkeen kiireiseen valmisteluun.¹⁶² Toisaalta hallitusohjelma sinänsä toteutuisi varsin pienelläkin muutoksella. Hallituksen esityksen antaminen laajasta muutospaketista¹⁶³ oli epärealistisesti aikataulutettu toukokuulle 2014.¹⁶⁴ Tätä kirjoittaessa kesäkuussa 2014 tämä ei ollut vielä toteutunut, ja epäselvää on, ehditäänkö esitystä käsitellä tällä eduskuntakaudella.

Havainnot eturyhmien välisistä kamppailuista sekä lainvalmistelijan roolista voidaan selittää niin lainsäädäntökenttään sovelletun *Bourdieu*n valtateorian kuin kriittisen lainsäädäntöteorian avulla. Viitekehykset tarjosivat toisiaan tukevaa teoreettista kiinnikettä havainnoille. Lainsäädäntöteoria toi esille muun muassa epärationaalisuuden ja tässä pohjimmiltaan konkretisoituneen erimielisyyden hallinnon ongelman. Pääoma ja kentän osallistujien rajaaminen selittivät tekijänoikeuden eksklusiivisuutta. *Bourdieu*n viitekehys ohjasi tutkimusta kamppailun päämääriin sekä toimijatahojen ja henkilöiden tarkkaan selvittämiseen. Kritiikin henkilöitymisen välttämiseksi tässä ei ole kuitenkaan arvuuteltu esimerkiksi henkilöiden asennoitumista, kytköksiä ja ministeriön valmistelutoimia. Tässä mielessä teoriasta ei otettu kaikkea irti. Tämä antaisi myös mahdollisuuksia jatko-tutkimuksille.

¹⁶² Hallitusohjelmakirjaus ja kulttuuriministerin toimeksianto 7.10.2013, ks. OKM 2013:13 s. 132, 138. Aiemmin toimikunnan mietinnöstä (OKM 2012:2) annetut lausunnot eivät johtaneet konkreettisiin toimenpiteisiin.

¹⁶³ Lakiehdotus sisältäisi myös sellaisia muutoksia, joita ei ole tässä käsitelty.

¹⁶⁴ Valtioneuvoston kanslia 2014 s. 21. Erikoista on, ettei perustuslakivaliokunnan arviota katsota tarvittavan.

LÄHTEET

Kirjallisuus

- Ahtonen, Riitta – Keinänen, Anssi*: Sidosryhmien vaikuttaminen lainvalmisteluun – empiirinen analyysi valiokuntakuulemisesta. Referee-artikkeli. Edilex 2012/5.
- Bourdieu, Pierre*: The Force of Law: Toward a Sociology of the Juridical Field. The Hastings Law Journal 1987, s. 805–853.
- Bourdieu, Pierre*: Rethinking the State: Genesis and Structure of the Bureaucratic Field. Sociological Theory 1994, s. 1–18.
- Bourdieu, Pierre – Wacquant, Loïc J.D.*: Refleksiiviseen sosiologiaan. Joensuu University Press. 1995.
- Bouwen, Pieter*: Corporate lobbying in the European Union: the logic of access. Journal of European Public Policy 2002, s. 365–390.
- Bouwen, Pieter – McCown, Margaret*: Lobbying versus litigation: political and legal strategies of interest representation in the European Union. Journal of European Public Policy 2007, s. 422–443.
- Culpepper, Pepper*: Quiet politics and business power: Corporate control in Europe and Japan. Cambridge University Press 2011.
- Farrand, Benjamin*: Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process. Routledge 2014.
- Giblin, Rebecca*: Evaluating Graduated Response. Columbia Journal of Law & Arts 2014, s. 147–208.
- Hargreaves, Ian*: Digital Opportunity. A Review of Intellectual Property and Growth 2011.
- Haunss, Sebastian – Kohlmorgen, Lars*: Lobbying or politics? Political claims making in IP conflicts. Teoksessa Sebastian Haunss (ed.): Politics of Intellectual Property. Edward Elgard 2009, s. 107–128.
- Haunss, Sebastian – Kohlmorgen, Lars*: Conflicts about intellectual property claims: the role and function of collective action networks. Journal of European Public Policy 2010, s. 242–262.
- Houtsonen, Jarmo*: Oikeus ja yhteiskunta oikeustieteen näkökulmassa ja oikeussosiologisessa vaikutustutkimuksessa. Teoksessa Kaijus Ervasti – Nina Meincke (toim.): Oikeuden tuolla puolen. Talentum 2002, s. 147–179.
- Husovec, Martin*: Injunctions against Innocent Third Parties: The Case of Website Blocking. Journal of Intellectual Property, Information Technology and E-Commerce Law 2013, s. 116–129.
- Hyvärinen, Anna*: Miten suomalaiset etu- ja kansalaisjärjestöt saavat äänensä kuuluville EU:n päätöksentekoprosessissa? Oikeus 3/2008, s. 365–372.
- Kellomäki, Timo*: Internetpiratismiin hyvinvointivaikutukset. Pro gradu -tutkielma. Kansantaloustiede. Tampereen yliopisto 2010.
- Kohl, Uta*: The rise and rise of online intermediaries in the governance of the Internet and beyond – connectivity intermediaries. International Review of Law, Computers & Technology 2012, s. 185–210.

- Koillinen, Mikael – Lavapuro, Juha*: Tekijänoikeudet tietoyhteiskunnassa perusoikeusnäkökulmasta. Teoksessa Heikki Kulla ym. (toim.): Viestintäoikeus. WSOY 2002, s. 335–355.
- Koulu, Risto*: Immateriaalioikeudet vuoden 2004 konkurssilain valmistelussa. Teoksessa Santtu Turunen (toim.): Immateriaalioikeudet insolvenssimenettelyssä. Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja 2004, s. 1–24.
- Levin, Marianne*: A Balanced Approach on Online Enforcement of Copyright. Teoksessa Johan Axhamn (ed.): Copyright in a Borderless Online Environment. Norstedts Juridik 2012, s. 135–172.
- Lim, Pheoh Hoon – Longdin, Louise*: P2P online file sharing: transnational convergence and divergence in balancing stakeholder interests. European Intellectual Property Review 2011, s. 690–698.
- Litman, Jessica*: Digital Copyright. Prometheus Books 2001.
- Mylly, Tuomas*: Tekijänoikeuden ideologiat ja myytit. Lakimies 2/2004, s. 228–254.
- Mylly, Tuomas*: Intellectual Property and European Economic Constitutional Law: The Trouble with Private Information Power. Publications of IPR University Center 2009.
- Mylly, Tuomas – Lavapuro, Juha – Karo, Marko* (toim.): Tekemisen vapaus: luovuuden ehdot ja tekijänoikeus. Gaudeamus 2007.
- Mähönen, Jukka – Määttä, Kalle*: Uusia näkökulmia oikeustaloustieteeseen. Teoksessa Kaijus Ervasti – Nina Meincke (toim.): Oikeuden tuolla puolen. Talentum 2002, s. 181–204.
- Norrgård, Marcus*: The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property Rights. ERA Forum 4/2005, s. 503–514.
- Norrgård, Marcus*: Varningsbrev på Internet – några kommentarer angående ett aktuellt lagförslag. JFT 6/2010, s. 638–650.
- Oesch, Rainer*: Tekijänoikeus, kuluttaja ja Lex Karpela. Teoksessa Rainer Oesch – Hanna Heiskanen – Outi Hyyrynen (toim.): Tekijänoikeus ja digitaalitalous. WSOYpro 2009, s. 3–29.
- Pakarinen, Auri*: Lainvalmistelu vuorovaikutuksena – Analyysi keskeisten etujärjestöjen näkemyksistä lainvalmisteluun osallistumisesta. Oikeuspoliittisen tutkimuslaitoksen tutkimuksia 253. 2011.
- Pakarinen, Auri*: Tapaustutkimuksia lainvalmistelun kehittämisestä ja sääntelyn toimivuudesta. Dissertations in Social Sciences and Business Studies. Publications of the University of Eastern Finland No 42. 2012.
- Patry, William*: How to Fix Copyright. Oxford University Press 2011.
- Pihlajarinne, Taina*: Internetvälittäjä ja tekijänoikeuden loukkaus. Lakimiesliiton Kustannus 2012.
- Poort, Joost – Leenheer, Jorna – van der Ham, Jeroen – Dumitru, Cosmin*: Baywatch: Two approaches to measure the effects of blocking access to the Pirate Bay. Telecommunications Policy 2014, s. 383–392.
- Rantala, Kati*: Lainvalmistelun laatu hallituksen kärkihankkeissa. Oikeuspoliittisen tutkimuskeskuksen tutkimuksia 255. 2011.
- Savola, Pekka*: Internet-operaattori ja perusoikeudet. Oikeustiede–Jurisprudentia XLVI:2013, s. 127–221.

- Savola, Pekka*: Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta. Tekniikan lisensiaattitutkimus, Aalto-yliopisto 2013. (2013a)
- Savola, Pekka*: Tekijänoikeus internetissä – suojaamisen keinot ja strategiat. Oikeus 1/2013, s. 49–70. (2013b)
- Savola, Pekka*: Tunnistamistietojen luovuttamismääräykset ja telepakkokeinot. Lakimies 5/2013, s. 886–908.
- Savola, Pekka*: Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers. Julkaistaan Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC) -lehdessä 2014.
- Schellekens, Maurice*: Liability of Internet Intermediaries: A Slippery Slope? SCRIPTed 2011, s. 154–174.
- Sell, Susan K.*: Private Power, Public Law: The Globalization of Intellectual Property Rights. Cambridge University Press 2003.
- Siiki, Marika*: Tietoyhteiskunnan tekijänoikeusdirektiivin 8 artiklan menettelysääntöjen täytäntöönpano Suomessa. Defensor Legis 2009/1, s. 172–185.
- Tala, Jyrki – Rantala, Kati – Pakarinen, Auri*: Paremmen sääntelyn kriittinen arviointi – tutkimushanke: kooste keskeisistä tutkimustuloksista. Verkkokatsauksia 21/2011. Oikeuspoliittinen tutkimuslaitos.
- Terdiman, Richard*: The Force of Law: Toward a Sociology of the Juridical Field. Translator’s Introduction. The Hastings Law Journal 1987, s. 805–813.
- Tuori, Kaarlo*: Kriittinen oikeuspositivismi. WSLT 2000.
- Van Eecke, Patrick*: Online service providers and liability: a plea for a balanced approach. Common Market Law Review 2011, s. 1455–1502.
- Välimäki, Mikko*: Ajatuksia tekijänoikeuslainsäädännön uudistamiseksi. Lakimies 2/2004, s. 255–273.
- Ylhäinen, Marjo*: Pierre Bourdieu ja oikeuden valta. Teoksessa Toomas Kotkas – Susanna Lindroos-Hovinheimo (toim.): Yhteiskuntateorioiden oikeus. Episteme-sarja. Tutkijaliitto 2010, s. 151–190.
- Yu, Peter K.*: Digital Copyright and Confuzzing Rhetoric. Vanderbilt Journal of Entertainment and Technology Law 2011, s. 881–939.
- Zemer, Phil*: Rethinking copyright alternatives. International Journal of Law and Information Technology 2006, s. 137–145.

Virallislähteet

- Hankerekisteri OPM122:00/2005, OPM016:00/2009, OKM001:00/2010, OPM012:00/2010, OKM056:00/2013 (asiakirjat).
- Hankerekisteri OPM012:00/2010, OKM017:00/2012, OKM044:00/2012, OKM037:00/2014 (henkilöt).
- HE 28/2004 vp. Hallituksen esitys eduskunnalle laeiksi tekijänoikeuslain ja rikoslain 49 luvun muuttamisesta.
- HE 235/2010 vp. Hallituksen esitys eduskunnalle laeiksi tekijänoikeuslain 60 a §:n ja sähköisen viestinnän tietosuojalain muuttamisesta (rauennut).

- HE 124/2012 vp. Hallituksen esitys eduskunnalle markkinaoikeutta ja oikeudenkäyntiä markkinaoikeudessa koskevaksi lainsäädännöksi.
- HE 73/2013 vp. Hallituksen esitys eduskunnalle laeiksi tekijänoikeuslain muuttamisesta ja orpoteosten käyttämisestä.
- LaVL 5/2005 vp. Hallituksen esitys laeiksi tekijänoikeuslain ja rikoslain 49 luvun muuttamisesta (HE 28/2004 vp).
- OKM: Tekijänoikeustoimikunnan mietintö. Ratkaisuja digiajan haasteisiin. OKM:n työryhmämuistioita ja selvityksiä 2012:2.
- OKM: Lausuntotiivistelmä – ratkaisuja digiajan haasteisiin 2012:2, 22.5.2012.
- OKM: Luvattomien verkkojaketun vähentämiskeinojen arviointia. Selvitykset lainvalmistelun tueksi. OKM:n työryhmämuistioita ja selvityksiä 2013:13.
- OPM: Luovien sisältöjen luvaton verkkojaketu. Lainsäädännölliset keinot. OPM:n työryhmämuistioita ja selvityksiä 2009:21.
- OPM: Luovien sisältöjen luvaton verkkojaketu; lainsäädännölliset keinot. Lausuntotiivistelmä. 27.11.2009.
- SiVM 6/2005 vp. Hallituksen esitys laeiksi tekijänoikeuslain ja rikoslain 49 luvun muuttamisesta (HE 28/2004 vp).
- SiVM 11/2010 vp. Valtioneuvoston selonteko kulttuurin tulevaisuudesta (VNS 4/1010 vp).
- SiVM 6/2013 vp. Hallituksen esitys eduskunnalle laeiksi tekijänoikeuslain muuttamisesta ja orpoteosten käyttämisestä (HE 73/2013 vp).
- Valtioneuvoston kanslia: Eduskunnalle kevätistuntokaudella 2014 annettavat hallituksen esitykset (30.1.2014)

Verkkolähteet¹⁶⁵

- Association littéraire et artistique international (ALAI): Report and opinion on the making available and communication to the public in the internet environment (16.9.2013). – [Http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf](http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf).
- Beumont, Claudine*: What does The Pirate Bay ruling mean for the web? Technology news. The Telegraph (17.9.2009). – [Http://www.telegraph.co.uk/technology/news/5170684/What-does-The-Pirate-Bay-ruling-mean-for-the-web.html](http://www.telegraph.co.uk/technology/news/5170684/What-does-The-Pirate-Bay-ruling-mean-for-the-web.html).
- Collier, Kevin*: Inside the confusing, contradictory world of Internet piracy studies. The Daily Dot (6.1.2014). – [Http://www.dailydot.com/politics/piracy-studies-contradictory-paid-for/](http://www.dailydot.com/politics/piracy-studies-contradictory-paid-for/).
- European Copyright Society: Opinion on the Reference to the CJEU in Case C-466/12 Svensson (15.2.2013). – [Http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf](http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf).
- Gramex: vuosikertomus 2011. – [Http://www.gramex.fi/index.php?mid=931](http://www.gramex.fi/index.php?mid=931).
- Helsingin yliopisto: E-Thesis -palvelu. Oikeustieteellinen tiedekunta. ”Opinnäytetiivistelmät” ja ”Pro gradut ja vastaavat opinnäytteet”. – [Http://ethesis.helsinki.fi/](http://ethesis.helsinki.fi/). Haettu 13.3.2014.

¹⁶⁵ Verkkolähteissä käyty 5.6.2014 ellei toisin mainittu.

- Helsingin yliopiston oikeustieteellinen tiedekunta: OTT-tutkintoa suorittavat opiskelijat (PDF, 7.3.2014). – [Http://www.helsinki.fi/oikeustiede/opiskelu/jatko-opiskelu/jatko-opiskelijat.htm](http://www.helsinki.fi/oikeustiede/opiskelu/jatko-opiskelu/jatko-opiskelijat.htm). Haettu 7.3.2014.
- Helsingin yliopiston oikeustieteellinen tiedekunta: 28.1.2014 pidetyn tiedekuntaneuvoston kokouksen 2/2014 pöytäkirja. Saatavilla Helsingin yliopiston sisäverkosta.
- Koistinen, Olavi*: ”Jotain meidän täytyy tehdä”. Helsingin Sanomat (1.6.2013). – [Http://www.hs.fi/tekniikka/a1369978353265](http://www.hs.fi/tekniikka/a1369978353265) (2013a).
- Koistinen, Olavi*: Musiikkiala jahtaa satunnaisesti valittuja piraatteja. Helsingin Sanomat (1.6.2013). – [Http://www.hs.fi/tekniikka/a1369977874691](http://www.hs.fi/tekniikka/a1369977874691) (2013b).
- Lakimiesmatrikkeli: Suomen Lakimiehet. 2014. – [Https://www.lakimiesmatrikkeli.fi/](https://www.lakimiesmatrikkeli.fi/) (edellyttää kirjautumista).
- LYHTY: kulttuuriuutiset.net: jäsenjärjestöt. 2014. – [Http://www.kulttuuri.net/lyhty/jasenjarjestat](http://www.kulttuuri.net/lyhty/jasenjarjestat).
- Mylly, Tuomas*: Järkeä tekijänoikeuslakiin. Perustuslakiblogi (14.10.2013). – [Http://perustuslakiblogi.wordpress.com/2013/10/14/tuomas-mylly-jarkea-tekijanoikeuslakiin/](http://perustuslakiblogi.wordpress.com/2013/10/14/tuomas-mylly-jarkea-tekijanoikeuslakiin/).
- OECD: Better Regulation in Europe: Finland 2010. – [Http://www.oecd.org/gov/regulatory-policy/betterregulationineuropefinland.htm](http://www.oecd.org/gov/regulatory-policy/betterregulationineuropefinland.htm).
- OKM: Tapahtumakalenteri – Tekijänoikeusfoorumi 2013 (28.10.2013). – [Http://www.minedu.fi/OPM/Tapahtumakalenteri/2013/10/Tekijanoikeusfoorumi2013.html](http://www.minedu.fi/OPM/Tapahtumakalenteri/2013/10/Tekijanoikeusfoorumi2013.html).
- OKM: Tekijänoikeusasioiden neuvottelukunnan aineistot ja asiakirjat. 2014. – [Http://www.minedu.fi/OPM/Tekijaenoikeus/neuvottelukunta/Aineistot.html](http://www.minedu.fi/OPM/Tekijaenoikeus/neuvottelukunta/Aineistot.html).
- Peltomäki, Tuomas*: HS-selvitys: Heitä eduskunta kuuntelee (28.4.2013). – [Http://www.hs.fi/kotimaa/a1305672825105](http://www.hs.fi/kotimaa/a1305672825105) (2013a).
- Peltomäki, Tuomas*: Lobbarit ajavat tekijänoikeutta. Helsingin Sanomat (5.5.2013). – [Http://www.hs.fi/kotimaa/a1367637318382](http://www.hs.fi/kotimaa/a1367637318382) (2013b).
- Sorjanen, Axa*: Tekijänoikeuksien viidakko hirvittää – edes tuomioistuimet eivät tunne pykälää (30.5.2014). Suomen Kuvalehti 22/2014. – [Http://suomenkuvalehti.fi/jutut/kotimaa/suomalaisia-tekijanoikeuksia-eivat-ymmarra-edes-oikeusistuimet/?shared=42306-a0c7d139-999](http://suomenkuvalehti.fi/jutut/kotimaa/suomalaisia-tekijanoikeuksia-eivat-ymmarra-edes-oikeusistuimet/?shared=42306-a0c7d139-999).
- TorrentFreak: Leaked RIAA Report: SOPA/PIPA ”Ineffective Tool” Against Music Piracy (27.7.2012). – [Http://torrentfreak.com/leaked-riaa-report-sopapipa-ineffective-tool-against-music-piracy-120727/](http://torrentfreak.com/leaked-riaa-report-sopapipa-ineffective-tool-against-music-piracy-120727/).
- TorrentFreak: UK ISPs Agree to Send Out Music & Movie Piracy Warnings (9.5.2014). – [Http://torrentfreak.com/uk-isps-agree-to-send-out-music-movie-piracy-warnings-140509/](http://torrentfreak.com/uk-isps-agree-to-send-out-music-movie-piracy-warnings-140509/).

OIKEUSTAPAUKSET

EY-tuomioistuin C-275/06 *Promusicae* [2008] ECR I-271

EY-tuomioistuin C-557/07 *LSG v Tele2* [2009] ECR I-1227

EU-tuomioistuin C-324/09 *L'Oréal v Ebay* [2011] ECR I-6011

EU-tuomioistuin C-70/10 *Scarlet Extended* [2011] ECR I-11959

EU-tuomioistuin C-314/12 *UPC Telekabel Wien* (27.3.2014)

Helsingin käräjäoikeus 21.12.2004 (04/22468), Helsingin hovioikeus 2.6.2005 (S 05/445):
lopputulosta ei muuteta

Helsingin käräjäoikeus 28.11.2012 (H 12/57279)

LEGISLATIVE POWER STRUGGLE TO EXPAND COPYRIGHT ENFORCEMENT THROUGH INTERNET SERVICE PROVIDERS

This article examines the legislative power struggle where copyright holders pursue adoption and expansion of copyright enforcement mechanisms through Internet connectivity providers. The participants, their positions and power are examined from the legal policy and sociology perspective based on Bourdieu's power and critical legislative theories. Lobbying is prevalent in lawmaking in so-called 'legislative field'. We see that the countless numbers of various copyright stakeholders and representatives have a rather strong position within the field. Internet service providers, industry and users lack coherence and resources to compete with them in equal terms. The goal of right holders appears to be to introduce new means of enforcement and make the existing ones more extensive at the expense of internet service providers. Others criticize inter alia the distribution of expenses, law drafting, and ineffectiveness of the means. They suggest that instead the solution should be to address the problem at its source or by modernizing the business models. It appears that at least for the moment preparatory bodies previously filled with the representatives of right holders are not being used, resorting to the drafting by civil servants. This also implies significant risks to the quality of legislation. Right holders' information power over other participants through supplying data to support their own agenda also tends to result in imbalanced results. In any case, this situation requires attention and critical appraisal from supposedly neutral parties, particularly law drafting officials.

Pekka Savola

Tunnistamistietojen luovuttamismääräykset ja telepakkokeinot

Hakusanat: Internet, välitystieto, tunnistamistieto, yksilönsuoja, perusoikeudet, pakkokeinot

1. Johdanto

Tunnistamistiedolla tarkoitetaan tietoverkosta peräisin olevaa, viestinnän välittämässä käytettyä käyttäjään tai tilaajaan yhdistettävissä olevaa tietoa, esimerkiksi IP-osoitetta.¹ Tunnistamistiedot ovat luottamuksellisia eikä niitä saa käsitellä ilman lain säännöstä ja silloinkin vain välttämättömässä laajuudessa. Myöskään teleyritys ei saa kerätä, luovuttaa tai käsitellä tietoja muuten kuin laissa säädetyn tarkoin rajatuin perustein.² Ne ovat luottamuksellisen viestinnän perusoikeussuojan piirissä, mutta vaikka tunnistamistietojen suojan on katsottakin jäävän ydinalueen ulkopuolelle, niiden salaisuuteen puuttuvien rajoitusten on täytettävä perusoikeuksien rajoittamisen yleiset edellytykset.³ Yksityiselämään

¹ Valmistelussa olevassa tietoyhteiskuntakaareissa »tunnistamistieto» ehdotetaan korvattavaksi samansisältöisellä, mutta havainnollisemmalla »välitystiedon» käsitteellä. Tällä pyritään välttämään sekaannus erilaisiin tunnistautumispalveluihin ja korostamaan, että kyse on viestinnän välittämisen yhteydessä kerätystä tiedosta, eikä esimerkiksi viestinnän osapuolten keräämistä tiedosta (Hallituksen esitys tietoyhteiskuntakaareksi, lausuntoluonnos 4.4.2013 s. 86). Viestien välittämisen yhteydessä käsiteltävä IP-osoite, joka on puhelinnumeroa vastaava tietoverkon laitteen yksilöivä numerosarja, on miltei poikkeuksetta tunnistamistieto, ks. HE 125/2003 vp sähköisen viestinnän tietosuojalaiksi ja eräksi siihen liittyviksi laeiksi s. 46; Tietosuojaryhmän lausunto 4/2007 henkilötietojen käsitteestä (WP 136) s. 16–17; *Jussi Päivärinne*: IP-osoitteen juridinen luonne ja käyttäjän yhteystietojen selvittäminen tekijänoikeuslain 60 a §:n perusteella. *Defensor Legis* 2013 s. 196–215, s. 197–202; *Joachim Enkvist – Magnus Westerlund*: Personuppgiftsskydd – med särskild betoning på profilering. *JFT* 2/2013 s. 85–113, s. 91–94; *Antti Innanen – Jarkko Saarimäki*: Internetoikeus, 2. uud. p., Edita. 2012 s. 76–79, 92–94.

² Luottamuksellisuudesta säädetään sähköisen viestinnän tietosuojalain (516/2004, jäljempänä SVTsL) 4–5 §:ssä ja käsittelyperusteista erityisesti 8–14 a §:ssä. Luonnolliseen henkilöön yhdistettävissä oleva IP-osoite voi olla tunnistamistiedon ohella tai asemesta myös henkilötieto, mutta tällä ei ole tässä juuri merkitystä (*Päivärinne* DL 2013 s. 202). SVTsL:n sääntely on ehdotettu yhdistettäväksi ja osin uudistettavaksi tietoyhteiskuntakaareen, mutta kovin merkittäviä muutoksia tämän tarkastelun osalta ei ole kuitenkaan odotettavissa.

³ PeVL 29/2008 vp s. 2; PeVL 23/2006 vp s. 3; PeVL 9/2004 vp s. 4; *Innanen – Saarimäki* 2012 s. 26–29. IP-osoitteen merkitystä vain tunnistamistietona eikä merkityksellisenä osana luottamuksellista viestintää voidaan myös jäljempänä kuvastusti kritisoida. Aiemmin ydinalueen koskemattomuutta käytettiin lähinnä käänteisesti, legitimaatioperusteena reuna-alueen suuremmalle liikkumavaralle. Tuoreempaa perustuslakivaliokunnan lausuntokäytäntöä voidaan pitää tässä mielessä positiivisena merkinä, mutta toisaalta linja ei ole ehkä vielä vakiintunut, vaikka siihen on muun muassa uuden pakkokeinolain televalvonnan laajennuksissa viitattukin

ja luottamuksellisen viestinnän suojaan liittyvät perusoikeudet ovatkin luoneet julkiselle vallalle suojaamisvelvoitteen myös yksityisten välisessä horisontaalisuhteessa.⁴

Kirjoituksessa on tarkoitus systematisoida ja arvioida perusoikeusnäkökulmasta tunnistamistietojen luovuttamismääräyksiä keskittyen erityisesti tekijänoikeuslain (404/1961, jäljempänä TekL) luovuttamismääräykseen ja poliisilain (872/2011, jäljempänä PolL) tiedonsaantioikeuteen näitä vastaaviin pakkokeinoinhin vertaillen.⁵ Tarkoituksena on tuoda esiin tekijänoikeudellisen luovuttamismääräyksen soveltamiskäytännön ongelmakohtia, poliisilain tiedonsaantioikeuden epäsuhtaisuutta verrattuna telepakkokeinosäätelyyn ja telepakkokeinon käyttöedellytysten laajentumista. Tarkastelen vain Internet-yhteydentarjoajien (jäljempänä Internet-operaattori tai operaattori) yhteydentarjoamiseen liittyvää IP-osoitteiden käsittelyä.⁶ Rajaan tarkastelun ulkoisista vaatimuksista johtuviin luovuttamisvelvoitteisiin, enkä käsittele tietojen omaehtoista käsittelyä tai kansainvälisiä luovutuksia. En myöskään tarkastele lähemmin sinänsä ongelmallista ja oikeusturvaan liittyvää kysymystä siitä, kuka IP-osoitetta on tosiasiaassa käyttänyt.⁷

Yksityiselämän suojaa tietoverkossa on erilaisten intressien vuoksi pyritty kovertamaan, ja niin ikään tunnistamistietojen sensitiivisyys on korostunut, hyödyntämisintressin merkitys kasvanut ja käsittely helpottunut.⁸ Internet-kontek-

(PeVL 66/2010 vp s. 7). Ydinalueargumentaatiosta laajemmin ks. esim. *Veli-Pekka Hautamäki*: Perusoikeuden ydinalue argumenttina. Lakimies 2011 s. 82–98, erit. s. 96–98.

⁴ PeVL 9/2004 vp s. 2; HE 309/1993 vp perustuslakien perusoikeussäännösten muuttamisesta s. 53. Ks. laajemmin *Innanen – Saarimäki* 2012 s. 13–18, 333. Esimerkkeinä yleisemmästä velvoitteen laiminlyönnistä ks. EIT 2.12.2002, *K.U. v Suomi* (2872/02), 46–50 kohta ja EIT 17.7.2008, *I v Suomi* (20511/03), 33–38, 44, 48–49 kohta.

⁵ TekL 60 a §:ää käsitelleestä ansioituneesta esityksestä ks. *Päivärinte* DL 2013 erit. s. 204–214. Poliisin tehtävistä keskityn vain rikosten selvittämiseen. Pidän tarkastelussa lähtökohtana 1.1.2014 voimaan tulevaa poliisi- ja pakkokeinolainsäädäntöä, mutta vertailen tätä myös olennaisissa kohdin aiempiin säännöksiin (VanhaPolL, 493/1995 ja VanhaPKL, 450/1987).

⁶ Internet-operaattoreita koskevista näkökulmista laajemmin ks. *Pekka Savola*: Internet-operaattori ja perusoikeudet. Teoksessa Tapani Lohi (toim.): Oikeustiede–Jurisprudentia XLVI:2013. Suomalaisen Lakimiesyhdistyksen julkaisuja s. 127–221.

⁷ Lähtökohta on, ettei Internet-liittymän haltijalla ole legaalista vastuuta liittymää käyttäen muiden tekemistä teoista, eikä hänellä ole myöskään erityistä huolenpitovelvollisuutta liittymästä. Liittymäsopimukseen mahdollisesti sisältyviin ehtoihin tai niiden pätevyys en mene tässä. Vastuun kohdentuminen pelkistyykin useimmiten kysymykseen näytöstä ja sen arvioinnista. Oikeuskäytännössä eräässä tapauksessa langattoman lähiverkon haltijan ei katsottu olleen vastuussa loukkauksesta; toisessa tapauksessa näyttöenemmysperiaatteeseen nojautuen hovioikeus katsoi, että liittymän haltija oli tehnyt teon (Ylivieska-Raahan käräjäoikeus 14.5.2012 (L 11/3769) vrt. Itä-Suomen hovioikeus 4.10.2012 (S 12/306) (ei lv.)). Ks. myös *Päivärinte* DL 2013 s. 201–202; *Pekka Savola*: Internet-operaattoreihin kohdistetut tekijänoikeudelliset estomääräykset erityisesti vertaisverkkopalvelun osalta. Tekniikan lisensiaattityö. Aalto-yliopisto. 2013 s. 49, 177–178; *Richard Clayton*: Online traceability: who did that? Technical expert report on collecting robust evidence of copyright infringement through peer-to-peer file sharing. *Consumer Focus* (26.7.2012) s. 16–17, 26–35.

⁸ Laajemmin ks. Päivikki Karhula (toim.): Paratiisi vai panoptikon? Näkökulmia ubiikki-yhteiskuntaan. Eduskunnan kirjasto. 2008 s. 48–61, 141–161, 162–190. Kansainvälisesti ks.

tissa tunnistamistiedoilla on huomattavasti suurempi merkitys kuin käsin syöte-tyillä henkilötiedoilla, koska tunnistamistiedoilla voidaan luoda kytkös tietoverkon tapahtumien ja henkilöiden välille. Myös perusoikeuksien ja turvallisuuden tasapaino on järkkynyt yksityisyyden ja tietosuojan alalla, kun tietojen vaihtoa, seurantaa ja toimivaltuuksia on lisätty, mutta perusoikeuksia suojaavat säännökset ovat jääneet hajanaisiksi.⁹

Tunnistamistietojen merkitys viestin sisällön luottamuksellisuuden kannalta olikin aiemmin »puhelin aikaan» vähäinen eikä perustuslakivaliokunta 1990-luvun loppupuolella katsonut tunnistamistietojen paljastumisen loukkaavan viestinnän luottamuksellisuuden suojaa.¹⁰ Verkkoaikakaudella esimerkiksi käytetyt palvelut ja vierailut sivustot paljastavat enemmän kuin tieto puhelun osapuolista. Tunnistamistietojen hyödyntäminen onkin hyvin laajaa, ja tietoja käytetään muun muassa rikosten ennaltaehkäisyyn ja selvittämiseen, mainonnan kohdistamiseen, tekniseen kehittämiseen ja yrityssalaisuuksien luvattoman paljastamisen selvittämiseen.¹¹ Operaattorilla voi olla myös oma taloudellinen intressi käyttäjien yksityisyyden loukkauksiin.¹²

Elävöitän aiheen käsittelyä vertaamalla sitä ns. Chisugate-tapauksessa esille nousseisiin kysymyksiin, jotka havainnollistavat eri osapuolten näkökulmia tunnistamistietojen säilyttämiseen, luovuttamiseen ja rikosselvittämisintressiin.¹³ Tapauksessa vasta ilmestynyttä musiikkialbumia jaettiin vertaisverkossa, ja oikeudenhaltijoiden edustaja piti kirjaa jakajista 13.–14.10.2011 saaden selville 67 jakajan IP-osoitteet.¹⁴ 18.11.2011 vireille pannun hakemuksen johdosta käräjäoikeus katsoi 5.1.2012 annetussa päätöksessä yksittäisenkin uutuuksien jakamisen olleen toimintaa, jossa jokaisesta yksittäisestä teleliittymästä saatettiin yleisön saataviin tekijän oikeuksien suojan kannalta merkittävässä määrin suojattua aineistoa, ja määräsi luovuttamaan IP-osoitetta vastaavien teleliittymien haltijoiden tiedot. Oikeudenhaltijoiden valvontajärjestö kirjelmöi

esimerkiksi *Keith M. Richards: The Dangers of Surveillance*. Harvard Law Review 2013 s. 1934–1965; *Michael A. Froomkin: The Death of Privacy?* Stanford Law Review. Vol 52. Issue 5. 2000 s. 1461–1544.

⁹ *Tuomas Ojanen: Perus- ja ihmisoikeudet terrorismin vastatoimissa Euroopan unionissa*. Lakimies 2007 s. 1053–1074, s. 1072–1073; *Riitta Ollila: Turvallisuus ja urkinta*. Lakimies 2005 s. 781–791, s. 783, erit. alaviite 10.

¹⁰ PeVL 7/1997 vp s. 1–2; *Innanen – Saarimäki* 2012 s. 27–28.

¹¹ *Innanen – Saarimäki* 2012 s. 28–29, 32; *Jan van Dijk: The Network Society*. 3rd Edition. SAGE Publications. 2012 s. 120–127. IP-osoitteena käytetyn tunnistamistiedon merkitys viestinnän salaisuudelle onkin huomattavasti suurempi kuin perinteisesti perusoikeuksia arvioitaessa on tiedostettu.

¹² Laajemmin ks. *Paul Ohm: The Rise and Fall of Invasive ISP Surveillance*. University of Illinois Law Review. Vol 2009. Issue 5 s. 1417–1496, erit. s. 1422–1437.

¹³ Vaikka kyse onkin käräjäoikeustasoisesta ratkaisusta ja poliisin toiminnasta, tämä osaltaan myös demonstroi tilanteen ongelmallisuutta: kysymyksiin ei ole eikä luultavasti tulla myöskään saamaan ylempien oikeusasteiden kannanottoja. Laajasti viimeaikaisia ratkaisuja tarkastellen ks. *Päivärintne* DL 2013 s. 204–213.

¹⁴ Tavallisesti jokainen lataaja on myös vähintään latauksen ajan aineiston jakaja.

liittymän haltijoille, kehottaen oikeudellisten toimenpiteiden uhalla sopimaan hyvityksestä ja kulujen korvaamisesta. Kun eräs liittymän haltija ei suostunut vaatimukseen, asiasta tehtiin rikosilmoitus ja myöhemmin poliisi suoritti kotietsinnän ja takavarikoi liittymän haltijan 10-vuotiaan lapsen käytössä olleen tietokoneen. Sittemmin asia sovittiin ja esitutkinta lopetettiin.¹⁵

2. Tunnistamistietojen tallentaminen ja erityissäilyttäminen

Internet-operaattorilla ei ole velvollisuutta tallentaa tunnistamistietoja.¹⁶ Tyypillisesti tietoja on kuitenkin kerättävä omaan käyttöön esimerkiksi palvelun toteuttamista, laskutusta tai teknisten vikojen selvittämistä varten.¹⁷

Operaattorin omaan tarkoitukseen tallentamia tiettyjä tietoja on säilytettävä 12 kuukautta viranomaisten mahdollista tulevaa erityistä käyttöä varten (SVTsL 14 a §, ns. data retention).¹⁸ Tämän säilytysvelvollisuuden ulkopuolisia tietoja voidaan poistaa niin halutessa.¹⁹ Säilytysvelvollisuuden alaisia tietoja voidaan käyttää vain PKL 10:6.2:ssa säädettyjen, televalvontaan oikeuttavien rikosten selvittämisessä. Vanhassa pakkokeinolaisissa kyse oli rikoksista, joista säädetty ankarin rangaistus oli eräin laajennuksin vähintään neljä vuotta vankeutta.²⁰ Edellytystä on voimaan tulevassa pakkokeinolaisissa lievennetty huomattavasti

¹⁵ Eduskunnan apulaisoikeusasiamies 10.12.2012 (Dnro 4565/4/12) s. 1–4; HeKO 5.1.2012 (11/47251) s. 3–5; *EFFI*: Apulaisoikeusasiamiehen päätös Chisugatesta – lakimuutos tarvitaan (12.12.2012).

¹⁶ Ks. *Innanen – Saarimäki* 2012 s. 28–29. Sananvapauden käyttämisestä joukkoviestinnässä annetun lain (460/2003, jäljempänä SananvapL) säätämisen yhteydessä esitettiin viestien tunnistamistietojen tallentamisvelvollisuutta, mutta perustuslakivaliokunta katsoi, että tallennus tulisi toteuttaa SVTsL:n yhteydessä yhteisin perustein ja poisti säännöksen (ehdotettu 7 §). SVTsL:ia säädettyä ei kuitenkaan onnistuttu löytämään yksityiselämän suojan kannalta tarkoituksenmukaista ratkaisua, poliisin tiedonsaantioikeuksien katsottiin olevan riittäviä eikä tallentamisvelvollisuudesta säädetty siinäkään. (PeVM 14/2002 vp s. 6; HE 125/2003 vp s. 18, 36.)

¹⁷ SVTsL 10.4 §:ssä säädetään, että teleyrityksen on säilytettävä laskun määräytymiseen liittyviä tietoja vähintään kolme kuukautta laskun eräpäivästä tai tunnistamistietojen tallentamisesta. Vallalla on käsitys, että operaattorin tulisi säilyttää IP-osoitetietoja vähintään kolmen kuukauden ajan (ks. esimerkiksi HE 235/2010 vp laeiksi tekijänoikeuslain 60 a §:n ja sähköisen viestinnän tietosuojalain muuttamisesta (rauennut) s. 14). Tämä käsitys on nähdäkseni kuitenkin virheellinen, koska useimmissa tapauksissa laskutuksen tai laskun määräytymisen kannalta operaattorille riittää muu tieto asiakkuudesta, eikä tätä tarkoitusta varten asiakkaan kunakin ajanhetkenä käyttämien IP-osoitteiden kirjaaminen tai säilyttäminen ole tarpeen.

¹⁸ Laajemmin ks. *Innanen – Saarimäki* 2012 s. 28–29, 212–218; *Sanna Helopuro* ym.: Sähköisen viestinnän tietosuoja. 2. uud. p. Talentum. 2009 s. 148–159. Viranomaisen vastaa säilyttämiskustannuksista (SVTsL 14 b §).

¹⁹ Rikoksen selvittämisen ajaksi voidaan antaa erityinen määräaikainen määräys tietojen säilyttämisen jatkamisesta (SVTsL 14b.2 §, pakkokeinolaki (806/2011), jäljempänä PKL, 8:24.2). Nyt käsiteltävässä siviiliprosessissa ei tällaisia turvaamistoimenpiteitä ole, ja sellaista ehdotettiin lisättäväksi TekL 60 a §:ään, mutta esitys raukesi (HE 235/2010 vp).

²⁰ TekL 60 a § ei ole oikeuttanut erityissäilytetyjen tietojen käyttöön aiemminkaan (HE 235/2010 vp s. 13–14).

siten, että telesoitetta tai -päätelaitetta käyttäen tehdyissä rikoksissa edellytetään enää vähintään kahden vuoden rangaistusmaksimia.²¹

Operaattori voi toteuttaa erityissäilyttämisen määrittelemällä tarkan tai keskimääräisen käsittelyajan omaa tarvetta varten tai siirtämällä tunnistamistiedot sen omaan erilliseen säilytysjärjestelmään.²² Tämä selkeyttäisi sitä, onko kyseinen tunnistamistieto luovutettavissa yleisesti ottaen vai vain PKL 10:6.2:ssa säädettyin edellytyksin.

Chisugate-tapauksessa jakaminen tapahtui 13.–14.10.2011, asia tuli vireille 18.11.2011 ja käräjäoikeus antoi päätöksen 5.1.2012. Tyytymättömyyttä ei ilmoitettu, ja päätös tuli lainvoimaiseksi 13.1.2012. Ensimmäisenä mahdollisena täytäntöönpanohetkenä oli siis kulunut jo kolme kuukautta tapahtumasta. Mikäli operaattori ei olisi enää tarvinnut tunnistamistietoja omaan käyttöönsä, tiedot olisivat jo voineet siirtyä erityissäilytyksen piiriin, eikä niitä olisi voinut luovuttaa.²³ Yksityisoikeudellinen hakemusasia ei myöskään täytä SVTsL 14 a §:ssä säädettyä edellytystä, jonka mukaan erityissäilytyksessä olevia tietoja voidaan käyttää vain rikoksen tutkimiseksi, selvittämiseksi ja syyteharkintaan saattamiseksi.²⁴ Tuomioistuinten tulisikin kiinnittää aiempaa enemmän huomiota määräyksen sanamuotoon, etteivät ne määräisi lainvastaisesti tietoja luovutettavaksi.²⁵

²¹ PeVL 66/2010 vp s. 6–7; LaVM 44/2010 vp s. 24. Kun sääntelyä ei ole sidottu rikostyyppiin, sen piiriin tulee myös muun muassa (tietoverkossa tehty) tekijänoikeusrikos, jonka rangaistusmaksimi on kaksi vuotta vankeutta. Aiemmin televalvontaan oikeuttivat ilman edellytyksiä automaattiseen tietojärjestelmään kohdistuneet hyökkäystyyppiset rikokset, eikä säännös »enää vastannut tämän päivän rikostutkinnallisia tarpeita» ja siten sitä haluttiin modernisoida ja sen soveltamisalaa laajentaa (HE 222/2010 vp esitutkinta- ja pakkokeinolainsäädännön uudistamiseksi s. 124, 321), mutta perustuslakivaliokunnan lausunnon johdosta soveltamisedellytyksiä oli täsmennettävä. Muutos sääntelytavassa johti siihen, että tietojärjestelmiin kohdistuneet rangaistusmaksimin alittavat rikokset eivät enää täyttäisi edellytystä, ja tältä osin sääntelyä on ehdotettu laajennettaviksi telesoitetta tai -päätelaitetta käyttäen tehtyihin automaattiseen tietojenkäsittelyjärjestelmään kohdistuneisiin eräisiin lievempiin rikoksiin (HE 14/2013 vp laeiksi esitutkintalain ja pakkokeinolain muuttamisesta sekä eräiksi niihin liittyviksi laeiksi s. 18–21, 52–53).

²² Viestintäviraston määräys 53A/2011M tunnistamistietojen tallentamisvelvollisuudesta, 7 §.

²³ HE 235/2010 vp s. 13. Edellä todetusti operaattorin ei välttämättä tarvitse säilyttää tietoja edes kolmea kuukautta. On epäilty, että jos kokonaisprosessin kesto lähenisi kolmea kuukautta, operaattori ei ehkä enää säilyttäisi tietoja. Tietyvästi luovuttamismääräysten täytäntöönpano ei ole kuitenkaan toistaiseksi estynyt tietojen poistamisen johdosta. (HE 235/2010 vp s. 13; *Päivärinte* DL 2013 s. 206 alaviite 70.)

²⁴ Näin myös HE 158/2007 vp laiksi sähköisen viestinnän tietosuojalain muuttamisesta s. 18, jossa viitataan vain poliisin oikeuteen saada säilytettyjä tietoja. Niin ikään taustalla olevan data retention -direktiivin (2006/24/EY) 17 perustelukappaleen ja 4 artiklan mukaan erityissäilytetyt tiedot saa luovuttaa yksinomaan kansallisesti säädettyille toimivaltaisille viranomaisille. Asianomistajan yksityisoikeudellinen rikosselvittämisintressi ei tätä edellytystä täytä.

²⁵ Päätöslauselmissa on vain yksikantaan määrätty luovuttamaan tiedot, ks. myös HE 235/2010 vp s. 13–14. Tuomioistuimen tulisi joko muotoilla määräykseen erityissäilytyksestä riippuva soveltamisedellytys tai selvittää operaattorilta, onko tietoja ylipäättänsä (enää) olemassa ja ovatko ne vielä omassa käytössä vai erityissäilytyksessä ja huomioida tämä ratkaisua antaessaan.

3. Tunnistamistietojen luovuttaminen yksityisille

3.1. Säännökset ja perusoikeusarvioinnin lähtökohdat

SananvapL 17 §:n mukaan tuomioistuimien voi määrätä lähettimen, palvelimen tai muun sellaisen laitteen ylläpitäjän luovuttamaan verkkoviestin lähettämisessä tarpeelliset tunnistamistiedot vaatimuksen esittäjälle, jos on todennäköisiä syitä epäillä viestin olevan sisällöltään sellainen, että sen toimittaminen yleisön saataville on säädetty rangaistavaksi. Soveltamiskriteerit on määritetty varsin tarkkarajaisesti. Vaatija vastaa ylläpitäjälle luovuttamisesta aiheutuneista kohtuullisista välittömistä kustannuksista.²⁶

TekL 60 a §:n mukaan tekijällä tai hänen edustajallaan on oikeus tuomioistuimen määräyksellä saada lähettimen, palvelimen tai muun sellaisen laitteen ylläpitäjältä taikka muulta välittäjänä toimivalta palvelun tarjoajalta yhteystiedot sellaisesta teleliittymästä, josta tekijän oikeuksien suojan kannalta merkittävässä määrin saatetaan yleisön saataviin tekijänoikeudella suojattua aineistoa ilman tekijän suostumusta. Lakivaliokunnan mukaan kyse on luovutusedellytyksiä rajoittavasta säännöksestä ja tuomioistuimen tehtävänä on valvoa, että merkittävyyskynnys ylittyy. Niin ikään korvausvelvollisuudella on haluttu ohjata selvittämistä tekijänoikeuden suojan toteuttamisen kannalta merkityksellisiin tapauksiin.²⁷ Kontrollimekanismin toimivuus voidaan tosin kyseenalaistaa, sillä tiettävästi yhtä viimeaikaista ratkaisua lukuun ottamatta kaikki hakemukset on hyväksytty.²⁸ Tekijän tai hänen edustajansa on korvattava luovuttamismääräyksen täytäntöönpanosta aiheutuneet kulut sekä mahdollinen vahinko. Myös Internet-operaattorin mahdolliset oikeudenkäyntikulut kuulunevat täytäntöönpanokuluina korvattaviksi.²⁹

²⁶ Laajemmin ks. HE 54/2002 vp laiksi sananvapauden käyttämisestä joukkoviestinnässä ja eräiksi siihen liittyviksi laeiksi s. 75–78; *Innanen – Saarimäki* 2012 s. 331–334.

²⁷ LaVL 5/2005 vp s. 8–9; *Päivärinte* DL 2013 s. 208–209. Laajemmin ks. *Päivärinte* DL 2013 s. 204–214; *Marika Siiki*: Tietoyhteiskunnan tekijänoikeusdirektiivin 8 artiklan menettelysääntöjen täytäntöönpano Suomessa. *Defensor Legis* 2009 s. 172–185, s. 177–178; *Kristiina Harenko* ym.: Tekijänoikeus. Kommentaari ja käsikirja. WSOYpro. 2006 s. 539–545.

²⁸ *Päivärinte* DL 2013 s. 204–205. Hylkäävä päätös annettiin vastikään, ks. HelKO 28.11.2012 (H 12/57279). Tätä edeltävistä lähteistä niin ikään ilmenee, että kaikki hakemukset oli hyväksytty, ks. HE 235/2010 vp s. 14; HelKO 11.6.2012 (H 11/51554) s. 14; *Petteri Järvinen*: Näin piraatti kärkehtää. *Tietokone* 8/2009 s. 42; *Siiki* 2009 s. 177 alaviite 51. Vrt. telepakkokeinoasioissa vuosittain noin 3500 lupahakemuksesta hylätään (vain) noin 10, ks. *Johanna Niemi – Virve-Maria de Godzinsky*: Oikeusturva telepakkokeinoasioissa. *Lakimies* 2009 s. 555–574 s. 567–570. Niin ikään monet päätösten perustelut olivat hyvin kaavamaisia, ja tilanne on tutkimuksen (aineisto oli vuodelta 2005) jälkeen huomattavasti kohentunut (*Juha Haapamäki*: Poliisin salaisen tiedonhankinnan valvonnasta. Teoksessa *Eduskunnan oikeusasiamies* 90. 2009 s. 191–201, s. 195–196). Vastaavasti telepakkokeinoista ja myös vangitsemisasiota koskevista oikeudenkäynneistä ks. *Matti Kuuliala*: Tuomioistuimen roolit ja rutiinit. *Lakimies* 2006 s. 727–749, s. 734–738.

²⁹ *Harenko* ym. 2006 s. 544–545. Tähän viittaa myös se, että hakemuksissa on oikeudenkäyntikulut-otsikon alla todettu hakijoiden vastaavan täytäntöönpanosta aiheutuvista kuluista,

Yksityisille luovuttamisessa tyypillistä on, että tietoja voi käyttää hyväksi vain määriteltyn käyttötarkoitukseen, eikä yleinen hyväksikäyttö ole mahdollista. Sekä SananvapL 17 §:ää että TekL 60 a §:ää sovelletaan useita kymmeniä kertoja vuodessa.³⁰ Keskityn kuitenkin tässä vain viimeksi mainittuun.

Tekijänoikeuslain säännöksen taustalla olevat direktiivit eivät velvoita jäsenvaltioita säätämään oikeudesta saada tunnistamistietoja siviiliprosessissa. Jos tästä on kuitenkin säädetty, se on toteutettava niin, että perusoikeuksien välillä vallitsee asianmukainen tasapaino.³¹ Useissa EU-maissa yksityisten välisestä luovutusvelvollisuudesta on säännöksiä.³²

Yksityisten välillä perusoikeusarvioinnin lähtökohdaksi tulee ottaa horisontaalinen yksilöiden välinen suhde: oikeudenhaltijan omaisuudensuoja vastaan väitetyn loukkaajan yksityiselämän suoja ja sananvapaus.³³ Omaisuudensuojalle voitaisiin pyrkiä hakemaan tukea myös vertikaalirelaatiosta, sillä onhan tekijänoikeusrikos kriminalisoitu, ja julkisen vallan tulisi yleisen järjestyksen nimissä torjua rikollisuutta ja toisaalta myös edistää omaisuudensuojan toteutumista.³⁴ Kuitenkin perusoikeudet ensisijaisesti rajoittavat rikosoikeudellisten keinojen käyttöä, ja ne voivat vain toissijaisesti perustella kriminalisointeja, jos muut keinot eivät ole osoittautuneet riittäviksi.³⁵ Aiemmin kriminalisointi näh-

ks. esimerkiksi HelKO 28.11.2012 (H 12/57279), hakemus s. 9. Laskutetut kulut ovat ilmeisesti tyypillisesti suuruusluokaltaan 60–250 euroa (HE 235/2010 vp s. 20).

³⁰ TekL 60 a §:n soveltamista kuvaa se, että vuonna 2008 tehtiin 55 hakemusta ja vuonna 2009 82 hakemusta (HE 235/2010 vp s. 14). Helsingin käräjäoikeuteen tehtiin hakemuksia vuonna 2011 95 kpl, vuonna 2012 87 kpl ja vuonna 2013 kesäkuun alkupuolelle mennessä 21 kpl (Helsingin käräjäoikeus, sähköposti 13.6.2013). SananvapL 17 §:n mukaisia asioita tuli Helsingin käräjäoikeuteen vuonna 2012 noin 40–50 kappaletta (Helsingin käräjäoikeus, osastonjohtaja Sirkka Jäntti, sähköpostit 3.6.2013). Viimeksi mainitut hakemukset ilmeisesti miltei poikkeuksetta liittyvät esitutkintaan (ks. esimerkiksi HelHO 12.9.2012 (R 12/1519)).

³¹ EUT 19.4.2012, *Bonnier Audio* (C-461/10), 52–60 kohta; EYT 19.2.2009, *LSG v Tele2* (C-557/07), 28–29 kohta; EYT 29.1.2008, *Promusicae v Telefonica Espana* (C-275/06), 62–70 kohta.

³² *Irini A. Stamatoudi*: Data Protection, Secrecy of Communications and Copyright: Conflicts and Convergences – The Example of *Promusicae v. Telefonica*. Teoksessa Irini A. Stamatoudi (ed.): Copyright enforcement and the Internet. Kluwer Law International s. 199–231, s. 223–230.

³³ Tekijänoikeuden perusoikeussuoja ei ole ehdoton ja sitä voidaan tarkastella monipuolisesti ja kriittisesti. Kokoavasti ks. esimerkiksi *Taina Pihlajarinne*: Internetvälittäjä ja tekijänoikeuden loukkaus. Lakimiesliiton Kustannus. 2012 s. 31–46; *Heikki Kemppinen*: Uusi tekijänoikeus? Näkemyksiä tekijänoikeuden suhteesta perus- ja ihmisoikeuksiin. Pro gradu -tutkielma. Valtiosääntöoikeus. Oikeustieteellinen tiedekunta. Helsingin yliopisto. 2011 erit. s. 54–62.

³⁴ Perusoikeuksista voidaan johtaa velvoite säätää kriminalisointeja, jotka ovat välttämättömiä perusoikeuden turvaamiseksi ulkopuolisilta loukkauksilta (PeVL 23/1997 vp s. 2–3). Julkiselle vallalle voidaan niin ikään hahmottaa velvoite riittävän turvaamistason tarkkailijana (*Pekka Lämsineva*: Perusoikeudet ja varallisuussuhteet. Suomalaisen Lakimiesyhdistyksen julkaisuja. A-sarja N:o 235. 2002 s. 134–135, 140).

³⁵ *Veli-Pekka Viljanen*: Perusoikeuksien rajoittaminen. Teoksessa Pekka Hallberg ym.: Perusoikeudet. 2. uud. p. WSOYpro. 2011 s.139–170, s. 160; *Veli-Pekka Viljanen*: Perusoikeuksien rajoitusedellytykset. WSLT. 2001 s. 340–345.

tiinkin ennen muuta perusoikeuksia toteuttavaksi kuin niitä rajoittavaksi toimeksi, mutta lähtökohta on sittemmin muuttunut.³⁶

Näin ollen suhtaudun torjuvasti vertikaali-intressin käyttämiseen rajoittamista puoltavana seikkana, etenkin kun kyse on asianomistajarikoksesta ja kun julkisella vallalla on myös yksityiselämän suojan turvaamisvelvollisuus. Koska kriminalisointi on toteutettu oikeudenhaltijan intressin vuoksi, olisi kehäpäätelmä käyttää rikollisuuden torjumista sinänsä oikeudenhaltijan perusoikeuden turvaamista puoltavana argumenttina. Tekijänoikeussuoja ei liene turvallisuuden verrannollinen yhteiskunnan kannalta tärkeä kollektiivinen intressi.³⁷ Näennäisestä osittaisesta vertikaaliasetelmasta huolimatta punninta tulisi suorittaa yksinomaan horisontaalisuhteessa.

3.2. Yksiasianosaisprosessin ongelmia ja vertailu telepakkokeinoihin

TekL 60 a §:n keskeisin arviointikriteeri on merkittävyyskynnys, eli se, onko teleliittymästä saatettu yleisön saataville tekijän oikeuksien suojan kannalta merkittävässä määrin tekijänoikeuden suojaamaa aineistoa. Tämä kriteeri jäi lainsäädännössä kokonaan tuomioistuimen arvioitavaksi.³⁸ Ongelma korostuu, koska kyse on hakemusasiasta, jossa on vain yksi asianosainen, hakija oikeudenhaltijan edustajana.³⁹ Internet-operaattori on asiaan osallinen (kuultava), eikä hakijalla ole vastapuolta, jolla olisi intressiä riitauttaa hakijan vaatimuksia tai hakea muutosta kyseenalaisiin päätöksiin.⁴⁰ Koska liittymän haltijaa ei vielä tiedetä, häntä ei voida kuulla, ja tältä osin asiassa on runsaasti yhtymäkohtia salaisten telepakkokeinojen käyttöedellytysten tuomioistuinkäsittelyyn.

Hakemusasiassa tuomioistuin arvioi esitetyn vaatimuksen hyväksymisen edellytyksiä.⁴¹ Tässä roolissa väitetyt loukkaajan »puolustajana» toimii tuomioistuin itse vastaavalla tavoin kuin salaisissa telepakkokeinoasioissa.⁴² Pakkokei-

³⁶ *Sakari Melander*: Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset. Suomalaisen Lakimiesyhdistyksen julkaisuja. A-sarja N:o 288. 2008 s. 158–159. Laajemmin kriminalisoinnista, viimesijaisuudesta ja perusoikeuksista ks. mts. 94–97, 157–160, 344–346, 395–402.

³⁷ Esimerkiksi televalvontaan oikeuttavilta rikoksilta edellytetään, että ne ovat törkeystasoltaan yhteiskunnan tai yksilön turvallisuutta vaarantavia, joista esimerkkeinä mainitaan törkeät väkivalta- ja valtiopetosrikokset tai huumausainerikokset (PeVL 67/2010 vp s. 4 ja lähemmin jäljempänä alaviite 67).

³⁸ Säännös lisättiin vasta eduskunnan lakivaliokunnassa, eikä myöskään esitöistä ole juuri apua tulkinnassa.

³⁹ Yksiasianosaisuudesta laajemmin ks. esimerkiksi *Matti Kuuliala*: Edunvalvontaan esitetyn kuuleminen alioikeudessa. Suomalaisen Lakimiesyhdistyksen julkaisuja. A-sarja N:o 303. 2011 s. 98–113.

⁴⁰ Internet-operaattori voisi toki myös katsoa periaatteellisesti tärkeäksi vastustaa ja tarvittaessa hakea muutosta kyseenalaisiin päätöksiin, mutta tällainen aktivismi voisi aiheuttaa kustannuksia henkilötyönä ja oikeudenkäyntikuluina, ja operaattorin olisi harkittava, onko tämä liiketoiminnallisesti perusteltua.

⁴¹ *Tuula Linna*: Hakemuslainkäyttö. Juridica-kirjasarja. Talentum. 2009 s. 24.

⁴² Vastaavasti ks. *Päivärinne* DL 2013 s. 212 erit. alaviite 111.

nojen yhteydessä korkein oikeus on edellyttänyt, että tuomioistuimen tehtävänä on valvoa epäillyn ja sivullisten etuja silloin, kun ne eivät itse sitä voi tehdä.⁴³ Tällainen tilanne ei ole aiemmin tullut hakemuslainkäytössä nimenomaisesti esiin, koska kaikki intressantit ovat asiaan osallisia ja heille varataan kuulemis-tilaisuus, ja näin mahdollisuus osallistua asian käsittelyyn turvataan.⁴⁴ Hakemuslainkäytön periaatteiden soveltuminen tällaisissa tapauksissa onkin hiukan kyseenalaista, ja samankaltaisuuksien vuoksi analoginen tulkinta pakkokeinoasioista voisi olla tarpeen. Esimerkiksi telepakkokeinoja koskevat asiat on käsiteltävä istunnossa, jotta tuomarilla olisi edellytykset selvittää pakkokeinon lainmukaisia edellytyksiä, mutta vastaavaa edellytystä tunnistamistietojen luovuttamisen osalta ei ole.⁴⁵ Eräissä tapauksissa telepakkokeinoasioissa eräänlaiseksi puolustajaksi määrätään erityinen julkinen asiamies, jonka roolia tulisi kuitenkin tehostaa ja käytön alaa laajentaa.⁴⁶

Laillisuusvalvojen suorittama »valvonnan valvonta» on oikeudenkäyntiin nähden pakostakin yleisluontoista.⁴⁷ Pakkokeinolakia säädettäessä eduskunta edellytti hallitukselta selvitystä siitä, tulisiko nykyisten valvontajärjestelmien lisäksi perustaa erityinen asiantuntijoista koostuva toimielin, joka valvoisi esitutkintaviranomaisten toimintaa.⁴⁸

Yksipuolinen prosessi, jossa ratkaisut eivät päädy ylempien oikeusasteiden arvioitavaksi eikä oikeuskäytäntö yhdenmukaistu tai joudu kriittisen arvioinnin kohteeksi, vaikuttaa kyseenalaiselta väitetyyn loukkaajan oikeusturvan ja oikeuskäytännön kehittymisen näkökulmasta. *De lege ferenda* luovuttamisessa tulisi vahvemmin soveltaa salaisiin pakkokeinoihin liittyviä periaatteita tai harkita,

⁴³ KKO 2009:54, 9 kohta; KKO 2007:7, 4–6 kohta. Laajemmin »ex-parte» -prosessin oikeusturvasta vastaavassa asiayhteydessä ks. *Tuomas Metsäranta: Yksilön oikeusturva pakkokeinolain mukaisten telekuuntelun ja teknisen kuuntelun käytössä*. Pro gradu -tutkielma. Valtiosääntöoikeus. Oikeustieteellinen tiedekunta. Turun yliopisto. 2009 s. 40–49.

⁴⁴ *Linna* 2009 s. 20–21. Asiaan osallisen kuulemisvelvollisuuden tarkoitus voidaan hahmottaa asian selvittämiseen tai oikeusturvatarpeeseen, jolla viitataan aineellisen lainsäädännön suojaamaan intressiin asiassa (*Kuuliala* 2011 s. 103–104). Nyt käsillä olevassa lainsäädännössä ei ole tästä säännöksiä. Yleisesti ottaen kuulemisen merkitystä on korostettu etenkin silloin, kun hakemuksella pyritään puuttumaan yksilön perusoikeuksiin (mts. 113).

⁴⁵ Tunnistamistietojen luovuttamisen hakemusasioille poikkeava telepakkokeinon van- gitsemisjärjestyksessä käsiteltävistä erillisasioista, joten prosessuaaliset lähtökohdat asioiden käsittelylle ovat erilaisia (*Linna* 2009 s. 88–89, 94). Nyt käsillä olevat hakemusasiat käsitellään pääsääntöisesti kansliassa, vaikka asia olisikin riittävä, mutta ne käsitellään istunnossa tuomioistuimen niin harkitessa tai jos joku asiaan osallinen sitä vaatii (mts. 151–156).

⁴⁶ PeVL 67/2010 vp s. 10; *Klaus Helminen* ym.: Esitutkinta ja pakkokeinot. Uudistettu laitos. Talentum. 2012 s. 718–719, 1076–1077 (*Helminen* ym. 2012a); *Metsäranta* 2009 s. 45–48; *Kuuliala* LM 2006, s. 736.

⁴⁷ *Haapamäki* 2009 s. 195–196, 199–200; *Jukka Lindstedt: Turvallisuus, kontrollipolitiikka ja laillisuusvalvonta*. Lakimies 2007 s. 1006–1037, s. 1029–1031. Ensisijainen kontrollimekanismi pakkokeinon osalta tulisi olla poliisin sisäinen valvonta ja esimiestyö (*Haapamäki* 2009 s. 197–199).

⁴⁸ PeVL 67/2010 vp s. 3; LaVM 44/2010 vp lausumat. Selvitystyö on ollut tarkoitus aloittaa ennen uuden pakkokeinolain voimaantuloa, mutta se on lykkäätynyt kiireellisempien pakkokeinolain muutosten vuoksi (Hallituksen vuosikertomus 2012. Osa 4/4: Toimenpiteet eduskunnan lausumien ja kannanottojen johdosta. Hallituksen julkaisusarja 4/2013 s. 31–32).

olisivatko tavoitteet toteutettavissa pakkokeinosäätelyn avulla kysymysten erityispiirteiden vuoksi huonosti soveltuvan hakemuslainkäytön asemesta. Niin ikään valvontaelimen, julkisen asiamiehen tai muun puolustajan käyttö voisi olla tarkoituksenmukaista.

3.3. Merkittävyyskynnyksestä erityisesti Chisugate-tapauksessa

TekL 60 a §:n mukaiset hakemukset ovat perinteisesti kohdistuneet yli tuhannen musiikkikappaleen jakamiseen, mutta tuoreemmissa ratkaisuissa, kun käytössä on ollut toinen vertaisverkkotekniikka, kysymystä on jouduttu arvioimaan uusista lähtökohdista.⁴⁹ Uudemmassa oikeuskäytännössä on huomioitu ainakin teoksen uutuusaste ja sen tuottamiseen ja markkinointiin käytetyt varat sekä se, kuinka laajasti teos on ollut saatavilla.⁵⁰ Keskeisempää kuitenkin olisi se, kuinka kauan kyseisestä liittymästä on jaettu teosta, mikä monissa tapauksissa korreloi myös jakamisesta aiheutuneisiin taloudellisiin tappioihin eli siihen, kuinka paljon teosta on kopioitu tai kuinka monella on ollut mahdollisuus ladata teos.⁵¹ Tällaista selvitystä tai argumentaatiota ei kuitenkaan ole tiettävästi esitetty.⁵²

Chisugate-tapauksessa hakemuksessa vedottiin levyjulkaisun merkittävyyteen, ensimmäisen kuukauden aikaisten tulojen osuuteen kokonaismyyntitulosta ja julkaisuun suositussa The Pirate Bay -palvelussa.⁵³ Täydennyslausemassa

⁴⁹ Aiemmin laajemmassa käytössä olleessa DirectConnect-tekniikassa oikeudenhaltijan on ollut mahdollista helposti selvittää jonkun käyttäjän jaossa olevien tiedostojen määrä (*Päivärintne* DL 2013 s. 210; *Siiki* DL 2009 s. 177). Nykyisin yleisemmässä BitTorrent-tekniikassa oikeudenhaltijan on hankalaa selvittää kaikkia käyttäjän jakamia teoksia, mutta teoskohtaisesti on mahdollista selvittää sen jakajat, ja tästä johtuen valvonta onkin kohdistunut yksittäisiin uutuuslevyihin. BitTorrent-tekniikkaa koskevissa luovuttamismääräyksissä jaettujen tiedostojen määrä onkin ollut varsin vähäinen, 9–15 kappaletta, eli ilmeisesti kyse on ollut ainoastaan yhdestä musiikkialbumista. (*Päivärintne* DL 2013, s. 210–211.)

⁵⁰ *Päivärintne* DL 2013 s. 211–212.

⁵¹ On ilmeistä, että jakaminen muutamien kymmenien minuuttien tai tuntien ajan (esimerkiksi silloin, kun käyttäjä itsekkin lataa teosta) on merkitykseltään mitätöntä verrattuna siihen, että teos on aktiivisessa jaossa esimerkiksi kuukauden ajan. Toisaalta yksittäisen albumin pitkäkestoinen jakaminen on niin ikään laajemmassa tarkastelussa vähämerkityksellistä huomattavia teosmääriä käsittävään laajamittaiseen jakamiseen verrattuna, vaikkakin yksittäisen jakajan ja oikeudenhaltijan välisessä relaatiossa muiden oikeudenhaltijoiden teoksiin kohdistuneella jakamisella ei liene merkitystä. Ainoassa hylätyssä tapauksessa käräjäoikeus katsoi, ettei lataaminen (oikeastaan jakaminen) 86 kertaa voi yksinään tai yhdessä uutuusjulkaisun jakamisen kanssa täyttää merkittävässä määrin -kriteeriä, ks. HelKO 28.11.2012 (H 12/57279) s. 7–8 ja hakemus s. 6; *Päivärintne* DL 2013 s. 213.

⁵² Monitorointimahdollisuuksista laajemmin ks. esimerkiksi *Tom Chothia* ym.: *The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent*. Teoksessa *Security and Privacy in Communication Networks. Lecture Notes of the Institute for Computer Sciences, Social Informatics and Telecommunications Engineering*. Volume 106. 2013 s. 185–202 ja siinä mainitut lähteet; *Scott Wolchok – J. Alex Halderman: Crawling BitTorrent DHTs for Fun and Profit*. Teoksessa *Proceedings of the USENIX Workshop on Offensive Technologies (WOOT)*. 2010. Jo nyt valvontakampanjat saattavat kestää päiviä tai viikkoja (HelKO 28.11.2012 (H 12/57279), hakemus s. 6), mutta kunkin jakajan osalta tuloksia raportoidaan vain yksittäisen havainnon tai koelatauksen ajankohdan perusteella.

⁵³ HelKO 5.1.2012 (11/47251), hakemus s. 7–8.

todettiin, että merkittävässä määrin -kriteeri täyttyisi jo sillä perusteella, mikä taloudellinen merkitys hakemuksessa yksilöidyllä albumilla oli hakijoille ja että aineiston kappalemäärä yksinään ei olisi edellytyksenä kriteerin täyttymiselle.⁵⁴ Jos tarkasteltaisiin 67 jakajan yhteisvaikutusta, kokonaisuutena kriteeri saattaisi mahdollisesti täytyä.⁵⁵ Kuitenkin kyse on perusoikeusarvioinnista, jossa vastakkain on kukin yksittäinen jakaja ja oikeudenhaltija, ja lisäksi TekL 60 a §:n esitöiden ja miltei vastaavasti säännöksen sanamuodon mukaan merkittävyyttä tulee arvioida liittymäkohtaisesti (korostus lisätty):

»Sen mukaan tietoja voitaisiin luovuttaa vain sellaisen *liittymän* osalta, *josta* tekijän oikeuksien suojan kannalta merkittävässä määrin saatetaan yleisön saataviin tekijänoikeutta loukkaavaa aineistoa.»⁵⁶

Tässä tapauksessa käräjäoikeus täydennyspyyntöä muotoillessaan ilmeisesti tunnisti ko. »yksilöidystä teleliittymästä» -kriteerin, vaikka lopulta hyväksyi-kin vaatimuksen sen kummemmin perustelematta.⁵⁷ Merkittävyyttä tekijän oikeuksien suojan kannalta argumentointiin edellä kuvatulla tavalla, mutta toisessa vaakakupissa olisi syytä pitää muun muassa kunkin yksittäisen jakajan merkitys tekijän oikeuksien suojan kannalta, tekijän taloudellinen asema ja julkaisun kaupallisen menekin väheneminen tai perusteltu arvio siitä.⁵⁸

Teoksen lyhytaikainen jakaminen ei ole, varsinkaan nimenomaan yksittäisen jakajan ja oikeudenhaltijan välisessä relaatiossa, kovin merkittävää tekijän oikeuksien suojan kannalta, mutta hyvin pitkäaikainen jakaminen voi sitä olla.⁵⁹ Yksilötarkastelussa ei ole myöskään merkitystä sillä, kuinka paljon jakajia ky-

⁵⁴ HelKO 5.1.2012 (11/47251), täydennyslausuma 8.12.2011 s. 3–4. Yleisesti ottaen oikeudenhaltijat ovat pyrkineet perustelevaan kriteerin täyttymistä muun muassa 1) vastikään julkaistulla teoksella, joka on vuoden tärkeimpiä julkaisuja, 2) teoksen tuottamiseen ja markkinointiin käytetyillä investoinneilla, 3) uusien teosten ensimmäisen kuukauden aikana tapahtuvan myynnin merkityksellä kokonaisympäristön kannalta, 4) jakamisella suosituksissa tiedostonjalkopalvelussa eli kohdeyleisön laajuudella ja 5) sillä, että merkittävässä määrin -kriteeri täyttyisi jo oikeudenhaltijan subjektiivisen taloudellisen merkityksen vuoksi (*Päivärinte* DL 2013 s. 211).

⁵⁵ Vrt. kuitenkin alaviitteessä 51 mainittu kielteinen päätös, jossa katsottiin, ettei 86 jakajaa täyttänyt edellytyksiä.

⁵⁶ LaVL 5/2005 vp s. 9.

⁵⁷ HelKO 5.1.2012 (11/47251), täydennyslausuma 8.12.2011 s. 3. Yleisesti ottaen kriteerin täyttymistä on perusteltu ratkaisussa heikosti tai ei lainkaan, vaikka asianmukaisiin perusteluihin olisi oikeudellisen tulkinnanvaraisuuden ja yksityisyyden suojan vuoksi erityinen syy (*Päivärinte* DL 2013 s. 213–214).

⁵⁸ Menestyneelle ja kymmeniä tai satoja tuhansia teoskappaleita myyneelle tekijälle merkittävyyskynnys lienee syytä pitää korkeammalla kuin silloin, jos kyse on pienemmästä julkaisusta, jolloin suhteessa vähäisempikin jakaminen voi vaikuttaa tekijän oikeuksien suojan kannalta erityisen haitallisesti.

⁵⁹ Tapauksessa ei tarkasteltu jakamisen ajallista kestoa, ja näin ollen on mahdotonta myöskään eritellä, kenen jakajien toimet olivat merkittäviä tekijän oikeuksien suojan kannalta. Oikeudellinen yhdenvertaisuus edellyttää, että samanlaiset tapaukset ratkaistaan samalla tavalla, kun taas erilaiset tapaukset eri tavalla. Tässä tapauksessa loukattiin viimeksi mainittua yksilöllistävän oikeudenmukaisuuden vaatimusta, kun kaikkia jakajia käsiteltiin niiden loukkauksen merkittävyyttä erittelemättä samalla tavalla.

seistä aineistoa jakavassa ryhmässä on.⁶⁰ Niin ikään teoksia kyseisestä jakajaryhmästä ladanneiden käyttäjien määrällä ei tulisi olla yksilötarkastelussa ratkaisevaa merkitystä.⁶¹ Taloudellisista näkökohdista huomionarvoista on se, kuinka suuri prosentuaalinen tai absoluuttinen tappio laittomasta jakamisesta voisi arvion mukaan aiheutua.⁶² Tässä tapauksessa muutama päivä hakemuksen vireille panemisen jälkeen albumi oli reilun kuukauden kuluessa ilmestymisestä »myynyt tuplaplatinaa» (40 000 kpl).⁶³ Kun otetaan huomioon artistin aiempi menestys ja ennätysellinen myynti jo hakemusta vireille pantaessa, ensimmäisen vuorokauden aikana 67 jakajaa voidaan pitää määrältään jopa yllättävän vähäisenä, sillä jos jokainen lataaja toimii useimmiten myös jakajana, lataajia-kaan ei ilmeisesti ollut kovin paljon enemmän. Niin ikään kunkin yksittäisen jakajan ja oikeudenhaltijan välisessä perusoikeusarvioinnissa kunkin jakajan jakamisen ajallista kestoja tai muuta merkittävyyttä ei eritelty ja sen merkitys olisi ilmeisesti joka tapauksessa ollut vähäinen.

Näin ollen jakajien toiminnalla tuskin oli kovin merkittävää vaikutusta lopputulokseen.⁶⁴ Tapauksessa ei ollut viitteitä eri intressejä punnitsevasta koko-

⁶⁰ Itse asiassa mitä enemmän jakajaryhmässä (»swarm») on jakajia, sitä vähäisempi on yksittäisen jakajan ja teleliittymän merkitys. Tästä näkökulmasta hyvin pienissä jakajaryhmissä yksittäisen jakajan merkitys on suurempi. Kokonaisloukkauksen tarkastelu edellyttäisi tulkittaa sanamuodon vastaisesti ja muutenkin kyseenalaisesti tapauksen KKO 2010:47 14–22 kohdan ja KKO 2010:48 9–14 kohdan rikosoikeudellista osallisuusoppikonstruktiota vastaavasti hyödyntävällä tavalla. Korkeimman oikeuden tapauksissa kyse oli kuitenkin tiedostonjakopalvelun ylläpitäjien ja palveluun kuvaustiedostojen lisänneen käyttäjän vastuusta, ja oikeusohje ei sellaisenaan soveltune varsinkaan hetkelliseen aineiston jakamiseen tai soveltaminen vähintään edellyttäisi perusteellista tarkastelua.

⁶¹ Oikeudenloukkaus on toki sinänsä merkittävämpi, mitä enemmän jaettua teosta kokonaisuudessaan jakajaryhmästä ladataan. Merkittävyyskynnyksen on katsottu täyttyneen, jos jakajaryhmästä ladattiin teosta yli tuhat kertaa kuukaudessa silloin, kun kyseinen jakaja oli aktiivinen tai viimeistään seuraavien kuukausien aikana (HelKO 10.6.2013 (H 13/20791) s. 10–11). Tämä ei kuitenkaan vielä osoita, että kyseisestä teleliittymästä olisi jaettu aineistoa merkittävässä määrin. Kriteerin täytyminen edellyttäisi edellä mainittua rikosoikeudelliseen osallisuusoppiin perustuvaa konstruktiota, johon hakijat tapauksessa analogisesti vetosivatkin, mutta jota ei käsitelty ratkaisun perusteluissa (mts. 6).

⁶² Koska on mahdotonta tietää, kuinka paljon teoksia myytäisiin ilman laitonta jakamista, tämän vaikutusta on tyydyttävä arvioimaan (vastaavasti ks. *Päivärinte* DL 2013 s. 212, erit. alaviite 108). Ainoassa hylätyssä hakemuksessa käräjäoikeus katsoi, etteivät hakijat olleet esittäneet selvitystä jakamisen vaikutuksesta levyn myynnille, vaikka sitä olisi ollut esitettävissä, ks. HelKO 28.11.2012 (H 12/57279) s. 7; *Päivärinte* DL 2013 s. 213.

⁶³ HelKO 5.1.2012 (11/47251), täydennyslausuma 8.12.2011. Lokakuisesta julkaisuajankohdasta huolimatta kyse oli toiseksi eniten myydyistä kotimaisista albumista vuonna 2011 (63 429 kappaletta), ks. *IFPI: Myydyimmät kotimaiset albumit vuonna 2011*. Artistin edellinen albumi oli myynyt samana vuonna tuplaplatinaa kokonaisuutensa ollessa tähän mennessä reilut 50 000 kpl.

⁶⁴ Oikeastaan vaikutus on saattanut olla jopa positiivinen, koska eräiden osin kiisteltujen tutkimusten mukaan jakaminen lisää levymyyntiä ja vertaisverkkoa käyttävät joka tapauksessa kuluttavat musiikin ostamiseen keskimääräistä enemmän varoja, ks. esimerkiksi *Luis Aguiar – Bertin Martens: Digital Music Consumption on the Internet: Evidence from Clickstream Data*. European Commission Joint Research Center Technical Reports. Institute for Prospective Technological Studies. Digital Economy Working Paper 2013/04; *Robert G. Hammond: Profit Leak? Pre-Release File Sharing and the Music Industry*. SSRN working papers series (last

naisarvioinnista.⁶⁵ Myös perusoikeusnäkökulmasta punninta omaisuudensuojan, yksityiselämän suojan ja sananvapauden välillä olisi johtanut toiseen lopputulokseen.

4. Tunnistamistietojen luovuttaminen viranomaisille

4.1. Kontrollipolitiikan tiukentamisesta yleisen edun nimissä

Perusoikeuksien rajoittamista voidaan tarkastella yksityisten välisten horisontaalisuhteiden ohella myös yhteiskunnallisista intresseistä käsin. Näistä tärkein lienee rikollisuuden torjunta laajasti ymmärrettynä, ja useimmat horisontaaliset perusoikeusloukkaukset ovatkin tavalla tai toisella kriminalisoituja. 2000-luvun alussa huomio keskittyi erityisesti varsin vakaviin ja erityisluonteisiin rikoksiin kuten terrorismiin, mutta myös esimerkiksi huumausainerikosten tai järjestäytyneen rikollisuuden torjunnan on toisinaan katsottu vaativan järeitä keinoja.⁶⁶ Yksilön tai yhteiskunnan turvallisuutta vaarantaviksi katsotaan muun muassa törkeät väkivalta- ja valtiopetosrikokset sekä jopa perusmuotoiset huumausainerikokset.⁶⁷ Erilaisten uhkien jälkeen usein esitetään uusia tiedonhankinta-, säilytys- tai luovutuskeinoja, ja kontrollipolitiikka on tiukentunut muun muassa pakkokeino- ja poliisilakien muutoksissa: pakkokeinojen määrä on kasvanut, soveltamisala on laajentunut ja teknisen kehityksen myötä ne ovat myös saaneet uuden sisällön.⁶⁸

2000-luvun alussa käytiin vilkasta keskustelua henkilökohtaisen turvallisuuden ja muiden perusoikeuksien rajoittamisesta arvioitaessa asiaa rajoitusperusteen hyväksyttävyyden näkökulmasta.⁶⁹ Perustuslakivaliokunta korosti, että yhteiskunnallinen intressi soveltuu rajoitusperusteeksi vain ääritapauksessa ja

revised 3.4.2013); *Joe Karagani – Lennart Renkema: Copy Culture in the US & Germany*. The American Assembly. Columbia University. 2013; *TorrentFreak.com: Sony Music Boss: Censored YouTube Videos Cost Us Millions* (24.2.2012).

⁶⁵ Vain yhdessä tapauksessa on pyritty vakavasti otettavaan kokonaisarviointiin ja epäillyn ja operaattorille aiheutuvien haittojen huomiointiin, ks. *Päivärinte* DL 2013 s. 212–213; HelKO 28.11.2012 (H 12/57279) s. 7.

⁶⁶ Laajemmin kontrollin lisääntymisestä ks. *Lindstedt* LM 2007 s. 1008–1018. Tällainen kriminaalipolitiikka ja sen toimivuus on kuitenkin kyseenalaistettavissa (*Tapio Lappi-Seppälä: Kriminaalipolitiikka – rikosoikeuspolitiikka*. Lakimies 1998 s. 1285–1308, s. 1303–1306). Uudeksi haasteeksi on viime aikoina mainittu myös kyberturvallisuus.

⁶⁷ PeVL 67/2010 vp s. 4; HE 309/1993 vp s. 54.

⁶⁸ PeVL 11/2005 vp *passim*; *Lindstedt* LM 2007 s. 1018–1027; *Ojanen* LM 2007; *Ollila* LM 2005 s. 786–787, 790–791. Esimerkiksi uudessa pakkokeinolaissa televalvonnan edellytyksiä lievennettiin siten, että telesoitetta tai -päätelaitetta käyttäen tehdystä rikoksesta edellytetään aiemman neljän vuoden asemesta vain vähintään kahden vuoden rangaistusmaksimia ja vastaavissa olosuhteissa suostumusperusteisen televalvonnan edellytykset poistuivat kokonaan.

⁶⁹ Laajemmin ks. *Viljanen* 2001 s. 159–184. Tästä tiivistetysti ks. *Länsineva* 2002 s. 137–140.

että muidenkin yleisten rajoitusedellytysten tulee samalla täytyä.⁷⁰ Vaikka intressi katsottaisiinkin sinänsä joissain rajoissa hyväksyttäväksi, sen täytyisi läpäistä myös muut osatestit ja erityisesti suhteellisuustesti. Perusoikeuksien turvaamisvelvoite ei voi myöskään toimia rajoitusten yleisenä legitimaatioperusteena eikä jonkin perusoikeuden kuten henkilökohtaisen turvallisuuden päätehtävänä voi olla muiden perusoikeuksien rajoitusten legitimoiminen. Oikeus henkilökohtaiseen turvallisuuteen (yksilöllisenä oikeutena) tulisikin pitää mahdollisimman pitkälle erillään yleisen järjestyksen ja turvallisuuden (kollektiivinen hyvä) käsitteistä.⁷¹

Turvallisuutta edistäviä toimenpiteitä voidaan oikeuttaa ainakin ehdottomien perusoikeuksien turvaamisella, mutta oletettujen ja etäisten uhkakuvien mukaan toimiminen on torjuttava, sillä tällöin tarkkailusta voi aiheutua laajempia ongelmia kuin uhkakuvista.⁷² Toisaalta positivistisesta näkökulmasta eduskuntalailla tapahtuva kontrollipolitiikan lisääminen turvallisuuden nimissä voidaan nähdä sinänsä legitimiinä.⁷³ Perustuslakivaliokunta ei uutta pakkokeinolakia ja poliisilakia säädettäessä hyväksynyt televalvonnan laajentamista kaikkiin teleosoitteita tai päätelaitteita käyttäen tehtäviin rikoksiin, koska kaikilta osin kyse ei enää ollut yksilön ja yhteiskunnan turvallisuutta vaarantavista, aiempaa törkeysastetta vastaavista rikoksista. Kannanottoa voidaan tosin pitää siinä mielessä ponnettomana: sen yleisluontoisuus johti siihen, että tältä osin edellytetty rangaistusmaksimi aleni vähintään kahdeksi vuodeksi vankeutta. Tämä tosiasiassa toi valvonnan piiriin huomattavan määrän sellaisiakin rikoksia, jotka eivät kriteereiltään vastanneet aiemman pakkokeinolain sääntelyä tai perustuslakivaliokunnan esittämää törkeysedellytystä.⁷⁴

4.2. Luovuttaminen rikosten selvittämiseksi ja muihin tarkoituksiin

Asianomistajan ohella pidättämiseen oikeutettu virkamies tai syyttäjä voi vaatia tuomioistuimelta SananvapL 17 §:n mukaista tiedon luovuttamista. Säännöstä

⁷⁰ PeVL 5/1999 vp s. 2. Laajemmin ks. *Viljanen* 2001 s. 175–178.

⁷¹ *Viljanen* 2001 s. 178–181, 184.

⁷² *Ollila* LM 2005 s. 788–791.

⁷³ *Lindstedt* LM 2007 s. 1031–1035.

⁷⁴ PeVL 67/2010 vp s. 3–5; PeVL 66/2010 vp s. 6; LaVM 44/2010 vp s. 24. Rajan valintaa perusteltiin vaikeudella poimia kattavasti niitä rikoksia, jotka olisivat tässä yhteydessä merkityksellisiä ja toisaalta neljää vuotta lievempi seuraava merkittävä rangaistusmaksimi on kaksi vuotta vankeutta. Rikoslaisia tekoja, joista voidaan tuomita alle vuosi vankeutta on 69, enintään vuosi 68, kaksi vuotta 119, kolme vuotta 12, neljä vuotta 58 ja 5–10 vuotta tai elinkausi 61. Toisaalta esimerkiksi perinteisissä väkivalta- tai anastusrikoksissa on kyse siitä, voidaanko telepakkokeinoja kohdistaa tekoon suoraan liittymättömään viestintään, kun taas tietoverkkoa käyttäen tehdyissä rikoksissa kytkentä viestintään on teon edellytys. Tästä näkökulmasta jossain määrin alempi kynnyks saattaa olla perusteltu, sillä muutoin tietoverkossa tehtyjen rikosten tutkinta voisi hankaloitua huomattavasti tai estyä kokonaan. Kuitenkin lopputulos ja tapa, jolla säännökseen päädyttiin, vaikuttaa kyseenalaiselta.

voidaan soveltaa silloin, kun tiedetään yleisön saataville saattamisesta rangaistava viesti, muttei sen lähettäjää tai tunnistamistietoja.

Poliisi voi saada Internet-palveluntarjoajilta tunnistamistietoja, jos tietoja yksittäistapauksessa tarvitaan poliisille kuuluvan tehtävän suorittamiseksi (PoL 4:3.2).⁷⁵ Tässä tapauksessa kyse on tietyllä ajanhetkellä tiettyä IP-osoitetta käyttäneen liittymän haltijan selvittämisestä. Säännöstä voidaan soveltaa minkä tahansa poliisille kuuluvan tehtävän suorittamiseen, eikä tuomioistuimen määräystä tai minkäänlaista merkittävyyssynnyksen ylittymistä edellytetä, joten se soveltuu muun ohella TekL 60 a §:n vaihtoehdoksi tai jos kyseisen säännöksen merkittävässä määrin -kriteeri ei täyty.⁷⁶ Hallituksen esityksessä viitataan aiempaan käytäntöön ja todetaan, että kyse on tavanomaisesta poliisitoimintaan liittyvästä toimenpiteestä, eikä pyyntö edellytä päällystöön kuuluvan poliisimiehen pyyntöä. Perustuslakivaliokunta ei käsitellyt asiaa.⁷⁷

Viestien tunnistamistietojen selvittäminen (televalvonta), viestien sisällön selvittäminen (telekuuntelu) ja muut tiedonhankintakeinot (esimerkiksi teleosoitteen yksilöintitietojen hankkiminen teknisellä laitteella) edellyttävät yleensä määriteltyä kynnystä, ja niistä säädetään poliisilaissa ja pakkokeinolaissa.⁷⁸ Uuden pakkokeinolain mukaan telekuunteluedellytyksin operaattorilta voidaan saada tietoja myös takavarikkona (PKL 10:4.1).⁷⁹ Telepakkokeinojen käyttöä rajoitetaan muun muassa viranomaisten toimintaa ohjaavilla periaatteilla, yleisellä edellytyksellä tuloksellisuusodotuksesta, kuuntelukielloilla ja kiellolla hyödyntää ylimääräistä tietoa (PKL 1:2–4, 10:2.1, 10:52, 10:55–57).⁸⁰ Tärkeä erityissäännös on niin ikään laitteen haltijan suostumuksella tapahtuva televal-

⁷⁵ Tämä vastaa vanhan poliisilain säännöstä (VanhaPoL 36.2 §).

⁷⁶ HE 235/2010 vp s. 6; HE 266/2004 vp laiksi poliisilain muuttamisesta ja eräksi siihen liittyviksi laeiksi s. 34–35; *Päivärinne* DL 2013 s. 215; *Helopuro* ym. 2009 s. 290–294; *Harenko* ym. 2006 s. 542; Viestintäviraston kannanotto tekijänoikeuslain 60 a §:n mukaiseen tietojen saantioikeuteen (29.11.2006), Dnro 1623/04/2006; *Rauno Korhonen*: Poliisin valvontakeinot ja kansalaisten yksityisyyden suoja. Edilex libri. Edita. 2005 s. 84–85. Vielä oman kysymyksensä muodostaa se, että esitutkinnassa asianomistaja saa joka tapauksessa tietoonsa epäillyn henkilöllisyyden (sikäli kuin poliisi sen selvittää), vaikka rikosasiana asia ei etenisi-kään. En voi kuitenkaan tarkastella tätä enemmälti.

⁷⁷ PeVL 67/2010 vp; HE 224/2010 vp poliisilaiksi ja eräksi siihen liittyviksi laeiksi s. 88; *Klaus Helminen* ym.: Poliisilaki. Talentum. 2012 s. 435 (*Helminen* ym. 2012b).

⁷⁸ Uusista laeista ks. esimerkiksi *Helminen* ym. 2012a s. 1031–1058; *Matti Tolvanen – Reima Kukkonen*: Esitutkinta- ja pakkokeino-oikeuden perusteet. Juridica-kirjasarja. Talentum. 2011 s. 333–347. Aiemmista käytännön havainnoista ks. *Niemi – de Godzinsky* LM 2009. Edellä kuvatusti televalvonnan edellytyksenä on, että eräin laajenuksin rangaistusmaksimi on vähintään neljä tai teleosoitetta käyttäen tehtyjen rikosten osalta kaksi vuotta vankeutta. Telekuuntelu on mahdollista vain ns. ylitörkeissä rikoksissa sekä muun muassa liike- tai ammatitoimintaan liittyvissä törkeissä rikoksissa.

⁷⁹ Laajemmin ks. *Helminen* ym. 2012a s. 1038–1044. Vrt. vanhan pakkokeinolain mukaan välittäjän luona tehtävä tunnistamistietoihin kohdistuva takavarikko oli määritelmällisesti telekuuntelua (*Siiki* DL 2009 s. 182–183). Kun tämä pakkokeino ei ole televalvontaedellytyksin käytettävissä, sillä ei ole juuri merkitystä tässä tarkastelussa.

⁸⁰ *Helminen* ym. 2012a s. 1128–1130, 1133–1140. Perustuslakivaliokunta myös totesi, että päätäntävaltaa on siirretty ja olisi aiheellista siirtää enemmänkin muulle kuin esitutkintaviranomaiselle. Eduskunta hyväksyi asiasta lausuman, jonka mukaan hallituksen tulee selvittää ja

vonta (PKL 10:7), jota on perinteisesti voitu käyttää muun muassa eräiden häiritäririkosten tai anastetun puhelimen viestinnän selvittämiseksi. Tämä on uudessa pakkokeinolaisissa laajentunut siten, että säännöksen 4 kohdan mukaan sitä voidaan soveltaa myös minkä tahansa telepäätelaitetta tai -osoitetta käyttäen tehdyn rikoksen selvittämiseen.⁸¹

Muista pakkokeinoista voidaan mainita teleosoitteen yksilöintitietojen hankkiminen teknistä laitetta käyttäen (PKL 10:25), mikä vastaa poliisin tiedonsaantioikeutta. Käyttö edellyttää vähintään vuoden rangaistusmaksimia ja siitä päättää pidättämiseen oikeutettu poliisimies.⁸² Niin ikään telekuunteluun verrannollisella teknisellä laitetarkkailulla voidaan suorittaa esimerkiksi näppäimistökuuntelua tai asentaa haittaohjelmia tietokoneisiin (PKL 10:23), mutta viestien tai tunnistamistietojen selvittäminen edellyttää kuitenkin muita keinoja, esimerkiksi teknistä kuuntelua.⁸³

Erityisesti tietoverkkoa käyttäen tehtyä tekijänoikeusrikosta epäiltäessä on huomionarvoista, että aiemman pakkokeinolain voimassa ollessa erityissäilytetyt tiedot ei olisi voitu hyödyntää rikoksen selvittämisessä, koska televalvonnan edellytykset eivät olisi täyttyneet. Sen sijaan voimaan tulevassa pakkokeinolaisissa televalvonnan edellytykset voisivat sinänsä täytyä.⁸⁴

Viestintävirastolla ja tietosuojavaltuutetulla on rajattu tiedonsaantioikeus tunnistamistietoihin ja viesteihin erinäisissä tietojärjestelmärikoksiin liittyvissä valvonta- ja selvitystehtävissä (SVTsL 33.3 §). Perusoikeusnäkökulmasta on huomionarvoista, että menettely ei sisällä minkäänlaisia oikeusturvakeinoja. Perustuslakivaliokunta vain totesi, että asia ei ole Suomen perustuslain (731/1999) 10 §:n näkökulmasta ongelmallinen ilmeisesti rinnastaen säännöksen hätäilmoitukseen (SVTsL 35.1 §) liittyviin hyväksyttäviin erityisiin luovu-

harkita, tulisiko salaisia tiedonhankintakeinoja koskeva ratkaisutoimivalta osoittaa tuomioistuinten toimivaltaan. Selvitystyö on käynnistymässä, ks. alaviite 48.

⁸¹ Aiemmin asiasta säädettiin suppeammin SVTsL 36.3 §:ssä ja VanhaPKL 5a:3.2:ssa. Käytännössä uudella säännöksellä poliisi voisi muun muassa aina selvittää viestinnän osapuolen suostumuksella toisen osapuolen (tai ainakin IP-osoitetta vastaavan liittymän haltijan) henkilöllisyyden. Säännöstä ei arvioitu perustuslakivaliokunnassa. Ks. HE 222/2010 vp s. 124–125, 137, 321–322; *Helminen* ym. 2012a s. 1052–1053.

⁸² HE 222/2010 vp s. 336; *Helminen* ym. 2012b s. 435. Säännöstä perusteltiin tarpeella saada selville rekisteröimättömistä liittymistä (esimerkiksi prepaid-liittymät) yksilöintitiedot televalvonta- tai kuuntelua koskevan hakemuksen tekemiseksi (HE 266/2004 vp s. 34–35).

⁸³ Laajemmin ks. HE 222/2010 vp s. 328–337; *Helminen* ym. 2012a s. 1069–1088.

⁸⁴ Mikäli tekijänoikeusrikoksen vahinkoedellytys ei täytyisi, kyse voisi olla tekijänoikeusrikkomuksesta. Käsittelen tätä luvussa 4.4. Esitutkintaa koskeva tulkintaharkinta on tehtävä sillä hetkellä tiedossa olevien seikkojen perusteella ja törkeysarviota saatetaan joutua myöhemmin tarkistamaan (*Helminen* ym. 2012a s. 687). Lienee kuitenkin yleistä, että esitutkinnassa rikos mieluummin kirjataan törkeämmäksi kuin mihin ratkaisuun tuomioistuin lopulta saattaisi päätyä, jotta tutkinnan apuna voitaisiin hyödyntää laajinta mahdollista pakkokeinoarsenaalia. Vaikka myöhemmin todettaisiinkin, ettei pakkokeinon myöntämiselle ollut edellytyksiä, sitä käyttäen saatu tieto on lähtökohtaisesti silti hyödynnettävissä (KKO 2007:58, 8–9 kohta; *Helminen* ym. 2012a s. 1134).

tuksiin.⁸⁵ Näkökulma selittyy sillä, että valvontaviranomaisten tehtävänä ei ole selvittää rikollisia, vaan varmistaa infrastruktuurin toimivuus; saadut tiedot ovat salassa pidettäviä, eikä niitä saa luovuttaa kuin rajoitetuin edellytyksin (SVTsL 34.1 §).⁸⁶

4.3. Erityistarkastelussa poliisin tiedonsaantioikeus

Poliisin oikeus saada tunnistamistietoja (PolL 4:3.2, VanhaPolL 36.2 §) johtaa useimmiten tosiasiallisesti samaan lopputulokseen kuin SananvapL 17 §:n mukainen tiedon luovuttaminen, teleosoitteen yksilöintitietojen hankkiminen teknistä laitetta käyttäen tai televalvonta.⁸⁷ Internet-kontekstissa PolL 4:3.2:n soveltamisessa on nimittäin useimmiten kyse siitä, että viestinnän osapuoli tai muuten viestin ja IP-osoitteen tietoonsa saanut taho vaatii poliisilta toimenpiteitä lähettäjän henkilöllisyyden selvittämiseksi ja vastuuseen saattamiseksi. Viestinnän osapuoli tai kolmas tämän suostumuksella saa käsitellä viestejä haluamallaan tavalla (SVTsL 8.2 §), mutta tämän ei nähdäkseni tulisi tehdä tyhjäksi toisen osapuolen lähtökohtaista oikeutta luottamukselliseen viestintään.⁸⁸ Toiseksi tämä asettaisi eri asemaan henkilöt, joista yksi ei osaa selvittää saamaansa viestiin liittyvää IP-osoitetta (jolloin olisi käytettävä esim. televalvontaa) ja toinen, joka osaa (jolloin tiedonsaantioikeus riittäisi tarpeellisten tietojen saamiseksi). Vastaavasti olisi outoa, jos kolmannen käsiinsä saamaa ja poliisille toimittamaa IP-osoitteen sisältävää viestiä voitaisiin käsitellä olennaisesti eri tavoin kuin viestiä, joka ei sisällä IP-osoitetta. Niin ikään sekä televalvonnassa että tiedonsaantioikeudessa on kyse jo tapahtuneen liikenteen osapuolten selvittämisestä.⁸⁹ Tiedonsaantioikeuden soveltamisella voi kuitenkin olla huomattavaa

⁸⁵ PeVL 9/2004 vp s. 6–7; HE 125/2003 vp s. 85–88; *Ollila* LM 2005 s. 784–786.

⁸⁶ Tunnistamistietoja, muttei viestejä, saa luovuttaa mm. ulkomaisille tietoturvaloukkauksia selvittäville tahoille sekä teleyrityksille ja yhteisötilaajille, joita on käytetty hyväksi tietoturvaloukkauksessa tai joihin voi todennäköisesti kohdistua tietoturvaloukkaus (SVTsL 34a.2–3 §). Osa luovutetuista tiedoista voisi siten päätyä esitutkintaan. Viestintäviraston käytäntönä on ollut, ettei tietoja luovuteta poliisille (*Ollila* LM 2005 s. 786 erit. alaviite 16). Laajemmin ks. *Helopuro* ym. 2009 s. 275–279.

⁸⁷ Tiedonsaantioikeus on rinnastettu telepakkokeinoon, jossa teleosoitteen yksilöintitiedot hankitaan teknistä laitetta käyttäen (*Helminen* ym. 2012b s. 435). Teoksessa PolL 4:3.2:n mukaisen tiedonhankinnan todetaan tapahtuvan avoimesti, kun taas yksilöintitietojen hankkiminen teknisellä välineellä salaiseksi pakkokeinoksi. Tämä erottelutapa on ongelmallinen, koska pääasiallinen oikeusturvan tarve kohdistuu määräyksen tosiasialliseen kohteeseen, eli siihen kenen tietoja selvitetään eikä määräyksen vastaanottajaan, ja molemmat keinot ovat näin ollen kohteen näkökulmasta yhtä kaikki salaisia pakkokeinoja.

⁸⁸ Huomattavaa kuitenkin on, että edellä esitetysti uudessa pakkokeinolaisissa suostumusperusteinen televalvonta ulotetaan koskemaan myös näitä tekoja, kunhan tiedon pyytäjänä on telepäätelaitteen tai -osoitteen haltija. PolL 4:3.2:n tiedonsaantioikeutta voidaan kuitenkin hyödyntää myös silloin, kun poliisille vaatimuksen esittää sivullinen.

⁸⁹ Poliisilain vastaavia telepakkokeinoja voidaan käyttää myös rikoksen estämiseksi ja paljastamiseksi, jolloin kyse on tulevaisuuteen suuntautuneesta valvonnasta (*Helminen* ym. 2012a s. 1025–1028). Tällainen ei ole tiedonsaantioikeuden nojalla mahdollista.

merkitystä viestinnän luottamuksellisuuden kannalta: esimerkiksi kerättyihin lokitietoihin sovellettaessa se voisi johtaa vaikkapa tuhansien eri osapuolten tietojen selvittämiseen.

Tiedonsaantioikeutta voitaisiin puolustaa lähinnä kolmella argumentilla. Ensimmäinen on vaivattoman tiedonsaannin tärkeys rikosten selvittämiseksi. Tämä yleiseen etuun viittaava kategorinen justifointiperuste on syytä torjua erityisen törkeitä tilanteita lukuun ottamatta. Toisen argumentin mukaan viestinnän osapuolten identiteettiä ei tarvitse suojata ulkopuolisilta. Tämä ajattelutapa on perusteeton ja rakentuu historialliselle ja nykyisin virheelliselle ajatukselle tunnistamistietojen lähtökohtaisesta julkisuudesta luottamuksellisuuden asemesta, ja tästä näyttää olevan kyse esitöiden puhelinluettelo- ja osoitetietoviittauksissa. Kolmanneksi viestinnän osapuolen suostumuksella tai pyynnöstä kyseisen henkilön kanssa viestineiden identiteetit voidaan viranomaisien avulla esteettä selvittää. Vaikka argumentti saakin tukea SVTsL 8.2 §:stä, on syytä havaita, ettei edes suostumusperusteinen televalvonta ole vapaasti käytettävissä.⁹⁰ Pidänkin tätä laajemmassa perusoikeustarkastelussa kategorisena sääntönä yleisesti ottaen kestäättömänä.

Vanhaa poliisilakia säädettäessä silloinen säännös (35.2 §) koski vain teletoimintalain salassapidon piiriin kuulumattomia tietoja. Säännöksen tarkoituksena oli ilmeisesti lähinnä asianomistajien ja omaisten tavoittaminen, sillä saatujen tietojen todettiin olevan verrattavissa julkisiin osoite- ja henkilötietoihin.⁹¹ Säännöstä laajennettaessa lähes nykymuotoon todettiin, että soveltamiskäytännössä oli jo saatu tiedot kiinteistä IP-osoitteista, mutta ne haluttiin saada myös dynaamisista IP-osoitteista.⁹² Perustuslakivaliokunta totesi säännöksen vastavaan perustuslakivaliokunnan käytännössä asetettuja vaatimuksia viitaten telemarkkinalain muuttamisesta aiemmin lausumaansa.⁹³ Tässä kohdin arviointi kuitenkin toteutettiin huolimattomasti, sillä viitatussa tapauksessa tietojen luovutus sallittiin vain hätätapauksissa ja muun ohella liittymän haltijan suostumuksella, ja muutoin tunnistamistietojen saamiseen tuli soveltaa pakkokeinolakia.⁹⁴ Kun VanhaPoL 36.2 §:ään lisättiin mahdollisuus hankkia telepäätelaitteen tai -osoitteen yksilöintitietoja teknisellä laitteella, perustuslakivaliokunta ei kiinnittänyt asiaan erityistä huomiota, ilmeisesti assosioiden tapaukset lähinnä sa-

⁹⁰ Helminen ym. 2012a s. 1052–1053. Tosin uudessa pakkokeinolaissa suostumusperusteisen televalvonnan käyttöala on laajentunut huomattavasti. Vanhan SVTsL 36.3 §:n mukaisissa tapauksissa keinosta päättää pidättämiseen oikeutettu virkamies, mutta muissa tapauksissa päätösvalta on kaikesta huolimatta tuomioistuimella (PKL 10:9).

⁹¹ HE 57/1994 vp poliisilakiksi ja eräksi siihen liittyviksi laeiksi s. 71.

⁹² HE 125/2003 vp s. 13–14, 103–104.

⁹³ PeVL 9/2004 vp s. 6–7.

⁹⁴ PeVL 47/1996 vp s. 3–4; HE 163/1996 vp telemarkkinalaiksi ja laiksi telehallinnosta annetun lain muuttamisesta s. 8–9, 32–33.

laisten osoite- tai puhelintietojen saantiin.⁹⁵ Asiaa ei käsitelty myöskään uuden poliisilain säätämisen yhteydessä.

Tunnistamistietojen tiedonsaantioikeuteen liittyviä ongelmia ei ole ilmeisesti yleisemmin tiedostettu. Tuoreissa poliisilakia sekä esitutkintaa ja pakkokeinoja käsittelevissä teoksissa säännöstä on lähinnä yleislauseita toistaen asiallisesti käsitelty muutamassa kappaleessa tai lauseessa.⁹⁶ Tämä väljä säännös on pakkokeinojen sääntelyn kontekstissa kyseenalainen ja perusoikeuksien kannalta ongelmallinen. Sen merkitys on monimutkaisten vaiheiden, viittauskäytännön ja huolimattomuuden summana jäänyt perustuslakivaliokunnalta huomaamatta, ja säännös tulisi ottaa tarkasteltavaksi. Asiallisesti monin tavoin telekuuntelua vastaavan sääntelyn soveltamisalaa tulisi rajata tai se tulisi siirtää osaksi pakkokeinosäätelyä.⁹⁷

4.4. Merkittävyyskynnys ja suhteellisuus poliisin toiminnassa

Tunnistamistietojen luovuttamista ja telepakkokeinojen käyttöä voidaan vertailla myös poliisin muihin pakkokeinoihin, erityisesti kotietsintään ja takavarikkoon. Chisugate-tapauksessa poliisi piti kotietsintää ja takavarikkoa perusteltuina, koska tuomioistuin oli jo luovuttamispäätöksessään katsonut huomattavuuskriteerin täyttyneen, ja koska takavarikon edellytyksenä ei ole rikoksen vakavuus. Apulaisoikeusasiamies ei nähnyt toimia suhteellisuusperiaatteen vastaisena tai muutenkaan lainvastaisena.⁹⁸

Tuomioistuin ei kuitenkaan tunnistamistietojen luovutusta käsitellessään arvioi merkittävyyskynnyksen ylittymistä rikosoikeudelliselta kannalta. Merkittävyyskynnyksen ylittymisellä ei voisikaan olla rikosprosessissa ratkaisevaa merkitystä, koska epäiltyä ei oltu kuultu eikä hän ollut saanut vastata kyseiseen väitteeseen, joten asian käsittely ei täyttäisi oikeudenmukaisen oikeudenkäynnin vaatimuksia. Toiseksi kotietsinnän edellyttämä tekijänoikeusrikos määritellään TekL 60 a §:n edellytyksistä poikkeavalla tavalla siten, että teon on oltava omiaan aiheuttamaan huomattavaa haittaa tai vahinkoa loukatun oikeuden haltijalle, ja onkin kyseenalaista täyttäisikö yksittäisen henkilön yksittäisen albumin yksittäinen jakaminen tämän tunnusmerkistön, vaikka TekL 60 a §:n nojalla yleisön saataville saattamista katsottaisiin tapahtuneen tekijän oikeuksien suojan kannalta merkittävässä määrin. Kolmanneksi vaikka edellä mainitut kri-

⁹⁵ PeVL 11/2005 vp s. 9.

⁹⁶ *Helminen* ym. 2012a s. 584, 1085; *Helminen* ym. 2012b s. 435; *Tolvanen – Kukkonen* 2011 s. 161.

⁹⁷ Säännös on ollut erityisen huomattava varsinkin vanhan pakkokeinolain kontekstissa, jolloin tavanomaisen ja suostumusperusteisen televalvonnan edellytykset tietoverkkoa hyödyntäen tehdyssä rikoksessa olivat ratkaisevasti korkeammat kuin voimaan tulevassa laissa. Uuden pakkokeinolain aikana merkitys tulee jonkin verran vähenemään ja se painottunee poliisin »ohituskaistaan», jolloin tietopyynnöissä ei edellytetä tuomioistuimen myötävaikutusta.

⁹⁸ Eoam 10.12.2012 (Dnro 4565/4/12) s. 4.

teerit täyttyisivätkin, toiminta voisi silti olla kotietsinnän tai takavarikon osalta kyseenalainen.

Kotietsinnästä päättää pidättämiseen oikeutettu virkamies ja sen laillisuus voidaan jälkeinpäin saattaa tuomioistuimen tutkittavaksi (PKL 8:18). Perustuslakivaliokunta on katsonut jälkikäteisen tuomioistuinkontrollin täyttävän EIT:n ratkaisukäytännön vaatimukset.⁹⁹ Takavarikointi on mahdollista esitutkintaviranomaisen päätöksellä, jos esine tai data voi olla todisteena rikosasiassa (PKL 7:1), mutta takavarikon on oltava järkevässä suhteessa sen aiheuttamiin haittoihin sekä loukattaviin etuihin tai arvoihin nähden.¹⁰⁰ Poliisilain ja pakkokeinolain yleisiä toiminnan periaatteita ovat perus- ja ihmisoikeuksien kunnioittaminen, suhteellisuusperiaate ja vähimmän haitan periaate.¹⁰¹ Nämä kaventavat poliisin toiminnan avointa mandaattia: periaatteessa yleisten periaatteiden tulisi johtaa lievimmän keinon valintaan.

Periaatteet eivät yksinään turvaa perusoikeuksien toteutumista. Periaatteet voisivatkin jäädä julistuksenomaisiksi ja jää nähtäväksi, tuleeko niiden käytännön merkitys kasvamaan. Mielestäni nyt puheena olleessa tapauksessa olisi ollut perusteita todeta, että ensinnäkään ei ollut syytä epäillä tekijänoikeusrikoksen tunnusmerkistön täytyneen ja toiseksi edellytyksiä kotietsinnälle tai takavarikolle ei ainakaan ensisijaisesti ollut käsillä.

5. Johtopäätökset

Tunnistamistiedoilla on verkottuneessa tietoyhteiskunnassa hyvin keskeinen merkitys niin käyttäjien yksityiselämän suojan, sananvapauden kuin näiden vastaintressienkin näkökulmasta. Viime kädessä keskeisin tunnistamistietojen »portinvartija» on Internet-yhteydentarjoaja, koska vain sillä olevien tietojen avulla on yleisessä tapauksessa mahdollista yhdistää IP-osoite liittymän haltijaan. Tarkastelin tunnistamistietojen luovuttamismääräyksiä erityisesti vertaillen niitä poliisin tiedonsaantioikeuteen ja telepakkokeinoihin.

Esittelen pelkistetyn ja vertailevan yhteenvedon eri säännöksistä taulukossa 1. Kohde-sarakkeesta ilmenee, mihin luovutus voi kohdistua: koko viestiin, vain tunnistamistietoihin vai muuhun tietoon. Päätätjä-sarakkeesta ilmenee, kuka toimenpiteestä voi päättää: erikseen säädetyissä kiiretapauksessa päätöksen voi tehdä pääsääntöisesti yhden asteen alempi taho. Edellytys-sarakkeella pyritään

⁹⁹ PeVL 66/2010 vp s. 6. Laajemmin ks. *Helminen* ym. 2012a s. 995–997; *Tolvanen – Kukkonen* 2011 s. 309–314.

¹⁰⁰ HE 222/2010 vp s. 273. Käytännössä esimerkiksi tietokonetta ei pitäisi takavarikoida, jos jäljentämällä tiedot tietokoneen kiintolevyltä voidaan turvata riittävä todistusaineisto (*Tolvanen – Kukkonen* 2011 s. 283–284).

¹⁰¹ HE 222/2010 vp s. 46–47, 72, 147, 193–194. VanhaPoIL 2.2 §:stä käy ilmi muun muassa suhteellisuusperiaate.

pelkistään kuvaamaan vaadittu peruste luovutukselle. Oikeusturva-sarakkeella viitataan luovutuksen kohteena olevan henkilön tehokkaihin oikeusturvakeinoihin, joita ei käytännössä välttämättä ole. Fokus-sarakkeeseen on tähdillä merkitty tästä näkökulmasta mielestäni ongelmallisimpia keinoja, joihin tulisi kiinnittää lähemmin huomiota. Kysymysmerkki tarkoittaa, että ainakin periaatteelliset ongelmat ovat todennäköisiä.¹⁰²

Taulukko 1: vertailua luovutus- ja pakkokeinosäännöksistä

Säännös	Kohde	Päätätjä	Edellytys	Oikeusturva	Fokus
SananvapL 17 §	TT	TI	Rangaistava viesti	Ei käytännössä	?
TekL 60 a §	TT	TI	Merkittävä jakaminen	Ei käytännössä	*
SVTsL 33.3 §	Viesti	ViVi/TSV	Valvonta	Ei ole	?
SVTsL 35.1 §	TT	Hätäkeskus	Hätätilanne	Ei ole	
PoL 4:3.2	TT	Poliisi	Poliisin tehtävä	Ei ole	**
Suost. televalv.	TT	TI/Pid.oik/kiire	As.om. pyyntö	Jälkikäteinen	*
Televalvonta	TT	TI/kiire	4v (2v) rang. max	Jälkikäteinen	*
Telekuuntelu	Viesti	TI/kiire	Ylitörkeät rikokset	Jälkikäteinen	
Yksilöintitiedot	TT	Pid.oik	1v rang.max	Jälkikäteinen	?
Laitetarkkailu	Muu	Pid.oik/kiire	4v rang.max	Jälkikäteinen	?
Takavarikko	Muu	Pid.oik	Todiste ym.	Jälkikäteinen	*

SananvapL 17 § ja TekL 60 a § rakentuvat samansuuntaisille periaatteille, mutta keskityin vain viimeksi mainittuun. Molemmissa on kyse hakemusasiasta, johon liittyviä yksiasianosaisprosessin haasteita ja verrannollisuutta telepakko-keinojen vastaavaan sääntelyyn ei ole huomioitu. Tekijänoikeudellisessa luovuttamismääräyksessä keskeisin kysymys on merkittävyyskynnyksen tulkitseminen. Aiemmin käytetyssä vertaisverkkotekniikassa huomattava jakaminen pystyttiin osoittamaan helposti ja oikeuskäytäntö oli vakiintunut, mutta nykyisin yhä enenevässä määrin käytössä olevassa BitTorrent-tekniikassa TekL 60 a §:n soveltaminen edellyttäisi oikeudenhaltijoilta laajempaa tarkkailua ja selvityksiä. Voidaankin sanoa, että tekniikkaan liittyvät näyttönäkökohdat painottavat säännöksen soveltamistilanteita entistä enemmän tosiasialliseen jakamiseen tai tar-

¹⁰² Lyhenteiden selityksiä, siltä osin kuin merkitys ei ole ilmeinen: TT = tunnistamistieto; TI = tuomioistuin; ViVi = Viestintävirasto; TSV = tietosuojavaltuutettu; Pid.oik. = pidättämiseen oikeutettu virkamies; »4v rang.max» = teko, josta voi seurata vähintään 4 vuotta vankeutta.

jolla pitämiseen. Näin ollen väitteet merkittävydestä jäävät entistä helpommin todentamattomiksi, ja tätä voi pitää myös terveenä merkinä tekijänoikeuslain tulkinnasta.

Myös PoL 4:3.2:n mukainen poliisin tunnistamistietojen tiedonsaantioikeus on kyseenalainen. Tiedot voi saada kuka tahansa poliisimies ilman ulkopuolista arviointia minkä tahansa poliisin tehtävän hoitamiseksi. Menettelyyn ei liity edes telepakkokeinojen kaltaisia jälkikäteisiä oikeusturvakeinoja, ja säännöksen tosiasiallinen merkitys on jäänyt perustuslakivaliokunnalta huomaamatta. Tiedonsaantioikeutta voidaan tosiasiallisesti verrata tietyiltä osin suostumusperusteeseen tai tavanomaiseen televalvontaan tai teleosoitteen yksilöintitietojen hankkimiseen teknistä laitetta käyttäen, vaikkakin säännöksen merkitys lienee vähenemässä, kun uudessa pakkokeinolaissa tietoverkkoihin liittyvien pakkokeinojen käytön edellytykset vähentyvät huomattavasti. Varsinkin nykyisin säännöksen tarpeellisuus tässä kontekstissa on kyseenalainen, ja voisi harkita, tulisiko sen soveltamisalaa rajoittaa tai siirtää se osaksi telepakkokeinosääntelyä.

Periaatteellisesti merkittävänä voidaan pitää tietosuojavaltuutetun ja Viestintäviraston tiedonsaantioikeutta, jonka nojalla sekä tunnistamistiedot että viestit sisältöineen on luovutettava kyseisille valvontaviranomaisille eräiden tietojärjestelmärikosten selvittämiseksi (SVTsL 33.3 §). Vaikka tietoja ei luovutetaakaan edelleen poliisille, tarkempi säännöksen arviointi, hyväksikäyttökiellot tai nimenomaiset luovutusrajoitukset ja oikeusturvakeinot voisivat olla perusteltuja. Hiukan vastaavasta, mutta rajatumasta tapauksesta on kyse hätä- ja pelastustoimeen liittyvissä tunnistamistietojen luovutuksissa (SVTsL 35.1 §).

Tässä yhteydessä keskeisimpiä salaisia telepakkokeinoja käsiteltiin vertaillevasta perspektiivistä. Televalvonnasta ja -kuuntelusta päättää pääsääntöisesti tuomioistuin, ja prosessi on varsin tarkasti säännelty ja toimenpiteistä on myös jälkikäteen mahdollisuus kannella tuomioistuimeen. Pakkokeinoja ei voi kohdistaa kuin tietyn törkeysluokituksen täyttäviin rikoksiin, ja keinojen käyttöä ja tiedon hyödyntämistä on muutenkin rajoitettu. Erityisesti on hyvä huomata, että erityissäilytetyjä tunnistamistietoja voidaan käyttää vain vähintään televalvonnan edellytykset täyttävien rikosten selvittämisessä. Päätelaitteen haltijan suostumuksella voidaan toteuttaa televalvontaa tilanteesta riippuen joko poliisin tai tuomioistuimen päätöksellä (PKL 10:7). Tätä voidaan pitää laajenuksena ja toisaalta rajoitteena käyttäjän omalle oikeudelle käsitellä viestinnän toisen osapuolen tietoja. Tältä osin on havaittavissa tiettyä päällekkäisyyttä PoL 4:3.2:n mukaiseen tunnistamistietojen selvittämiseen silloin, kun käyttäjä vaatii poliisilta toimenpiteitä.¹⁰³

¹⁰³ Tekninen lait tarkkailu on esimerkki muunlaisesta salaisesta pakkokeinosta, jota ei kuitenkaan saa käyttää tunnistamistietojen tai viestien selvittämiseen. Takavarikon edellytykset ovat hyvin joustavat, lukuun ottamatta tilannetta, jossa sitä sovelletaan tietojen hankkimiseen telekuuntelun sijaan.

Vanhaa ja uutta pakkokeinolakia vertailtaessa huomataan useita periaatteellisesti hyvin merkittäviä ja osin muun muassa perustuslakivaliokunnassa huomaamatta jääneitä tai lausunnon antamisen jälkeen toteutettuja muutoksia. Telepäätelaitetta tai -osoitetta käyttäen tehdyissä rikoksissa televalvonnan edellytyksenä ollut kategorinen neljän vuoden rangaistusmaksimi on alennettu kahteen vuoteen, mikä on tuonut pakkokeinon piiriin yli 100 uutta perusterikosta, muun muassa tässä käsitellyn tietoverkossa tehdyn tekijänoikeusrikoksen. Tämän johdosta tällaisessa rikosepäilyssä voidaan jatkossa ainakin joissakin olosuhteissa hyödyntää myös erityissäilytettyjä tunnistamistietoja, mikä ei aiemmin ollut mahdollista. Toisaalta erityissäilytetyjä tietoja ei saa edelleenkään luovuttaa siviiliprosessissa. Niin ikään suostumusperusteista televalvontaa on laajennettu siten, että sitä voidaan kohdistaa tuomioistuimen luvalla mihin tahansa viestintän osapuoleen, kun aiemmin se soveltui lähinnä eräisiin häirintärikoksiin tai edellytti perusterikokselta vähintään kahden vuoden rangaistusmaksimia.

Voidaan myös pohtia, ovatko TekL 60 a §:n mukaiset tuomioistuinratkaisut perustuneet osin myös reaaliin näkökohtiin, koska kategorisesti kielteiset ratkaisut voisivat ohjata tapauksia poliisin esitutkintaan ja sitä kautta mahdollisesti rikosasiana tuomioistuimeen. Toistaiseksi oikeudenhaltijat ovat voineet valita rikosoikeudellisten ja siviilioikeudellisten keinojen välillä, ja itse asiassa tekijänoikeudellisten riita- ja hakemusasioiden siirtyessä markkinaoikeuteen tämä laajenee yleisen ja erityistuomioistuimen väliseen foorumivalintaan. Vastaavasti oikeuspoliittisesti kyse on siitä, millä tavoin tällaisia tekijänoikeudellisia ongelmatilanteita halutaan selvitettävän, eli onko yksityisoikeudellinen selvittely muun ohella omine painostamiseen liittyvine ongelmineen asianmukaista vai pitäisikö tähän käyttää merkittäviä viranomaisten, erityisesti poliisin resursseja.¹⁰⁴

Tiivistetysti voidaan todeta, että telepakkokeinosäätelyn ulkopuolisiin tunnistamistietojen luovuttamismääräyksiin sisältyy erityisen paljon ongelmia. Näiden perusoikeustarkastelu on jäänyt huomattavasti telepakkokeinoja ohuemmaksi, jos sitä on tehty lainkaan. Ainakin eräiltä osin erillissäätely voidaan kyseenalaistaa ja varsinkin poliisin tiedonsaantioikeutta on syytä tarkastella kriittisesti. Myöskään telepakkokeinojen sisäisesti eri keinoja, niiden eroja ja samankaltaisuutta ei ole tarkasteltu riittävästi erityisesti tunnistamistietojen luovuttamisen kontekstissa. Ongelma korostuu etenkin yksilöintitietojen hankkimista ja televalvontaa vertailtaessa; ensiksi mainitun soveltamiskynnys on huomattavasti alhaisempi, vaikka sitä voikin käyttää kauaskantoisin seurauksin. Niin ikään hyvin laajassa pakkokeinojen uudistamisessa ilmeisesti perusoikeusarviointi tai oikeastaan ponsilausuma jäi puutteelliseksi, koska huomattavat laajennukset eivät kaikilta osin vaikuta aiempaan käytäntöön ja perusoikeusarviointeihin nähden asianmukaisilta.

¹⁰⁴ Samansuuntaisesti ks. *Päivärinne* DL 2013 s. 215; *Tuomas Mylly*: Tekijänoikeuksia ei pidä valvoa liikaa (8.12.2012). Helsingin Sanomat, pääkirjoitus, vieraskynä.

Blocking Injunctions and Website Operators' Liability for Copyright Infringement for User-Generated Links

Pekka Savola*

CSC-Scientific Computing Ltd, Helsinki

☞ Communication to the public right; Copyright; EU law; Hyperlinks; Internet service providers; Online infringement; User-generated content

This article explores UK website blocking injunctions, the CJEU ruling in Svensson (C-466/12), and referrals on linking in the context of website operator's direct, secondary or joint liability for copyright infringement due to user-generated content. Direct liability and UK authorisation doctrine seem questionable, but joint tortfeasance and similar criminal law constructs form a more solid foundation for operators' liability.

Introduction

Various forms of liability for copyright infringement may apply to website operators for user-generated content. This is explored in the context of injunctions ordering internet service providers to block access to such sites. The focus is on sites that make infringement particularly easy by aggregating content or facilitating peer-to-peer networking.¹ The most prominent such website is The Pirate Bay, which has been blocked in about a dozen EU countries; some other sites have also been blocked,

particularly in the United Kingdom.² In a few countries proxy services providing access to such websites have also been targeted.³

In some judgments, linking to copyrighted material constituted direct infringement, but in others the opposite was held.⁴ On February 13, 2014, the CJEU judgment in *Svensson* provided one answer to some pertinent issues, but the approach chosen also raised new ones. More referrals are also pending.⁵ National courts have also applied other grounds for liability such as aiding and abetting, authorisation or joint tortfeasance.

This article seeks to answer the question: which forms of liability apply to the operators of prima facie questionable websites based on users' acts, and are such sites eligible for blocking? The focus is on the United Kingdom owing to the number of blocking injunctions issued. When examining the preliminary question of liability for linking in general, EU case law is more broadly covered.

On communication to the public and forms of linking

Some further introductory remarks are in order. In this context, online copyright infringement may occur through violating the author's exclusive right to communication to the public or reproduction of a work. Here only the former is studied.⁶ As required by art.3.1 of the Infosoc Directive (2001/29)⁷:

“Member states shall provide authors with the exclusive right to [1.] authorise or prohibit any communication to the public of their works, by wire or wireless means, including [2.] the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

* Pekka Savola (Lic.Sc(Tech), Master of Laws) is legal counsel at CSC-Scientific Computing Ltd and researcher at the University of Helsinki, Finland.

¹ See e.g. Edward Lee, “Warming Up to User-Generated Content” [2008] U. Illinois L. Rev. 1459; John Blevins, “Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms” (2013) 34 Cardozo L. Rev. 1821, 1827–1829. See generally e.g. Patrick van Eecke, “Online Service Providers and Liability: A Plea for a Balanced Approach” (2011) 48 C.M.L. Rev. 1455; Dennis Lievens, “L'Oreal v. eBay — Welcomed in France, Resented in England” (2012) 43(1) I.I.C. 68.

² As of this writing, over 30 sites have been blocked in this manner. See e.g. TorrentFreak, “UK Piracy Blocklist Expands with YIFY, PrimeWire, Vodly and Others” (November 22, 2013), <http://torrentfreak.com/uk-piracy-blocklist-expands-with-yify-primewire-vodly-and-others-131122/> [Accessed February 25, 2014].

³ TorrentFreak, “Police Visit Pirate Bay Proxy Owner's Home Demanding a Shutdown” (June 9, 2013), <http://torrentfreak.com/police-visit-pirate-bay-proxy-owners-home-demanding-a-shutdown-130609/>; TorrentFreak, “Movie Studios Get UK ISPs to Block Torrent Site Proxies” (September 5, 2013), <http://torrentfreak.com/movie-studios-get-uk-isps-to-block-torrent-site-proxies-130905/> [Both accessed February 25, 2014]. See also fnn.110–111.

⁴ See e.g. *Football Association Premier League Ltd v British Sky Broadcasting Ltd (FAPL v Sky)* [2013] EWHC 2058 (Ch), [2013] E.C.D.R. 14 at [37]–[44]; *Paperboy* [2003] BGH I ZR 259/00, [2005] E.C.D.R. 7. More of these below.

⁵ *Svensson v Retriever Sverige AB* (C-466/12), February 13, 2014. The most important referrals are *C More Entertainment* (C-279/130) and *BestWater International* (C-348/13). More of these below.

⁶ The argument that linking infringes the reproduction right is weaker, except possibly in the case of embedded links. See e.g. *Paperboy* [2003] BGH I ZR 259/00, [2005] E.C.D.R. 7. The German Supreme Court held that a news notification/search engine (*Paperboy*) did not infringe newspapers' rights by providing direct links to subpages even if doing so bypassed advertisements on the front page.

⁷ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) [2001] OJ L167/10. See e.g. *EMI Records Ltd v British Sky Broadcasting Ltd (EMI v Sky)* [2013] EWHC 379 (Ch), [2013] E.C.D.R. 8 at [30]–[32]; *SCF v Del Corso* (C-135/10) [2012] E.C.D.R. 16; Katarzyna Klafkowska-Waśniowska, “Public Communication Right: Towards Full Harmonisation?” [2013] E.I.P.R. 751, 756–757.

The first part concerns communication to the public in general, the latter part “making available” by offering and providing access to works for on-demand transmission.⁸ The latter is broader in this context, because it applies irrespective of transmission occurring.⁹

There are many ways to classify web linking.¹⁰ The most relevant distinction is between “normal” hyperlinks, where clicking the browser redirects to another page, and embedding, i.e. inline links where the browser transparently fetches material (e.g. image or another web page) and displays it as part of the current page. Framing links require user activity (clicking) but the page is portrayed as if it was part of the original site. Such a portrayal page essentially embeds the material on the framing page and therefore for most purposes framing is similar to embedding.

Linking as direct infringement

Direct infringement in UK blocking injunctions

In *EMI v Sky*, access to three websites (KAT, H33T and Fenopy) was blocked.¹¹ The sites included user-uploaded descriptions of copyrighted material (metadata, including so-called “torrent” files) in indexed and searchable form, but no infringing material as such. While users were clearly committing infringement, for example by sharing works in a peer-to-peer network, the question of whether the operators of the said websites did too is of more interest here. Three bases for infringement were claimed: that sound recordings were communicated to the public by the operators, the operators committed the tort of authorising infringements, and that operators were jointly liable as accessories for infringements.¹² The last two will be addressed in the next section. It was held that the service provided by the website was not purely passive and the operator had intervened in an active manner by having a mechanism specifically designed to allow users to provide the actual content. Arnold J., however, explicitly noted that even if this interpretation of

communication to the public was wrong, the operators might still be liable on the grounds of authorisation and joint tortfeasance.¹³

The same judge reached the same conclusions also in a slightly different context in *FAPL v Sky*.¹⁴ A website called FirstRow provided links to various sports video streams submitted and produced (from a broadcast) by users.¹⁵ It is obvious that such user-generated streams were infringing, but was the website operator also liable for communication to the public for the posted links?¹⁶ It was held that websites provided a mechanism specifically designed to achieve the act of communication even if the actual material was provided by others.¹⁷ The website was considered analogous to torrent indexing sites, aggregating, indexing and providing users a simple link in order to access streams. A specific feature was also that the stream was presented in a frame provided by FirstRow, therefore making it seem as if the stream originated from that site. FirstRow was held directly liable for communication to the public but the judge again repeated the same “backup” grounds, authorisation and joint tortfeasance.¹⁸

In a later blocking injunction case, *Paramount v Sky*, Arnold J. reflected on his earlier reasoning on communication to the public in the light of recent case law and CJEU referrals. He acknowledged that it is arguable whether inter alia provision of hyperlinks amount to communication to the public. This did not affect the outcome, however, and he emphasised that what the operators of FirstRow were doing went beyond mere provisioning of hyperlinks and, in any case, the operators would be jointly liable for these activities.¹⁹

Recent Svensson judgment (C-466/12)

What is the basis for these interpretations? Let us examine liability for linking in general. In *Svensson*, newspaper journalists sued a media monitoring company for providing links to their articles without paying remuneration. CJEU held that hyperlinking was communication to the public as “making available”. However, given that the authors had already authorised

⁸ The related rights of performers, phonogram and film producers, and broadcast organisations are covered similarly by art.3.2 and art.8 of Directive 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L376/28.

⁹ For a detailed discussion, see Alexander Tsoutsanis, “Why Copyright and Linking Can Tango”, <http://jiplp.blogspot.com/2014/02/why-copyright-and-linking-can-tango.html> [Accessed February 25, 2014] (pre-published version of February 3, 2014, to be published in J.I.P.L.P.). Also see Jane C. Ginsburg, “Hyperlinking and ‘Making Available’” [2014] E.I.P.R. 147.

¹⁰ e.g. based on linking technique: (1) surface linking (to the main page); (2) deep linking (directly to a subpage or resource); (3) framing (preserving original web page address even when linking to foreign pages); and (4) inlining or embedded linking (making the web browser fetch the target page or resource and display it as part of the current page). An alternative classification is based on (a) how source and target relate (intra-page, internal or external link); (b) link activation technique (embedded being automatic, others manual); or (c) indication of origin of the material. See Alain Strowel and Nicolas Ide, “Liability with Regard to Hyperlinks” (2001) 24(4) Colum.-VLA J.L. & Arts 403, 407–409.

¹¹ *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8. On problems with considering providing access to torrent files communication to the public, see Gaetano Dimita, “Six Characters in Search of Infringement: Potential Liability for Creating, Downloading and Disseminating .Torrent Files” (2012) 7 J.I.P.L.P. 466, 469–471.

¹² *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8 at [43]. In an earlier case of blocking The Pirate Bay only the last two causes were pursued. See *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (Dramatico v Sky)* [2012] EWHC 268, [2012] E.C.D.R. 14 at [44].

¹³ *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8 at [44]–[46].

¹⁴ *FAPL v Sky* [2013] EWHC 2058 (Ch); [2013] E.C.D.R. 14.

¹⁵ *FAPL v Sky* [2013] EWHC 2058 (Ch); [2013] E.C.D.R. 14 at [14]–[16].

¹⁶ See *FAPL v Sky* [2013] EWHC 2058 (Ch); [2013] E.C.D.R. 14 at [28]–[37] including references.

¹⁷ *FAPL v Sky* [2013] EWHC 2058 (Ch); [2013] E.C.D.R. 14 at [40]–[41] referring to *Twentieth Century Fox Film Corp v Newzbin Ltd (Newzbin)* [2010] EWHC 608 (Ch), [2010] F.S.R. 21 at [125]; and *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8 at [46].

¹⁸ *FAPL v Sky* [2013] EWHC 2058 (Ch); [2013] E.C.D.R. 14 at [42]–[43], [50].

¹⁹ *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd (Paramount v Sky)* [2013] EWHC 3479 (Ch) at [32]–[35]. In this case blocking was extended to two additional sites, SolarMovie and TubePlus.

publication in open internet and there were no access restrictions, there was no new public and therefore no infringement.²⁰

The referral questions had been speculated and advocated in a number of writings as well as court cases. The European Copyright Society (ECS) opined that setting a hyperlink does not amount to transmission of a work and therefore communication to the public cannot occur; a hyperlink would communicate to the public something other than “a work”; and in any case communication would not be directed to a new public. A similar argument would apply to a framing link.²¹ Unfortunately, the ECS Opinion did not consider the applicability of “making available”. Another group, ALAI, published an opinion with almost diametrically opposite views. Their suggestion was that only hyperlinks merely referring to a source are not covered under the author’s exclusive right. On the other hand, linking directly to a “protected file” would be.²² The opinion failed to see that webpages are also protected works and technically files. Therefore the distinction provided was unclear and insufficient, and the result would be absurd.²³ Tsoutsanis provided a good analysis based on these two diverging approaches, trying to avoid the pitfalls of the broad making available right by emphasising flexibility through inter alia “new public” test.²⁴ This was for most part the approach later adopted by CJEU.

The ruling raised a number of issues and questions.²⁵ For example CJEU did not critically examine if hyperlinking to a public webpage (as in *Svensson*) actually constitutes making works directly accessible.²⁶ The underlying WIPO Copyright Treaty focused on ensuring that “offering” and “providing access to a work” was within the scope of making available. This meant that mere placing a work on a website from which it could be downloaded or streamed would be infringing irrespective of whether transmission occurred. It has been argued that

this also applies to hyperlinking owing to, e.g., a technology neutral interpretation.²⁷ This can be contested. In some or even most cases, linking is equivalent to providing a reference,²⁸ and in others it is at most *indirect* making available of a work. There is no authority to suggest that this should (or must) be in scope of “making available” and there are strong reasons to prefer the opposite.²⁹

In previous CJEU judgments, the “new public” seemed to have effectively lost most of its relevance. Any public or means of transmission that the right holder did not originally consider was considered “new” and as such covered by the author’s exclusive right.³⁰ This emerged as a solution in *Svensson*. There was no new public, because all users could access the authorised publication, and were deemed to have already been taken into account by the author.³¹

Another Swedish referral, *C More Entertainment* (C-279/13), should also be noted. In this case sports events were streamed to customers behind a pay-wall. A customer discovered the streaming webpage address (URL) and published a link to it on his own webpage, thus enabling free access to the public.³² In *Svensson* it was implied that using linking to circumvent access restrictions to an otherwise unavailable work would result in a new public.³³ This might imply finding infringement.

Framing and embedding links

In *Svensson* (C-466/12), February 13, 2014 the approach was the same to framing. While embedded links were not discussed (and in contrast, the ruling mentioned only clickable links), the argumentation used with framing would apply to embedding as well.³⁴ Previously, the ECS opinion suggested there is no reason to differentiate hyperlinking and framing, but noted that linking might give rise to liability on other grounds such as accessory

²⁰ *Svensson*, February 13, 2014 at [20], [27]–[29], [31].

²¹ *Paramount v Sky* [2013] EWHC 3479 (Ch) at [13]–[22]; European Copyright Society, “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*” (February 15, 2013). Similarly in Jeremy de Beer and Mira Burri, “Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada” [2014] E.I.P.R. 95, 103–104.

²² L’Association Littéraire et Artistique Internationale (ALAI), “Report and Opinion on the Making Available and Communication to the Public in the Internet Environment — Focus on Linking Techniques on the Internet” (September 16, 2013), also published in [2014] E.I.P.R. 149. Ginsburg, “Hyperlinking and ‘Making Available’” [2014] E.I.P.R. 147 provided a supportive contextual comment. The opinion was referred to in *Paramount v Sky* [2013] EWHC 3479 (Ch) at [29].

²³ Ginsburg, “Hyperlinking and ‘Making Available’” [2014] E.I.P.R. 147 seemed satisfied with, inter alia, copyright exceptions and implied licence bringing balance to the very broad right as suggested by the ALAI opinion. While the CJEU has made somewhat of a “judge-made exception” to the right with the new public requirement, at least in EU statutory exceptions are insufficient (i.e. no “fair use” exception and e.g. quotation right is too narrow). Essentially the ALAI opinion advocated that the right holder should have the exclusive economic right to control the contexts where a work is mentioned or referenced.

²⁴ Tsoutsanis, “Why Copyright and Linking Can Tango”, <http://jiplp.blogspot.com/2014/02/why-copyright-and-linking-can-tango.html> [Accessed February 25, 2014].

²⁵ See e.g. Pekka Savola, “Hyperlinks, making available and the ‘new public’ — or just a dead end?” (February 14, 2014), The 1709 Blog, <http://the1709blog.blogspot.com/2014/02/hyperlinks-making-available-and-new.html> [Accessed February 25, 2014]

²⁶ cf. *Svensson*, February 13, 2014 at [18]–[20].

²⁷ Tsoutsanis “Why Copyright and Linking Can Tango”, <http://jiplp.blogspot.com/2014/02/why-copyright-and-linking-can-tango.html> [Accessed February 25, 2014].

²⁸ This was also (to some rather vague extent) supported by ALAI, “Report and Opinion on the Making Available and Communication to the Public in the Internet Environment” (September 16, 2013).

²⁹ With this line of argument a mere mention of a web page address or domain name (without providing a hyperlink tag to it) could also be “indirectly making available” a web page, i.e. a work.

³⁰ See Benoît Keane, “Ill Communication — The Concept of a Communication to the Public under EU Copyright Law” [2013] Ent. L.R. 165, 168–169; Poorna Mysoor, “Unpacking the Right of Communication to the Public: A Closer Look at International and EU Copyright Law” [2013] I.P.Q. 166, 177–178; Martin Senftleben, “Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions” (2013) 4 *J.I.P.I.T.E.C.* 87, para.19. cf. Tsoutsanis, “Why Copyright and Linking Can Tango”, <http://jiplp.blogspot.com/2014/02/why-copyright-and-linking-can-tango.html> [Accessed February 25, 2014].

³¹ *Svensson*, February 13, 2014 at [25]–[28].

³² *Paramount v Sky* [2013] EWHC 3479 (Ch) at [23]–[24]; Mark Turner, “European National News” (2013) 29 *C.L.S. Rev.* 616.

³³ *Svensson*, February 13, 2014 at [31].

³⁴ *Svensson*, February 13, 2014 at [29]–[30].

liability, unfair competition or authors' moral rights but the CJEU currently does not have competence as regards that subject-matter.³⁵ On the other hand, Tsoutsanis argued for differentiation and that the new public would not need to be evaluated with embedding and framing because the content is made available "under different technical conditions".³⁶ It is not obvious that "conditions" are of relevance. In *ITV v TVCatchup* "mere technical means" not requiring permission (such as means to improve reception) were distinguished from "specific technical means" requiring permission (such as converting a satellite TV signal to an internet broadcast).³⁷ Linking seems to be more of the first category but this distinction might be considered in subsequent rulings.

Traditionally, the evaluation of embedding links has not been as straightforward as with hyperlinks. Technically the linker only instructs the user's web browser to fetch material from the linked third-party website. In consequence, from a purely technical perspective it is actually the user (or the web browser) which makes a copy of the material even though it is the linker that (practically) causes it to happen.³⁸ Essentially this doctrinal or technically purist view suggests that such "infringement" is not a relevant act from a copyright perspective and must be addressed with other means. In contrast, a broad interpretation focuses on the practical effects of acts of the linker. Indeed, embedding *possibly* infringing the right of communication to the public or reproduction rights has been rather generally accepted, although exact criteria for infringement have been unclear.³⁹

Embedding will be considered in a referral from German Supreme Court (BGH), *BestWater International* (C-348/13).⁴⁰ In this case an embedding link was added on a web page to a competitor's video that someone had uploaded in YouTube. BGH noted that hyperlinking would not have required permission but it was unclear if the embedding link would. BGH suggested that the answer should be affirmative even if there would not be a new public and the technical process as to how a video would be viewed from the webpage is identical to viewing it from YouTube. Essentially the suggestion boiled down to a reasoning that the linker misappropriated the work as his own by embedding it into a website and this might

be a yet unnamed right of exploitation.⁴¹ If the path paved by *Svensson* is taken, the fact of embedding might be irrelevant; however, infringement could be found based on the lack of authorisation for the initial publication.⁴²

Nonetheless, to consider BGH's argument, it is not obvious which economic right of copyright would be violated (and how) by "misappropriation". It might be out of the scope of copyright law completely, possibly covered by national laws such as unfair competition or passing off. Or if it was deemed a violation of author's moral rights, it would be determined by national law.⁴³ Senftleben also argues that embedding is acceptable as long as it is made clear that the content stems from another source.⁴⁴

Authorisation for publication and the implied licence

Svensson concerned a case where the referred work was already publicly available on the internet. The arguments could be read to imply that linking to non-public or unlawful material would be infringing. The CJEU will need to explicitly address this in subsequent rulings, particularly in the pending *BestWater International* case.

The legality of linking should not be entirely based on the authorisation of the original publication or in general the lawfulness of the source. The linker cannot and even need not know who the author is and ensure the legality of the target.⁴⁵ With regard to *BestWater International*, the critical question would be the conditions on which the linkers might have a defence against the originally illegal uploading act.⁴⁶ Strict liability in all cases—especially when the linker does not intentionally link to unlawful material—would seem disproportionate and would undermine the functioning of the internet. In contrast, the Czech Supreme Court recently held that embedding illegal videos residing on third-party servers on your own web page was communication to the public. As with the previous UK cases, secondary liability would have been preferable grounds for infringement.⁴⁷

In the implied licence interpretation, the right holder tacitly allows normal use of the work by putting it on the internet.⁴⁸ This is supported by *Svensson*, which seems to make a blanket statement of the intent of authors who

³⁵ ECS, "Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*" (February 15, 2013), paras 7, 53–59; Senftleben, "Breathing Space for Cloud-Based Business Models" (2013) 4 J.I.P.I.T.E.C. 87, paras 20, 23. On US case law rejecting direct infringement, see e.g. Blevins, "Uncertainty as Enforcement Mechanism" (2013) 34 *Cardozo L. Rev.* 1821, 1853–1855.

³⁶ Tsoutsanis, "Why Copyright and Linking Can Tango", <http://jiplp.blogspot.com/2014/02/why-copyright-and-linking-can-tango.html> [Accessed February 25, 2014].

³⁷ *ITV v TVCatchup* (C-607/11) [2013] E.C.D.R. 9 at [24]–[30].

³⁸ For more detail, see e.g. Pessi Honkasalo, "Links and Copyright Law" (2011) 27 C.L.S. Rev. 258, 261–262; Senftleben, "Breathing Space for Cloud-Based Business Models" (2013) 4 J.I.P.I.T.E.C. 87, para.18.

³⁹ See Honkasalo, "Links and Copyright Law" (2011) 27 C.L.S. Rev. 258, 261–264 and references.

⁴⁰ *BestWater International* [2013] BGH I ZR 46/12; *Paramount v Sky* [2013] EWHC 3479 (Ch) at [25]–[28].

⁴¹ Benjamin Schuetze, "Germany: The Federal Court of Justice and 'the reality' about embedded content" (June 18, 2013), *Kluwer Copyright Blog*, <http://kluwercopyrightblog.com/2013/06/18/germany-the-federal-court-of-justice-and-the-reality-about-embedded-content/> [Accessed February 25, 2014].

⁴² *Svensson*, February 13, 2014 at [27].

⁴³ Recital 19 of Infococ Directive. Also see Honkasalo, "Links and Copyright Law" (2011) 27 C.L.S. Rev. 258, 262 (especially n.31) and 264 (n.55).

⁴⁴ Senftleben, "Breathing Space for Cloud-Based Business Models" (2013) 4 J.I.P.I.T.E.C. 87, paras 20–23.

⁴⁵ See Savola, "Hyperlinks, making available and the 'new public' — or just a dead end?" (February 14, 2014), *The 1709 Blog*, <http://the1709blog.blogspot.com/2014/02/hyperlinks-making-available-and-new.html> [Accessed February 25, 2014].

⁴⁶ See fn.41 and corresponding text.

⁴⁷ 8 Tdo 137/2013; Martin Husovec, "Czech Supreme Court: Embedding is Communication to the Public" (November 5, 2013), *Kluwer Copyright Blog*, <http://kluwercopyrightblog.com/2013/11/05/czech-supreme-court-embedding-is-communication-to-the-public/> [Accessed February 25, 2014].

⁴⁸ See e.g. Taina Pihlajarinne, "Setting the Limits for the Implied License in Copyright and Linking Discourse — the European Perspective" (2012) 43(6) *I.I.C.* 700.

make their works available on the public internet.⁴⁹ This construct is useful only if linking is considered infringing in the first place because the implied licence cannot help in the situation of unauthorised publication.

The construct might also lead to issues if one accepts that the author would have the possibility of withdrawing consent (i.e. the right to forbid linking) without withdrawing the material (i.e. without restricting access), for example by placing an explicit note on the website. It seems obvious that such exclusive right does not exist at least when it comes to hyperlinking, again barring certain moral rights aspects. This is at least tentatively supported by *Svensson*: withdrawing authorisation appears to require removing the work or restricting access to it.⁵⁰ Also, this construct cannot answer a problem of embedding: using technical resources of a target website without generating benefit similar to visiting it, particularly when the author and website operator are two different entities.⁵¹

Summary

There has been mixed case law on direct liability but secondary liability has provided another basis for infringement.⁵² Both in *Svensson* and earlier in *Paperboy* the author had already made the content available to the public and there were no access restrictions.⁵³ Circumventing access restrictions has sometimes led to holding infringement, and this is to be addressed in *C More Entertainment*.⁵⁴ It seems widely established that at least a hyperlink to lawful and publicly available content is non-infringing. With the support of *Svensson* this applies to framing and tentatively might be extended

to embedding, with the moral rights requirement to adequately note that the content originates from another website.⁵⁵

The same analysis should apply to material that the linker can reasonably expect to be lawful, but there is no authoritative case law yet on this. Preferably the same approach should also apply to *direct* infringement related to unlawful material, to be addressed through, e.g., secondary liability. However, previous case law seems to have taken a different path and *Svensson*, in obiter dicta, seemed to point towards that as well.⁵⁶

Traditionally it has been argued that the concept of communication must be construed broadly to mean any kind of transmission of protected works.⁵⁷ Making available also expands the overarching concept of communication to the public to include providing and offering “access” to works.⁵⁸ A broad interpretation was provided in *SGAE*, where the hotel was held to communicate to the public by installing television equipment in the rooms, owing to “interven[ing], in full understanding of its actions, to give access to the protected works to its customers”. The interpretation was later affirmed in another, Irish hotel case.⁵⁹ However, Recitals 23 and 24 of the Infosoc Directive also state that the respective rights should not cover any other acts.⁶⁰ Reading these together would suggest that acts which preceded or are related to the transmission or making available might—and in some cases, should—be out of the scope even if those ultimately resulted in communication to the public.⁶¹ Care is needed when interpreting broadly the already overly broad concepts. Fortunately, there are some signs that lately users have been better taken into account in balancing of interests.⁶²

⁴⁹ *Svensson*, February 13, 2014 at [26]–[27].

⁵⁰ *Svensson*, February 25, 2014 at [31]. cf. the ALAI Report, which advocated a broader exclusive right: see fnn.22–23.

⁵¹ In some countries it has been held that embedded linking is not normal use covered by the implied licence. See Pihlajarinne, “Setting the Limits for the Implied License in Copyright and Linking Discourse” (2012) 43(6) I.L.C. 700, 705–06.

⁵² See Allen N. Dixon, “Liability of Users and Third Parties for Copyright Infringements on the Internet: Overview of International Developments” in Alain Strowel (ed.), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar, 2009), pp.22–23; Alain Strowel and Vicky Hanley, “Secondary Liability for Copyright Infringement with Regard to Hyperlinks” in *Peer-to-Peer File Sharing* (2009), pp.84 et seq.; Honkasalo, “Links and Copyright Law” (2011) 27 C.L.S. Rev. 258, 260–261; ECS, “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*” (February 15, 2013), paras 7, 54–56; Blevins, “Uncertainty as Enforcement Mechanism” (2013) 34 Cardozo L. Rev. 1821, 1853–1855.

⁵³ *Svensson*, February 13, 2014 at [27]; *Paperboy* [2003] BGH I ZR 259/00, [2005] E.C.D.R. 7 at [42]; Senfleben, “Breathing Space for Cloud-Based Business Models” (2013) 4 J.I.P.I.T.E.C. 87, para.21.

⁵⁴ *Session-ID* [2010] BGH I ZR 39/08; Tsoutsanis (n 9).

⁵⁵ Honkasalo, “Links and Copyright Law” (2011) 27 C.L.S. Rev. 258, 264; Senfleben, “Breathing Space for Cloud-Based Business Models” (2013) 4 J.I.P.I.T.E.C. 87, paras 20, 23. cf. Tsoutsanis, “Why Copyright and Linking Can Tango”, <http://jiplp.blogspot.com/2014/02/why-copyright-and-linking-can-tango.html> [Accessed February 25, 2014]. It is unclear whether Senfleben requires the original content to be lawful. It has typically also been suggested that a reasonable expectation of the source being lawful is sufficient.

⁵⁶ As can be seen from the recent UK cases, direct infringement for adding a hyperlink has been held essentially based on facts similar to concerted action or similar doctrines to be examined next.

⁵⁷ *FAPL v QC Leisure* (C-403/08 and C-429/08) [2011] E.C.R. I-9083; [2012] E.C.D.R. 8 at [186], [193] (concerning inter alia legality of foreign satellite decoder cards and pub owner committing communication to the public by showing football matches on television).

⁵⁸ Tsoutsanis, “Why Copyright and Linking Can Tango”, <http://jiplp.blogspot.com/2014/02/why-copyright-and-linking-can-tango.html> [Accessed February 25, 2014].

⁵⁹ *PPL v Ireland* (C-162/10) [2012] E.C.D.R. 15, affirming *SGAE v Rafael Hoteles SL* (C-306/05) [2006] E.C.R. I-11519, [2007] E.C.D.R. 2 at [42].

⁶⁰ See also ECS, “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*” (February 15, 2013), paras 9–11.

⁶¹ See fn.29 and corresponding text. The concrete communication act is already covered, and it is submitted that preceding or subsequent acts should cause at most secondary liability.

⁶² Senfleben, “Breathing Space for Cloud-Based Business Models” (2013) 4 J.I.P.I.T.E.C. 87, paras 37–43, referring to e.g. *FAPL v QC Leisure* [2011] E.C.R. I-9083, [2012] E.C.D.R. 8 at [162]–[163]; and *Painer v Standard* (C-145/10) [2012] E.C.D.R. 6 at [132]–[133] (a case on photographs, inter alia focusing on striking a fair balance when interpreting copyright exceptions). See also *SCF v Del Corso* (C-135/10) [2012] E.C.D.R. 16 at [88]–[89] (a dentist did not communicate sound recordings to the public by playing the radio at his practice).

Secondary liability and joint actions

Classification of liability

There are various ways of classifying non-direct infringement.⁶³ In the United States, third-party liability is based on contributory, vicarious and inducement doctrines.⁶⁴ Secondary liability has not been subject of harmonisation in the EU.⁶⁵ In Commonwealth countries, there are authorisation, joint tortfeasor liability, and criminal law accomplice theories.⁶⁶ In civil law countries, third-party liability is based on knowing assistance, duty of care and possibly injunctive relief. Similar constructs such as joint actions may also be available.⁶⁷ It is not possible to discuss these in detail here.⁶⁸ However, in consequence, the applicability of judgments from a different legal tradition is particularly limited.

In general, Dixon has characterised the elements of third-party culpability as follows: (1) *relation* of the third party with the user, that is, the potential or actual influence on the user; (2) *extent* of the third party's involvement (for example sanctioning, countenancing or causing; preparatory acts or providing means for infringement); (3) *knowledge* of infringing activities; (4) *intention* of the third party (even inferred based on inactivity or indifference); (5) *extent* of infringement and lawful activities, such as substantial (potential of actual) non-infringing use; (6) *financial or other benefit* of the third party (for example if the business model depends on infringement); (7) *ability to prevent or deter* infringement; (8) *due care* of the third party implying responsible practices; and (9) *cost-benefit analysis* (liability is a bad fit if preventing or deterring infringement would be technically infeasible or economically unreasonable). In the seven examined cases, no one factor itself caused liability but substantial findings from two or more criteria did.⁶⁹

Liability exemptions and defences

Likewise the exemptions from third-party liability granted to intermediaries also differ somewhat. The United States includes safe harbour provisions that in some aspects go further than their EU counterparts, and within the EU interpretations also vary.⁷⁰ In this context, of particular note is art.14 of the E-Commerce Directive (2000/31), by which hosting providers are not liable for information stored by recipients of the service provided that (a) the provider does not have actual knowledge of illegal activity or information or circumstances from which it is apparent, and (b) the provider removes such material upon obtaining such knowledge or awareness.⁷¹ If this defence is inapplicable, national rules on material liability or lack thereof apply.⁷² Further, art.15 precludes imposing a general monitoring obligation on transmitted information or to seek facts or circumstances of illegal activity.⁷³

In *L'Oréal v eBay*, the online marketplace operator was not liable for trade mark infringement by its users on certain conditions. A standard of "diligent economic operator" was established, requiring inter alia also the processing of imprecise takedown requests and the termination of repeat infringers. Specifically, required duties of care must not be monitoring obligations, but rather providing for example a sufficiently sophisticated notification system for receiving complaints.⁷⁴ These exemption provisions could be important in cases where the website operator only provides a platform for users to create or link content. However, this "it was just a platform" defence has almost invariably been rejected when the site relates to illegal activity.⁷⁵

In practice, courts have found ways to find platform providers liable owing to awareness, participation or some other basis. This has also led to undesirable uncertainty as to what exactly could cause liability for platform providers. This has a "chilling" effect on service providers

⁶³ See e.g. Dixon, "Liability of Users and Third Parties for Copyright Infringements on the Internet" in *Peer-to-Peer File Sharing* (2009), pp.12 et seq.

⁶⁴ See e.g. Dixon, "Liability of Users and Third Parties for Copyright Infringements on the Internet" in *Peer-to-Peer File Sharing* (2009), pp.15–16; Alfred C. Yen, "Third Party Copyright Liability after Grokster" (2006) 91 Minn. L.R. 184.

⁶⁵ Opinion of A.G. Jääskinen in *L'Oréal v eBay* (C-324/09) [2011] E.C.R. I-6011, [2011] E.T.M.R. 52 at [55]–[56]; Paul S. Davies, "Accessory Liability: Protecting Intellectual Property Rights" [2011] I.P.Q. 390.

⁶⁶ See e.g. Dixon, "Liability of Users and Third Parties for Copyright Infringements on the Internet" in *Peer-to-Peer File Sharing* (2009), pp.16–18; Christina Angelopoulos, "Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement" [2013] I.P.Q. 253, 255–259. For a more elaborate discussion, see Davies, "Accessory Liability" [2011] I.P.Q. 390; Saw Cheng Lim and Warren B. Chik, "Revisiting Authorisation Liability in Copyright Law" (2012) 24 Sac. L.J. 698.

⁶⁷ See e.g. Dixon, "Liability of Users and Third Parties for Copyright Infringements on the Internet" in *Peer-to-Peer File Sharing* (2009), pp.18–19; Angelopoulos, "Beyond the Safe Harbours" [2013] I.P.Q. 253, 266–270.

⁶⁸ On issues with holding platform providers liable through facilitating users' infringing acts, see e.g. Mark A. Lemley and R. Anthony Reese, "Reducing Digital Copyright Infringement Without Restricting Innovation" (2004) 56 Stan. L.R. 1345; Blevins, "Uncertainty as Enforcement Mechanism" (2013) 34 Cardozo L. Rev. 1821, 1829; Senfleben, "Breathing Space for Cloud-Based Business Models" (2013) 4 J.I.P.I.T.E.C. 87, paras 52, 59, 67, 73.

⁶⁹ Dixon, "Liability of Users and Third Parties for Copyright Infringements on the Internet" in *Peer-to-Peer File Sharing* (2009), pp.38–40.

⁷⁰ See e.g. Jane C. Ginsburg, "User-Generated Content Sites and Section 512 of the US Copyright Act" in Irini A. Stamatoudi (ed.), *Copyright Enforcement and the Internet* (Kluwer Law International, 2010), p.183; Jeremy de Beer and Christopher D. Clemmer, "Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?" (2009) 49 *Jurimetrics* 375, 382–389; Mark A. Lemley, "Rationalizing Internet Safe Harbours" (2007) 6 *J.T.H.T.L.* 101. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 arts 12–15. On developing common secondary liability in varying legal traditions, see Angelopoulos, "Beyond the Safe Harbours" [2013] I.P.Q. 253, 270–273.

⁷¹ As we have seen and will be discussed below, in all UK cases knowledge seemed apparent.

⁷² See Van Eecke, "Online Service Providers and Liability" (2011) 48 C.M.L. Rev. 1455, 1463–1464.

⁷³ See generally e.g. Van Eecke, "Online Service Providers and Liability" (2011) 48 C.M.L. Rev. 1455, 1465–1478. On interpretations of monitoring obligations, see e.g. Etienne Montero and Quentin van Enis, "Enabling Freedom of Expression in Light of Filtering Measures Imposed on Internet Intermediaries: Squaring the Circle?" (2011) 27 C.L.S. Rev. 21, 28–34; Sophie Stalla-Bourdillon, "Online Monitoring, Filtering, Blocking ... What is the Difference? Where to Draw the Line?" (2013) 29 C.L.S. Rev. 702, 704–710.

⁷⁴ *L'Oréal v eBay* [2011] E.C.R. I-6011, [[2011] E.T.M.R. 52 at 120]–[122], [140]–[141]; Senfleben, "Breathing Space for Cloud-Based Business Models" (2013) 4 J.I.P.I.T.E.C. 87, paras 49–50, 57–59; Montero and Van Enis, "Enabling Freedom of Expression in Light of Filtering Measures Imposed on Internet Intermediaries" (2011) 27 C.L.S. Rev. 21, 29.

⁷⁵ See e.g. Dixon, "Liability of Users and Third Parties for Copyright Infringements on the Internet" in *Peer-to-Peer File Sharing* (2009), pp.40–41. A disclaimer against illegal activity was present in *Newzbin* terms and conditions, but it was deemed entirely cosmetic and neither intended to be acted upon: see *Newzbin* [2010] EWHC 608 (Ch), [2010] F.S.R. 21 at [41]–[42]. Disclaimers were also present in torrent indexing sites: see *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R 8 at [60]–[62]. On "window dressing", also see Saw and Chik, "Revisiting Authorisation Liability in Copyright Law" (2012) 24 Sac. L.J. 698, para.81.

and externalises copyright enforcement costs to platform providers.⁷⁶ Higher costs and uncertainty in turn raises the standard in order to “play safe”, which leads to market concentration and stifles innovation by placing barriers to newcomers.⁷⁷ When on paper the liability is extensive and exemptions practically uncertain, differentiating between bona fide services and liable services is difficult, with the aforementioned consequences.⁷⁸

Examples of non-direct liability for platforms

In the UK blocking injunction *Dramatico v Sky*, The Pirate Bay operators were held to authorise infringement and be jointly liable as accessories, and internet service providers were ordered to block access to the site.⁷⁹ Comparatively, in Sweden the operators of The Pirate Bay website were found guilty of secondary liability for copyright infringement under criminal law. The defendants were found to have furthered the main offence of users' unlawful communication to the public by providing a website with well-developed search functions, storing facilities, providing a tracker service and having actual knowledge of copyrighted material. The hosting defence was rejected.⁸⁰ Somewhat differently in the Finreactor case, the Finnish Supreme Court considered the file sharing activity as a whole instead of assessing each participant's acts and liability separately. Most operators were considered joint infringers based on criminal law doctrine of mutual understanding and complicity which had until then been unfamiliar to copyright law; the hosting defence was likewise rejected.⁸¹ In contrast, in the United Kingdom establishing criminal accessory liability has not been so successful.⁸² Recently, with regard to the similar yet private Lithuanian site Linkomanija, in civil proceedings the operator was ordered to pay the maximum statutory damages and shut down the site for contributing to the infringement based on knowing of and encouraging illegal activities. The hosting defence was also deemed inapplicable.⁸³

Authorisation

Authorising means granting or purported granting of the right to do the act complained of; it does not extend to mere enablement, assistance or even encouragement. The nature of the relationship, the means used to infringe, the inevitability of infringement, the degree of control and steps to prevent infringement were each examined in turn. The conclusion was that the operators went far beyond merely enabling and assisting, and on any view, they sanction, approve and countenance users' infringements and also purport to grant users the right to do the acts complained of.⁸⁴ These five criteria, developed by Kitchin J. in *Newzbin*, were mostly based on circumstances rejected or unsupported in case law.⁸⁵

Therefore, it is questionable how authorising is applicable at least in the narrow sense. In *CBS Songs v Amstrad* it was specifically noted that mere facilitation or giving the users the means to infringe would not suffice, although with certain additional notes.⁸⁶ Grant or encouragement by someone who does not have authority is insufficient.⁸⁷ Given that users are responsible for their own activities, it is submitted that a purported grant to infringe should require significantly more and for clarity something explicit rather than mere provision of a website well suited for infringement. This is especially the case if the website includes an explicit disclaimer warning against copyright infringement. However, such disclaimers have had little impact on liability if it seems that the warning was not to be honoured.⁸⁸

Because in the United Kingdom copying for private use is not permitted, the most important non-infringing substantial use of an Amstrad device was likely to be copying self-made recordings. Was karaoke really that big in the United Kingdom in the 1980s? Particularly, copying such recordings to enchanted friends and family? Probably not. It is likely that the majority of activities were in fact infringing. Therefore, a website such as The Pirate Bay, which allows all kinds of material, even though most of it ends up being infringing, is not

⁷⁶ Lemley and Reese, “Reducing Digital Copyright Infringement Without Restricting Innovation” (2004) 56 Stan. L.R. 1345; Blevins, “Uncertainty as Enforcement Mechanism” (2013) 34 Cardozo L. Rev. 1821, 1824, 1834–1855; Lital Helman, “Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement” (2010) 19 Tex. Intell. Prop. L.J. 111, 155–156; Angelopoulos, “Beyond the Safe Harbours” [2013] I.P.Q. 253, 253–254.

⁷⁷ Senfleben, “Breathing Space for Cloud-Based Business Models” (2013) 4 J.I.P.I.T.E.C. 87, paras 51–52.

⁷⁸ Michael A. Carrier, “The Pirate Bay, Grokster, and Google” (2010) 15 J.I.P.R. 7, 14–15; Senfleben, “Breathing Space for Cloud-Based Business Models” (2013) 4 J.I.P.I.T.E.C. 87, paras 67, 73.

⁷⁹ Ruth Hoy, John Wilks and Nick Edbrooke, “*Dramatico Entertainment v BSKYB*: Pirate Bay Runs Aground in English Waters” [2012] Ent. L.R. 151, 152–53. Direct infringement was not claimed in this case (see *Dramatico Entertainment* [2012] EWHC 268, [2012] E.C.D.R. 14).

⁸⁰ Jerker Edström and Henrik Nilsson, “The Pirate Bay Verdict — Predictable, and Yet ...” [2009] E.I.P.R. 483, 483–486; Mikko Manner, Topi Siniketo and Ulrika Polland, “The Pirate Bay Ruling—When The Fun and Games End” [2009] Ent. L.R. 197, 200–201; Carrier, “The Pirate Bay, Grokster, and Google” (2010) 15 J.I.P.R. 7, 9–12.

⁸¹ Pessi Honkasalo, “Criminal Proceedings Against the Administrators of a BitTorrent Tracker: Finreactor KKO 2010:47” [2010] E.I.P.R. 591; Manner, Siniketo and Polland, “The Pirate Bay Ruling” [2009] Ent. L.R. 197, 202–203.

⁸² See Davies, “Accessory Liability” [2011] I.P.Q. 390 393–394. The psychological bar to convict may also be higher in countries where such matters are decided by a jury. This may be one of the reasons for aversion to criminal proceedings in certain countries and inclination towards civil litigation.

⁸³ [2012] Vilnius District Court 2-742-262/2012. The decision has been appealed. See Rita Matulionyte and Mindaugas Lankauskas, “Bittorrent Loses Again: A Recent Lithuanian BitTorrent Case and What It Means for the Construction of the E-commerce Directive” (2013) 4(3) J.I.P.I.T.E.C. 179, paras 5–8.

⁸⁴ *Newzbin* [2010] EWHC 608 (Ch), [2010] F.S.R. 21 at [85]–[102]; *Dramatico v Sky* [2012] EWHC 268, [2012] E.C.D.R. 14 at [73]–[81]; *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8 at [52]–[70]; Min Yan, “The Law Surrounding the Facilitation of Online Copyright Infringement” [2012] E.I.P.R. 122. For a more nuanced discussion of interpretations of authorisation liability, see Saw and Chik, “Revisiting Authorisation Liability in Copyright Law” (2012) 24 Sac. L.J. 698.

⁸⁵ Angelopoulos, “Beyond the Safe Harbours” [2013] I.P.Q. 253, 256.

⁸⁶ *CBS Songs v Amstrad* [1988] A.C. 1013 HL. The case was about the liability of producers of twin cassette recording devices, and comparison to an internet service may be difficult.

⁸⁷ *CBS Songs v Amstrad* [1988] A.C. 1013 at 1054; Davies, “Accessory Liability” [2011] I.P.Q. 390, 396; Saw and Chik, “Revisiting Authorisation Liability in Copyright Law” (2012) 24 Sac. L.J. 698, paras 14–16.

⁸⁸ See fn.75. It should be a factor on this aspect of authorisation, however. It is also worth considering which kind of disclaimer could be considered serious enough, given that the operator may not be able or required to enforce it. At some point this must be distinguished from negligence, which is unlikely to apply to an accessory owing to the lack of any duty of care, see Davies, “Accessory Liability” [2011] I.P.Q. 390, 398.

necessarily so far from the “substantial non-infringing use” standard when compared with this aspect of *CBS Songs v Amstrad*.⁸⁹ This also shows how particularly in the United States the original doctrine required only potential substantial non-infringing use. Nowadays the requirement for non-liability seems to have been raised to actual use. This might in turn in many contexts be uncontrollable by the operator with the reasonable effort as required by the safe harbour provisions, for example in a video publishing service.⁹⁰

In *Newzbin*, the strongest signals of authorisation seemed to be the advice on the user support message board and the operators and volunteer editors creating and classifying material to detailed subject-matter categories which showed knowledge of infringing content. All or most (other) activities could also have been deemed as “enabling, assisting and encouraging”, which is not sufficient for authorisation—and neither is, according to House of Lords, to “sanction, approve and countenance”.⁹¹ While in *The Pirate Bay* case the statements of operators might be indicative,⁹² also in *Newzbin* the applicability of the authorisation doctrine was suspect. Essentially the defendant had built a technical system for easily obtaining file collections from the Usenet newsfeed service, a precursor to the World Wide Web.⁹³ The developed system could be beneficial for non-infringing purposes provided that there existed a substantial amount of non-infringing content in Usenet.

Interpretation has shifted more towards allowing facilitation through the flexibility of recent judgments.⁹⁴ Based on case law the precise difference between what is in and out of scope seems unclear.⁹⁵ As a consequence, caution is advised when considering applying the authorisation doctrine through interpretative expansion. Angelopoulos states this even more strongly and suggests joint tortfeasance as a more sensible approach:

“If both [operator and users] know that the intended copying is illegal, it is misleading to talk about the purported grant of a right; quite contrary, what the sites in question encourage is precisely unauthorised copying.”

And:

“What [High Court decisions] reveal is bewildered lower courts struggling to identify a sound jurisprudential basis on which to ground the liability of third parties whose wrongfulness the judges instinctively accept. The result is legal gymnastics that fail to convince.”⁹⁶

Joint tortfeasance

Joint tortfeasance is based on general theory of tort law and in consequence has more generic applicability. Based on earlier case law, Kitchin J. and later Arnold J. concluded that mere (even knowing) assistance or facilitation of the primary infringement is not enough. The joint tortfeasor must be so involved as to make the tort his own. This would be the case if he induced, incited, or persuaded the primary infringer to engage in the act or if there is a common design or concerted action or agreement on a common action to secure the doing of the act.⁹⁷

Based on *CBS Songs v Amstrad*, this again raises questions, given that it is the user who chooses to commit infringing acts and there has been no evidence of explicit incitement or persuasion. As Lord Templeman stated:

“The purchaser will not make unlawful copies because he has been induced or incited or persuaded to do so by Amstrad. The purchaser will make unlawful copies for his own use because he chooses to do so. Amstrad’s advertisements may persuade the purchaser to buy an Amstrad machine but will not influence the purchaser’s later decision to infringe on copyright.”⁹⁸

This is supported by an appeals case focused on the inevitability of infringement which seems to set the case apart from these injunctions where the choice of infringement lay with the users.⁹⁹

Therefore, it could be argued that providing a website with an “open doors” policy does not procure the user to potential subsequent acts of infringement. Procurement seems to require giving the primary infringer an idea (s)he would not otherwise have had and make the primary infringement more desirable than it otherwise would have

⁸⁹ On the probability of infringement and requirement of culpability, i.e. a “mental element” on the part of the accessory, see Davies, “Accessory Liability” [2011] I.P.Q. 390, 394–395, 397–398.

⁹⁰ Yen, “Third Party Copyright Liability after Grokster” (2006) 91 Minn. L.R. 184, 225–226, 232; Blevins, “Uncertainty as Enforcement Mechanism” (2013) 34 Cardozo L. Rev. 1821, 1841–1842, 1849.

⁹¹ Angelopoulos, “Beyond the Safe Harbours” [2013] I.P.Q. 253, 256.

⁹² The site flaunted “piracy” and it was stated that no torrent descriptions would be removed (with certain exceptions) and requests would be published and ridiculed at the site: see *Dramatico v Sky* [2012] EWHC 268, [2012] E.C.D.R. 14 at [13], [79]–[80]. Obviously users clearly knew that website operators were in no position to grant them any right. See Saw and Chik, “Revisiting Authorisation Liability in Copyright Law” (2012) 24 Sac. L.J. 698, para.22.

⁹³ See *Newzbin* [2010] EWHC 608 (Ch), [2010] F.S.R. 21 at [23]–[31], [98]–[101].

⁹⁴ Angelopoulos, “Beyond the Safe Harbours” [2013] I.P.Q. 253, 256.

⁹⁵ cf. the Australian case *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, referred to in *Newzbin* [2010] EWHC 608 (Ch), [2010] F.S.R. 21 at [91]–[93], it was held that adding hyperlinks to music recordings on a website amounted to authorising infringement. However, in Australia there is a more explicit statutory provision on what constitutes authorisation under copyright law, and the case is incomparable here.

⁹⁶ Angelopoulos, “Beyond the Safe Harbours” [2013] I.P.Q. 253, 257. On lack of authority to grant any right, also see fn.92.

⁹⁷ *Newzbin* [2010] EWHC 608 (Ch), [2010] F.S.R. 21 at [108]; *Dramatico v Sky* [2012] EWHC 268, [2012] E.C.D.R. 14 at [82]; *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8 at [71]–[74].

⁹⁸ *CBS Songs v Amstrad* [1988] A.C. 1013 at 1058.

⁹⁹ *Football Dataco Ltd Ltd v Sportradar GmbH* [2013] EWCA Civ 27 [96]–[97]; [2013] Bus. L.R. 837. Arnold J. noted that this approach cannot be translated wholesale to the context of torrent site blocking, but in his view it provided support for conclusions reached; see *EMI v Sky* [2013] EWHC 379 (Ch); [2013] E.C.D.R. 8 at [73]. Actually it seemed to do the opposite.

been.¹⁰⁰ However, properly implementing takedown procedures would still be required, and this was a failure at least in case of The Pirate Bay. Respectively in *Newzbin* knowledge of infringement, providing detailed categories for the content on the site, advice on the message boards and inducing editors to act in their roles seemed to be strongest bases for participation in common design.¹⁰¹

Additional considerations for blocking injunctions

A case for restraint in issuing orders

In addition to caution in applying substantive law, the peculiar procedural situation in court may also warrant consideration. The actual infringer is absent¹⁰² and internet service providers have no incentive to appeal because it would require resources and incur costs (e.g. legal fees). Therefore, no decision will be reviewed by higher courts thus eroding the value of case law as precedent.

It has also been argued that the UK accessory liability doctrines could use development.¹⁰³ Development and acceptance would be maximised if done or approved in higher courts. On the other hand, denying a request would be likely to result in appeal, leading to review and even CJEU referral if deemed necessary. From this perspective, erring on the side of restraint would seem preferable than on action.

Applicability to proxy sites

What about websites linking to infringing sites or websites acting as proxies (e.g. *www.pirateproxy.net* to access *www.thepiratebay.se*) to such sites? First, freedom of expression implies that linking to a website's main page cannot amount to direct infringement, and the only grounds that could even be considered would be joint liability in some extreme cases. Secondly, specific proxy sites numbering in the hundreds that provide access to the blocked websites are a different question.¹⁰⁴

In the implementation of *Newzbin2*, blocking the order was extended to cover "any other IP address or URL whose sole or predominant purpose is to enable or facilitate access to the *Newzbin2* website", to be identified

and verified by the right holders. Further, if inclusion of an address or page is disputed the issue could be resolved in court.¹⁰⁵ In subsequent orders specific terms have not been analysed by the court. However, it has been noted that an IP address¹⁰⁶ is not eligible for blocking if it is shared with anyone else.¹⁰⁷ This is a concrete risk given that according to a study 10 years ago 87 per cent of websites shared an IP address.¹⁰⁸ Owing to the running-out of IP(v4) addresses¹⁰⁹ the problem is likely to become worse; ascertaining whether the address is shared may also be difficult.

These provisions have apparently been the grounds for including proxy sites in the blocking list. In contrast, it is likely that the original intent was to cover the changes of domain names and IP addresses by website operators, not the acts of third parties. As long as over-blocking due to shared IP addresses does not result, the evaluation of infringement criteria seems similar. However, liability is one step further from the main infringement, possibly resulting in challenges in proving joint actions. Per the Belgian Supreme Court decision, the providers apparently need to identify and block these on their own.¹¹⁰ On the other hand, in the UK and Dutch courts these have been addressed in proceedings against the website operator.¹¹¹ Indeed, analysis of the liability of third parties and a consideration of the limits of blocking given the potential over-blocking results would be beneficial, especially in the context of blocking injunctions.

Conclusions

Establishing website operators' liability based on direct infringement of communication to the public for user-generated links seems to have been the most lucrative option. This is understandable because this is harmonised within the EU and requires little with regard to facts or causality. However, such expansion is undesirable for various reasons including subsequent use of the broadened concept in less applicable contexts.

It is submitted that hyperlinking and embedding are similar when it comes to direct infringement of economic rights of communication to the public. There are compelling systematic reasons to advocate that the lawfulness of the source cannot be the sole factor for

¹⁰⁰ Davies, "Accessory Liability" [2011] I.P.Q. 390, 396. Davies argues (at 397) that criminal accessory liability leading inevitably to civil liability (as in Sweden) should also be adopted in England, and also (at 401–402) on the preference of the US style of contributory liability.

¹⁰¹ cf. *Newzbin* [2010] EWHC 608 (Ch); [2010] F.S.R. 21 at [111].

¹⁰² Serving summons was deemed unnecessary; see *Dramatico v Sky* [2012] EWHC 268; [2012] E.C.D.R. 14 at [9]–[15].

¹⁰³ Saw and Chik, "Revisiting Authorisation Liability in Copyright Law" (2012) 24 Sac. L.J. 698, paras 86–91; Davies, "Accessory Liability: Protecting Intellectual Property Rights" [2011] I.P.Q. 390, 397, 401, 403, 409.

¹⁰⁴ See e.g. <http://TorrentProxies.com> [Accessed February 25, 2014]; fnn.2–3.

¹⁰⁵ *Twentieth Century Fox Film Corp Ltd v British Telecommunications Plc (No.2)* [2011] EWHC 2714 (Ch); [2012] Bus. L.R. 1525 at [10]–[12].

¹⁰⁶ An IP address is used to identify and locate a computer in the network.

¹⁰⁷ *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No.2)* [2012] EWHC 1152 (Ch) [13]; [2012] 3 C.M.L.R. 15 at [13]; *FAPL v Sky* [2013] EWHC 2058 (Ch); [2013] E.C.D.R. 14 at [56].

¹⁰⁸ Benjamin Edelman, "Web Sites Sharing IP Addresses: Prevalence and Significance" (September 12, 2003), http://cyber.law.harvard.edu/archived_content/people/edelman/ip-sharing/ [Accessed February 25, 2014].

¹⁰⁹ Internet Society, "Frequently Asked Questions on IPv6 adoption and IPv4 exhaustion", http://www.isoc.org/internet/issues/ipv6_faq.shtml [Accessed February 25, 2014].

¹¹⁰ TorrentFreak, "Court Orders ISPs to Police the Internet for Pirate Bay Proxies" (November 20, 2013) <http://torrentfreak.com/court-orders-isps-to-police-the-internet-for-pirate-bay-proxies-131120/> [Accessed February 25, 2014]. It is possible that this would be inappropriate, being too generic and not specific enough. See Opinion of A.G. Kokott in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH (C-314/12)*, November 26, 2013 at [86]–[90]. The case concerns which internet service providers may be ordered to block access to a site and the required specificity of such orders.

¹¹¹ TorrentFreak, "Court Shuts Down Wordpress Based Pirate Bay Proxy" (July 9, 2012), <http://torrentfreak.com/court-shuts-down-wordpress-based-pirate-bay-proxy-120709/>; TorrentFreak, "Pirate Party Shuts Down Pirate Bay Proxy After Legal Threats" (December 19, 2012), <http://torrentfreak.com/pirate-party-shuts-down-pirate-bay-proxy-after-legal-threats-121219/> [Both accessed February 25, 2014].

direct infringement. From a practical perspective, however, it is understandable how hyperlinking to unlawful material or embedding links could in some cases be considered direct infringement.

A systematically preferable option is to examine secondary and joint liability, even if applying these might in some cases, such as with authorisation, be suspect. At the very least arguments must be built with care. The downside is that these doctrines have not been harmonised and the role of CJEU in interpreting and approximating copyright would be limited. It is submitted that if harmonisation in these circumstances was deemed useful,

it should occur through legislation, not through judicial interpretation of the concepts related to direct infringement.

The practical inapplicability of the hosting defence and the rise of the role of websites in policing content are somewhat worrisome. This leads to legal uncertainty and increases the costs of running a site. In addition, it seems rather straightforward to issue a website blocking order. Further, at least in the United Kingdom, after the initial cases, it has been relatively straightforward to extend blocking to new sites as soon as it seems apparent that the site provides a platform suitable for substantial amount of copyright.

The Ultimate Copyright Shopping Opportunity – Jurisdiction and Choice of Law in Website Blocking Injunctions

Pekka Savola

Published online: 26 March 2014

© Max Planck Institute for Innovation and Competition, Munich 2014

Abstract So-called “mere conduit” internet service providers (ISPs) have been issued injunctions to block access to websites to try to mitigate online copyright infringement. Such orders have an international and ubiquitous character, because various parties reside and infringing acts typically occur in different states. This raises questions as to which court has jurisdiction to try the case and to what extent, and which laws apply. These issues are examined *de lege lata* from the perspective of forum-shopping and choice of law, first in the context of proceedings against the website operator and then against the ISP. We see that the flexibility afforded by EU case law provides options for localizing infringing acts and damages and selecting the jurisdiction and applicable law. A typical but complex scenario is a state enforcing its laws and policies on a foreign website at the user end. The state of the ISP’s domicile has global jurisdiction but local law may only be applied to communications that go through the territory of that state. This portrays the distributive effect of the Rome II Regulation which usually leads to the application of multiple laws. Respectively, a foreign court would have local jurisdiction if the affected ISP at least had a branch or an agency there. Jurisdiction may also be based on preventive or protective measures with arguable cross-border limitations. On the other hand, Art. 5(3) of the Brussels I Regulation on tort liability and Art. 6(2) on third party proceedings seem inapplicable to these injunctions.

Keywords Information technology · Copyright · Choice of law · Jurisdiction · Forum-shopping · Blocking injunction · Internet service provider

P. Savola (✉)

Licentiate in Science (Technology) at Aalto University; Master of Law and JD candidate at University of Helsinki, Finland; Legal Counsel and Senior Network Specialist at CSC–IT Center for Science Ltd
Helsinki, Finland
e-mail: pekka.savola@helsinki.fi

1 Introduction

Recently internet service providers (ISPs) have been issued injunctions to block access to websites in order to mitigate copyright infringement in peer-to-peer networks populated by users of the website. Most notably, website blocking has been applied to The Pirate Bay in about ten EU states.¹ In 2013, blocking expanded in the UK to cover various other similar and proxy sites, and this trend is expected to continue.² The legal basis for an injunction against a so-called “mere conduit” intermediary ISP has been the national implementation of Art. 8(3) of the Information Society Directive (2001/29/EC). This provides for injunctive relief that does not require establishing an intermediary’s direct or secondary liability for infringement.³

This kind of online copyright infringement has an international and often also ubiquitous character. Typically the site is located in one state, the users are located in various states, and the ISP operates in a number of states. The acts of infringement can likewise be considered to occur in various states.⁴ The traditional approach under private international law, largely based on the concept of liability, is inadequate to resolve which forum and which law is applicable to issuing ISPs an order to block access to a website, given that there is no wrongful conduct on the part of the ISP.⁵ Further, international aspects provide the right holder with a large number of options on how to seek a remedy and respectively also opportunities for alleged infringers to avoid or optimize litigation.

While copyright law has to some degree been harmonized within the EU, many aspects are still national and territorial.⁶ In the same vein, different national

¹ See e.g. L. Feiler, “Website Blocking Injunctions under EU and U.S. Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?” (TTLF Working Paper No. 13, 2012); Husovec (2013); P. Savola, “Copyright Injunctions against Internet Connectivity Providers Especially with Regard to Peer-to-peer Networking” (Aalto University Thesis [in Finnish], 2013). The term “website” is used for simplicity to refer to all similar technical resources.

² See e.g. TorrentFreak.com, “Movie Studios Get UK ISPs to Block Torrent Site Proxies” (5 September 2013) and references. There have also been other attempts to reduce online copyright infringement, such as delisting or deprefering results in search engines. See e.g. TorrentFreak.com, “How Google Helps Copyright Holders Fight Piracy” (11 September 2013).

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ L 167* (22 June 2001). See M. Husovec, *supra* note 1, at 116–117, paras. 1–5; L. Feiler, *supra* note 1, at 17–22; Fawcett and Torremans (2011, at 545–546, 575).

⁴ See e.g. J. Fawcett & P. Torremans, *supra* note 3, at 548–550.

⁵ For example, M. Husovec (*supra* note 1, at 125–126, paras. 46–48, 52) notes a paradigm shift from tort-law-centric injunctions to *in rem* injunctions and vulnerability of third party injunctions to abuse. See also C. Angelopoulos, “Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe”, 2013 *I.P.Q.* 253.

⁶ See e.g. Hugenholtz (2013, 277 *et seq*); Tritton et al. (2008, 1153 *et seq*); *Football Dataco Ltd v. Sportradar* (C-173/11), 18 October 2012, para. 27. The grounds for this historical tradition have however been disputed. See e.g. Ubertazzi (2012b); Neumann (2011).

requirements and enforcement strategies for ISPs are acceptable, contrary to the general principle of the E-Commerce Directive (2000/31/EC).⁷ Indeed, this paper focuses on issues of international jurisdiction (which courts can try the case and to what extent) and the choice of law (which law should be applied in that court and to what extent). For simplicity, all parties are assumed to be from the EU.⁸

There have been a number of studies on private international and intellectual property law, also in the context of copyright and the online environment.⁹ However, most have not focused on “mere conduit” intermediaries and the context of peer-to-peer copyright infringement, or the focus has been on *de lege ferenda*.¹⁰ This paper explores copyright injunctions ordering an internet connectivity provider to block access to a website. The focus is on the current law and various forum-shopping and choice-of-law opportunities and how these could be addressed in court.¹¹

The three principal approaches to (try to) stop infringement are suing users or website operators¹² and obtaining an injunction ordering an intermediary service provider to (try to) block access to the site, either at the user end or closer to the source.¹³ These approaches have different costs, effectiveness, and international character, and as such the choice is also strategic. From the right holders’ perspective, expanding the liability of intermediaries and suing facilitators is a logical move in trying to change the economics of copyright law, even if it is not a socially optimal response.¹⁴ Therefore, given that suing website operators may be challenging,¹⁵ the growing interest in pursuing website blocking through intermediaries seems natural. Further discussion of these choices is, however, beyond the scope of this article.

⁷ 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 July 2000). In general, Art. 3 forbids making foreign service providers subject to stricter requirements in local laws compared to those applicable in the state of their establishment, but this specifically does not apply to copyright and related rights. See L. Feiler, *supra* note 1, at 51–52.

⁸ Denmark is partially excluded, and certain other non-EU states are also included per the Brussels and Lugano Conventions. I will not go into details here. Otherwise national procedural and substantive law applies, influenced by various international conventions and agreements, typically in a manner similar to principles outlined here. See e.g. J. Fawcett & P. Torremans, *supra* note 3, at 665 *et seq.*

⁹ See e.g. Ubertazzi (2012a); De Miguel Asensio (2012); Maunsbach (2012); S. Neumann, *supra* note 6; Dinwoodie et al. (2009).

¹⁰ For example, a number of academic principles governing jurisdiction and choice of law have been suggested, e.g. so-called “ALI principles”, “CLIP principles”, the Japanese “Transparency Proposal” and “Joint Korean and Japanese Proposal”. As a summary, see e.g. P. De Miguel Asensio, *supra* note 9; B. Ubertazzi, *supra* note 9; International Law Association (ILA) Intellectual Property and Private International Law Committee, Sofia Conference (2012), First Report. The goal of these proposals has been, however, to reform legislation; they do not purport to be descriptive of the current law. See e.g. J. Fawcett & P. Torremans, *supra* note 3, at 646, 652–653.

¹¹ See generally J. Fawcett & P. Torremans, *supra* note 3, at 221–227 on forum-shopping.

¹² Here “website operator” refers to a company or people responsible for the (content of a) website. This typically excludes non-liable parties, for example the hosting provider.

¹³ Other options are also available, for example initiating criminal proceedings against infringers.

¹⁴ See Lemley and Reese (2003, at 1374 *et seq.*); Schellekens (2011). See M. Husovec, *supra* note 1, at 124, paras. 44–45, for right holders pushing for a broad scope of injunctions against intermediaries.

¹⁵ See e.g. M. Husovec, *supra* note 1, at 121, para. 25.

These principal approaches may also be connected. In order to obtain an injunction against an ISP, in some states (e.g. Finland) the right holder is required to sue the website operator in order to obtain a declaratory judgment of infringement, prohibiting continued violation.¹⁶ If such a suit is dismissed, ruled inadmissible or the plaintiff cancels the legal action or fails to appear in court, the plaintiff must reimburse all damages and costs to the alleged infringer and the ISPs.¹⁷ Therefore, choosing a forum without jurisdiction might lead to inadmissibility and have dramatic consequences.

As an introduction and to flesh out the more generic perspective in a simpler situation, proceedings against website operators are first discussed. This paper then moves on to discuss the primary topic, issuing a multinational ISP an injunction that affects other states. In both of these contexts, particular focus has been put on various choices for acts or arguments that could optimize the outcome (“shopping”). Finally, conclusions are presented.

2 Proceedings Against Website Operators

2.1 Jurisdiction

The general rule in the Brussels I Regulation¹⁸ is that the court where one of the defendants is domiciled or has an establishment has jurisdiction per Arts. 2, 5(5), and 6(1). This is extended in Art. 5(3) stating that, in case of a tort, delict or quasi-delict, the courts where the harmful event occurred or may occur also have jurisdiction.¹⁹ There is no specific provision that would apply to copyright, and for special jurisdiction one must resort to tort law principles.²⁰

¹⁶ This is supported by Art. 50(6) of the TRIPS Agreement, by which provisional measures may be revoked unless proceedings leading to a decision on the merits of the case are initiated within a reasonable period. It is possible that in other states a website blocking action is already considered to constitute a decision on the merits. *See infra* notes 84 and 98 and accompanying text.

¹⁷ Finnish Copyright Act (404/1961, as modified by 821/2005 and 679/2006), Secs. 60b and 60c(4). This is similar to Art. 50(7) of the TRIPS Agreement.

¹⁸ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 12* (16 January 2001). The recast regulation will apply from 2015. Article numbering has changed, but from the perspective of this paper, the changes in content are not relevant. *See* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ L 351* (20 December 2012).

¹⁹ Based on the CJEU judgment *Folien Fischer AG, Fofitec AG v. Ritrama SpA* (C-133/11), 25 October 2012, this also applies to negative declaratory actions seeking to establish that liability for damages does not exist. Earlier some states adopted a different model, with exclusive jurisdiction under Art. 22(4) of the Brussels I Regulation, which led to so-called “torpedo” issues aimed at lengthening proceedings. *See* B. Ubertazzi, *supra* note 9, at 247–249. *Cf.* Opinion of Advocate General Niilo Jääskinen on *Fischer* (C-133/11), 19 April 2012, proposing a restrictive interpretation and answering that Art. 5(3) did not apply, but this was not adopted in the judgment.

²⁰ *See* S. Neumann, *supra* note 6, at 584–585.

The CJEU interpreted liability under Art. 5(3) in its *eDate* judgment (C-509/09 and C-161/10) in the context of personality right violations, such as libel, as follows. The state where the publisher is established (where the action took place) has jurisdiction for liability for all damages, and alternatively every state where online content has been accessible (where effects appeared) has jurisdiction to the extent of damages in that state.²¹ Because personality rights are not subject to territoriality like intellectual property rights, applicability or lack thereof to IPR infringement has been debated.²² Indeed, the CJEU later stated in its *Wintersteiger* judgment (C-523/10) on a registered trade mark used in online advertising that this principle does not apply to IPRs. It was also stated that “in principle” protection is territorially limited and cannot “in general” be relied on outside the territory of the granting state.²³ A recent judgment on copyright infringement, *Pinckney* (C-170/12), confirmed that the meaning of Art. 5(3) may vary according to the nature of the infringed right and that the Court has distinguished between personality rights and IPR violations.²⁴

In *Wintersteiger* it was established that the case could be tried in the state that granted the trade mark (the place where damage occurred) or the state where the company (advertiser) that had bought trademarked keywords was established (the place where the event giving rise to the damage occurred).²⁵ *Pinckney* confirmed strict territoriality of registered trade marks, emphasizing further that the state that granted a national mark was best placed to ascertain whether the right had been infringed. The Advocate General suggested that an approach similar to *Wintersteiger* should be followed with regard to copyright, but the CJEU went its own way.²⁶ The CJEU held that, by virtue of Directive 2001/29, copyright is automatically protected in all

²¹ Joined cases *eDate Advertising GmbH v. X* (C-509/09) and *Olivier Martinez and Robert Martinez v. MGN Limited* (C-161/10), 25 October 2011 (Grand Chamber). See e.g. U. Maunsbach, *supra* note 9, at 55–57. The effect of the website in the state must still be significant enough at least to constitute the centre of the victim’s interest. See e.g. J. Fawcett & P. Torremans, *supra* note 3, at 554–558; *eDate* (C-509/09 and C-161/10), paras. 49–50.

²² See e.g. S. Neumann, *supra* note 6, at 596, especially note 56; B. Ubertazzi, *supra* note 9, at 231–232, para. 28 including references, at 233, paras. 36–38, and at 245, para. 111; U. Maunsbach, *supra* note 9, at 56; N. Hitsevich, “Article 5(3) of the Brussels I Regulation and Its Applicability in the Case of Intellectual Property Rights Infringement on the Internet”, 79 *World Academy of Science, Engineering and Technology Index* 1811 (2013). In the Finnish *Pirate Bay* declaratory action (Helsinki District Court case 11/48308, still pending), the applicants also argued for jurisdiction of the court based on the principle of *eDate*.

²³ *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH* (C-523/10), 19 April 2012, paras. 24–25; B. Ubertazzi, *supra* note 9, at 232, paras. 29–30.

²⁴ *Peter Pinckney v. KDG Mediatech AG* (C-170/12), 3 October 2013, paras. 32, 35–37.

²⁵ *Wintersteiger* (C-523/10), paras. 29, 38. Earlier it was widely argued that the infringing act and the damage must occur in the same protecting state. See S. Neumann, *supra* note 6, at 593–594 (stating that *inter alia* Art. 5(3) is considered to be limited to the infringement of IPRs committed in the protecting country). Based on newer case law, this no longer appears to hold. *Pinckney* also points in this direction, given that the infringing act (at least with a typical location of acts) apparently did not occur in the state where the action was brought.

²⁶ Opinion of Advocate General Niilo Jääskinen on *Pinckney* (C-170/12), 12 June 2013, paras. 57–61, 68–69.

Member States and that every state where an internet site was accessible has jurisdiction.²⁷

The *Wintersteiger* judgment did not contemplate what damages could be awarded in which court.²⁸ In *Pinckney*, it was held that the limited protection of a state also applies to which damages may be considered or even that only local damages can be awarded.²⁹ Due to the facts of the case and vagueness of the judgment one should be wary of making conclusions on this aspect of *Pinckney*.³⁰ If the principle of *eDate* was applied to *Wintersteiger*, the state where an online advertiser's wrongful conduct occurs would have jurisdiction for all damages, and the state where the infringed trade mark is registered (where damage occurs) for local damages. This is also what the Advocate General suggested in *Pinckney* in the context of infringement of the right to communication to the public.³¹ This interpretation becomes suspect after *Pinckney*, given that the judgment emphasizes that damages can only be considered insofar as protection is offered, or alternatively limited to the state where the court is situated.

In practical terms, however, it would be more important to know where damage is deemed to have been caused than the theoretical division between local and all damages. For example, taking the facts of *Pinckney*, does an infringing communication to the public by an online store in the UK cause (practically) all its damage in the author's domicile in France? Every state where the store is accessible? Or only in the UK? If in the UK, would purchases from France still cause damage in France? Such questions have significant practical relevance, but have not been specifically addressed in EU case law.³² If practically all damages (from lost sales, profits, etc.) were always considered to occur in the author's domicile, this would in most cases render the jurisdiction limitation and distinction of local and all damages meaningless.³³

²⁷ See *Pinckney* (C-170/12), paras. 39–44.

²⁸ This did not make a difference in this particular case because (apparently) only two states were involved. In *Football Dataco Ltd. v. Sportradar* (C-173/11) this was also not considered.

²⁹ *Pinckney* (C-170/12), paras. 45–47. The former interpretation is supported by para. 45; the latter by paras. 46–47.

³⁰ The CJEU did not consider the details of the protection granted by a state, which kind of infringement had occurred, or where and by whom; possibly this was considered to belong to the substance of the matter. Likewise, there was no consideration of what damage could have been caused in which states. On the other hand, in his opinion the Advocate General discussed this in more detail and previous cases were also more detailed in this respect. Consequently, it is not obvious how well the statements in the judgment would apply to other cases.

³¹ Opinion of Advocate General Niilo Jääskinen on *Pinckney* (C-170/12), para. 71. With Union-wide IPRs, under the Community Trade Mark (and Design) Regulation, the domicile or establishment of the defendant (if located in the EU) has principal jurisdiction; only local damages can be awarded by the court on infringement. See B. Ubertazzi, *supra* note 9, at 232, para. 30.

³² Advocate General Niilo Jääskinen discussed this issue in some detail in his opinion on *Pinckney* (C-170/12), paras. 53 *et seq.* (especially in footnote 46), also referring to earlier case law. In para. 70 he explicitly noted that, when the exclusive right of communication to the public is infringed, the damage is linked to the location of the public rather than the centre of the author's interests (as with personality rights). Given that the AG's opinion was not followed and the referred case law did not relate to IPRs, the applicability of the argument is unclear.

³³ In practice this would result in an inverse situation compared to the principal rule of jurisdiction at the defendant's domicile. Global jurisdiction was rejected but, as stated, the practical impact might still be the same. See *infra* note 36.

We have at least four potential interpretations on the award of damages. *Pinckney* could be read so that damages can only be awarded to the extent of the jurisdiction of the court or that only local damages can be awarded even if jurisdiction were broader. The third interpretation is the solution described above based on *eDate*, specifically with the focus on the act of infringement rather than the protecting state.³⁴ This was also the Advocate General's interpretation of infringement of communication to the public in *Pinckney*.³⁵ As the fourth option, the reverse could also be argued by focusing solely on the right and the state that granted it, regardless of who infringed it and where. The argument would be that the effectiveness of protection and sound administration of justice requires the ability to make all claims in one court. That court would naturally be the one with the closest connection to the granted IPR, rather than, for example, the defendant's domicile. This approach would actually have some similarity to *Pinckney* except that the author's domicile would explicitly have global jurisdiction. Even though global jurisdiction was rejected in that case, a practical backdoor remains open owing to the uncertainty of where the damages occur. Accepting this model would have a similar impact as extending exclusive jurisdiction per Sec. 22(4) to damage claims and non-registered rights, which should be rejected.³⁶ In this paper, I will follow the broad interpretation of *Pinckney*, where the award of damages follows the extent of jurisdiction. This is also in line with the proposal of the Advocate General and the first interpretation of *eDate*, except that these interpretations would confer global jurisdiction on the state where the event giving rise to damage occurred, that is, where the wrongful conduct occurred.

In the *Wintersteiger* and *Pinckney* judgments, special jurisdiction was examined solely from the perspective of Art. 5(3).³⁷ Article 8(2) of the Information Society Directive (2001/29/EC) requires Member States to ensure that right holders can bring an action for damages for infringing activity that occurs in that state's territory. However, the situation where the act of copyright infringement occurs outside the territory but damages are felt locally is unspecified. This could, however, be considered an issue of substantive law, not a question of jurisdiction.³⁸ Indeed, any state recognizing copyright for a work has jurisdiction for damages in that state

³⁴ Similarly in J. Fawcett & P. Torremans, *supra* note 3, at 561 (stating that the focus must be on the act of the defendant).

³⁵ Opinion of Advocate General Niilo Jääskinen on *Pinckney* (C-170/12), para. 70, specifically referring to *Wintersteiger* and the Advocate General's opinion on *Wintersteiger*.

³⁶ Article 22(4) does not apply to infringement cases. See J. Fawcett & P. Torremans, *supra* note 3, at 19–20. The applicability of Art. 22(4) for copyright damages was reversed and rejected in the UK Supreme Court's ruling, *Lucasfilm Ltd. & Ors v. Ainsworth & Anor*, UKSC 29 (27 July 2011). See B. Ubertazzi, *supra* note 9, at 243, paras. 93–94. Advocate General Niilo Jääskinen in his opinion on *Pinckney* (C-170/12), para. 69, also strongly advised against this because it would deprive Art. 2 of its meaning and distort the intention of the legislature.

³⁷ More generally, in certain matters relating to the validity of registered IPRs, the state that grants such a right has exclusive jurisdiction per Art. 22(4), but this does not apply to copyright. See G. Tritton et al., *supra* note 6, at 1210–1211.

³⁸ U. Maunsbach (*supra* note 9, at 57) has argued that it would not be unjust to force the right holder to bring its claims before the court where the action took place or where the defendant is domiciled.

by virtue of EU law and international conventions.³⁹ Further, *Football Dataco Ltd v. Sportradar* (C-173/11) appears to imply that escaping the applicability of national law should not be possible by being located in a different state. This suggests that the “home state” of the original database may have been a factor when deciding if that state has jurisdiction.⁴⁰ *Pinckney* went further and categorically granted jurisdiction to every state granting copyright protection. On the other hand, jurisdiction was limited to the damages caused in that state. These cases confirm that at least in theory the “home state” does not have any special role when considering jurisdiction, although it may have practical relevance to where damage is considered to occur.

It has typically been assumed that the mere availability of a website to users in another state is not a sufficient ground for jurisdiction. Rather, the court must determine whether a particular website targets the public in a specific state. Targeting has been evaluated based on factors such as having a commercial presence on the market, contracts on content with parties in the target state or contents translated into a target state’s language.⁴¹ *Pinckney* quashed that interpretation by stating that Art. 5(3) cannot depend on criteria that belong to the examination of the substance and which do not appear in the provision.⁴² This implies that the CJEU feels that targeting or the lack

³⁹ See *supra* note 27 and accompanying text. The Berne Convention precludes applying preferential “law of origin” treatment to copyright. See Basedow (2010) at 14.

⁴⁰ *Football Dataco Ltd v. Sportradar* (C-173/11), paras. 42–47. In this case the website was in Austria and the establishment of the defendant was in Germany, but it was held that the UK court could consider its jurisdiction for reasons of efficiency. See H. Smith & R. Montagnon, “Databases Hosted Outside the United Kingdom Can Infringe Rights in UK Databases”, 35 *E.I.P.R.* 111, at 112 (2013). However, there was no discussion about infringement occurring at the location of the establishment of the company, which would have followed the principal rule of the Brussels I Regulation. Cf. Opinion of Advocate General Cruz Villalón on *Football Dataco Ltd v. Sportradar* (C-173/11), para. 60, who specifically suggested that the court rule that infringement occurred in both states. The CJEU, however, underlined the territorial nature of the database *sui generis* right and that the directive had not aimed at uniform law at the EU level. Analogously, the court referred to the territorial nature of trade mark rights in *Wintersteiger* (paras. 24–28). While similar arguments could be made with regard to copyright (see *supra* note 26 and accompanying text), it is notable how the CJEU in *Pinckney* (C-170/12), para. 39, took an entirely different course by emphasizing protection in all Member States.

⁴¹ *Football Dataco Ltd. v. Sportradar* (C-173/11), paras. 37–43 with references; Opinion of Advocate General Cruz Villalón on *Wintersteiger* (C-523/10), 16 February 2012, paras. 22–28. See also B. Ubertazzi, *supra* note 9, at 231, para. 26 (particularly on the German interpretation that the mere ability to download is not sufficient, but that the site must be “intentionally directed at” a specific country), and at 240, para. 78 (on factors to be assessed when considering whether a site is directed at the forum state); J. Fawcett & P. Torremans, *supra* note 3, at 561 (on where infringement may be considered to occur); A. Blythe, “Searching Questions: Issues Surrounding Trade Mark Use on the Internet”, 35 *E.I.P.R.* 507, at 512–513 (2013) (on criteria to assess the targeting of a specific state). One must, however, be careful when assessing these criteria, especially in the context of essentially unmanaged sites. Even if The Pirate Bay (as of this writing) supports 35 languages, there is actually very little translated content and the language matters little. Likewise, advertisements targeting a specific country are chosen automatically by the advertisement provider, not the website.

⁴² *Pinckney* (C-170/12), paras. 41–42. This was distinguished from an appropriate targeting test under Art. 15(1)(c) in *Pammer and Hotel Alpenhof* (C-585/08 and C-144/09), 7 December 2010 (Grand Chamber). Application by analogy had already been adopted in *Football Dataco Ltd v. Sportradar* (C-173/11), para. 36, though the decision focused more on the details of where the act was considered to have occurred. Which courts have jurisdiction for online copyright infringement, and particularly whether a targeting test exists, has also been referred to the CJEU in a pending case, *Pez Hejduk* (C-441/13).

thereof would possibly affect the evaluation of infringement but the examination of jurisdiction should be straightforward. Also, in some cases, the act of infringement has been considered to occur where the target audience is, rather than at the website location or where the infringing content was uploaded.⁴³ While this is connected to the substance, it is also related to jurisdiction based on where the harmful event occurred. This reasoning on localizing acts is questionable when it is grounded on the effectiveness of protection under national law. It results in uncertainty especially from the perspective of an alleged infringer, given that the principles on where acts can be localized are open to debate and ultimately at the court's discretion. This allows the right holder shopping opportunities, because inadmissibility due to the lack of jurisdiction seems rare, no matter where the issue is brought to court.⁴⁴

The CJEU has focused perhaps unnecessarily on jurisdiction in contrast to the choice of law. For example, *Wintersteiger* attempts to restrict jurisdiction by excluding the search engine operator's domicile and emphasizing the jurisdiction of the state that granted the registered trade mark. In contrast, in *Football Dataco Ltd v. Sportradar*, jurisdiction was unnecessarily expanded, because the applicability of national law and preventing "escaping it" is already guaranteed by the choice of law (*lex loci protectionis*, see below). These cases also discussed the facts and substantive law, for example, where the infringement was considered to have occurred. *Pinckney* was entirely different in many respects. Jurisdiction on copyright became scattered, leading to a truly "mosaic" approach.⁴⁵ It could even imply that no state would have jurisdiction per Art. 5(3) to consider damages caused in all states. Also, discussion of the substance was very brief, which might have been intentional if the CJEU only wanted to emphasize the criteria in Art. 5(3) and leave the rest to national courts. It might also have been intentional not to take any stance on where the act or its effect occurred, because the CJEU seemed to say that if it "may occur", meaning multiple alternative locations, it is sufficient for jurisdiction. It remains to be seen in which direction the case law will develop in the future. While the CJEU's interpretation of territoriality was already strong, it became even stronger with *Pinckney*. An alternate direction moving towards fewer and a more deterministic selection of jurisdictions with extraterritorial powers would also have been possible. That would have led to a stronger internal market and pan-European justice system.

The type of website and how actively it is operated varies. Some websites are simplistic and include copyright content or direct links to such for users to download or

⁴³ See references in *supra* note 41.

⁴⁴ The ECJ case, *Owusu v. Jackson* (C-281/02), 1 March 2005 (Grand Chamber), paras. 37–46, seems to suggest that declining jurisdiction based on the doctrine of *forum non conveniens* or by using case management powers is severely restricted under the Brussels I Regulation. See J. Fawcett & P. Torremans, *supra* note 3, at 204–206, 218–221.

⁴⁵ On the other hand, *Pinckney* interpreted *Wintersteiger* so that the state where the registered IPR was granted would be best placed to ascertain whether the right had been infringed, implying higher concentration. The distinction was made for copyright because it was "automatically protected". The same argument would also apply to other non-registered rights, such as database rights, even though *Football Dataco Ltd v. Sportradar* earlier took a different view. It is unfortunate that this discrepancy was not considered in *Pinckney*.

stream.⁴⁶ Others, such as The Pirate Bay, do not contain copyright works. Rather, such sites only have descriptions and identification tags of content and links to third-party rendezvous servers called “trackers”, where the users sharing content corresponding to a queried identification tag may be found. Depending on legislation, a website operator’s acts could be deemed legal, as contributing to infringements by users sharing content, or establishing liability based on knowingly participating in concerted infringing activities.⁴⁷ The evaluation of the latter kind of websites may be more complicated, because the jurisdiction, choice of law and substance are somewhat intertwined. If a particular law would not consider the website operator’s acts to be infringing, the case might be rejected even if it were considered admissible.⁴⁸ With broadly distributed jurisdiction limited by territoriality per *Pinckney*, cases would be considered admissible but could be more easily rejected, which might preclude re-trial elsewhere (*res judicata*). On the other hand, the previous model of considering the applicable law and substance in the jurisdiction phase, leading to inadmissibility, would not incur such preclusion. This forces the plaintiff to plan more carefully how and where exactly it is best to launch proceedings.

In order to understand how trade mark case law could apply to copyright, let us consider both. Viewing or using trademarked products does not constitute infringement and therefore trade mark infringement is always related to commercial activities. On the other hand, sharing copyright works is infringement, and private copying of copyright works may also be infringing, at least to some degree. Consequently, there are arguably at least five fora for copyright infringement proceedings: (1) the state where one of the website operators is domiciled, (2) the state where the website is located, (3) the state where the users of the website share copyright works, (4) the state where users download copyright works, and (5) any other state that grants copyright for a work.

Traditionally, it has been argued that the location of the server is a more important basis than the establishment of the defendant company.⁴⁹ In *Wintersteiger*, the trade mark was technically shown at the location of the search engine operator’s web servers, but this was deemed objectively unforeseeable. “The place of establishment of that server”, likely referring to the technical location of web servers instead of where the company was established, could not be the basis for jurisdiction due to its

⁴⁶ At least in some cases, directly linking to copyright content may constitute infringement, but I cannot go into this here. This issue will be contemplated, for example, in pending cases *Svensson E.A.* (C-466/12) and *C More Entertainment* (C-279/13).

⁴⁷ An example of the second category is the *Pirate Bay* case in Sweden (Svea Court of Appeals decision on 26 November 2010, case B-4041-09; the Supreme Court denied leave to appeal on 1 February 2012); a third example is the Finnish Supreme Court case KKO 2010:47 (“Finreactor”). See Mylly (2012) at 214–215; Manner (2009). See generally C. Angelopoulos, *supra* note 5, on participation.

⁴⁸ Limited jurisdiction forces courts to investigate the factual subject matter (to some degree) before being able to decide questions of jurisdiction. See U. Maunsbach, *supra* note 9, at 47. On the other hand, in *Pinckney* (C-170/12), para. 40, the CJEU noted that attributability of infringement and other factors are matters of substance, not jurisdiction.

⁴⁹ See J. Fawcett & P. Torremans, *supra* note 3, at 553. In the context of trade marks, a modified version of *Shevill* (C-68/93), 7 March 1995, was proposed. Also, copyright infringement rarely relates to a legitimate business as such, and the enforcement perspective (*i.e.* the location of the server) is more relevant, especially if the location has been and is expected to remain stable.

uncertain location.⁵⁰ The irrelevance of the web server's location was affirmed in *Football Dataco Ltd v. Sportradar*.⁵¹ *Pinckney*, however, rejected additional criteria that belong to the substantive examination. Until this has been considered in subsequent cases, it is submitted that these grounds for refusal could still be valid. The requirement for foreseeability and a restrictive interpretation of Art. 5(3) should prima facie result in rejecting jurisdiction when the defendant obtains services from a non-liable third party. Especially when infringement occurs in "cloud services", the location is increasingly arbitrary and could also be changed in an instant.⁵² However, if the website operator owns physical server infrastructure and is domiciled intentionally in a country with a low degree of IPR protection, the location of the server could be a possible basis for jurisdiction.⁵³

Wrapping up, in the widest possible interpretation of *Pinckney*, any state where damage may have been caused would have jurisdiction but only for that damage. With a more restrictive interpretation and also taking into account where it would be practicable to seek justice, the website operator's domicile and the location where users share copyright works seem generally acceptable fora. The technical location of the website might also be acceptable under some circumstances. Because infringement in the state where users download copyright works is not harmonized, and in any case is not very interesting from the website operator's perspective, it is not discussed here.⁵⁴ Also, as already noted, the state that grants copyright protection for a work, but where no damages have been caused should be rejected.⁵⁵

⁵⁰ *Wintersteiger* (C-523/10), paras. 36–37; *Football Dataco Ltd. v. Sportradar* (C-173/11), para. 45.

⁵¹ *Football Dataco Ltd. v. Sportradar* (C-173/11), paras. 37–47. In this case, the website and the establishment of the defendant were in Austria and Germany, respectively, and the company was sued in the UK. It was claimed that the web server location constituted a ground for exclusive jurisdiction, but this was rejected.

⁵² See B. Ubetazzi, *supra* note 9, at 242, para. 89 (that the server as a central point of infringement is no longer identifiable in the era of cloud computing), and at 247, para. 123 (that the place of the server can be manipulated too easily). J. Fawcett & P. Torremans (*supra* note 3, at 571) also argue that the location of the server does not normally have much weight, but the weight increases if an action against a hosting provider or other intermediary is made based on primary or secondary liability. Similarly, little weight should be put on a third-party website location (e.g. Ebay) if the alleged infringer acts alone. See generally van Eechoud (2003, 221 *et seq*) (on criteria for states that have an effective rather than a theoretical connection to infringement).

⁵³ A similar argument was presented in *Football Dataco Ltd. v. Sportradar* (C-173/11), paras. 45–46: by locating in a different EU Member or non-Member State, it should not be possible to escape the applicability of national law. As noted above, relying on the choice-of-law provisions would also have sufficed.

⁵⁴ It is worth noting, however, that in *Football Dataco Ltd v. Sportradar* (C-173/11), paras. 39–42, it was held that infringement may occur in the territory of the state where the target persons are located. In this manner, the state where the users are targeted, even if they do not commit infringing acts, might be relevant depending on where the website operator's infringing act is considered to have occurred. According to *Pinckney*, the location of acts and their effects could also be examined with the substance, not necessarily when considering jurisdiction.

⁵⁵ See *supra* note 39 and accompanying text. Damage claims can be made in essentially any state that is a party to the Berne Convention or TRIPS. See Metzger (2010) at 173 (that sharing a file in a peer-to-peer network could infringe intellectual property rights in all WTO member states and third countries as well). This interpretation should be restricted so that, if damages have not occurred in that state, such state should not have jurisdiction for infringement. See e.g. Larsen (2011). Indeed, this suggestion is supported by *Pinckney*.

A separate question is the requirement of, for example, the Finnish Copyright Act to apply for a declaratory action to prohibit operating the site.⁵⁶ In a broad sense, such a request could be considered based on a delict or quasi-delict: the order would give rise to a legal obligation (to stop the site, i.e. copyright infringement). In the narrow sense, a delict by definition needs to cause damage, and in this case prohibition could be ordered even if damages were not claimed or could not be established.⁵⁷ The CJEU has held that Art. 5(3) covers all actions that “seek to establish the liability of a defendant” which “are not related to a contract”⁵⁸ and also that Art. 5(3) does not apply to allegedly wrongful conduct if the legal action does not seek compensation for harm – for example a revocatory *action paulienne*. On the other hand, in *Fischer* (C-133/11) it was held that Art. 5(3) would apply to an action seeking to establish that liability for damages does not exist.⁵⁹ This seems somewhat contradictory but, given that liability could be affirmed even without establishing damages, the case law seems to suggest that Art. 5(3) would be applicable. In any case, in practice this is moot because the right holder could always claim damages. Also, given that Art. 5(3) only requires that the issue “relates to” a tort, delict or quasi-delict, the type of action is similar to a compensation claim, and it would seem natural that the jurisdiction for a declaratory positive action on infringement should also follow Art. 5(3).⁶⁰ For example, similar rules on the defendant’s domicile and *forum delicti* also exist in the Finnish Code of Judiciary Procedure (4/1734, modified by 135/2009).⁶¹ Also, according to the principles of territorial jurisdiction, the court with limited jurisdiction would only have jurisdiction to prohibit operating the site in that state.

2.2 Choice of Law

The law applicable to copyright infringement is the law of the state for which protection is sought (*lex loci protectionis*), as set down in Art. 8 of the Rome II

⁵⁶ The rationale of the provision is to establish that infringement occurred, provide a forum to investigate liability for costs and damages, and satisfy the defendants’ fair-trial requirements, which are not yet guaranteed in the blocking injunction proceedings. *See supra* note 81 and accompanying text for a critical evaluation of *ex-parte* proceedings.

⁵⁷ Similarly in *Lundstedt* (2001), at 136–137, arguing that the “event giving rise to the damage” is infringement itself (by which damage may or may not be proven), and the damage occurs at the place of infringement. *See also* J. Fawcett & P. Torremans, *supra* note 3, at 174 (that infringement cases do not require that damage be shown). Later in *Wintersteiger*, the CJEU considered the damage rather to have occurred where the right was registered (*see supra* note 25) and in a similar manner apparently also in *Football Dataco Ltd. v. Sportradar*.

⁵⁸ *Tacconi* (C-334/00), 17 September 2002, paras. 21–23 including references.

⁵⁹ *Reichert and Kockler* (C-261/90), 26 March 1992, paras. 17–20. *See supra* note 19 on *Fischer*. In *ČEZ* (C-343/04), 18 May 2006, paras. 15 and 18, it was also considered whether Art. 5(3) applies to prohibiting a neighbour from causing a nuisance. This was, however, not specifically addressed by the court.

⁶⁰ Similarly, L. Lundstedt, *supra* note 57, at 137, who argues that jurisdiction should lie in a court in the state where the alleged infringement occurred, regardless of any proof of damage. This is also what is apparently referred to by B. Ubertazzi, *supra* note 9, at 248, note 153.

⁶¹ These rules would also be applied if the Brussels I Regulation were not applicable. As a minor detail, Chapter 10, Sec. 7, restricts jurisdiction for cases relating to tort, delict and quasi-delict to *damages*; the occurrence of harmful events is unspecified.

Regulation. This cannot be changed even with the parties' agreement, and escape clauses of closer connection in Art. 4 also do not apply.⁶² Typically this refers to the state where the work is being used or where the exploitation takes place, which differs in some cases from the *lex fori* (where protection is sought) or where the tort was committed.⁶³ The same law also applies, for example, to determine liable persons and liability for the acts of other persons per Arts. 15(a) and 15(g).

There have been multiple interpretations of what "for which country protection is sought" means in the context of ubiquitous online copyright infringement. It is not always clear how interpretations arising from the perspective of registered rights or IPRs in general apply to copyright. The widely accepted understanding of the provision is that the law of the state where the effects of an infringing act were felt is decisive. This is often also cited without distinguishing acts and effects, but with a strict territorial limitation to the protecting state, for example, by requiring that infringing acts and damages need to occur in the same state. Consequently, multistate infringement must be split into where its effects were felt and apply each state's legislation to damages.⁶⁴ It is no wonder that this has been criticized as being inconvenient in cases of ubiquitous online infringement, and proposals have been made to narrow down the choice of law.⁶⁵ Unfortunately, formulations of this interpretation typically lack precision and detail in order to properly evaluate its legal basis. It is accepted here as the primary interpretation, but alternatives are examined in some depth.

An alternative is to relax absolute territoriality so that acts committed in multiple states may be addressed under a single law of the state where the effects were felt, that is, where damage occurred. A second alternative is localizing the act to a single state and applying that state's law to all effects without territorial limitation.⁶⁶ Let us start with the former. The Rome II Regulation and the concept of the "protecting state" does not specifically exclude acts that occur abroad.⁶⁷ Article 8 allows the claimant to choose the state where protection is sought and, as a consequence, which

⁶² Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199 (31 July 2007). See U. Maunsbach, *supra* note 9, at 59–60; P. De Miguel Asensio, *supra* note 9, at 352–353; J. Fawcett & P. Torremans, *supra* note 3, at 804; S. Neumann, *supra* note 6, at 586–591; A. Metzger, *supra* note 55, at 157–161, 171–172; J. Basedow, *supra* note 39, at 27.

⁶³ B. Hugenholtz, *supra* note 6, at 278; J. Fawcett & P. Torremans, *supra* note 3, at 676–678, 806–810; J. Basedow, *supra* note 39, at 12–13. See also Frohlich (2009), at 885).

⁶⁴ See P. De Miguel Asensio, *supra* note 9, at 353, para. 12; S. Neumann, *supra* note 6, at 592–593; U. Maunsbach, *supra* note 9, at 54, 59; J. Fawcett & P. Torremans, *supra* note 3, at 818; A. Frohlich, *supra* note 63, at 886; Dinwoodie (2009), at 730; M. van Eechoud, *supra* note 52, at 105 *et seq.*, 222. In the *Pirate Bay* case (Svea Court of Appeals decision on 26 November 2010, case B-4041-09), when the Rome II Regulation was not yet in effect, Swedish law was applied to all damages, calculated on the total number of downloads. This might no longer be appropriate. See U. Maunsbach, *supra* note 9, at 53–54; B. Ubertazzi, *supra* note 9, at 249, para. 133. Similarly also in Schack (2009, at 133) (that if infringements happen in several protecting countries at once, distributive application of multiple laws would be unavoidable).

⁶⁵ See references in *supra* note 10. I will not go into further detail here.

⁶⁶ See *e.g.* A. Frohlich, *supra* note 63, at 886. Cf. Matulionyte (2011) at 60.

⁶⁷ In the context of tort law, for example, Art. 4(1) explicitly selects the law where damage occurred (*i.e.* where the effects were felt), rather than where the act was committed. *Lex loci protectionis* could however be based on different choices.

law is applied to the infringement. Also, Art. 8 does not include any provision that would restrict territorial applicability of the chosen law if the law were to grant protection in some extraterritorial scenarios. Rather, there is often no specific provision on international applicability in a particular national act, but applicability depends on the extent of jurisdiction of the court where the law is applied.

The main counter-argument would be that the limitation is built-in as an unwritten principle. The traditionally widely understood territoriality principle is usually only cited as a conclusion that both the infringing conduct and damage need to occur in the same protecting state. For example, earlier it was submitted that “an infringement of an intellectual property right arising from activities conducted outside the country of protection is hardly conceivable”.⁶⁸ The ECJ judgment in *Lagardère Active Broadcast* (C-192/04) might also be cited, which included a statement that the Harmonization Directive does not detract from the internationally recognized territoriality principle and territoriality of rights, and therefore domestic law could only penalize conduct engaged in within national territory.⁶⁹ Further, delving into the wording of Art. 8(1), the concept of “protecting state” could be interpreted to include a restriction on what the state is allowed to protect, for example, based on arguments such as public international law.⁷⁰ On the other hand, if one accepts that the substance of the chosen law is decisive, limited by the jurisdiction of the court, the conclusion is entirely different. In that case acceptability of local damage for an infringing act abroad depends on national copyright or tort law. For example, Finnish tort law does not have any territorial limitations, and neither does copyright when it comes to infringement. Limitations are set by jurisdiction, in this case through the Brussels I Regulation.⁷¹ For example, a person living in Sweden could claim in a Finnish court the protection of Finnish copyright law for an infringing act in Estonia for damages occurring in Finland.⁷²

In the second alternative, localizing the infringing act, the details of infringement and where it occurs need to be analyzed in more depth. The earlier interpretation

⁶⁸ See e.g. A. Metzger, *supra* note 55, at 171–172. See also S. Neumann, *supra* note 6, at 589–594 including numerous references; J. Basedow, *supra* note 39, at 27. However, as noted above, in new case law, for example *Wintersteiger* and *Pinckney*, the damage and the act might occur in different states. See *supra* note 25.

⁶⁹ *Lagardère Active Broadcast* (C-192/04), 14 July 2005, para. 46. The statement might be of *obiter dictum* nature.

⁷⁰ See S. Neumann, *supra* note 6, at 587 (on territoriality having an impact on the substantive law). On the other hand, categorical limitations on what a state is allowed to protect do not exist, for example, in tort or criminal law. Both allow national law to penalize extraterritorial conduct, although with some restrictions. See M. van Eechoud, *supra* note 52, at 97. While the perspective was on exclusive jurisdiction, the grounds of territoriality are disputed, e.g. in B. Ubertazzi, *supra* note 6, at 160 *et seq.*

⁷¹ Finnish Copyright Act (404/1961, as modified by 648/1974 and 446/1995) Secs. 63–65. The most important territorial restrictions concern which works are protected, but as all works under the Berne Convention are covered, this is not relevant when it comes to infringement. However, some uses of related rights are territorially limited, for example, requiring that communication to the public must occur in Finland.

⁷² The protection of Swedish authors in Finland and by Finnish law is provided by Art. 5(2) of the Berne Convention and similar agreements. Protection for locally occurring damages by foreign acts is provided by jurisdiction of Finnish courts per Art. 5(3) of the Brussels I Regulation and Sec. 57 of the Finnish Copyright Act.

that infringement due to activities outside the protecting state is hardly conceivable has become suspect or, at the very least, requires creative interpretation of where the infringement is considered to have occurred or where the damages are felt.⁷³ In *Football Dataco Ltd v. Sportradar*, it was held that the infringing act was considered to have occurred in the territory of the targeted user audience.⁷⁴ Let us consider a very simple example. A website operator domiciled in Estonia uploads a copyright work to a website located in Sweden, and the work becomes immediately available. Users of the website in Finland and Germany download the said work. The act of uploading infringes the reproduction right, most likely in the state where the work was uploaded. As the work becomes immediately available, the act also infringes the right of communication to the public. But where is that right infringed? In the state where the website is located, the website operator's domicile or all the states where the website is accessible (or based on earlier case law, the targeted states)? Lastly, users downloading the work may infringe the reproduction right in their respective states. While some of the presented approaches to localizing the acts might end up being rejected, we can see that there are multiple ways to slice the cake. Obviously the right holder is in a key position to choose which way(s) to argue and consequently which applicable law to invoke for the infringement. This allows various shopping opportunities; on the other hand, this implies unpredictability for the alleged infringer.

In order to obtain the most economically efficient response and application of a single law, it would likely be beneficial for the right holder to focus on the right of communication to the public. It could easily be argued that the right is infringed both at the website location or the operator's domicile and every state where the website is available. By claiming infringement and damages at the former, only a single law would be applied. If that law would not result in an optimal outcome, a different argumentation could be used. It might even be possible to claim infringement of the reproduction right in that state for each copy downloaded from the server.⁷⁵

In consequence, the earlier requirement that acts and damages need to occur in the same state due to territoriality seems suspect in the context of ubiquitous internet infringement. In the light of recent case law and the alternative interpretations discussed above, it seems that 1) locating where the act of infringement occurred may depend on the circumstances, 2) the infringement (act) and damages (effects) can be considered to occur in different states, 3) either of these states or even a third state may have jurisdiction or be chosen as the legal forum, although jurisdiction may be limited, and 4) protection can also be sought in a number of different states, including (in principle) every state that is a party to the Berne Convention or the TRIPS Agreement.

⁷³ See *supra* note 68 and corresponding text.

⁷⁴ *Football Dataco Ltd v. Sportradar* (C-173/11), para. 39. This is a questionable example of localizing acts of ubiquitous infringement.

⁷⁵ The reproduction right might also be infringed at the website location or operator's domicile by virtue of the web server's making a copy of the work as a necessary technical step in order to enable downloading.

For websites that directly infringe copyright, although the users do not, this would imply applying the law of the state where the website is located or where it is operated (i.e. the defendant's domicile). In some cases, the technical location of the website could also be argued to be most suitable, but with the rise of virtual services this is, as a rule, becoming more and more unforeseeable and meaningless, as was demonstrated in *Wintersteiger*.⁷⁶ The state where the act was committed would have local (per *Pinckney*) or global (per interpretation of *eDate* and *Wintersteiger*) jurisdiction. The defendant's domicile would always have global jurisdiction, and the state where the damages occurred would have local jurisdiction. Depending on the interpretation of the Rome II Regulation and the location of acts and damages, one or multiple laws could be applied.

A low degree of IPR protection could be possible if the states where the website is located and the defendant is domiciled are chosen carefully. However, locating the acts elsewhere and jurisdiction anywhere where the site is accessible prevent such optimization.⁷⁷ Earlier case law has focused on the joint liability of users and the foreign website as a prerequisite for bringing a foreign site under national law. *Football Dataco Ltd. v. Sportradar* arguably makes liability more straightforward to prove by locating the infringing act in the state of the targeted user audience.⁷⁸ *Pinckney* went even further and eliminated the targeting test from consideration of jurisdiction. However, the judgment did not take a stance on the location of the acts.⁷⁹ This demonstrates flexibility but also highlights the need for due consideration: right holders have shopping opportunities with flexible rules and respectively defendants with rigid rules; both extremes are undesirable.

For websites that may or may not directly infringe copyright but users' activities do, at least to some degree (e.g. sharing content in a peer-to-peer network), the issue is more nuanced.

In a court trying a case with global jurisdiction, the plaintiff might want to argue that protection is sought at the location of the website or where it is operated (as above), that the website operators would also be liable for damages caused by users, and that only one law would need to be applied. This would be supported by the argument that the website infringes copyright by making works available to the public, that damages occur where the act is committed, and that users' activities in other states are irrelevant. However, it might be inconsistent to calculate the amount of damages based on the number of downloads or some other measure that would depend on the number of users if the users' actions were not at issue or were

⁷⁶ The same arguments presented in the context of jurisdiction also apply to the choice of law, although the requirement for predictability is not so strict. See *supra* note 44 and accompanying text.

⁷⁷ This scenario of being domiciled in a country of lax protection was suggested in the context of suing where the web server was located, e.g. by J. Fawcett & P. Torremans, *supra* note 3, at 553 (referring to Ginsburg in its note 126). See also R. Xalabarder, "Copyright: Choice of Law and Jurisdiction in the Digital Age", 8 *Annual Survey of International and Comparative Law* 79, at 84–88 (2002).

⁷⁸ *Football Dataco Ltd. v. Sportradar* (C-173/11), paras. 39–43. See Smith & Montagnon, *supra* note 40, at 112; C. Angelopoulos, *supra* note 5, at 255–259 (on jurisprudence and the background to joint tortfeasance doctrine in the UK).

⁷⁹ See *supra* note 42 and corresponding text. The Advocate General did make detailed suggestions on localization, however.

considered to occur in some other state. This argument is also especially challenging when the site does not have any directly infringing content, and the role of the website operators is of (at most) contributory nature.⁸⁰ Contributory IPR infringement could be based on general tort law principles governing contributory liability (e.g. in the USA) or considered a form of IPR infringement (e.g. in the UK).⁸¹ While in the former *lex loci protectionis* does not apply, at least in the latter context it has become generally accepted that the governing law would be the law applying to the main infringement.⁸² In this case the main infringement would be sharing or downloading content by users in various other states, which would lead to the application of multiple laws.

Alternatively, by another strategy, suing in a local court with only local jurisdiction, the plaintiff would need to argue for damages caused locally by infringing users (and/or by the website as such) and that the website operator is liable for these damages. This approach would also be workable when the website is operated from a state with a low degree of IPR protection. Establishing civil liability might be easier than criminal liability and associated civil claims.⁸³ Especially if liability has already been established in some earlier proceedings, this is the easiest path for national right holders, and it was also the approach chosen in the Finnish case against The Pirate Bay operators.⁸⁴ Lastly, it would also be possible to try the case with global jurisdiction, but focus only on states with the most infringing activity and thus keep the number of applicable laws manageable. All in all, it seems that in most cases, or with the typical interpretation of the Rome II Regulation, the result is a fragmentation of claims. The most notable exception is seeking compensation for infringing the right of communication to the public at the website location or the operator's domicile.⁸⁵

As previously mentioned, the law chosen also determines liability for other persons' acts. This expands shopping opportunities even further when alleging that the website operators participate in or contribute to a distributed concerted

⁸⁰ In Finland, however, in Supreme Court case KKO 2010:47, the operators of a site ("Finreactor") were held directly liable for users' infringement. Liability was based on knowingly participating in concerted actions. On the difficulty of proving the ISP's role in concerted action, see J. Fawcett & P. Torremans, *supra* note 3, at 545. However, the site was actively administered (including managing user accounts, monitoring upload/download ratios, and maintaining content metadata) and had a private BitTorrent tracker. As such it is not clear if the same argumentation could be reasonably applied to an essentially unmanaged site as far as content is concerned, such as the current version of The Pirate Bay. See P. Savola, *supra* note 1, at 160–170.

⁸¹ See J. Fawcett & P. Torremans, *supra* note 3, at 920–921.

⁸² See P. De Miguel Asensio, *supra* note 9, at 352, para. 10.

⁸³ For example, in the Swedish *Pirate Bay* case (Svea Court of Appeals decision on 26 November 2010, case B-4041-09), the operators were held criminally liable and this was cited as a ground in subsequent requests in Finland. The French Supreme Court considered having jurisdiction to adjudicate criminal proceedings only if the infringing act took place in France, not if the harm was suffered in France. See B. Ubertazzi, *supra* note 9, at 249, para. 133.

⁸⁴ In the Finnish request for a declaratory judgment (Helsinki District Court, case 11/48306, still pending), the right holders sought compensation for Finnish music producers' works shared by Finnish users. The alleged website operators lived abroad in various states or unknown locations.

⁸⁵ See P. De Miguel Asensio, *supra* note 9, at 353, para. 12; J. Fawcett & P. Torremans, *supra* note 3, at 818–819.

infringement. Specifically, it would be strategic to sue under a law where the persons who are liable and the liability for other persons' activities is as broad as possible (i.e. also for damages caused by the users of the website, not just website itself). Similarly, the determination of compensation and damages may be crucial due to variances in alternative applicable laws. For example, in Finland, compensation and remuneration for infringement can be claimed under *sui generis* Sec. 57(1) of the Copyright Act. These are usually calculated in a straightforward manner and proof of actual damage caused and similar requirements are not needed. However, only the violator can be ordered to pay compensation and remuneration. Therefore, if only contributing acts are established, only damages, with a higher bar, could be awarded. Similarly, some states allow the award of punitive damages, which might also be an attractive choice for the plaintiff. Therefore, being able to choose the law that is used to calculate damages or compensation might also be beneficial for the right holder.

3 Website Blocking Injunctions Against ISPs

3.1 Scenarios, Differences and Tentative Analysis

In this paper, discussion of ISPs is restricted to internet connectivity providers, i.e. passive so-called "mere conduit" intermediaries, which are not liable for users' infringement per Art. 12 of the E-Commerce Directive.⁸⁶ This does not preclude Member States from having laws that allow a court or similar authority to give orders to terminate or prevent infringement per Art. 12(3). There is not, however, a general obligation to monitor communications or to actively seek facts or circumstances indicating illegal activity per Art. 15. Based on the CJEU judgment in *Scarlet Extended* (C-70/10), at least under certain conditions, systems that monitor all communications are not appropriate. On the other hand, orders with varying details to block a specific website are likely acceptable.⁸⁷ The reason for rejecting a website blocking request has typically been attributed to the lack of implementation or interpretation of Art. 8(3) of the Information Society Directive.⁸⁸ By comparison, in the USA such an injunction would require establishing contributory infringement by the ISP which has never occurred.⁸⁹

Website blocking by ISPs can at least be ordered for sites located in a different Member or non-Member State.⁹⁰ Indeed, blocking access can be implemented (1)

⁸⁶ Other intermediaries, such as hosting providers or search engine operators have been assigned further requirements for non-liability in the case law of EU, German and French courts. *See e.g.* C. Angelopoulos, *supra* note 5.

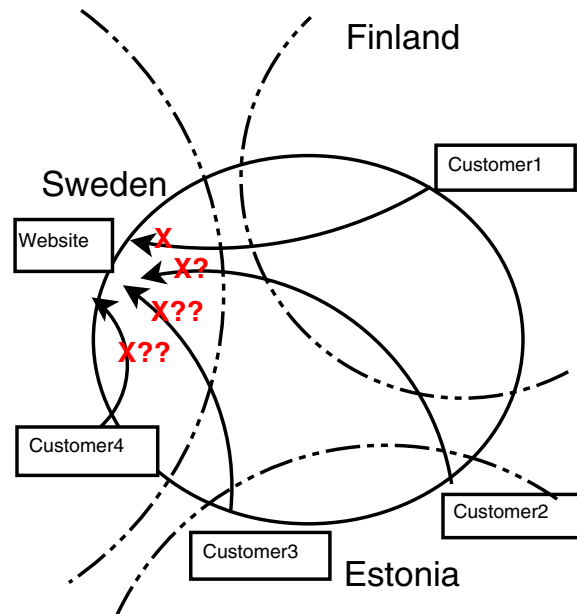
⁸⁷ *Scarlet Extended SA v. SABAM* (C-70/10), 24 November 2011. *See e.g.* Kulk and Borgesius (2012); L. Feiler, *supra* note 1, at 17–20. Specific orders will be contemplated in the pending case, *UPC Telekabel Wien* (C-314/12). *See* M. Husovec, *supra* note 1, at 118, para. 8.

⁸⁸ *See* L. Feiler, *supra* note 1, at 27–30.

⁸⁹ *See* L. Feiler, *supra* note 1, at 46; Kopko (2003) at 116–117.

⁹⁰ *See* L. Feiler, *supra* note 1, at 46–52. Applicability to a local site is arguable, but not a key topic in the international context.

Fig. 1 International scenarios of an ISP ordered to block access to a website



close to the source, for example, by issuing an injunction on the ISP that provides connectivity to the hosting provider of the website, (2) in the middle if communications go through a so-called “transit” ISP, or (3) at the ISP at the user end. The first and third alternatives have been used multiple times in the case of The Pirate Bay. The first has resulted in the site’s switching internet connectivity providers, while the third seems to have been the primary, albeit somewhat ineffective, means to block access to the site. This tendency to implement blocking at the user end is natural in the sense that it is the easiest way to enforce national policies and legislation at foreign sites.

The international element is the strongest in the latter two options, and this paper focuses particularly on the third, for which a simplistic scenario is illustrated in Fig. 1. The solid circle in the middle depicts an ISP established in Finland, which operates and has customers in a number of states (Finland, Estonia and Sweden). The website where access is being blocked is located in Sweden. The arrows show the territory of the states used to transport communications through the ISP’s backbone network.⁹¹

This scenario raises the following questions. If an injunction against the ISP is requested in a court in Finland, does the court also have jurisdiction to block access to the website by customers located in other states? More importantly, does the court have jurisdiction to block customers’ communications that do not go through the territory of the said state (Customer 3 and Customer 4), and if yes, which law should be applied? Alternatively, if proceedings against the ISP established in

⁹¹ For example, in the case of The Pirate Bay, the site was hosted for years until February 2013 in Sweden. The Finnish ISPs that were the target of injunctions also had an international presence. For example, an ISP named Elisa Plc. had a presence at interconnection points in Stockholm, Oslo, Copenhagen, Frankfurt, London, Amsterdam, New York, and Tallinn, and also had customers in some of these locations. See P. Savola, *supra* note 1, at 181–182. Likewise TeliaSonera Finland Plc. and DNA Ltd. also had an international presence.

Finland were initiated in some other state, would that state have jurisdiction and on what conditions?

The introductory discussion of proceedings against a website operator can be taken as a basis for analysis, keeping in mind that the situation of the ISP differs significantly from that of the website operator. First of all, the ISP is not liable for infringement, which could be argued to mean that Art. 5(3) of the Brussels I Regulation as a special ground for jurisdiction is inapplicable. Would there be any other jurisdiction in addition to the principal rule of Art. 2, and by extension Art. 5(5), and is jurisdiction limited in some of these cases? Further, what are the implications of the territorial *lex loci protectionis* principle in Art. 8 of the Rome II Regulation?

A tentative hypothesis suggests that from a traditional territorial perspective, a Finnish court would only have jurisdiction to block access to Customer 1 and Customer 2, and even if it did have jurisdiction to block access to Customer 3 and Customer 4, the law of the state in question would need to be applied. The hypothesis is also that the Finnish ISP could only be sued in a foreign state (e.g. Estonia) if it was established in that state, i.e. had a sufficient branch office there. The mere existence of physical equipment or cabling would not be sufficient to confer jurisdiction on a foreign court.

3.2 Jurisdiction

Article 2 of the Brussels I Regulation confers principal jurisdiction on the state where the defendant (the ISP) is established. Traditionally, jurisdiction has been limited by territoriality, unless it has been extended by conventions and similar international instruments. Arguably, the Brussels I Regulation could confer global jurisdiction within the EU and its scope of applicability.⁹² The choice of law could, however, limit or practically influence the extraterritorial impact.

Article 6(2) allows any third party proceedings in the court seised of the original proceedings, unless such a change of forum would amount to abuse.⁹³ The provision seems to be targeted at issues where the original defendant seeks to secure either performance of a warranty, guarantee or some other indemnity against the consequences of the original claim.⁹⁴ It could, however, be submitted that the wording “or in any third party proceedings” allows any kind of claim. On the other hand, the wording refers to a specific legal institution; the jurisdictional basis for how and in what capacity a third party may be joined in proceedings must be supplemented by legal criteria.⁹⁵ Due to the lack of liability, there is no similar link here: neither the right holder nor the website operator could make the same claim

⁹² While *Pinckney* did limit jurisdiction to the local protecting state, it is submitted that the judgment only considered jurisdiction in the context of Art. 5(3) and provided no guidance to interpret Art. 2.

⁹³ *GIE v. Zurich* (C-77/04), 26 May 2005, paras. 33–37.

⁹⁴ Opinion of Advocate General Jacobs on *GIE v. Zürich* (C-77/04), 24 February 2005, paras. 32–33; Jenard Report of 1968, *OJ C 59*, at 27–28 (5 March 1979). See also J. Fawcett & P. Torremans, *supra* note 3, at 188–189.

⁹⁵ See Schlosser Report, *OJ C 59*, at 112 (5 March 1979).

against the ISP. Therefore, “third party proceedings” seem to have a special meaning in the context of Art. 6(2), excluding this kind of action. A mere interest in issuing an injunction against a non-liaible ISP in the course of primary proceedings could not be considered as such.

Article 31 allows the court to apply national provisional or protective measures even if another state would have jurisdiction on the substance of the matter. Further, an order might also have extraterritorial effect, but this has been rejected due to an insufficient connecting link, for example, in patent infringement cases. It has been submitted that for extraterritorial effect, the court of the substantive action should be used rather than relying solely on jurisdiction.⁹⁶ Therefore, at least local jurisdiction is available, but extraterritorial jurisdiction or enforceability would be suspect, requiring ascertaining the nature of these proceedings. The website operator could be considered the defendant and the ISP a third party or, alternatively, the ISP the defendant and the website operator not a party at all. The first option would likely preclude the use of extraterritorial provisional or protective measures, because the order would likely need to be given *ex parte* (the website operator being absent) and therefore it would not be enforceable in another state.⁹⁷ In the second option there is no such restriction provided that the ISP has been heard. On the other hand, this approach may require initiating proceedings against the website operator on the merits of the case per Art. 50(6) of the TRIPS Agreement. In most cases, primary proceedings are not required and have not been initiated or, in the case of Finland, were initiated as required only after the interlocutory injunction had already been issued.⁹⁸ Traditionally, this provision would be applicable to the seizure of goods in transport or an interim prohibitive injunction.⁹⁹ In this context it could be similarly applicable, but would likely require a link to subsequent or parallel primary proceedings.

Article 5(5) provides that in a dispute arising out of the operations of a branch, agency or other establishment, the court where the branch is established has special jurisdiction. What would be the conditions for an ISP to be sued in a state where it had a branch? Focusing on the operations of a branch, it would seem safe to assume that the court would only have local rather than global jurisdiction. But are third-party blocking injunctions “disputes” and what is a “branch, agency or other establishment”? Moreover, is a request to order the ISP to block access to a website in such state an issue “arising out of the operations of a branch”?

⁹⁶ See G. Tritton et al., *supra* note 6, at 1184–1185, 1194–1196. J. Fawcett & P. Torremans, *supra* note 3, at 248–250, note different views on extraterritoriality between German and English lawyers and that the law is not *acte clair*.

⁹⁷ Even though the recast Brussels I Regulation abolishes the exequatur procedure, enforcing decisions abroad will require providing that the judgment has been successfully served. This may be challenging, because, for example in Finland, the case against website operators has been pending due to the inability even to serve the summons successfully.

⁹⁸ In the UK, only the first blocking injunction (*Twentieth Century Fox Film Corp & Ors v. British Telecommunications Plc*, EWHC 1981 (28 July 2011) (*Newzbin II*) included primary proceedings or the website operator as a party to the blocking order proceedings. See M. Husovec, *supra* note 1, at 122, para. 33 *et seq.*, and in the context of website blocking, *supra* note 16.

⁹⁹ For the latter, see *Solvay SA v. Honeywell* (C-616/10), 12 July 2012.

The term “dispute” is likely intended to cover any kind of (non-criminal) issue that can be adjudicated. In contrast, in some states, at least in Finland, there are also so-called “petitionary matters” that are not disputes in a narrow sense. The applicant for a matter files a request and the court considers it, often also asking parties with an interest in the matter for comment. This model is also used in copyright injunctions. The ISP is not even formally a defendant in the proceedings but rather comparable to a third party that participates in the proceedings at the invitation of the court and as required by substantive law. Nonetheless, making an autonomous interpretation of the regulation, it is likely intended that this kind of procedural peculiarity is covered as well. Furthermore, the concept of “branch, agency or other establishment” requires that the place of business should have an appearance of permanency, have management and be materially equipped to negotiate business in the name of the parent company or as an extension of it.¹⁰⁰

ISPs may operate in multiple states in numerous ways. First, the most typical case for a smaller ISP is simply to have network infrastructure in place and no staff or agency; the ISP might not even have customers in that state.¹⁰¹ Second, the ISP might have a small branch office or a similar sales arrangement. Third, the ISP might have a significant establishment in the state, with dozens or hundreds of employees, typically also including some network engineering and operations staff; networks in different states might also be separated and mostly autonomous. It is clear that Art. 5(5) does not apply to the first scenario but would apply to the third scenario. A more difficult question is whether it applies to the second scenario, especially if the local branch would not even have the possibility of making any changes to the network on its own to implement an injunction order. Based on the earlier case law, a permanent and specific branch or agency would likely fulfill the criteria. Further, this seems to be supported by the interpretation of “operations of a branch”. In *Somafer SA v. Saar-Ferngas AG* (33/78) this was interpreted to include *inter alia* claims concerning undertakings concluded in the name of the parent company to be performed in that state or similar non-contractual obligations.¹⁰² This was later extended in *Lloyd’s v. Bernard* (C-439/93) so that the undertakings need not be performed in the state of the branch.¹⁰³ A local branch entering into contracts to provide internet connectivity to customers in that state could be considered such an undertaking. Therefore, a non-contractual obligation due to a court order to block a site could also probably be considered within the scope of Art. 5(5). On the other hand, if there is no such representation locally and contracts with local customers are concluded directly from the main establishment in another state, such a link would not exist merely by virtue of the existence of network

¹⁰⁰ See e.g. *Somafer SA v. Saar-Ferngas AG* (33/78), 22 November 1978; *SAR Schotte v. Parfums Rothschild* (218/86), 9 December 1987.

¹⁰¹ The purpose of having network infrastructure abroad might be to optimize traffic load and to save transit costs by increasing the amount of traffic exchanged through settlement-free peer arrangements with other ISPs.

¹⁰² *Somafer SA v. Saar-Ferngas AG* (33/78), para. 13.

¹⁰³ *Lloyd’s Register of Shipping v. Société Campenon Bernard* (C-439/93), 6 April 1995.

infrastructure (e.g. an optical fibre cable or a router) and provision of internet connectivity.¹⁰⁴

Does Art. 5(3) apply to proceedings concerning injunctive relief against a non-liable intermediary? It has been argued that this kind of injunction is not a tort and, owing to the lack of liability or due care, it also cannot be a delict.¹⁰⁵ The CJEU has held that Art. 5(3) covers all actions that “seek to establish the liability of a defendant” which “are not related to a contract”. On the other hand, in *Fischer* this was also considered to cover a negative declaratory action that liability for damages did not exist.¹⁰⁶ However, there was no wrongful conduct on the part of the ISP, and these could be characterized as *in rem* injunctions, aimed at resolving the disharmony between legally granted rights and the factual situation.¹⁰⁷ Indeed, the traditional liability-based approach is unsuited to this scenario. Earlier case law also suggests that Art. 5(3) does not apply to an action that does not seek compensation or a declaration of lack of liability for such. Specifically, it does not apply to a revocatory action (*action paulienne*) that also targeted a non-obligated third party who had not committed any wrongful act.¹⁰⁸ Therefore, because injunction proceedings do not attempt to establish the liability of the ISP, and in any case the objective would not be compensation but to oblige the ISP, a third party, they would seem to be outside the scope of Art. 5(3).

For the sake of argument, let us put aside the mentioned case law and consider how a broad interpretation could be justified based on the textual form of Art. 5(3). First, one could interpret “related to” in a very broad manner, so that it would be sufficient that jurisdiction is “related to” events caused by the infringing activity of someone else, i.e. the website operator or the ISP’s customers. Second, one could interpret the concept of tort widely, possibly also arguing that liability exists in principle, even if there are limitations or exceptions in some circumstances.¹⁰⁹

If the German-language version of Art. 5(3) was used, it might be possible to argue that a third-party injunction could be comparable to a tort, but even this would

¹⁰⁴ Comparatively, for example, the Personal Data Directive does not apply to foreign data controllers when equipment is used only for purposes of transit through the territory of the Community per Art. 4(1)(c). See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ L* 281 (23 November 1995).

¹⁰⁵ The German version of Art. 5(3) also covers an action that is comparable to a tort (“*eine Handlung, die einer unerlaubten Handlung gleichgestellt ist*”). On the other hand, the Finnish text only covers damages for non-contractual issues (“*sopimuksenulkoinen vahingonkorvaus*”).

¹⁰⁶ See *Tacconi* (C-334/00), 17 September 2002, paras. 21–23 including references. On *Fischer* (C-133/11), see *supra* note 19.

¹⁰⁷ See M. Husovec, *supra* note 1, at 113, para. 11. There is no provision in the Brussels I Regulation that would grant jurisdiction in cases of *in rem* issues, except when related to object rights to immovable property per Art. 22(1). While copyright may be classified as immovable property, for the purposes of the Brussels I Regulation, it should not be treated as such. See J. Fawcett & P. Torremans, *supra* note 3, at 33–34, 189; *CEZ* (C-343/04), para. 33 (likewise that the provision only applies to the existence and content of rights such as ownership and no other kind of related rights or damages).

¹⁰⁸ *Reichert and Kockler* (C-261/90), paras. 17–20, referred to in the Opinion of Advocate General Niilo Jääskinen on *Fischer* (C-133/11), para. 52.

¹⁰⁹ Similarly, on indirect liability in the context of choice of law, see P. De Miguel Asensio, *supra* note 9, at 353, para. 10.

be somewhat far-fetched. It seems more appropriate to discuss the “related to” argument, because a tort does exist, even if the ISP was not responsible. Essentially the situation would be similar to a broad interpretation of Art. 6(2), arguing that a blocking injunction qualifies for “third party proceedings”, or Art. 31 on provisional measures, arguing that cross-border injunctions are acceptable. Indeed, the question of jurisdiction with regard to the ISP could possibly be avoided if the proceedings primarily targeted the website operator. Still, the CJEU has emphasized that alternative grounds for jurisdiction must be based on a close link between the court and the action and to facilitate the sound administration of justice.¹¹⁰ In a copyright context, Art. 3(3) of the E-Commerce Directive does allow making foreign service providers subject to laws other than those of the state of their establishment. Using these arguments, the implication would be that an ISP could be sued in any state where it is operating, with some definition of “operating”. All in all, this line of argumentation seems insufficient in the face of earlier case law. Also, such an interpretation of Art. 5(3) might even be largely unnecessary given that ISPs have branches in various states. There are also other bases of jurisdiction, for example, suing the website operator per Art. 5(3) and requesting an interim injunction against the ISP based on Art. 31.

In summary, the state where the ISP is domiciled has principal and also global jurisdiction. Provisional or protective measures could also be ordered individually in each state, but arguably they could only have extraterritorial effect or enforceability in rare cases. Also, having a branch or some other establishment in another state confers special jurisdiction to order injunctions affecting that state. On the other hand, earlier case law seems to exclude applying Art. 5(3) to non-liable third parties such as ISPs. Also, Art. 6(2) on third-party proceedings appears to be inapplicable in this context.

3.3 Choice of Law

As discussed above, Art. 8 of the Rome II Regulation specifies that the law for non-contractual obligations arising from copyright infringement is *lex loci protectionis*. This and territorial fragmentation implies substantial, even excessive, legal uncertainty for ISPs operating in a number of states or worldwide due to the need to take into account various laws on liability and requirements for preventive or reactive measures. Subjecting the ISP to the laws of each country of protection has been criticized as a source of unfair and unreasonable results, but this nonetheless seems to be the current law.¹¹¹

It seems to have been generally accepted that the law where the main infringement occurs also applies to indirect or secondary liability, including limitations or exemptions of liability per Art. 15. A cited example is the liability of a hosting provider. Nonetheless, the measures the court may take to prevent or terminate infringement, while provided by the applicable law, are limited by the

¹¹⁰ See e.g. *Wintersteiger* (C-523/10), paras. 18, 27, 31 referring to Recital 12 of the Brussels I Regulation.

¹¹¹ P. De Miguel Asensio, *supra* note 9, at 353, paras. 12–13. Academic proposals have indeed made *de lege ferenda* suggestions to limit this uncertainty. See *ibid.*, at 354–357; ILA PIL committee report, *supra* note 10.

procedural law of *lex fori*.¹¹² This may give rise to shopping opportunities, for example, in the field of interim injunctive relief.

It is questionable how well this concept applies in this context, because with website blocking requests little consideration is usually given to what precisely is the main infringement and it has certainly not been the subject of primary proceedings. As discussed above, an infringing act could occur in a number of justifiable ways. The easiest and the strongest case would be the peer-to-peer network users of a website sharing copyright works: the main infringement would then be local. However, it might be more challenging to argue why the website must be blocked, and also how the claim for damages from the website operators would be justified. A second option would be to claim that the website operator commits primary infringement. However, establishing this might be challenging if the website does not have any directly infringing content. Also, as the website would typically be located and operated in another state, the issue of applicable law might arise. If the principle of the law applicable to secondary liability was followed, this might lead to the law of the state where the website operator is established, assuming that the act was committed there. All in all, this heads into murky waters.

Recital 6 of the Rome II Regulation specifies that the same national law must be applied irrespective of the country where the action was brought in order to improve the predictability of litigation, certainty as to the applicable law, and the free movement of judgments. It must be noted that the goal is not to harmonize the applicable laws or make the same national law applicable extraterritorially, but to make the choice of law more predictable and independent of the forum state. In the context of territoriality and *lex loci protectionis* this may also imply multiple laws. In consequence, the Rome II Regulation must not be seen as a ground to expand the scope of national and typically territorial law. The only predictability that has materialized has been of an unpredictable type; however, by now it should be clear that you may be sued practically anywhere and under any law.

In addition to legal uncertainty, it has been questioned whether a transit scenario constitutes the closest link to justify application of the law of the transit state.¹¹³ As discussed above in the context of jurisdiction, the *Wintersteiger* judgment rejected jurisdiction at the location of the search engine operator's server due to unforeseeability and uncertainty based on the recitals in the Brussels I Regulation.¹¹⁴ Similar aspects have not been considered in the Rome II Regulation, although the reference in Recital 26 to preserving the universally acknowledged principle of *lex loci protectionis* could be read to include the case law on the interpretation of earlier traditions.¹¹⁵ Indeed, Recitals 6 and 26 could arguably justify adding some flexibility to the otherwise very rigid Art. 8.

¹¹² See P. De Miguel Asensio, *supra* note 9, at 352–353, para. 10; J. Fawcett & P. Torremans, *supra* note 3, at 811–812, 920–921.

¹¹³ S. Neumann, *supra* note 6, at 599–600.

¹¹⁴ See *supra* note 52 and accompanying text. At least for now, this might still be valid even after *Pinckney*.

¹¹⁵ This principle, its scope and to what extent it is really universally accepted has been doubted. See e.g. S. Neumann, *supra* note 6, at 587 *et seq.*

Let us consider the case of transit in the context of internet connectivity. Using the presented argument, the mere presence of communications through at least some kind of network equipment in the state would be insufficient to apply *lex loci protectionis*. This could be supported at least when the request could not be implemented in that state, or from a broader perspective, could not be implemented so that it would only apply to that state. Obviously, a website could not be blocked, for example, if a fibre-optic cable just passes through the territory of a state. With some other kinds of network equipment, implementation would also be suspect. For example, DNS blocking might be impossible, because typically it requires changes to specific DNS resolver servers that are located close to the users. IP-address-based blocking, on the other hand, might be possible if router equipment is present.¹¹⁶ Therefore it would seem reasonable to argue that it should be possible to implement the ordered blocking in the state in question or, at the very least, be able to do so reasonably outside the state in a manner that does not affect other states. The requirement of considering each law separately is based on territoriality and the potential differences in the substantive law and its interpretation. In conclusion, this would also imply that even if a court had global jurisdiction, it would be questionable to issue an injunction to block access to a website from foreign states by applying the local law (rather than the respective foreign laws) when the communications do not go through the state of the applied law.

Now we can consider the scenario in Fig. 1. In a Finnish court, Finnish copyright law could not be applied to block access to a website in Sweden if it concerns communications from Estonia that do not go through Finland. On the other hand, if the website operations in Sweden constitute the primary infringement, Swedish copyright law could be applied even in a Finnish court to block all access from outside Sweden, provided that the order could be implemented in Swedish territory. An Estonian court, on the other hand, might or might not have jurisdiction, depending on whether the ISP has a sufficient branch there. Even if such were present, jurisdiction would be limited to blocking access from Estonian customers or communications that transit the territory of Estonia, with reservations on implementability.

Some additional considerations must be noted on blocking access to websites in the middle of the internet. Internet connectivity providers form a loose hierarchy, and there are a number of operators that provide services on most continents and also provide connectivity to ISPs in a lower “tier”.¹¹⁷ Would it be possible to order such a global ISP to block access to the website worldwide? Arguably, jurisdiction would be limited to the EU and the states party to jurisdiction conventions, or in the case of jurisdiction based on a branch or other establishment, only that particular state. Following earlier argumentation, within these limits on jurisdiction, it would seem that the court could issue such an order by applying the law of (1) simply the state where the website is located, (2) state(s) through which the communications

¹¹⁶ For a description of technical measures, see e.g. M. Husovec, *supra* note 1, at 122, para. 30; P. Savola, *supra* note 1, at 67 *et seq.*

¹¹⁷ For example, in 2002, US providers that were targeted were global backbone operators operating in dozens of (or even a hundred) states. See D. Kopko, *supra* note 89.

transit, with reservations regarding implementability, or (3) each state from which access would be blocked.

4 Conclusions

Proceedings against website operators can be pursued in a number of different ways due to the flexibility afforded by legislation and the case law of the CJEU. There are a number of options for jurisdiction, defining where infringing acts and damages are considered to occur, and the choice of law, even to the extent of whether one or multiple laws would need to be applied. The right holder has a large choice of “shopping” opportunities in order to “stack the deck” in trying to ensure a successful outcome. On the other hand, for the alleged infringer this implies serious unforeseeability and unpredictability. He or she could be sued for allegedly infringing activity anywhere under practically any law.

When it comes to ISPs ordered to block access to websites, the case where access is blocked close to the source (i.e. the website) is straightforward in the international context: local courts have jurisdiction for blocking access from every state applying the local law. However, if the ISP does not have a sufficient branch or other establishment in that state, the local court would not have jurisdiction on the matter except on the grounds of preventive or protective measures. Further, in some cases where only passive network infrastructure exists in the territory of the state and implementing blocking would not be possible, it is submitted that *lex loci protectionis* in that state could not be applied.

This paper has focused on blocking at the user end due to its practical importance and the related international considerations. If the court with local jurisdiction formulates the blocking order in such a manner that it only affects the local ISP’s local customers or customers whose communications go through the territory of the state, issuing the injunction is relatively straightforward. Nonetheless, issues with regard to suing the website operator might still arise. More care is needed if the ISP is domiciled in some other state; a branch would confer only local jurisdiction. Also, it is submitted that the mere presence of network infrastructure is not a sufficient basis for jurisdiction but, on the other hand, this kind of ISP is not likely to be very interesting from the national perspective because the focus has typically been on the largest ISPs. In the most difficult scenario, the court would also order the ISP to block access to a foreign website by foreign users whose communications do not go through the said state. It is submitted that in such a case the foreign law(s) would need to be applied. Further, the most complex issues of jurisdiction and choice of law would arise in the context of issuing global “transit ISPs” blocking orders due to the distributive effect of the applicable law.

The provisions of current law are ill fit for ubiquitous internet infringement, especially as complex as occurring in peer-to-peer networks and related websites. It is no wonder that a number of academic principles have been suggested and widely discussed to mitigate these issues. However, as this paper has focused on the *de lege lata* perspective, they are beyond its scope. The juridical interpretative activism of the CJEU has to some degree addressed certain shortcomings but, on the other hand,

the flexibility and over-emphasis on territoriality has created new uncertainties and shopping opportunities for right holders. The grounds for territoriality of IPRs and copyright are also suspect, especially in the face of the practical impact of international conventions and localization of acts and damages.

Acknowledgments I thank Taina Pihlajarinne, Martin Husovec and anonymous reviewers for comments.

References

- Basedow J (2010) Foundations of private international law in intellectual property. In: Basedow J, Kono T, Metzger A (eds) *Intellectual property in the global arena*. Mohr Siebeck, Tübingen
- De Miguel Asensio P (2012) Internet intermediaries and the law applicable to intellectual property infringements. *JIPITEC* 3:350
- Dinwoodie G (2009) Developing a private international intellectual property law: the demise of territoriality? *William Mary Law Rev* 51:711
- Dinwoodie G, Dreyfuss R, Kur A (2009) The law applicable to secondary liability in intellectual property cases *NYU J Int Law Politics* 42:201
- Fawcett J, Torremans P (2011) *International property and private international law*, 2nd edn. OUP, Oxford
- Frohlich A (2009) Copyright infringement in the Internet age—primetime for harmonized conflict-of-laws rules? *Berkeley Technol Law J* 24:851
- Hugenholtz B (2013) The dynamics of harmonization of copyright at the European level. In: Geiger C (ed) *Constructing European Intellectual Property. Achievements and New Perspectives*. Edward Elgar, Cheltenham
- Husovec M (2013) Injunctions against innocent third parties: case of website blocking. *JIPITEC* 4:116
- Kopko D (2003–2004) Looking for a crack to break the internet's back: the listen4ever case and backbone provider liability under the copyright act and the DMCA. *Computer L Rev Tech J* 8:83
- Kulk S, Borgesius F (2012) Filtering for copyright enforcement in Europe after the sabam cases. *EIPR* 34:791
- Larsen J (2011) Hvilket lands lovgivning finder andendelse, når ophavsrettigheder kænkes på Internettet? *Nordiskt Immateriellt Rättskydd (NIR)* 222
- Lemley M, Reese A (2003–2004) Reducing digital copyright infringement without restricting innovation. *Stanford Law Rev* 56:1345
- Lundstedt L (2001) Jurisdiction and the principle of territoriality in intellectual property law: has the pendulum swung too far in the other direction? *IIC* 32:124
- Manner M, Siniketo T, Polland U (2009) The Pirate Bay ruling—when the fun and games end. *Entertain Law Rev* 19:197
- Matulionyte R (2011) Law applicable to copyright: a comparison of the ALI and CLIP proposals. Edward Elgar, Cheltenham
- Maunsbach U (2012) Copyright in a borderless online environment—comments from a Swedish horizon. In: Axhamn J (ed) *Copyright in a borderless online environment*. Norstedts Juridik, Stockholm
- Metzger A (2010) Applicable law under the CLIP principles: a pragmatic reevaluation of territoriality. In: Basedow J, Kono T, Metzger A (eds) *Intellectual property in the global arena*. Mohr Siebeck, Tübingen
- Mylly T (2012) Criminal enforcement and European Union law. In: Geiger C (ed) *Criminal enforcement and intellectual property. A handbook of contemporary research*. Edward Elgar, Cheltenham
- Neumann S (2011) Intellectual property rights infringements in European private international law: meeting the requirements of territoriality and private international law. *J Private Int Law* 7:583
- Schack H (2009) The law applicable to unregistered IP rights after Rome II. *Ritsumeikan Law Rev* 26:129
- Schellekens M (2011) Liability of internet intermediaries: a slippery slope? *SCRIPTed* 8:154
- Tritton G et al (2008) *Intellectual Property in Europe*, 3rd edn. Sweet & Maxwell, London

- Ubertazzi B (2012a) Infringement and exclusive jurisdiction in intellectual property: a comparison for the international law association. *JIPITEC* 3:227
- Ubertazzi B (2012b) Exclusive jurisdiction in intellectual property. Mohr Siebeck, Tübingen
- van Eechoud M (2003) Choice of law in copyright and related rights: alternatives to the *Lex Protectionis*. Kluwer Law International, The Hague

Proportionality of Website Blocking:

Internet Connectivity Providers as Copyright Enforcers

by **Pekka Savola***, Lic.Sc.(Tech.), Master of Laws, LL.D. candidate. Legal Counsel at CSC–IT Center for Science Ltd, Researcher at University of Helsinki, Finland,

Abstract: Internet connectivity providers have been ordered to block access to websites facilitating copyright infringement in various EU countries. In this paper, the proportionality of these enforcement measures is analysed. After addressing preliminary questions, the recent CJEU ruling UPC Telekabel Wien (C-314/12) and then case law from all Member States are examined from the perspective of proportionality. Finally, five criteria are submitted for proportionality analysis, and a proportionality evaluation

is provided. The major observation is that the underlying goal of copyright enforcement has implications on how the scale tilts. In particular, ineffective enforcement mechanisms can be more easily accepted if the goal of symbolic, educational or politically motivated enforcement is considered legitimate. On the other hand, if the goal is to decrease the impact of infringement, higher efficiency and economically quantifiable results may be required.

Keywords: Proportionality, Fundamental Rights Conflicts, Copyright Enforcement, Website Blocking, ISP

© 2014 Pekka Savola

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Pekka Savola, Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers, 5 (2014) JIPITEC 116, para. 1.

A. Introduction

- 1 There has been an increasing tendency to oblige various kinds of intermediaries to perform web filtering and aid in enforcement.¹ This paper focuses on enforcement of specific right (copyright), target (Internet connectivity, i.e. access providers), means (court order to block access to a website) and perspective (proportionality of such order).²
- 2 Intermediaries are typically faultless third parties with respect to the dispute between right holders and infringers.³ Therefore, passive or neutral intermediaries are generally exempt from liability within varying constraints. To balance the lack of liability, a court may issue an injunction ordering—for example, to stop or prevent a specific infringement.⁴ Indeed, intermediaries are an attractive tool to enforce local policies on foreign sites.⁵ However, broad liability for activities that intermediaries cannot and need not control or monitor would result in *inter alia* stifling of innovation, preventive censorship and increased operating costs.⁶
- 3 Proportionality evaluation is depicted as three or four steps. The initial and sometimes omitted step is the *legitimacy* of the pursued objective.⁷ The first two of the three main stages are *suitability* and *necessity* of the means in achieving the objective, i.e. that the goal can be achieved and there are no better means, respectively. Third, the actual balancing part is *proportionality* in the narrow sense (*stricto sensu*), i.e. whether the burden of the means is excessive in relation to the objective sought.⁸
- 4 In this context, proportionality analysis concerns fundamental rights conflicts in national measures implementing EU legislation. Because blocking measures are unlikely to affect the fundamental freedoms,⁹ the evaluation occurs between conflicting fundamental rights. Here EU and national fundamental rights coexist, but in conflict the supremacy of EU law prevails.¹⁰ CJEU case law provides minimum and maximum standards¹¹ and guidelines that must be applied when national courts interpret EU law. Issues at stake are the effectiveness of protecting the right holders' intellectual property in contrast to the costs and limits on the freedom to conduct a business on the ISP and the limitations of

freedom of information (expression) on the users.¹² ECtHR has not made very significant rulings in this aspect.¹³ The evaluation is augmented with more intense scrutiny.¹⁴

- 5 This paper is structured as follows. Section B first discusses the differences in liability exemptions between hosting and connectivity providers, and what constitutes a general monitoring obligation. Then various parties' interests, EU IPR enforcement principles, and the effect of national legislation are briefly covered. After these preliminary questions, we move on to Section C, where the case law of CJEU and all Member States is covered from the proportionality perspective mixed with analysis and commentary. Using these as a basis, Section D formulates five criteria for assessing proportionality of website blocking. Finally, Section E provides proportionality analysis. Brief conclusions are presented last in Section F.

B. Preliminary Considerations

I. Legal Basis of Website Blocking Injunctions

- 6 Article 8(3) of the Infosoc Directive¹⁵ obliges Member States to provide a possibility for copyright injunctions against intermediaries:

Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

- 7 Per Recital 59, the conditions and modalities are to be determined in national legislation. Essentially identical provisions also exist for other intellectual property rights *in fine* of Article 9(1)(a) and 11 of the Enforcement Directive.¹⁶ Indeed, the E-Commerce Directive allows national law to provide specific injunctions against connectivity providers in Article 12(3), but on the other hand prohibits general monitoring obligations in 15(1):

[12(3)]. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

[15(1)]. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or

store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

II. Different Providers and Liability Exemptions

- 8 While Internet service providers are not liable for information transmitted or stored, they may be subject to various obligations.¹⁷ As connectivity and hosting providers provide a different kind of service, the conditions and scope of potential obligations also differ.¹⁸
- 9 The liability exemption of connectivity providers is based on neutrality, passivity and technical nature of automatic communication. According to the recital, this implies lack of knowledge and control over the transmitted information; deliberate collaboration in order to undertake illegal acts is also excluded.¹⁹
- 10 On the other hand, the exemption of hosting providers is conditional on awareness or knowledge of illegal activities or facts or circumstances from which illegality is apparent. Upon obtaining awareness of illegal material, hosting providers also need to act expeditiously to remove or disable access to it. The exemption does not apply if the provider has authority or control over the user and the content.²⁰ The awareness of facts relating to illegality appears to have been the grounds to exclude the operators of sites such as The Pirate Bay from the hosting defence; even if material on the site might not be infringing, its role in overall infringing activities has been apparent.²¹
- 11 In the latest case on hosting providers, *L'Oréal v eBay*, it was held that the operator must not have an active role allowing it to have knowledge of the data stored. To measure awareness (or "neutrality"²²), a standard of diligent economic operator was established as to when illegality should have become apparent.²³
- 12 This interpretation is inapplicable to connectivity providers, because their liability exemption is not tied to knowledge or awareness in the same manner as hosting providers.²⁴ Further, their role is more passive, neutral and automatic, and transmitted data is transitory. They also have no obligation to act upon obtaining awareness of illegality²⁵ unless explicitly required by national law as provided by Article 15(2) of the E-Commerce Directive.²⁶

III. Restrictions on General Monitoring and Orders

- 13 The prohibition against imposing monitoring obligations of a general nature applies to all kinds

of providers. Likewise, a general obligation to seek facts or circumstances indicating illegal activity is forbidden. However, monitoring (in a fairly narrow meaning) “in a specific case” by orders of national authorities is possible.²⁷ Court or administrative authority may also require termination of present or prevention of specific future infringement.²⁸ In particular, in *UPC Telekabel Wien* rather severe requirements regarding judicial review were imposed on generic orders targeting a website.²⁹ In contrast, the Advocate General had more explicitly suggested that a specific kind of generic blocking order would not amount to a general monitoring obligation.³⁰

- 14 Only hosting providers may be subjected to “duties of care” in order to detect and prevent certain types of illegal activities.³¹ National legislation may also establish procedures governing the removal or disabling of access to information (i.e. notice-and-takedown mechanisms).³² Examples of court orders to prevent future infringements in the context of hosting providers were suspending infringing users’ accounts or making user identification on the marketplace easier.³³ In national courts, there have also been “stay-down” orders, obliging the hosting provider to ensure that a specific infringement is not repeated. Unless carefully constructed, these might be disproportionate or amount to a general monitoring obligation.³⁴
- 15 All in all, the differences in the legal basis and the scope when comparing connectivity and hosting providers suggests that appropriateness of injunctions varies. Because for connectivity providers the conditions for liability exemption are broader, similar limitations could very well also apply to all types of injunctions. Depending on circumstances, it may be more proportionate and technically feasible to order a hosting provider rather than a connectivity provider to implement a certain kind of blocking. In contrast, issuing orders grounded on duties of care or knowledge assumed by a diligent economic operator at connectivity providers would not be appropriate. Also, accepting the premise of narrower injunctions, all the conditions in case law relating to hosting providers that restrict the orders (e.g. what constitutes a monitoring obligation and principles for weighing proportionality) would be *prima facie* valid. On the other hand, those conditions which expand the scope should be critically evaluated.

IV. Interests in Balancing

- 16 The following table summarizes private and public interests at stake; detailed elaboration is not possible here.

	Private interests	Public interests
IPR Holder	IPR protection	Sufficient protection, innovation, policy, culture
Connectivity provider	Freedom to conduct a business (and protection of property)	Market economy, network neutrality
User	Freedom of expression (and protection of personal data)	Democracy, freedom of expression in general, culture
Website operator	Freedom of expression, right to fair trial (and business freedom)	Possibility to enforce national policies on foreign sites

- 17 Intellectual property rights are not absolute, and it is impossible to completely protect them through enforcement. Therefore, trying to find the least restrictive means (LRM) to eliminate IPR infringement is misguided. This specifically applies to copyright, given the extensive exclusive rights also governing non-commercial activities, whereas in contrast e.g. trademarks or patents can be used by private individuals more freely. This was emphasised in *Scarlet Extended* and affirmed in *UPC Telekabel Wien* very explicitly as follows:³⁵

There is, however, nothing whatsoever in the wording of [Article 17(2) of Charter stating that “Intellectual property shall be protected”] or in the Court’s case-law to suggest that that [intellectual property] right is inviolable and must for that reason be absolutely protected.

- 18 A better question is to ask which degree of IPR enforcement is deemed appropriate when balanced with other issues at stake, in particular other fundamental rights.³⁶ This reflects the underlying (and unresolved) policy issue on the level and constraints of enforcement an IPR holder is entitled to.
- 19 Rather than trying to find LRM in general, one must survey the means and their trade-offs (e.g. effectiveness, costs and other impacts). Based on this analysis, the appropriate balance between certain degrees of enforcement using a specific means and other rights can be considered. In *UPC Telekabel Wien*, issuing a generic order incurred requirements to the national procedure in order to ensure proportionality evaluation.³⁷ This was noted more explicitly in the Advocate General’s Opinion that proportionality cannot be evaluated if the necessary measures could not be reviewed.³⁸

V. IPR Enforcement Principles in EU Law

- 20 The Infosoc Directive does not provide guidance on how to balance injunctions of Article 8(3).³⁹ On the other hand, Article 3 of the Enforcement Directive applies to (all) measures, procedures and remedies necessary to ensure the enforcement of IPRs covered

by the Directive. These shall be “fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays”, and also “effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”⁴⁰

Strong	Neutral	Weak
effective	fair	proportionate
dissuasive	equitable	not complicated
no time-limits	not abusable	not costly
no delays	no barriers to trade	

- 21 It is challenging to realize all of these at the same time. In consequence, case-by-case balancing will be needed.⁴¹ In the preceding table these are classified as “strong” (pro-rights), “weak” (pro-users) and “neutral” principles. However, in different interpretative contexts – for example, against infringer versus a third party – the principles could have an entirely different meaning.⁴² Per Article 2(1), a Member State may provide stronger enforcement only “in accordance with Article 3”, i.e. the balance must not be upset.⁴³
- 22 Norrgård noted in 2005 that a national judge could reasonably adopt both a weak or strong enforcement ideology based on the discretion granted by the directive.⁴⁴ A balanced interpretation was suggested based on principles of Article 3, fundamental rights, context-sensitivity and the comparative method.⁴⁵ These have since then materialised in CJEU case law, and this paper also continues on that path. Similarly, Ohly has underlined the need of proportionality to balance effectiveness and dissuasiveness, referring in a similar fashion to taking due account of the specific characteristics of the case as noted in Recital 17.⁴⁶
- 23 Both directives have been geared towards infringers. Applying principles of effectiveness and dissuasiveness against a faultless intermediary is questionable.⁴⁷ Indeed, in his Opinion in *L’Oréal v eBay*, Advocate General Jääskinen was not convinced that the identical scope of injunctions available against the intermediary and the infringer would be a reasonable interpretation of Article 11 of the Enforcement Directive.⁴⁸ Similarly, the requirement for context-sensitivity would suggest caution with regard to third-party injunctions.⁴⁹ Further, the notions attached to injunctions are different and comparisons difficult between infringers and intermediaries as well as between legal systems.⁵⁰

VI. National Principles and Triggers for Evaluation

24 National law may specify the grounds for a proportionality evaluation or leave issuing the order at the court’s discretion. While this may give the national court leads on what to evaluate, it is important to note that EU law provides the minimum (and maximum) level of protection to various competing rights. This will perforce affect the court’s discretion and evaluation.⁵¹

25 As an example of national law,⁵² in Finnish Copyright Act (404/1961, as amended by 679/2006) Section 60c(1):⁵³

[...The] court [...] may order [...the] intermediary to discontinue [...] unless this can be regarded as unreasonable in view of the rights of the person making the material available to the public, the intermediary and the author.

26 On the other hand, many countries seem to have transposed Article 8(3) in a very minimal fashion, almost verbatim, or without substantial additional details or modalities.⁵⁴

C. Proportionality in Case Law

I. Introduction

27 The latest blocking requests targeting connectivity providers at the user end in EU/EEA are illustrated in the following table. In other EU/EEA countries, blocking has not been requested. The table notes the highest court which has made the latest decision. The rulings are final except the Netherlands (pending appeal to Supreme Court). The type of proceedings (civil and/or criminal) has also been noted.

28 “(X)” under “ruling” implies that the decision has been reversed in contrast to a lower court instance or earlier proceedings. This illustrates that while the general trend has been to order one or more ISPs to block access to a website, in some cases requests have also been rejected on various grounds. The most prominent reason for rejection (particularly in Ireland and Norway, and arguably in Germany) has been attributed to the lack of legal basis due to the implementation (or lack thereof) of Article 8(3).⁵

Country	Site	Provider	Date	Court	Type	Ruling
Spain	Other	Vodafone etc.	16.7.2014	Appeal	Criminal	No block (x)
Austria	Kino.to	UPC Telekabel	24.6.2014	Supreme/ CJEU	Civil	Block
The NL	TPB	Ziggo etc.	28.1.2014	Appeal (to Sct)	Civil	No block (x)
France	Streaming	All ISPs	23.11.2013	First instance	Civil	Block
Belgium	TPB	Belgacom etc.	22.10.2013	Supreme	Civil+Crim.	Block (x)
Ireland	TPB	UPC etc.	12.6.2013	First instance	Civil	Block (x)
Finland	TPB	TeliaSonera etc.	11.2.2013	Appeal	Civil	Block
UK	TPB etc.	All ISPs	13.11.2013	First instance	Civil	Block
Greece	Other	Vodafone etc.	16.5.2012	First instance	Civil	Block
Germany	Other	Unknown	22.12.2010	Appeal	Civil	No block
Denmark	TPB	Telenor etc.	27.5.2010	Supreme	Civil	Block
Norway	TPB	Telenor etc.	10.2.2010	Appeal	Civil	No block
Italy	TPB	All ISPs	23.12.2009	Supreme	Criminal	Block (x)

29 Next, a summary of all cases is provided, with particular focus on issues relating to proportionality. The goal is to review arguments used in CJEU and national decisions as a step of formulating the criteria for balancing.

II. The Court of Justice

30 As for blocking injunctions,⁵⁶ in *L'Oréal v eBay*, it was held that courts of Member States must be able to order online marketplaces to take measures to stop current infringements as well as – if justified by the circumstances – prevent future ones. These must be effective, proportionate and dissuasive and must not create barriers to legitimate trade. The measures must also be fair and not excessively costly. A couple of examples were provided.⁵⁷ This provides little guidance in the present context.

31 *Scarlet Extended* applied the aforementioned proportionality principles to whether a connectivity provider could be ordered to install a comprehensive filtering system.⁵⁸ The system would have monitored all the data relating to all customers in order to prevent any future infringement of claimants' intellectual property rights. CJEU held that it would have constituted a general monitoring obligation in violation of Article 15(1); nonetheless, proportionality was also considered.⁵⁹ As introduced in *Promusicae*, protection of the IPR must be balanced against other fundamental rights. Specifically, the connectivity provider's freedom to conduct a business would be inappropriately balanced against the interest to protect the IPR, because the order would require installing a complicated, costly and permanent system at the provider's own expense. The cost and complicated nature of the system were also against Article 3(1) of the Enforcement

Directive.⁶⁰ The system would also be questionable from the perspective of users' data protection and freedom of expression, as it would have applied to all the communications and would also have misidentified and blocked lawful communications.⁶¹ This judgment is relevant, but given the intrusiveness of the contested filtering system, the constraints it provides for blocking orders are limited.⁶²

32 *UPC Telekabel Wien* concerned a more restricted form of blocking, only one specified site. In summary, the CJEU in principle accepted generic orders (where adopted measures are chosen by the provider), but imposed judicial review requirements that might make issuing them unattractive for national courts. This restricted the applicability of generic orders and transformed generic orders into court-approved specific orders.⁶³ The Advocate General was more straightforward and suggested rejecting them instead of crafting requirements. In the end, the essential result was the same.⁶⁴ More detailed analysis follows.

33 The CJEU held that national law must be transposed in a manner allowing a fair balance to be struck between competing interests. The law must also be interpreted in the manner that takes fundamental rights and proportionality into consideration.⁶⁵ The fundamental rights conflict was construed between Charter Articles 17(2) (IPR holders' right to property), 16 (the provider's freedom to conduct a business), and 11 (users' freedom of information).⁶⁶

34 Business freedom was characterized as *inter alia* the right to freely use the economic, technical and financial resources available to the provider. An injunction was considered to constrain the free use of resources, as it obliges taking measures which may represent a significant cost, have considerable impact on the organization of activities, or require difficult and complex technical solutions. However, such an injunction was held not to infringe on the very substance of conducting business.⁶⁷ With a generic order, the provider can choose measures that are best adapted to the resources, abilities and challenges facing it. The provider can also avoid being in breach of an order by proving at the execution stage that all reasonable measures have been taken. Specifically, no unreasonable sacrifices are required.⁶⁸ However, legal certainty was held to require that the evaluation of reasonableness – i.e. which means can be expected – is done in court prior to issuing any sanctions due to the lack of sufficient compliance.⁶⁹ Essentially, the CJEU transferred the evaluation of proportionality from the ordering phase to the execution phase, with a mandate to provide for court review. In consequence, the provider can obtain confirmation of compliance in court by first doing a minimal implementation. Very likely this will decrease the use of generic orders.⁷⁰

- 35 With generic orders and uncertainty, the A.G. had been concerned with providers opting for intrusive means, endangering users' freedom of information or facing the risk of disobeying the order.⁷¹ The CJEU's approach was to impose requirements on the adopted measures and require allowing court review for both providers and users. In particular, measures must comply with Internet users' right to freedom of information: they must be strictly targeted to end infringement, and must not affect users lawfully accessing information.⁷² The A.G. provided an example of collateral damage by referring to the ECtHR ruling *Yildirim v Turkey*, where the whole Google Sites service was blocked when only one site hosted there should have been targeted. This violated the freedom of expression guaranteed by Article 10 ECHR in various ways.⁷³
- 36 The CJEU held that national courts must be able to verify that the measures are appropriate. This may not be possible if the provider chooses the measures and their use is not contested. In consequence, in this case users must be provided *locus standi* to assert their rights before the court.⁷⁴ It is submitted that this also applies to national courts issuing specific orders, unless proportionality has also been reviewed from the users' perspective.⁷⁵
- 37 As previously noted, the IPR is not inviolable in that it must be absolutely protected. It is possible that a complete cessation of IPR infringement is not achieved, if for example some measures that would achieve the result would not be reasonable for the provider, or because means do not exist or the goal is not in practice achievable.⁷⁶ The adopted measures should still be "sufficiently effective" or at least discourage users from accessing the site and make accessing the site difficult to achieve.⁷⁷ Therefore, even if infringement is not completely prevented, the fair balance and proportionality in the light of Article 52(1) is achieved provided that freedom of information to lawful material is not unnecessarily prevented and that blocking prevents access or at least makes it difficult and seriously discouraged.⁷⁸
- 38 The CJEU's emphasis on effectiveness, a high degree of IPR protection, and the means which may place significant obligations on the provider could be read to imply that the balance should be shifted more towards IPR protection. This reading must be rejected. The CJEU appears to have taken no clear stance on the balance of protecting the IPR and business freedom.
- 39 The fourth question was whether it was proportional to order a provider to implement specific means even if these incurred significant costs and the blocking could be easily circumvented without technical knowledge. The CJEU's final answer displays naiveté or evasion, because those issues were also in the background in the third question. The problem is apparent when considering the ineffectiveness of blocking in general, and that there may not be "sufficiently effective" and "seriously discouraging" means that would not also be complicated, costly and/or too intrusive. The CJEU provided no guidance on the provider's required degree of involvement. The problem of unlawful material on a site which also includes lawful material was also not addressed. In consequence, essentially both balancing exercises (IPR holder vs provider and IPR holder vs user, respectively) were effectively deferred to national evaluation or a future referral. Therefore, the A.G.'s guidelines on the fourth question are valuable and will be used tentatively as a basis.
- 40 When assessing suitability, the A.G. noted that protecting the rights of others was a valid grounds for limitation. It was questionable whether ineffectiveness of blocking could imply unsuitability, but he opined that this would not necessarily be the case. While users can circumvent blocking, it does not follow that every one of these users will do so. If the user learns about a website's illegality, he might forgo accessing the site. Finally, even if many users could circumvent blocking, all of them cannot. Also, even if the same site is available through another domain name or IP address, it does not *prima facie* mean that blocking would be unsuitable. The users here could also forgo accessing the site, and they need to use a search engine to find the site. With repeated blocking, it is also more difficult to find the site with search engines. In consequence, the A.G. held that generally speaking even somewhat ineffective means are not unsuitable.⁷⁹
- 41 When assessing necessity, appropriateness and proportionality *stricto sensu*, the A.G. noted that the least restrictive means should be adopted. It would be the responsibility of the national court to make the assessment based on guidelines and the non-exhaustive list of considerations provided. First, the estimated efficacy of the order would be one factor to consider. However, the possibility to circumvent blocking would not in general exclude the means. Second, the complexity, costs and duration needs to be assessed. The A.G. expected that this may be a test case, and more blocking injunctions might be pending. If one of them were disproportionate under those three grounds, the court might need to consider whether proportionality would be ensured by making the right holder liable for costs wholly or in part. Third, the right holders should have some means against an infringing site, but notably the provider has no contractual relationship with the infringer. This implies that the right holder must primarily target the infringer or the infringer's provider. Fourth, an injunction must not undermine the legitimate business of providing Internet connectivity. In general, the A.G. underlined freedom of expression and its necessity in a democratic

society as essential and access to the Internet as an essential right.⁸⁰

- 42 All of these seem applicable against the backdrop of the CJEU's judgment, with a potential caveat with regard to the third criterion. The CJEU had rejected contractual relationship as a prerequisite for injunction.⁸¹ The A.G. had done likewise, but had opined that it is "obvious" that an intermediary without contractual link can "in no circumstances" be held unconditionally responsible for stopping infringements, laying out implications for proportionality of the third consideration.⁸² Further, "in many cases such intermediaries are best placed" in Recital 59 (and respectively Recital 23 in the Enforcement Directive) implies that in some cases intermediaries are *not* best placed. In that case, the infringer should be targeted. This also conveys an additional issue of *which* intermediary is best placed; typically there are three to five connectivity providers in the "chain" between the user and the source. As an example, the A.G. opined that an injunction would be appropriate against a website connected by a non-European provider, because the website and its operators often cannot be prosecuted.⁸³ *E contrario* websites operated in the EU or connected by providers in the EU might be evaluated differently.
- 43 Orders may target the infringing website's connectivity provider, a provider in the middle of the Internet, or a provider at the user end.⁸⁴ A contractual relationship between the provider and the website operator exists only in the first case. In the second case, some providers may obtain indirect financial gain (through transit agreements between providers), but in the third case there is not even such indirect benefit.⁸⁵ This study focuses on blocking at the user end, because actions against infringing customers are in many aspects more proportionate, and in any case different from those against a completely third party.
- 44 A few interim observations are in order before moving on to examine national case law. The rights to balance in enforcement have been confirmed. However, the evaluation has been rather thin except for the A.G. opinion on the fourth question (unaddressed by the CJEU) in *UPC Telekabel Wien*. In all likelihood, in the future courts will mainly issue specific orders. Also, neither the CJEU nor the A.G. addressed the required level of efficiency when constraining a provider's rights.⁸⁶ The CJEU's position on the provider's function to discourage users could possibly be seen as approving the suitability of educating the users of the site's illegality. Finally, the A.G. made a number of points that the CJEU did not get a chance to address. He noted that proportionality would be affected by the right holder's possibility of primarily targeting the infringer or the infringer's connectivity provider. Second, effectiveness could

be used as a factor both in suitability (with limited impact) and necessity. Third, the assumption seemed to be that the connectivity provider might bear the costs, but an alternative cost model could also be used particularly if the number of blocking requests grew.

III. Expanding Blocking in the UK

- 45 A Usenet newsgroup service *Newzbin*, whose content consisted primarily of infringing files, was ordered to stop copyright infringement with a restricted injunction.⁸⁷ The site ceased operations, but essentially the same service reappeared overseas, and the claimants sought an order against the connectivity provider British Telecom to block access to the new *Newzbin2* site. Judge Arnold examined the issues in depth and *inter alia* found the specific injunction order to be compatible with Articles 12 and 15(1) of the E-Commerce Directive and Article 10 ECHR. Against the backdrop of the referral of *L'Oréal v eBay* and *Scarlet Extended*, he held that the court had jurisdiction to block the whole site.⁸⁸
- 46 Arnold also considered and rejected four reasons why the court should exercise its discretion to decline the request. First, the order targeting the whole site would also affect other right holders. This benefit would rather support issuing the order, and further, the incidence of non-infringing uses was considered *de minimis*.⁸⁹ Second, it was immaterial that accepting the request might lead to more requests in the future.⁹⁰ Third, ineffectiveness of blocking was not decisive. Specifically, users will need to acquire additional expertise to circumvent blocking. Even if they were able to do so, it was not clear that the users wished to expend the time and effort. Arnold also seemed to rely on advocacy research claiming that in Italy, the use of The Pirate Bay had been markedly reduced. All in all, he stated that the order would be justified even if it only prevented access to the site by a minority of users.⁹¹ Fourth, Arnold evaluated proportionality against ECHR in the light of *L'Oréal v eBay*. He held that it was necessary to protect the right holders' property rights, and this clearly outweighed freedom of expression by the users and the connectivity provider, and even more clearly by the site operator. The order was narrow and targeted, it included safeguards against changes of circumstances and the cost of implementation would be modest and proportionate. He also rejected the requirement of notifying infringing files by URLs as being disproportionate and impracticable for the claimants when the site did not have a substantial proportion of non-infringing content.⁹²
- 47 After the main judgment in *Newzbin2*, additional issues on details of the order were raised, some of which may be of relevance here. Arnold found

it proportional to apply the order to all services which use BT's Cleanfeed, but in essence excluded access and wholesale business from blocking. Other IP addresses and URLs, whose sole or predominant purpose was to enable or facilitate access to the Newzbin2 website, could also be added later to the block list without judicial determination. The request to allow temporary shutdown of blocking (e.g. due to operational reasons) without court or claimant approval was rejected. The relatively modest implementation costs would be borne by the connectivity provider, at least in this case. The legal fees were divided based on the merits of the arguments.⁹³ Later the blocking was also extended to other connectivity providers.⁹⁴

- 48 Blocking of The Pirate Bay was soon to follow in *Dramatico Entertainment*, where it was held that the users and website operators infringed copyrights of the claimants in the UK. After *Newzbin2*, the connectivity providers have elected not to actively participate in court proceedings.⁹⁵ In a subsequent ruling, the injunction was issued on the terms the claimants had agreed with connectivity providers. Again, Arnold considered the discretion to grant the order. He stated that the proportionality of orders must be considered, referring to the principles of the Enforcement Directive and *L'Oréal v eBay*. While the terms of the order may be proportionate between the right holders and connectivity providers, it was the duty of the court to ensure the proportionality from the perspective of those who are not before the court (in particular, the users). Given that the IP address of The Pirate Bay was not shared, blocking it was appropriate.⁹⁶ Since this judgment, specific terms of orders have been agreed in advance between the claimants and providers, and those have not been described in the ruling or scrutinized by the court.⁹⁷
- 49 In *Emi v Sky*, blocking was extended to cover three more sites (KAT, HEET and Fenopy). In this case, proportionality was more extensively discussed in the light of recent English judgments. Specifically, Arnold had established a balancing test of conflicting fundamental rights in the context of an order to disclose identities of subscribers, and it had been later endorsed by the UK Supreme Court.⁹⁸ Also, he considered the referral questions posed in *UPC Telekabel Wien*. Arnold rather brusquely dismissed the third preliminary question on whether "prohibition of outcome" would be inappropriate, essentially stating that UK courts carefully consider such matters before any blocking order is made.⁹⁹ Arnold also seemed to dismiss the Austrian Supreme Court's desire for European uniformity in assessing the proportionality of specific blocking measures by referring to the context-sensitivity of such evaluations.¹⁰⁰ The cost of compliance was also not relevant in the UK context because no connectivity provider had resisted making the orders on the basis that compliance would be unduly burdensome

or costly. He still held that blocking order *may be justified* (emphasis added) even if it only prevents access by a minority of users, and that the efficacy depends on the precise form of the order. For example, orders in *Dramatico Entertainment* were likely less easy to circumvent due to the ability of the right holders to revise the list of blocked resources. Finally, Arnold noted that evidence indicates that orders are reasonably effective, again pointing to the Italian study and the drop of The Pirate Bay in Alexa site popularity rankings.¹⁰¹ In conclusion, the orders were deemed necessary and appropriate to protect IPR, and these interests outweighed the freedom of expression rights by users, connectivity providers and website operators.¹⁰² Since then, blocking has extended to cover over 40 sites, but no new considerations of proportionality have come up.¹⁰³

- 50 Access to FirstRow, a site consisting of user-generated streams of sports events, was also blocked in a similar manner. The claimant, FAPL, contended that the order would be proportionate because 1) the providers do not oppose the order and implementation costs are modest and proportionate; 2) the orders are necessary to protect copyrights infringed on a large scale and identifying and bringing proceedings against the operators of the website would be difficult, leaving no other effective remedy in this jurisdiction; 3) the orders are necessary or at least desirable to protect sporting objectives in general; 4) while also foreign content is available, the vast bulk of content infringes the rights of FAPL; and 5) the orders are narrow and targeted ones, and include safeguards against changes of circumstances. The orders will also likely be reasonably effective, even if not completely efficacious. Arnold did not object to these grounds.¹⁰⁴ FAPL had submitted evidence that FirstRow's IP address is not shared, but this later seemed to turn out to be incorrect, leading to substantial overblocking.¹⁰⁵ Further, Arnold added an additional provision to the orders introduced earlier by Mann J, so that any website operator claiming to be affected by the order would have permission to apply to vary or discharge it.¹⁰⁶

IV. Mixed Approach in Nordic Countries

- 51 The Supreme Court of Denmark has issued two relevant judgments on preliminary injunctive relief. The first judgment in 2006 concerned a file transfer (FTP) server and TDC as the connectivity provider for that subscriber. Because the injunction would have essentially required terminating the Internet connection, it was held that Article 8(3) of the Infosoc Directive requires consideration with balancing of interests.¹⁰⁷ In a case concerning blocking users' access to a website, it was submitted that injunctive relief should be rejected as ineffective under the

balance of interest requirement, but this claim was denied with reference to obligations of Article 8(3).¹⁰⁸ In the second judgment, on blocking The Pirate Bay, in the Supreme Court it was mainly argued that the requested interim relief was too imprecise and the balance of interest did not favour injunction. This was rejected because the court felt the order was precise enough to be granted, and there would be no harm to the connectivity provider in a way which would make it disproportionate.¹⁰⁹

- 52 In Sweden there have been no court cases on blocking at the user end. One reason may be the Swedish Copyright Act tying injunctive relief to contributing to infringement.¹¹⁰ However, a website's connectivity provider has been ordered to implement blocking. In *Black Internet*, the Svea Court of Appeal upheld the order to cease providing connectivity to The Pirate Bay. The provider's argument was that the site also had other connectivity providers, the access prevention would not be effective and the site had been reorganised so that the order would not be effective. These did not prevent injunctive relief, and the balance of interest also favoured granting it. Further, the freedom of expression or other fundamental rights would not be restricted in a manner that would violate the ECHR.¹¹¹ Similarly, in *Portlane*, a connectivity provider was ordered to prevent access to a peer-to-peer tracker service "tracker.openbittorrent.com". The court noted that the relief was fair and equitable and not unnecessarily complicated or costly as required by the Enforcement Directive.¹¹² Later, *Portlane* and other providers were persuaded to stop servicing The Pirate Bay.¹¹³
- 53 In Norway, the request to block access to The Pirate Bay was rejected because providers had no obligation to remove or block illegal content in the implementation of Article 12 of the E-Commerce Directive. Therefore, there was no legal basis for granting an injunction. In another EEA state, Iceland, an initial attempt at blocking failed due to the claimants' procedural error.¹¹⁴ Since the cases in Norway the Copyright Act has been amended in this respect, and a blocking request is expected in the near future.¹¹⁵
- 54 In Danish and (former) Norwegian statutes, injunctive relief shall not be granted if it would cause harm or inconvenience to the defendant in a manner that would be obviously disproportionate to the plaintiff's interest in the injunction. Balancing thus occurs between the parties. However, because the court has some discretion, in special circumstances third-party interests may also be considered, and this has indirectly happened in case law. In contrast, in Sweden the balance of interests has been developed in case law and legal theory. In the two described cases, third-party interest was not considered. As such, in all three countries extraordinary circumstances

seem to be required before a court would take third parties into account when balancing interests.¹¹⁶ In Finland, the statute also provides for reasonableness balancing only between the IPR holder, intermediary and infringer.¹¹⁷ These are in stark contrast to the more recent CJEU case law.

- 55 In Finland, the three largest providers have been ordered to block access to The Pirate Bay with specific orders to avoid uncertainty for the providers. Also, specifying and updating the list of blocked IP addresses and domain names was deemed to require judicial review. It was acknowledged that all measures differed with regard to their effectiveness, precision, cost and implementation time. By citing earlier reports, it was held that none of the proposed technological measures was so ineffective as to preclude issuing the order. The efficacy of blocking could be measured only after implementation. Costs and harm of the injunction were not unreasonable.¹¹⁸ The blocking order affected the providers' whole network, and for example the connectivity provided to other providers or the government could not be excluded.¹¹⁹ It was considered proportionate that the providers needed to cover their own implementation expenses (ca. 10,000 euro) and legal fees (ca. 100,000 euro) each.¹²⁰ While the blocking must not endanger third parties' communications, the minor amount of legal content on the website did not prohibit blocking. Targeting the infringers in Sweden was also not required by law.¹²¹

V. Divergence of Positions in Benelux

- 56 In The Netherlands, summary proceedings to block access to The Pirate Bay failed in July 2010. The judge argued that access could only be blocked from those who directly infringe copyrights rather than non-infringing visitors of the site, and that the individual infringers should have been targeted first.¹²²
- 57 In new proceedings, Ziggo and XS4ALL were ordered to block access to the site, with the right holders having authority to update the list as needed. On subsidiarity the claimant had already sued The Pirate Bay operators and hosting providers, and proceedings against connectivity providers were appropriate; suing users was not needed. On proportionality, given the amount of illegal content on the site, the interests of the copyright holders outweighed those of ordinary Internet users. Also the necessity in a democratic society was briefly addressed. Claims as to effectiveness of blocking were made, which subsequently turned out to be unfounded.¹²³ Other providers have also been ordered to block access, but this time the list of sites needed to be updated in court.¹²⁴
- 58 The first order was overturned on appeal in January 2014.¹²⁵ Based on recent research by the University of

Amsterdam, the blocking was found to be ineffective, particularly if it targeted only one site, because most of the affected users would just use another website or circumvent blocking.¹²⁶ Only the images of art works of music albums and video covers and such material were found to be infringing, and blocking access to these was not sufficiently important when contrasted to the operators' freedom to conduct a business.¹²⁷ It seemed that the court might have been more amenable if the claimants had requested blocking more sites at once instead of proceeding step-by-step.¹²⁸ This would have arguably made blocking more effective.

59 In Belgium, interlocutory proceedings to block access to The Pirate Bay also failed in July 2010. Immediate blocking was deemed disproportionate, especially since the site had already existed for years.¹²⁹ Blocking a fixed list of 11 domain names was established in September 2011 on appeal. The court held that subsidiarity is not required by Article 8(3) of the Infosoc Directive, and the order was also proportionate.¹³⁰ In a different set of cases, in criminal investigation against unidentified operators of The Pirate Bay, all connectivity providers were ordered to block access to the site in April 2012. This was appealed but upheld in February 2013. In October 2013, the Supreme Court upheld the decision that required providers to stop all current and future Pirate Bay domain names and monitor them. Strangely enough, it was not considered a general monitoring obligation.¹³¹

VI. Varied or Lack of Action in Other EU countries

60 In Ireland, a blocking injunction was rejected in 2010 due to lacking implementation of Article 8(3) of the Infosoc Directive.¹³² The law was amended, and six providers were ordered to block access to The Pirate Bay in June 2013.¹³³ A draft order had been agreed in advance between the parties, though concern with overblocking was voiced. The blocking list could be updated without judicial determination as in *Newzbin2*. Providers bore the cost of implementation and most of their legal expenses. The judge considered the draft order both proportionate and reasonable.¹³⁴

61 In Italy the access to The Pirate Bay was blocked for a while in 2008–2009 as a criminal seizure, then the blocking was rejected and then again blocked, the latest order being from February 2010.¹³⁵ There is no explicit provision to issue connectivity providers a blocking order in civil proceedings, and the easier criminal procedure has been used.¹³⁶ There have also been subsequent orders to block other sites.¹³⁷ At the end of 2013, the law changed so that the regulatory authority AGCOM could block sites, though the

EU Commission had serious doubts about various aspects of the draft regulation.¹³⁸

62 In Germany there is no explicit statutory provision on Article 8(3) of the Infosoc Directive. The alternative “Störerhaftung” (disturber) liability imposes a high bar on these injunctions. A prevailing opinion has been that the Infosoc Directive has been adequately implemented, and Störerhaftung is an acceptable solution as to “the conditions and modalities”. Website blocking has also been considered with strong scepticism. Yet *UPC Telekabel Wien* may require reconsideration through expanding interpretation of Störerhaftung or legislation.¹³⁹

63 The lack of an explicit legal basis and evaluation against Störerhaftung has been adopted in a number of cases.¹⁴⁰ For example, in the Hamburg Court of Appeals ruling, the legal basis for injunction was deemed insufficient. It was also stated that Article 8(3) would not require providing for blocking injunctions.¹⁴¹ Last, in the Cologne District Court ruling, a request to order a connectivity provider to block access to certain URLs in the eDonkey peer-to-peer networking service was likewise rejected. This was due to the lack of explicit legal basis, Störerhaftung liability not being met, and the lack of technical capabilities in preventing infringements. In consequence, the blocking would have been unreasonable and ineffective due to the small effort of circumventing such measures.¹⁴² On the other hand, a preliminary injunction has been issued to an operator providing connectivity to The Pirate Bay.¹⁴³

64 There has been no blocking in Portugal, but a request to block The Pirate Bay is to be expected.¹⁴⁴ In Spain, there have been mixed rulings on the legality of operating peer-to-peer indexing sites such as The Pirate Bay. A single case of website blocking has been overturned in appeal due to insufficient grounds.⁴⁵ In France, due to the efforts aimed at users through Hadopi, The Pirate Bay has not been blocked, but ISPs and search engines have been ordered to block a set of video streaming sites.¹⁴⁶ In Greece, only two music sites have been blocked.¹⁴⁷ There has been no news of any blocking activity in Eastern Europe.¹⁴⁸

D. Criteria for Assessing Proportionality

I. Overview

65 Blocking cases essentially concern four parties, each with its own private interests: the IPR holder, provider, user and website operator.¹⁴⁹ The operator's interests have not usually been considered explicitly, and they are also not in the main focus here.¹⁵⁰ Public

interests in the background may also implicitly affect the weight court affords each private interest.

- 66 Proportionality has been considered in case law, though often in a summary fashion. Typically it is difficult to even find the criteria used in the evaluation. The criteria may also have been formulated at so high a level (as with most CJEU judgments) that applying them *in concreto* is challenging. However, there are also exceptions. The A.G. opinion on the fourth, unanswered question in *UPC Telekabel Wien* is useful, as well as UK cases *Newzbin2* and *FAPL v Sky*. Also, several recurring themes can be noticed from other national case law. These concern in particular effectiveness (or lack thereof), impact of subsidiarity, effect on the third parties and implementation costs.¹⁵¹ Further, in the literature, comprehensive lists of criteria have been formulated at least by Lodder and van der Meulen,¹⁵² Husovec,¹⁵³ Savola¹⁵⁴ and Pihlajarinne.¹⁵⁵ These also have many recurring issues, but the interest for brevity precludes detailed discussion of each. Various requirements for adequate safeguards have also been suggested, but these are less relevant here.¹⁵⁶
- 67 A generic balancing rule, which as such is not yet very helpful *in concreto*, could be formulated as follows. The more significant negative economic impact infringements cause to the IPR holder, the stronger enforcement mechanisms should be available, and in contrast the more significant negative impact of ordering such blocking needs to be on the other parties. Respectively, the more costs or constraints blocking causes to the provider, and the more it impacts freedom of information of the users, the more significant the losses must be to the IPR holder.
- 68 In consequence, in the crux are effectiveness and costs (or burden in general), respectively. If blocking is ineffective, it cannot mitigate the economic losses of IPR holders; such blocking would only have symbolic value. On the other hand, if blocking is cheap, non-intrusive and precise, it usually does not have a major immediate impact to providers and users. The more intrusive, expensive or vague blocking becomes, the stronger its justification and effectiveness needs to be in order to be proportionate.
- 69 In the following, concrete evaluation criteria are submitted. Interpretation of these criteria is based on the enforcement principles and fundamental rights.

II. Degree and Basis of Illegality

- 70 The legal basis of blocking, the illegality of the source, has implications on proportionality. If some other court has already established the

illegality (as with *The Pirate Bay*),¹⁵⁷ or the court issuing blocking does so when the operators have been served summons, more extensive blocking may be appropriate. Blocking is always dubious if the operators have not been represented and the illegality has not been subject to rigorous analysis.¹⁵⁸ Proxies that enable circumventing blocking provide a problematic example of this.

- 71 Is the intent of blocking to prevent site operators from (facilitating) making available copyrighted material,¹⁵⁹ blocking access from users as such, or to prevent users from copying and sharing the material? If illegality cannot be clearly attributed to the site (e.g. because it at most facilitates infringements by others), the legal basis of blocking the site may be in doubt. Because accessing the site is not as such infringing, the focus should be on preventing the main infringement, i.e. users downloading and sharing material. It might be sufficient to target blocking only to those users – i.e. consumers – who are expected to become infringers, rather than e.g. wholesale business, companies or the government.¹⁶⁰
- 72 The scale of infringement also matters as to how invasive blocking mechanisms may be appropriate. For example, a site which has essentially no legal material at all could more easily be blocked as a whole, but this may not be appropriate for a site which has substantial legal uses or where the illegality is doubtful. Specifically, in some such cases URL blocking (for example) has been required instead of blocking the whole site.¹⁶¹ Also, if blocking is targeting a site hosted in the EU/EEA, it also seems relevant to assess whether the site is operating legally in the origin state.¹⁶²

III. Effectiveness

- 73 The relevance of ineffectiveness has come up in almost every case as well as in the literature.¹⁶³ Users' and operators' ease to circumvent blocking, respectively, could be distinguished. The accuracy and completeness of measures may also be measured.¹⁶⁴ The possibility of revising the blocking list already allows taking into account the website operator's actions, although blocking proxies would still be challenging. Overblocking will be discussed below. Therefore, in practice the effectiveness – or more precisely, circumventability – of blocking from the user's perspective is most relevant.
- 74 IPR holders have conducted or commissioned unverifiable advocacy research on the effectiveness of blocking. For example, Italian or Belgian studies, where effectiveness ranges between 73 and 80%, have been cited first when requesting blocking to support its effectiveness. Yet afterwards the ineffectiveness has been implicitly or explicitly argued to justify extending blocking. Alexa ratings

have also been cited, but those are unreliable as they do not apparently account for those that arrive at the site through non-conventional channels.¹⁶⁵ In contrast, in a University of Amsterdam study, it was noted that blocking could in theory only affect the behaviour of those 27 to 28% of consumers who download or intend to download from illegal sources. Of these infringing consumers, the large majority (70-72%) was found to be non-responsive to blocking by finding other ways to access the same or a different site. There was essentially no lasting effect, and even the awareness effect wore off quickly. In consequence, blocking affected only 4 to 6% of all users. Respectively, in another survey Dutch university students were asked if they were downloading less illegal material after the blockade of The Pirate Bay. 13 % of 302 respondents used only legitimate sources, the rest at least sometimes downloaded from illegal sources: 39 % used The Pirate Bay and 48 % used other sources. Of The Pirate Bay users, 66 % used various techniques to bypass blocking, 18 % did not even notice blocking, and 17 % no longer had access to the site. Only 22 % of its users told they now downloaded less from the site. Because some downloaded more, statistically blocking had no discernible impact on the amount of infringement.¹⁶⁶ Connectivity providers have also similarly observed no significant impact on traffic levels. This is also supported by an intuitive finding that those who are already aware of the site (say, “The Pirate Bay”) can just enter the name in a search engine and obtain the list of proxy services on the first page of results.¹⁶⁷

75 It is obvious that blocking may affect some users, especially the ones who are not already familiar with the sites and arrive at the site by web references or by searching for specific content.¹⁶⁸ Equally obvious is that blocking will not affect those regular users who know sites by name, and will continue using them or the alternatives through other, essentially equally easy means (e.g. proxies). This is exacerbated by the fact that infringing users are more knowledgeable and determined than users on average.¹⁶⁹ In consequence, blocking seems to – at most – accomplish a slight deterrence against some non-recurring users, provide “education” to those users,¹⁷⁰ and make it seem that IPR holders are doing something. It seems obvious that almost everyone downloading or sharing from clearly notable unauthorized sources is aware of its illegality. In consequence, education as a goal seems difficult to justify.¹⁷¹ Indeed, the reasoning that users do not bother or will forgo accessing the site when encountering a block seems to apply at most with non-recurring users.¹⁷² Therefore, the A.G.’s justification for ineffective blocking as deterrence is questionable. As will be discussed in the context of legitimacy below, it is not obvious that subordinating providers to such a task is proportionate, especially if it incurs expenses.

76 Blocking with inefficient mechanisms usually results from having to resort to a least bad solution. While a more effective mechanism would in principle be desirable, usually one does not exist or must be rejected on other grounds. Therefore, the main alternative would be to reject the request. As previously noted, it seems easier for courts to accept inefficiency if a more effective order could not be granted.¹⁷³

77 Acceptance of inefficient mechanisms therefore depends on the associated costs, degree of efficiency, and whether using blocking for (somewhat ineffective) educational, symbolic or political purposes is considered legitimate. It is submitted that blocking must be at least reasonably effective by substantially reducing IPR holders’ economic losses. Otherwise, it would be reduced to a symbolic gesture, a useless attempt to educate users, or as a political power play in the field of legal policy.¹⁷⁴

IV. Negative Burden

78 With blocking, the IPR holder shifts the burden of enforcement to third parties, i.e. providers.¹⁷⁵ For providers, this implies implementation cost and expenses for legal services. In all the reviewed cases, the cost of implementation has been borne by providers, even if this is not required by EU legislation.¹⁷⁶ Given that costs have been modest, at most 10,000 euro for a large provider, these are only important in principle.¹⁷⁷ On the other hand, requiring the installation of a URL-blocking mechanism (for example) would likely be disproportionate.¹⁷⁸ Providers likely fear the expansion of mechanisms and costs. Arnold J and the A.G. anticipated this and noted that there may be reasons to cover some or all costs in the future.¹⁷⁹

79 Given that blocking furthers the IPR holder’s private interest, and the IPR holder is also the sole beneficiary, it would not seem unreasonable for it to cover all costs.¹⁸⁰ This would guide it to do a rigorous assessment of which blocking would be economically justified. This might also allow adopting more efficient yet costlier means.

80 However, to date, implementation costs have been dwarfed by 10 to 30 times larger legal expenses. It would be disproportionate to require the provider also to bear the claimants’ costs if an order is granted. This applies in particular to countries where the provider is not even legally allowed to implement blocking without court approval.¹⁸¹ Likewise, if the provider makes good arguments in court and the claimant’s request is restricted, the provider’s costs should also be compensated.¹⁸² An appropriate default might be that both parties bear their own costs if the blocking order is granted essentially as requested.

- 81 Other burdens may also be relevant because the order will restrict how the provider is able to use its resources.¹⁸³ The order may also require reducing the security and reliability of the network.¹⁸⁴ Likewise, there may be limits (usually hundreds or thousands of entries) of blocked targets until the provider faces a serious performance penalty. In consequence, there may also be an issue of scalability if the number of blocking entries grows significantly.¹⁸⁵
- 82 Usually blocking orders have been ordered without a time limit. This imposes restrictions on the provider because as a matter of business, services (e.g. BT's Cleanfeed and equivalents) might need to be replaced or retired. Blocking orders should not restrict innovation and maintenance of services.¹⁸⁶ Also, even if the site disappears, blocking will stay in place until the order is discharged. In that case, the blocking might unduly affect the new user of (in particular) IP addresses. It would be appropriate for the order to have a fixed time limit of two to five years, but renewable as need be with a simple substantiated request.¹⁸⁷ Alternatively, the IPR holder could have the obligation to apply for discharging or varying the order if circumstances change or face liability for potential damages.¹⁸⁸ These would hopefully ensure that the list of blocked sites will contain only relevant and up-to-date entries.
- 83 The impact of this kind of burden must be accounted for, though admittedly the potential technical and innovation implications may be difficult to qualify.

V. Subsidiarity

- 84 The issue of addressing the infringement at its source has been a recurring theme in national case law as well as in the literature. While the CJEU confirmed that the connectivity provider at the user end may be issued a blocking order, it is not always necessarily best placed to end or prevent infringement.¹⁸⁹ In contrast to subscriber identification requests that the CJEU referred to, the user end provider is not the *only* provider that could implement blocking. Further, the A.G. opined that as a consideration of proportionality, if possible, primarily the infringer or infringer's provider should be targeted. This might be the case in particular if an upstream provider is located in the EU.¹⁹⁰ It must also be observed that Article 8(2) of the Infosoc Directive does not require Member States to provide for injunction (against infringers), except when infringement occurs on its territory.¹⁹¹ While wider protection may be provided, this portrays the general principle that in some cases it is not unreasonable to require that the IPR holder pursues the case abroad.¹⁹²
- 85 All of this seems to indicate that subsidiarity does have some role in evaluating proportionality. This is underlined especially if the measures would be burdensome, ineffective, the infringer is operating in EU, there has been no attempt to target him/her or to disconnect the site and/or the illegality is suspect. On the other hand, if there is evidence that the website has repeatedly changed providers (as with The Pirate Bay) or the administrators are anonymous and difficult to identify,¹⁹³ addressing the issue at the user end might be more easily proportionate.

VI. Avoiding Collateral Damage

- 86 The CJEU has emphasised the importance of freedom of information, and the A.G. also underlined its necessity for democracy and supporting the provider's legitimate business.¹⁹⁴ Legal communications in particular must not be "unnecessarily" disturbed.¹⁹⁵ This implies that a minor disturbance might be acceptable in some circumstances; one example might be a site that has a small fraction of legal content. However, it is difficult to conceive of a scenario where overblocking – i.e. blocking affecting unrelated sites – would be acceptable. This comes up (and has come up) in particular with IP address blocking. For example, Arnold J has noted in two UK blocking cases that IP address blocking would not be appropriate if the address was shared.¹⁹⁶
- 87 While overblocking has not yet caused significant problems with the top infringing sites, the ever-expanding blocking implies that this would become a problem. Specifically, for example, proxy sites and less significant websites will most likely almost always use a shared IP address. Thus IP address-based blocking would be excluded. On the other hand, more detailed forms of blocking (e.g. URL blocking) might be unavailable, and more generic ones such as DNS blocking might suffer from other problems. Given the crudeness of the website blocking as a tool, the result may be that blocking would be disproportionate.
- 88 Another difficult-to-qualify issue, as already touched on in the context of burdens, concerns the technical, architectural and security implications of blocking mechanisms, among others. All blocking mechanisms have their problems. DNS blocking undermines the security of the Internet by decreasing trust in domain name lookup services. IP blocking is simple, yet it has a risk of overblocking if not used with caution. There is also a danger of permanent blocking orders hindering innovation as some addresses cannot be recycled to new uses due to lingering blocking orders all over Europe. URL blocking may be expensive and it is incompatible with secure web connections. All of these might cause collateral damage through specific problems or as unreliability in general.¹⁹⁷

E. Proportionality Evaluation

I. Legitimacy of the Objective

- 89 The objective might be construed as IPR protection in such a manner that it does not disproportionately affect other rights. *Prima facie* this could be accepted as legitimate as is, but closer examination reveals doubts on the ultimate goal of blocking.
- 90 The general goal of blocking would seem to be protecting the private interests of IPR holders.¹⁹⁸ The political motives of IPR holders include strengthening the position against other parties, obtaining ever more effective enforcement mechanisms, and being seen to be doing something. The latter is essential to legitimise the existence of central copyright organisations to the actual copyright holders, as well as to affect public opinion that “piracy” cannot be tolerated. On the other hand, the more concrete motive would be to decrease the amount of infringement to regain some “lost” sales.
- 91 The crucial question is which and to which degree these underlying motives of blocking can be accepted as legitimate. Specifically, are enforcement mechanisms (especially at intermediaries’ expense) available only for efficient enforcement that produces economically quantifiable results?¹⁹⁹ Or is blocking also acceptable for educational, symbolic or politically motivated gestures?²⁰⁰ There is likely no single right answer to this because the symbolic value of copyright enforcement is also tied to the public interests, with varied valuations. However, at least using enforcement to enhance your own political agenda at others’ expense must be rejected.

II. Suitability for the Purpose

- 92 The Advocate General suggested that, in general, specific blocking is not inappropriate for the purpose of furthering the aim of protecting the IPR holder’s rights. This was essentially based on a belief that many users would forgo accessing the site and would not bother to search for it because finding a way to access the material would become significantly more difficult. These also seemed to rest on an uneasy assumption that users would not be familiar with the illegality of the site, and blocking would have an educational purpose, affecting users’ behaviour. This displays naiveté or undue optimism. Almost everybody seems to know that downloading and especially sharing is illegal; clearly “illegal sites” are typically also identifiable as such. Most infringers are likely recurring users who are not affected either by blocking or such subtle forms of education. Also, as demonstrated, searching is also trivial, and the increase in deterrence is minimal. As such, the A.G.

seemed to overestimate the suitability of blocking as a deterring and educational mechanism.²⁰¹

- 93 The University of Amsterdam study²⁰² and other public studies confirmed that the anticipated efficacy of deterring and also educating users is too optimistic. In the survey, 71% of infringing users reported that they did not intend to decrease or stop their infringing behaviour; after blocking, 77% continued (similar and even more pessimistic figures were found in other Dutch studies). This was one of the grounds for the Appeals Court rejection of blocking in The Netherlands. It raised an issue, however: would an order be more easily proportionate if the IPR holder requested extensive blocking at once? The court rejected proceeding with a step-by-step approach, which perforce is more ineffective than blocking more sites at once. The court seemed to think “yes”, but it is not clear if this was a fair assessment given that The Pirate Bay was only a test case.²⁰³ On the other hand, a step-by-step approach demonstrates IPR holders’ rhetorical twists: first it is claimed that blocking is effective and as such the request should be granted, and later insufficient effectiveness is used to argue for extending blocking.²⁰⁴
- 94 What is deemed to be the legitimate goal of blocking affects the evaluation of effectiveness and subsidiarity in suitability analysis. If symbolic gestures, education or politics are accepted, even completely ineffective means could be deemed appropriate, assuming that the negative impact on providers and users is minimal. If the goal is to make a significant impact on sharing and reduce the economic loss of IPR holders, a much higher degree of effectiveness may be required. The scale also tilts towards higher requirements if the negative impact on others increases. For example, Arnold J seemed to accept blocking even if it only affected a minority of users.²⁰⁵ This might be suspect unless a broad notion of the goals of blocking is adopted.

III. Necessity: What Is the Least Restrictive Means?

- 95 Necessity concerns whether there are better means of achieving the objective. With the objective of preventing infringements, targeting the infringer (if possible) or infringer’s provider (especially if located in the EU, unless the operator has already switched providers multiple times) would be preferable to a patchwork of step-by-step blocking separately in all Member States. Blocking at the user end incurs much higher costs overall in the form of implementation costs and legal expenses than addressing the problem at its source.²⁰⁶ The necessity to try alternative means first, if at all possible, was also underlined in the A.G. opinion in *UPC Telekabel*

Wien. This is more important in particular if the cost and burden for the provider or the impact on users' freedom of expression is not minimal.

96 Again, if the objective of blocking is deemed to (also) be symbolic, educational or political, there may not be much better means. It is in the IPR holder's interest to increase the duties and responsibilities of intermediaries irrespective of efficacy. Further, blocking appears to be the second- or third-best solution to educating the users, with graduated response probably being preferable; there seems to be a mixed reaction to the relatively expensive and, in PR terms, uncertain trend to sue the users.²⁰⁷ On the other hand, deploying ineffective mechanisms may also result in ridicule, especially from infringing website operators. It would be a much more powerful message from IPR holders to pursue infringers directly.

IV. Proportionality: Weighing the Burden against the Objective

97 Criteria and their impact have already been discussed. Here only a general observation is made. As has already come up repeatedly, the goal of blocking as perceived and accepted by a court doing a proportionality evaluation incurs implications on the level of accepted proportionality. This is in particular the case with ineffective measures that do not cause significant costs or burden to the provider or the users. With a stricter focus on the economically quantifiable results – that is, proof that blocking significantly reduces the losses by IPR holders – ineffective mechanisms might be more easily rejected.

98 One point is worthy of noting, however. The effectiveness or lack thereof in a particular country or context can be measured only (and even then with difficulty) after blocking has been implemented. Erring on the side of restraint, however, might cause the issues to be addressed at higher courts or referred to the CJEU. This might also allow (or force) the IPR holder to conduct more rigorous studies of effectiveness in other countries.²⁰⁸

F. Conclusions

99 IPR holders, intermediaries, users and website operators each have very different interests, and satisfying all of them is obviously impossible. As CJEU case law provides only very high-level guidance, five interrelated criteria for assessing proportionality were formulated: degree and basis of illegality, effectiveness, negative burden, subsidiarity and avoiding collateral damage.

100 As was already observed by Norrgård in 2005, the Enforcement Directive affords a national judge wide discretion in how strong an enforcement model is adopted. It is submitted that by using these criteria, it would be possible to untangle the Gordian Knot of proportionality evaluation and make more reasoned, nuanced and explicit decisions. Too little attention has also been given to the different interpretative contexts (infringer vs intermediary) of enforcement principles.

101 Blocking has not been requested in most EU countries. This is likely due to strategic choices of major national IPR holders and associations: e.g. unsatisfactory benefit compared to the expenses. On the other hand, with reasoned judgments the UK has been in the forefront of blocking. Different aspects of discretion and proportionality have also been considered in many UK rulings, even if on most issues there has not been detailed scrutiny. The appropriateness of blocking, even if impacting only the minority, hinted at particular regard for the symbolic value of copyright enforcement; this was also observable from Ireland.

102 Case law from Scandinavian countries provides an example of how proportionality has traditionally been assessed mainly between the parties in proceedings – a model which is now insufficient. Finland is an example of a country that adopted a very strict interpretation on establishing and updating the blocking list through judicial review only. Norway and several other countries such as Germany also demonstrated the rejection of requests when Article 8(3) of the Infosoc Directive was not explicitly transposed. Belgium was atypical in the sense that both criminal and civil proceedings were used. Criminal proceedings resulted in probably the most extensive blocking and a related monitoring obligation in Europe, closely followed by criminal proceedings in Italy.

103 In contrast, a Court of Appeals decision in the Netherlands was striking. It adopted an unconventional and restricted interpretation of the illegality of the site, and rejected blocking in a proportionality evaluation due to ineffectiveness as demonstrated by public research.²⁰⁹ It remains to be seen if this will be considered an anomaly and overturned in the Supreme Court or CJEU, or if this will be a sign of a new kind of critical movement in European case law.

104 As was seen, the key point in proportionality analysis is establishing which goals in blocking are accepted. Blocking may be portrayed as a technical measure aimed at reducing the economic losses from infringement by increasing sales. Legitimacy of this objective requires substantial impact and effectiveness. On the other hand, if it is accepted that IPR holders have a legitimate aim to try to use

connectivity providers (at their own expense) to perform vain attempts at educating users, or to make symbolic gestures or political moves to increase their own power, inefficient mechanisms might be considered more easily acceptable as well. While the national case law from various EU countries has suggested that the latter justification has also been implied to some degree, it is submitted that a critical assessment is needed before embarking on that path.

* Lic.Sc.(Tech.), Master of Laws, LL.D. candidate. Legal Counsel at CSC-IT Center for Science Ltd, Researcher at University of Helsinki, Finland, and part-time expert member on IPR issues in Market Court. The author likes to thank in particular Taina Pihlajarinne, Martin Husovec, Simon Morrison and Cedric Manara for discussions and feedback.

- 1 See e.g. Van Eecke, "Online service providers and liability: A plea for a balanced approach", 48 CML Rev. (2011) 1455, pp. 1461, 1497-1501; Kohl, "The rise and rise of online intermediaries in the governance of the Internet and beyond - connectivity intermediaries", 26 IRLCT (2012) 185, pp. 192-193, 200. See also Bright - Agustina, "Mediating Surveillance: The Developing Landscape of European Online Copyright Enforcement", 9 J Contemporary European Research (2013) 120, pp. 122-124; Lodder - van der Meulen, "Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time", 4 JIPITEC (2013) 130, paras. 3, 5, 10, 57; Montero - Van Enis, "Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?", 27 CLSR (2011) 21, p. 22.
- 2 A blocking order is just one of the many possible mechanisms an IPR holder may use. See e.g. Edwards, *Role and Responsibility of the Internet Intermediaries in the Field of Copyright* (WIPO study, 2011).
- 3 Husovec, "Injunctions against Innocent Third Parties: The Case of Website Blocking", 4 JIPITEC (2013) 116, paras. 1, 18, 24; Sandfeld Jacobsen - Salung Petersen, "Injunctions against mere conduit of information protected by copyright: A Scandinavian perspective", 42 IIC (2011) 151; Feiler, "Website Blocking Injunctions under EU and U.S. Copyright Law - Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?" TTLF Working Papers 13, 2012, pp. 45-46.
- 4 Arts 12-15 of E-Commerce Directive, 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. O.J. 2000, L 178/1. See also Van Eecke (n 1), p. 1464.
- 5 Kohl (n 1), pp. 186, 190-191, 193; Husovec (n 3), para. 25; Feiler (n 3), pp. 71-73; Bright - Agustina (n 1), pp. 123-124, 131. See also Savola, "The Ultimate Copyright Shopping Opportunity: Jurisdiction and Choice of Law in Website Blocking Injunctions", 45 IIC (2014) 287. Generally on governments' control of Internet, see Goldsmith - Wu, *Who Controls the Internet? Illusions of a Borderless World* (OUP, 2006), pp. 65-85.
- 6 Van Eecke (n 1), p. 1465; Kohl (n 1), p. 191; Blevins, "Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms", 34 Cardozo L Rev (2013) 1821; Senftleben, "Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions", 4 JIPITEC (2013) 87, para. 6; Montero - Van Enis (n 1), pp. 28-29.
- 7 See e.g. Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing, 2013), p. 16; Sauter, "Proportionality in EU Law: A Balancing Act?", 15 CYELS (2013) 439, p. 448; Stone Sweet - Mathews, "Proportionality Balancing and Global Constitutionalism", 47 CJTL (2008) 72, p. 75.
- 8 See e.g. Ibid; Craig - de Búrca, *EU Law: Text, Cases and Materials* (OUP, 5th ed. 2011), p. 526; Harbo, "The Function of the Proportionality Principle in EU Law", 16 ELJ (2010) 158, p. 165.
- 9 Websites have typically been held to infringe copyrights in almost all countries. See Savola, "Blocking Injunctions and Website Operator's Liability for Copyright Infringement for User-Generated Links", 36 EIPR (2014) 279. Feiler (n 3, pp. 67-69, 71) sees a potential for market fragmentation and creating barriers to legitimate trade.
- 10 See generally e.g. Sarmiento, "Who's afraid of the charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013) 1267, pp. 1294-1295.
- 11 By analogy, see Husovec (n 3), paras. 7-8; Peukert "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature", Goethe Institut Frankfurt am Main Faculty of Law research paper 7/2013, also forthcoming in Geiger (ed.), *Human Rights and Intellectual Property: From Concepts to Practice* (Edward Elgar, 2014), p. 3.
- 12 See e.g. Case C-314/12, *UPC Telekabel Wien*, judgment of 27 Mar. 2014, nyr, para. 47; Case C-70/10, *Scarlet Extended*, [2011] ECR I-11959, paras. 45-46, 50-53. In addition, the typically neglected website operator's rights - for example, the right to fair trial, freedom of expression and freedom to conduct a business - are also relevant. See Husovec (n 3), paras. 33-38. More generally on IPR protection and its relation to fundamental rights, see e.g. Griffiths, "Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law", 28 ELR (2013) 65; Peukert, "Intellectual Property as an End in Itself?", 33 EIPR (2011), 67; Geiger, "Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope", 31 EIPR (2009) 113, Mylly, "Intellectual property and fundamental rights: Do they interoperate?" in Bruun (ed.), *Intellectual Property Beyond Rights* (WSOY, 2005) 185, pp. 206-207.
- 13 See e.g. Sandfeld Jacobsen - Salung Petersen (n 3), pp. 176-180; Geiger - Izuymenko, "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression", 45 IIC (2014) 316; Jones, "Internet Pirates Walk the Plank with Article 10 kept at Bay: Neij and Sunde Kolmisoppi v Sweden", 35 EIPR (2013) 695; ECtHR *Kolmisoppi v Sweden*, Appl. No. 40397/12, decision of 19 Feb. 2013, 4 EHRLR (2013) 425. On blocking, see cases listed in note 73. Cf. Peukert (n 11), pp. 4-6, 10 (criticising both CJEU and ECtHR for the lack of normative criteria, weighting without a scale and unforeseeability, and also that limitations require justification rather than balancing).
- 14 For a critique of the CJEU's succinct reasoning, see e.g. Mylly (n 12), pp. 210-213; Griffiths (n 12), pp. 74, 76-78; Peukert (n 11), p. 4.
- 15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. O.J. 2001, L 167/10.
- 16 Corrigendum to the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. O.J. 2004, L 195/16. The former Article governs interlocutory injunctions, the latter injunctions awarded after infringement has been established in court. The Infosoc Directive does not explicitly require interlocutory injunctions; see Leistner, "Structural aspects of secondary (provider) liability in Europe", 9 JIPLP (2014) 75, p. 76. The Enforcement Directive explicitly notes

- that injunctions are ordered by a judicial authority, while “injunction” seems to imply that also in the Infosoc Directive.
- 17 Articles 12–14 of E-Commerce Directive; Husovec (n 3), paras. 4–6.
 - 18 On these differences, see Opinion in *L’Oréal v eBay*, paras. 138–146, correctly questioning applying the liability exemptions of connectivity providers to hosting providers in Joined cases C-236–238/08, *Google France*, [2010] ECR I-2417, paras. 113–114. Also see Van Eecke (n 1), pp. 1481–1483.
 - 19 Recitals 42–44 and Art 12 of E-Commerce Directive.
 - 20 Recital 46 and Art 14 of E-Commerce Directive.
 - 21 For a summary, see references in Savola (n 9), p. 285. This will have impact in a proportionality evaluation. See also e.g. Matulionyte – Lankauskas, “Bittorrent Loses Again: A Recent Lithuanian BitTorrent Case and What It Means for the Construction of E-commerce Directive”, 4 JIPITEC (2013) 179; Dimita, “Six Characters in Search of Infringement: Potential Liability for Creating, Downloading and Disseminating .Torrent Files”, 7 JIPLP (2012) 466.
 - 22 On reinterpretation of neutrality to imply awareness, see note 18.
 - 23 Case C-324/09, *L’Oréal v eBay*, [2011] ECR I-6011, paras. 120–123. Van Eecke’s reading of this is that any diligent economic operator should have been able to note the illegality, implying a threshold slightly lower than “manifestly illegal content” (n 1, p. 1467). For similar earlier trends, see Verbiest et al., “Study on the Liability of Internet Intermediaries”, Final report (Markt/2006/09/E) of 12 Nov. 2007, pp. 36–47.
 - 24 Cf. Rizzuto, “The liability of online intermediary service providers for infringements of intellectual property rights”, 18 CTLR (2012) 4, pp. 13–14, submits the opposite argument by generalization and analogous interpretation. For the stated reasons, this seems unconvincing. Indeed, since the E-Commerce Directive, there have been few serious claims (and no rulings) to establish a connectivity provider’s liability for transmitted information.
 - 25 Similarly in *Newzbin2* [2011] EWHC 1981 (Ch), para. 145.
 - 26 Such duties exist in close to 10 EU states, for example, Belgium and Italy. See Verbiest et al. (n 23), pp. 72–73. At least in Italy, failure to comply has also led to finding the connectivity provider liable. See Bellan, “Intellectual Property Liability of Consumers, Facilitators and Intermediaries: The Position in Italy” in Heath – Kamperman Sanders (eds.), *Consumers, Facilitators, and Intermediaries: IP Infringers or Innocent Bystanders?* (Kluwer Law International, 2012) 87, pp. 92, 96–97.
 - 27 Recital 47 and Art 15(1) of E-Commerce Directive. Art 18 also requires providing court measures “designed to terminate any alleged infringement and to prevent any further impairment of the interests involved”. See Montero – Van Enis (n 1), pp. 28–29. An example of “specific monitoring” is a targeted, temporary request to tackle a specific illegal activity. See *ibid.*, p. 30 footnote 69.
 - 28 Recital 45 and Arts 12(3), 13(3), and 14(3) of E-Commerce Directive.
 - 29 This might re-ignite debate on which generic orders would constitute a monitoring obligation. See Husovec, “CJEU Allowed Website Blocking Injunctions With Some Reservations” 9 JIPLP (2014) 631, p. 634.
 - 30 Opinion in *UPC Telekabel Wien* (n 12), para. 78. The A.G. did note that if the connectivity provider needed to search for duplicate DNS entries for the same site, this would amount to forbidden monitoring.
 - 31 Recital 48 of E-Commerce Directive. These also cannot amount to general monitoring but rather refer to notification systems, for example. See Montero – Van Enis (n 1), p. 29. Also, see generally e.g. Nordemann, “Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach”, 2 JIPITEC (2011) 37. Cf. Leistner (n 16, pp. 88–89) who seems to consider the violation of reasonable duties of care to prevent infringements a significant European factor and standard for providers’ secondary liability. His discussion seems to have an implicit hosting provider focus.
 - 32 Last part of Article 14(3) of E-Commerce Directive. See Van Eecke (n 1), pp. 1484–1485.
 - 33 *L’Oréal v eBay* (n 23), paras. 139, 141.
 - 34 *Gema v Rapidshare* (BGH I ZR 80/12), *Atari v Rapidshare* (BGH I ZR 18/11). See Gärtner – Jauch, “GEMA v RapidShare: German Federal Supreme Court extends monitoring obligations for online file hosting providers”, 36 EIPR (2014) 197, pp. 198–199; Ginsburg, “Take Down/Stay Down: RIP in France? But Little Solace for Google...”, Intellectual property issues, The Media Institute (6.8.2012). Cf. Opinion in *L’Oréal v eBay* (n 23), paras. 166–168, 178–182, which suggested a double identity requirement for preventing future infringements: that a person could be prevented from repeating infringement of a specific trademark. This was not explicitly addressed by the CJEU, but the restrictions seemed to point towards that direction; see Van Eecke (n 1), pp. 1477–1478. On potential issues of “stay down” orders, see *ibid.*, pp. 1479–1480.
 - 35 *Scarlet Extended* (n 12), para. 43, affirmed in *UPC Telekabel Wien* (n 12), para. 61. Also similarly in Opinion in *UPC Telekabel Wien*, paras. 75–76, 79–81. For an earlier discussion, see e.g. Mylly (n 12), p. 200.
 - 36 See e.g. Feiler (n 3), pp. 74–75. One way to answer this is to conclude that rights are in some cases practically unenforceable. Alternatively, it must be evaluated whether the extension to enforcement is justified. See Husovec (n 3), para. 26.
 - 37 *UPC Telekabel Wien* (n 12), paras. 54, 57.
 - 38 Opinion in *UPC Telekabel Wien* (n 12), paras. 66, 81–86, 88. This was also submitted by the Commission.
 - 39 While Art 8(1) requires effective, providing and dissuasive sanctions against infringers (emphasis added), these do not apply to faultless intermediaries.
 - 40 Cf. a case on trademark infringement, in which the A.G. did not see that EU law would impose any specific requirements beyond efficacy, dissuasiveness and proportionality required by Article 3(2). Opinion in *L’Oréal v eBay* (n 23), para. 180.
 - 41 See Recital 17 of Enforcement Directive on case-by-case consideration.
 - 42 The interpretations have been taken mainly from *Scarlet Extended* (n 12). For example, “not unnecessarily costly or complicated” could also be construed to mean that the procedure should be easy and cheap for the right holder. Similarly, it could be argued that it would be disproportionate for the right holder to be denied an injunction. On the other hand, the “effectiveness” requirement could also be read in a negative fashion (see Feiler (n 3), pp. 61–62). That is, non-effective mechanisms must be rejected. A positive and widely accepted reading seems to be that effective mechanisms should be provided, but ineffective ones are also acceptable (*maius includit minus*). Likewise, “no barrier to legitimate trade” could also be construed to imply reluctance against intra-EU market fragmentation by imposing requirements to website operators in all jurisdictions. See Feiler (n 3), pp. 68–69 and note 9.
 - 43 See also Norrgård, “The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property Rights”, ERA Forum 4/2005 at 503, p. 506.
 - 44 Norrgård (n 43), pp. 507–511.
 - 45 Norrgård (n 43), pp. 511–514.
 - 46 Ohly, “Three principles of European IP enforcement law: Effectiveness, proportionality, dissuasiveness”, prepublication

version of article published in Drexel et al. (eds.), *Technology and Competition, Contributions in honour of Hanns Ullrich* (Larcier, 2009), pp. 7–8, 11, 15.

- 47 Cf. Headdon, “Beyond liability: On the availability and scope of injunctions against online intermediaries after *L’Oréal v eBay*”, 34 EIPR (2012) 137, p. 139, seems to implicitly accept dissuasiveness with respect to intermediaries, interpreting it as being in contempt of the court for disobeying the court order.
- 48 Opinion in *L’Oréal v eBay* (n 23), paras. 176–177.
- 49 Norrgård (n 43), p. 514. Actually, Norrgård lists only four types of infringers (and not third parties at all) as imposing considerations for the context. The omission is striking and calls for a specific reminder of third-party scenarios.
- 50 For examples, see Husovec (n 3), paras. 15–19.
- 51 In particular, according to the German Constitutional Court (1 BvL 3/08), a preliminary reference to the CJEU is required if a national court needs to determine the exact scope of discretion of the Member State implementing EU law. See Sarmiento (n 10), p. 1301 fn 128.
- 52 For more examples, see e.g. Verbiest et al. (n 23), pp. 53–56.
- 53 Further details are provided in this and a number of subsections.
- 54 This is the case at least in the UK, Ireland, The Netherlands, Belgium and Austria.
- 55 Feiler (n 3), pp. 27–30. Generally on IPR injunctions in Member States, see European Observatory on Counterfeiting and Piracy, “Injunctions in Intellectual Property Rights” (2011), <http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf> (Observatory Report).
- 56 There have also been cases which relate to Internet connectivity providers and also discussed proportionality, but where the context has been *inter alia* disclosing the subscriber whose IP address was used in copyright infringement. It is not necessary or possible to discuss these in detail. See Case C-275/06, *Promusicae*, [2008] ECR I-271, Case C-557/07, *LSG v Tele2*, [2009] ECR I-1227, Case C-461/10, *Bonnier Audio*, judgment of 19 Apr. 2012, nyr, and Joined cases C-293/12 and C-594/12, *Digital Rights Ireland*, judgment of 8 Apr. 2014, nyr.
- 57 *L’Oréal v eBay* (n 23), paras. 134, 139–144. The criteria established in *Google France* (n 18) were apparently superseded in *L’Oréal v eBay*.
- 58 In another case, a social media site benefited from the Article 14 defence. The judgment was essentially identical to *Scarlet Extended* (n 12), so it is not necessary to cover it here. See Case C-360/12, *NETLOG*, judgment of 16 Feb. 2012, nyr.
- 59 *Scarlet Extended* (n 12), para. 40. Because such an injunction is prohibited, it is not clear why the CJEU continued to consider the fundamental rights balance at all. The CJEU possibly wanted to provide for criteria for evaluation for subsequent cases instead of just addressing the issue at hand.
- 60 *Scarlet Extended* (n 12), paras. 44, 48–49. Also see Kulk – Zuiderveen Borgesius, “Filtering for Copyright Enforcement in Europe after the Sabam Cases”, 34 EIPR (2012) 791.
- 61 *Scarlet Extended* (n 12), paras. 50–52.
- 62 The Opinion in *Scarlet Extended* is of less relevance. The key point was the argument that the national law was vague and broad, and could be used to issue essentially arbitrary orders. The quality of the law as required by fundamental rights limitations should prevent issuing such orders. This aspect was not addressed in the CJEU judgment. See e.g. Van Eecke (n 1), pp. 1494–1495; Husovec (n 3), paras. 40–41.
- 63 *UPC Telekabel Wien* (n 12), paras. 54–62.
- 64 The unfortunate side-effect was that the answer to the fourth question on specific orders was not given and no explicit guidance was provided. It would have been crucial for a proportionality evaluation.
- 65 *Ibid.*, para. 46. The CJEU referred to *Promusicae* (n 56); also see Coudert – Werkers, “In The Aftermath of the *Promusicae* Case: How to Strike the Balance?”, 18 IJLIT (2008) 50.
- 66 *UPC Telekabel Wien* (n 12), para. 47. A.G. had opined (paras. 94–98) on the Charter, limitations and the rights at issue in much the same manner. It is notable that users’ right to data protection was not at issue, as with *Scarlet Extended* (n 12), paras. 50–51, 53.
- 67 *UPC Telekabel Wien* (n 12), paras. 48–51. This latter means that injunctions are not completely forbidden, merely restricted.
- 68 *Ibid.*, paras. 52–53. A.G. had opined (paras. 84–86) that “prohibition of outcome” would not be compatible with the fair balance requirement, as it might require the use of very complicated mechanisms, and the intensity of interference with a provider’s fundamental rights varied. Prevention could also be impossible.
- 69 *Ibid.*, para. 54. The A.G. had opined (paras. 87–88) that a defence at the execution stage would be incompliant, because the provider does not know which actions it must perform. Similarly in *L’Oréal v eBay* (n 23), the A.G. had opined (para. 181) that it is crucial that the intermediary can know for certain what is required of it, and that the injunction does not impose impossible, disproportionate or illegal duties like the general monitoring obligation.
- 70 See Savola, “Website blocking in copyright injunctions: A further perspective” (28.3.2014), <<http://the1709blog.blogspot.fi/2014/03/website-blocking-in-copyright.html>>. Alternatively, this would imply orders which specify, for the avoidance of doubt, a sufficient implementation as in the early UK injunctions; see *Newzbin2* (No 2) [2011] EWHC 2714 (Ch), para. 56.
- 71 Opinion in *UPC Telekabel Wien* (n 12), paras. 88–89. Intrusive means could also incur significant expenses to the provider.
- 72 *UPC Telekabel Wien* (n 12), paras. 55–56. The A.G. also emphasised (para. 82) that blocking (emphasis added) *actually affects* infringing material and there is no danger of blocking access to lawful material. “Actually affects” could be read to disallow ineffective or misdirected means.
- 73 ECtHR *Yildirim v Turkey*, Appl. No. 3111/10, judgment of 18 Dec. 2012, paras. 65–69. In contrast, in *Akdeniz v Turkey*, Appl. No. 20877/10, inadmissibility decision of 11 Mar. 2014, an Internet user was deemed not to be a ‘victim’ of website blocking.
- 74 *UPC Telekabel Wien* (n 12), para. 57. This may be unattractive for national courts; see Savola (n 70).
- 75 As will be seen, in some countries such a review has not been conducted or it has been superficial.
- 76 *Ibid.*, paras. 58–61. Indeed, on impossibility, see section B.IV.
- 77 *Ibid.*, para. 62.
- 78 *Ibid.*, para. 63.
- 79 Opinion in *UPC Telekabel Wien* (n 12), paras. 99–102. This “users will not bother” argument is similar to the one used by Arnold J; see notes 91 and 101 and accompanying text.
- 80 *Ibid.*, paras. 103–108.
- 81 *UPC Telekabel Wien* (n 12), paras. 34–35. Notably here the context differs from a connectivity provider ordered to reveal the identity of the subscriber using an IP address, as with the referred (para. 32) *LSG v Tele* (n 56), para. 44. In that case, there is only one provider having the required information; here, blocking can be implemented by others as well, and it is a matter of convenience and other considerations.
- 82 *UPC Telekabel Wien* (n 12), paras. 34–35; A.G. Opinion, paras. 58, 107.
- 83 Opinion in *UPC Telekabel Wien* (n 12), para. 57. Similarly, Lodder and van der Meulen (n 1, para. 71) suggest that the problem

- should be addressed at its source and only as the last resort on the user end. While injunctions may be ordered without prejudice to the other actions available to the right holder (Recital 59 of Infosoc Directive, and respectively, Recital 23 of Enforcement Directive), the novel part is taking this into account in the proportionality evaluation. Subsidiarity has been applied at least in France and The Netherlands. On the other hand, some courts in e.g. Germany and Belgium have held that such a subsidiarity requirement does not exist in Article 8(3) of the Infosoc Directive. See Feiler (n 3), pp. 47–52; Van Eecke (n 1), p. 1490; Verbiest et al. (n 23), pp. 49–50.
- 84 See Savola (n 5) pp. 305, 312; Feiler (n 3), p. 53.
- 85 IPR holders have typically claimed that the user end provider benefits, e.g. due to increased demand for high-speed connectivity. This is not obvious. Typically the provider's own audio-visual additional services suffer, and high-volume users that use disproportionate amount of capacity are not ideal customers.
- 86 For example, in the UK it has been held that affecting even a “minority” of users is sufficient; see notes 91 and 101 and corresponding text.
- 87 *Newzbin2* (n 25), paras. 43, 151. Cf. *Newzbin* [2010] EWHC 608 (Ch), paras. 133–135 where Kitchin J was more hesitant and did not initially grant a broader injunction.
- 88 *Newzbin2* (n 25), paras. 157 ff.
- 89 *Ibid.*, paras. 185–186.
- 90 *Ibid.*, paras. 189–190. Cf. Schellekens, “Liability of internet intermediaries: A slippery slope?” 8 SCRIPT-ed (2011) 154.
- 91 *Newzbin2* (n 25), paras. 194, 197–198. For a critique of the research, see note 101.
- 92 *Ibid.*, paras. 199–201. In this case, BT's Cleanfeed system would also have supported URL blocking. In a later ruling, Arnold J also noted that the final *Scarlet Extended* judgment would not have made any difference to his consideration. See *Dramatico Entertainment (No 2)* [2012] EWHC 1152 (Ch), para. 8.
- 93 *Newzbin2 (No 2)* (n 70). It is somewhat strange that an operational requirement of doing emergency service maintenance to the system was rejected.
- 94 See references in *Dramatico Entertainment* [2012] EWHC 268 (Ch), paras. 3–4.
- 95 *Ibid.*, para. 7 and below *Emi v Sky* (n 98), para. 90; *Paramount v Sky* (n 103), para. 3. Reasons may be saving legal expenses, adopting a neutral stance in order to avoid having to reimburse claimants' legal fees, and emphasising that it is not their role to argue for the users and the website but the court's. On saving costs, see Senfleben (n 6), para. 67.
- 96 *Dramatico Entertainment (No 2)* (n 92).
- 97 *Ibid.*, para. 13. This approach could be questioned from the perspective of guarding the interests of parties not represented in the proceedings.
- 98 *Emi v Sky* [2013] EWHC 379 (Ch), paras. 91–93, referring to *Golden Eye* [2012] EWHC 723 (Ch), para. 117: “... That approach is as follows: (i) neither Article as such has precedence over the other; (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or ‘ultimate balancing test’ – must be applied to each.” On these developments, including *Golden Eye* [2012] EWCA Civ 1740, see Hyland, “The seductive interface between adult entertainment and Norwich Pharmacal relief”, 18 Comms L (2013) 56; Daly, “Is there an entitlement to anonymity? A European and international analysis”, 35 EIPR (2013) 198. Arnold's test is essentially similar to the balancing considered here, except it lacks an explicit suitability and necessity part.
- 99 *Emi v Sky* (n 98), paras. 7, 95–97.
- 100 *Ibid.*, paras. 99–100.
- 101 *Ibid.*, paras. 102–106. As will be discussed, the more important feature of efficacy is users', not operators', possibility to circumvent blocking. Also, there was no critical assessment of the methodology or bias of these measurements.
- 102 *Ibid.*, para. 107. Again, freedom to conduct a business was not specifically addressed.
- 103 See e.g. *Paramount v Sky* [2013] EWHC 3479 (Ch), para. 42. The number of blocked sites appears to be around 40 as of this writing. See e.g. TorrentFreak, “UK Piracy Blocklist Expands With Megashare, Viooz, Watch32 and Zmovie” (11.3.2014), <<http://torrentfreak.com/megashare-viooz-watch32-zmovie-blocked-140311/>>.
- 104 *FAPL v Sky* [2013] EWHC 2058 (Ch), para. 55. It is notable, however, that there is no requirement to provide an effective remedy in the jurisdiction of the claimant's choosing.
- 105 *FAPL v Sky* (n 104), para. 56; “Premier League piracy fight brings down Radio Times site” (15.8.2013, World IP Review), <<http://www.worldipreview.com/news/premier-league-piracy-fight-brings-down-radio-times-site>>. Also in *Dramatico Entertainment (No 2)* (n 92), para. 13, Arnold J stated that blocking an IP address was only appropriate when it is not shared with anyone else.
- 106 *FAPL v Sky* (n 104), paras. 57–58.
- 107 *TDC*, Supreme Court decision of 10.2.2006 (59/2005). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 159–160.
- 108 *Allofmp3.com*, Copenhagen City Court decision of 25.10.2006 (F1-15124/2006). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 161–162; Verbiest et al. (n 23), p. 57.
- 109 *Telenor*, Supreme Court decision of 27.5.2010 (153/2009). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 162–163.
- 110 Swedish Copyright Act, Section 53 b. Preparatory materials explicitly stated that operating the network does not as such constitute contributory infringement and that injunctions of Article 8(3) are not always available in this context. See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 156–157, 164, 167, 170; Verbiest et al. (n 23), p. 53.
- 111 *Black Internet*, Svea Court of Appeal decision of 21.5.2010 (Ö 7131-09 and Ö 8773-09). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 163–164.
- 112 *Portlane*, Svea Court of Appeal decision of 21.5.2010 (Ö 10146-09). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 164–165.
- 113 See TorrentFreak, “Pirate Bay Bandwidth Supplier Disconnected, But the Ship Sails On” (13.2.2013), <<http://torrentfreak.com/pirate-bay-bandwidth-supplier-disconnected-but-the-ship-sails-on-130221/>>.
- 114 *Telenor*, Borgarting Court of Appeal decision of 9.2.2010 (10-00654ASK-BORG/04). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 165–167; Manner – Flythstrom, “Bonnier Amigo Music Norway AS v Telenor ASA – another flag in the Pirate Bay – internet service provider not responsible for blocking Bittorrent file sharing services in Norway”, 21 EntLR (2010) 237, pp. 239–240. On Iceland, see TorrentFreak, “Pirate Bay Blockade Dismissed by Icelandic Supreme Court” (3.5.2014). <<http://torrentfreak.com/pirate-bay-blockade-dismissed-by-icelandic-supreme-court-140503/>>. The substance was not evaluated and therefore it is not listed in the table.
- 115 See e.g. TorrentFreak, “Anti-Piracy Group Will Use New Law to Block The Pirate Bay” (24.7.2013). <<http://torrentfreak.com/anti-piracy-group-will-use-new-law-to-block-the-pirate-bay-130724/>>.
- 116 Sandfeld Jacobsen – Salung Petersen (n 3), pp. 171–172.
- 117 However, there is a separate provision on not disturbing third parties, so the lack of “users” here seems irrelevant.

- An amendment to add users (and make a number of other revisions) is in progress, however.
- 118 *Elisa*, Helsinki Court of Appeals decision of 15.6.2012 (S 11/3097), Supreme Court denied leave to appeal on 29.10.2012; *DNA*, Helsinki Court of Appeals decision of 8.2.2013 (S 12/1850); *TeliaSonera Finland*, Helsinki Court of Appeals decision of 11.2.2013 (S 12/2223). All court of appeals decisions upheld Helsinki district court decisions, though in the *Elisa* case (p. 21) with a tightened precision of orders. Only the first lower court decision has been elaborated in English; see Norrgård, “Blocking Web Sites – Experiences from Finland” in Axhamn (ed.), *Copyright in a Borderless Online Environment* (Norstedts Juridik, 2012) 171. The most extensive commentary in Finnish is Savola, *Copyright Injunctions against Internet Connectivity Providers Especially with Regard to Peer-to-peer Networking* (Aalto University Licentiate Thesis, 2013).
- 119 By adopting Cleanfeed, some of these were excluded in *Newzbin2* (n 25); see note 93 and corresponding text. Savola has submitted (n 5) that blocking international transit communications would likely be inappropriate, and as such the wording was too broad.
- 120 *DNA* (n 118), pp. 1, 8–9. In contrast, in The Netherlands, the expenses for two providers were 326,000 euro (n 125).
- 121 *Elisa* (n 118), pp. 17–18.
- 122 *Ziggo*, District Court of The Hague, 19.7.2010 (KG ZA 10-573). See Lodder – van der Meulen (n 1), paras. 31–34; Feiler (n 3), p. 28.
- 123 *Ziggo and XS4ALL*, District Court of The Hague, 11.1.2012 (HA ZA 10-3184). See Lodder – van der Meulen (n 1), paras. 35–42.
- 124 *UPC etc.*, District Court of the Hague, 10.5.2012 (KG ZA 12-156). See Lodder – van der Meulen (n 1), paras. 43–44. NB. the case number there is incorrect.
- 125 *Ziggo and XS4ALL*, The Hague Court of Appeals ruling of 28.1.2014 (200.105.418-01). An appeal to the Supreme Court is pending.
- 126 Poort et al., “Baywatch: Two approaches to measure the effects of blocking access to the Pirate Bay”, 38 *Telecom Policy* (2014) 383; *Ziggo and XS4ALL* (n 125), paras. 5:17–5:22. Previous versions of research were available during court proceedings.
- 127 *Ibid.*, paras. 5:25–5:26. The alternative ground that the providers were obliged to act against their infringing customers in this manner was also rejected (paras. 6:1–6:2).
- 128 *Ibid.*, paras. 5:23–5:24.
- 129 *Telenet and Belgacom*, Antwerp Commercial Court, 8.7.2010 (A/10/05374). See TorrentFreak, “ISP’s Don’t Have to Block The Pirate Bay, Court Rules” (10.7.2010), <http://torrentfreak.com/isps-dont-have-to-block-the-pirate-bay-court-rules-100710/>. This justification did not preclude issuing preliminary blocking orders in Finland; see note 118.
- 130 Antwerp Court of Appeal, 26.9.2011 (2011/8314). The court rejected IP-address-based blocking due to its greater potential for over-blocking.
- 131 Van Bael – Bellis, “Belgian Supreme Court Confirms Order Obliging Internet Providers To Block Access To Pirate Bay Websites” (20.12.2013), <http://bit.ly/1uF4bPn>. Cf. confusing the ruling to be related to the earlier cases; see TorrentFreak, “Court Orders ISPs to Police the Internet for Pirate Bay Proxies” (20.11.2013), <http://torrentfreak.com/court-orders-isps-to-police-the-internet-for-pirate-bay-proxies-131120/>.
- 132 *EMI v UPC* [2010] IEHC 377, paras. 133–134. Earlier ex-tempore judgment, *EMI v Eircom* [2009] IEHC 108, where the blocking had been granted, was here admitted to have been wrong; see *EMI v UPC*, paras. 136–137.
- 133 *UPC etc.* [2013] IEHC 274.
- 134 *Ibid.*, paras. 5–8, 21.
- 135 Supreme Court decision of 23.12.2009 (49437/09); TorrentFreak, “Supreme Court Opens Door For Pirate Bay Block” (1.10.2009), <http://torrentfreak.com/supreme-court-opens-door-for-pirate-bay-block-091001/>; Rinaldi, “Italian Supreme Court explains reasons for ordering blocking of Swedish Pirate Bay website” (10.5.2010), <http://www.twobirds.com/en/news/articles/2012/italian-supreme-court-blocking-swedish-pirate-bay-website-050510>; Bellan (n 26), pp. 107–108; Feiler (n 3), p. 26.
- 136 Bellan (n 26), pp. 91, 97; Verbiest et al. (n 23), p. 54.
- 137 See e.g. TorrentFreak, “Italian Court Orders ISPs To Block Several Major Torrent Sites” (17.10.2013), <http://torrentfreak.com/court-orders-isps-to-block-several-major-torrent-sites-131017/>. Also as a rejection of blocking the whole site instead of infringing URL, see TorrentFreak, “Court Orders ISPs to Unblock ‘Pirate’ Site” (3.4.2014), <http://torrentfreak.com/court-orders-isps-to-unblock-pirate-site-140403/>.
- 138 EDRI, “Italian authority gets the power to block websites” (18.12.2013), <https://edri.org/italian-telecom-authority-gets-power-block-websites/>; Rosati, “BREAKING NEWS: EU Commission had serious doubts about Italian Communication Authority draft online copyright enforcement regulation” (15.1.2014), <http://the1709blog.blogspot.com/2014/01/breaking-news-eu-commission-had-serious.html>.
- 139 See Hoeren – Yankova, “The liability of internet intermediaries – the German perspective”, 43 *IIC* (2012) 501, pp. 517–518; Verbiest et al. (n 23), pp. 54–55. Cf. Hoeren on German law misconceiving the goals of EU legislation in Angelopoulos, “Beyond the safe harbours: Harmonising substantive intermediary liability for copyright infringement in Europe”, (2013) *IPQ* 253, p. 269 fn 123; Observatory Report (n 55), pp. (PDF page numbers) 10, 24. Generally on Störerhaftung liability, see e.g. Leistner (n 16), pp. 78–81; Angelopoulos, pp. 266–270.
- 140 *Deutsche Telecom*, Hamburg District Court decision of 12.3.2010 (308 O 640/08), para. 42; Feiler (n 3), p. 27.
- 141 *G-Stream.in*, Hamburg Court of Appeals decision of 22.12.2010 (5 U 36/09); Feiler (n 3), p. 27.
- 142 *Hansenet*, Cologne District Court decision of 31.8.2011 (28 O 362/10), paras. 115–122. See Feiler (n 3), pp. 26–27.
- 143 *CB3ROB*, District Court of Hamburg decision of 6.5.2010 (310 O 154/10).
- 144 TorrentFreak, “Portugal Next in Line to Block The Pirate Bay” (26.9.2013), <http://torrentfreak.com/portugal-next-in-line-to-block-the-pirate-bay-130926/>.
- 145 Bright – Agustina (n 1), pp. 129–130; TorrentFreak, “Website Blocking Law Implemented by New Spanish Government” (2.1.2012), <http://torrentfreak.com/website-blocking-law-implemented-by-new-spanish-government-120102/>. Cf. TorrentFreak, “Court Jails Torrent Site Owner and Issues Three Year Website Work Ban” (8.11.2013), <http://torrentfreak.com/court-jails-torrent-site-owner-and-issues-three-year-website-work-ban-131108/>. TorrentFreak, “‘Pirate’ Site ISP Blockades Reversed by Court (17.7.2014). <http://torrentfreak.com/pirate-site-isp-blockades-reversed-by-court-140717/>. It is reported that the judge deemed that there were insufficient grounds for blocking “especially when it is not absolutely necessary for the continuation of the investigation. For earlier discussion of injunctions, see Verbiest et al. (n 23), pp. 49, 59.
- 146 See e.g. Liard – Hainsdorf, “French Courts Ordered to Block and Delist 16 Streaming Websites” (10.1.2014), <http://www.whitecase.com/articles-01102014/>. *Allostreaming*, TGI Paris decision of 28.11.2013 (11/60013). Website blocking after meeting the requirement of subsidiarity should be possible, however. See Verbiest et al. (n 23), p. 54.
- 147 *Grammo v Internet Service Providers*, Protodikeio (16.5.2012), see 44 *IIC* (2013) 468; TorrentFreak, “Court Orders ISP Blockades of ‘Pirate’ Music Sites” (21.5.2012), <http://torrentfreak.com/court-orders-isp-blockades-of-pirate-music-sites-210512/>.

- com/greek-court-orders-isp-blockades-of-pirate-music-sites-120521/>.
- 148 In Slovakia and Czech Republic, injunctions against intermediaries are not possible due to the lack of legal basis. See Observatory Report (n 55), pp. 10–11, 24–25.
- 149 See section B.IV and in particular the table therein.
- 150 It is submitted that the court must consider the absent operator's rights (to some degree) on its own motion; see Husovec (n 3), paras. 33–38.
- 151 Other recurring themes include specificity of the order, the procedure for updating the blocking list, and applicability of interlocutory injunctions, but these are less relevant from a proportionality perspective.
- 152 In slightly different words, six criteria were submitted: 1) subsidiarity, 2) effectiveness, 3) costs, 4) expansion of existing means, 5) duration and reactive/preventive nature and 6) various adequate safeguards. See Lodder – van der Meulen (n 1), paras. 70–76, 79.
- 153 Husovec (n 3, paras. 27–50) does not specifically propose criteria for proportionality, but some guidelines can be gleaned from general observations: 1) effectiveness, 2) method of implementation, 3) collateral damage to innovation, 4) operator's right to fair trial, 5) abusive use, 6) legality of blocking (out-of-court private agreements), 7) degree of illegality, 8) subsidiarity and 9) shifting of costs.
- 154 Considerations are 1) the goal of blocking and targeting, 2) effectiveness and suitability, 3) impact on users and third party communications, 4) subsidiarity i.e. alternatives and 5) costs and other burdens. These were initially submitted in Savola (n 118), pp. 183–199, and further refined in Savola, "Internet connectivity provider and fundamental rights" in Lohi (ed.), *Oikeustiede–Jurisprudentia XLVI:2013* (Suomalainen Lakimiesyhdistys, 2013) 127, pp. 195–199.
- 155 In the conflict between users and IPR holders: 1) preventive/reactive nature, 2) impact on legal material, 3) IPR holder's financial losses, 4) the extent of material and means, 5) subsidiarity and 6) communications of political or societal nature. Between provider and IPR holder: 1) IPR holder's financial losses and subsidiarity, 2) burden on the provider and 3) specific characteristics of the service. See Pihljarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (Lakimiesliiton Kustannus, 2012), pp. 51–61, 140–148.
- 156 See e.g. Lodder – van der Meulen (n 1), para. 76; Husovec (n 3), paras. 37–40.
- 157 This was done in Sweden. However, it is worth noting that the site has changed slightly since then. For example, instead of torrent files, it's serving only "magnet links", i.e. it is even one step further from the infringing act. See note 21. In contrast, in the Netherlands, only the artworks on the site were held to be infringing. See note 127 and corresponding text.
- 158 Examples of analysis are the UK injunctions in *Dramatic Entertainment* (No 2) (n 92), and *FAPL v Sky* (n 104). Some of the grounds could also be contested, however. See Angelopoulos (n 139), p. 257; Savola (n 9), p. 286.
- 159 On finding website operators liable, even though the site does not have any infringing content, see Savola (n 9), p. 285. On the inapplicability of hosting defences, also see note 21.
- 160 See Savola (n 118), pp. 170–173, 179–181.
- 161 For example, in *Newzbin2* (n 25), Arnold J noted that URL blocking might have been appropriate if the site had substantial legal uses (n 92). The A.G. in his Opinion in *UPC Telekabel Wien* (n 12), was also sensitive to this by referring to *Yildirim v Turkey* (n 73), where blocking the whole Google Sites site to block one site violated Article 10 ECHR in various ways. For example, Rome Court of Appeals rejected blocking the whole site (n 137).
- 162 See note 9. Husovec (n 3, paras. 37–39) notes that website blocking as a substitute for proceedings against infringers might lead to abusive or inappropriate use of blocking, citing an example of blocking a Spanish "HomeLifeSpain.com" site in Denmark due to allegations of trademark violation.
- 163 For example, Lodder and van der Meulen (n 1, para. 72) suggest that symbolic or insignificant mechanisms should not be used, but that normally means could be used when costs are not disproportionate. Pihljarinne (n 155, pp. 135–136) observes optimism in effectiveness and converting wilfully infringing users to legal consumers, and (p. 145) that due to unavoidable negative externalities, sufficient effectiveness should be required. Husovec (n 3, paras. 27–29) calls for evaluation using the so-called Kaldor Hicks improvement test.
- 164 On users' and operators' possibilities to evade the blocking, see Savola (n 118), pp. 99–106 and Opinion in *UPC Telekabel Wien* (n 12), para. 99. On distinguishing accuracy and completeness (in information theory, "precision" and "recall", respectively), see Savola (n 118), pp. 106–108.
- 165 See e.g. note 101 and corresponding text. On further critical analysis, see note 167.
- 166 Poort et al. (n 126), pp. 387, 391. Wesselingh et al., "To Block or Not to Block?" (Work in progress, 4.6.2014). <<http://ssrn.com/abstract=2273453>> (also citing another University of Amsterdam study, where no significant measurable effect on infringement was discerned). Cf. IFPI, "Digital Music Report 2014", <<http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>>, p. 41, claim an 11% reduction of peer-to-peer traffic in EU countries where blocking has been adopted, in contrast to a 15% increase in others. It is not possible to evaluate the reliability of such claims.
- 167 See e.g. Savola (n 118), pp. 104, 112–117. Also IFPI (n 166, p. 42) claims that 74% of consumers are introduced to pirate services through search. This was based on research commissioned by the IPR holder organization MPAA, see MilwardBrown Digital: "Understanding the Role of Search in Online Piracy" (17.9.2013). <<http://www.mpa.org/wp-content/uploads/2014/03/Understanding-the-role-of-search-in-online-piracy.pdf>>, p. 8. Only domain names ("navigational searches") rather than other keywords were used 37% of time for first visits and 46% for repeated visits (p. 9). The study is questionable because a visit to the site within 20 minutes of search is considered a success, and a sharp drop was noticed the shorter the time was (p. 12). Even a minute of delay would seem like a long time and only a fraction of these searches were actually successful. In contrast, using a different methodology, another study found only a ca. 20% impact of search. See Computer & Communications Industry Association, "The Search Fixation: Infringement, Search Results and Online Content" (5.8.2013), <http://www.cciainet.org/wp-content/uploads/2013/08/CCIA_TheSearchFixation.pdf>. Further, according to a study, 2% of Internet users committed 74% of all infringement, see Ofcom, "High volume infringers analysis report" (11.9.2013), <<http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/high-volume-infringers/>>. These users are obviously not deterred by any mechanism. Other sources of entry include for example social media sites. Nonetheless, in this kind of use of navigational search by typically recurring users, the percentage is likely somewhere between 20% to 50%. However, there is not much that can be done about it. Completely censoring such generic phrases would seem to infringe on the very substance of the freedom of expression.
- 168 This was measured by a CCIA report (n 167), and the impact seemed rather modest.
- 169 Pihljarinne (n 155), p. 135. On high-volume infringers, see Ofcom (n 167).
- 170 It is suspect whether blocking could even in the best case educate users, given that access blocking is not necessarily

accompanied by any clear message. For novice users, this is likely indistinguishable from an Internet connectivity or site failure. For recurring users, this has no educational value.

- 171 For example, courts have held that the illegality of The Pirate Bay should be obvious to the users merely through its name; see e.g. *Elisa* (n 118), p. 17. Pihlajarinne (n 155, pp. 135–136) also rejects blocking as an educational signal, noting that users are very well aware of the illegal nature of the site and it is optimistic to assume that they would convert to using legal sources. Hargreaves, “Digital Opportunity: A Review of Intellectual Property and Growth” (May 2011), <<http://www.ipo.gov.uk/ipreview-finalreport.pdf>>, pp. 78–79, also cites reports from an education campaign from 2009 that 69% of average users understood the illegality of downloading after watching an educational advertisement. In contrast (p. 68), a 2010 study found that 44% of peer-to-peer users believed their actions to be lawful. On the other hand, in a recent Finnish Gallup poll commissioned by IPR holders from 2013, 83% of respondents said that downloading music or movies from unauthorized sources is illegal, and respectively 94% said the same for sharing music or movies. A majority of them had done both regardless. See Tekijänoikeusbarometri 2013, <http://www.kulttuuriuutiset.net/gallupit/piratismitutkimus_2013/>. While these are somewhat contradictory, it seems obvious that the illegality of sites is indeed known, but respecting the rights is a different question.
- 172 See note 79 and corresponding text. Likewise Arnold J had similar arguments on blocking increasing the “transaction costs” of using a site; see note 91 and corresponding text. A similar argument and reference to blocking being “educational and helpful” can be found in *EMI v UPC* (n 132), para. 134.
- 173 On interpretations of the effectiveness principle, see note 42. A different reading of the “effectiveness” requirement is also possible: ineffective and merely symbolic means do not strike a fair balance.
- 174 Savola (n 154), p. 198.
- 175 Husovec (n 3), para. 47.
- 176 In *Newzbin2* (No 2) (n 70), paras. 30–34, the estimate for implementation costs was quoted (in the same ballpark as in Finland), and Arnold J noted that the distribution of costs is a national modality, and read “not excessively costly” as implying that the provider needs to cover the cost of carrying the Internet connectivity business. Other interpretations are also possible: that if costs are due, they must not be excessive; or IPR holder’s costs must not be excessive. See also Husovec (n 3), para. 49.
- 177 The principal opposition likely stems from the fear of expanding and extending blocking once “the genie is out of the bottle” and subjugating providers to the role of active web enforcers. See e.g. Schellekens (n 90). It has also been submitted that when implementation costs are minimal, it is not a good sole argument for rejecting blocking, and that it is easier to require blocking more sites once the provider has been subjected to blocking the first time. See Lodder – van der Meulen (n 1), paras. 73–74.
- 178 Feiler (n 3), p. 60.
- 179 The A.G. opined that proportionality might require that e.g. in some repeated cases IPR holders might be ordered to pay costs (n 80); Arnold J in *Newzbin2* (No 2) (n 70), also made a reservation that costs might be ordered in the future; see note 93.
- 180 Similarly on shifting business risks and liability to the provider, see Pihlajarinne (n 155), p. 147; Husovec (n 3), paras. 47–50.
- 181 This is exacerbated by *UPC Telekabel Wien* (n 12) holding that providers may also be responsible for taking into account the users’ interests. In practice this may call for legal evaluation and participation in the proceedings.
- 182 There are some signs of this at least in the UK and Ireland. In the UK, BT was reimbursed costs during refining the orders until 16 December 2010, but BT’s futile “all-out opposition” resulted in it having to compensate subsequent IPR holders’ costs; see *Newzbin2* (No 2) (n 70), paras. 53–55. In Ireland, one of the defendants that actively participated in drafting the order was compensated costs based on agreement with the claimants; see *UPC* etc. (n 133), paras. 19–22.
- 183 On the CJEU’s stance on the impact to business freedom, see notes 67–68 and corresponding text.
- 184 For example, DNS blocking increases the likelihood of users using less secure DNS resolvers, potentially leading to security problems or preventing the use of secure DNS extensions. This was also one of the reasons why the so-called SOPA/PIPA proposals failed. As a summary, see Savola (n 118), pp. 87–88. There are similar constraints with respect to other mechanisms.
- 185 Savola (n 118), p. 78.
- 186 *UPC Telekabel Wien* (n 12), para. 51.
- 187 This may be compared to industrial property rights regimes which include renewable terms that weed out those registrations that were later found out to be useless. On the requirement of regular re-assessment of preventive actions, see Lodder – van der Meulen (n 1), paras. 75, 79.
- 188 This makes more sense than imposing a monitoring duty on the provider or a third party, who have no knowledge and no reason to obtain knowledge of such changes.
- 189 See note 83 and corresponding text.
- 190 See notes 80–83 and corresponding text. Again, as the CJEU did not address the fourth question, it is impossible to conclude if it would have endorsed the A.G.’s opinion on the impact on proportionality.
- 191 In the review of the Enforcement Directive, the Commission has stated that “[a]ny amendments should have as their objective tackling the infringements at their source and, to that end, foster cooperation of intermediaries [...]”. At least in *de lege ferenda* there appears to be a priority to address the problems at their source. See COM(2011) 287 final, p. 19, “A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe”.
- 192 National courts seem reluctant to reject requests, however, and in essence state “go seek an injunction in a court closer to the source”. For extensive discussion of international aspects, see Savola (n 5).
- 193 Within EU it might also be possible to request a court order for the infringer’s ISP to disclose subscriber identification information that relates to the anonymous website operator.
- 194 On CJEU see note 72 and on A.G., note 79.
- 195 However, according to ECtHR, even illegal communications enjoy freedom of expression subject to proportionate limitations. See note 13.
- 196 See note 105. Similarly see Feiler (n 3), p. 57.
- 197 See e.g. Savola (n 118), pp. 87–88, 91–93, 115–117; Husovec (n 3), para. 30.
- 198 Further, it could be argued that this would incentivise the creation of new works and foster culture (as a public interest), but this has been disputed; see e.g. Patry, *How to Fix Copyright* (OUP, 2011), pp. 14–27, 77–78; Hargreaves (n 171), pp. 75–76.
- 199 On difficulties of quantifying the impact of infringement, see e.g. Hargreaves (n 171), pp. 72–76. Also, it is not obvious if stronger enforcement measures have reduced piracy (*ibid.*, pp. 77–78). Careful tracking and assessing the impact of enforcement and educational initiatives was also deemed

important (*ibid.*, p. 81). Notably, emphasising enforcement as an alternative to improved licensing and modernisation of copyright law was flat-out rejected (*ibid.*).

- 200** It is unclear if CJEU's statement on "seriously discouraging" accessing the site could be read to accept educational purposes.
- 201** See discussion and references in notes 169–172 and corresponding text.
- 202** See note 166 and corresponding text.
- 203** See notes 125–128 and corresponding text.
- 204** If blocking was indeed as effective as the best claims made of it, expansion might not be worthwhile. See Savola (n 118), pp. 112–113.
- 205** See notes 91 and 101 corresponding text. Arnold likely referred to the minority of infringing users. Likewise, Charleton J felt that blocking would be educational and helpful. See note 172.
- 206** It can be estimated that both providers and IPR holders have used at least 5 million euro in Europe on legal expenses in trying to block The Pirate Bay alone. This estimate is based on the number of countries, ISPs and the proceedings involved when the cost for one provider for one proceedings through appeals instances has been reported (where the information is available) to run at ca. 100,000 to 300,000 euro (see eg. note 120). It seems obvious that such expenses cannot be motivated by blocking (or resistance thereto) just one site, but both parties have more general agenda.
- 207** In *EMI v UPC* (n 132), para. 62, a reference was made to an attempt to educate the public with campaigns. The impact of reducing infringements lasted for only several months before returning to the previous level. As noted in the context of the research of blocking, there appears to be no evidence to suggest that attempts to educate already cognisant persons with inefficient blocking is any more useful. A key difference is that it shifts some expenses and responsibility to providers.
- 208** Unfortunately, such measurements and research are also often biased, so it may be of limited usefulness, especially if the connectivity provider does not wish to expend its resources to fighting it.
- 209** This has also been the only case where detailed public research has been notably part of the proceedings. In some other cases, this could also have made a difference.