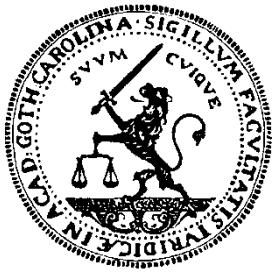

FACULTY OF LAW
Lund University

Ieva Kisieliute

A “fair balance” between intellectual property rights and other fundamental rights?

Master thesis
30 credits

Supervisor: Professor Xavier Groussot

Master Programme in European Business Law

Spring 2012

Contents

Summary

Recent development of case law emphasises the need to strike a fair balance between intellectual property rights and other fundamental rights. In theory, balancing of various fundamental rights is not a new concept. However, in practice, striking a fair balance between intellectual property rights and other fundamental rights is quite a new and problematic issue due to digitalisation, which has created new ways for the copyright holders to produce and distribute their works, but also made it easier for the users to share culture. Since the copyright holders have the exclusive right of distribution, unauthorised file sharing online normally constitutes a copyright infringement. Most problems arise when the copyright holders attempt to take measures against the infringers.

Looking at the relevant legislation and at the case law, it is far from clear what measures are likely to strike a fair balance between the fundamental rights involved. In this thesis, various aspects of balancing are explored, discussing whether a fair balance between intellectual property rights and other fundamental rights can be achieved in practice. Based on a thorough analysis of case law, the act of striking a fair balance is compared with the mathematical expression of inverse proportionality; depending on the need to protect the very substance of copyright, the other rights can be restricted accordingly. The scope of the various rights is presented, concluding that since file sharing impairs the very substance of copyright, the other rights can be restricted, but only insofar as the restriction does not impair the very substance of those rights.

The practical possibilities to strike a fair balance are discussed and various alternatives are presented. Preventive measures that involve filtering or blocking of information are discarded as unfeasible because they are likely to be disproportionate or technically ineffective. Tax measures to compensate for unauthorised file sharing are discussed briefly and rejected as an unviable solution. While ACTA is briefly presented as an indicator of tendencies towards stricter legal protection of copyright, business models and digital rights management are suggested as the most realistic ways to prevent unauthorised file sharing.

Finally, the very core of the file sharing problem is examined. It is suggested that due to the long term of copyright protection, most culture cannot be shared freely, which means that most file sharing infringes copyright. A shorter term of protection is advocated as beneficial both for the society and for the copyright holders. It is concluded that the current state of law protecting intellectual property rights does not serve the needs of the Information society and that innovative business models could be used as a temporary solution when a balance between copyright and other fundamental rights cannot be fully achieved by other means.

Sammanfattning

Senaste utvecklingen av rättspraxis betonar behovet av att uppnå en korrekt balans mellan immateriella rättigheter och andra grundläggande rättigheter. Själva balanseringen är i sig inget nytt koncept, men i vissa sammanhang, framförallt i fildelningssammanhanget, är det väldigt problematiskt att uppnå en korrekt balans mellan de olika grundläggande rättighteterna.

Digitaliseringen har har skapat nya möjligheter för upphovsrättsinnehavare att producera och distribuera sina verk, men har också gjort det lättare för användare att dela kultur. Eftersom upphovsrättsinnehavarna har ensamrätt för distribution så utgör fildelning upphovsrättsintrång. De flesta problem uppstår när upphovsrättsinnehavarna försöker vidta effektiva åtgärder mot sådana intrång; varken lagstiftaren eller EU domstolen har formulerat konkreta och tydliga regler för vilka typer av åtgärder som kan uppnå en korrekt balans mellan de grundläggande rättigheterna.

I den här avhandlingen har olika aspekter av balansering diskuterats. Baserat på en grundlig analys av rättspraxis, har balanseringen jämförts med omvänd proportionalitet; ju större behov man har av att skydda en rättighet desto mer kan de andra rättigheterna inskränkas, förutsatt att inskränkningen inte utgör ett orimligt och oacceptabelt ingripande som påverkar själva kärnan i rättigheten.

De praktiska möjligheterna att uppnå en korrekt balans diskuteras och olika alternativ presenteras. Förebyggande åtgärder som innebär filtrering eller blockering av datatrafik avvisas som oproportionerliga eller tekniskt ineffektiva. Detta följs av en kortfattat diskussion av skattemässiga åtgärder som avvisas som praktiskt ogenomförbara. Därefter presenteras ACTA som en indikator på tendenser till strängare upphovsrättskydd, men affärsmodeller och digital rights management föreslås som de mest realistiska sätten att förhindra otillåten fildelning.

Slutligen argumenteras det att den nuvarande upphovsrättslagstiftningen inte tillgodoser informationssamhällets behov. En kortare skyddstid förespråkas för att lösa fildelningsproblemet och innovativa affärsmodeller föreslås som en tillfällig lösning när en korrekt balans mellan upphovsrätt och andra grundläggande rättigheter inte kan uppnås på andra sätt.

Preface

"So many times, it happens too fast
You trade your passion for glory
Don't lose your grip on the dreams of the past
You must fight just to keep them alive."[1]

I would firstly like to thank Professor Xavier Groussot – not only for being my supervisor, but also for these great two years at the Master Programme of European Business Law, and especially for the European Law Moot Court experience. Thank you for being my guru of EU law.

I would also like to thank Zlatan Balta for all the great projects we have taken up and completed together (and once again, thanks for finding the *Scarlet Extended* case – who knows what this master thesis would have been about if you had not told me about that case).

I would like to thank everyone who has been there for me – especially my Mom for helping me believe in myself even during the darkest times. ♥

Finally, I would like to thank my Moot Court teammates and coaches for probably the craziest, the most hectic and the most fulfilling time of my life. Without the Moot Court, I would certainly have had more sleep, social activities and more time for this thesis – but this whole experience taught me so much in terms of law and in terms of life that I do not regret a single second. Blue Tigers forever.

Lund, May 2012

Ieva Kisieliute

[1] Survivor – Eye of a Tiger (released as a single on 29 May 1982)

Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
AG	Advocate General
ChFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DRM	Digital rights management
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ISP	Internet service provider
IPRED	Directive on the enforcement of intellectual property rights
n.y.r.	Not yet reported
p2p	Peer-to-peer
TEU	Treaty on European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

1 Introduction

As a 90's kid, I belong to the generation that could spend hours catching favourite songs on the radio and recording them on a cassette.

Later, cassettes were replaced by CDs, and the radio was more or less replaced by the computer. Mp3 was the new king, but not only did the mixtape culture survive; it became stronger than ever, as it took only a few clicks to download a song.

Of course, a homemade collection of music would never replace an album; it would never replace the joy of having all the songs in one place, alongside with a booklet of lyrics and band photos. It would never replace the touch, even the smell, but most of all, the pride of owning an original record. Well, of course, it was not literally *original*; by saying "original", I mean a copy reproduced and distributed by the right holder.

I cannot really claim that I was truly concerned about copyright issues back in the day. It was not really a matter of right or wrong; it was truly a matter of money. When you are in your teens and have a very limited amount of savings, you cannot possibly buy all the records of the bands that you seem to like.

Some songs are not played on the radio equally often as others, and some songs are not available on streaming services. Therefore, buying a whole album can be like lottery; if you do not get a decent chance to listen to all the songs in the album beforehand, you might as well end up buying a pig in a poke. Moreover, even if you like surprises, buying a whole album and realising that you only like a couple of songs in it does not erase the fact that the album has been sold. It is like sending the wrong signals to the artist: "Yes, please, we love your music, keep on making it!"

Culture is expensive. The worst thing is, "good culture" and "bad culture" – which is a matter of taste, of course – both cost the same. Therefore, it makes sense to sample some songs – or a whole album, for that matter – and decide whether it is worth your money.

Now, this would have been a good example when buying tangible media was considered a reasonable choice. However, emerging new technologies have brought along some major changes. CDs exist alongside with digital media (and still cost pretty much the same as they did ten years ago), but they are on the edge of extinction, just like cassette tapes were some 15 years ago. The times have changed, sure enough. However, just as the transition from cassette tapes to CDs was a rather natural process, why should there be any problems with the process of digitalisation? It simply gives way for more convenient solutions, does it not?

The answer is both "yes" and "no", all because of the very specific character of digital media. Over 20 years ago, Pamela Samuelson proposed taxonomy for digital media to describe its fundamental characteristics and to emphasise the connected problems. The essential features can be summarised as follows:[2]

1) Digital media is easy to replicate while keeping the same quality as the original; this poses difficulties for copyright law.

2) Digital copies can be easily transmitted; the same copy can be used simultaneously on several computers, which makes copyright enforcement more complicated and motivates right holders to restrict access in order to derive more revenue from uses than from sales.

3) Digital media can be easily modified and manipulated until it becomes unrecognisable as a derivation from the original work;

4) Copyrighted works in a digital form are less differentiated by type because they are in the same medium;

5) Digital media is very compact; complex data can be stored in a small place, but these contents cannot be perceived by humans without technological means;

6) Digital media is "non-linear": it is connected with the potential to create new systems allowing users to find and browse information, but also encouraging new intellectual property law questions.

Digitalisation has without a doubt made culture more accessible, however, it has also "fundamentally changed how copyright laws must operate in order to be effective".[3] We live in a world of "digital abundance", where each copy of a work is just as good as the original and can be distributed globally without any extra cost.[4]

A well-known social advertisement against piracy says, "You wouldn't steal a car. You wouldn't steal a handbag. You wouldn't steal a television. You wouldn't steal a movie. Downloading pirated films is stealing. Stealing is against the law. Piracy. It's a crime."[5]

However, purely technically, obtaining a copy does not affect the "original". To put it bluntly, digital copying it is by no means the same as stealing a tangible object; when stolen, tangible objects are no longer in your possession. As Lawrence Lessig expressed in his book "Free culture"[6], the

[2] N. LUCCHI: *Digital Media & Intellectual Property/Management of Rights and Consumer Protection in a Comparative Analysis*, p. 13
[3] W. PATRY: *How to fix copyright,* p. 37
[4] W. PATRY, *How to fix copyright*, p. 39
[5] http://www.youtube.com/watch?v=HmZm8vNHBSU, 2012-05-08
[6] http://www.authorama.com/free-culture-1.html, 2012-05-07

difference between downloading a song and stealing a CD is that if you steal a CD, then there is one less CD to sell.

Digital copying, on the contrary, can be seen as an act of multiplying the work rather than physically stealing it. Then why is file sharing so wrong? Well, there are several reasons. Firstly, given current copyright laws, it is not up to the user to decide what to share. Reproduction and distribution is in generally the exclusive right of the copyright holder,[7] and the rule of exhaustion does not apply to online services,[8] clearly distinguishing digital copies from tangible ones.

Secondly, when tangible media is bought, there is no doubt that artists will be paid. However, when it comes to digital media, due to the availability of unauthorised copies, the incentive to pay for culture might decrease: why would you want to pay for something when you can get it for free? You may wish to pay for a legitimate copy in order to show support for the artist, but you may as well not wish to do so; in the end, what can they do against you?

A typical situation occurs, for instance, when the copyright holder has no approved of file sharing, but someone uploads the copyrighted material online anyway, and others start downloading the material. By engaging in unauthorised file sharing, you infringe intellectual property rights and the right holder has a legal possibility to take measures against you.

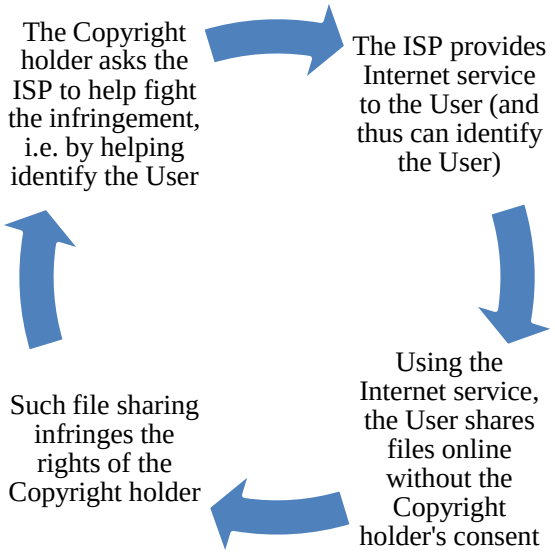

Figure 1

The service technically necessary for the sharing, but not created solely for the purposes of file sharing, such as web hosting (or simply access to the Internet), is provided by an intermediary. The copyright holder, when he or she finds out about the file sharing, contacts the intermediary and asks the

[7] Art. 2 and 3(1) Directive 2001/29/EC *("InfoSoc Directive")*
[8] Recital 29 of the Preamble to the InfoSoc Directive

intermediary to do something in order to stop or prevent such file sharing for instance, to disclose the personal data of the infringer. A dispute arises if the intermediary refuses to disclose the data. However, this is not really the main issue for the thesis; the focus is on what measures can be taken against the file sharers in order to stop or prevent unlawful file sharing. In other words; what measures are effective enough to enforce intellectual property rights, but not too strict, so that such enforcement does not undermine the rights of the file sharers and the intermediaries?

Even though all the rights involved are protected by primary and secondary law, a clear guidance cannot be deduced from the law. Directives leave a certain margin or discretion to the Member States, allowing them to find the most suitable ways to safeguard the rights. As the Court put in *Promusicae*,[9] it is up to the Member States to transpose the Directives into national law, but when doing so and when applying the implementing laws, the Member States must ensure that a fair balance is struck between the fundamental rights involved.

The transition from tangible media to digital media is not as smooth as it may seem. It has become even more complicated due to the recent constitutionalisation of the Charter of Fundamental Rights,[10] meaning, i.a., that all the fundamental rights in theory have the same value; however, they may be restricted in order to protect the rights and freedoms of others.[11] Therefore, in a way, balancing of more than two fundamental rights resembles an equation. Similar to mathematical equations, this legal "equation" can only be correct with certain values of the variables.

Balancing is a great slogan.[12] Indeed, in the perfect case scenario, an optimal balance would be achieved, meaning that copyright could be efficiently protected without jeopardising the rights of others. This balance is the core of a fully functioning information society. However, can the ultimate balance ever be achieved, given current legal possibilities?

1.1 Purpose

The aim of this thesis is to examine the notion of "fair balance" in cases of the CJEU concerning the clash of intellectual property rights and other fundamental rights. The key issue is whether it is possible to maintain an adequate level of protection for intellectual property rights[13] without compromising the right to personal data protection[14] and the freedom to

[9] Case C-275/06 *Promusicae*, para.68
[10] Art.6(1) TEU
[11] Art.52(1) ChFR
[12] X. GROUSSOT, *"Rock the KaZaA: Another Clash of Fundamental Rights"*, CLMRev. 45: 1745-1766, 2008, at p.1760
[13] Art.17(2) ChFR
[14] Art.8 ChFR

receive or impart information[15] of the Internet users and the freedom to conduct a business[16] of the intermediaries.

To find out whether, and with what values this legal equation could be solved, I will briefly examine the scope of the rights and discuss what factors could possibly increase or undermine the value of the rights that are being balanced. I will then speculate on the practical solutions that could lead to a fair balance.

1.2 Material

I have chosen to base my legal analysis mainly on cases from the CJEU. I have also sought guidance and support for my arguments in scholarly articles and books. However, given the limited availability of scholarly works that are of direct relevance for this thesis, I had to search through countless databases and read a considerable amount of material just to find out that it was not exactly what I had been looking for. Nevertheless, I managed to find several works of immediate relevance for this thesis, and those are listed below.

Concerning constitutional issues, the most useful source was Xavier Groussot's article "Rock the KaZaA: Another Clash of Fundamental Rights".[17] I also used Robert Alexy's article "Balancing, constitutional review, and representation"[18].

Regarding intellectual property law, I got most of the inspiration from Nicola Lucchi's "Digital Media & Intellectual Property. Management of Rights and Consumer Protection in a Comparative Analysis",[19] Michele Boldrin and David K. Levine's "Against Intellectual Monopoly",[20] William Patry's "How to fix Copyright"[21], and Lawrence Lessig's "Free culture"[22]. I have also used several case notes, articles containing statistical data[23], and articles on the most recent copyright enforcement issues, such as ACTA.[24]

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[15] Art.11 ChFR
[16] Art.16 ChFR
[17] X. GROUSSOT:*"Rock the KaZaA: Another Clash of Fundamental Rights"*, CMLRev. 45: 1745-1766, 2008
[18] R. ALEXY: *"Balancing, constitutional review, and representation"*, International Journal of Constitutional Law, 10/2005, Volume 3, Issue 4, 2005, pp. 572–581
[19] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, Springer-Verlag Berlin Heidelberg 2006
[20] M. BOLDRIN & D. K. LEVINE: *Against Intellectual Monopoly*, Cambridge University Press, 2008
[21] W. PATRY: *How to Fix Copyright*, Oxford University Press, 2011
[22] L. LESSIG: *Free culture*, available at http://www.authorama.com/free-culture-1.html , (2012-04-27)
[23] F. OBERHOLZER & K. STRUMPF: *"File Sharing and Copyright"*, Innovation Policy and the Economy, Volume 10, University of Chicago Press, 2010, available at http://www.nber.org/chapters/c11764 (2012-04-27)
[24] A. J. CERDA SILVA: *"Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy"*, 26 Am. U. Int'l L. Rev. 601 2010-2011

1.3 Methods

A "fair balance" is always a matter of assessment; different interests have to be taken into account. More than that, the interpretation of the law depends on the context of the legal text and the context of the reader. Possible interpretations or understandings cannot be eliminated only because they are not explicitly included in the text: "[t]here is always more to the text than what the author has written."[25] This is especially apparent in cases of balancing, where two or more interests have to be weighed against each other; while the applicable law may be the same, the outcome in the cases of balancing is directly dependant on the context.

The attempt to find the "limits" of the various fundamental rights in order to strike a fair balance is to a certain extent inspired by deconstructionist ideas, even though I am fully aware of the fact that deconstruction is "not a method and cannot be transformed into one".[26] Therefore, I use those ideas as a support for something that mostly resembles the teleological method: when examining the various fundamental rights, I give priority to the interpretation that gives the most effect and value to the right at stake. [27]

Jacques Derrida[28] described deconstruction as "an unclosed, unenclosable, not wholly formalizable ensemble of rules for reading, interpretation and writing."[29] Without openness, justice would become stabilised by the "force of law".[30] The "openness" allows a potential of change:

> *"Our lives change, and so do our values, as individuals and as societies. Deconstruction does not prescribe change. Life does that. Rather, it recognises that situations change, and that this is a good thing, and that a postmodern jurisprudence can best accommodate, indeed celebrate, this fact".*[31]

The outline of this thesis is based on a method that can be abbreviated as CLEO (**C**laim, **L**aw, **E**valuation, **O**utcome).[32] It will help me analyse the current state of law and determine how the law can fulfil its purpose to the maximum.

Fundamental rights, though equal in law, are not always treated equally in practice due to various factors. The clash of fundamental rights could be

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[25] I. WARD: *Introduction to Critical Legal Theory*, p. 167
[26] J. DERRIDA: *"Letter to A Japanese Friend"*, in *Derrida and Différance*, p. 3
[27] B. LEHRBERG: *Praktisk Juridisk Metod*, p. 120
[28] Jacques Derrida (1930-2004) was a French philosopher who developed the critical legal theory known as deconstruction.
[29] J. DERRIDA: *"The time of a thesis: punctuations"*, in ALAN MONTEFIORE: *Philosophy in France Today*, p.40
[30] I. WARD: *Introduction to Critical Legal Theory*, pp. 168-169
[31] *Ibid.* See also J. DERRIDA: *"The Force of Law: the mythical foundations of authority"*, 11 Cardozo L Rev 921, 1990, pp.945-47, 959-61, 969-73.
[32] S.I. STRONG: *How to write law essays and exams*, 2006, pp.113, 120-127

compared with a "classical philosophical opposition", which never encounters "peaceful coexistence" of the two opposing concepts, but rather a "violent hierarchy", where one of the two dominates over the other.[33] The **c**laim flowing from case law is that a fair balance has to be struck between the various fundamental rights involved when the Member States transpose secondary legislation protecting these rights and/or apply the implementing national legislation.[34]

The **l**aw (primary law, secondary law and case law) defines the scope of those rights. Firstly, I will summarise relevant primary and secondary law. Secondly, I will have a closer look at a number of recent cases that concern the clash between intellectual property rights and other fundamental rights and explain the direction in which the law is moving.[35] To define the development of case law, I will follow three steps[36]: 1) summarise the relevant case law (define the facts and the outcome); 2) generalise the outcome in order to establish a legal rule; 3) place the legal rule in its context. In order to establish the context, I will briefly examine the features of the fundamental rights involved.

Evaluation comprises the application of the law; in other words, having established the need to balance the rights and the scope of those rights, I will discuss whether a fair balance indeed can be struck in practice.

Finally, I will tie together the various strands of argumentation to define the **o**utcome. In this step, I will briefly touch upon the possibility of adopting non-legislative measures that could lead to a fair balance. I will also discuss the need for legal reform[37]

1.4 Delimitations

Firstly, even though the thesis concerns striking a fair balance between intellectual property rights and other fundamental rights, for the purpose of discussion, the focus is on copyright in the digital media and the ways to effectively protect it without undermining other fundamental rights. When necessary, I will use some case law concerning other intellectual property rights by analogy; however, the substance and scope of copyright protection will be in the centre of attention.

Secondly, the focus is on copyright of audio and video records, as this area is extremely affected by online piracy and therefore very controversial. For

[33] J. DERRIDA: *"Interview with Jean-Louis Houdebine and Guy Scarpetta"* in *Positions,* 1981, pp. 41-44
[34] Case C-275/06 *Promusicae,* para.68; Court order in C-557/07 *Tele2 v. LSG,* para. 28; Case C-70/10 *Scarlet Extended,* para.45; Case C-360/10 *SABAM v. Netlog,* para.43; Case C-461/10 *Bonnier,* para.56
[35] S.I. STRONG: *How to write law essays and exams,* p. 22
[36] B. LEHRBERG: *Praktisk Juridisk Metod,* p. 120
[37] S.I. STRONG: *How to write law essays and exams,* p. 116

the sake of simplicity, I will only explicitly refer to copyright when I in fact mean both copyright and related rights.

Thirdly, the focus is on civil proceedings and not on criminal procedures and penalties. This delimitation is based on the limited scope of IPRED, as expressed in Article 3.3(b) IPRED[38].

Fourthly, this thesis is based on an EU perspective. Even though I will briefly mention international agreements such as TRIPS and ACTA for the purpose of discussion, I will not touch upon matters of purely international law or US law, as they require an in-depth knowledge and do not directly fall within the scope of this thesis. Therefore, I will not discuss SOPA[39], PIPA[40] or CISPA[41], despite their topicality.

Finally, I will focus on the legal implications of recent case law development. I will thus not provide any concrete technical or economical solutions but rather discuss the hypothetical possibilities that could help to achieve a fair balance in practice. Competition law concerns that might follow from the suggested solutions are also excluded from the scope of this thesis.

1.5 Outline

Apart from the introduction, the thesis consists of four parts. The first part contains a presentation of relevant legislation: the relevant provisions of TRIPS; the relevant articles of the Charter of Fundamental Rights; the relevant Directives for the protection of intellectual property rights and personal data.

The legislation seems to be clear; however, when applied in practice, it can cause a clash of fundamental rights, which can only be resolved by means of balancing of the various fundamental rights involved when transposing the secondary law into national law and applying the implementing national law. Therefore, the second part of this thesis covers case law of the CJEU that concerns balancing between intellectual property rights and other fundamental rights.

The third part of the thesis encompasses a discussion of the actual balancing. In this part, the theory of balancing is explained and the relevant fundamental rights are presented briefly, including the most evident tendencies in case law development and legislation concerning their substance and scope.

[38] Directive 2004/48/EC (*"IPRED"*)
[39] Stop Online Piracy Act
[40] Protect IP Act
[41] Cyber Intelligence Sharing and Protection Act

In the fourth part, various practical solutions are suggested and discussed in the light of the scope of the rights and the principle of proportionality. The discussion is followed by final conclusions.

2 Part I: Legislation

The legal mechanisms that should be used to achieve a fair balance between copyright and other fundamental rights are contained in a variety of legislative acts. Most importantly, the fundamental rights that have to be balanced are enshrined in the Charter of Fundamental Rights. The most relevant articles will be presented below, while a more detailed examination of their scope and application will be provided in Part III.

Union law must as far as possible be interpreted in the light of the TRIPS agreement,[42] where it regulates a field to which that agreement applies;[43] therefore, the summary of relevant legislation starts with a brief presentation of the most relevant parts of the TRIPS agreement. It is a matter of settled case law that international agreements have to be placed below primary law but above secondary legislation in the hierarchy of norms.[44]

The actual balancing has to be conducted at the national level, when the Member States transpose secondary law. The national authorities and courts of the Member States are obliged to their national law in conformity with Union law; they must not rely on an interpretation of the directives which could conflict with the fundamental rights and the general principles of Union law, such as the principle of proportionality. Since the domestic laws may vary due to the margin of appreciation given to the Member States, the best way (or the only reasonable way for the purposes of this thesis) to present the legal basis for the balancing is to provide a brief summary of relevant secondary law.

2.1 EU: primary law

The Charter of Fundamental Rights became a legally binding document in December 2009, when the Lisbon Treaty entered into force. Pursuant to Article 6(1) TEU, it now has the same legal value as the Treaties. However, even before the Charter became legally binding, it had been occasionally used by the Court as a major source of inspiration, for instance, in *Laval*,[45] *Unibet*[46] and *Kadi*[47]. According to Article 51(1) of the Charter and settled case law,[48] it is undisputable that the Charter applies in situations where the Member State is implementing EU law. Such were the situations in the

[42] Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994
[43] *Case C-275/06 Promusicae*, para.60, Joined Cases C-300/98 and C-392/98 *Dior and Others*, para. 47, Case C-431/05 *Merck Genéricos & Produtos Farmacêuticos* para. 35. See also A. ROSAS & L. ARMATI: *EU Constitutional Law: An Introduction,* p. 61
[44] A. ROSAS & L. ARMATI: *EU Constitutional Law: An Introduction,* p. 48
[45] Case C-341/05 *Laval*
[46] Case C-432/05 *Unibet*
[47] Joined cases C-402/05 P & C-415/05 P *Kadi*
[48] Case 5/88 *Wachauf*

Promusicae case and the subsequent case law[49] in which the Court relied directly on the balancing test set out in *Promusicae*.

As stated in paragraphs 62 to 68 of *Promusicae*, a balance has to be struck between the rights of the copyright holders and the rights of the others involved (such as intermediaries and users of their service) when the Member States implement measures to enforce intellectual property rights.

The protection of the right to intellectual property is enshrined in Article 17(2) of the Charter. The wording of Article 17(2) seems to be ambiguous; no explicit reference is made to the limited nature of intellectual property rights.[50] However, Article 17(2) could also be seen as a simple clarification of Article 17(1), meaning that there is "absolutely no justification *to expand* remedies on this ground." [51] Indeed, neither the wording of the provision nor the Court's case law implies that the right is inviolable.

The intermediaries enjoy the freedom to conduct a business (as defined in Article 16 of the Charter). The users of their service, firstly, have the right to protection of personal data (Article 8 of the Charter), and such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Secondly, the users have the right to freedom of expression and information, granted in Article 11 of the Charter. This right includes i.a. the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. Finally, pursuant to Article 47 of the Charter, everyone whose rights and freedoms granted under EU law are violated has the right to an effective remedy before a tribunal. This is especially important for the copyright holders when they enforce their property rights.

The mere definition of the rights does not seem to cause any problems: in cases concerning unauthorised file sharing, the right to intellectual property has been infringed and needs to be protected, but the means of enforcement have to respect the rights and interests of the others involved. Simple as that. It is the constitutional status of the Charter that adds a fair share of confusion into a balancing: all of the fundamental rights that have to be balanced enjoy equal protection; moreover, they all can be restricted if that is necessary in order to protect other rights, as stated in Article 52(1) if the Charter. How is that supposed to help in practice? Well, further clarifications have to be sought in international agreements (such as TRIPS, when applicable) and in secondary law, that protects the rights involved in the balancing.

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[49] Case C-70/10 *Scarlet Extended*, Case C-360/10 *SABAM v. Netlog* and Case C-461/10 *Bonnier*

[50] C. 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"*, E.I.P.R. 2009, 31(3), 113-117, at p.115

[51] *Ibid.*, p.116

2.2 International law

TRIPS requires i.a. that all limitations and exceptions of exclusive rights must satisfy the three step-test: the limitations and exceptions confine to certain special cases "which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".[52] The cases discussed in this thesis concern measures against illegal file sharing. Therefore, Articles 41, 42 and 47 of TRIPS have to be considered, as they regulate enforcement of intellectual property rights.

Pursuant to Article 41, Members shall ensure that enforcement procedures are available under their law in order to permit effective action against any act of infringement of intellectual property rights, including expeditious remedies to prevent infringements and remedies that constitute a deterrent to further infringements. These procedures 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. Such procedures concerning the enforcement of intellectual property rights shall be "fair and equitable", meaning that they shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

Article 42 obliges Members to make available to right holders civil judicial procedures concerning the enforcement of intellectual property rights. Article 47 provides that Members may allow their judicial authorities to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution, unless this would be out of proportion to the seriousness of the infringement.

These provisions require the effective protection of intellectual property rights and the granting of judicial remedies for their enforcement. They however do not compel the Member States to lay down an obligation to communicate personal data in the context of civil proceedings.[53] Neither do they provide any guidelines as to what a fair balance could be; they only emphasise the need to ensure enforcement of intellectual property rights and thus could be seen as adding value to the side of copyright on the weighing scale. The framework for the actual balancing of the various fundamental rights is respective provisions of secondary law, which leaves a margin of appreciation for the Member States.[54]

2.3 EU: secondary law

The substance of copyright, the legal ways to enforce copyright and the adequate level of private data protection are all defined in secondary law.

[52] Art.13 TRIPS; L. BENTLY & B. SHERMAN: *Intellectual Property Law*, p.43
[53] Case C-275/06 *Promusicae*, para.60
[54] M. LEISTNER: *"Copyright law in the EC: status quo, recent case law and policy perspectives"*, CMLRev. 46: 847-884, 2009, at p.873

When the substance of copyright (defined in the InfoSoc Directive) is infringed, enforcement measures (based on IPRED) are used to hold the infringers responsible. The Member States may choose whether or not, and in what form to provide for a right to disclosure of information in the context of civil proceedings.[55] In a perfect case scenario, it should be possible to enforce copyright without putting an unreasonable burden on the intermediary and without jeopardising the rights of the Internet users. The relevant provisions of the Directives, which to a certain extent set out the limits of what can and cannot be done, are presented below.

2.3.1 Copyright in the Information society: InfoSoc Directive 2001/29

The InfoSoc Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.[56] The Directive introduces the "making available" right, harmonises the reproduction and distribution rights, and defines when exceptions can be made from those rights:[57]

According to Article 2 of the InfoSoc Directive, Member States shall provide for the "exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part "for authors, of their works. Member States are also obliged to provide authors with the "exclusive right to authorise or prohibit any communication to the public of their works, […] including 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".[58] These two articles define the substance of copyright: any violation of the exclusive rights, for instance, unauthorised sharing of copyrighted material, is considered a copyright infringement, unless the use falls within the exceptions allowed under Article 5.

Member States may provide for such exceptions or limitations[59], i.a. in respect of reproductions made by a natural person for private use and for ends that are neither directly nor indirectly commercial, provided that the right holders receive fair compensation which takes account of the application or non-application of effective technological measures further defined in Article 6. Such limitations shall only be applied in certain special cases that do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder.[60] It is however undisputable that sharing a copy online with

[55] M. LEISTNER: *"Copyright law in the EC: status quo, recent case law and policy perspectives"*, CMLRev., p.873
[56] Art.1 InfoSoc Directive
[57] L. BENTLY & B. SHERMAN: *Intellectual Property Law*, p. 53
[58] Art. 3(1) InfoSoc Directive
[59] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, p.57
[60] Art. 5(5) InfoSoc Directive

thousands of strangers cannot constitute "normal exploitation" and does not fall within this exception; file sharers can therefore be held liable for copyright infringement.[61]

Pursuant to Article 8, Member States shall provide "appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive" and take "all the measures necessary to ensure that those sanctions and remedies are applied". The sanctions have to be effective, proportionate and dissuasive. Article 8 includes the obligation to ensure that right holders 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. Guidelines for measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights are further defined in IPRED.[62] Some commentators have argued that IPRED goes beyond the TRIPS rules on enforcement.[63]

2.3.2 Enforcement of copyright: IPRED Directive 2004/48

Pursuant to Article 3 of IPRED, the measures, procedures and remedies shall be "fair and equitable "and not "unnecessarily complicated or costly", or "entail unreasonable time-limits or unwarranted delays". They shall also be effective, proportionate and dissuasive and "applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse". As will be seen in Part II, "not unnecessarily complicated or costly" is an especially important requirement, connected to i.a. the intermediaries' freedom to conduct a business; a measure which otherwise might ensure a fair balance cannot be adopted if it entails an unreasonable burden on the intermediaries.

Article 8 creates the obligation to ensure that information about the infringement may be provided in the context of infringement proceedings and in response to a justified and proportionate request of the right holder, but the eventual disclosure is limited by i.a. rules on protection of private data. [64] IPRED shall further not affect the EU provisions governing i.a. the substantive law on intellectual property, Directive 95/46/EC, or the E-commerce Directive 2000/31/EC, especially Articles 12 to 15. [65]

[61] E. WERKERS & F. COUDERT: *"The Fight Against Piracy in Peer-to-Peer Networks: the Sword of Damocles Hanging over ISP's Head?"*, p.340
[62] Art.1, 3 IPRED
[63] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, p.82
[64] Art. 8(3) IPRED
[65] Art. 2(3) IPRED

2.3.3 The role of the intermediaries: E-commerce Directive 2000/31

The E-commerce Directive aims to "contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States."[66] The Directive approximates certain national provisions on information society services relating i.a. to the responsibilities of the intermediaries.

Pursuant to Article 15, Member States shall not impose a general obligation on providers, when providing the services of "mere conduit", "caching" and hosting, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. However, according to the second part of Article 15, Member States may establish obligations for information society service providers to inform the competent public authorities of i.a. "alleged illegal activities undertaken or information provided by recipients of their service"[67]. Member States may also establish obligations to communicate to the competent authorities, at their request, "information enabling the identification of recipients of their service with whom they have storage agreements".

Article 18 provides an obligation for the Member States to ensure that national law allows for the "rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved."

These provisions may seem clear in theory but are not easily applicable in practice; while general monitoring is prohibited, it is far from clear what can be classified as such general monitoring. Furthermore, a significant amount of infringing activities might slip through if the intermediaries, being obliged to inform about alleged infringements, are not allowed to actively check the content to actually establish the infringement. Finally, even if infringement has been established, the disclosure of personal details has to respect certain limitations stated in data protection Directives.

2.3.4 The Internet users: Personal Data Protection Directive 95/46/EC

The Personal Data Protection Directive applies to the "processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system."[68] Together with the E-privacy Directive 2002/58, this Directive defines what data can

[66] Art. 1 of Directive 2000/31/EC (*"E-commerce Directive")*
[67] Art. 15(2) E-commerce Directive
[68] Art. 3 Directive 95/46/EC (*"Personal Data Protection Directive"*)

be processed and when exemptions can be made from the general obligations concerning personal data protection.

For the purposes of the personal data protection directive, "personal data" is defined as any information relating to an identified or identifiable natural person ("data subject"). "Processing of personal data" means any operation performed upon personal data, such as i.a. collection, recording, retrieval, disclosure by transmission, dissemination or otherwise making available.[69]

Pursuant to Article 7 of the Directive, Member States shall i.a. provide that personal data may be processed if such processing is "necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed". However, such interests can be overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).

According to Article 13(g) of the Directive, Member States may adopt legislative measures to restrict the scope of the obligations when such a restriction constitutes a necessary measure to safeguard i.a. the protection of the data subject or of the rights and freedoms of others. The Personal Data Protection Directive is complemented by the E-privacy Directive 2002/58.[70]

2.3.5 E-privacy Directive 2002/58/EC

The Directive applies to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the EU[71] and harmonises the processing of personal data in the electronic communication sector.

Under Article 2 of the E-privacy Directive, "traffic data" means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof. "Communication" is any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service, generally excluding information conveyed as a part of a broadcasting service to the public over an electronic communications network, except to the extent that the information can be related to the identifiable subscriber or user receiving the information.

Pursuant to Article 5 of the Directive, Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, this entails the obligation to prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data

[69] Art. 2 Personal Data Protection Directive
[70] Art. 1 Directive 2002/58/EC ("*E-privacy Directive*")
[71] Art. 3 E-privacy Directive

by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). However, Article 5 does not prevent technical storage necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

Article 6 provides that traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must generally be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication; however, there are some exceptions, for instance, Article 15(1). According to the wording of Article 15, Member States restrict the scope of some of the rights and obligations stated in the Directive and adopt legislative measures providing for the retention of data for a limited period justified on certain grounds. The restriction must be "necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system"[72] and has to respect the general principles of EU law. The scope of Article 15 was further clarified by the Court in the *Promusicae*[73] case.

2.3.6 Practical use

The secondary legislation contains detailed mechanisms for copyright enforcement and for the protection of the rights of the Internet users and the intermediaries. Indeed, it seems that everything has been covered by the Directives and that there are no legal gaps. In a way, it is true; the Directives can be seen as a puzzle, which, when put together, ensures effective enforcement of copyright and helps fight infringements in the digital environment without undermining the rights of the users. In an ideal situation, the intermediaries would help the copyright holders spot all the infringements made using their Internet service, and the infringers could be identified and punished while not affecting the rights of the users that have not done anything illegal. A fair balance would struck. However, as Billy Idol sang in one of his greatest hits, "there is nothin' fair in this world".[74] Even when it comes to copyright enforcement under EU law.

[72] Art. 15 of the E-privacy Directive explicitly refers to Art. 13(1) of Directive 95/46/EC
[73] Case C-275/06 *Promusicae*,
[74] Billy Idol, song "White Wedding" from the album "Billy Idol", released October 23, 1982

3 Part II: case law

There is an ongoing war against piracy, and it has been provoked by the Internet. The technological development has unleashed a monster; peer-to-peer being one of the most efficient technologies to share files, copyrighted material can be shared "in a way unimagined a generation ago."[75] We live in a world where our taste in music is no longer dependant on what is played on the radio; in a world where TV programmes or cinema schedules do not need to determine what movie we will watch tonight. Countless songs and movies are just a few clicks away, without any additional costs, other than the normal price paid for the actual access to the Internet and the costs for normal maintenance of the computer. But what is the real price of "free"?

The answer depends on whose rights will weigh more in the balancing test; in other words, it depends on the value assigned to the rights of the Internet users and the intermediaries, and the value given to the exclusive rights of the copyright holders. If the rights of the copyright holders can be enforced, the entertainment is not as "free" as it may seem; the infringer can end up paying a significant amount in damages. For the past few years, copyright holders have been very active and have brought legal actions against developers of peer-to-peer network software such as Napster, Grokster, Kazaa, and Bittorent.[76] Those actions are not only directed at the owners of such software; the copyright holders have also started chasing the alleged infringers. However, it is difficult to efficiently prosecute the users: in a p2p network, computers operate as both client and server,[77] and copyright holders often have to rely on other parties, such as the intermediaries, to get access to the infringers.[78] Since the legal actions do not tend to lead to a substantial decrease of illegal downloads, the copyright holders would prefer a set of preventive measures, applied by the intermediaries, such as filtering communications and blacklisting certain users.[79] Such preventive schemes sound desirable with regard to effective protection of copyright; yet, they are not very realistic, as will be seen in the following few chapters. The recent development of case law has shown that in choosing whether to provide for disclosure of information in the context of copyright infringement proceedings, the Member States are "free to balance the various fundamental rights involved and to choose different solutions, on

[75] L. LESSIG: *Free culture*, Chapter *"piracy"* http://www.authorama.com/free-culture-3.html (2012-05-07)
[76] E. WERKERS & F. COUDERT: *"The Fight Against Piracy in Peer-to-Peer Networks: the Sword of Damocles Hanging over ISP's Head?"*, p.339
[77] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, p.75
[78] *Ibid.*, p.76
[79] E. WERKERS & F. COUDERT: *"The Fight Against Piracy in Peer-to-Peer Networks: the Sword of Damocles Hanging over ISP's Head?"*, p.339

condition that such balancing process is fair and in compliance with the general principles of [Union] law"[80].

In practice, if the Member State finds that the need to protect the rights of the Internet users prevails, enforcement becomes complicated. Furthermore, if the only way to effectively prevent file sharing entails an unreasonable burden on the intermediaries, the measure will not be adopted and the infringements will continue unless specifically fought by the copyright holder. It might sound cynical, but in reality, a "fair balance" does not necessarily lead to a fair outcome.

Recent case law development, starting with the *Promusicae*[81] case, decided in the beginning of 2008, illustrates the problematic reality very well. Even though the balancing approach had been used by the Court on various occasions,[82] both to reconcile the fundamental rights with the fundamental freedoms and to solve clashes of various fundamental rights, the *Promusicae* case is the first case that deals with the need to balance intellectual property rights with other fundamental rights in situations of enforcement. Cases such as *Scarlet Extended*, *SABAM v. Netlog*, and, most recently, *Bonnier*, demonstrate the most common practical concerns regarding the copyright infringements in the digital environment. What measures can or cannot be taken in order to effectively fight unauthorised file sharing? The next few chapters contain summaries of cases that somewhat clarify when and against whom measures can be taken, but also narrow down the range of acceptable measures.

3.1 Promusicae: a (not so solid?) ground for future judgements

3.1.1 Facts

Promusicae[83] was a non-profit organisation of producers and publishers of musical and audiovisual recordings. In 2005, Promusicae found out that some people had been using Kazaa[84] p2p file exchange program to share music files to which held exploitation rights. It then lodged an application to the national court[85] to order the Internet service provider (ISP) Telefónica[86] to disclose the identities and physical addresses of those persons. [87]

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[80] M. LEISTNER: "Copyright law in the EC: status quo, recent case law and policy perspectives", CMLRev., p.873
[81] Case C-275/06 *Promusicae*
[82] Case C-112/00 *Schmidberger*, para.77; Case C-36/02 *Omega Spielhallen*, para 36; Case C-341/05 *Laval*, para 94; Case C-101/01 *Lindqvist*, para.82
[83] Productores de Música de España
[84] Once stylised as "KaZaA", but now usually written "Kazaa", http://en.wikipedia.org/wiki/Kazaa (2012-03-26)
[85] Juzgado de lo Mercantil No 5 de Madrid
[86] Telefónica de España SAU
[87] Case C-275/06 *Promusicae*, paras.29-32

In December 2005, the national court ordered the requested preliminary measures. Telefónica appealed against that order, claiming that under national law the communication of the data sought by Promusicae was authorised only in a criminal investigation or for the purpose of safeguarding public security and national defence, and not in the context of civil proceedings or as a preliminary measure relating to civil proceedings.

3.1.2 Issues

Promusicae argued that the relevant national provision had to be interpreted in accordance with various provisions of the E-commerce Directive, the InfoSoc Directive, IPRED. The main issue was whether the relevant secondary legislation, read in the light of Articles 17 and 47 of the Charter, obliged the Member States to lay down an obligation for ISPs to communicate personal data in the context of civil proceedings in order to ensure effective protection of copyright. [88]

It is worthwhile mentioning that by virtue of the original question referred by the national court, there were no hints that the case would turn out to be one of the most important cases in the area of intellectual property law, but also in the area of intellectual property law. The "twist" was added by the Court of Justice, when it reformulated the question to provide the national court with all the elements of interpretation of [Union] law which may be useful for deciding the case. [89] The original question concerned the interpretation of Directives 2000/31, 2001/29 and 2004/48 and the Articles 17 and 47 of the Charter. However, the national legislation at stake was intended to implement the rules for the protection of personal data, also required under Directives 95/46 and 2002/58.

The communication of information stored by Telefónica constituted the processing of personal data within the meaning of Article 2 of Directive 2002/58 and Article 2(b) of Directive 95/46. Therefore, it fell within the scope of Directive 2002/58, even though the compliance of the data storage itself with the requirements of that directive was not at issue in the main proceedings.[90] What is the catch? Well, since the E-privacy Directive 2002/58 concerns protection of personal data, which is a fundamental right protection under Article 8 of the Charter, by adding it to the question, the Court defined a clash of fundamental rights that had not explicitly been mentioned in the original dispute.

3.1.3 Findings of the Court

3.1.3.1 Freedom of choice for the Member States…

The Court reaffirmed that none of the exceptions explicitly stated in Article 15(1) of Directive relate to situations that may give rise to civil

[88] Case C-275/06 *Promusicae,* paras.34, 41.
[89] *Ibid.*, para. 42
[90] *Ibid.*, para.45

proceedings.[91] Nevertheless, the Court also pointed out that Article 15(1) of Directive 2002/58 ends the list of the above exceptions with an express reference to Article 13(1) of Directive 95/46. This provision allows the Member States to adopt legislative measures to restrict the obligation of confidentiality of personal data where that restriction is necessary i.a. for the protection of the rights and freedoms of others.

Article 13(1) of Directive 95/46 does not specify the rights and freedoms concerned. However, the Court stated that Article 15(1) of Directive 2002/58 has to be interpreted as "expressing the [Union] legislature's intention not to exclude from their scope the protection of the right to property or situations in which authors seek to obtain that protection in civil proceedings."[92] Therefore, the Court interpreted Directive 2002/58 as not precluding the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings. However, it also explained that laying down such an obligation is not mandatory under the Directive. [93]

In relation to the three other Directives (2004/48, 2000/31, 2001/29) referred to by the national court, the Court of Justice found that the wording of neither of the Directives can be interpreted as requiring the Member States to lay down an obligation for the ISPs to disclose personal data in the context of civil proceedings.[94] The Court also stated that no such obligation exists under the TRIPS agreement, even though Articles 41, 42 and 47 TRIPS require the effective protection of intellectual property rights and the institution of judicial remedies for their enforcement.[95]

To sum up, the Court found that the Member States may, but are not obliged to, provide for disclosure of personal data in civil proceedings regarding enforcement of intellectual property rights.

3.1.3.2 …limited by the Charter

Having provided the national court with an interpretation of the Directives, the Court of Justice went on and examined the relevance of fundamental rights in order to make sure whether other rules of [Union] law might require a different reading of the directives.[96] It is indeed this second part of the case that makes Promusicae a truly "principled ruling".

Since the provisions in the Directives at issue are relatively general, they logically include rules that leave the Member States with the necessary discretion to define transposition measures that may be adapted to the

[91] *Ibid.*, para.51
[92] *Ibid.*, para.53
[93] *Ibid.*, para.55
[94] *Ibid.*, paras.57-59
[95] *Ibid.*, para.60; Joined Cases C-300/98 and C-392/98 *Dior and Others*, para. 47; Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos*, para. 35
[96] Case C-275/06 *Promusicae* para.46

various situations possible.[97] Therefore, the Court explained that the Member States must, when implementing the directives at issue, rely on an interpretation which "allows a fair balance to be struck between the various fundamental rights protected by the [Union] legal order".[98] Moreover, the authorities and courts of the Member States must "not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of [Union] law, such as the principle of proportionality".[99]

In conclusion, even though the Member States enjoy discretion to decide whether or not to create an obligation of disclosure of personal data in civil proceedings, they always have to reconcile the rights involved when transposing secondary legislation. The findings were confirmed in the *LSG v. Tele2*[100] case (concerning a classical situation in which a collecting society, LCG, sought disclosure of data from the ISP, Tele2). In the *LSG v. Tele2* case, the Court deduced the answer from the *Promusicae* case. However, it also clarified the notion of "intermediary": access providers, who merely enable clients to access the Internet, provide a service capable of being used by a third party to infringe a copyright or related right, inasmuch as those access providers supply the user with the connection enabling him to infringe such rights.[101] The legal protection granted by the InfoSoc Directive otherwise would be substantially diminished if intermediaries, within the meaning of Article 8(3) of that directive, were to be construed as not covering access providers, which alone are in possession of the data making it possible to identify the users who have infringed those rights.[102]

The *Promusicae* case, confirmed in its "twin" case *LSG v.Tele2*, definitely created a starting point for future case law concerning enforcement of intellectual property right; however, the mere statement that a balance has to be struck between the fundamental rights at stake does not give any guidance as to what is meant by such balance. In other words, what we get to know from those cases is that national possibilities are limited by the Charter; some more practical implications regarding the values of the rights in the balancing equation can be found in the SABAM cases.

[97] Case C-275/06 *Promusicae* para.67, see also *Case C-101/01 Lindqvist* , para. 84.
[98] Case C-275/06 *Promusicae* para.68. See also *Case C-101/01 Lindqvist* , para. 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others*, para. 28.
[99] Case C-275/06 *Promusicae* para.68. See also *Case C-101/01 Lindqvist* , para.87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others*, para.28.
[100] Court order in case C-557/07 *LSG v.Tele2*, paras.23-28
[101] *Ibid.*, para.43
[102] *Ibid.*, para.45

3.1.4 *Scarlet Extended v. SABAM*: "NO" to general monitoring

Scarlet Extended was the first case to deal with the practical side of the balancing between intellectual property rights and other fundamental rights. After having established that the national measure was likely to be prohibited by Article 15 of the E-commerce Directive, the Court continued and assessed the national measure in the light of the various fundamental rights, which basically gives an overview of what values are likely to be given to the rights in an actual balancing.

3.1.5 Facts

When SABAM found out that p2p networks were being used to share copyrighted material from its catalogue, it got very upset. SABAM's main function was to represent authors, composers and editors of musical works in authorising the use of their copyright-protected works by third parties. The file sharing at issue had not been authorised by SABAM and no royalties had been paid to it; therefore, SABAM brought interlocutory proceedings against Scarlet, claiming that the Scarlet, as an ISP, was best placed to take measures to end copyright infringements committed by its customers. [103]

In November 2004, the national court[104] ruled that copyright had been infringed, and a couple of years later, Scarlet was ordered to bring to an end those copyright infringements by blocking, or making it impossible for its customers to share copyrighted music using p2p software without the permission of the right holders. Scarlet appealed against that decision,[105] claiming that it was technically impossible to comply with the injunction. It pointed out that the injunction would be contrary to national law implementing Article 15 of Directive 2000/31, as it would impose a general obligation to monitor all the EU provisions on the protection of personal data and the secrecy of communications.

3.1.6 Issues

The injunction at stake would require the ISP to install a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of p2p software. It would apply indiscriminately to all its customers, *in abstracto*, as a preventive measure, and be installed exclusively at the expense of the ISP and for an unlimited period. The system would be used to identify the movement of electronic files works in respect of which the applicant claims to hold copyright, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent. The main issue

[103] Case C-70/10 *Scarlet Extended* paras.15-16
[104] President of the Tribunal de première instance, Brussels
[105] Case C-70/10 *Scarlet Extended*, paras.24-26.

was whether Directives 2001/29, 2004/48, 95/46, 2000/31 and 2002/58 had to be interpreted as precluding a specific type of injunction imposed on an ISP whose services are used by a third party to infringe copyright or related right.[106]

3.1.7 Findings of the Court

The Court stated that preventing further infringements is legitimate under settled case-law,[107] however, rules for the operation of the injunctions must observe the limitations arising from Directives 2001/29 and 2004/48 and from the sources of law to which those directives refer.[108] However, even though the right holders may apply for an injunction against intermediaries whose services are being for copyright infringement, the Member States are not entirely free to choose measures for copyright enforcement. Article 15(1) of Directive 2000/31 explicitly prohibits national authorities from adopting measures that would require an ISP to carry out general monitoring of the information that it transmits on its network.[109] The contested injunction was found to be a general monitoring measure, prohibited by Article 15(1) of the E-commerce Directive,[110] since it would require active observation of all electronic communications and encompass all information to be transmitted and all customers using the network.

In order to assess whether the injunction was consistent with EU law, the Court also took into account the requirements stemming from the relevant fundamental rights. [111] It referred to paragraphs 62 to 68 in the *Promusicae* case and reaffirmed that the national authorities and courts must "strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures".[112] The Court then looked at what effects the contested injunction would have on the various fundamental rights. By identifying the actual impediment to the various rights, the Court implied that a very restrictive measure for the protection of one right could be accepted only if it did not cause undue harm to other fundamental rights.

The contested injunction was found to lead to a serious infringement of the ISP's freedom to conduct business, since the measure involved monitoring all the electronic communications made through the network of the ISP, had no limitation in time, was directed at all future infringements and intended to protect not only existing works, but also future works. Another reason why it impaired the freedom to conduct a business was that the ISP would have to install this complex, expensive and permanent system at its own

[106] Case C-70/10 *Scarlet Extended* para.28
[107] Ibid., para.31; see also Case C-324/09 *L'Oréal and Others*, para.131
[108] Case C-70/10 *Scarlet Extended* paras.32-33
[109] *Ibid.*, para.35
[110] *Ibid.*, paras.39-40
[111] *Ibid.*, para.41
[112] *Ibid.*, paras. 43-45; see also Case C-275/06 *Promusicae* paras. 62-68

expense; this was also contrary to Article 3(1) of IPRED, which requires that such measures should not be unnecessarily complicated or costly.[113]

The Court also took into account the fundamental rights of the Internet users, namely their right to protection of personal data and their freedom of information, enshrined in Articles 8 and 11 ChFR, respectively.[114] Since the IP addresses allow the users to be identified, they are protected as personal data.[115] The contested filtering system would impair their right to personal data protection, as it would require a systematic analysis of all data traffic and an identification of IP addresses of users that had been engaging in unlawful file sharing. Furthermore, the contested filtering system would negatively affect the users' freedom of information: it might not make an adequate distinction between lawful and unlawful content, which could lead to the blocking of lawful communications, especially considering the fact that the lawfulness of the transmissions tends to vary between Member States.[116]

In sum, the Court found that in adopting the contested injunction the referring court would not respect the requirement to strike a fair balance between fundamental rights: the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.[117] To put it bluntly, the contested measure was so harmful to the other fundamental rights that it could not possibly be accepted as a means to protect copyright.

The *Scarlet Extended* case is a great example of what problems can arise when selecting measures for copyright enforcement at the national level. It does not clearly indicate what measures would be permitted, but it definitely narrows down the range of alternatives by exemplifying a measure which fails to strike a fair balance.

3.2 SABAM v. Netlog: the sequel

SABAM v. Netlog could be called "the twin case" of *Scarlet Extended*. The facts are very similar; however, in *SABAM v. Netlog*, the injunction to stop unauthorised file sharing was to be taken against a website.

3.2.1 Facts

SABAM[118] claimed that the musical and audio-visual works in its repertoire had been unlawfully shared using a social networking platform called

[113] Case C-70/10 *Scarlet Extended* para.48
[114] *Ibid.*, para.50
[115] *Ibid.*, para.51
[116] *Ibid.*, para.52
[117] *Ibid.*, para.53
[118] The same management company representing authors, composers and publishers of musical works as in Case C-70/10 *Scarlet Extended*

Netlog. [119] On Netlog's website, users could build virtual communities and have an own profile;[120] SABAM's main claim was that Netlog also offered all users the opportunity to share copyrighted material by means of their profile. Since the use had not been authorised, SABAM had Netlog summoned before a national court[121] in injunction proceedings, requesting i.a. that Netlog be ordered to cease unlawfully making available the works in question. [122]

3.2.2 Issues

The contested injunction required the hosting service provider to install, as a preventative measure, a system for filtering information stored on its servers by its service users. In order to prevent copyright infringement, the contested filtering system would identify electronic files containing works in respect of which SABAM claims to hold intellectual property rights. The system would apply indiscriminately to all users and have to be installed for an unlimited period exclusively the hosting service provider's expense. The main issue was whether EU law precluded the contested injunction, either directly by means of secondary legislation, or as a measure that failed to strike a fair balance between the relevant fundamental rights.

3.2.3 Findings of the Court

The Court found that the contested injunction imposed on the hosting service provider would oblige it to actively monitor almost all the data in order to prevent any future infringement of copyright, and therefore fall within the definition of general monitoring prohibited by Article 15(1) of the E-commerce Directive.[123] The Court also took into account the requirements stemming from the protection of the applicable fundamental rights and reaffirmed the need to strike a fair balance on the national level.[124]

The Court found that contested injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business. [125] Furthermore, it pointed out that the effects of that injunction would not be limited to the hosting service provider, as the contested filtering system may also infringe the fundamental rights of that hosting service provider's service users, namely their right to protection of their personal data and their freedom to receive or impart information.[126] The contested filtering system would involve the identification, systematic analysis and processing of protected personal data because, in principle,

[119] Case C-360/10 *SABAM v. Netlog* para.18
[120] *Ibid.*, paras. 16-17
[121] President of the rechtbank van eerste aanleg te Brussel
[122] Case C-360/10 *SABAM v. Netlog* para.19-21
[123] *Ibid.*, para.38
[124] *Ibid.*, para.43
[125] *Ibid.*, paras.44-46
[126] Case C-360/10 *SABAM v. Netlog* paras.48-51

would allow those users to be identified. The injunction could also potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content. Therefore, as the measure failed to strike a fair balance between the rights involved, it was precluded by EU law.[127]

The findings in *SABAM v. Netlog* were very similar to those in *Scarlet Extended*. Nevertheless, *SABAM v. Netlog* contributes to the development of case law because it clarifies what measures are not acceptable in relation to hosting service providers.

As will be seen in the next chapter, balancing of intellectual property rights and other fundamental rights does not always lead to the preclusion of a national measure. In its subsequent case law, the Court has indicated what measures are likely to strike a fair balance. However, most importantly, it has shown that the balancing does not always lead to an unfair outcome.

3.3 Bonnier: the combo breaker

Bonnier, delivered on 19 April 2012, is a true combo breaker; it concerns a measure that has successfully struck an actual fair balance. Nevertheless, firstly, the contested measure was not purely preventive, as it was to be used in order to facilitate the investigation of past infringements. Secondly, it is highly doubtful whether the measure in the *Bonnier* case sets the limits of what can be acceptable: it remains unclear what the most effective and yet still acceptable measure could be, as well as what preventive measures could be permitted.

3.3.1 Facts

The applicants in the main proceedings are publishing companies that hold i.a. exclusive rights to the reproduction, publishing and distribution to the public of 27 audio books. The copyright of those books was allegedly infringed when the books were shared on an ftp server using Internet service provided by ePhone.[128] The main proceedings, which started at Solna District Court[129] and continued at the Stockholm Court of Appeal[130] and Högsta Domstolen, concerned injunction issued against the ePhone ordering it to disclose the personal data of the user of the IP address.

3.3.2 Issues

Even though the issues concern enforcement of copyright, the questions referred from the national court are significantly different from those in the SABAM cases as they essentially concerned the applicability of the Data

[127] *Ibid.*, para.51
[128] Case C-461/10 *Bonnier* paras.25-33
[129] Solna tingsrätten
[130] Svea hovrätten

retention Directive. However, the Court eliminated the possibility of using the Data retention Directive in cases of enforcement of copyright, since the Data retention Directive deals exclusively with the handling and retention of data generated or processed for the purpose of the investigation, detection and prosecution of serious crime and their communication to the competent national authorities. [131] The national legislation at issue, based on Article 8 of IPRED, did not fall within the material scope of Directive 2006/24 as it concerned the communication of data, in civil proceedings, in order to obtain a declaration that there has been an infringement of intellectual property rights.[132]

Interestingly, the CJEU interpreted the referring court‘s question as an indication of doubt as to whether the national transposing measures were likely to ensure a fair balance between the various applicable fundamental rights. [133] Therefore, regardless of the fact that questions posed by the national court only focused on the Data Retention Directive, *Bonnier* continues the saga of cases concerning striking a fair balance.

3.3.3 Findings of the Court

Pursuant to national law, if the following conditions were fulfilled, an order for disclosure of personal data to private persons in civil proceedings could be made:

1) There had to be clear evidence of an infringement of an intellectual property right.
2) The information had to be regarded as facilitating the investigation into an infringement of copyright or impairment of such a right.
3) The reasons for the measure had to outweigh the nuisance or other harm which the measure may entail for the person affected by it or for some other conflicting interest.[134]

The Court stated that the national legislation at issue was likely, in principle, to ensure a fair balance between the protection of intellectual property rights enjoyed by copyright holders and the protection of personal data enjoyed by internet subscribers or users. This was based on the fact that the legislation enabled the national court to weigh the conflicting interests involved, on the basis of the facts of each case and taking due account of the requirements of the principle of proportionality. [135]

Nevertheless, even though the *Bonnier* case provides an example of a measure that is likely to strike a fair balance, the puzzle is not complete. Knowing how to deal with past infringements is certainly useful, but it is of little help when it comes to preventing infringements from happening. Thus,

[131] Case C-461/10 *Bonnier*, paras.40, 43
[132] *Ibid.*, paras.44, 45
[133] *Ibid.*, para.49
[134] *Ibid.*, para.58
[135] *Ibid.*, paras.59-60

it remains to be discussed whether preventive measures could be accepted and whether, given the maximum values to the rights involved, a fair balance can be struck. In more practical terms, file sharing is detrimental to the copyright holders, but can anything be done about it when the need to protect the other rights is just as high?

In the next part of this thesis (Part III), the technicalities of balancing are presented and the scope of the various rights is explored to see what values could possibly fit in the balancing equation.

4 Part III: balancing – the pieces

As shown in Part II, the outcome in each case depends on the specific features of the measure at stake, especially on how much that measure impairs the various rights involved. For instance, general monitoring measures prejudice the service provider's freedom to conduct a business, but also jeopardise the right to protection of personal data and the freedom of information of the Internet users. The harm that such general measures cause to the "other fundamental rights" is so severe that it cannot be justified by the need to protect copyright. By contrast, measures that allow a case-by-case assessment when an infringement of intellectual property rights has been established, are not likely to be precluded by EU law.

In the next few chapters, the theory of balancing is presented. That presentation is followed by a brief discussion of case law concerning the substance of each right in order to establish when the rights can or cannot be restricted in order to protect other rights. This is crucial in order to create a solid ground for the analysis in Part IV, where the practical possibilities of striking a fair balance will be discussed.

4.1 The theory of balancing

Promusicae is a "principled ruling"; it was reasoned in terms of principles and weighing.[136] In a way, there is nothing revolutionary about the *Promusicae* case: it consistent with older case law, stating that Member States have to respect fundamental rights when implementing Union law.[137] Reconciliation of contradictory values is also evident in earlier cases such as *Schmidberger*, *Omega* and *Laval.*[138] The essence of the balancing approach is especially clear in the *Lindqvist* case[139], where the Court did not only emphasise the need to balance the rights and interests involved, but also explicitly referred to the national discretion: "[t]hus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved."[140]

However, what makes the *Promusicae* line of case law special is that it demonstrates how complex it is to transpose secondary legislation in a way

[136] X. GROUSSOT, *"Rock the KaZaA: Another Clash of Fundamental Rights"*, CMLRev., p.1757
[137] Case 5/88 *Wachauf*, [1989] ECR 2609.
[138] X. GROUSSOT, *"Rock the KaZaA: Another Clash of Fundamental Rights"*, CMLRev., p.1761. Case C-112/00 *Schmidberger* para.77; Case C-36/02 *Omega Spielhallen* para. 36, Case C-341/05 *Laval* para.94
[139] Case C-101/01, *Lindqvist*, [2003] ECR I-12971, paras.80-85
[140] *Ibid.*, para.85

that ensures adequate protection for all the interests in the information society; especially when those interests are also fundamental rights.

Constitutional rights – and this is the case of fundamental rights, since they enjoy the same legal value as the Treaties[141] – are treated as "norms requiring that something be realised to the greatest extent possible, given the factual and legal possibilities."[142] In other words, the fundamental rights are treated as optimisation requirements and thereby as principles, not simply as rules. Weighing fundamental rights against each other means applying the "Law of Balancing" in practice. It may seem quite uncomplicated but is hard to achieve in practice, hence the case law development: "[se]ducing as it may seem, balancing may be closer to a slogan than to a methodology."[143]

Balancing is a part of the principle of proportionality[144]; the principle of proportionality is divided into 1) suitability, 2) necessity and 3) proportionality in the narrow sense. This proportionality *stricto sensu* constitutes the Law of Balancing.[145] While suitability and necessity concern optimisation relative to what is factually possible and express the idea of Pareto-optimality, proportionality *stricto sensu* concerns optimisation relative to the legal possibilities (defined by competing principles), and can be summarised as follows:

"The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other."[146]

The actual balancing consists of three steps:
1) establishing the degree of non-satisfaction, or of detriment to a first principle;
2) establishing the importance of satisfying the competing principle;
3) establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.[147]

Balancing can be expressed as a Weight formula[148] $W = \frac{Ii}{Ij}$, where I_i is the intensity of interference with the first principle (P_i), and I_j is the importance of satisfying the competing principle (P_j). The intensity/importance can be defined as light, moderate, or serious, and if numeric values are assigned to the intensity/importance, the balance can be calculated. For example, on the basis of the geometric sequence 2^0, 2^1, and 2^2, that is, 1, 2, and 4, "light" would get the value 1, "moderate" the value 2, and "serious" the value 4.

[141] Art.6(1)TEU
[142] R. ALEXY: *"Balancing, constitutional review, and representation"*, p.572-573
[143] X. GROUSSOT, *"Rock the KaZaA: Another Clash of Fundamental Rights"*, CMLRev., p.1760
[144] For proportionality, see X.GROUSSOT: *General Principles of Community Law*, p. 150ff
[145] R. ALEXY: *"Balancing, constitutional review, and representation"*,p.572
[146] Ibid., p.573
[147] X. GROUSSOT: *"Rock the KaZaA: Another Clash of Fundamental Rights"*, CMLRev., p.1760; R. ALEXY: *"Balancing, constitutional review, and representation"*, pp. 572-574
[148] R.ALEXY: *"Balancing, constitutional review, and representation"*, p. 575

Consequently, if the intensity of infringement of one right is serious (I_i=4), and the importance of satisfying the other right is only moderate (I_j=2), the concrete value of weight would be $\frac{Ii}{Ij} = \frac{4}{2} = 2$. P_i prevails if the concrete weight is greater than 1; P_j prevails if the concrete weight is less than 1.[149] Weighing of values leads to a judgment but is not able to justify the outcome.[150] The results of using the Weight Formula therefore have to be justified by means of further arguments; the Weight Formula itself is a form of argument.[151]

However, balancing is not a mechanical process and it is hard to apply the Weight Formula in cases where more than two principles conflict with each other, especially considering that there are no standards as to what is fair or not. Judges enjoy discretion and the rights involved may not always appear to be equal to the judge, regardless of their legal status; a breach might seem moderate to one judge but serious to another. Therefore, the outcomes are as much dependant on the factual circumstances, as on pure subjectivity.

Partly because more than two rights are involved and partly because it is not realistic to agree on the boundaries between light and moderate/ moderate and serious damage, I will not rely on the mathematical expression of the Weight formula in my discussion. Since all fundamental rights recognised in the Charter enjoy a constitutional status, they are equally protected. The "Law of Balancing" entails a contextualised evaluation dependant on the particular circumstances of the case. According to settled case law of the European Court of Human Rights, the state is given a wide margin of discretion in cases of conflict between two fundamental rights.[152] This wide margin of discretion is also evident in case law of the CJEU.[153] (Nevertheless, it cannot be forgotten that in the field of intellectual property law, the EU has to a certain extent exercised competence, and "[i]n those circumstances, the Member States are no longer competent to adopt provisions compromising that European Union legislation."[154])

Fundamental rights are not absolute rights; they must be considered in relation to their social function.[155] However, pursuant to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms.

[149] R.ALEXY: *"Balancing, constitutional review, and representation"*, p. 576
[150] *Ibid.*, p. 573
[151] *Ibid.*, p. 575
[152] X. GROUSSOT: *"Another clash of fundamental rights"*, CMLRev., p. 1762; ECtHR Case *Chassagnou v. France*
[153] Case C-112/00 *Schmidberger* , para.93; Case C-36/02 *Omega Spielhallen*, para. 37
[154] Case C-277/10 *Martin Luksan v. Petrus van der Let* para.64
[155] Case 5/88 *Wachauf* , para. 18; C-280/93 *Germany v. Council*, para.78

Complete reconciliation is not always possible in situations of total conflicts.[156] As Advocate General Sharpston pointed out in her opinion in the *Varec* case, paragraph 48, "interests should obviously be reconciled, although it will not always be feasible to reconcile them fully. In particular, it will in some cases be necessary to restrict one party's right [...] in order to ensure that the very substance or essence of the other party's right [...] is not impaired. However, any restriction must not go beyond what is necessary for that purpose, and a fair balance must be struck between the conflicting rights."[157] In other words, 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.

Therefore, instead of using the Weight formula, I prefer seeing balancing of fundamental rights as an equation of inverse proportionality. For example, the variable *y* is inversely proportional to the variable *x* if there exists a non-zero constant *k*, so that $y = \frac{k}{x}$. If x decreases, then y will increase, and vice versa.[158] Even though law is not mathematics and legal equations cannot be solved using a formula, for the purpose of illustration, I will express fundamental rights by numerical values. Now, for the purpose of this example, k=100, y is copyright and x is the right to protection of personal data. Both x and y can be just any positive number. If no restrictions need to be made to x, then x=y=10. However, as soon as the right to protection of personal data is somewhat restricted (for example, personal data of the infringer can be disclosed to facilitate further investigation, such as in the *Bonnier* case), the value of x decreases, while y increases proportionately. For example, if the new x=8, then $y = \frac{100}{8} = 12.5$

The higher is the need to protect copyright, the more the right to protection of personal data has to be restricted to protect copyright. The value of y increases while the value of x decreases accordingly. However, as soon as the restriction of the right to personal data protection impairs the very substance of that right, x becomes equal to zero, and regardless of how high the value of y might be, the equation cannot be solved:

> *"Division by zero must be left undefined in any mathematical system that obeys the axioms of a field. The reason is that division is defined to be the inverse operation of multiplication. This means that the value of a/b is the solution x of the equation bx = a whenever such a value exists and is unique. Otherwise the value is left undefined."*[159]

[156] X. GROUSSOT: "*Rock the KaZaA: Another Clash of Fundamental Rights*", CMLRev., p. 1761
[157] AG Sharpston in Case C-450/06 *Varec*, para.48
[158] http://www.youtube.com/watch?v=swAs0v7u4Vk (2012-05-19)
[159] http://en.wikipedia.org/wiki/Division_by_zero (2012-05-19)

Division by zero is an operation for which you cannot find an answer; [160] in terms of fundamental rights, this means that if the very substance of copyright can only be protected by impairing the very substance of another right, a fair balance cannot be struck. Moreover, when the value of x gets close to zero, the value of y increases towards infinity; in terms of fundamental rights, this would mean that y enjoys absolute protection, and according to the Charter and to settled case law,[161] the right to property is not absolute.

It does not matter how many fundamental rights are involved; as soon as the very substance of one of them is impaired in order to protect a right that is not absolute, there will be no fair balance. The measures in the *Scarlet Extended* and *SABAM v. Netlog* obviously attempted to divide by zero – the general monitoring measures were likely to impair the substance of three fundamental rights at once. A fair balance could not possibly be struck.

The aim of the following few chapters is to define the need to protect copyright, and then to determine to what extent the other fundamental rights can be restricted within the boundaries of a fair balancing.

4.2 The rights involved

4.2.1 Copyright

As a property right, copyright is protected under Article 17 of the Charter and by the European Convention on Human Rights and Fundamental Freedoms. (Compare Article 52(3) of the Charter: when rights guaranteed by the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same, however, the EU may provide for more extensive protection).[162]

In order to assess the extent of the fundamental right to respect for property, account is to be taken of, in particular, Article 1 of the First Additional Protocol to the ECHR.[163] Pursuant to Article 1 of Protocol 1 of the ECHR, every natural or legal person is entitled to the peaceful enjoyment of his possessions and no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

As stated above in Part II, pursuant to Article 2(a) of the InfoSoc Directive, Member States have the obligation to provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction

[160] http://mathforum.org/dr.math/faq/faq.divideby0.html (2012-05-19)
[161] Case C-70/10 *Scarlet Extended*, para.43
[162] Compare ECtHR Case *Bosphorus v. Ireland*
[163] C. 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"*, E.I.P.R., p.117; ECtHR Case *Balan v Moldova;* Joined cases C-402/05 P & C-415/05 P *Kadi* , para.356

by any means and in any form, in whole or in part, for authors, of their works. The exclusive right to reproduce the protected work forms part of the specific subject-matter of copyright.[164] The essential function of copyright is to protect the moral rights in the work and to ensure a reward for creative effort.[165] The specific subject matter is therefore not the same thing as the essential function; however, the rights within the specific subject-matter are indispensable to guarantee the copyright owner a sufficient reward for his or her creative effort.[166] The Court has held on numerous occasions that the exercise of exclusive rights is to be regarded as necessary even in very specific circumstances in order to ensure the function of the intellectual property right at issue.[167]

4.2.1.1 Exceptions from the exclusive right

Pursuant to Article 5 of the InfoSoc Directive, the exclusive right of reproduction can be subject to exceptions. One of the exceptions, stated in Article 5(1) of the InfoSoc Directive, is for transient or incidental reproductions. As was implied in the *Infopaq* case[168], "transient" has to be interpreted strictly.

Another exception, one of immediate relevance for private users, is Article 5(2)(b) of the InfoSoc Directive, allowing reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial. The exception is conditional; if the Member States decide to introduce the private copying exception into their national law, they are, in particular, required to provide for the payment of "fair compensation" to right holders.[169]

It is evident from the Preamble to the InfoSoc Directive and from settled case law that a "fair balance" has to be maintained between the rights and interests of the authors, on one hand, and those of the users of protected works, on the other hand.[170] Article 5(5), in particular, makes the private copying exception subject to three conditions: 1) it shall apply only in certain special cases, 2) it shall not conflict with a normal exploitation of the work; 3) it shall not unreasonably prejudice the legitimate interests of the copyright holder.[171]

When a person reproduces a protected work for private use without seeking prior authorisation from the right holder, he or she causes harm to the right holder and should financially compensate the right holder for the harm.[172]

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[164] AG Gulmann in Joined cases C-241/91 P and C-242/91 P *RTE and ITP*, para.34
[165] *Ibid.*, para.37
[166] *Ibid*., para.82
[167] Case C-10/89 *HAG GF*, para. 16; Case 19/84 *Pharmon v Hoechst*, paras. 25-26
[168] Case C-5/08 *Infopaq*
[169] Case C-467/08 *Padawan*, para. 30; Case C-462/09 *Stichting de Thuiskopie*, para.22
[170] Recital 31 of the Preamble to the InfoSoc Directive; Case C-467/08 *Padawan*, para. 43; Case C-462/09 *Stichting de Thuiskopie*, para.25
[171] Case C-462/09 *Stichting de Thuiskopie*, para.21
[172] Case C-467/08 *Padawan*, para. 45; Case C-462/09 *Stichting de Thuiskopie*, para.26

However, given the practical difficulties in identifying private users and obliging them to compensate right holders for the harm caused to them, Member States may provide for a 'private copying levy' to ensure fair compensation. Such levy would be chargeable not directly to the private persons concerned but to those who, in law or in fact, make digital reproduction equipment, devices and media equipment available to private users or who provide copying services for them. [173]

The system would allow the persons responsible for payment to pass on the amount of the private copying levy in the price charged for reproduction equipment or services, so that the burden of the levy would ultimately be borne by the private user. Such a system would ensure a "fair balance" between the interests of authors and those of the users of the protected subject-matter.[174]

In a world where private copying is directly connected to tangible media, fair compensation is not a problem. In the *Padawan* case, for instance, the company marketed CD-Rs, CD-RWs, DVD-Rs and MP3 players.[175] In the *Stichting de Thuiskopie* case, the company also sold blank media.[176] Fair compensation could in other words be ensured by making the companies pay the private copying levy, which would ultimately be passed on the consumers engaged in private copying. This, of course, requires the use of tangible media for which the user is charged extra.

4.2.1.2 The impact of unauthorised file sharing

In a way, tangible media cannot be compared to the piracy of digital media; for instance, if you steal a CD from a shop, the shop will have one less CD to sell. However, if you take an album in the MP3 format from the Internet, the album is still as available online as it was before you took a copy of it. Moreover, while unauthorised sharing of digital media might lead to losses for the record industry, but it does not lead to gains for the digital pirates. Sure enough, the consumers "gain" the amount equal to the value of the record if they take it for free instead of buying. However, the correlating losses cannot be estimated by simply referring to the amount of shared media; there is no guarantee that the consumers would actually have been willing to buy the record. By contract, physical piracy is an actual business; copyrighted material is taken and copied without permission of the right holder, and then sold. One in three CDs sold worldwide is a pirated copy, which leads to estimated losses of approximately $4.6 billion every year for the record industry[177] and to significant profit for the pirates. Therefore, the "physics of piracy of the intangible are different from the physics of piracy of the tangible".[178]

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[173] Case C-462/09 *Stichting de Thuiskopie*, para. 27; Case C-467/08 *Padawan*, para.46
[174] Case C-462/09 Stichting de Thuiskopie, para. 28; Case C-467/08 *Padawan*, para. 48-49
[175] Case C-467/08 *Padawan* , para.17
[176] Case C-462/09 *Stichting de Thuiskopie*, para. 10
[177] L. LESSIG: *Free culture*, Chapter 5, at http://www.authorama.com/free-culture-8.html, (2012-05-13)
[178] *Ibid.*

Nevertheless, when it comes to nature of the infringement, the differences between tangible piracy and digital piracy vanish. All piracy is detrimental to the very substance of copyright. Firstly, as explained above, unauthorised private copying that does not lead to a fair compensation prejudices the interests of the right holder. Secondly, under current legislation, even if the copyright holder receives an adequate remuneration for the private use online sharing of private copies cannot possibly be regarded as personal use (and thus normal exploitation) of the work.[179]

Making copies of copyrighted media and sharing the copied files online cannot possibly be allowed under the private copying exception, even if the persons that download the copies will later transfer them to their media devices and thereby to a certain extent ensure a fair compensation to the right holder. The exclusivity of the production right "certainly constitutes the most effective form of protection, having regard in particular to the development of new technologies and the increasing threat of piracy, which is favoured by the extreme ease with which recordings can be copied."[180] Such exclusivity is necessary to ensure proper remuneration; the lack of proper remuneration would have "inevitable repercussions for the creation of new works."[181] Therefore, as online file sharing does not respect the exclusive right of reproduction and distribution, it impairs the very substance of copyright. This conclusion is also supported by the fact that the rule of exhaustion does not apply to digital services.[182]

Digital file sharing bears a striking resemblance to the situations in older case law concerning video rentals. In *Warner Bros*[183], the Court reaffirmed that the right to prohibit the hiring-out of a video-cassette was bound up with the exclusive right of performance and the exclusive right of reproduction, necessary in order to guarantee to makers of films a satisfactory remuneration on the specific rental market which was held to be distinct from the sales market. The Court specifically pointed out that the size of the rental market, owing to developments in technology, offered great potential as a source of revenue.

In *Laserdisken*,[184] the Court found that by authorising the collection of royalties only on sales to private individuals and to persons hiring out video cassettes, it was impossible to guarantee to makers of films a remuneration that would reflect occasions on which the video cassettes were actually hired out and which would secure them a satisfactory share on the rental market. The release into circulation of a film could not render lawful other acts of exploitation of the protected work, such as rental, by nature different

[179] Compare "fair use": G. MAZZIOTTI: *EU digital copyright law and the end-user*, p. 140; Case UMG Recordings, Inc. v. Mp3.Com, 92 Federal Supplement 2d 349, p.351 (S.D.N.Y. 2000)
[180] Case C-200/96 *Metronome Music*, para.24
[181] *Ibid.*
[182] Recital 29 of the Preamble to the InfoSoc Directive
[183] Case 158/86 *Warner Brothers*
[184] Case C-61/97 *Laserdisken*

from sale or any other lawful act of distribution. The Court stated that rental rights remained one of the prerogatives of the author and producer notwithstanding sale of the physical recording, and that the specific right to authorise or prohibit rental would be rendered meaningless if it were held to be exhausted as soon as the object was first offered for rental.

The Internet can without a doubt be used as a source of revenue; file sharing has therefore both legal and economical consequences. According to statistic data, Internet users prefer downloading current alternative music. Downloading of movies is also heavily concentrated on current releases.[185] Taking music as an example, while a low effective price of music leads to a larger consumer interest and drive up the demand for live performances, at the same time, concerts are a less effective way to increase revenues from a new recording if the audience shares files.[186]

In theory, the copyright holder enjoys the exclusive right to reproduction, while in practice, unauthorised copies are so wide-spread that only a non-significant part of the audience still willingly obtains copies from the right holder. As the right holder cannot control how many copies are reproduced and shared, the unauthorised sharing impairs the exclusive right of reproduction to such an extent that the legitimate interests of the right holder are prejudiced and the right holder is deprived of the substance of the intellectual property right.

Member States have the obligation to provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights,[187] and to strike a fair balance between the rights involved when implementing those measures. The main problem with copyright enforcement is that even though file sharing impairs the very substance of the right, measures that are too strict are not acceptable because they are likely to undermine the rights of the Internet users and the intermediaries, as seen in the *SABAM* cases. However, less strict measures might not be sufficiently effective. For instance, the measure in the *Bonnier* case served a particular purpose: "facilitating the investigation into an infringement of copyright or impairment of such a right". There, the reasons for the measure outweighed the nuisance or other harm that the measure could entail for the person affected by it or for some other conflicting interest.[188] Such a measure, even though ensuring a fair balance when used for a particular purpose, is completely limited to that purpose; it does not prevent the infringements from happening but merely deals with the consequences. Of course, it could be claimed that it scares off other file sharers; having witnessed effective enforcement of copyright, they probably would not like to experience it themselves. For instance, in Sweden, 52% of illegal file-sharers said their activity had declined merely due to the law transposing the

[185] F. OBERHOLZER & K. STRUMPF: *"File Sharing and Copyright"*, pp. 31-33
[186] *Ibid*., p. 45
[187] Article 3 of IPRED
[188] Case C-461/10 *Bonnier*, para.58

IPRED.[189] However, this preventive effect might be incidental. Therefore, it is especially important to find how to effectively prevent file sharing in a way that affords a fair balance between the interests involved.

Fundamental rights, as mentioned above, have to be seen in relation to their social purpose and can be restricted, provided that the restriction in fact corresponds to objectives of general interest pursued by the Union and does not constitute, with regard to the aim pursued, "a disproportionate and intolerable interference, impairing the very substance of the right".[190] The importance of copyright protection in cases of unauthorised file sharing means that it might be necessary to restrict other rights in order to safeguard copyright; the question is, how much can those rights be restricted without impairing their very substance?

4.2.2 Freedom to conduct a business

According to the Explanations relating to the Charter of Fundamental Rights[191], Article 16 of the Charter is based on CJEU case law which has recognised freedom to exercise an economic or commercial activity[192] and freedom of contract.[193] The freedom to conduct a business may be subject to the limitations provided for in Article 52(1) of the Charter.

Freedom to conduct a business, as an expression of the general principle of freedom to pursue a trade or profession, "cannot be interpreted in isolation from the general principles relating to protection of intellectual property rights and international obligations entered into in that sphere by the Community and by the Member States".[194]

To what extent can the freedom to conduct a business be restricted in order to protect the rights of others? In the *Metronome Musik* case, concerning commercial rental of phonograms, the Court stated that if the objective (copyright protection) could not be "achieved by measures which preserved to a greater extent the entrepreneurial freedom of individuals or undertakings specialising in the commercial rental of phonograms", the consequences of introducing an exclusive rental right could not "be regarded as disproportionate and intolerable."[195] However, at the same time, regardless of how important it is to protect the rights of others, the freedom to conduct a business cannot be restricted to such an extent as to impair the very substance of the right. This is especially evident in the recent

[189] IFPI Digital Music Report 2011, p.11, at http://www.ifpi.org/content/library/DMR2011.pdf (2012-05-13)
[190] Case 5/88 *Wachauf* , para. 18; Case C-177/90 *Kühn*, para. 16; Case C-22/94 *The Irish Farmers' Association and Others*, para. 27; Joined cases C-402/05 P & C-415/05 P *Kadi*, para.355. See also T.TRIDIMAS: *The general principles of EU law*, p. 313
[191] Explanations relating to the Charter of Fundamental Rights
[192] Case 4/73 *Nold*, para. 14; Case 230-78 *SpA Eridiana and others*, paras. 20, 31
[193] Case C-240/97 *Spain v Commission*, para. 99
[194] Case C-200/96 *Metronome Musik*, para.26
[195] *Ibid*.

Interseroh[196] case, concerning quite a different factual situation, namely the obligation to disclose the name of the waste producer to the consignee of a shipment of waste.

In the *Interseroh* case, the right of protection of personal data was balanced against the freedom to conduct a business. The non-disclosure was not permitted under the relevant Regulation even though disclosure would have negatively affected the protection of business secrets. In addition, the Court stated that any unjustified breach of the protection of business secrets, assuming it were established, would not be such as to limit the scope of the relevant provision in the Regulation, but "rather to call into question the validity of that provision."[197] The scope of Article 16 of the Charter seems to be rather wide; nonetheless, it is evident that business secrets constitute a substantial part of the freedom to conduct a business, since the impediment at issue was likely to affect the validity of Union legislation. Disclosure of data would have impaired the substance of the right, as there is no mechanism to protect business secrets but just to keep them secret.

Could an analogy be drawn to *Scarlet Extended* and *SABAM v. Netlog*? In those cases, the non-installation of a general monitoring system *de facto* affected the substance of copyright, but was legitimate due to the need to protect other fundamental rights. Such general monitoring is absolutely prohibited under secondary legislation, but it is hard to imagine any other obvious preventive measures. Could that lead to invalidity of the prohibition of general monitoring? At the same time, such invalidity would enable general monitoring, which impairs the freedom of expression and the right to protection of personal data. Monitoring, even in order to enforce copyright protection, is a type of private censorship. After all, general monitoring is not prohibited without a reason: constant monitoring of all content passing through or stored on the ISP's network in order to spot illegal activity would lead to a "chilling effect" on Internet communications.[198]

In any case, as the Court stated in *Scarlet Extended*, forcing the ISP to install a complicated, costly, permanent computer system at its own expense "would result in a serious infringement of the freedom of the ISP concerned to conduct its business".[199] It is logical to conclude that in the context of copyright enforcement, it takes quite a lot to impair the very substance of the freedom to conduct a business. A serious infringement, no matter how serious, is still not the same as impairment of the substance of the right, and therefore $x \neq 0$. Therefore, if we only had to balance copyright against the rights of the ISPs, copyright would be protected at the expense of the freedom to conduct a business, but it could still be a fair balance. However,

[196] Case C-1/11 *Interseroh*
[197] Case C-1/11 *Interseroh*, para.46
[198] E.WERKERS & F. COUDERT: *"The Fight Against Piracy in Peer-to-Peer Networks: the Sword of Damocles Hanging over ISP's Head?"*, p.340
[199] Case C-70/10 *Scarlet Extended*, para.48

in reality, there are more rights involved, and all of them have to be taken into account.

4.2.3 Protection of personal data

The right to protection of personal data is enshrined in Article 8 of the Charter and Article 8 ECHR. It protected by means of Directive 95/46/EC. Pursuant to both Article 52(1) of the Charter and Article 8(2) ECHR, the right to protection of private data can be restricted for the protection of the rights and freedoms of others.

It follows from settled case law that the provisions of a directive must be interpreted in the light of the aims pursued by the directive and the system it establishes.[200] As stated in Article 1 of the Directive, its objective is to protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy, with respect to the processing of personal data, while also permitting the free flow of personal data.[201]

According to Article 13(1)(g) of the Directive, Member States may restrict the scope of certain rights and obligations provided for by the Directive, when such a restriction is necessary to safeguard the rights or freedoms of others. As the Court expressed in *Promusicae*,[202] the obligation of confidentiality of personal data can indeed be restricted when doing so is necessary for the protection of intellectual property rights.

In the *Satamedia* case, which concerned Article 9 of Directive 95/46/EC (an exemption for the purposes of journalism), the right to protection of personal data had to be reconciled with the freedom of expression.[203] In order to reconcile the two fundamental rights for the purposes of Directive 95/46/EC, the Member States have to limit the protection of personal data.[204] Since the *Satamedia* case concerned Article 9, the derogations had to be made solely for journalistic purposes or the purpose of artistic or literary expression.[205]

The Court emphasised importance of the right to freedom of expression in every democratic society and the necessity to interpret notions relating to that freedom broadly. The Court then stated that "in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided [...] must apply only in so far as is strictly necessary."[206] To put it bluntly, even given a broad interpretation of freedom of expression as a value of a democratic society, the protection of

[200] Case C-73/07 *Satamedia*, para. 51; see also Case C-265/07 *Caffaro*, para. 14
[201] Case C-73/07 *Satamedia* para. 52
[202] Case C-275/06 *Promusicae*, paras.49-53
[203] Case C-73/07 *Satamedia* para. 53
[204] *Ibid*., para.55
[205] *Ibid.*, para.55
[206] *Ibid.*, para. 56

personal data is still of such importance as to be restricted only when the restriction is crucial for the protection of freedom of expression.

Would the prohibition to disclose the personal data have impaired the substance of freedom of expression in the *Satamedia* case? In other words, was the restriction indispensable? Looking at the facts at the case, the question should probably be answered in the affirmative, even though it was left to the national court to determine. [207] The company in the *Satamedia* case collected public data from the Finnish tax authorities for the purposes of publishing extracts from those data in a regional newspaper each year. The information comprised the personal details of natural persons whose income exceeded certain thresholds. While the newspaper also contained articles, summaries and advertisements, its main purpose was to publish personal tax information. In relation to the data, the newspaper also carried a statement that the personal data disclosed may be removed on request and without charge. Later, the data published in the newspaper was transferred to an associated company in the form of CD-ROM disc. Both companies signed an agreement with a mobile telephony company which created a text-messaging service allowing mobile phone users to receive information published in the newspaper on their telephone for a charge. Personal data could be removed from that service on request.[208]

Whether these activities had to be considered as activities involving the processing of personal data carried out "solely for journalistic purposes" depended on whether the sole object of those activities was the disclosure to the public of information, opinions or ideas. The conclusion that can be drawn from the comparison with the *Satamedia* case is that scope of freedom of expression and information is very closely connected to the genuine objective of the activities. Consequently, the right to protection of personal data can be limited when doing so is essential to facilitate the disclosure to the public of information, opinions or ideas. In terms of balancing, it can be concluded that the right to protection personal data can be limited, but only when such restriction is necessary to protect the very substance of the other right. It is hard to determine how far-reaching the restriction of the right to personal data protection in the *Satamedia* case was; names and financial status constitute quite sensitive personal information; however, the details could be removed from the newspaper on request. The restriction certainly did not impair the very substance of the right; in terms of balancing, the estimated value of x could be somewhere between 1 and 5.

By contrast, when it comes to copyright infringements, the need to restrict the right to personal data protection can vary. While it is indispensible to disclose the data of the infringers, it is also imperative to take into account the rights of those who have not taken part in the infringements. A preventive measure which is more restrictive than absolutely necessary would without a doubt impair the very substance of the right to personal data protection. In the balancing equation, this would mean that x=0 and

[207] *Ibid.*, para.62
[208] *Ibid.*, paras. 25-29

that a fair balance cannot be struck. It would also mean that striking a fair balance is only possible if there exists a realistic way to effectively protect copyright without impairing the very substance of the right to protection of personal data, but also without impairing the very substance of the other rights involved, such as the freedom of expression and information.

4.2.4 Freedom of expression and information

Freedom of expression and information, enshrined in Article 11 of the Charter (and Article 10 ECHR), is an essential foundation of a pluralist, democratic society, reflecting the values on which the Union is based.[209] It includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers and is "both a right in itself but also a matrix essential to nearly every other form of freedom "and "is inseparable from the objective of democracy". [210]

It follows from the express wording of Articles 10 ECHR that freedom of expression can be subject to limitations justified by a pressing social need and proportionate to the legitimate aim pursued.[211] Therefore, freedom of expression and information is not absolute, unlike, for instance, the right to life. Consequently, the substance of freedom of expression and information can be restricted.[212]

As stated above, freedom of expression is inseparable from the objective of democracy – but is it within the interest of a democratic state to allow mass infringements of others rights, such as in cases of online piracy? Where does the genuine freedom of information end and where does online piracy begin? How much can the freedom of information can be restricted to safeguard the rights of others, namely the copyright holders? Since there is no case law that answers these particular questions, an analogy has to be made with other case law in which the freedom of expression was reconciled with other rights.

In the *FIFA* cases[213] from the General Court, the national measures at stake were intended to protect the right to information as they granted television access for the general public to events of major importance for society. At the same time, the measures restricted the right to property, but the General Court once again reaffirmed that such restriction was permitted, provided that it in fact corresponded to objectives in the public interest and did not impair the very substance of the right to property.[214]

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[209] Case C-163/10 *Criminal proceedings against Aldo Patriciello*, para. 31
[210] AG Jääskinen in Case C-163/10 *Criminal proceedings against Aldo Patriciello,* para.35
[211] *Case C-112/00 Schmidberger,* para.79
[212] *Case C-112/00 Schmidberger,* para.80.
[213] Case T-385/07 *FIFA;* Case T-68/08 *FIFA*
[214] Case T-68/08 *FIFA,* para.143; Case T-385/07 *FIFA,* para.139. See also Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA,* para.119, and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others,* para.126.

In the *Schmidberger* case, the Court held that the imposition of stricter conditions on the demonstration in question would have been "perceived as an excessive restriction, depriving the action of a substantial part of its scope"[215]. The Court emphasised that while the action entailed inconvenience for non-participants, this inconvenience could be tolerated provided that the objective pursued was the public and lawful demonstration of an opinion.[216]

In that regard, *Scarlet Extended* and *SABAM v. Netlog* are comparable with the *Schmidberger* case; the general monitoring systems, filtering both lawful and unlawful communications, would have completely undermined the freedom of information (thus impairing the very substance of it; x=0), and was therefore not an acceptable means for copyright enforcement.

However, it remains unclear whether there can exist measures which effectively prevent copyright infringements and at the same time do not impair the very substance of the freedom of expression. As soon as the measure cannot separate lawful and unlawful communication, the measure will impair the very substance of freedom of information, and when x=0, no fair balance can be struck.

4.2.5 Conclusion

The key to finding a fair balance lies in the very substance of the rights involved. The ultimate measure is one that effectively protects the substance of copyright while not impairing the substance of the other rights involved. The challenge is to "achieve and maintain the balance, 'offering enough control to motivate authors, inventors and publishers, but not so much control as to threaten important public policy goals.'"[217]

Is a fair balance between copyright and other fundamental rights possible under EU law, or is it a complete utopia? What could be done in order to strike such a balance? These are the questions for the final part of this thesis, Part IV.

4.2.6 Part III – post scriptum

Before moving on to Part IV, here is an additional thing I observed when looking at the relevant fundamental rights: there is an inherent problem in the balancing between the rights of the copyright holders and the rights of the Internet users. I am not sure how the problem could be solved, but here it is: can the balancing ever be "fair" if the need to combat illegal file sharing and protect copyright can be outweighed by the need to protect the rights of *all* the users? Is it reasonable to treat the rights of those who

[215] Case C-112/00 *Schmidberger* , para.90
[216] *Ibid.*, para.91
[217] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis,* p.39.

deliberately infringe copyright and the rights of those who have never shared a single file as a "lump sum" in the equation of balancing?

Normal online communication, as a way to express opinions and ideas,[218] and a way to access and impart information, is within the scope of freedom of expression and information. But is really this the case when it comes to unauthorised file sharing? Is an action of unauthorised reproduction and distribution – an action that impairs the very substance of copyright – still within the scope of Article 8 of the Charter? Does the fact that some of the filtered communication is completely illegitimate not undermine the value of freedom of information?

Indeed, what kind of freedom expression and information is online piracy? Access to information is in practice available through legitimate channels. (Unauthorised file sharing, of course, has its reasons, some of which might be legitimate. For example, the available sources of legal content might not be attractive due to various reasons (inconvenient technology; complicated methods of payment, or extra services that are not interesting for the actual user but significantly increase the cost of the main service). Another reason could be that the actual file is no longer be available through legitimate sources (e.g. authorised copies are no longer sold and the only way to acquire the file is to get an illegal copy).[219] Finally, some users sample music before deciding what to buy.[220])

Probably the main reason for unauthorised file sharing is that all the content is easily accessible and does not cost money: some users download instead of purchasing.[221] According to statistics, by 2006, 60% of all consumer Internet traffic consisted of file sharing (mostly of video files).[222] This data implies that a significant amount of Internet user share files; yet, in the balancing test, the rights of those who do not share files are taken into account and prevail against the need to protect copyright. Treating the rights of all the users as "a lump sum" when assessing a general monitoring system means that the file sharers could basically "hide behind the backs" of those who are completely innocent.

The fact that the rights of people that illegally share files and the rights of those who do not are summed up, which affects the value of freedom of expression and information in a very peculiar way. One the one hand, the rights of innocent users of the Internet should not be jeopardised only because some of the Internet users engage in infringing activities. On the other hand, the file sharers should not escape responsibility only because there are still some people among the Internet users that have not been file sharing. It is explicitly stated in Article 54 of the Charter that nothing in the

[218] Compare Case C-73/07 *Satamedia*
[219] L. LESSIG: *Free culture*, Chapter 5, at http://www.authorama.com/free-culture-8.html (2012-05-13)
[220] *Ibid.*
[221] *Ibid.*
[222] F. OBERHOLZER & K. STRUMPF: *"File Sharing and Copyright"*, p. 29

Charter implies “any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter“. Could this Article be interpreted as excluding illegal file sharing from the scope of freedom of expression and information? This would further complicate the balancing (as if it were not complicated enough!)

I will not answer these question, although they should be kept in mind for the final discussion, because the mere fact that these questions have popped up implies that there is something irregular about this balancing. Or this equation. Whichever you prefer.

5 Part IV: striking a fair balance – how to solve the puzzle

In the war against online piracy, copyright is being torn between two extremes. There is a continuous struggle and a violent hierarchy: which extreme should prevail depends on whom you ask. Some would prefer very weak copyright protection, if any at all (for example, the Pirate movement[223]), whereas the copyright holders are of the opposite opinion and seem to be willing to protect copyright at any cost (which is evident from the facts in *Scarlet Extended* and *SABAM v. Netlog*).

These contrasts have become even more visible since the majority of the Member States have signed ACTA[224] and tens of thousands of people have immediately reacted against it[225] (including the Anonymous group, "a decentralized network of individuals focused on promoting access to information, free speech, and transparency").[226]

The truth is, no matter which extreme you choose, they both might lead to a completely undesirable outcome. Seeing copyright as an individual right and the rights of the Internet users as the "general interest", since they are the basis for a democratic society, would mean that the general interest should take precedence over other considerations.[227] However, if effective measures cannot be taken to protect copyright, countless works will fall into an artificial public domain, meaning that in theory, someone has the exclusive right to reproduce and distribute the works, but in practice, those works are being shared without permission and this behaviour cannot really be stopped. The very substance of copyright would be impaired; if most of the copyright holders are deprived of their exclusive rights, it is suddenly not really a matter of an individual right anymore. It is a denial of the current form of the right. Conversely, if excessively strict measures are allowed in order to protect the very substance of copyright, the values that are at the core of a democratic society will be undermined. Copyright is somewhere between the devil and the deep blue sea; the extremes can only be avoided if a fair balance is struck. But is it possible to achieve a fair balance in practice?

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[223] A. RYDELL & S. SUNDBERG: *Piraterna. Historien om The Pirate Bay, Piratpartiet och Piratbyrån*, p. 143 ff.
[224] http://www.wired.co.uk/news/archive/2012-01/26/eu-signs-up-to-acta (2012-05-15), http://register.consilium.europa.eu/pdf/en/11/st12/st12196.en11.pdf (2012-05-16)
[225] https://www.accessnow.org/policy-activism/press-blog/acta-protest-feb-11 (2012-05-15)
[226] http://anonymous.pysia.info/ (2012-05-15)
[227] AG Mischo in Case C-331/88 *ex parte Fedesa*, para.42

5.1 Is there a need for stricter measures?

To begin with, is there even a need for stricter measures? What impact does unauthorised file sharing have on copyright and what will happen if copyright infringements cannot be prevented?

The right to property has to be viewed in relation to its function in the society and may be restricted, provided that there restrictions correspond to objectives of public interest pursued by the Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right.[228] Given the very specific nature of copyright, a level of protection that is not high enough has almost the same effects as no protection at all: many copyright holders are deprived of their exclusive right of reproduction and distribution. Unauthorised file sharing impairs the very substance of copyright, and without any effective measures to stop the sharing, most of the copyrighted works fall into a forced public domain: while the works are not really in the public domain, they are reproduced and distributed as if that was the case.

As confirmed in the *Bonnier* case, national measures can indeed strike a fair balance between fundamental rights if they allow the national court to weigh the conflicting interests involved, on the basis of the facts of each case and taking due account of the requirements of the principle of proportionality.[229] In that particular case, the national measures were regarded as "facilitating the investigation into an infringement of copyright or impairment of such a right". Therefore, the reasons for the measure outweighed the nuisance or other harm which the measure could entail for the person affected by it or for some other conflicting interest.[230]

Measures such as those in the *Bonnier* case are better than nothing; however, without any possibility to filter the communications, only a limited number of infringements can be discovered. When there are no efficient means to find out about the infringements, most copyright holders are deprived of the substance of the intellectual property right. By effect, the lack of effective measures is similar to expropriation.[231]

The Member States have the obligation to provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights.[232] Moreover, pursuant to Article 19 of the TEU, the Member States have a general obligation to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. It is settled case law that procedural rules governing actions for safeguarding an

[228] Joined cases C-402/05 P & C-415/05 P *Kadi*, para.55; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA*, para. 119
[229] Case C-461/10 *Bonnier*, para. 59
[230] *Ibid.*, para.58
[231] Compare Article 1 of Protocol 1 of the ECHR
[232] Article 3 of IPRED

individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.[233]

The mere fact that the Member States have to strike a fair balance between intellectual property rights and other fundamental rights, when implementing secondary legislation and when applying the transposing national laws, in practice means that, in certain cases, it might become impossible or excessively hard for the copyright holders to enforce their rights. If effective protection of copyright means that the very substance of the rights of others will be impaired, the measure is not acceptable, which leads to a complete lack of balance to the detriment of the copyright holders. The question is; could more effective measures, than those based entirely on a case-by-case assessment, be acceptable? To put it bluntly: must the copyright holders somehow keep an eye on what is being shared online (i.e. occasionally check the content of the most popular file sharing websites) and step in when the infringements become intolerable? Alternatively, should some type of non-general monitoring or blocking of content be used (if it is not too burdensome to the intermediary and if it does not undermine the rights of the users)? How realistic are such measures?

5.2 Are stricter measures possible?

To begin with, just to make clear, a measure will never ensure a fair balance if it is excessively costly and has to be installed at the expense of the intermediary because that impairs the very substance of the intermediary's freedom to conduct a business. This conclusion is in line with the findings of the Court in *Scarlet Extended* and *SABAM v. Netlog*. It also follows from the legal definition that an "information society service" only exists by virtue of sending and receiving information, and therefore blocking of information should per definition not constitute a part of an "information society service": "the act of preventing the delivery or receipt of information is a negation of the service envisioned by the law".[234]

It is settled case law that measures can be taken to prevent future infringements:

> *"[I]n view of the objective pursued by Directive 2004/48, which is that the Member States should ensure, especially in the information society, effective protection of intellectual property [...], the jurisdiction conferred, in accordance with the third sentence of Article 11 of the directive, on national courts must allow them to order an online service provider, such as a provider making an online marketplace available to internet users, to take measures that contribute not only to bringing to an end infringements committed*

[233] D.CHALMERS, ET.AL.: *European Union Law*, p. 276; Case C-279/09 *DEB*, para.28; Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* , para. 5; Case C-432/05 *Unibet*, para. 43; Case C-268/06 *Impact*, para. 46; Case C-13/01 *Safalero*, para. 49;
[234] C.MANARA: *"Block the Filtering! A Critical Approach to the SABAM Cases"*, p.15

through that marketplace, but also to preventing further infringements."[235]

Thus, the mere fact that the system is preventive does not affect the balancing, as long as it does not impair the substance of other fundamental rights. It follows that if a preventive measure is to be accepted, it firstly has to be able to distinguish between lawful and unlawful communications in order not to impair the substance of the freedom of information and the right to protection of personal data.

If a measure applies to all communications, even to those of people that have never engaged in unlawful file sharing, there is no doubt that the measure does not respect the freedom of expression and information. The fact that this freedom is at the very core of a democratic society makes the contested system even more inacceptable: Internet users, being aware that their communication is being monitored, might choose to "limit their exchanges", or "feel constrained to do so".[236] Furthermore, nowadays, when cloud computing is very popular (files can be copied from a hard drive to a server in order to make them accessible from different computers), measures that are too general are likely to block any work that the copyright holder legitimately wants to store online.[237] In order to avoid such situations, the preventive system would need to separate unauthorised file sharing from lawful activities, including sharing of material that is not copyrighted.

Secondly, any technological protection measures require an appropriate legal basis. General monitoring is prohibited under Article 15(1) of the E-commerce Directive. Nevertheless, non-general measures should be permitted under the E-commerce Directive if they do not require active monitoring of the communications, ensure a fair balance and respect the principle of proportionality. Selective measures, for instance, blocking of certain websites that known as file sharing sources, could be an alternative. For example, in the UK, some ISPs have to block the Pirate Bay as a website that "infringes copyright on a massive scale". However, some critics argue that blocking can be circumvented using proxy servers and other techniques, and therefore is not really effective.[238] Furthermore, blocking the information does not eliminate the problem; it fights the effects, not the causes. In order to have any effect on the behaviour of the offenders, the measure should instead lead to sanctions. As Jim Killock from the Open Rights Group expressed, blocking measures may have quite the opposite effect: "It will fuel calls for further, wider and even more drastic internet censorship of many kinds, from pornography to extremism. Internet

[235] Case C-324/09 *L'Oreal*, para.131; Case C-275/06 *Promusicae, para.* 4; Case C-70/10 *Scarlet Extended,* para.31
[236] C.MANARA: *"Block the Filtering! A Critical Approach to the SABAM Cases"*, p.24
[237] *Ibid.*, p.12
[238] http://www.swedishwire.com/business/13682-pirate-bay-blocked-in-uk-after-high-court-rule (2012-05-07)

censorship is growing in scope and becoming easier. Yet it never has the effect desired. It simply turns criminals into heroes".[239]

On websites like The Pirate Bay, as soon as the user begins sharing information, that transaction occurs peer-to-peer, and thus the website acts "more like a dynamic map of who's sharing what and where to find it, after which the transactions occur privately".[240] Therefore, another possibility could be technical filtering of certain websites or services that are normally used for file sharing. It would identify infringers as well as discourage future infringements, considering that fact that sharing by other means, such as email, is much less convenient that using a p2p service. In order to respect sensitive private data, filtering of certain websites and services, such as banks, hospitals and social networks with no uploading possibilities would be strictly prohibited. The main problem with this type of measure is that there is no clear line between such selective filtering and prohibited active monitoring, especially considering the fact that technical filtering is likely to have extraterritorial effects, just like general monitoring, since filtering aims at the total sum of information that passes through the provider's service.[241] This may result in files being blocked merely because they have moved through the European Union and have been recognised there.[242]

Is filtering technically effective? Not really. For instance, in the French Yahoo case, the judge pointed out that filtering of IP addresses only prevented the spread of illegal content in France 70% of the time. There have also been other rulings concluding that technical filtering is ineffective.[243] Furthermore, nowadays, there exist technical possibilities to hide the IP address[244] when browsing or downloading files, some of which are even offered by Internet service providers;[245] such technologies neutralise the measures that attempt to filter communication and trace the IP addresses of possible infringers. That narrows down the technical possibilities of detecting infringements even more.

However, under the assumption that there actually exist technical and legal possibilities to apply selective measures and target certain communications without jeopardising the rights of the users, such measures would still need to be in line with the principle of proportionality.[246]

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[239] http://www.ultimate-guitar.com/news/industry_news/pirate_bay_officially_blocked_in_uk.html (2012-05-07)
[240] http://techland.time.com/2012/05/01/british-court-orders-isps-to-block-pirate-bay-is-the-u-s-next/ (2012-05-14)
[241] On general monitoring, compare C.MANARA: *"Block the Filtering! A Critical Approach to the SABAM Cases"*, p.21
[242] *Ibid.*, p.21
[243] *Ibid.*, p.12
[244] http://whatismyipaddress.com/hide-ip, http://torrentfreak.com/5-ways-to-download-torrents-anonymously-100819/ (2012-05-07)
[245] http://bredband.bahnhof.se/extra-services/anonym-pa-internet (2012-05-14)
[246] Case C-275/06 *Promusicae*, para.68; Case C-438/05 *Viking Line*, para.46; *Case C-112/00 Schmidberger*, para.77; Case C-36/02 *Omega Spielhallen* , para. 36

Proportionality requires the restriction to be suitable for ensuring the attainment of the legitimate objective pursued and not go beyond what is necessary to achieve that objective.[247] A restrictive measure can be regarded as suitable for securing the attainment of the objective pursued only if it "genuinely reflects a concern to attain that objective in a consistent and systematic manner".[248] The requirement of suitability is especially observed in areas where the Member State has a wide margin of discretion, such as gambling,[249] environmental policy.[250] Balancing of rights is also such an area: according to settled case law of the European Court of Human Rights, the state is given a wide margin of discretion when there is a clash between fundamental rights.[251]

Could a selective measure be applied in a coherent and systematic manner and thus suitable for copyright protection, if it is only applied to certain websites and services? Probably not; new means of file sharing are constantly developing. For example, after the ban of Napster, "its clones […] have spread on the Net with extreme success."[252] From a practical perspective, it would challenging (and not very realistic) to target all the sources of file sharing, as new ones keep on appearing. Moreover, would it really be the least restrictive means to attain that objective,[253] particularly considering the possible negative effects it might have on the overall flow of information? If not, then the measure is disproportionate and is consequently not a realistic alternative.

An attempt to cover the enforcement of intellectual property rights in a way that is adequate for the digital environment has recently been made in the Anti-Counterfeiting Trade Agreement ("ACTA").[254] ACTA contains a whole section on the enforcement of intellectual property rights in the digital environment and establishes complementary application of the provisions related to civil and criminal enforcement. It encourages digital rights management and the disclosure of personal information of Internet users by online service providers. It also requires cooperation within the

[247] Case C-438/05 *Viking Line*, para.90; Case C-55/94 *Gebhard*, para.37
[248] Case C-28/09 *Commission v. Austria*, para.126; Case C-169/07 *Hartlauer*, para. 55; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* , para. 42; Case C-137/09 *Josemans*, para. 70
[249] Case C-243/01 *Gambelli*, para.67
[250] Case C-28/09, *Commission v. Austria*, para.126
[251] X. GROUSSOT: *"Rock the KaZaA: Another Clash of Fundamental Rights"*, CMLRev., p. 1762; Case *Chassagnou v. France*
[252] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, p.75
[253] Case C-320/03 *Commission* v *Austria*, para. 87; Case C-28/09 *Commission v. Austria*, para.140
[254] A. J. Cerda Silva: *"Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy"*, p. 602; see also KIMBERLEE WEATHERALL: *"ACTA as a new kind of international IP lawmaking"*, 26 Am. U. Int'l L. Rev. 839 2010-2011

business community in order to fight infringement of intellectual property rights. [255]

Privacy and data protection is emphasised in ACTA; nothing in ACTA shall detract from national legislation protecting these rights. It does not pre-empt national provisions that "regulate access to or disclosure of personal data in civil enforcement and border measures".[256] It also encourages parties to order online service providers to "transfer expeditiously information on the identity of subscribers to right holders in claims of infringement" and "preserves privacy in the implementation of enforcement procedures, cooperation within the business community, and the identification of Internet users".[257] Furthermore, proportionality needs be taken into account when implementing the measures.[258]

The provisions of ACTA on the identification of subscribers apply not only to criminal enforcement, but also to civil enforcement[259], and intend to balance competing interests. However, some claim that the balance is "elusive, particularly because the underlying interests conflict".[260] Despite its social value for culture, copyright is a "private right", while privacy and personal data are "essential to the very idea of democracy and as safeguards of human rights."[261] Indeed, ACTA lacks specific safeguards for the right to privacy, which also means that it would not lead to a proper legal harmonisation among the Member States. The problem is especially evident in the case of countries that lack adequate technical assistance or suffer from "political pressure to turn over information about alleged infringers".[262]

The issue of file sharing is already very sensitive, and it would not be realistic to diminish the right to protection of private data and the freedom of information. The main problem with ACTA is that full compliance with the encouraged terms of ACTA would require the EU Member States to provide for an obligation for ISPs to identify subscribers for purposes of civil enforcement, even when such an obligation does not exist under Union law.[263] But most importantly, ACTA has received predominantly negative reactions from the Internet users,[264] which is a clear implication that ordinary citizens do not support the attempts to strengthen intellectual property rights.

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[255] A. J. CERDA SILVA: *"Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy"*, p. 609
[256] *Ibid.*, p. 610
[257] *Ibid*., p. 610
[258] *Ibid.*, p. 627
[259] *Ibid*., p. 625
[260] *Ibid.*, p. 611
[261] *Ibid.*, p. 612
[262] *Ibid*., p. 630
[263] *Ibid.*, p. 626
[264] http://www.petitiononline.com/stopacta/petition.html (2012-05-15); http://www.youtube.com/watch?v=8XoFGApjhFE (2012-05-15); http://ipjustice.org/wp/campaigns/acta/ (2012-05-15)

5.3 What is next?

Telling the Member States to strike a fair balance and giving them a wide margin of discretion implies how sensitive the issue of file sharing is. The Member States are completely free to choose whether to oblige the intermediaries to disclose personal data for the purposes of copyright protection; however, such freedom of choice can lead to a partitioning of the Union. Some Member States might prefer effective protection of copyright, while others might emphasise the right to personal data protection,[265] or the freedom of information. For instance, in some Member States, such as Finland (the first country in the world to declare broadband Internet access a legal right[266]), the scope of freedom of information is wider that in others. It could possibly be claimed that access to Internet is a part of Finland's national identity,[267] as a right that extends the scope of freedom of information even further. Of course, that right can also be restricted and online content can be blocked, if that is necessary in order to fight serious crime.[268] However, what would be the acceptable way to prevent illegal file sharing in a Member State where such importance is attached to the rights of the Internet users? Could a fair balance ever be achieved? This is yet another reason why balancing of fundamental rights at the national level sounds good in theory, but may lead to unpredictable results in practice.

Given current legal and technical possibilities, copyright enforcement in cases of unauthorised file sharing resembles a Russian roulette; due to the lack of preventive means, not all the infringements are detected and not all the infringers are held responsible. However, in a way, copyright is still an individual right and thus a private matter of the right holders. It is undeniable that infringements, when detected, can be fought, either by litigation or by simply contacting the website and requesting to remove the infringing content. Indeed, direct communication with the intermediaries is a very smooth and effective way to combat copyright infringements, as websites tend to remove the possibly infringing content on request by the right holders without any legal proceedings.[269]

Then again, when content is removed on request, without any legal proceedings, this possibility can be easily abused. Since copyright requires no registration, there is no way to prove whether the material is copyrighted and whom the rights belong to. For example, a Dutch experiment has proved that the intermediaries are likely to remove the content on request without any further considerations. (For the purposes of the experiment, a text of a minor nineteenth-century author, originally published in 1871, was posted on several websites alongside the fact that it belonged to the public domain. Some weeks later, a request was sent to the intermediaries to

[265] X. GROUSSOT, *"Rock the KaZaA: Another Clash of Fundamental Rights"*, CMLRev., p. 1765
[266] http://edition.cnn.com/2009/TECH/10/15/finland.internet.rights/ (2012-05-13)
[267] Art.4(2)TEU
[268] I. BROWN: *"Internet censorship: be careful what you ask for"*, p.7
[269] C.MANARA: *"Block the Filtering! A Critical Approach to the SABAM Cases"*, p. 19

remove the content, signed by someone pretending to be the copyright holder. 70% of the technical intermediaries removed the content "without trying to verify whether the legal conditions were met to do so").[270] In the worst case, such requests to remove material could have the effect of *de facto* censorship; Internet censorship, which by definition interferes with the freedom of expression and information and is very popular among totalitarian states.[271] Yet another pattern that is likely to impair the very substance of a fundamental right. It seems that we have reached a dead end.

Could it be that the best solution to the file sharing problem is not to fight the effects, but to eliminate the causes? Some say that decriminalising "non-commercial file sharing and forcing the market to adapt is not just the best solution. It's the only solution, unless we want an ever more extensive control of what citizens do on the Internet."[272] Others, for instance, William Patry,[273] claim that sometimes law is not the answer: "If there are non-legislative ways to solve whatever the problem is, the last thing we should do is for lawyers, courts or governments to get involved."[274]

I would like to agree. "Decriminalisation" and "forcing the market to adopt" are great slogans, but changes will not happen overnight. I believe that changes have to be made step-by-step. After all, copyright is necessary to in order to reward authors and to provide incentives for creativity, and file sharing undermines the very substance of their exclusive rights. Therefore, the challenge is "to achieve and maintain balance, "offering enough control to motivate authors […], but not so much control as to threaten important public policy goals'",[275] and there are several ways that could lead help achieve that goal.

5.3.1 Business models

> *"As we move to an access-based world of distribution of copyrighted works, a copyright system that neglected access controls would make copyright illusory, and in the long run it would disserve consumers."*[276]

New technologies have brought along some drastic changes in consumer behaviour; a person who would never steal a tangible item can consider

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[270] C.MANARA: *"Block the Filtering! A Critical Approach to the SABAM Cases"*, p.19; see also http://ww.bof.nl/2004/10/13/providers-verwijderen-tekst-multatuli/ (2012-05-15)
[271] I. BROWN: *"Internet censorship: be careful what you ask for"*, p.3
[272] http://arstechnica.com/tech-policy/news/2008/01/swedish-prosecutors-dump-4000-legal-docs-on-the-pirate-bay.ars (2012-05-15)
[273] Senior Copyright Counsel to Google Inc.
[274] W. PATRY: *How to fix copyright*, p.141
[275] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, p.39
[276] J. GINSBURG: *"From having copies to experiencing works"*, 50 J. Copyright Soc'y U.S.A. 113 2002-2003

downloading illegal copies.[277] Why? Well, probably because downloading is technically not exactly the same as stealing. [278] Of course, some people download because they do not want to pay; however, sometimes downloading is the only way to get access to the copyrighted material that you are interested in. For example, a certain TV show might be interesting, but you cannot get access to it; the show might not run on local TV, has not been released or re-released on DVD, is not available online from a legitimate source or is only available to users located in certain countries. In other words, you want it but you cannot get it, even if you are willing to pay for it. You search for it online and several clicks later, you are at The Pirate Bay and have a chance to get the whole season of the show. Right now. For free. What would you do?

If it the copyrighted material were available from an authorised source at a relatively low price, illegal file sharing would become less attractive, especially considering the fact that injunctions could still be used against infringers – the adoption of new business models does not presuppose changes or abolishment of copyright laws. While sharing might not disappear completely, it would probably be less justifiable if authorised copies were at least as accessible as illegal ones.

Often, those in charge of old distribution technologies are "afraid of losing control over authors, composers, and performers, because their role would become unnecessary."[279] What is more, they do not see the possibilities of the new technology, "such as the dramatic reduction of production and distribution costs."[280] For instance, in the music industry, expensive equipment has been replaced with significantly cheaper computer technologies.[281] If technology is used in production, why should it be ignored when it comes to distribution?

Using new technologies requires innovative thinking; the business models that suit digital content are by nature different from those used by record stores.[282] Currently, there are two leading online business models: pay-per-download and subscription services.[283] Pay-per-download allows purchasing single tracks, which makes this business model more attractive than buying tangible media, such as CDs containing full albums. The subscription model is based on a monthly fee, allows access to databases containing copyrighted material and is likely to replace CD buying.

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[277] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis,* p.14
[278] L. LESSIG: *Free culture*, Preface, at http://www.authorama.com/free-culture-1.html, (2012-05-13)
[279] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis,* p.14
[280] *Ibid.*, p.15; M. BOLDRIN & D. K. LEVINE: *Against Intellectual Monopoly*, p.150
[281] M. BOLDRIN & D. K. LEVINE: *Against Intellectual Monopoly*, p.173
[282] P. PEDLEY: *Digital Copyright*, p.2
[283] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis,* p.130

When it comes to innovation, the conventional entertainment industry (music and movies) still has a lot to learn from other (entertainment?) industries, such as the porn branch. Technically and economically, producing a pornographic movie is very similar to producing a "normal" movie. Pornographic websites are quick to adopt new technologies, such as video streaming, fee-based subscriptions, electronic billing and pop-up advertisements. Due to such experimentation, the porn branch is one of the most profitable online industries. [284]

Of course, the copyright holders enjoy the freedom to conduct a business (Article 16 of the Charter!) and thus should not be forced to take up a certain business model. However, the Internet should definitely be seen as a possibility, not as a threat, and copyright holders should dare to try new, access-based business models. Copyright laws have to protect healthy business models; copyright holders have to embrace the new technologies and respond to consumer demand, instead of acting surprised each time their works are made available for illegitimate file sharing.[285] As for the users, there is one caveat: if a service collects money from its users, this does not necessarily mean that the right holder will actually get the money;[286] therefore, it is important to check whether the source is legitimate.

I personally believe that new business solutions should be encouraged because it is convenient, but mostly because of the contrast that the availability of legitimate sources would create. The mere fact that the user continues downloading illegal copies of copyrighted content that can be obtained from a legitimate source for a reasonable price – the mere fact that the user deliberately "steals" instead of buying – should be sufficient to make it easier for the copyright holders to enforce their rights in cases of infringement.[287] Nonetheless, I am aware that certain types of problems might arise as a result of the introduction of new business models. For instance, there might be some competition law concerns, especially when collecting societies are involved.[288] However, such speculations are not within the scope of this thesis.

5.3.2 DRM

Digital rights management (DRM) is another reasonable way to protect copyright and is widely used by copyright holders all around the world. There are two main types of DRM: 1) advisory, which means that the media is labelled as protected and authorised players refuse to copy such protected material; 2) encryption of content, meaning that only specific software can unlock the encryption. Such encryption schemes are effective without legal

[284] M. BOLDRIN & D. K. LEVINE: *Against Intellectual Monopoly*, pp.36-39
[285] W. PATRY: *How to fix copyright,* pp.143-144
[286] P. PEDLEY: *Digital Copyright,* p.46
[287] Compare W. PATRY: *How to fix copyright,* p.143
[288] Compare Case C-52/07 *Kanal 5 Ltd and TV 4 AB vs. STIM;* Commission Decision in Case COMP/C2/38.698 – *CISAC*

enforcement; it is sufficient for the media companies to provide the copyrighted material in a certain format. Encrypted material can also be linked to a specific type of device, for instance, video games are often linked to special consoles.[289]

Some argue that DRM may hinder development, especially regarding developing countries' access to knowledge and information, as DRM is not necessarily limited to copyrighted works but can be used to "lock" any information.[290] Moreover, DRM also increases the power of copyright holders: a "combination of a contract and technological protection measures could represent a powerful mixture for fully automated system of secure distribution, rights management, monitoring and payment for protected content".[291] In a way, DRM could be seen as a *de facto* imposition of "unilateral terms and conditions",[292] which could undermine the rights of consumers. For example, even when the consumers have the right to make copies for private use, DRM will hinder them from doing so.

Limitation of private use is probably the most negative aspect of DRM, a measure which otherwise is quite balanced with regard to the rights involved. Even though the essence of DRM is to prevent copying, people will always find their ways around technological protection. For example, when you search DRM removal on Google, approximately 12 200 000 results are found. The ugly truth is that nobody (except for the copyright holders) likes DRM. What else is out there?

5.3.3 Business combined with DRM

Some solutions contain mixed features, namely, a business model that makes use of digital rights management. For example, Spotify offers a digitally restricted streaming service for music.[293] Another player, iTunes, operates on the basis of a proprietary DRM system "FairPlay": it allows single purchases of songs which can be accessed from a limited amount of devices and can only be played using certain software.[294]

Business models, possibly combined with a reasonable amount of DRM, can help overcome digital piracy, but only if they are accessible to consumers. In that regard, pricing and methods of payment play a huge role, but interoperability is at least as important; the absence of interoperability between the technological solutions can hamper the free circulation of copyrighted works because consumers may be forced to choose content that fits their devices.[295] For example, songs of The Beatles are not available on

[289] M. BOLDRIN & D. K. LEVINE: *Against Intellectual Monopoly*, pp.115-116
[290] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, page 91
[291] *Ibid.*, p. 102
[292] *Ibid.*
[293] http://ww.spotify.com (2012-05-16)
[294] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, p.131
[295] *Ibid.*, p. 133

Spotify because of an exclusive digital distribution agreement with iTunes,[296] and I personally find it a huge problem. Some other great artists not available on Spotify are Pink Floyd, Led Zeppelin, and Metallica and AC/DC,[297] and this fact alone serves to prove that no matter how accessible and attractive some business solutions might be, none of them is perfect.

5.3.4 Taxation

In business, freedom of contract is the king, and yet sometimes might lead to undesirable consequences; the copyrighted content might be unavailable to a certain group of consumers if the copyright holder chooses a certain channel to distribute the digital content. A solution to this problem could be a more general measure, for example, a new tax in order to compensate for the use of copyrighted material online.

Such a "file sharing tax" could be imposed on Internet services (especially on high-speed Internet, since it allows faster file sharing). However, such a measure has inherent flaws, which are quite obvious even without going into the technicalities of taxation. Firstly, having access to high-speed Internet does not automatically mean that the user will engage in unauthorised file sharing. Secondly, due to the global nature of the Internet, the measure is unfeasible; it would need to be applied globally in order to be effective, which would require a new international agreement. Thirdly, it is unclear how the funds would be redistributed to the copyright holders in order to provide remuneration for the actual amount of downloads. A more detailed analysis of this issue falls outside the scope of this thesis; however, it can be concluded that a special file sharing tax is not likely to be successful in practice, at least not in the nearest future.

5.3.5 Changing copyright

> *"Cultural and economic progress is the result of the free circulation of ideas and knowledge. Continuing on the road of restrictions and barriers, or to the indiscriminate use of technological protection measures, is a return to anachronistic measures of the past, such as what happened many years ago with the untenable 'red flag act' enacted to defend carriage industry at the advent of the first automobiles".*[298]

The "obsolescence and inappropriateness of the traditional intellectual property regime"[299] has been emphasised by the digitalisation. At the early stages of copyright development, uses of copyrighted works were divided into "public" and "private", and have remained that way ever since.

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[296] http://www.sltrib.com/sltrib/lifestyle/52305191-80/spotify-music-songs-service.html.csp (2012-05-13)
[297] http://www.spotify.com/us/help/faq/content/ (2012-05-16)
[298] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis,* p.140
[299] *Ibid.*

However, nowadays, due to digitalisation, the line has been blurred; "a simple e-mail can reach more addressees than a theater in the eighteenth century". [300] New technologies have also made it more complicated to maintain a balance "between the inherently contradictory interests of intellectual property rights-holders and the general public."[301]

"Music is everybody's possession. It's only publishers who think they own it".[302] I found this quote online; purportedly, these are the words of John Lennon, but you can never be too sure. Both the quote and the way it has been circulating online reflect the beauty of sharing. Indeed, consumption is the very heart of intellectual property, especially of copyright. Multiple uses do not diminish it; on the contrary, "[o]nce a work is created, its intellectual content is infinitely multipliable."[303]

New technologies have brought both freedom and chaos. Digitalisation has decreased the production costs and given the copyright holders maximal possibilities to share their works with the world.[304] However, the same technologies have facilitated for illegal file sharing and deprived them of the exclusivity of this right. In 2010, more than 60% of Internet traffic consisted of consumers sharing music, movies, books, and games.[305] Considering the duration of copyright protection, it is highly likely that most of that sharing constituted copyright infringement, an act that impairs the very substance of the right to intellectual property. Does that mean that the Information society is actually a society of thieves?

Freedom of expression and information, protection of personal data, and some freedom to conduct a business: this is what it takes to eliminate illegal file sharing. The very substance of those rights would need to be impaired in order to effectively prevent infringements, given the current scope of copyright protection. Alternatively, we could do something more constructive instead of repeatedly attempting to divide by zero. Instead of constant struggling and unsuccessful balancing, we could just change the essence of copyright, so that a significantly smaller portion of file sharing would count as infringement.

According to various studies, piracy and music sales are largely unrelated.[306] Neither is there any evidence that that file sharing has discouraged the production of artistic works; the number of new records has more than doubled since 2000. [307] When music becomes available for free, the price of concerts is likely to rise, which leads to a complementary source

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[300] R.M. HILTY & S. NÉRISSON: *"The Balance of Copyright"*, p.355
[301] N. LUCCHI: *Digital Media & Intellectual Property/ Management of Rights and Consumer Protection in a Comparative Analysis*, p. 135
[302] http://www.brainyquote.com/quotes/quotes/j/johnlennon167341.html (2012-03-26)
[303] M. BOLDRIN & D. K. LEVINE: *Against Intellectual Monopoly*, p.177
[304] F. OBERHOLZER & K. STRUMPF: *"File Sharing and Copyright"*, p.50
[305] *Ibid*., p. 19
[306] *Ibid.*, p. 49
[307] *Ibid.*, p. 50

of revenue, or at least helps ensure that the artists do not suffer if the sales of records decline.[308]

Furthermore, copyright protection is not, and has never been the main basis for creativity. For instance, Shakespeare created without copyright laws, because the first legislative act that resembles the modern form of copyright was the Statute of Anne, was adopted in England in 1710.[309] Should Shakespeare be seen as an exception rather than the rule? Not at all. For example, copyright was not used for musical works until the end of the eighteenth century, and yet a great deal of classical music was produced without copyright protection.[310]

Copyright, by nature, is different from other intellectual property rights; firstly, it originates automatically as soon as a work is created, and secondly, the term of copyright protection (in the EU, it is 70 years *post mortem auctoris*, pursuant to the Duration Directive[311]) is much longer than the term of protection of other intellectual property rights. The excessive length of copyright protection denies access to culture[312], but also does not affect the incentive to create. It might result in additional benefits in the distant future, but has a very low present economic value.[313] Even "[m]aking copyright perpetual would increase author's compensation by at most 0.12 percent, and these figures are unrealistically high, since the vast majority of works lose value after a short period of time."[314]

A regime that provides for an excessively long term of protection has no social benefit; consumers are forced to pay monopoly prices for over 100 years, while their rights to access and use are restricted; moreover, a large amount of works are no longer available from the legitimate sources but still copyrighted, which limits access to culture even more.[315] Therefore, it would only be beneficial for the society to decrease the term of copyright protection. Since a shorter term would mean that more works would fall into the public domain, the amount of infringements would also decrease. At the same time, the contrast between copyrighted and non-copyrighted works would become more apparent. In terms of balancing, it would become more acceptable to restrict other rights in order to protect copyright.

Being completely unbiased towards either large record companies or online pirates, I am reluctant to accept the current state of law protecting intellectual property rights because it does not seem to serve the needs of the Information society. The strong copyright protection is favourable for the right holders, however, it is not always enforceable due to the need to

[308] *Ibid.*, pp.23, 44-45
[309] M. BOLDRIN & D. K. LEVINE: *Against Intellectual Monopoly*, p. 30
[310] *Ibid.*, p. 187
[311] Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights
[312] W. PATRY: *How to fix copyright*, pp.190-195
[313] *Ibid.*, pp.199-200
[314] *Ibid.*, p.200
[315] *Ibid.*, p.201

protect the interests of Internet users and ISPs. Changing the essence of copyright is a measure that is the most likely to result in a fair balance between copyright and other fundamental rights – provided that the mechanisms of international law, which copyright protection is based on, allow such radical changes. However, recent development, including the ACTA[316], implies a strong preference towards measures that strengthen the protection of intellectual property rights. This leads to the conclusion that it would take a while before drastic legislative changes can made.

[316] http://register.consilium.europa.eu/pdf/en/11/st12/st12196.en11.pdf (2012-05-16)

6 Conclusions

Right now, the Information society is standing in a crossroad; it has been standing there for quite a while, taking a leap back and forth every now and then. It cannot stay there for ages; eventually, it will have to choose one path. It is hard to say which one is the right one, but one thing is clear: it is too late to turn around and go back. Digitalisation and the Internet have done their job, and now it is the Information society's time to react and actually embrace the future; or the present, because the future is now.

As Lawrence Lessig expressed in "Free culture", it is necessary to use some common sense and decide how to respond to the changes; however, instead, we are "allowing those most threatened by the changes to use their power to change the law – and more importantly, to use their power to change something fundamental about who we have always been".[317]

In the war against piracy, striking a fair balance between fundamental rights is not an easy task. The reality of particular relations has to be recognised over "abstract metaphysical concepts";[318] balancing might be a great slogan, but applying it blindly will lead us back to where we started; at a total conflict of rights. A balance will never be achieved if the very substance of a right needs to be impaired in order to protect other rights.

In a way, balancing of copyright and other fundamental rights resembles a mathematical equation, where the rights are variables. The situation becomes even more complicated when the rights of the infringers and the rights of those who have not engaged in infringing activities are treated as a "lump sum"; suddenly, it becomes unclear what value could be assigned to the "variables" of the right to protection of personal data and the freedom of information. In a way, this balancing is also a give-and-take kind of approach: when a balance between copyright and other fundamental rights cannot be achieved by purely legal means, sometimes the only solution could be to find a compromise, such as a business model that would equally respect all the rights involved.

A completely different perspective is also possible; instead of looking for a solution to the problem, the straightest way to a fair balance could be to attack the very core of it and to eliminate the very reasons for the problem. Efficient changes presuppose a radical approach: "[r]evolution will not just happen. It must be made to happen."[319] In the case of illegal file sharing, this would mean changing the substance of copyright in order to decrease the amount of situations in which a clash of fundamental rights occurs. The contrast created by distinguishing copyrighted and non-copyrighted works

[317] L. LESSIG: *Free culture*, Introduction, at http://www.authorama.com/free-culture-2.html (2012-05-16)
[318] I. WARD: *Introduction to Critical Legal Theory* p. 168
[319] *Ibid.*, p. 147

would also give a more solid basis for a case-by-case assessment when the copyright holder decides to hold the infringer responsible.

Personally, I am unwilling to accept the current state of law protecting intellectual property rights because it does not seem to serve the needs of the Information society. Without openness, justice would become stabilised by the "force of law":[320] it seems that this has happened to intellectual property law. Intellectual property law, more than any other kind of law, is inseparable from innovation, and should be allowed to develop accordingly. It should embrace the openness, the potential of change, and "maintain the possibility of freedom".[321] The violent hierarchy between the fundamental rights should be overturned; in a fully functioning Information society, there should not be any need to balance intellectual property rights with other fundamental rights. Only then can we avoid accidental dividing by zero; only then can we claim that we live in an actual Information society.

Until then, I believe in business models. As William Patry suggested in his book "How to fix copyright": "[i]n a healthy market, copyright owners make their works available in formats and at prices consumers desire. Consumers then pay copyright owners money and everyone wins."[322] If such a healthy market existed, I would not need to go to youtube.com in order to listen to Pink Floyd (50 times for the past three weeks…). If such a healthy market existed, my friends would not need to look over their shoulders each time they want to download a new episode of a popular TV series. If such a healthy market existed, the war against piracy would end, or at least start focusing on combating real "pirates", such as those that upload leaked albums or movies weeks before their official release. However, remembering the "stone age" of file sharing and comparing it with the current situation, I am sure that we are on the right track.

[320] I. WARD: *Introduction to Critical Legal Theory,* pp. 168-169
[321] *Ibid.*, p.169
[322] W. PATRY: *How to fix copyright,* p.143

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