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Blocking injunction requisites

The balancing of rights and other aspects of blocking
injunctions towards intermediaries

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Summary

The increased significance of intellectual property rights, rapid development of easier dissemination of protected works and the subsequent concern for protection has lead right holders to seek new ways of countering online piracy. In the past decade, a new regime of targeting online intermediaries with blocking injunctions has emerged. Carrying no actual liability for infringement, intermediaries find themselves ordered to implement blocking injunctions purposed to discourage Internet users from accessing illegal content. This phenomenon raises a multitude of issues concerning the appropriateness of bestowing obligations upon an innocent intermediary, and along with it the balancing of property right interests towards fundamental rights such as the freedom of expression and information, freedom to conduct a business and data privacy protection concerns. The issues are highlighted when attempting to discern the requisites for issuing a blocking injunction; interpretation of this common legal framework has diverged in the member states applying them.

A study of the European Court of Justice's case law paired with the doctrine surrounding the legal framework reveals a core set of requisites that must be taken into account for the court tasked with assessing a blocking order application. Of these requisites, the proportionality assessment surface as the particularly complex issue. However, its complexity serves to highlight the importance of the accumulated requisites, while the balancing act contained within this assessment remains a question of legal review *in casu*. Further clarity and legal foreseeability as to the particular requisites and their handling is required for harmonization, but the proportionality assessment is not in such a dire need of restructuring as some may argue. The well-established nationality of especially copyright protection, where differing legal traditions affect the assessment, poses more of a hindrance to a clear and foreseeable harmonization of assessing blocking injunctions.

Sammanfattning

Den ökade betydelsen av immateriella rättigheter, utvecklade möjligheter till lättare spridning av skyddat material och därigenom ett ökat skyddsbehov har föranlett rättighetsinnehavare att söka nya tillvägagångssätt för bekämpning av immaterialrättsintrång online. Under det senaste årtiondet har ett nytt vapen i form av förbuds förelägganden mot mellanhänder trätt fram. Utan något faktiskt ansvar för eget intrång åläggs mellanhänder, såsom internetleverantörer och sites, att implementera blockeringsåtgärder i syfte att motverka internetanvändares åtkomst till innehåll som gjorts tillgängligt på olagligt sätt. Detta har väckt en lång rad tolkningsfrågor kring ändamålsenligheten i att belasta oskyldiga mellanhänder med långtgående förpliktelser, och synliggjort behovet av att balansera immateriella rättigheter mot grundläggande rättigheter såsom yttrande- och informationsfrihet, näringsfrihet och skydd av personuppgifter. Frågeställningarna träder särskilt fram i ljuset av försöken att utvärdera de enskilda rekvisiten för utfärdande av sådana förelägganden; tolkningarna av det gemensamma regelverket har kraftigt avvikit mellan de olika medlemsstaternas domstolar.

Genom studier av EU-domstolens praxis kombinerat med den doktrin som omgärdar de rättsliga ramarna åskådliggörs en kärna av rekvisit nödvändiga för den domstol som ställs inför en begäran om blockering. Av dessa rekvisit framträder proportionalitetskravet som särskilt svårbedömt. Dess komplexitet belyser dock snarare de ackumulerade rekvisitens samlade betydelse, varpå balanseringen av rättigheterna förblir en fråga *in casu* som ankommer på den nationella domstolen. Rekvisiten är förvisso i behov av fortsatta klargöranden och förutsebarhet, men proportionalitetsbedömningen är inte i ett sådant skriande behov av omstrukturering som vissa gör gällande. Den i hög grad nationella präglningen av immaterialrätter medlemsstater emellan utgör ett större hinder för en tydlig och förutsebar harmonisering av blockering via förbuds förelägganden.

Preface

The issues surrounding intermediaries and their role in the advancement of regulating the online environment has become a highly acknowledged and fiercely debated topic within intellectual property law; not only as a matter of investments and protection of economic interests within business law, but for society as a whole. Its intersection, or perhaps rather its conflict with fundamental freedoms and rights has served to bring it to the attention of mainstream media, and rightly so.

The seemingly straightforward question of how to apply the powers of injunctions granted to national courts by the European Union encompass wider issues concerning the way we view and use the Internet, immaterial property and basic human rights. My interest in this area awoke during my studies of European intellectual property law. What initially appeared to be a rather comprehensible legal patchwork, except for a few minor transnational issues thrown in between, slowly entangled me in a way I suspect many intellectual property lawyers may have encountered themselves. From there on it went, along with numerous lectures from visiting speakers across Europe who fuelled this interest, until I found the topic of my graduate thesis contained within a lecture given by Prof. Dr. Annette Kur of the Max Planck Institute for Innovation and Competition.

Thus, I have her along with a vast list of faculty members who have helped and challenged me during my studies at Lund and Stockholm University to thank for the achievement of this work, with a specific thank you to my supervisor Ulf Maunsbach. As for my colleagues, friends, family and Li; words cannot suffice.

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Martin Husberg

Abbreviations

CJEU	Court of Justice of the European Union
DNS	Domain Name System
DPI	Deep Packet Inspection
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
EU	European Union
EUC	Charter of Fundamental Rights of the European Union
IP	Intellectual Property
IP address	Internet Protocol Address
IPR	Intellectual Property Rights
ISP	Internet Service Provider
ISSP	Internet Society Service Provider
P2P	Peer-to-Peer
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
URL	Uniform Resource Locator
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

1 Introduction

1.1 Background

In the past decades of property law, the significance of intellectual property rights (IPR) has seen an unmatched growth. With steadily accelerated technological developments and increased internet access worldwide, IPR holders have undergone challenges to adapt and fully take advantage of both the established and potential values that IPRs infer.

Within the context of immaterial property, the possession and use thereof give rise to complex issues of where the boundaries of these rights are to be drawn. At the other end of the same spectrum lie equally recognisable and fundamental rights, such as the freedom of information and right to conduct business. Internet service providers (ISPs) and other intermediaries play an important role on the battlefield of these rights; they offer platforms upon which traders and users congregate, and where infringing acts occur. Indeed, their power in shaping the Internet is widely recognized in the instruments regulating IPR on a European Union (EU) level.

In recent years, the number of cases regarding injunctions towards intermediaries has risen. Both national and supranational courts have been posed with balancing countervailing interests against each other, signifying a trend in European intellectual property law; without bearing any direct responsibility for actual IPR infringement themselves, intermediaries are imposed with implementing blocking injunctions towards users of their services. On the one hand lies the interest of established IPR holders, and on the other the right for intermediaries to conduct business freely, as well as users' right to information. The sheer speed of the technological development and the subsequent torrent of infringing acts perpetuated via the Internet, having left the legislators and political powers tasked with

harmonizing and adapting the system lagging behind, therefore seizes the courts with the task of striking a balance. In the interest of a harmonized and consistent intellectual property law within the European Union, the question thus remain; what are the requisites for issuing a blocking order towards an intermediary in the context of an IPR infringement, and how should these requisites be interpreted and applied?

1.2 Purpose

This thesis aims to present and analyse recent development in European case law where IPR holders has sought blocking injunctions against various intermediaries, with the specific purpose of discerning the requisites required of such injunctions.

No gathered requisites are to be found in any definite article of the legal framework, and the aspects taken into account by the courts in case law are shifting and varying. This analysis serves to establish the thresholds for issuing such injunctions by discerning each requisite, and analyzing its role in the context of judicial review.

Adjudicating blocking orders often involve a balancing act between upholding intellectual property rights vis-à-vis rights of the intermediaries and users (such as the right to freedom of information, data privacy protection and freedom to conduct business) the question of where this balance can be fairly struck lies inherent. Driven too far, the responsibilities of intermediaries to comply with upholding the IPR holders' rights may amount to monitoring and censorship of the Internet. How should national courts, IPR holders and intermediaries alike interpret the requisites that form the legal basis of blocking-order injunctions, especially in the interest of a harmonized intellectual property law in the European Union?

The thesis therefore aims to intertwine these issues in its analysis in an effort to clarify the requisites for issuing blocking injunctions towards

intermediaries, with an emphasis on the balancing between countervailing rights and obligations, as well as provide a commentary of how these rights effect upon such a legal remedy should be treated *de lege ferenda*.

1.3 Method and delimitation

The author primarily makes use of a qualitative method of legal dogmatics, which examines statutory law, *travaux préparatoires*, doctrine and case law of the Court of Justice of the European Union (CJEU).

The legal dogmatic method, also referred to as the *traditional legal method*, holds different implications, despite its name. It often refers to what material is used and how, when arranging sources hierarchically according to the *particular legal doctrine*¹, where e.g. statutes takes precedence over preparatory work such as the particular legal doctrine of Swedish law (*Sw. Rättskälleläran*).

The legal dogmatic method may however also refer to its function and purpose, when determining what constitutes sound legal argumentation, as well as its immanence, i.e. its position of working and viewing this work from within the frame of *de lege lata*.²

This thesis employs the legal dogmatic method with principal regard to the material used. Therefore, it bears note to emphasize the difference in legal dogmatic methods used for sources within European Union law and other sources of international law, which therefore implies slight differences in the application of the particular legal doctrine between these two sources.

In addition to established sources within the legal dogmatic method, empirical studies and scientific reports are referred to within the material

¹ Peczenik, A., 'Volume 4: Scientia Juris, Legal Doctrine as Knowledge of Law and as a Source of Law' in Pattaro, E., (ed.) *A Treatise of Legal Philosophy and General Jurisprudence*, (Springer Netherlands, 2007), p. 3.

² Sandgren, C., *Är rättsdogmatiken dogmatisk?*, *Tidsskrift for Rettsvitenskap*, Vol. 118, nr. 4-5, (2005), p. 649.

brought forth by the legal dogmatic method in this study. Hence, the method used in this thesis serves to discern the current applicable law, but also as a foundation for analyzing said law and provide an academic base for drawing conclusions of its prospective development.

The focus lies primarily upon the matter of definitive blocking injunctions. While disconnection injunctions, de-indexing and interlocutory injunctions often share the same legal foundation and may provide relevant argumentation, other legal remedies such as damages are not examined, nor is the related issue of secondary tort liability explored outside its relevance to injunctions. The rising trend of graduate response schemes³ in connection to blocking injunctions is not presented or analysed more so than where it serves to further the analysis of the particular topics of this study. The presentations and analysis of the relevant directives referred to in 1.4 below are all limited to their relevance concerning blocking injunctions.

1.4 Sources of law

EU law and its endeavour towards a fruitful harmonization is the core of this thesis. Therefore, the legal sources used are those commonly found in European Union law; primarily intellectual property law focusing on copyright and, to a lesser extent, trademark rights, along with the relevant fundamental rights of freedom of information, data privacy protection and the right to conduct a business, mainly found in the Charter of Fundamental Rights of the European Union (EUC), and the Data Protection Directive.⁴

As a legal person, its international treaties bind the EU. The influence and impact of such treaties and agreements cannot be overlooked. Though they

³ For a more in-depth look at graduate response schemes, see Edwards, L., *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, (WIPO Study, 2011), pp. 30 ff.

⁴ *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, OJ L 281, 23.11.1995.

are to a large extent now already incorporated into the European Union's "own" legal framework, the importance of its cooperation with the World Intellectual Property Organization (WIPO) and the EU's membership in the World Trade Organization (WTO), in particular with regard to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) of the WIPO, and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) of the WTO respectively, cannot be overlooked. Two of the main EU directives of this thesis are primarily 'European' implementations of these agreements. The Infosoc Directive⁵ implemented the WCT and the WPPT, and therefore covers its material aspects and then some.⁶ Similarly, TRIPS has served as an important stepping-stone in drafting the Enforcement Directive⁷, which in many aspects also goes beyond the minimum requirements of IPR protection stipulated in TRIPS.⁸ The E-Commerce Directive⁹ is also influenced by the WCT in its construction; this is further described in chapter 2.2.

Having provided the foundation for its subsequent EU law, the material aspects of these international agreements are enshrined within the legal framework described in chapter 2 of this thesis. Further reference to TRIPS, the WCT and the WPPT is consequently purposely excluded, though the importance of adherence to its articles and principles by way of *pacta sunt servanda* is, of course, always present.

⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001.

⁶ Stamatoudi, I. and Torremans, P., *EU Copyright Law: A Commentary* (Edward Elgar, 2014), p. 397.

⁷ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ L 195, 2.6.2004.

⁸ Vrins, O. and Schneider, M., 'Cross-Border Enforcement of Intellectual Property: The European Union', in Torremans, P., (ed.) *Research Handbook on Cross-border Enforcement of Intellectual Property*, (Edward Elgar, 2014), p. 176.

⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000.

1.5 Outline

The field of IPR infringement in an online environment provides a multitude of interplaying aspects. In trying to assess the requisites necessary for a blocking-order, an IPR infringement must have been deemed to take place. Correspondingly, this thesis takes its premise from an outset of actual infringements having occurred, and begins by examining the legal basis for the injunctions at hand.

The thesis therefore begins with a presentation of the relevant legal framework of allowing injunctions toward intermediaries, most notably the three EU directives at hand.

From these sources, the actual responsibility of the intermediary may be determined, which leads us to examine the boundaries of what measures can be demanded of intermediaries. The relevant statutes and directives that form the basis of the boundaries are presented and inserted into the context of this thesis. These consist of the fundamental, countervailing rights at hand.

Subsequently, the application and interpretation of the aforementioned legal framework is examined through case law of the CJEU.

Lastly, the thesis intends to summarize the requisites for issuing blocking-orders towards Internet intermediaries, as well as an analysis of how these blocking orders must be drafted. Each issue connected to the requisites of blocking order-injunctions is examined individually. The analysis also intends to provide a comment on how these injunctions may affect public interests as well as the harmonization process for blocking injunctions in the European Union, and how it can and should function *de lege ferenda*.

2 Legal foundation of injunctions

2.1 IPR rights and The EU Charter

The importance of national regulation is an aspect that sets IPRs apart from other forms of protection under the umbrella of EU law. For copyright protection, this is especially true. As a relatively new phenomenon of property, the field of IPR protection is characterized by being chiefly maintained and enforced on a national level; international treaties and EU law often serve to pinpoint common features which the member states of the European Union has been able to agree upon, but the lack of harmonization is still evident.¹⁰ With this in mind, the protection of IPRs offered on a EU level stem from a multitude of sources. Applying the particular legal doctrine, Article 17 (2) of the EUC, which concisely reads “intellectual property shall be protected” serves as a particularly manifest foundation for the recognition of IPRs, given the EUCs elevation to a document of the same legal value as the European Union treaties¹¹ by way of the adoption of the Lisbon Treaty in 2009.¹²

Battling IPR infringement, the right holders possess a wide range of enforcement possibilities consisting of both criminal and civil sanctions depending on the type of infringement. Injunctions serve as a possibility for IPR holders to force intermediaries whose services are relied upon by a third party infringing the rights of the IPR holder to take action. The legal basis for these injunctions consists of the following three directives presented below.

¹⁰ Kur, A. and Dreier, T., *European Intellectual Property Law – Text Cases, and Materials*, (Edward Elgar, 2013) pp. 2-12.

¹¹ *Treaty on the European Union*, and *Treaty on the Functioning of the European Union*, OJ C 326, 26.10.2012.

¹² *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, OJ C 306, 17.12.2007.

2.2 The E-Commerce Directive

Beginning with the E-Commerce Directive, the European Union sought provide legal certainty for both businesses and private persons; an important part of this was to harmonize certain limits of liabilities for Internet intermediaries in their role as information society service providers (ISSPs)¹³. The definition in article 2 of the directive describes the intermediary as a ‘provider of an information society service’, and ‘information society services’ are further defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”¹⁴ As sweeping as this definition may be, its application rarely becomes an issue of blocking injunction proceedings.¹⁵

The overarching goal of the directive is painted with smaller brush strokes; recital 40 of the directive states its *raison d’être* as fostering “the development of rapid and reliable procedures for removing and disabling access to illegal information”, and in recital 41 striking “a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based”; such mechanisms should, according to the directive, be developed voluntarily between the concerned parties. The E-Commerce Directive functions as a horizontal instrument of minimum harmonization, regulating intermediaries’ liabilities across all kind of content, with the exceptions of gambling and privacy protection,¹⁶ although the latter exception has come under scrutiny within the directive as well.

¹³ ‘Information society service providers’ are but one of many definitions regarding Internet intermediaries; further aspects on intermediaries’ differing definitions and roles are presented below at 3.1.

¹⁴ E-Commerce Directive, Article 2 (a) and (b), with reference to the Technical Standards and Regulations Directive 98/34/EC, Article 1.

¹⁵ Defining the intermediary and its *role* may however prove important with regard to the assessment of proportionality; this is treated below at 3.1.2 and 5.7.

¹⁶ Edwards, *supra* note 3, p. 7.

Given the economic market importance of the Internet, the directive seeks to preclude a fragmentation of the internal market.¹⁷ Avoiding such fragmentation thus requires a certain amount of foreseeability and legal certainty for the intermediaries. This is achieved through the construction of several “safe harbours”. This mode of legislation, which goes about defining what intermediaries are *not* liable for, partly demonstrates how the E-Commerce Directive models itself somewhat upon the WCT and the way liability exemptions were set out therein.¹⁸

Speaking within the context of injunctions, all of the directive’s main points of interest lie in its *liability exemptions*. These exemptions form the “safe harbours” of Internet intermediaries; grounds for which they may escape liability even if an IPR infringement has occurred.

The safe harbours are found in Article 12 (the *mere conduit defence*) aimed at intermediaries merely transmitting information or providing access to a communication network; Article 13 concerning *caching*, a form of temporary and automatized storage process; Article 14 concerning third-party content made available on the intermediary’s server (the *hosting defence*); and lastly, the prohibition for member states to impose upon the ISP a general obligation to monitor the information transmitted or stored (*monitoring prohibition*), found in Article 15.¹⁹

Each safe harbour requires a level of *passivity*, which differs from each other. The passivity is usually based on to what extent the intermediary selects and modifies the data it stores, as well as to what extent it selects the recipient of the data. The mere conduit defence does not allow any initiative to the above. Caching allows the intermediary to select the data and the recipient, but allows no modification. The hosting defence has the lowest

¹⁷ Feiler, L., *Website Blocking Injunctions under EU and U.S. Copyright Law—Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?*, Transatlantic Technology Law Forum (TTLF) Working Paper No. 13, (2012), pp. 67-68. Available at: https://www.law.stanford.edu/sites/default/files/publication/203758/doc/slspublic/feiler_wp_13.pdf, last visited on February 6, 2015.

¹⁸ Kur, *supra* note 10, p. 451.

¹⁹ See further below at 3.3.3.

requirement of passivity; as long as the user of the intermediary's services does not act under the authority or control of the intermediary, the passivity requirement is fulfilled.²⁰

However, these exemptions are not without derogations and exceptions; a legal basis for IPR holders to seek injunctions is embedded directly in Article 12 (3) itself, which expressly allows for injunctions towards intermediaries in order to combat or prevent infringements. As per the hosting defence, an ISP may only rely upon it up until the point where they attain knowledge of the infringing activities; when informed, they must take immediate action to remove access to the infringing content.

A limit to the monitoring prohibition is found in recital 47 of the directive, which states that the prohibition of Article 15 “does not concern monitoring obligations in a specific case”; only “obligations of a general nature”. This allows courts and national authorities to order an ISP to monitor and filter their content for a specific website.²¹ The specificity of a blocking injunction is thus revealed as a relevant factor here.

Further, the “duty of care” found in recital 48 of the directive provides further exemption from the monitoring prohibition, as ISPs are required to “apply duties of care [...] specified by national law, in order to detect and prevent certain types of illegal activities”. However, this duty is usually understood to function as a tool for combating illegal activities concerning criminal and public law rather than private interests of IPR holders, though the ambiguous wording does leave its purpose open to interpretation.²²

The E-Commerce Directive (specifically its Article 14) provided IPR holders with a supranational legal framework for issuing warnings to intermediaries that they host illegal content, and risk liability of IPR

²⁰ DLA Piper, *EU Study on the Legal Analysis of a Single Market for the Information Society: New Rules for a New Age? – 6. Liability of Online Intermediaries*, EU Publications Office, (2009), pp. 8-9.

²¹ Stamatoudi, *supra* note 6, p. 508.

²² Edwards, *supra* note 3, p. 10.

infringement by not taking action after having been informed; these so-called “notice and takedown” procedures has lead to the intermediaries (rather than the liable infringers) becoming the prominent “targets” through the use of injunctions.²³

2.3 The Infosoc Directive

The Infosoc Directive intended to harmonize the scope of protection regarding copyright and related rights. For injunctions, this resulted in a clear and concise legal basis afforded in Article 8 (3):

“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”

As evident in its ninth recital, the Infosoc Directive is to provide IPR holders with a “high level of protection”, indicating a strong footing for copyright holders. For the sake of clarity, recital 45 states that these injunctions are unaffected by any liability limitations found in the E-Commerce Directive; indeed, the implementation date of both directives were coordinated for reasons such as interplays of these kind.²⁴

The role of intermediaries in enforcing the Infosoc Directive was foretold in recital 59, which states; “the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end.” Even so, this wording may be interpreted *e contrario* as well, implying that courts may also note possible situations where the intermediary is a rather ill suited target for an injunction.²⁵

²³ Vriens and Schneider, *supra* note 8, pp. 296-297.

²⁴ Stamatoudi, *supra* note 6, p. 513-514.

²⁵ Savola, P., *Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers*, Journal of Intellectual Property, Information Technology and

2.4 The Enforcement Directive

After the introduction and recognition of IPRs through the E-Commerce and Infosoc directives, enforcement of these rights on a EU level went largely unaddressed until 2004. The Enforcement Directive was introduced as a horizontal instrument creating rights and obligations for private parties. The directive refers to all types of IPRs, including *inter alia* copyright and related rights and trademark rights.²⁶

Article 11 of the Enforcement Directive functions as an all-encompassing basis for allowing IPR holders to seek injunctions towards intermediaries. Its third sentence reads:

“Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.”

Article 3 of the Enforcement Directive summarizes the scope of criteria necessary for justifying any remedy available under the directive, including injunctions, and states that injunctions shall:

“...be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”

Recital 23 of the directive leaves the conditions and procedures of these injunctions in the hand of the member states. Again, the pursuit of

Electronic Commerce Law (JIPITEC) Vol. 5, (2014) p. 122, see also Feiler, *supra* note 17, p. 47.

²⁶ Kur, *supra* note 10, pp. 440-441.

coherence is evident as the recital references the harmonization efforts of the Infosoc Directive, which happens to utilize the same principle of subsidiarity.

Article 2 of the Enforcement Directive states that the directive leaves also the provisions of the E-Commerce Directive unaffected; an important aspect with regards to the so-called “safe harbours” offered by the latter.²⁷

Article 8 of the Enforcement Directive provides the member states with the option of ensuring that IPR holders may obtain information on the “origin and distribution networks” behind the infringement. Although already pre-existent in several states, it became a novelty in some through the adoption of the directive.²⁸

²⁷ Headdon, T., *Beyond liability: on the availability and scope of injunctions against online intermediaries after L’Oreal v eBay*, European Intellectual Property Review (EIPR) Vol. 34, nr. 3 (2012), p. 138.

²⁸ European Commission, *Commission Staff Working Document: Analysis of the application of Directive 2004/48/EC*, COM (2010) 779, p. 11.

3 Range of injunctions

3.1 The Role of the Intermediary

The obligations of Internet intermediaries differ depending on a number of factors, *inter alia* their role in the chain of communications. Before defining intermediaries in the sense of EU's legal framework, an analysis of their underlying function is necessary; especially as to what roles they play in practice.

3.1.1 Connectivity and hosting providers

An important practical distinction between various intermediaries is that of 'connectivity provider' vis-à-vis 'hosting provider', wherein the former acts as the main provider of communications; they may carry the role of *access network provider*, i.e. providing the initial access to connectivity (a "backbone provider"), offering connectivity between access network providers or peer-to-peer connectivity.²⁹ The *hosting provider* is situated further downstream, as it provides hosting of web sites or files. In the context of blocking injunctions stemming from EU law, there is no exact legal definition of these two types of information society service providers to be found, as they are both subsumed under the category of "service provider" in the E-Commerce Directive.³⁰

These days, the line separating 'pure' connectivity providers from other types of Information society service providers has become somewhat blurred, as telecommunication providers (such as phone companies) and other actors previously categorized as 'backbone' providers have expanded their business models to include more content-based services, while the role

²⁹ Savola, *supra* note 25, p. 117 with reference to the CJEU's analysis in *L'Oreal v. eBay* (C-324/09).

³⁰ See above 2.2.

of ‘traditional’ ISPs has experienced a mirrored development, developing services reminiscent of ‘backbone’ providers.³¹ However, the distinction may be relevant as connectivity providers and hosting providers face different thresholds for incurring liability – and as discussed below in chapter 5.7, these differences may in turn affect the proportionality-assessment of injunctions.

How do these liabilities differ? As mentioned above in 2.2, connectivity providers and other *mere conduit* providers are exempt from liability under Article 12 of the E-Commerce Directive. This “safe harbour” is only valid when the ISPs role is that of a passive and neutral intermediary. For hosting providers, their “safe harbour” is built upon lack of knowledge and awareness – when obtaining awareness of infringement, the exemption is only valid if they act expeditiously to remove or disable access to the infringing content.³²

3.1.2 Defining ‘intermediaries’

The E-Commerce Directive defines the intermediary as a ‘provider of an information society service’, i.e. an ISSP.³³ The Internet service provider (ISP) falls under this category, and is usually treated as a synonym; something a quick study of the CJEU case law aptly confirms. A broad definition of ISSPs and ISPs would therefore include anyone who provides ‘technical support and services in and around the internet’.³⁴ This encompasses connectivity *and* hosting providers, the latter of which includes forums of social media and “user-mediated content” such as Facebook and YouTube; online marketplaces such as eBay, and cloud

³¹ Edwards, *supra* note 3, p. 4.

³² Savola, *supra* note 25, p. 117.

³³ E-Commerce Directive, Article 2 (a) and (b), with reference to the Technical Standards and Regulations Directive 98/34/EC, Article 1, see above 2.2.

³⁴ Kur, *supra* note 10, p. 449, see also Stamatoudi, I., ‘The Role of Internet Service Providers in Copyright Infringements on the Internet under EU Law’, in Torremans, P., (ed.) *Research Handbook on Cross-border Enforcement of Intellectual Property*, (Edward Elgar, 2014), p. 789.

computing services. Search engines such as Google and Bing fall roughly into the latter category, although their *modus operandi* differ somewhat – see below in 3.1.3.2.

Hence, the spectrum is incredibly wide, and the ‘ISP’ is to be construed as a broad concept.³⁵ The ambiguity of the definition of an ISP, as well as many other key aspects in defining their role and in consequence their liability, has been noted time and again.³⁶ Perhaps a certain amount of flexibility must be afforded given the rapid development described above. The broadest definition available is used in this thesis; the term ‘ISP’ therefore encompasses all kinds of ‘information society service providers’, and covers both connectivity and hosting providers; the latter including marketplaces, search engines and forums. To further illustrate this, article 8 (3) of the Infosoc Directive defines ‘intermediary’ as any provider “who carries a third party’s infringement”, which is an equally valid definition consistent with the definitions described above. One may also note that according to the E-Commerce Directive, an ISP may be a legal as well as a natural person.³⁷

In conclusion, the terms ‘ISSP’, ‘ISP’ and ‘intermediary’ all represent the same legal subject with regard to blocking injunctions; as they are used interchangeably in case law, this must be noted for the purpose of this thesis.

The further relevant distinctions between intermediaries requires a few words on the types of services and *modus operandi* used in the most important aspects of IPR infringement.

³⁵ Stamatoudi, *supra* note 6, p. 507, and European Commission, *supra* note 28, p. 14.

³⁶ DLA Piper, *supra* note 20, pp. 10-18, see also Feiler, *supra* note 17, p. 14.

³⁷ Edwards, *supra* note 3, p. 8.

3.1.3 Different technical modes of infringement

3.1.3.1 Peer-to-peer

Peer-to-peer (P2P) file sharing is a method of infringement in which illegal content is downloaded directly between users through the aid of intermediaries. P2P infringement became widespread through intermediaries such as Napster, Grokster, Limewire and Kazaa. This technique later evolved with the advent of the “BitTorrent” protocol. Without going into detail, sites such as the famously notorious Pirate Bay acts as intermediaries in the sense of hosting not the illegal content itself, but torrent files and trackers which enable P2P users to engage in file sharing.³⁸

3.1.3.2 Linking

The issue of *linking* and copyright was long heavily debated and plagued by disharmony in national courts. As the importance of search engines and various ISPs in “organizing” the Internet grew, it became subject for discussion and investigation by the European Commission.

It finally fell upon the ECJ to take a stand on this matter by way of its judgment in *Svensson v. Retriever C-466/12*. Websites who via hyperlinks redirect users to protected works which are already made freely available on the internet were found exempt from liability of copyright infringement due to the works having already been communicated to the same public by the original publication; the key here was thus whether communication (by linking) took place to a *new public*, to which the court responded negatively.

Note however that the judgment only concerned linking to other sites; not imbedded links. For Google and other search engines, who in essence only

³⁸ Wesselingh, E.M, *Website Blocking: Evolution or Revolution? 10 Years of Copyright Enforcement by Private Third Parties*, Internet, Law and Politics. A Decade of Transformations, Proceedings of the 10th International Conference on Internet, Law & Politics. Universitat Oberta de Catalunya, (Barcelona, 2014), p. 62.

create links to material spread over the Internet and seldom make us of imbedded links, this was of great importance in the context of notice and takedown procedures, and as such indirectly for injunctions.³⁹

3.1.3.3 Streaming

In the past five years, IPR infringement through direct streaming of illegal content from hosting sites has become the prevalent form of copyright infringement online. The most severe disadvantage IPR holders face is simple; a high level of anonymity afforded to the users engaging in such behaviour. When engaging in P2P file sharing, users usually disclose their IP address; IPR holders could accordingly participate in this activity themselves, allowing to obtain both information and evidence on P2P file sharer's identity and IPR infringement. Through streaming, an IPR holder cannot obtain the identity with the same ease as through P2P-technology, seeing how the user's IP-address is shared only with the website linking the content and the hosting provider.⁴⁰ The website in question may further be hosted in places with weak jurisdiction. The ease with which these infringements are perpetrated contributes to both its expanse and difficulty to combat.

3.1.4 The choice of targeting intermediaries

The inefficiency in pursuing each and every infringement at its source became apparent for IPR holders everywhere quite soon. Although it may seem harsh to impose responsibility on intermediaries for the actions of third parties, the often-present contractual relationship between ISPs and their subscribers, paired with their close proximity to the technical solution, i.e. the intermediary being the one best placed to disconnect users or otherwise "block" the infringements, serves as the main causes for IPR

³⁹ Edwards, *supra* note 3, pp. 13-14.

⁴⁰ Feiler, *supra* note 17, p. 3.

holders seeking injunctions towards intermediaries.⁴¹ Additionally, the prospects of garnering economic compensation from an established intermediary (who fails to comply with a blocking injunction) rather than suing a private infringer would usually be deemed more favourable. Understandably, during the early days of establishing the E-Commerce Directive ISPs sought to classify themselves as neutral carriers of information with regard to the liabilities they potentially faced.⁴²

3.1.4.1 Choosing which intermediary

There may be several intermediaries in the chain of infringing communication – and blocking may be allowed towards several of them. The choice usually lies between the ISPs providing Internet connectivity to the host of the infringing website, or towards the end-users’ ISP, and lastly towards “transit” ISPs situated between the former two. Of these, the end-users’ connectivity provider has been the natural target for most IPR holders.⁴³

Why is this? Given the above dilemma of Internet user’s anonymity⁴⁴ when taking advantage of infringing streaming services, paired with the hosting provider’s safe harbour of Article 14 in the E-Commerce Directive⁴⁵ and the linking website’s location often to be found in jurisdictions of low copyright protection, “targeting” the end-user’s connectivity provider best serves the IPR holders’ interest, as it “strikes” a wider and more effective blow.⁴⁶

⁴¹ Headdon, *supra* note 27, p. 137.

⁴² Edwards, *supra* note 3, p. 5.

⁴³ Savola, P., *The Ultimate Copyright Shopping Opportunity – Jurisdiction and Choice of Law in Website Blocking Injunctions*, International Review of Intellectual Property and Competition Law (IIC), Vol. 45, (2014), pp. 305-306, and Wesselingh, *supra* note 38, p. 63.

⁴⁴ See above 3.1.3.3.

⁴⁵ Connectivity providers also benefit from safe harbours; however, in order to target hosting providers, IPR holders must continuously screen their activities. A hosting provider may also more easily transfer the content elsewhere.

⁴⁶ Feiler, *supra* note 17, pp. 3-4.

3.1.4.2 Liability of the intermediary

As mentioned, the intermediary need not be liable *per se* – it has been argued whether national law may require at least a secondary liability in order to grant an injunction, but this might run contrary to the minimum requirement of protection awarded by e.g. Art 8 (3) of the Infosoc Directive, as it would severely restrict the possibilities of obtaining an injunction. The fact that many intermediaries cannot fall liable due to the safe harbours of the E-Commerce Directive interplays with this argument.⁴⁷ The European Commission observed the difficulty of correctly implementing the legal framework of injunctions, in particular when distinguishing its construction of an “autonomous” responsibility from actual liability, with several member states often requiring the existence of secondary liability.⁴⁸

Based on the central role played by intermediaries, the IPR holders have a logical economic interest in expanding their liability. When this is deemed impossible, for instance due to the safe harbours of the E-Commerce Directive, the injunctions serve as an indirect way of accomplishing the same goals.⁴⁹ In trying to ease the sense of expanding liabilities, the European Commission propagated an alternate view in their analysis of the Enforcement Directive’s application, stating that the intermediary is simply often in the best position to end infringements⁵⁰, and the injunctions should therefore not be viewed as a penalty.⁵¹

For P2P intermediaries, the assessment has focused on the amount of evidence relating to the intent of infringement –as the Pirate Bay and similar sites usually are deemed as structured specifically for illegal file sharing; hence, *intent* is easily proven. For user-mediated content sites such as YouTube, the assessment has rather focused on the actual knowledge of

⁴⁷ Husovec, M. and Peguera, M., *Much Ado About Little: Privately Litigated Internet Disconnection Injunctions*, International Review of Intellectual Property and Competition Law (IIC) Vol. 2, (2015), pp. 3 and 15.

⁴⁸ European Commission, *supra* note 28, p. 18.

⁴⁹ Savola, *supra* note 43, p. 290.

⁵⁰ Cf. recital 59 of the Infosoc Directive and 2.2 above.

⁵¹ European Commission, *supra* note 28, p. 16.

infringing content, and as such the same assessments that occur when examining the boundaries of liability exemptions for ISPs become more relevant than questions of whether the ISP has any intent of infringement or at least financial gain thereof.⁵²

3.2 Modes of blocking

As for the implementation of a blocking injunction, there are several modes available. Through recent CJEU case law, the mode of blocking is now an open choice for the intermediaries in any court-ordered injunction.⁵³ A court order could previously be delivered in the form of a *targeted order* specifying the type of blocking mode to be implemented by the intermediary, in contrast to a *generic order*, which simply states the goal of the injunction. The modes are given a simplified, brief description in the following, with emphasis placed on their relative cost, invasiveness and ease of circumvention.

3.2.1 DNS blocking

The Domain Name System (DNS) translates a domain name (such as www.infringer.com) into a specific Internet Protocol address (IP address). By adjusting their DNS server settings, a connectivity provider may block access to the domain in question for all its users. As a rather primitive and imprecise way of denying access to a specific website, DNS blocking is easily circumvented by Internet users.⁵⁴ DNS blocking is relatively inexpensive to implement; however, it is plagued with issues of inefficacy and a notable risk of over-blocking, as sites with both legal and illegal content suffers a complete blocking of its entire domain name.⁵⁵

⁵² Edwards, *supra* note 3, p. 61.

⁵³ See below at 4.4.

⁵⁴ Feiler, *supra* note 17, p. 7.

⁵⁵ Wang, F. F., 'Site-blocking Orders in the EU: Justifications and Feasibility', 14th Annual Intellectual Property Scholars Conference, Boalt Hall School of Law, University of California, Berkeley, August 7-8, (2014), p. 2. Available at:

3.2.2 IP blocking

When blocking an IP address, the connectivity provider blacklists a certain IP address, shutting down traffic to the server of the infringing website – a blocking method more difficult to circumvent than DNS blocking, though far from impossible.⁵⁶ As IP addresses often store a vast number of websites, IP blocking bears the risk of “over blocking”; as a result, sites carrying mainly legal content may be unintentionally affected.⁵⁷ IP blocking is cost efficient in its simplicity. The ease with which it may be circumvented, i.e. its efficiency, lies somewhere between DNS and DPI-enhanced URL blocking; the latter described below.⁵⁸

3.2.3 URL blocking

The third main type of blocking used consists of the ISP examining the actual content of the information with deeper scrutiny than IP blocking; in layman-terms, it filters out what websites to block by a more invasive and costly procedure than IP or DNS blocking; URL blocking is thus more difficult for both the website operator and the user to circumvent, and allows for more precise blocking.⁵⁹ URL blocking may be implemented in various ways. One common method is that of Deep Packet Inspection (DPI), in which the actual data transmitted is monitored, and not only the type.⁶⁰ As a crude allegory, the difference may be likened to opening a letter and reading its contents, rather than merely judging it by its “cover”.

https://www.law.berkeley.edu/files/Wang_Faye_Fangfei_IPSC_paper_2014.pdf

last visited on February 12, 2015.

⁵⁶ Husovec, M., *Injunctions against Innocent Third Parties: The Case of Website Blocking*, JIPITEC, Vol. 4, (2013), p. 122. Available at:

http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2318631_code1137858.pdf?abstractid=2257232&mirid=1, last visited on February 13, 2015.

⁵⁷ Feiler, *supra* note 17, pp. 9-10.

⁵⁸ Feiler, *supra* note 17, p. 9.

⁵⁹ Feiler, *supra* note 17, pp. 10-11, and Edwards, *supra* note 3, p. 53.

⁶⁰ Edwards, *supra* note 3, p. 53.

3.3 Countervailing rights to injunctions

3.3.1 Right to Freedom of Information

The right to freedom of information is a cornerstone of all democratic systems, and as such recognized as a fundamental right enshrined in Article 11 of the EUC. The role of the Internet in enabling a free and effective exchange of ideas, opinions and information cannot be overstated. When information provided on the Internet is blocked it violates this fundamental right; at least on the outset. Blocking injunctions may thus be subject to a balancing act, as inferred from recital 2 of the Enforcement Directive, which expressively states that the freedom of information and expression shall not be hampered by the enforcement of IP rights. A disproportionate use of the enforcement options available is a possible future concern raised *inter alia* by the Council of Europe.⁶¹

3.3.2 Right to Freely Conduct Business

Article 16 of the EUC provides protection for the right to freely conduct business as yet another fundamental right. Its counterweight towards IPR enforcement is indeed obvious in cases where intermediaries are forced, by court order, to implement injunctions that are both time-consuming and costly. However, when this right has been balanced against the forced co-opt enforcement of IP rights, the level of infringement in the intermediary's freedom to conduct business would seem to have to reach levels which are remarkably flagrant in order for Article 16 to deny a blocking injunction.⁶² This is further elaborated upon in chapter 5.5.

⁶¹ Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, Foreign Affairs Council Meeting (2014), pp. 1 and 18.

⁶² O'Sullivan, K., *Enforcing copyright online: internet service provider obligations and the European Charter of Human Rights*, *European Intellectual Property Review*, Vol. 36, Nr. 9, (2014), pp. 577-579.

3.3.3 Prohibition of imposing monitoring

A more specific countervailing right is enshrined in Article 15 of the E-Commerce Directive. In order to set an absolute limit of the burdens that may be imposed upon intermediaries, the law of a member state cannot impose a general obligation to monitor the information they transmit or store, establishing a “ceiling” level of enforcement available through the directive.⁶³

This conflict was aptly scrutinized in the landmark CJEU case of *Scarlet v. Sabam*; for the presentation and analysis of this case, see below at 4.3.

3.3.4 Data privacy protection

The concern for data privacy protection is currently regulated within the Data Protection Directive⁶⁴, which is set to be superseded by a uniform regulation, at the time of writing held under scrutiny and halted in the European Parliament due to differences of opinion between the member states regarding *inter alia* the scope of protection afforded.

Article 5 obligates member states to provide confidentiality of private information, while Article 15 may restrict this obligation in the interest of, *inter alia*, national and public security, defence and prosecution of criminal offences – but not civil proceedings.

Article 2 of the Data Protection Directive provides a definition of ‘personal data’, and though the interpretations of ‘personal data’ vary between member states, the information required to identify IP infringers (usually the IP address) constitutes personal data in most jurisdictions. As such, there must be a legitimate interest on par with the ‘data subject’s’ interest when

⁶³ Stamatoudi, *supra* note 34, pp. 795-796.

⁶⁴ The main focus of the Data Protection Directive lies closer to the debate of the *right to be forgotten* best illustrated in the case of *Google Spain v. AEPD* (C-131/12), but as stated in 1.3, its treatment in this thesis is limited to its relevance to blocking injunctions.

harvesting and storing the personal data (which in turn is a requirement for proving the existence of an infringement, one of the absolute requirements for blocking injunctions), and as the CJEU case of *Promusicae* below illustrates,⁶⁵ the IPR holders interest doesn't necessarily outweigh privacy concerns.⁶⁶

3.4 Summarized topics of blocking order injunctions

From a simplified viewpoint, the debate concerning blocking injunctions concerns appropriate standards, ranging from the minimum level of protection afforded to IP rights to its maximum "ceiling".⁶⁷ The issues at hand have crystallized themselves through debate within doctrine and, above all, the case law submitted to the CJEU.

Before delving into the court's examination of these issues, they may be summarized and sorted into the following categories below.

Type of orders – generic or targeted (i.e. specific) orders

Besides a variation in the range of measures imposed⁶⁸, the question of whether a court may issue a targeted order was addressed by the CJEU as late as 2014. Moreover, the outcome has been criticised in doctrine and by the industry; the lack of guidance from the court, which instil an obligation upon an innocent intermediary without any guidance on how to fulfil it, may prove harmful to the business of intermediaries. Without adequately harmonizing how far this obligation goes, this may also lead to differing standards throughout the Union.⁶⁹

⁶⁵ See below 4.1.

⁶⁶ Edwards, *supra* note 3, pp. 40-41.

⁶⁷ Husovec, *supra* note 56, pp. 117-118.

⁶⁸ DLA Piper, *supra* note 20, p. 22.

⁶⁹ Wang, *supra* note 55, p. 12.

The balancing of burdens between the IPR holder and the intermediary

The cost of implementation is the main focus of balancing the burdens, and while the economical burden usually has befallen the intermediary (within reasonable extent), this topic is still debated as the proper balance has yet to find an objective standard.⁷⁰

Legality

The legal framework contains an abundance of ambiguous terms lacking autonomous and harmonized definitions. Thus, questions of legal certainty and foreseeability have plagued both decisions and subsequent doctrine concerning blocking injunctions.⁷¹ For example, the European Commission's assessment of the Enforcement Directive has raised issues concerning diverging interpretations of evidence and the level of certainty required by the courts when granting injunctions.⁷² The indefinite connection to liability mentioned above in 3.1.4.2 formed part of this issue in the early days of the Enforcement Directive's application.

Proportionality

Last but undoubtedly not least, the proportionality assessment required by Article 3 of the Enforcement Directive is one of the most notably discussed and scrutinized issues, with openly varying case law in national courts.⁷³ Weighing the countervailing rights of the IPR holders towards the interests and rights of the public, the intermediaries and the affected end-users has proven complicated.⁷⁴

The following chapter examines how these issues have been approached by the CJEU when applying the described legal framework.

⁷⁰ Husovec, *supra* note 56, p. 125.

⁷¹ Husovec, *supra* note 56, pp. 123-124.

⁷² Kur, *supra* note 10, pp. 445-446.

⁷³ Kur, *supra* note 10, p. 453, and DLA Piper, *supra* note 20, p. 22.

⁷⁴ European Commission, *supra* note 28, p. 12.

4 CJEU Injunction Case Law

In lack of a harmonized and standard formula applicable for issuing injunctions, a multitude of aspects (such as those of efficiency, proportionality, fairness and reasonability, all provided for in Article 3 of the Enforcement Directive) suddenly required interpretation when determining the validity of a sought blocking order. This required the courts to examine the arguments by IPR holders and defendants on a case-by-case basis.⁷⁵ In national courts, injunctions have been granted in most, but not all, instances.⁷⁶ This chapter examines four prominent cases that found their way to the CJEU and cumulatively contain the essentials for determining the requisites of blocking injunctions.

4.1 *Promusicae v. Telefonica*

The case of *Promusicae v. Telefónica* was to be amongst the first of many cases where representatives of IPR holders sue a connectivity provider intermediary demanding an injunction.⁷⁷ When trying to extract personal data information on Telefónica's end-users engaged in P2P file sharing, the CJEU was faced with the question of whether such a request could be sought in a civil proceeding on the basis of EU law protecting IP rights such as Article 8 of the Infosoc Directive.⁷⁸ The Court clarified, with reference to the E-Commerce Directive, the Infosoc Directive, the Enforcement Directive and the Data Protection Directive, that such a request must weigh the interests of the IPR holders against the fundamental rights of privacy, as well as other fundamental rights enshrined in the directives. The privacy obligation laid down in the Data Protection Directive, which references the right to privacy enshrined in Article 7 and 8 of the EUC, must accordingly

⁷⁵ Savola, *supra* note 25, p. 119.

⁷⁶ Feiler, *supra* note 17, p. 22.

⁷⁷ *Promusicae v. Telefónica de España* (C-275/06).

⁷⁸ *Promusicae v. Telefonica*, para 58.

be balanced towards the IP rights and adjoining rights to an effective remedy.⁷⁹ *Promusicae* became the first CJEU verdict stating that IP rights are far from absolute, and that a proportionality assessment is always inherent when enforcing them.

4.2 L’Oreal v. eBay

In 2007, L’Oreal brought a lawsuit against eBay to the UK High Court for infringement of their trade mark rights.⁸⁰ The case concerned both the liability of eBay, as well as possibilities of injunctive relief. Although the subject-matter of the IP rights concerned trade marks rather than the more often debated copyright, all of the aspects below are relevant for nearly all cases of IP infringement injunctions towards intermediaries.

According to the CJEU, eBay enjoyed the liability exemption of the hosting defence under Article 14 of the E-Commerce Directive, due to their passive role.⁸¹ As mentioned above in 3.1.4.2, liability was at the time a possible factor when assessing the validity of an injunction. The CJEU chose to address this notion, concluding that the operator of a marketplace may, on the basis of the third sentence in Article 11 of the Enforcement Directive, be ordered to take measures against infringers using their services *irrespective of their own liability*. Contrary to some member states’ requirement of determining liability on the part of the intermediary, liability was proven as unnecessary, and ruled out as a requisite *per se*.⁸²

It is also noteworthy that the injunctions imposed on an intermediary also may entail preventing *future* infringements. Injunctions may therefore also carry a *preventive* function – i.e. it is not necessary that an infringement

⁷⁹ *Promusicae v. Telefonica*, paras. 64-70.

⁸⁰ *L’Oreal v. eBay* (C-324/09).

⁸¹ *L’Oreal v. eBay*, para. 124, see also the distinctive difference in the required level of passivity for different providers described in chapter 2.2.

⁸² *L’Oreal v. eBay*, paras. 127-134. This reasoning of the CJEU echoes in the European Commissions analysis, see *supra* note 28, p. 16; without a literal reference to *L’Oreal v. eBay*, but quite obviously influenced.

already has been committed (as suggested by the wording in Art 8 (3) Infosoc and Art 11 of the Enforcement Directive), but it is sufficient that the injunction may prevent any future infringements of the same kind that has occurred. If, for example, an injunction is brought based on infringement of type A by infringer X, the injunction also serves to enforce the intermediary to prevent infringements of type A by any other infringer. This preventive function was balanced towards the monitoring prohibition of Article 15 in the E-Commerce Directive, with an outcome that leaves the reader uncertain to its actual extent as the type of infringement was described only as “further infringements of that kind”, without any further definition.⁸³

The principle of *effet utile*, i.e. member states’ responsibility to fulfil the objectives of each directive adopted, was heralded as guidance for national law in determining what minimum protection must be awarded to the IPR holders.⁸⁴ Article 3 of the Enforcement Directive was held as the framework for this balancing act, stating that the injunctions must be *effective, proportionate, dissuasive, fair and equitable*; they must not create barriers to legitimate trade, and in whole, must strike a fair balance between the rights of the interested parties.⁸⁵

4.3 Scarlet Extended v. SABAM

SABAM, the collective copyright society of Belgium, sought to impose upon Scarlet Extended, an ISP also situated in Belgium, an obligation to install a filtering system in order to combat their users’ copyright infringements.⁸⁶ The method suggested an invasive method of DPI-filtering⁸⁷, essentially making all traffic, both legal and illegal, prone to inspection by Scarlet Extended on its own expense and for an unlimited amount of time.

⁸³ *L’Oreal v. eBay*, para. 144.

⁸⁴ *L’Oreal v. eBay*, paras. 131-137.

⁸⁵ *L’Oreal v. eBay*, paras. 125-143.

⁸⁶ *Scarlet Extended v. SABAM* (C-70/10).

⁸⁷ For a short description of DPI, see above in 3.2.3.

The ISP therefore appealed, leading the Belgian court to seek advice on whether such an injunction was precluded by the fundamental rights enshrined not in the EUC but the ECHR, and if not, whether EU law require the national court to undertake a proportionality test.⁸⁸ The reason for the Belgian court to reference the ECHR is not expressively clear, but perhaps by referring to an international convention aimed specifically at *human rights*, the national court sought to emphasize the privacy concerns from a more unmitigated human rights perspective. The EU is set to formally accede to the ECHR, and the fundamental rights enshrined in the ECHR already form part of the general principles of EU law.⁸⁹ Hence, its relevance was indeed justified, though as seen below not reflected in the final judgment of the CJEU.

The CJEU referenced *L'Oreal v. eBay*, stating that an intermediary indeed may be required to take measures to prevent future infringements, which the filtering system at hand undoubtedly was aimed at.⁹⁰

Further, drawing upon the judgment of *Promusicae*, a proportionality assessment was indeed found necessary as IP rights had to be balanced against the interests of all parties involved.⁹¹ However, the CJEU chose to rephrase the question in two aspects: they divided the proportionality assessment between on one hand the IPR holders' interests vis-à-vis Scarlet Extended in their role as an intermediary and their subsequent right to freedom to conduct a business enshrined in Article 16 of the EUC, and on the other hand the IPR holders and the end-users, whose right to protection of personal data is found in Article 8 of the EUC and the Data Protection Directive, as well as their right to freedom of information enshrined in Article 11 of the EUC. The fundamental freedoms were therefore referred to

⁸⁸ *Scarlet Extended v. SABAM*, para. 28.

⁸⁹ The Lisbon Treaty, Article 6 (2) and (3).

⁹⁰ *Scarlet Extended v. SABAM*, para. 31.

⁹¹ *Scarlet Extended v. SABAM*, para. 44.

in a more ‘pure’ EU law context; reference to fundamental rights was preferably to be drawn directly from secondary EU law and the EUC.⁹²

The CJEU concluded that with regard to the interests of Scarlet Extended, the injunction violated the monitoring prohibition in Article 15 of the E-Commerce Directive and constituted a “serious infringement of the freedom of the ISP concerned to conduct its business”.⁹³

With regard to Scarlet Extended’s users, the CJEU found that the injunction “may infringe” their right to protection of privacy and freedom of expression, the latter specifically with regard to the risk of lawful content being blocked by the filtering system.⁹⁴ It would therefore seem that the CJEU held the economic interests of the ISP as the prominent factor in determining the disproportionality of the injunction; the rights of the end-users may have added more weight to the scales, but perhaps due to a lack of a more in-depth understanding of the technology at hand, the CJEU, by their choice of wording, lay their emphasis on the economic implications at hand.⁹⁵

4.4 UPC Telekabel Wien v. Constantin

The ruling in *UPC Telekabel Wien v. Constantin*⁹⁶ somewhat mirrors the theme of this thesis in that the CJEU began by stating their assumption that an IPR infringement already was at hand; thus, the CJEU focused purely on the requisites and assessments of proportionality with regard to blocking injunctions.⁹⁷

⁹² *Scarlet Extended v. SABAM*, paras. 47-53.

⁹³ *Scarlet Extended v. SABAM*, paras. 47-48.

⁹⁴ *Scarlet Extended v. SABAM*, paras. 50-52.

⁹⁵ Psychogiopoulou, E., *Copyright enforcement, human rights protection and the responsibilities of internet service providers after Scarlet*, in *European Intellectual Property Review (EIPR)* Vol. 34, nr. 8, (2012), p. 555.

⁹⁶ *UPC Telekabel Wien v. Constantin* (C-314/12).

⁹⁷ *UPC Telekabel Wien v. Constantin*, para. 24.

Constantin and Wega, two Austrian film production companies, sued UPC Telekabel (henceforth “UPC”), an Austrian ISP, requiring UPC to block their users’ access to the website kino.to, which offered streaming services that infringed the rights of Constantin and Wega. UPC claimed they couldn’t be viewed as an intermediary and further stated that even if this was the case, the measures available could all be circumvented, and were therefore inefficient in relation to the goal of blocking injunctions. UPC also made note of the excessive costs of many of the available implementation measures.⁹⁸ These latter two grounds for appeal were made without reference to any particular requisite of efficiency or proportionality, which led the Austrian court to rephrase the question by asking whether a measure requiring “not inconsiderable costs” which “can easily be circumvented” was compatible “with Union law”.⁹⁹

The ruling concerns two questions: whether UPC acted as an *intermediary* in the context of Article 8 (3) of the Infosoc Directive, and whether the generic order¹⁰⁰ issued by the appeal court of Austria was justifiable in respect of the parties’ fundamental rights.

Was UPC an intermediary?

UPC claimed they could not be construed as an intermediary, since they had no contractual relationship with the operators of the infringing website. Further, it was not proven that the users of UPC had acted unlawfully.¹⁰¹

The CJEU pointed to recital 9 of the Infosoc Directive, stating the directive’s aim to provide a high level of protection to IP rights. From an implicit interpretation of the directive’s *effet utile*, a contractual relationship between the intermediary and the infringer is thus not required.¹⁰²

⁹⁸ *UPC Telekabel Wien v. Constantin*, para. 16.

⁹⁹ *UPC Telekabel Wien v. Constantin*, para. 17.

¹⁰⁰ The differences of targeted and generic orders are described above in 3.2.

¹⁰¹ *UPC Telekabel Wien v. Constantin*, para. 16.

¹⁰² *UPC Telekabel Wien v. Constantin*, paras. 32-35.

As to the possible infringements of UPC's users, the CJEU referenced the court in *Scarlet Extended v. Sabam*¹⁰³ when maintaining that *prevention* is a sufficient goal of an injunction – proof of the intermediaries' users having actually used the services is thus not required either.¹⁰⁴

Was the generic order towards UPC justifiable under EU law?

The CJEU began by pointing out that the material rules of injunctions are, according to recital 59 of the Infosoc Directive, a matter for national law. However, the limitations that stem from the sources of law provided by the directive must be respected; here, we are able to trace a coherent line of relevant case law as the CJEU refers to the paragraphs of *Scarlet Extended v. Sabam*, which in turns references the ruling of *L'Oreal v. eBay*, which in turn lastly reference the findings of the court in *Promusicae*.¹⁰⁵

Thus, the CJEU matter-of-factly lines up the countervailing rights at stake: IP rights as protected by Article 17 of the EUC, versus firstly the intermediary's freedom to conduct a business (Art 16 EUC) and secondly UPCs' users' right to freedom of information (Art 11 EUC).¹⁰⁶

The CJEU found that a generic order indeed infringes the intermediary's freedom to conduct a business, but *not* the “very substance” of this freedom due to the fact that the intermediary is able to choose the implementation method best suited to its possibilities, and in that further liability may be avoided by proving it has taken “all reasonable measures” of implementation. The CJEU describes this as the ability to prove that “the measures taken were indeed those which could be expected of him in order to prevent the proscribed result.”¹⁰⁷

¹⁰³ See 4.3 above.

¹⁰⁴ *UPC Telekabel Wien v. Constantin*, paras. 36-39.

¹⁰⁵ *UPC Telekabel Wien v. Constantin*, paras. 43-45. For the relevant arguments of *L'Oreal v. eBay* and *Promusicae*, see 4.2 and 4.1 respectively above.

¹⁰⁶ *UPC Telekabel Wien v. Constantin*, para. 47.

¹⁰⁷ *UPC Telekabel Wien v. Constantin*, paras. 52-54.

Countering UPCs argument regarding *inefficiency* of the measures available, the CJEU declared that this requisite (*inter alia* inherent in Article 3 of the Enforcement Directive) is already fulfilled when merely making it difficult to achieve access to the protected subject-matter, *and* seriously discourages Internet users from it.¹⁰⁸

As for the argument of excessive costs, the CJEU gave sparse counter-argument: it is on the one hand considered part of the infringement upon the intermediary's freedom to conduct a business – but as the court offered no further analysis of the issue, the CJEU seemingly found this obstacle vanquished by allowing the intermediary to choose the method of implementation itself.¹⁰⁹

A final but quite important point raised in the balancing of interests at hand concerned the end-users of the intermediary. The measures adopted must be “strictly targeted”. As the measures imposed by a blocking order may infringe upon their right to freedom of information, the CJEU found that such affected parties must be awarded *locus standi* once the actual measures to be implemented are known.¹¹⁰ This specific aspect is analysed further below in chapter 5.6.

¹⁰⁸ *UPC Telekabel Wien v. Constantin*, para. 63.

¹⁰⁹ *UPC Telekabel Wien v. Constantin*, paras. 50-52.

¹¹⁰ *UPC Telekabel Wien v. Constantin*, paras. 55-57.

5 Analysis of requisites

Reviewing the legal basis of blocking injunctions and their subsequent application in case law, a definite number of factors emerge as mandatory when assessing the requisites. As to their order and application, the need for clarification may still lie inherent in order for blocking injunctions to reach the effect desired by its legislators.¹¹¹ Nonetheless, an attempt to summarize these, along with an interwoven analysis of their potential application follows.

5.1 Type of infringement

Without infringement of a protected right, there can be no ground for issuing an injunction. This thesis works on the assumption that an infringement by a third-party has already been committed. But does the subject-matter infringed upon affect the assessment of a blocking injunction in any of its latter stages? The higher consumer demand of copyright infringing content vis-à-vis trademark infringing goods provides for stronger incentives (for end-users) to circumvent blocking in copyright cases. Thus, injunctions that create high transaction costs for consumers, that is to say copyright injunctions, would from an economically influenced standpoint have a lower threshold of “necessity” to overcome.¹¹² The stronger regulation of copyright compared to trademark rights further this argument.¹¹³ Subsequently, obtaining an injunction on the basis of trademark infringement would prove more difficult, as high transaction costs for consumers carry less effect when consumers are unwilling to “pay the higher price” for trademark infringing goods.¹¹⁴ Seeing how the vast majority of blocking injunctions brought before the CJEU concerns

¹¹¹ As observed by the European Commission in their analysis of the Enforcement Directive, see *supra* note 28, pp. 25-26; see also Wang, *supra* note 55, p. 8.

¹¹² Husovec, *supra* note 56, p. 121.

¹¹³ Savola, *supra* note 25, p. 118.

¹¹⁴ Husovec, *supra* note 56, p. 122.

copyright infringements; hence, the type of infringement may influence the assessment in the aforementioned way.

5.2 The intermediary and its services

Defining the *intermediary* in the sense of Article 11 and Article 8 (3) of the Enforcement Directive and Infosoc Directive respectively is the first requirement, and an easy one; it is unchallenged in most cases presented above in chapter 4 and as evidenced earlier, its definition may include anyone who provides ‘technical support and services in and around the internet’.¹¹⁵ The intermediaries’ services must further be *used* to commit an infringement in the sense required by the above-mentioned articles; again, a requisite that offer little resistance. As evidenced by *UPC Telekabel Wien v. Constantin*, no contractual relationship between the intermediary and the infringer is required.¹¹⁶ In this regard, it should be noted that Article 8 (3) of the Infosoc Directive functions as *lex specialis* for copyright infringements.

What of the distinction between different types of intermediaries – most importantly *connectivity* vis-à-vis *hosting* providers? When seeking an injunction aimed at blocking a website located in the same member state as the *connectivity provider*, the rationale of the Infosoc Directive found in recital 59 suggests “targeting” the *hosting provider* rather than the connectivity provider, at least from a standpoint of efficiency. However, taking into account the ease with which a website operator may transfer the website, as well as the time required to enforce an injunction granted in another member state, the choice of targeting an end-user ISP would meet the requirements of recital 59 in cases where the infringing website is located in a member state different from the connectivity provider. As for websites outside of the EU, it is self-evident that the local connectivity

¹¹⁵ See above 3.1.2.

¹¹⁶ See above 4.4.

provider is best placed to bring the infringing activities to an end.¹¹⁷ Case law has as of yet to further illuminate the “pecking-order” of target intermediaries, perhaps largely due to the margin of appreciation afforded to the member states by way of recital 59 of the Infosoc Directive. It may however be observed that the infringer definitely *uses* the services of the intermediary when the latter acts as connectivity provider of the infringing website – but in the light of *UPC Telekabel Wien v. Constantin*, the requisite of *use* need only be potential, due to the *preventive* function of injunctions.¹¹⁸

The *mode* with which the infringement occurs may carry implications for which intermediaries run the risk of fulfilling the requisite of “best suited” under recital 59 of the Infosoc Directive. With regard to file sharing, the content may be transmitted by multiple ISPs from one region to another, creating a situation where injunctions may be relevant towards all ISPs in a country. In contrast, infringement through e.g. streaming, only the ISP providing access to the infringing website host would communicate the content, and the injunction can only be directed towards this intermediary.¹¹⁹ The preventive approach argued by the CJEU in *L’Oreal v eBay* may however provide a basis for including other intermediaries in these cases as well; it is still undetermined in EU case law.

How the intermediaries’ services are used may form an important part of the assessment as well; the ratio of lawful versus illegal content that flows through the medium and consequently may be subject to blocking is usually dependant on the type of service provided by the intermediary. Sites who rely on user-mediated content require a more in-depth assessment, in order to not infringe upon end-users’ rights to freedom of information.¹²⁰

¹¹⁷ Feiler, *supra* note 17, pp. 47-52.

¹¹⁸ See above at 4.4.

¹¹⁹ Husovec and Peguera, *supra* note 47, p. 6.

¹²⁰ As explained above in 4.3.

5.3 Blocking modes and sufficient legal basis

The mode with which to implement the injunction is now essentially a matter of choice for the intermediary.¹²¹ As evidenced by case law, the methods may become subject to review by the CJEU, and this is still true with regard to the blocking modes' actual effect when examining efficacy vis-à-vis end users' fundamental rights.¹²² A mode of blocking that is unable to properly filter the lawful and illegal content may therefore risk infringing upon the right to freedom of information.¹²³

The Advocate General Cruz Villalón, who gave opinions on all the above four CJEU cases presented in chapter four, argues that issuing non-specific, generic blocking orders give rise to a possible dilemma of *lack of sufficient legal basis* as well as foreseeability. Villalón argues that the proper balancing of conflicting rights belong to the proceedings issuing the injunctions. With a generic order, the balancing becomes a later question; perhaps the ISP chooses a mild method, which may render it liable for later infringements, or the intermediary may overblock access to the Internet, rendering it liable towards end-users.¹²⁴ As seen in *UPC Telekabel Wien v. Constantin*, the CJEU largely bypassed this by making the implementations optional to judicial review and awarding *locus standi* to end-users. Perhaps for the sake of legal certainty, the CJEU should have explored this issue further; among the few cases in national courts where blocking injunctions were denied, several outcomes depended on the lack of proper transposition of the legal basis for allowing blocking.¹²⁵

¹²¹ See above 4.4.

¹²² Chiang, Y., *Review of the CJEU Judgement on the Application of Site Blocking Order*, Journal of Intellectual Property Law & Management, Vol. 3, (2014), pp. 211-212.

¹²³ Stamatoudi, *supra* note 6, p. 875.

¹²⁴ Opinion of Advocate General Cruz Villalón, Case C-314/12, *UPC Telekabel Wien v. Constantin*, paras. 73, 86-97.

¹²⁵ Feiler, *supra* note 17, pp. 27 and 29-30.

The type of blocking used raises three important aspects to factor in; efficiency, cost and risk of over-blocking. The modes and their qualities as to these factors have been described above in chapter 3.2. As both DNS and IP blocking are cheap but run the risk of over-blocking, these could in many cases present an inexpensive but hazardous mode of implementation for the ISP at hand. URL blocking is the most expensive mode that best serves the CJEU's requisite of "strict targeting", but rather than over-blocking, poses challenges towards the right of privacy for personal data through its invasive technology.¹²⁶

There are a multiple range of hybrid modes of blocking, and needless to say they influence the above three factors, regardless of their combination. Each factor weighs differently depending on the type of intermediary (its business models and subsequent business model). Admittedly, national courts faced with assessing an injunction may breathe a sigh of relief in now being *forced* to leave the mode of blocking up to the intermediary; at least up until the point where the court is called to review the implemented measures, either by the intermediary, the website operator or the end-users.

5.4 Efficacy

As required by Article 3 of the Enforcement Directive, the efficiency of the injunction is a requisite of central importance, yet the discussions surrounding this requirement diverge. National courts have previously refused injunctions based on reports stating both its relative and factual inefficiency, the latter argument pointing to evidence that all forms of blocking *can* be circumvented; others have sufficed in their deterring effect, potential or proven.¹²⁷ The discussion has thus somewhat developed into a theorization of the abstract concept of efficiency, rather than focusing on

¹²⁶ *UPC Telekabel Wien v. Constantin*, para 56. See further above at 4.4.

¹²⁷ See for instance, in the UK *EMI Records Ltd and Others v British Sky Broadcasting Ltd and Others* (2013) EWHC 379 (Ch), [2013] WLR (D) 86, and in the Netherlands *Ziggo B.V and XS4ALL Internet B.V v BREIN*, (2014) case no. 200.105.418/01 374634/HA ZA 10-3184, as referenced in O'Sullivan, *supra* note 62, pp. 579-581.

how it should be utilized in court. However, once the dust settles, the remaining standpoint should seem to focus on its *outcome*; the assessment of efficiency should not address whether the blocking measures *can* be circumvented, but rather if they *will* be.¹²⁸ As such, the CJEU offers two requisites for efficiency: do the blocking measures make it difficult to achieve access to the protected subject-matter, and do they seriously discourage Internet users from it?¹²⁹ The use of the word “and” demonstrates the cumulative nature of these requisites; the efficiency is therefore, to a certain degree, reliant on the actual behaviour of end-users.

As with the mode of blocking used, the efficiency assessment also varies with the type of intermediary: injunctions towards larger connectivity providers may appropriately face a lower threshold due to the number of users blocked – as long as over-blocking is avoided.¹³⁰

5.5 Cost

From the outset, it may seem like IPR holders are looking to bestow the responsibility of policing their rights upon Internet intermediaries rather than carrying out this task themselves.¹³¹ Originally an issue of debate, the costs of implementing the measures now seem to firmly rest on the intermediaries’ shoulders.

Six years ago the opposing standpoint may have had more traction, as evidenced in a legal analysis commissioned by the European Commission’s Information Society and media Directorate-General.¹³² Still, as the burden of costs so far only has been determined in case law, often with disclaimers

¹²⁸ Feiler, *supra* note 17, p. 61.

¹²⁹ *UPC Telekabel Wien v. Constantin*, para. 62.

¹³⁰ Feiler, *supra* note 17, p. 63.

¹³¹ Edwards, *supra* note 3, p. 57.

¹³² DLA Piper, *supra* note 20, p. 43.

stating the *in casu* nature of the placement of this burden, the issue is still open to debate.¹³³

The potentially excessive costs of implementation,¹³⁴ raised by the intermediary in *UPC Telekabel Wien v. Constantin* did not pose much of a hindrance to the blocking order as long as the order is issued in a generic form, as such allowing the intermediary itself to regulate the cost to a certain extent.¹³⁵

It would seem, from the structuring of the arguments delivered by the CJEU in the said case, that a cost assessment falls under the umbrella of “all reasonable measures” – an intermediary would hardly be required to implement measures so costly they would substantially harm its business, this much is clear; but where is the line drawn? Must the “very substance”¹³⁶ of its freedom to conduct business be infringed upon? The practical issue of this is, judging by the CJEU and the legal framework, left as a matter to the national courts. A fixed quota is impossible, as the assessment must form part of the complex balancing towards efficiency.¹³⁷ Depending on the function of the intermediary, this may lead to different outcomes: marketplaces such as eBay profit from the business of both legitimate and pirated goods on their websites – the close connection between the profitability of their business model and the infringing acts would accordingly justify placing the burden of costs, i.e. the “policing” of the IPR holders’ rights, upon eBay and intermediaries with similar *functions* – as long as these costs would not drive them out of business.¹³⁸

With regard to the size of the intermediary, injunctions against larger service providers seem more likely to be granted, due to the efficiency assessment

¹³³ Stamatoudi, *supra* note 6, p. 874.

¹³⁴ Husovec, *supra* note 56, p. 125.

¹³⁵ See above in 4.4.

¹³⁶ The term used by the CJEU when referring to the subject matter of the freedom to conduct business in *UPC Telekabel Wien v. Constantin*, see above in chapter 4.4.

¹³⁷ Savola, *supra* note 25, p. 126.

¹³⁸ Edwards, *supra* note 3, p. 61.

in estimating the number of users blocked – which also strikes a fair balance of proportionality, as larger providers absorb costs more easily.¹³⁹

5.6 Affected users *locus standi*

Following *UPC Telekabel Wien v. Constantin*, the end-users affected by the measures of a blocking injunction are entitled to *locus standi* when the measures of implementation are known.¹⁴⁰ Does this affect the judicial review of issuing an injunction? One may rephrase the issue in order to provide clarification; will the injunction face rejection if the procedural rules of the member state don't allow *locus standi* to affected third parties?¹⁴¹ If an Internet user or the website operator whose website is blocked wish to challenge the injunction, it follows from the CJEU's line of argumentation that the fundamental rights of the EUC actually precludes the injunction to be granted at all in such a case.¹⁴² Though neither stated in any regulative act of the legal framework of injunctions, nor included in the *ratio decidendi* of any CJEU case so far, this seems a clear and rational requisite of injunctions after *UPC Telekabel Wien v. Constantin*.

5.7 Proportionality

With all the above requisites gathered on the table, the framework that is Article 3 of the Enforcement Directive requires a final assessment of proportionality; a notion the CJEU made clear through *Promusicae*.¹⁴³

Drawing conclusions from the application of the *general* principle of proportionality in EU law,¹⁴⁴ Savola portrays the proportionality assessment

¹³⁹ Feiler, *supra* note 17, p. 63.

¹⁴⁰ See above 4.4.

¹⁴¹ Husovec, M., *CJEU Allowed Website-blocking Injunctions With Some Reservations*, *Journal of Intellectual Property Law and Practice*, Vol. 9, (2014) p. 633.

¹⁴² *UPC Telekabel Wien v. Constantin*, para. 57. See also above in 4.4.

¹⁴³ See above 4.1.

as a four step-test, beginning with the *legitimacy* of the pursued objective, the *suitability* of an injunction, followed by estimating its *necessity*, and finally its *proportionality stricto sensu*, i.e. whether, regardless of its suitability and necessity, it imposes an undue burden on the intermediary.¹⁴⁵

As mentioned previously, the question of *liability* for IP infringement varies for different types of intermediaries; most obviously with regard to connectivity and hosting providers.¹⁴⁶ Savola argues that since liability differ between connectivity providers and hosting providers, this may affect the limitations of injunctions in a similar vein – as connectivity providers enjoy broader exemptions of liability than hosting providers, the limitations of injunctions should follow suit. A blocking order towards a *hosting* provider would be more proportionate than towards the *connectivity* provider involved, all other circumstances the same.¹⁴⁷ Yet again, the interplay between requisites surfaces here; this time between the type of intermediary, type of infringement and modes of blocking available.

Appropriately, all of the aforementioned requisites in this chapter form part of the proportionality assessment. The level of abstraction behind the guiding principles of proportionality provides the court faced with assessing the injunctions little guidance, which, in combination with the strong territoriality of copyright law has lead to divergence between national courts. Consequently, subsidiarity may be raised as yet another issue in the context of proportionality; has the IPR holder targeted the most relevant intermediary, and to what extent has the IPR holder made efforts to combat the infringement “at its source”, i.e. the infringing actor?¹⁴⁸

¹⁴⁴ Harbo, T., *The Function of the Proportionality Principle in EU Law*, European Law Journal, Vol. 16, No. 2, (2010), pp. 158–185, as referenced by Savola in *supra* note 25, p. 116.

¹⁴⁵ Savola, *supra* note 25, p. 116.

¹⁴⁶ See above 3.1.4.2.

¹⁴⁷ Savola, *supra* note 25, p. 117.

¹⁴⁸ Savola, *supra* note 43, p. 290, and Feiler, *supra* note 17, pp. 48-51.

The *temporal* aspect of the blocking injunction is yet another, albeit less complicated factor included in the proportionality assessment. As evidenced in *Scarlet Extended v. SABAM*, the disproportionality of an unduly burdensome injunction is inflated when not limited in time.¹⁴⁹

The balancing act between countervailing rights is conducted under the notion of proportionality. The views on what legal instruments such as regulations, directives, articles and recitals shall be deemed relevant differ in both case law and doctrine.¹⁵⁰ In addition to the four-step test purported by Savola above, the Council of the European Union has suggested the three-step evaluation contained in the EU Human Rights Guidelines, in which any restriction must be a) provided for by law, b) pursue a legitimate purpose and c) be proven necessary and as the least restrictive means required. The three-step evaluation invokes the principles of legal certainty, predictability, transparency, legitimacy, necessity and proportionality.¹⁵¹ Suffice to say, the well from which arguments can be drawn is deep.

For the court faced with assessing the proportionality of a blocking injunction, the argument must evidently factor in all the above requisites in this chapter. A concise guideline as to *how* proportionality should apply falls short due to the multitude of possible outcomes the interplay between all relevant requisites generates.

The conclusion is therefore rather that an assessment of the above criteria must at the very least take all of the above into consideration, establishing a schedule of factors tied to the proportionality assessment – whether this assessment is then brought to a fair conclusion rests upon the court's competence in the matter.

¹⁴⁹ See above 4.3.

¹⁵⁰ O'Sullivan, *supra* note 62, pp. 582-583.

¹⁵¹ *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, referenced above *supra* note 61, p. 5.

Evidently, the European Union is in need of a harmonized assessment of proportionality when approaching the final requisite of assessing blocking injunctions; a view supported by the CJEU.¹⁵² However, the range of interpretations debated in the light of the proportionality requirement might rather be a healthy sign of awareness of its complexity, rather than distress of diverging opinions.

¹⁵² Wang, *supra* note 55, p. 10.

6 Conclusions

The aim of this thesis is to discern and appropriately evaluate the requisites of blocking injunctions towards intermediaries, while providing guidance to balancing the fundamental rights that are at play. Such an evaluation reveals many of the complex issues surrounding the legal regime of IP rights. The countervailing fundamental rights that must enjoy equitable treatment stem from a vast array of interests, reflected in the substantial list of aspects contained within the analysis above; from varying economical interests on both sides to concerns of privacy and freedom of information. The case law and analysis presented has served to illuminate how the recognized interests are translated into requisites and guiding principles. However, one must bear in mind that the judgments of the courts are but a legal decoction of the many underlying rationales that has led to the development of blocking injunctions being described as a paradigm in IPR enforcement.

The reasoning behind bestowing obligations upon “innocent” intermediaries is based on one of many available views on their overarching role in society. The two extremes of the spectrum may be illustrated with likening their role to, on the one end, *publishers*; for instance newspaper publishers who are liable for the content made available. On the other end are wholly neutral *common carriers*, similar to e.g. postal and phone service providers; a view championed by ISPs in the early days of discussions regarding ISP liability. The lack of contractual relationship deemed as insufficient to exonerate ISPs from all obligations in *UPC Telekabel Wien v. Constantin* points to the former view having prevailed, seeing how “offline” publishers may contractually limit their responsibilities for the content they publish.

These differing views represent the conflicting interests at stake, such as IPR holders’ property right interests, vis-à-vis public interest of freedom of expression, culture and innovation. Several of these interests may sometimes overlap – for instance, free circulation of protected works may

advance innovation, but a lack of effective enforcement may decrease incentives to invest, which would stall innovation. The blocking of larger sites with high amounts of dynamic content may also lead to blocking of lawful content, hindering users' right to information.

The purpose of website blocking may at first glance seem self-evident – an extended form of enforcing property rights – but the rationale behind assessing the underlying criteria is not as easily defined. With questions of efficiency still surrounding the discourse, the motives of IPR holders having changed their course from a prosecutorial to a preventive approach may indirectly influence why the requisites for injunctions are more easily fulfilled in some court cases, while other are rejected. Is the efficiency requisite a question of politically motivated deterrence rather than an effective redress? How should this aspect function if an intermediary obtains a court order stating that the measure suggested by the intermediary is sufficiently efficient, if a later judicial review proves the mode to be inefficient? The rationale behind efficiency seems dependent on its agenda. Reducing IPR holders economic losses, educating the public on the unlawfulness behaviour of IP infringement and symbolic displays of power towards “pro-piracy” lobbyists are recurring topics of discussion that may influence the legislation behind Europe's differing copyright regimes, and thus invisible but perhaps implicit in the judgments of national courts. Is the real purpose actual enforcement of rights, or merely deterrence? Can blocking injunctions be construed as part of a larger scheme in fighting online piracy, where the effect of each injunction should take into account the synergy it might create with other forms of combating piracy, such as the targeting of individuals with damages and custodial sentencing?

The national divergences in IP law, most evident in copyright law, automatically poses a threat of fragmentation for the internal market when faced with heavy enforcement procedures that rather illuminates the boundaries set by national copyright regimes than harmonize them. The legislators seem to have accepted this, as copyright was specifically set

aside from the prohibition of restricting freedom to provide information society services in the E-Commerce Directive. The source of this risk is not blocking injunctions in themselves – they are but a symptom of the lack of harmonization of copyright law; the injunctions often being the only effective means left.

As the actual regulation of imposing injunctions is left up to the national courts, a harmonization of the requisites for blocking order injunctions would force national legislators and courts to alter their established doctrines when weighing IPR protection against their countervailing rights and freedoms, disrupting the discretion bestowed upon them by the Enforcement Directive. What effect does this have upon an attempt to find the common denominators of the criteria laid down by the legal framework of the EU, and the case law of the CJEU?

The requisites presented and analysed in chapter five are requisites any assessment of a blocking injunction cannot escape. The proportionality assessment must balance them towards their countervailing rights. Hence, the proportionality assessment is the overarching platform upon which all the relevant requisites are ultimately tested. The lack of a clear guideline on *how* the proportionality shall be evaluated as shown by the multitude of instruments and considerations in case law is, by evidence of the complexity contained within such an assessment, not necessarily a sign of failure to harmonize or equip the injunction regime with sufficient legal foreseeability, but rather a strong indication of an awareness of the elaborate nature of the proportionality assessment. When defining the proportionality requisite, for example within the context of a court blocking order, it is more important to showcase that the other requisites presented in chapter five are *taken into account*, and given due consideration. The outcome of this assessment, which in turn will depend on the individual court's review of each separate criteria and the special circumstances surrounding each injunction case, will therefore follow general principles of *what to assess*, but its *outcome* will be a ruling *in casu*.

It is important to notice the two-way burden of obligations borne by the ISP when implementing a blocking order, as they must balance the enforcement of IP rights while making sure that end-users' right to freedom of information (and any other fundamental right that might be infringed upon through their implementation of the injunction) are upheld. When contemplating a new business model, the unpredictability of responsibility for the content that may be generated on their sites may lead intermediaries to refrain from certain ventures; once again, hindering innovation.

Leaving the assessment of a factual requisite of the blocking injunction to the intermediary, at least up until the point where the blocking mode is called into question, is an overly simplified solution to a tortuous issue. A review of the blocking mode may be called into action not only upon challenge from the intermediary or the IPR holder, but also any affected user due to their *locus standi* awarded by the CJEU. It is undoubtedly a difficult task set upon the intermediary, especially those with limited resources and knowledge of blocking implementation, to first assess what level of blocking fulfils the requirements of efficiency, and to then balance this towards possible infringements upon end-users' rights. There are of course practical reasons for leaving this assessment to the intermediary – they would in most cases be better suited to assess the technical aspects than any court would – but one cannot help but feel that the argument of having retained the intermediaries “freedom” by allowing them to choose their own mode of blocking comes packaged with a heavy burden of legal assessments.

As it stands, the uncertainties surrounding the legal composition of European blocking injunctions are indeed deserving of clarification, and the courts tasked to apply these powers entitled to more guidance. However, one cannot escape the conclusion that where legal remedies, moulded and shaped by centuries of disparate national legal traditions, intertwine with global human rights and an unprecedented rapid development of technology

to form a coherent and harmonized supranational framework, complex issues will arise. As long as the courts of Europe recognize this through severe and meticulous review afforded to each relevant requisite, the inherent issues of blocking injunctions are still solvable by carefully harmonizing the differing national IPR regimes. The path to harmonisation and foreseeability is thus doubtlessly long and winding, but its importance well worth the journey.

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