

# Proportionality of Website Blocking:

## Internet Connectivity Providers as Copyright Enforcers

by **Pekka Savola\***, Lic.Sc.(Tech.), Master of Laws, LL.D. candidate. Legal Counsel at CSC–IT Center for Science Ltd, Researcher at University of Helsinki, Finland,

**Abstract:** Internet connectivity providers have been ordered to block access to websites facilitating copyright infringement in various EU countries. In this paper, the proportionality of these enforcement measures is analysed. After addressing preliminary questions, the recent CJEU ruling UPC Telekabel Wien (C-314/12) and then case law from all Member States are examined from the perspective of proportionality. Finally, five criteria are submitted for proportionality analysis, and a proportionality evaluation

is provided. The major observation is that the underlying goal of copyright enforcement has implications on how the scale tilts. In particular, ineffective enforcement mechanisms can be more easily accepted if the goal of symbolic, educational or politically motivated enforcement is considered legitimate. On the other hand, if the goal is to decrease the impact of infringement, higher efficiency and economically quantifiable results may be required.

**Keywords:** Proportionality, Fundamental Rights Conflicts, Copyright Enforcement, Website Blocking, ISP

© 2014 Pekka Savola

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Pekka Savola, Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers, 5 (2014) JIPITEC 116, para. 1.

## A. Introduction

- 1 There has been an increasing tendency to oblige various kinds of intermediaries to perform web filtering and aid in enforcement.<sup>1</sup> This paper focuses on enforcement of specific right (copyright), target (Internet connectivity, i.e. access providers), means (court order to block access to a website) and perspective (proportionality of such order).<sup>2</sup>
- 2 Intermediaries are typically faultless third parties with respect to the dispute between right holders and infringers.<sup>3</sup> Therefore, passive or neutral intermediaries are generally exempt from liability within varying constraints. To balance the lack of liability, a court may issue an injunction ordering—for example, to stop or prevent a specific infringement.<sup>4</sup> Indeed, intermediaries are an attractive tool to enforce local policies on foreign sites.<sup>5</sup> However, broad liability for activities that intermediaries cannot and need not control or monitor would result in *inter alia* stifling of innovation, preventive censorship and increased operating costs.<sup>6</sup>
- 3 Proportionality evaluation is depicted as three or four steps. The initial and sometimes omitted step is the *legitimacy* of the pursued objective.<sup>7</sup> The first two of the three main stages are *suitability* and *necessity* of the means in achieving the objective, i.e. that the goal can be achieved and there are no better means, respectively. Third, the actual balancing part is *proportionality* in the narrow sense (*stricto sensu*), i.e. whether the burden of the means is excessive in relation to the objective sought.<sup>8</sup>
- 4 In this context, proportionality analysis concerns fundamental rights conflicts in national measures implementing EU legislation. Because blocking measures are unlikely to affect the fundamental freedoms,<sup>9</sup> the evaluation occurs between conflicting fundamental rights. Here EU and national fundamental rights coexist, but in conflict the supremacy of EU law prevails.<sup>10</sup> CJEU case law provides minimum and maximum standards<sup>11</sup> and guidelines that must be applied when national courts interpret EU law. Issues at stake are the effectiveness of protecting the right holders' intellectual property in contrast to the costs and limits on the freedom to conduct a business on the ISP and the limitations of

freedom of information (expression) on the users.<sup>12</sup> ECtHR has not made very significant rulings in this aspect.<sup>13</sup> The evaluation is augmented with more intense scrutiny.<sup>14</sup>

- 5 This paper is structured as follows. Section B first discusses the differences in liability exemptions between hosting and connectivity providers, and what constitutes a general monitoring obligation. Then various parties' interests, EU IPR enforcement principles, and the effect of national legislation are briefly covered. After these preliminary questions, we move on to Section C, where the case law of CJEU and all Member States is covered from the proportionality perspective mixed with analysis and commentary. Using these as a basis, Section D formulates five criteria for assessing proportionality of website blocking. Finally, Section E provides proportionality analysis. Brief conclusions are presented last in Section F.

## B. Preliminary Considerations

### I. Legal Basis of Website Blocking Injunctions

- 6 Article 8(3) of the Infosoc Directive<sup>15</sup> obliges Member States to provide a possibility for copyright injunctions against intermediaries:

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

- 7 Per Recital 59, the conditions and modalities are to be determined in national legislation. Essentially identical provisions also exist for other intellectual property rights *in fine* of Article 9(1)(a) and 11 of the Enforcement Directive.<sup>16</sup> Indeed, the E-Commerce Directive allows national law to provide specific injunctions against connectivity providers in Article 12(3), but on the other hand prohibits general monitoring obligations in 15(1):

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

*[15(1)]. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or*

*store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*

## II. Different Providers and Liability Exemptions

- 8 While Internet service providers are not liable for information transmitted or stored, they may be subject to various obligations.<sup>17</sup> As connectivity and hosting providers provide a different kind of service, the conditions and scope of potential obligations also differ.<sup>18</sup>
- 9 The liability exemption of connectivity providers is based on neutrality, passivity and technical nature of automatic communication. According to the recital, this implies lack of knowledge and control over the transmitted information; deliberate collaboration in order to undertake illegal acts is also excluded.<sup>19</sup>
- 10 On the other hand, the exemption of hosting providers is conditional on awareness or knowledge of illegal activities or facts or circumstances from which illegality is apparent. Upon obtaining awareness of illegal material, hosting providers also need to act expeditiously to remove or disable access to it. The exemption does not apply if the provider has authority or control over the user and the content.<sup>20</sup> The awareness of facts relating to illegality appears to have been the grounds to exclude the operators of sites such as The Pirate Bay from the hosting defence; even if material on the site might not be infringing, its role in overall infringing activities has been apparent.<sup>21</sup>
- 11 In the latest case on hosting providers, *L'Oréal v eBay*, it was held that the operator must not have an active role allowing it to have knowledge of the data stored. To measure awareness (or "neutrality"<sup>22</sup>), a standard of diligent economic operator was established as to when illegality should have become apparent.<sup>23</sup>
- 12 This interpretation is inapplicable to connectivity providers, because their liability exemption is not tied to knowledge or awareness in the same manner as hosting providers.<sup>24</sup> Further, their role is more passive, neutral and automatic, and transmitted data is transitory. They also have no obligation to act upon obtaining awareness of illegality<sup>25</sup> unless explicitly required by national law as provided by Article 15(2) of the E-Commerce Directive.<sup>26</sup>

## III. Restrictions on General Monitoring and Orders

- 13 The prohibition against imposing monitoring obligations of a general nature applies to all kinds

of providers. Likewise, a general obligation to seek facts or circumstances indicating illegal activity is forbidden. However, monitoring (in a fairly narrow meaning) “in a specific case” by orders of national authorities is possible.<sup>27</sup> Court or administrative authority may also require termination of present or prevention of specific future infringement.<sup>28</sup> In particular, in *UPC Telekabel Wien* rather severe requirements regarding judicial review were imposed on generic orders targeting a website.<sup>29</sup> In contrast, the Advocate General had more explicitly suggested that a specific kind of generic blocking order would not amount to a general monitoring obligation.<sup>30</sup>

- 14 Only hosting providers may be subjected to “duties of care” in order to detect and prevent certain types of illegal activities.<sup>31</sup> National legislation may also establish procedures governing the removal or disabling of access to information (i.e. notice-and-takedown mechanisms).<sup>32</sup> Examples of court orders to prevent future infringements in the context of hosting providers were suspending infringing users’ accounts or making user identification on the marketplace easier.<sup>33</sup> In national courts, there have also been “stay-down” orders, obliging the hosting provider to ensure that a specific infringement is not repeated. Unless carefully constructed, these might be disproportionate or amount to a general monitoring obligation.<sup>34</sup>
- 15 All in all, the differences in the legal basis and the scope when comparing connectivity and hosting providers suggests that appropriateness of injunctions varies. Because for connectivity providers the conditions for liability exemption are broader, similar limitations could very well also apply to all types of injunctions. Depending on circumstances, it may be more proportionate and technically feasible to order a hosting provider rather than a connectivity provider to implement a certain kind of blocking. In contrast, issuing orders grounded on duties of care or knowledge assumed by a diligent economic operator at connectivity providers would not be appropriate. Also, accepting the premise of narrower injunctions, all the conditions in case law relating to hosting providers that restrict the orders (e.g. what constitutes a monitoring obligation and principles for weighing proportionality) would be *prima facie* valid. On the other hand, those conditions which expand the scope should be critically evaluated.

#### IV. Interests in Balancing

- 16 The following table summarizes private and public interests at stake; detailed elaboration is not possible here.

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

- 17 Intellectual property rights are not absolute, and it is impossible to completely protect them through enforcement. Therefore, trying to find the least restrictive means (LRM) to eliminate IPR infringement is misguided. This specifically applies to copyright, given the extensive exclusive rights also governing non-commercial activities, whereas in contrast e.g. trademarks or patents can be used by private individuals more freely. This was emphasised in *Scarlet Extended* and affirmed in *UPC Telekabel Wien* very explicitly as follows:<sup>35</sup>

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

- 18 A better question is to ask which degree of IPR enforcement is deemed appropriate when balanced with other issues at stake, in particular other fundamental rights.<sup>36</sup> This reflects the underlying (and unresolved) policy issue on the level and constraints of enforcement an IPR holder is entitled to.
- 19 Rather than trying to find LRM in general, one must survey the means and their trade-offs (e.g. effectiveness, costs and other impacts). Based on this analysis, the appropriate balance between certain degrees of enforcement using a specific means and other rights can be considered. In *UPC Telekabel Wien*, issuing a generic order incurred requirements to the national procedure in order to ensure proportionality evaluation.<sup>37</sup> This was noted more explicitly in the Advocate General’s Opinion that proportionality cannot be evaluated if the necessary measures could not be reviewed.<sup>38</sup>

#### V. IPR Enforcement Principles in EU Law

- 20 The Infosoc Directive does not provide guidance on how to balance injunctions of Article 8(3).<sup>39</sup> On the other hand, Article 3 of the Enforcement Directive applies to (all) measures, procedures and remedies necessary to ensure the enforcement of IPRs covered

by the Directive. These shall be “fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays”, and also “effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”<sup>40</sup>

Strong	Neutral	Weak
effective	fair	proportionate
dissuasive	equitable	not complicated
no time-limits	not abusable	not costly
no delays	no barriers to trade	

- 21 It is challenging to realize all of these at the same time. In consequence, case-by-case balancing will be needed.<sup>41</sup> In the preceding table these are classified as “strong” (pro-rights), “weak” (pro-users) and “neutral” principles. However, in different interpretative contexts – for example, against infringer versus a third party – the principles could have an entirely different meaning.<sup>42</sup> Per Article 2(1), a Member State may provide stronger enforcement only “in accordance with Article 3”, i.e. the balance must not be upset.<sup>43</sup>
- 22 Norrgård noted in 2005 that a national judge could reasonably adopt both a weak or strong enforcement ideology based on the discretion granted by the directive.<sup>44</sup> A balanced interpretation was suggested based on principles of Article 3, fundamental rights, context-sensitivity and the comparative method.<sup>45</sup> These have since then materialised in CJEU case law, and this paper also continues on that path. Similarly, Ohly has underlined the need of proportionality to balance effectiveness and dissuasiveness, referring in a similar fashion to taking due account of the specific characteristics of the case as noted in Recital 17.<sup>46</sup>
- 23 Both directives have been geared towards infringers. Applying principles of effectiveness and dissuasiveness against a faultless intermediary is questionable.<sup>47</sup> Indeed, in his Opinion in *L’Oréal v eBay*, Advocate General Jääskinen was not convinced that the identical scope of injunctions available against the intermediary and the infringer would be a reasonable interpretation of Article 11 of the Enforcement Directive.<sup>48</sup> Similarly, the requirement for context-sensitivity would suggest caution with regard to third-party injunctions.<sup>49</sup> Further, the notions attached to injunctions are different and comparisons difficult between infringers and intermediaries as well as between legal systems.<sup>50</sup>

## VI. National Principles and Triggers for Evaluation

24 National law may specify the grounds for a proportionality evaluation or leave issuing the order at the court’s discretion. While this may give the national court leads on what to evaluate, it is important to note that EU law provides the minimum (and maximum) level of protection to various competing rights. This will perforce affect the court’s discretion and evaluation.<sup>51</sup>

25 As an example of national law,<sup>52</sup> in Finnish Copyright Act (404/1961, as amended by 679/2006) Section 60c(1):<sup>53</sup>

*[...The] court [...] may order [...the] intermediary to discontinue [...] unless this can be regarded as unreasonable in view of the rights of the person making the material available to the public, the intermediary and the author.*

26 On the other hand, many countries seem to have transposed Article 8(3) in a very minimal fashion, almost verbatim, or without substantial additional details or modalities.<sup>54</sup>

## C. Proportionality in Case Law

### I. Introduction

27 The latest blocking requests targeting connectivity providers at the user end in EU/EEA are illustrated in the following table. In other EU/EEA countries, blocking has not been requested. The table notes the highest court which has made the latest decision. The rulings are final except the Netherlands (pending appeal to Supreme Court). The type of proceedings (civil and/or criminal) has also been noted.

28 “(X)” under “ruling” implies that the decision has been reversed in contrast to a lower court instance or earlier proceedings. This illustrates that while the general trend has been to order one or more ISPs to block access to a website, in some cases requests have also been rejected on various grounds. The most prominent reason for rejection (particularly in Ireland and Norway, and arguably in Germany) has been attributed to the lack of legal basis due to the implementation (or lack thereof) of Article 8(3).<sup>5</sup>

Country	Site	Provider	Date	Court	Type	Ruling
Spain	Other	Vodafone etc.	16.7.2014	Appeal	Criminal	No block (x)
Austria	Kino.to	UPC Telekabel	24.6.2014	Supreme/ CJEU	Civil	Block
The NL	TPB	Ziggo etc.	28.1.2014	Appeal (to Sct)	Civil	No block (x)
France	Streaming	All ISPs	23.11.2013	First instance	Civil	Block
Belgium	TPB	Belgacom etc.	22.10.2013	Supreme	Civil+Crim.	Block (x)
Ireland	TPB	UPC etc.	12.6.2013	First instance	Civil	Block (x)
Finland	TPB	TeliaSonera etc.	11.2.2013	Appeal	Civil	Block
UK	TPB etc.	All ISPs	13.11.2013	First instance	Civil	Block
Greece	Other	Vodafone etc.	16.5.2012	First instance	Civil	Block
Germany	Other	Unknown	22.12.2010	Appeal	Civil	No block
Denmark	TPB	Telenor etc.	27.5.2010	Supreme	Civil	Block
Norway	TPB	Telenor etc.	10.2.2010	Appeal	Civil	No block
Italy	TPB	All ISPs	23.12.2009	Supreme	Criminal	Block (x)

29 Next, a summary of all cases is provided, with particular focus on issues relating to proportionality. The goal is to review arguments used in CJEU and national decisions as a step of formulating the criteria for balancing.

## II. The Court of Justice

30 As for blocking injunctions,<sup>56</sup> in *L'Oréal v eBay*, it was held that courts of Member States must be able to order online marketplaces to take measures to stop current infringements as well as – if justified by the circumstances – prevent future ones. These must be effective, proportionate and dissuasive and must not create barriers to legitimate trade. The measures must also be fair and not excessively costly. A couple of examples were provided.<sup>57</sup> This provides little guidance in the present context.

31 *Scarlet Extended* applied the aforementioned proportionality principles to whether a connectivity provider could be ordered to install a comprehensive filtering system.<sup>58</sup> The system would have monitored all the data relating to all customers in order to prevent any future infringement of claimants' intellectual property rights. CJEU held that it would have constituted a general monitoring obligation in violation of Article 15(1); nonetheless, proportionality was also considered.<sup>59</sup> As introduced in *Promusicae*, protection of the IPR must be balanced against other fundamental rights. Specifically, the connectivity provider's freedom to conduct a business would be inappropriately balanced against the interest to protect the IPR, because the order would require installing a complicated, costly and permanent system at the provider's own expense. The cost and complicated nature of the system were also against Article 3(1) of the Enforcement

Directive.<sup>60</sup> The system would also be questionable from the perspective of users' data protection and freedom of expression, as it would have applied to all the communications and would also have misidentified and blocked lawful communications.<sup>61</sup> This judgment is relevant, but given the intrusiveness of the contested filtering system, the constraints it provides for blocking orders are limited.<sup>62</sup>

32 *UPC Telekabel Wien* concerned a more restricted form of blocking, only one specified site. In summary, the CJEU in principle accepted generic orders (where adopted measures are chosen by the provider), but imposed judicial review requirements that might make issuing them unattractive for national courts. This restricted the applicability of generic orders and transformed generic orders into court-approved specific orders.<sup>63</sup> The Advocate General was more straightforward and suggested rejecting them instead of crafting requirements. In the end, the essential result was the same.<sup>64</sup> More detailed analysis follows.

33 The CJEU held that national law must be transposed in a manner allowing a fair balance to be struck between competing interests. The law must also be interpreted in the manner that takes fundamental rights and proportionality into consideration.<sup>65</sup> The fundamental rights conflict was construed between Charter Articles 17(2) (IPR holders' right to property), 16 (the provider's freedom to conduct a business), and 11 (users' freedom of information).<sup>66</sup>

34 Business freedom was characterized as *inter alia* the right to freely use the economic, technical and financial resources available to the provider. An injunction was considered to constrain the free use of resources, as it obliges taking measures which may represent a significant cost, have considerable impact on the organization of activities, or require difficult and complex technical solutions. However, such an injunction was held not to infringe on the very substance of conducting business.<sup>67</sup> With a generic order, the provider can choose measures that are best adapted to the resources, abilities and challenges facing it. The provider can also avoid being in breach of an order by proving at the execution stage that all reasonable measures have been taken. Specifically, no unreasonable sacrifices are required.<sup>68</sup> However, legal certainty was held to require that the evaluation of reasonableness – i.e. which means can be expected – is done in court prior to issuing any sanctions due to the lack of sufficient compliance.<sup>69</sup> Essentially, the CJEU transferred the evaluation of proportionality from the ordering phase to the execution phase, with a mandate to provide for court review. In consequence, the provider can obtain confirmation of compliance in court by first doing a minimal implementation. Very likely this will decrease the use of generic orders.<sup>70</sup>

- 35 With generic orders and uncertainty, the A.G. had been concerned with providers opting for intrusive means, endangering users' freedom of information or facing the risk of disobeying the order.<sup>71</sup> The CJEU's approach was to impose requirements on the adopted measures and require allowing court review for both providers and users. In particular, measures must comply with Internet users' right to freedom of information: they must be strictly targeted to end infringement, and must not affect users lawfully accessing information.<sup>72</sup> The A.G. provided an example of collateral damage by referring to the ECtHR ruling *Yildirim v Turkey*, where the whole Google Sites service was blocked when only one site hosted there should have been targeted. This violated the freedom of expression guaranteed by Article 10 ECHR in various ways.<sup>73</sup>
- 36 The CJEU held that national courts must be able to verify that the measures are appropriate. This may not be possible if the provider chooses the measures and their use is not contested. In consequence, in this case users must be provided *locus standi* to assert their rights before the court.<sup>74</sup> It is submitted that this also applies to national courts issuing specific orders, unless proportionality has also been reviewed from the users' perspective.<sup>75</sup>
- 37 As previously noted, the IPR is not inviolable in that it must be absolutely protected. It is possible that a complete cessation of IPR infringement is not achieved, if for example some measures that would achieve the result would not be reasonable for the provider, or because means do not exist or the goal is not in practice achievable.<sup>76</sup> The adopted measures should still be "sufficiently effective" or at least discourage users from accessing the site and make accessing the site difficult to achieve.<sup>77</sup> Therefore, even if infringement is not completely prevented, the fair balance and proportionality in the light of Article 52(1) is achieved provided that freedom of information to lawful material is not unnecessarily prevented and that blocking prevents access or at least makes it difficult and seriously discouraged.<sup>78</sup>
- 38 The CJEU's emphasis on effectiveness, a high degree of IPR protection, and the means which may place significant obligations on the provider could be read to imply that the balance should be shifted more towards IPR protection. This reading must be rejected. The CJEU appears to have taken no clear stance on the balance of protecting the IPR and business freedom.
- 39 The fourth question was whether it was proportional to order a provider to implement specific means even if these incurred significant costs and the blocking could be easily circumvented without technical knowledge. The CJEU's final answer displays naiveté or evasion, because those issues were also in the background in the third question. The problem is apparent when considering the ineffectiveness of blocking in general, and that there may not be "sufficiently effective" and "seriously discouraging" means that would not also be complicated, costly and/or too intrusive. The CJEU provided no guidance on the provider's required degree of involvement. The problem of unlawful material on a site which also includes lawful material was also not addressed. In consequence, essentially both balancing exercises (IPR holder vs provider and IPR holder vs user, respectively) were effectively deferred to national evaluation or a future referral. Therefore, the A.G.'s guidelines on the fourth question are valuable and will be used tentatively as a basis.
- 40 When assessing suitability, the A.G. noted that protecting the rights of others was a valid grounds for limitation. It was questionable whether ineffectiveness of blocking could imply unsuitability, but he opined that this would not necessarily be the case. While users can circumvent blocking, it does not follow that every one of these users will do so. If the user learns about a website's illegality, he might forgo accessing the site. Finally, even if many users could circumvent blocking, all of them cannot. Also, even if the same site is available through another domain name or IP address, it does not *prima facie* mean that blocking would be unsuitable. The users here could also forgo accessing the site, and they need to use a search engine to find the site. With repeated blocking, it is also more difficult to find the site with search engines. In consequence, the A.G. held that generally speaking even somewhat ineffective means are not unsuitable.<sup>79</sup>
- 41 When assessing necessity, appropriateness and proportionality *stricto sensu*, the A.G. noted that the least restrictive means should be adopted. It would be the responsibility of the national court to make the assessment based on guidelines and the non-exhaustive list of considerations provided. First, the estimated efficacy of the order would be one factor to consider. However, the possibility to circumvent blocking would not in general exclude the means. Second, the complexity, costs and duration needs to be assessed. The A.G. expected that this may be a test case, and more blocking injunctions might be pending. If one of them were disproportionate under those three grounds, the court might need to consider whether proportionality would be ensured by making the right holder liable for costs wholly or in part. Third, the right holders should have some means against an infringing site, but notably the provider has no contractual relationship with the infringer. This implies that the right holder must primarily target the infringer or the infringer's provider. Fourth, an injunction must not undermine the legitimate business of providing Internet connectivity. In general, the A.G. underlined freedom of expression and its necessity in a democratic

society as essential and access to the Internet as an essential right.<sup>80</sup>

- 42 All of these seem applicable against the backdrop of the CJEU's judgment, with a potential caveat with regard to the third criterion. The CJEU had rejected contractual relationship as a prerequisite for injunction.<sup>81</sup> The A.G. had done likewise, but had opined that it is "obvious" that an intermediary without contractual link can "in no circumstances" be held unconditionally responsible for stopping infringements, laying out implications for proportionality of the third consideration.<sup>82</sup> Further, "in many cases such intermediaries are best placed" in Recital 59 (and respectively Recital 23 in the Enforcement Directive) implies that in some cases intermediaries are *not* best placed. In that case, the infringer should be targeted. This also conveys an additional issue of *which* intermediary is best placed; typically there are three to five connectivity providers in the "chain" between the user and the source. As an example, the A.G. opined that an injunction would be appropriate against a website connected by a non-European provider, because the website and its operators often cannot be prosecuted.<sup>83</sup> *E contrario* websites operated in the EU or connected by providers in the EU might be evaluated differently.
- 43 Orders may target the infringing website's connectivity provider, a provider in the middle of the Internet, or a provider at the user end.<sup>84</sup> A contractual relationship between the provider and the website operator exists only in the first case. In the second case, some providers may obtain indirect financial gain (through transit agreements between providers), but in the third case there is not even such indirect benefit.<sup>85</sup> This study focuses on blocking at the user end, because actions against infringing customers are in many aspects more proportionate, and in any case different from those against a completely third party.
- 44 A few interim observations are in order before moving on to examine national case law. The rights to balance in enforcement have been confirmed. However, the evaluation has been rather thin except for the A.G. opinion on the fourth question (unaddressed by the CJEU) in *UPC Telekabel Wien*. In all likelihood, in the future courts will mainly issue specific orders. Also, neither the CJEU nor the A.G. addressed the required level of efficiency when constraining a provider's rights.<sup>86</sup> The CJEU's position on the provider's function to discourage users could possibly be seen as approving the suitability of educating the users of the site's illegality. Finally, the A.G. made a number of points that the CJEU did not get a chance to address. He noted that proportionality would be affected by the right holder's possibility of primarily targeting the infringer or the infringer's connectivity provider. Second, effectiveness could

be used as a factor both in suitability (with limited impact) and necessity. Third, the assumption seemed to be that the connectivity provider might bear the costs, but an alternative cost model could also be used particularly if the number of blocking requests grew.

### III. Expanding Blocking in the UK

- 45 A Usenet newsgroup service *Newzbin*, whose content consisted primarily of infringing files, was ordered to stop copyright infringement with a restricted injunction.<sup>87</sup> The site ceased operations, but essentially the same service reappeared overseas, and the claimants sought an order against the connectivity provider British Telecom to block access to the new *Newzbin2* site. Judge Arnold examined the issues in depth and *inter alia* found the specific injunction order to be compatible with Articles 12 and 15(1) of the E-Commerce Directive and Article 10 ECHR. Against the backdrop of the referral of *L'Oréal v eBay* and *Scarlet Extended*, he held that the court had jurisdiction to block the whole site.<sup>88</sup>
- 46 Arnold also considered and rejected four reasons why the court should exercise its discretion to decline the request. First, the order targeting the whole site would also affect other right holders. This benefit would rather support issuing the order, and further, the incidence of non-infringing uses was considered *de minimis*.<sup>89</sup> Second, it was immaterial that accepting the request might lead to more requests in the future.<sup>90</sup> Third, ineffectiveness of blocking was not decisive. Specifically, users will need to acquire additional expertise to circumvent blocking. Even if they were able to do so, it was not clear that the users wished to expend the time and effort. Arnold also seemed to rely on advocacy research claiming that in Italy, the use of The Pirate Bay had been markedly reduced. All in all, he stated that the order would be justified even if it only prevented access to the site by a minority of users.<sup>91</sup> Fourth, Arnold evaluated proportionality against ECHR in the light of *L'Oréal v eBay*. He held that it was necessary to protect the right holders' property rights, and this clearly outweighed freedom of expression by the users and the connectivity provider, and even more clearly by the site operator. The order was narrow and targeted, it included safeguards against changes of circumstances and the cost of implementation would be modest and proportionate. He also rejected the requirement of notifying infringing files by URLs as being disproportionate and impracticable for the claimants when the site did not have a substantial proportion of non-infringing content.<sup>92</sup>
- 47 After the main judgment in *Newzbin2*, additional issues on details of the order were raised, some of which may be of relevance here. Arnold found

it proportional to apply the order to all services which use BT's Cleanfeed, but in essence excluded access and wholesale business from blocking. Other IP addresses and URLs, whose sole or predominant purpose was to enable or facilitate access to the Newzbin2 website, could also be added later to the block list without judicial determination. The request to allow temporary shutdown of blocking (e.g. due to operational reasons) without court or claimant approval was rejected. The relatively modest implementation costs would be borne by the connectivity provider, at least in this case. The legal fees were divided based on the merits of the arguments.<sup>93</sup> Later the blocking was also extended to other connectivity providers.<sup>94</sup>

- 48 Blocking of The Pirate Bay was soon to follow in *Dramatico Entertainment*, where it was held that the users and website operators infringed copyrights of the claimants in the UK. After *Newzbin2*, the connectivity providers have elected not to actively participate in court proceedings.<sup>95</sup> In a subsequent ruling, the injunction was issued on the terms the claimants had agreed with connectivity providers. Again, Arnold considered the discretion to grant the order. He stated that the proportionality of orders must be considered, referring to the principles of the Enforcement Directive and *L'Oréal v eBay*. While the terms of the order may be proportionate between the right holders and connectivity providers, it was the duty of the court to ensure the proportionality from the perspective of those who are not before the court (in particular, the users). Given that the IP address of The Pirate Bay was not shared, blocking it was appropriate.<sup>96</sup> Since this judgment, specific terms of orders have been agreed in advance between the claimants and providers, and those have not been described in the ruling or scrutinized by the court.<sup>97</sup>
- 49 In *Emi v Sky*, blocking was extended to cover three more sites (KAT, HEET and Fenopy). In this case, proportionality was more extensively discussed in the light of recent English judgments. Specifically, Arnold had established a balancing test of conflicting fundamental rights in the context of an order to disclose identities of subscribers, and it had been later endorsed by the UK Supreme Court.<sup>98</sup> Also, he considered the referral questions posed in *UPC Telekabel Wien*. Arnold rather brusquely dismissed the third preliminary question on whether "prohibition of outcome" would be inappropriate, essentially stating that UK courts carefully consider such matters before any blocking order is made.<sup>99</sup> Arnold also seemed to dismiss the Austrian Supreme Court's desire for European uniformity in assessing the proportionality of specific blocking measures by referring to the context-sensitivity of such evaluations.<sup>100</sup> The cost of compliance was also not relevant in the UK context because no connectivity provider had resisted making the orders on the basis that compliance would be unduly burdensome

or costly. He still held that blocking order *may be justified* (emphasis added) even if it only prevents access by a minority of users, and that the efficacy depends on the precise form of the order. For example, orders in *Dramatico Entertainment* were likely less easy to circumvent due to the ability of the right holders to revise the list of blocked resources. Finally, Arnold noted that evidence indicates that orders are reasonably effective, again pointing to the Italian study and the drop of The Pirate Bay in Alexa site popularity rankings.<sup>101</sup> In conclusion, the orders were deemed necessary and appropriate to protect IPR, and these interests outweighed the freedom of expression rights by users, connectivity providers and website operators.<sup>102</sup> Since then, blocking has extended to cover over 40 sites, but no new considerations of proportionality have come up.<sup>103</sup>

- 50 Access to FirstRow, a site consisting of user-generated streams of sports events, was also blocked in a similar manner. The claimant, FAPL, contended that the order would be proportionate because 1) the providers do not oppose the order and implementation costs are modest and proportionate; 2) the orders are necessary to protect copyrights infringed on a large scale and identifying and bringing proceedings against the operators of the website would be difficult, leaving no other effective remedy in this jurisdiction; 3) the orders are necessary or at least desirable to protect sporting objectives in general; 4) while also foreign content is available, the vast bulk of content infringes the rights of FAPL; and 5) the orders are narrow and targeted ones, and include safeguards against changes of circumstances. The orders will also likely be reasonably effective, even if not completely efficacious. Arnold did not object to these grounds.<sup>104</sup> FAPL had submitted evidence that FirstRow's IP address is not shared, but this later seemed to turn out to be incorrect, leading to substantial overblocking.<sup>105</sup> Further, Arnold added an additional provision to the orders introduced earlier by Mann J, so that any website operator claiming to be affected by the order would have permission to apply to vary or discharge it.<sup>106</sup>

## IV. Mixed Approach in Nordic Countries

- 51 The Supreme Court of Denmark has issued two relevant judgments on preliminary injunctive relief. The first judgment in 2006 concerned a file transfer (FTP) server and TDC as the connectivity provider for that subscriber. Because the injunction would have essentially required terminating the Internet connection, it was held that Article 8(3) of the Infosoc Directive requires consideration with balancing of interests.<sup>107</sup> In a case concerning blocking users' access to a website, it was submitted that injunctive relief should be rejected as ineffective under the

balance of interest requirement, but this claim was denied with reference to obligations of Article 8(3).<sup>108</sup> In the second judgment, on blocking The Pirate Bay, in the Supreme Court it was mainly argued that the requested interim relief was too imprecise and the balance of interest did not favour injunction. This was rejected because the court felt the order was precise enough to be granted, and there would be no harm to the connectivity provider in a way which would make it disproportionate.<sup>109</sup>

- 52 In Sweden there have been no court cases on blocking at the user end. One reason may be the Swedish Copyright Act tying injunctive relief to contributing to infringement.<sup>110</sup> However, a website's connectivity provider has been ordered to implement blocking. In *Black Internet*, the Svea Court of Appeal upheld the order to cease providing connectivity to The Pirate Bay. The provider's argument was that the site also had other connectivity providers, the access prevention would not be effective and the site had been reorganised so that the order would not be effective. These did not prevent injunctive relief, and the balance of interest also favoured granting it. Further, the freedom of expression or other fundamental rights would not be restricted in a manner that would violate the ECHR.<sup>111</sup> Similarly, in *Portlane*, a connectivity provider was ordered to prevent access to a peer-to-peer tracker service "tracker.openbittorrent.com". The court noted that the relief was fair and equitable and not unnecessarily complicated or costly as required by the Enforcement Directive.<sup>112</sup> Later, *Portlane* and other providers were persuaded to stop servicing The Pirate Bay.<sup>113</sup>
- 53 In Norway, the request to block access to The Pirate Bay was rejected because providers had no obligation to remove or block illegal content in the implementation of Article 12 of the E-Commerce Directive. Therefore, there was no legal basis for granting an injunction. In another EEA state, Iceland, an initial attempt at blocking failed due to the claimants' procedural error.<sup>114</sup> Since the cases in Norway the Copyright Act has been amended in this respect, and a blocking request is expected in the near future.<sup>115</sup>
- 54 In Danish and (former) Norwegian statutes, injunctive relief shall not be granted if it would cause harm or inconvenience to the defendant in a manner that would be obviously disproportionate to the plaintiff's interest in the injunction. Balancing thus occurs between the parties. However, because the court has some discretion, in special circumstances third-party interests may also be considered, and this has indirectly happened in case law. In contrast, in Sweden the balance of interests has been developed in case law and legal theory. In the two described cases, third-party interest was not considered. As such, in all three countries extraordinary circumstances

seem to be required before a court would take third parties into account when balancing interests.<sup>116</sup> In Finland, the statute also provides for reasonableness balancing only between the IPR holder, intermediary and infringer.<sup>117</sup> These are in stark contrast to the more recent CJEU case law.

- 55 In Finland, the three largest providers have been ordered to block access to The Pirate Bay with specific orders to avoid uncertainty for the providers. Also, specifying and updating the list of blocked IP addresses and domain names was deemed to require judicial review. It was acknowledged that all measures differed with regard to their effectiveness, precision, cost and implementation time. By citing earlier reports, it was held that none of the proposed technological measures was so ineffective as to preclude issuing the order. The efficacy of blocking could be measured only after implementation. Costs and harm of the injunction were not unreasonable.<sup>118</sup> The blocking order affected the providers' whole network, and for example the connectivity provided to other providers or the government could not be excluded.<sup>119</sup> It was considered proportionate that the providers needed to cover their own implementation expenses (ca. 10,000 euro) and legal fees (ca. 100,000 euro) each.<sup>120</sup> While the blocking must not endanger third parties' communications, the minor amount of legal content on the website did not prohibit blocking. Targeting the infringers in Sweden was also not required by law.<sup>121</sup>

## V. Divergence of Positions in Benelux

- 56 In The Netherlands, summary proceedings to block access to The Pirate Bay failed in July 2010. The judge argued that access could only be blocked from those who directly infringe copyrights rather than non-infringing visitors of the site, and that the individual infringers should have been targeted first.<sup>122</sup>
- 57 In new proceedings, Ziggo and XS4ALL were ordered to block access to the site, with the right holders having authority to update the list as needed. On subsidiarity the claimant had already sued The Pirate Bay operators and hosting providers, and proceedings against connectivity providers were appropriate; suing users was not needed. On proportionality, given the amount of illegal content on the site, the interests of the copyright holders outweighed those of ordinary Internet users. Also the necessity in a democratic society was briefly addressed. Claims as to effectiveness of blocking were made, which subsequently turned out to be unfounded.<sup>123</sup> Other providers have also been ordered to block access, but this time the list of sites needed to be updated in court.<sup>124</sup>
- 58 The first order was overturned on appeal in January 2014.<sup>125</sup> Based on recent research by the University of

Amsterdam, the blocking was found to be ineffective, particularly if it targeted only one site, because most of the affected users would just use another website or circumvent blocking.<sup>126</sup> Only the images of art works of music albums and video covers and such material were found to be infringing, and blocking access to these was not sufficiently important when contrasted to the operators' freedom to conduct a business.<sup>127</sup> It seemed that the court might have been more amenable if the claimants had requested blocking more sites at once instead of proceeding step-by-step.<sup>128</sup> This would have arguably made blocking more effective.

59 In Belgium, interlocutory proceedings to block access to The Pirate Bay also failed in July 2010. Immediate blocking was deemed disproportionate, especially since the site had already existed for years.<sup>129</sup> Blocking a fixed list of 11 domain names was established in September 2011 on appeal. The court held that subsidiarity is not required by Article 8(3) of the Infosoc Directive, and the order was also proportionate.<sup>130</sup> In a different set of cases, in criminal investigation against unidentified operators of The Pirate Bay, all connectivity providers were ordered to block access to the site in April 2012. This was appealed but upheld in February 2013. In October 2013, the Supreme Court upheld the decision that required providers to stop all current and future Pirate Bay domain names and monitor them. Strangely enough, it was not considered a general monitoring obligation.<sup>131</sup>

## VI. Varied or Lack of Action in Other EU countries

60 In Ireland, a blocking injunction was rejected in 2010 due to lacking implementation of Article 8(3) of the Infosoc Directive.<sup>132</sup> The law was amended, and six providers were ordered to block access to The Pirate Bay in June 2013.<sup>133</sup> A draft order had been agreed in advance between the parties, though concern with overblocking was voiced. The blocking list could be updated without judicial determination as in *Newzbin2*. Providers bore the cost of implementation and most of their legal expenses. The judge considered the draft order both proportionate and reasonable.<sup>134</sup>

61 In Italy the access to The Pirate Bay was blocked for a while in 2008–2009 as a criminal seizure, then the blocking was rejected and then again blocked, the latest order being from February 2010.<sup>135</sup> There is no explicit provision to issue connectivity providers a blocking order in civil proceedings, and the easier criminal procedure has been used.<sup>136</sup> There have also been subsequent orders to block other sites.<sup>137</sup> At the end of 2013, the law changed so that the regulatory authority AGCOM could block sites, though the

EU Commission had serious doubts about various aspects of the draft regulation.<sup>138</sup>

62 In Germany there is no explicit statutory provision on Article 8(3) of the Infosoc Directive. The alternative “Störerhaftung” (disturber) liability imposes a high bar on these injunctions. A prevailing opinion has been that the Infosoc Directive has been adequately implemented, and Störerhaftung is an acceptable solution as to “the conditions and modalities”. Website blocking has also been considered with strong scepticism. Yet *UPC Telekabel Wien* may require reconsideration through expanding interpretation of Störerhaftung or legislation.<sup>139</sup>

63 The lack of an explicit legal basis and evaluation against Störerhaftung has been adopted in a number of cases.<sup>140</sup> For example, in the Hamburg Court of Appeals ruling, the legal basis for injunction was deemed insufficient. It was also stated that Article 8(3) would not require providing for blocking injunctions.<sup>141</sup> Last, in the Cologne District Court ruling, a request to order a connectivity provider to block access to certain URLs in the eDonkey peer-to-peer networking service was likewise rejected. This was due to the lack of explicit legal basis, Störerhaftung liability not being met, and the lack of technical capabilities in preventing infringements. In consequence, the blocking would have been unreasonable and ineffective due to the small effort of circumventing such measures.<sup>142</sup> On the other hand, a preliminary injunction has been issued to an operator providing connectivity to The Pirate Bay.<sup>143</sup>

64 There has been no blocking in Portugal, but a request to block The Pirate Bay is to be expected.<sup>144</sup> In Spain, there have been mixed rulings on the legality of operating peer-to-peer indexing sites such as The Pirate Bay. A single case of website blocking has been overturned in appeal due to insufficient grounds.<sup>45</sup> In France, due to the efforts aimed at users through Hadopi, The Pirate Bay has not been blocked, but ISPs and search engines have been ordered to block a set of video streaming sites.<sup>146</sup> In Greece, only two music sites have been blocked.<sup>147</sup> There has been no news of any blocking activity in Eastern Europe.<sup>148</sup>

## D. Criteria for Assessing Proportionality

### I. Overview

65 Blocking cases essentially concern four parties, each with its own private interests: the IPR holder, provider, user and website operator.<sup>149</sup> The operator's interests have not usually been considered explicitly, and they are also not in the main focus here.<sup>150</sup> Public

interests in the background may also implicitly affect the weight court affords each private interest.

- 66 Proportionality has been considered in case law, though often in a summary fashion. Typically it is difficult to even find the criteria used in the evaluation. The criteria may also have been formulated at so high a level (as with most CJEU judgments) that applying them *in concreto* is challenging. However, there are also exceptions. The A.G. opinion on the fourth, unanswered question in *UPC Telekabel Wien* is useful, as well as UK cases *Newzbin2* and *FAPL v Sky*. Also, several recurring themes can be noticed from other national case law. These concern in particular effectiveness (or lack thereof), impact of subsidiarity, effect on the third parties and implementation costs.<sup>151</sup> Further, in the literature, comprehensive lists of criteria have been formulated at least by Lodder and van der Meulen,<sup>152</sup> Husovec,<sup>153</sup> Savola<sup>154</sup> and Pihlajarinne.<sup>155</sup> These also have many recurring issues, but the interest for brevity precludes detailed discussion of each. Various requirements for adequate safeguards have also been suggested, but these are less relevant here.<sup>156</sup>
- 67 A generic balancing rule, which as such is not yet very helpful *in concreto*, could be formulated as follows. The more significant negative economic impact infringements cause to the IPR holder, the stronger enforcement mechanisms should be available, and in contrast the more significant negative impact of ordering such blocking needs to be on the other parties. Respectively, the more costs or constraints blocking causes to the provider, and the more it impacts freedom of information of the users, the more significant the losses must be to the IPR holder.
- 68 In consequence, in the crux are effectiveness and costs (or burden in general), respectively. If blocking is ineffective, it cannot mitigate the economic losses of IPR holders; such blocking would only have symbolic value. On the other hand, if blocking is cheap, non-intrusive and precise, it usually does not have a major immediate impact to providers and users. The more intrusive, expensive or vague blocking becomes, the stronger its justification and effectiveness needs to be in order to be proportionate.
- 69 In the following, concrete evaluation criteria are submitted. Interpretation of these criteria is based on the enforcement principles and fundamental rights.

## II. Degree and Basis of Illegality

- 70 The legal basis of blocking, the illegality of the source, has implications on proportionality. If some other court has already established the

illegality (as with *The Pirate Bay*),<sup>157</sup> or the court issuing blocking does so when the operators have been served summons, more extensive blocking may be appropriate. Blocking is always dubious if the operators have not been represented and the illegality has not been subject to rigorous analysis.<sup>158</sup> Proxies that enable circumventing blocking provide a problematic example of this.

- 71 Is the intent of blocking to prevent site operators from (facilitating) making available copyrighted material,<sup>159</sup> blocking access from users as such, or to prevent users from copying and sharing the material? If illegality cannot be clearly attributed to the site (e.g. because it at most facilitates infringements by others), the legal basis of blocking the site may be in doubt. Because accessing the site is not as such infringing, the focus should be on preventing the main infringement, i.e. users downloading and sharing material. It might be sufficient to target blocking only to those users – i.e. consumers – who are expected to become infringers, rather than e.g. wholesale business, companies or the government.<sup>160</sup>
- 72 The scale of infringement also matters as to how invasive blocking mechanisms may be appropriate. For example, a site which has essentially no legal material at all could more easily be blocked as a whole, but this may not be appropriate for a site which has substantial legal uses or where the illegality is doubtful. Specifically, in some such cases URL blocking (for example) has been required instead of blocking the whole site.<sup>161</sup> Also, if blocking is targeting a site hosted in the EU/EEA, it also seems relevant to assess whether the site is operating legally in the origin state.<sup>162</sup>

## III. Effectiveness

- 73 The relevance of ineffectiveness has come up in almost every case as well as in the literature.<sup>163</sup> Users' and operators' ease to circumvent blocking, respectively, could be distinguished. The accuracy and completeness of measures may also be measured.<sup>164</sup> The possibility of revising the blocking list already allows taking into account the website operator's actions, although blocking proxies would still be challenging. Overblocking will be discussed below. Therefore, in practice the effectiveness – or more precisely, circumventability – of blocking from the user's perspective is most relevant.
- 74 IPR holders have conducted or commissioned unverifiable advocacy research on the effectiveness of blocking. For example, Italian or Belgian studies, where effectiveness ranges between 73 and 80%, have been cited first when requesting blocking to support its effectiveness. Yet afterwards the ineffectiveness has been implicitly or explicitly argued to justify extending blocking. Alexa ratings

have also been cited, but those are unreliable as they do not apparently account for those that arrive at the site through non-conventional channels.<sup>165</sup> In contrast, in a University of Amsterdam study, it was noted that blocking could in theory only affect the behaviour of those 27 to 28% of consumers who download or intend to download from illegal sources. Of these infringing consumers, the large majority (70-72%) was found to be non-responsive to blocking by finding other ways to access the same or a different site. There was essentially no lasting effect, and even the awareness effect wore off quickly. In consequence, blocking affected only 4 to 6% of all users. Respectively, in another survey Dutch university students were asked if they were downloading less illegal material after the blockade of The Pirate Bay. 13 % of 302 respondents used only legitimate sources, the rest at least sometimes downloaded from illegal sources: 39 % used The Pirate Bay and 48 % used other sources. Of The Pirate Bay users, 66 % used various techniques to bypass blocking, 18 % did not even notice blocking, and 17 % no longer had access to the site. Only 22 % of its users told they now downloaded less from the site. Because some downloaded more, statistically blocking had no discernible impact on the amount of infringement.<sup>166</sup> Connectivity providers have also similarly observed no significant impact on traffic levels. This is also supported by an intuitive finding that those who are already aware of the site (say, “The Pirate Bay”) can just enter the name in a search engine and obtain the list of proxy services on the first page of results.<sup>167</sup>

75 It is obvious that blocking may affect some users, especially the ones who are not already familiar with the sites and arrive at the site by web references or by searching for specific content.<sup>168</sup> Equally obvious is that blocking will not affect those regular users who know sites by name, and will continue using them or the alternatives through other, essentially equally easy means (e.g. proxies). This is exacerbated by the fact that infringing users are more knowledgeable and determined than users on average.<sup>169</sup> In consequence, blocking seems to – at most – accomplish a slight deterrence against some non-recurring users, provide “education” to those users,<sup>170</sup> and make it seem that IPR holders are doing something. It seems obvious that almost everyone downloading or sharing from clearly notable unauthorized sources is aware of its illegality. In consequence, education as a goal seems difficult to justify.<sup>171</sup> Indeed, the reasoning that users do not bother or will forgo accessing the site when encountering a block seems to apply at most with non-recurring users.<sup>172</sup> Therefore, the A.G.’s justification for ineffective blocking as deterrence is questionable. As will be discussed in the context of legitimacy below, it is not obvious that subordinating providers to such a task is proportionate, especially if it incurs expenses.

76 Blocking with inefficient mechanisms usually results from having to resort to a least bad solution. While a more effective mechanism would in principle be desirable, usually one does not exist or must be rejected on other grounds. Therefore, the main alternative would be to reject the request. As previously noted, it seems easier for courts to accept inefficiency if a more effective order could not be granted.<sup>173</sup>

77 Acceptance of inefficient mechanisms therefore depends on the associated costs, degree of efficiency, and whether using blocking for (somewhat ineffective) educational, symbolic or political purposes is considered legitimate. It is submitted that blocking must be at least reasonably effective by substantially reducing IPR holders’ economic losses. Otherwise, it would be reduced to a symbolic gesture, a useless attempt to educate users, or as a political power play in the field of legal policy.<sup>174</sup>

## IV. Negative Burden

78 With blocking, the IPR holder shifts the burden of enforcement to third parties, i.e. providers.<sup>175</sup> For providers, this implies implementation cost and expenses for legal services. In all the reviewed cases, the cost of implementation has been borne by providers, even if this is not required by EU legislation.<sup>176</sup> Given that costs have been modest, at most 10,000 euro for a large provider, these are only important in principle.<sup>177</sup> On the other hand, requiring the installation of a URL-blocking mechanism (for example) would likely be disproportionate.<sup>178</sup> Providers likely fear the expansion of mechanisms and costs. Arnold J and the A.G. anticipated this and noted that there may be reasons to cover some or all costs in the future.<sup>179</sup>

79 Given that blocking furthers the IPR holder’s private interest, and the IPR holder is also the sole beneficiary, it would not seem unreasonable for it to cover all costs.<sup>180</sup> This would guide it to do a rigorous assessment of which blocking would be economically justified. This might also allow adopting more efficient yet costlier means.

80 However, to date, implementation costs have been dwarfed by 10 to 30 times larger legal expenses. It would be disproportionate to require the provider also to bear the claimants’ costs if an order is granted. This applies in particular to countries where the provider is not even legally allowed to implement blocking without court approval.<sup>181</sup> Likewise, if the provider makes good arguments in court and the claimant’s request is restricted, the provider’s costs should also be compensated.<sup>182</sup> An appropriate default might be that both parties bear their own costs if the blocking order is granted essentially as requested.

- 81 Other burdens may also be relevant because the order will restrict how the provider is able to use its resources.<sup>183</sup> The order may also require reducing the security and reliability of the network.<sup>184</sup> Likewise, there may be limits (usually hundreds or thousands of entries) of blocked targets until the provider faces a serious performance penalty. In consequence, there may also be an issue of scalability if the number of blocking entries grows significantly.<sup>185</sup>
- 82 Usually blocking orders have been ordered without a time limit. This imposes restrictions on the provider because as a matter of business, services (e.g. BT's Cleanfeed and equivalents) might need to be replaced or retired. Blocking orders should not restrict innovation and maintenance of services.<sup>186</sup> Also, even if the site disappears, blocking will stay in place until the order is discharged. In that case, the blocking might unduly affect the new user of (in particular) IP addresses. It would be appropriate for the order to have a fixed time limit of two to five years, but renewable as need be with a simple substantiated request.<sup>187</sup> Alternatively, the IPR holder could have the obligation to apply for discharging or varying the order if circumstances change or face liability for potential damages.<sup>188</sup> These would hopefully ensure that the list of blocked sites will contain only relevant and up-to-date entries.
- 83 The impact of this kind of burden must be accounted for, though admittedly the potential technical and innovation implications may be difficult to qualify.

## V. Subsidiarity

- 84 The issue of addressing the infringement at its source has been a recurring theme in national case law as well as in the literature. While the CJEU confirmed that the connectivity provider at the user end may be issued a blocking order, it is not always necessarily best placed to end or prevent infringement.<sup>189</sup> In contrast to subscriber identification requests that the CJEU referred to, the user end provider is not the *only* provider that could implement blocking. Further, the A.G. opined that as a consideration of proportionality, if possible, primarily the infringer or infringer's provider should be targeted. This might be the case in particular if an upstream provider is located in the EU.<sup>190</sup> It must also be observed that Article 8(2) of the Infosoc Directive does not require Member States to provide for injunction (against infringers), except when infringement occurs on its territory.<sup>191</sup> While wider protection may be provided, this portrays the general principle that in some cases it is not unreasonable to require that the IPR holder pursues the case abroad.<sup>192</sup>
- 85 All of this seems to indicate that subsidiarity does have some role in evaluating proportionality. This is underlined especially if the measures would be burdensome, ineffective, the infringer is operating in EU, there has been no attempt to target him/her or to disconnect the site and/or the illegality is suspect. On the other hand, if there is evidence that the website has repeatedly changed providers (as with The Pirate Bay) or the administrators are anonymous and difficult to identify,<sup>193</sup> addressing the issue at the user end might be more easily proportionate.

## VI. Avoiding Collateral Damage

- 86 The CJEU has emphasised the importance of freedom of information, and the A.G. also underlined its necessity for democracy and supporting the provider's legitimate business.<sup>194</sup> Legal communications in particular must not be "unnecessarily" disturbed.<sup>195</sup> This implies that a minor disturbance might be acceptable in some circumstances; one example might be a site that has a small fraction of legal content. However, it is difficult to conceive of a scenario where overblocking – i.e. blocking affecting unrelated sites – would be acceptable. This comes up (and has come up) in particular with IP address blocking. For example, Arnold J has noted in two UK blocking cases that IP address blocking would not be appropriate if the address was shared.<sup>196</sup>
- 87 While overblocking has not yet caused significant problems with the top infringing sites, the ever-expanding blocking implies that this would become a problem. Specifically, for example, proxy sites and less significant websites will most likely almost always use a shared IP address. Thus IP address-based blocking would be excluded. On the other hand, more detailed forms of blocking (e.g. URL blocking) might be unavailable, and more generic ones such as DNS blocking might suffer from other problems. Given the crudeness of the website blocking as a tool, the result may be that blocking would be disproportionate.
- 88 Another difficult-to-qualify issue, as already touched on in the context of burdens, concerns the technical, architectural and security implications of blocking mechanisms, among others. All blocking mechanisms have their problems. DNS blocking undermines the security of the Internet by decreasing trust in domain name lookup services. IP blocking is simple, yet it has a risk of overblocking if not used with caution. There is also a danger of permanent blocking orders hindering innovation as some addresses cannot be recycled to new uses due to lingering blocking orders all over Europe. URL blocking may be expensive and it is incompatible with secure web connections. All of these might cause collateral damage through specific problems or as unreliability in general.<sup>197</sup>

## E. Proportionality Evaluation

### I. Legitimacy of the Objective

- 89 The objective might be construed as IPR protection in such a manner that it does not disproportionately affect other rights. *Prima facie* this could be accepted as legitimate as is, but closer examination reveals doubts on the ultimate goal of blocking.
- 90 The general goal of blocking would seem to be protecting the private interests of IPR holders.<sup>198</sup> The political motives of IPR holders include strengthening the position against other parties, obtaining ever more effective enforcement mechanisms, and being seen to be doing something. The latter is essential to legitimise the existence of central copyright organisations to the actual copyright holders, as well as to affect public opinion that “piracy” cannot be tolerated. On the other hand, the more concrete motive would be to decrease the amount of infringement to regain some “lost” sales.
- 91 The crucial question is which and to which degree these underlying motives of blocking can be accepted as legitimate. Specifically, are enforcement mechanisms (especially at intermediaries’ expense) available only for efficient enforcement that produces economically quantifiable results?<sup>199</sup> Or is blocking also acceptable for educational, symbolic or politically motivated gestures?<sup>200</sup> There is likely no single right answer to this because the symbolic value of copyright enforcement is also tied to the public interests, with varied valuations. However, at least using enforcement to enhance your own political agenda at others’ expense must be rejected.

### II. Suitability for the Purpose

- 92 The Advocate General suggested that, in general, specific blocking is not inappropriate for the purpose of furthering the aim of protecting the IPR holder’s rights. This was essentially based on a belief that many users would forgo accessing the site and would not bother to search for it because finding a way to access the material would become significantly more difficult. These also seemed to rest on an uneasy assumption that users would not be familiar with the illegality of the site, and blocking would have an educational purpose, affecting users’ behaviour. This displays naiveté or undue optimism. Almost everybody seems to know that downloading and especially sharing is illegal; clearly “illegal sites” are typically also identifiable as such. Most infringers are likely recurring users who are not affected either by blocking or such subtle forms of education. Also, as demonstrated, searching is also trivial, and the increase in deterrence is minimal. As such, the A.G.

seemed to overestimate the suitability of blocking as a deterring and educational mechanism.<sup>201</sup>

- 93 The University of Amsterdam study<sup>202</sup> and other public studies confirmed that the anticipated efficacy of deterring and also educating users is too optimistic. In the survey, 71% of infringing users reported that they did not intend to decrease or stop their infringing behaviour; after blocking, 77% continued (similar and even more pessimistic figures were found in other Dutch studies). This was one of the grounds for the Appeals Court rejection of blocking in The Netherlands. It raised an issue, however: would an order be more easily proportionate if the IPR holder requested extensive blocking at once? The court rejected proceeding with a step-by-step approach, which perforce is more ineffective than blocking more sites at once. The court seemed to think “yes”, but it is not clear if this was a fair assessment given that The Pirate Bay was only a test case.<sup>203</sup> On the other hand, a step-by-step approach demonstrates IPR holders’ rhetorical twists: first it is claimed that blocking is effective and as such the request should be granted, and later insufficient effectiveness is used to argue for extending blocking.<sup>204</sup>
- 94 What is deemed to be the legitimate goal of blocking affects the evaluation of effectiveness and subsidiarity in suitability analysis. If symbolic gestures, education or politics are accepted, even completely ineffective means could be deemed appropriate, assuming that the negative impact on providers and users is minimal. If the goal is to make a significant impact on sharing and reduce the economic loss of IPR holders, a much higher degree of effectiveness may be required. The scale also tilts towards higher requirements if the negative impact on others increases. For example, Arnold J seemed to accept blocking even if it only affected a minority of users.<sup>205</sup> This might be suspect unless a broad notion of the goals of blocking is adopted.

### III. Necessity: What Is the Least Restrictive Means?

- 95 Necessity concerns whether there are better means of achieving the objective. With the objective of preventing infringements, targeting the infringer (if possible) or infringer’s provider (especially if located in the EU, unless the operator has already switched providers multiple times) would be preferable to a patchwork of step-by-step blocking separately in all Member States. Blocking at the user end incurs much higher costs overall in the form of implementation costs and legal expenses than addressing the problem at its source.<sup>206</sup> The necessity to try alternative means first, if at all possible, was also underlined in the A.G. opinion in *UPC Telekabel*

*Wien*. This is more important in particular if the cost and burden for the provider or the impact on users' freedom of expression is not minimal.

96 Again, if the objective of blocking is deemed to (also) be symbolic, educational or political, there may not be much better means. It is in the IPR holder's interest to increase the duties and responsibilities of intermediaries irrespective of efficacy. Further, blocking appears to be the second- or third-best solution to educating the users, with graduated response probably being preferable; there seems to be a mixed reaction to the relatively expensive and, in PR terms, uncertain trend to sue the users.<sup>207</sup> On the other hand, deploying ineffective mechanisms may also result in ridicule, especially from infringing website operators. It would be a much more powerful message from IPR holders to pursue infringers directly.

#### IV. Proportionality: Weighing the Burden against the Objective

97 Criteria and their impact have already been discussed. Here only a general observation is made. As has already come up repeatedly, the goal of blocking as perceived and accepted by a court doing a proportionality evaluation incurs implications on the level of accepted proportionality. This is in particular the case with ineffective measures that do not cause significant costs or burden to the provider or the users. With a stricter focus on the economically quantifiable results – that is, proof that blocking significantly reduces the losses by IPR holders – ineffective mechanisms might be more easily rejected.

98 One point is worthy of noting, however. The effectiveness or lack thereof in a particular country or context can be measured only (and even then with difficulty) after blocking has been implemented. Erring on the side of restraint, however, might cause the issues to be addressed at higher courts or referred to the CJEU. This might also allow (or force) the IPR holder to conduct more rigorous studies of effectiveness in other countries.<sup>208</sup>

#### F. Conclusions

99 IPR holders, intermediaries, users and website operators each have very different interests, and satisfying all of them is obviously impossible. As CJEU case law provides only very high-level guidance, five interrelated criteria for assessing proportionality were formulated: degree and basis of illegality, effectiveness, negative burden, subsidiarity and avoiding collateral damage.

100 As was already observed by Norrgård in 2005, the Enforcement Directive affords a national judge wide discretion in how strong an enforcement model is adopted. It is submitted that by using these criteria, it would be possible to untangle the Gordian Knot of proportionality evaluation and make more reasoned, nuanced and explicit decisions. Too little attention has also been given to the different interpretative contexts (infringer vs intermediary) of enforcement principles.

101 Blocking has not been requested in most EU countries. This is likely due to strategic choices of major national IPR holders and associations: e.g. unsatisfactory benefit compared to the expenses. On the other hand, with reasoned judgments the UK has been in the forefront of blocking. Different aspects of discretion and proportionality have also been considered in many UK rulings, even if on most issues there has not been detailed scrutiny. The appropriateness of blocking, even if impacting only the minority, hinted at particular regard for the symbolic value of copyright enforcement; this was also observable from Ireland.

102 Case law from Scandinavian countries provides an example of how proportionality has traditionally been assessed mainly between the parties in proceedings – a model which is now insufficient. Finland is an example of a country that adopted a very strict interpretation on establishing and updating the blocking list through judicial review only. Norway and several other countries such as Germany also demonstrated the rejection of requests when Article 8(3) of the Infosoc Directive was not explicitly transposed. Belgium was atypical in the sense that both criminal and civil proceedings were used. Criminal proceedings resulted in probably the most extensive blocking and a related monitoring obligation in Europe, closely followed by criminal proceedings in Italy.

103 In contrast, a Court of Appeals decision in the Netherlands was striking. It adopted an unconventional and restricted interpretation of the illegality of the site, and rejected blocking in a proportionality evaluation due to ineffectiveness as demonstrated by public research.<sup>209</sup> It remains to be seen if this will be considered an anomaly and overturned in the Supreme Court or CJEU, or if this will be a sign of a new kind of critical movement in European case law.

104 As was seen, the key point in proportionality analysis is establishing which goals in blocking are accepted. Blocking may be portrayed as a technical measure aimed at reducing the economic losses from infringement by increasing sales. Legitimacy of this objective requires substantial impact and effectiveness. On the other hand, if it is accepted that IPR holders have a legitimate aim to try to use

connectivity providers (at their own expense) to perform vain attempts at educating users, or to make symbolic gestures or political moves to increase their own power, inefficient mechanisms might be considered more easily acceptable as well. While the national case law from various EU countries has suggested that the latter justification has also been implied to some degree, it is submitted that a critical assessment is needed before embarking on that path.

\* Lic.Sc.(Tech.), Master of Laws, LL.D. candidate. Legal Counsel at CSC-IT Center for Science Ltd, Researcher at University of Helsinki, Finland, and part-time expert member on IPR issues in Market Court. The author likes to thank in particular Taina Pihlajarinne, Martin Husovec, Simon Morrison and Cedric Manara for discussions and feedback.

- 1 See e.g. Van Eecke, "Online service providers and liability: A plea for a balanced approach", 48 CML Rev. (2011) 1455, pp. 1461, 1497-1501; Kohl, "The rise and rise of online intermediaries in the governance of the Internet and beyond - connectivity intermediaries", 26 IRLCT (2012) 185, pp. 192-193, 200. See also Bright - Agustina, "Mediating Surveillance: The Developing Landscape of European Online Copyright Enforcement", 9 J Contemporary European Research (2013) 120, pp. 122-124; Lodder - van der Meulen, "Evaluation of the Role of Access Providers: Discussion of Dutch Pirate Bay Case Law and Introducing Principles on Directness, Effectiveness, Costs, Relevance, and Time", 4 JIPITEC (2013) 130, paras. 3, 5, 10, 57; Montero - Van Enis, "Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?", 27 CLSR (2011) 21, p. 22.
- 2 A blocking order is just one of the many possible mechanisms an IPR holder may use. See e.g. Edwards, *Role and Responsibility of the Internet Intermediaries in the Field of Copyright* (WIPO study, 2011).
- 3 Husovec, "Injunctions against Innocent Third Parties: The Case of Website Blocking", 4 JIPITEC (2013) 116, paras. 1, 18, 24; Sandfeld Jacobsen - Salung Petersen, "Injunctions against mere conduit of information protected by copyright: A Scandinavian perspective", 42 IIC (2011) 151; Feiler, "Website Blocking Injunctions under EU and U.S. Copyright Law - Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?" TTLF Working Papers 13, 2012, pp. 45-46.
- 4 Arts 12-15 of E-Commerce Directive, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. O.J. 2000, L 178/1. See also Van Eecke (n 1), p. 1464.
- 5 Kohl (n 1), pp. 186, 190-191, 193; Husovec (n 3), para. 25; Feiler (n 3), pp. 71-73; Bright - Agustina (n 1), pp. 123-124, 131. See also Savola, "The Ultimate Copyright Shopping Opportunity: Jurisdiction and Choice of Law in Website Blocking Injunctions", 45 IIC (2014) 287. Generally on governments' control of Internet, see Goldsmith - Wu, *Who Controls the Internet? Illusions of a Borderless World* (OUP, 2006), pp. 65-85.
- 6 Van Eecke (n 1), p. 1465; Kohl (n 1), p. 191; Blevins, "Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms", 34 Cardozo L Rev (2013) 1821; Senftleben, "Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions", 4 JIPITEC (2013) 87, para. 6; Montero - Van Enis (n 1), pp. 28-29.
- 7 See e.g. Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing, 2013), p. 16; Sauter, "Proportionality in EU Law: A Balancing Act?", 15 CYELS (2013) 439, p. 448; Stone Sweet - Mathews, "Proportionality Balancing and Global Constitutionalism", 47 CJTL (2008) 72, p. 75.
- 8 See e.g. Ibid; Craig - de Búrca, *EU Law: Text, Cases and Materials* (OUP, 5<sup>th</sup> ed. 2011), p. 526; Harbo, "The Function of the Proportionality Principle in EU Law", 16 ELJ (2010) 158, p. 165.
- 9 Websites have typically been held to infringe copyrights in almost all countries. See Savola, "Blocking Injunctions and Website Operator's Liability for Copyright Infringement for User-Generated Links", 36 EIPR (2014) 279. Feiler (n 3, pp. 67-69, 71) sees a potential for market fragmentation and creating barriers to legitimate trade.
- 10 See generally e.g. Sarmiento, "Who's afraid of the charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CML Rev. (2013) 1267, pp. 1294-1295.
- 11 By analogy, see Husovec (n 3), paras. 7-8; Peukert "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature", Goethe Institut Frankfurt am Main Faculty of Law research paper 7/2013, also forthcoming in Geiger (ed.), *Human Rights and Intellectual Property: From Concepts to Practice* (Edward Elgar, 2014), p. 3.
- 12 See e.g. Case C-314/12, *UPC Telekabel Wien*, judgment of 27 Mar. 2014, nyr, para. 47; Case C-70/10, *Scarlet Extended*, [2011] ECR I-11959, paras. 45-46, 50-53. In addition, the typically neglected website operator's rights - for example, the right to fair trial, freedom of expression and freedom to conduct a business - are also relevant. See Husovec (n 3), paras. 33-38. More generally on IPR protection and its relation to fundamental rights, see e.g. Griffiths, "Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law", 28 ELR (2013) 65; Peukert, "Intellectual Property as an End in Itself?", 33 EIPR (2011), 67; Geiger, "Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope", 31 EIPR (2009) 113, Mylly, "Intellectual property and fundamental rights: Do they interoperate?" in Bruun (ed.), *Intellectual Property Beyond Rights* (WSOY, 2005) 185, pp. 206-207.
- 13 See e.g. Sandfeld Jacobsen - Salung Petersen (n 3), pp. 176-180; Geiger - Izuymenko, "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression", 45 IIC (2014) 316; Jones, "Internet Pirates Walk the Plank with Article 10 kept at Bay: Neij and Sunde Kolmisoppi v Sweden", 35 EIPR (2013) 695; ECtHR *Kolmisoppi v Sweden*, Appl. No. 40397/12, decision of 19 Feb. 2013, 4 EHRLR (2013) 425. On blocking, see cases listed in note 73. Cf. Peukert (n 11), pp. 4-6, 10 (criticising both CJEU and ECtHR for the lack of normative criteria, weighting without a scale and unforeseeability, and also that limitations require justification rather than balancing).
- 14 For a critique of the CJEU's succinct reasoning, see e.g. Mylly (n 12), pp. 210-213; Griffiths (n 12), pp. 74, 76-78; Peukert (n 11), p. 4.
- 15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. O.J. 2001, L 167/10.
- 16 Corrigendum to the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. O.J. 2004, L 195/16. The former Article governs interlocutory injunctions, the latter injunctions awarded after infringement has been established in court. The Infosoc Directive does not explicitly require interlocutory injunctions; see Leistner, "Structural aspects of secondary (provider) liability in Europe", 9 JIPLP (2014) 75, p. 76. The Enforcement Directive explicitly notes

- that injunctions are ordered by a judicial authority, while “injunction” seems to imply that also in the Infosoc Directive.
- 17 Articles 12–14 of E-Commerce Directive; Husovec (n 3), paras. 4–6.
  - 18 On these differences, see Opinion in *L’Oréal v eBay*, paras. 138–146, correctly questioning applying the liability exemptions of connectivity providers to hosting providers in Joined cases C-236–238/08, *Google France*, [2010] ECR I-2417, paras. 113–114. Also see Van Eecke (n 1), pp. 1481–1483.
  - 19 Recitals 42–44 and Art 12 of E-Commerce Directive.
  - 20 Recital 46 and Art 14 of E-Commerce Directive.
  - 21 For a summary, see references in Savola (n 9), p. 285. This will have impact in a proportionality evaluation. See also e.g. Matulionyte – Lankauskas, “Bittorrent Loses Again: A Recent Lithuanian BitTorrent Case and What It Means for the Construction of E-commerce Directive”, 4 JIPITEC (2013) 179; Dimita, “Six Characters in Search of Infringement: Potential Liability for Creating, Downloading and Disseminating .Torrent Files”, 7 JIPLP (2012) 466.
  - 22 On reinterpretation of neutrality to imply awareness, see note 18.
  - 23 Case C-324/09, *L’Oréal v eBay*, [2011] ECR I-6011, paras. 120–123. Van Eecke’s reading of this is that any diligent economic operator should have been able to note the illegality, implying a threshold slightly lower than “manifestly illegal content” (n 1, p. 1467). For similar earlier trends, see Verbiest et al., “Study on the Liability of Internet Intermediaries”, Final report (Markt/2006/09/E) of 12 Nov. 2007, pp. 36–47.
  - 24 Cf. Rizzuto, “The liability of online intermediary service providers for infringements of intellectual property rights”, 18 CTLR (2012) 4, pp. 13–14, submits the opposite argument by generalization and analogous interpretation. For the stated reasons, this seems unconvincing. Indeed, since the E-Commerce Directive, there have been few serious claims (and no rulings) to establish a connectivity provider’s liability for transmitted information.
  - 25 Similarly in *Newzbin2* [2011] EWHC 1981 (Ch), para. 145.
  - 26 Such duties exist in close to 10 EU states, for example, Belgium and Italy. See Verbiest et al. (n 23), pp. 72–73. At least in Italy, failure to comply has also led to finding the connectivity provider liable. See Bellan, “Intellectual Property Liability of Consumers, Facilitators and Intermediaries: The Position in Italy” in Heath – Kamperman Sanders (eds.), *Consumers, Facilitators, and Intermediaries: IP Infringers or Innocent Bystanders?* (Kluwer Law International, 2012) 87, pp. 92, 96–97.
  - 27 Recital 47 and Art 15(1) of E-Commerce Directive. Art 18 also requires providing court measures “designed to terminate any alleged infringement and to prevent any further impairment of the interests involved”. See Montero – Van Enis (n 1), pp. 28–29. An example of “specific monitoring” is a targeted, temporary request to tackle a specific illegal activity. See *ibid.*, p. 30 footnote 69.
  - 28 Recital 45 and Arts 12(3), 13(3), and 14(3) of E-Commerce Directive.
  - 29 This might re-ignite debate on which generic orders would constitute a monitoring obligation. See Husovec, “CJEU Allowed Website Blocking Injunctions With Some Reservations” 9 JIPLP (2014) 631, p. 634.
  - 30 Opinion in *UPC Telekabel Wien* (n 12), para. 78. The A.G. did note that if the connectivity provider needed to search for duplicate DNS entries for the same site, this would amount to forbidden monitoring.
  - 31 Recital 48 of E-Commerce Directive. These also cannot amount to general monitoring but rather refer to notification systems, for example. See Montero – Van Enis (n 1), p. 29. Also, see generally e.g. Nordemann, “Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach”, 2 JIPITEC (2011) 37. Cf. Leistner (n 16, pp. 88–89) who seems to consider the violation of reasonable duties of care to prevent infringements a significant European factor and standard for providers’ secondary liability. His discussion seems to have an implicit hosting provider focus.
  - 32 Last part of Article 14(3) of E-Commerce Directive. See Van Eecke (n 1), pp. 1484–1485.
  - 33 *L’Oréal v eBay* (n 23), paras. 139, 141.
  - 34 *Gema v Rapidshare* (BGH I ZR 80/12), *Atari v Rapidshare* (BGH I ZR 18/11). See Gärtner – Jauch, “GEMA v RapidShare: German Federal Supreme Court extends monitoring obligations for online file hosting providers”, 36 EIPR (2014) 197, pp. 198–199; Ginsburg, “Take Down/Stay Down: RIP in France? But Little Solace for Google...”, Intellectual property issues, The Media Institute (6.8.2012). Cf. Opinion in *L’Oréal v eBay* (n 23), paras. 166–168, 178–182, which suggested a double identity requirement for preventing future infringements: that a person could be prevented from repeating infringement of a specific trademark. This was not explicitly addressed by the CJEU, but the restrictions seemed to point towards that direction; see Van Eecke (n 1), pp. 1477–1478. On potential issues of “stay down” orders, see *ibid.*, pp. 1479–1480.
  - 35 *Scarlet Extended* (n 12), para. 43, affirmed in *UPC Telekabel Wien* (n 12), para. 61. Also similarly in Opinion in *UPC Telekabel Wien*, paras. 75–76, 79–81. For an earlier discussion, see e.g. Mylly (n 12), p. 200.
  - 36 See e.g. Feiler (n 3), pp. 74–75. One way to answer this is to conclude that rights are in some cases practically unenforceable. Alternatively, it must be evaluated whether the extension to enforcement is justified. See Husovec (n 3), para. 26.
  - 37 *UPC Telekabel Wien* (n 12), paras. 54, 57.
  - 38 Opinion in *UPC Telekabel Wien* (n 12), paras. 66, 81–86, 88. This was also submitted by the Commission.
  - 39 While Art 8(1) requires effective, providing and dissuasive sanctions against infringers (emphasis added), these do not apply to faultless intermediaries.
  - 40 Cf. a case on trademark infringement, in which the A.G. did not see that EU law would impose any specific requirements beyond efficacy, dissuasiveness and proportionality required by Article 3(2). Opinion in *L’Oréal v eBay* (n 23), para. 180.
  - 41 See Recital 17 of Enforcement Directive on case-by-case consideration.
  - 42 The interpretations have been taken mainly from *Scarlet Extended* (n 12). For example, “not unnecessarily costly or complicated” could also be construed to mean that the procedure should be easy and cheap for the right holder. Similarly, it could be argued that it would be disproportionate for the right holder to be denied an injunction. On the other hand, the “effectiveness” requirement could also be read in a negative fashion (see Feiler (n 3), pp. 61–62). That is, non-effective mechanisms must be rejected. A positive and widely accepted reading seems to be that effective mechanisms should be provided, but ineffective ones are also acceptable (*maius includit minus*). Likewise, “no barrier to legitimate trade” could also be construed to imply reluctance against intra-EU market fragmentation by imposing requirements to website operators in all jurisdictions. See Feiler (n 3), pp. 68–69 and note 9.
  - 43 See also Norrgård, “The Role Conferred on the National Judge by Directive 2004/48/EC on the Enforcement of Intellectual Property Rights”, ERA Forum 4/2005 at 503, p. 506.
  - 44 Norrgård (n 43), pp. 507–511.
  - 45 Norrgård (n 43), pp. 511–514.
  - 46 Ohly, “Three principles of European IP enforcement law: Effectiveness, proportionality, dissuasiveness”, prepublication

version of article published in Drexel et al. (eds.), *Technology and Competition, Contributions in honour of Hanns Ullrich* (Larcier, 2009), pp. 7–8, 11, 15.

- 47 Cf. Headdon, “Beyond liability: On the availability and scope of injunctions against online intermediaries after *L’Oréal v eBay*”, 34 EIPR (2012) 137, p. 139, seems to implicitly accept dissuasiveness with respect to intermediaries, interpreting it as being in contempt of the court for disobeying the court order.
- 48 Opinion in *L’Oréal v eBay* (n 23), paras. 176–177.
- 49 Norrgård (n 43), p. 514. Actually, Norrgård lists only four types of infringers (and not third parties at all) as imposing considerations for the context. The omission is striking and calls for a specific reminder of third-party scenarios.
- 50 For examples, see Husovec (n 3), paras. 15–19.
- 51 In particular, according to the German Constitutional Court (1 BvL 3/08), a preliminary reference to the CJEU is required if a national court needs to determine the exact scope of discretion of the Member State implementing EU law. See Sarmiento (n 10), p. 1301 fn 128.
- 52 For more examples, see e.g. Verbiest et al. (n 23), pp. 53–56.
- 53 Further details are provided in this and a number of subsections.
- 54 This is the case at least in the UK, Ireland, The Netherlands, Belgium and Austria.
- 55 Feiler (n 3), pp. 27–30. Generally on IPR injunctions in Member States, see European Observatory on Counterfeiting and Piracy, “Injunctions in Intellectual Property Rights” (2011), <[http://ec.europa.eu/internal\\_market/iprenforcement/docs/injunctions\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf)> (Observatory Report).
- 56 There have also been cases which relate to Internet connectivity providers and also discussed proportionality, but where the context has been *inter alia* disclosing the subscriber whose IP address was used in copyright infringement. It is not necessary or possible to discuss these in detail. See Case C-275/06, *Promusicae*, [2008] ECR I-271, Case C-557/07, *LSG v Tele2*, [2009] ECR I-1227, Case C-461/10, *Bonnier Audio*, judgment of 19 Apr. 2012, nyr, and Joined cases C-293/12 and C-594/12, *Digital Rights Ireland*, judgment of 8 Apr. 2014, nyr.
- 57 *L’Oréal v eBay* (n 23), paras. 134, 139–144. The criteria established in *Google France* (n 18) were apparently superseded in *L’Oréal v eBay*.
- 58 In another case, a social media site benefited from the Article 14 defence. The judgment was essentially identical to *Scarlet Extended* (n 12), so it is not necessary to cover it here. See Case C-360/12, *NETLOG*, judgment of 16 Feb. 2012, nyr.
- 59 *Scarlet Extended* (n 12), para. 40. Because such an injunction is prohibited, it is not clear why the CJEU continued to consider the fundamental rights balance at all. The CJEU possibly wanted to provide for criteria for evaluation for subsequent cases instead of just addressing the issue at hand.
- 60 *Scarlet Extended* (n 12), paras. 44, 48–49. Also see Kulk – Zuiderveen Borgesius, “Filtering for Copyright Enforcement in Europe after the Sabam Cases”, 34 EIPR (2012) 791.
- 61 *Scarlet Extended* (n 12), paras. 50–52.
- 62 The Opinion in *Scarlet Extended* is of less relevance. The key point was the argument that the national law was vague and broad, and could be used to issue essentially arbitrary orders. The quality of the law as required by fundamental rights limitations should prevent issuing such orders. This aspect was not addressed in the CJEU judgment. See e.g. Van Eecke (n 1), pp. 1494–1495; Husovec (n 3), paras. 40–41.
- 63 *UPC Telekabel Wien* (n 12), paras. 54–62.
- 64 The unfortunate side-effect was that the answer to the fourth question on specific orders was not given and no explicit guidance was provided. It would have been crucial for a proportionality evaluation.
- 65 *Ibid.*, para. 46. The CJEU referred to *Promusicae* (n 56); also see Coudert – Werkers, “In The Aftermath of the *Promusicae* Case: How to Strike the Balance?”, 18 IJLIT (2008) 50.
- 66 *UPC Telekabel Wien* (n 12), para. 47. A.G. had opined (paras. 94–98) on the Charter, limitations and the rights at issue in much the same manner. It is notable that users’ right to data protection was not at issue, as with *Scarlet Extended* (n 12), paras. 50–51, 53.
- 67 *UPC Telekabel Wien* (n 12), paras. 48–51. This latter means that injunctions are not completely forbidden, merely restricted.
- 68 *Ibid.*, paras. 52–53. A.G. had opined (paras. 84–86) that “prohibition of outcome” would not be compatible with the fair balance requirement, as it might require the use of very complicated mechanisms, and the intensity of interference with a provider’s fundamental rights varied. Prevention could also be impossible.
- 69 *Ibid.*, para. 54. The A.G. had opined (paras. 87–88) that a defence at the execution stage would be non-compliant, because the provider does not know which actions it must perform. Similarly in *L’Oréal v eBay* (n 23), the A.G. had opined (para. 181) that it is crucial that the intermediary can know for certain what is required of it, and that the injunction does not impose impossible, disproportionate or illegal duties like the general monitoring obligation.
- 70 See Savola, “Website blocking in copyright injunctions: A further perspective” (28.3.2014), <<http://the1709blog.blogspot.fi/2014/03/website-blocking-in-copyright.html>>. Alternatively, this would imply orders which specify, for the avoidance of doubt, a sufficient implementation as in the early UK injunctions; see *Newzbin2* (No 2) [2011] EWHC 2714 (Ch), para. 56.
- 71 Opinion in *UPC Telekabel Wien* (n 12), paras. 88–89. Intrusive means could also incur significant expenses to the provider.
- 72 *UPC Telekabel Wien* (n 12), paras. 55–56. The A.G. also emphasised (para. 82) that blocking (emphasis added) *actually affects* infringing material and there is no danger of blocking access to lawful material. “Actually affects” could be read to disallow ineffective or misdirected means.
- 73 ECtHR *Yildirim v Turkey*, Appl. No. 3111/10, judgment of 18 Dec. 2012, paras. 65–69. In contrast, in *Akdeniz v Turkey*, Appl. No. 20877/10, inadmissibility decision of 11 Mar. 2014, an Internet user was deemed not to be a ‘victim’ of website blocking.
- 74 *UPC Telekabel Wien* (n 12), para. 57. This may be unattractive for national courts; see Savola (n 70).
- 75 As will be seen, in some countries such a review has not been conducted or it has been superficial.
- 76 *Ibid.*, paras. 58–61. Indeed, on impossibility, see section B.IV.
- 77 *Ibid.*, para. 62.
- 78 *Ibid.*, para. 63.
- 79 Opinion in *UPC Telekabel Wien* (n 12), paras. 99–102. This “users will not bother” argument is similar to the one used by Arnold J; see notes 91 and 101 and accompanying text.
- 80 *Ibid.*, paras. 103–108.
- 81 *UPC Telekabel Wien* (n 12), paras. 34–35. Notably here the context differs from a connectivity provider ordered to reveal the identity of the subscriber using an IP address, as with the referred (para. 32) *LSG v Tele* (n 56), para. 44. In that case, there is only one provider having the required information; here, blocking can be implemented by others as well, and it is a matter of convenience and other considerations.
- 82 *UPC Telekabel Wien* (n 12), paras. 34–35; A.G. Opinion, paras. 58, 107.
- 83 Opinion in *UPC Telekabel Wien* (n 12), para. 57. Similarly, Lodder and van der Meulen (n 1, para. 71) suggest that the problem

- should be addressed at its source and only as the last resort on the user end. While injunctions may be ordered without prejudice to the other actions available to the right holder (Recital 59 of Infosoc Directive, and respectively, Recital 23 of Enforcement Directive), the novel part is taking this into account in the proportionality evaluation. Subsidiarity has been applied at least in France and The Netherlands. On the other hand, some courts in e.g. Germany and Belgium have held that such a subsidiarity requirement does not exist in Article 8(3) of the Infosoc Directive. See Feiler (n 3), pp. 47–52; Van Eecke (n 1), p. 1490; Verbiest et al. (n 23), pp. 49–50.
- 84 See Savola (n 5) pp. 305, 312; Feiler (n 3), p. 53.
- 85 IPR holders have typically claimed that the user end provider benefits, e.g. due to increased demand for high-speed connectivity. This is not obvious. Typically the provider's own audio-visual additional services suffer, and high-volume users that use disproportionate amount of capacity are not ideal customers.
- 86 For example, in the UK it has been held that affecting even a “minority” of users is sufficient; see notes 91 and 101 and corresponding text.
- 87 *Newzbin2* (n 25), paras. 43, 151. Cf. *Newzbin* [2010] EWHC 608 (Ch), paras. 133–135 where Kitchin J was more hesitant and did not initially grant a broader injunction.
- 88 *Newzbin2* (n 25), paras. 157 ff.
- 89 *Ibid.*, paras. 185–186.
- 90 *Ibid.*, paras. 189–190. Cf. Schellekens, “Liability of internet intermediaries: A slippery slope?” 8 SCRIPT-ed (2011) 154.
- 91 *Newzbin2* (n 25), paras. 194, 197–198. For a critique of the research, see note 101.
- 92 *Ibid.*, paras. 199–201. In this case, BT's Cleanfeed system would also have supported URL blocking. In a later ruling, Arnold J also noted that the final *Scarlet Extended* judgment would not have made any difference to his consideration. See *Dramatico Entertainment (No 2)* [2012] EWHC 1152 (Ch), para. 8.
- 93 *Newzbin2 (No 2)* (n 70). It is somewhat strange that an operational requirement of doing emergency service maintenance to the system was rejected.
- 94 See references in *Dramatico Entertainment* [2012] EWHC 268 (Ch), paras. 3–4.
- 95 *Ibid.*, para. 7 and below *Emi v Sky* (n 98), para. 90; *Paramount v Sky* (n 103), para. 3. Reasons may be saving legal expenses, adopting a neutral stance in order to avoid having to reimburse claimants' legal fees, and emphasising that it is not their role to argue for the users and the website but the court's. On saving costs, see Senfleben (n 6), para. 67.
- 96 *Dramatico Entertainment (No 2)* (n 92).
- 97 *Ibid.*, para. 13. This approach could be questioned from the perspective of guarding the interests of parties not represented in the proceedings.
- 98 *Emi v Sky* [2013] EWHC 379 (Ch), paras. 91–93, referring to *Golden Eye* [2012] EWHC 723 (Ch), para. 117: “... That approach is as follows: (i) neither Article as such has precedence over the other; (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or ‘ultimate balancing test’ – must be applied to each.” On these developments, including *Golden Eye* [2012] EWCA Civ 1740, see Hyland, “The seductive interface between adult entertainment and Norwich Pharmacal relief”, 18 Comms L (2013) 56; Daly, “Is there an entitlement to anonymity? A European and international analysis”, 35 EIPR (2013) 198. Arnold's test is essentially similar to the balancing considered here, except it lacks an explicit suitability and necessity part.
- 99 *Emi v Sky* (n 98), paras. 7, 95–97.
- 100 *Ibid.*, paras. 99–100.
- 101 *Ibid.*, paras. 102–106. As will be discussed, the more important feature of efficacy is users', not operators', possibility to circumvent blocking. Also, there was no critical assessment of the methodology or bias of these measurements.
- 102 *Ibid.*, para. 107. Again, freedom to conduct a business was not specifically addressed.
- 103 See e.g. *Paramount v Sky* [2013] EWHC 3479 (Ch), para. 42. The number of blocked sites appears to be around 40 as of this writing. See e.g. TorrentFreak, “UK Piracy Blocklist Expands With Megashare, Viooz, Watch32 and Zmovie” (11.3.2014), <<http://torrentfreak.com/megashare-viooz-watch32-zmovie-blocked-140311/>>.
- 104 *FAPL v Sky* [2013] EWHC 2058 (Ch), para. 55. It is notable, however, that there is no requirement to provide an effective remedy in the jurisdiction of the claimant's choosing.
- 105 *FAPL v Sky* (n 104), para. 56; “Premier League piracy fight brings down Radio Times site” (15.8.2013, World IP Review), <<http://www.worldipreview.com/news/premier-league-piracy-fight-brings-down-radio-times-site>>. Also in *Dramatico Entertainment (No 2)* (n 92), para. 13, Arnold J stated that blocking an IP address was only appropriate when it is not shared with anyone else.
- 106 *FAPL v Sky* (n 104), paras. 57–58.
- 107 *TDC*, Supreme Court decision of 10.2.2006 (59/2005). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 159–160.
- 108 *Allofmp3.com*, Copenhagen City Court decision of 25.10.2006 (F1-15124/2006). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 161–162; Verbiest et al. (n 23), p. 57.
- 109 *Telenor*, Supreme Court decision of 27.5.2010 (153/2009). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 162–163.
- 110 Swedish Copyright Act, Section 53 b. Preparatory materials explicitly stated that operating the network does not as such constitute contributory infringement and that injunctions of Article 8(3) are not always available in this context. See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 156–157, 164, 167, 170; Verbiest et al. (n 23), p. 53.
- 111 *Black Internet*, Svea Court of Appeal decision of 21.5.2010 (Ö 7131-09 and Ö 8773-09). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 163–164.
- 112 *Portlane*, Svea Court of Appeal decision of 21.5.2010 (Ö 10146-09). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 164–165.
- 113 See TorrentFreak, “Pirate Bay Bandwidth Supplier Disconnected, But the Ship Sails On” (13.2.2013), <<http://torrentfreak.com/pirate-bay-bandwidth-supplier-disconnected-but-the-ship-sails-on-130221/>>.
- 114 *Telenor*, Borgarting Court of Appeal decision of 9.2.2010 (10-00654ASK-BORG/04). See Sandfeld Jacobsen – Salung Petersen (n 3), pp. 165–167; Manner – Flythstrom, “Bonnier Amigo Music Norway AS v Telenor ASA – another flag in the Pirate Bay – internet service provider not responsible for blocking Bittorrent file sharing services in Norway”, 21 EntLR (2010) 237, pp. 239–240. On Iceland, see TorrentFreak, “Pirate Bay Blockade Dismissed by Icelandic Supreme Court” (3.5.2014). <<http://torrentfreak.com/pirate-bay-blockade-dismissed-by-icelandic-supreme-court-140503/>>. The substance was not evaluated and therefore it is not listed in the table.
- 115 See e.g. TorrentFreak, “Anti-Piracy Group Will Use New Law to Block The Pirate Bay” (24.7.2013). <<http://torrentfreak.com/anti-piracy-group-will-use-new-law-to-block-the-pirate-bay-130724/>>.
- 116 Sandfeld Jacobsen – Salung Petersen (n 3), pp. 171–172.
- 117 However, there is a separate provision on not disturbing third parties, so the lack of “users” here seems irrelevant.

- An amendment to add users (and make a number of other revisions) is in progress, however.
- 118 *Elisa*, Helsinki Court of Appeals decision of 15.6.2012 (S 11/3097), Supreme Court denied leave to appeal on 29.10.2012; *DNA*, Helsinki Court of Appeals decision of 8.2.2013 (S 12/1850); *TeliaSonera Finland*, Helsinki Court of Appeals decision of 11.2.2013 (S 12/2223). All court of appeals decisions upheld Helsinki district court decisions, though in the *Elisa* case (p. 21) with a tightened precision of orders. Only the first lower court decision has been elaborated in English; see Norrgård, “Blocking Web Sites – Experiences from Finland” in Axhamn (ed.), *Copyright in a Borderless Online Environment* (Norstedts Juridik, 2012) 171. The most extensive commentary in Finnish is Savola, *Copyright Injunctions against Internet Connectivity Providers Especially with Regard to Peer-to-peer Networking* (Aalto University Licentiate Thesis, 2013).
- 119 By adopting Cleanfeed, some of these were excluded in *Newzbin2* (n 25); see note 93 and corresponding text. Savola has submitted (n 5) that blocking international transit communications would likely be inappropriate, and as such the wording was too broad.
- 120 *DNA* (n 118), pp. 1, 8–9. In contrast, in The Netherlands, the expenses for two providers were 326,000 euro (n 125).
- 121 *Elisa* (n 118), pp. 17–18.
- 122 *Ziggo*, District Court of The Hague, 19.7.2010 (KG ZA 10-573). See Lodder – van der Meulen (n 1), paras. 31–34; Feiler (n 3), p. 28.
- 123 *Ziggo and XS4ALL*, District Court of The Hague, 11.1.2012 (HA ZA 10-3184). See Lodder – van der Meulen (n 1), paras. 35–42.
- 124 *UPC etc.*, District Court of the Hague, 10.5.2012 (KG ZA 12-156). See Lodder – van der Meulen (n 1), paras. 43–44. NB. the case number there is incorrect.
- 125 *Ziggo and XS4ALL*, The Hague Court of Appeals ruling of 28.1.2014 (200.105.418-01). An appeal to the Supreme Court is pending.
- 126 Poort et al., “Baywatch: Two approaches to measure the effects of blocking access to the Pirate Bay”, 38 *Telecom Policy* (2014) 383; *Ziggo and XS4ALL* (n 125), paras. 5:17–5:22. Previous versions of research were available during court proceedings.
- 127 *Ibid.*, paras. 5:25–5:26. The alternative ground that the providers were obliged to act against their infringing customers in this manner was also rejected (paras. 6:1–6:2).
- 128 *Ibid.*, paras. 5:23–5:24.
- 129 *Telenet and Belgacom*, Antwerp Commercial Court, 8.7.2010 (A/10/05374). See TorrentFreak, “ISP’s Don’t Have to Block The Pirate Bay, Court Rules” (10.7.2010), <http://torrentfreak.com/isps-dont-have-to-block-the-pirate-bay-court-rules-100710/>. This justification did not preclude issuing preliminary blocking orders in Finland; see note 118.
- 130 Antwerp Court of Appeal, 26.9.2011 (2011/8314). The court rejected IP-address-based blocking due to its greater potential for over-blocking.
- 131 Van Bael – Bellis, “Belgian Supreme Court Confirms Order Obliging Internet Providers To Block Access To Pirate Bay Websites” (20.12.2013), <http://bit.ly/1uF4bPn>. Cf. confusing the ruling to be related to the earlier cases; see TorrentFreak, “Court Orders ISPs to Police the Internet for Pirate Bay Proxies” (20.11.2013), <http://torrentfreak.com/court-orders-isps-to-police-the-internet-for-pirate-bay-proxies-131120/>.
- 132 *EMI v UPC* [2010] IEHC 377, paras. 133–134. Earlier ex-tempore judgment, *EMI v Eircom* [2009] IEHC 108, where the blocking had been granted, was here admitted to have been wrong; see *EMI v UPC*, paras. 136–137.
- 133 *UPC etc.* [2013] IEHC 274.
- 134 *Ibid.*, paras. 5–8, 21.
- 135 Supreme Court decision of 23.12.2009 (49437/09); TorrentFreak, “Supreme Court Opens Door For Pirate Bay Block” (1.10.2009), <http://torrentfreak.com/supreme-court-opens-door-for-pirate-bay-block-091001/>; Rinaldi, “Italian Supreme Court explains reasons for ordering blocking of Swedish Pirate Bay website” (10.5.2010), <http://www.twobirds.com/en/news/articles/2012/italian-supreme-court-blocking-swedish-pirate-bay-website-050510>; Bellan (n 26), pp. 107–108; Feiler (n 3), p. 26.
- 136 Bellan (n 26), pp. 91, 97; Verbiest et al. (n 23), p. 54.
- 137 See e.g. TorrentFreak, “Italian Court Orders ISPs To Block Several Major Torrent Sites” (17.10.2013), <http://torrentfreak.com/court-orders-isps-to-block-several-major-torrent-sites-131017/>. Also as a rejection of blocking the whole site instead of infringing URL, see TorrentFreak, “Court Orders ISPs to Unblock ‘Pirate’ Site” (3.4.2014), <http://torrentfreak.com/court-orders-isps-to-unblock-pirate-site-140403/>.
- 138 EDRI, “Italian authority gets the power to block websites” (18.12.2013), <https://edri.org/italian-telecom-authority-gets-power-block-websites/>; Rosati, “BREAKING NEWS: EU Commission had serious doubts about Italian Communication Authority draft online copyright enforcement regulation” (15.1.2014), <http://the1709blog.blogspot.com/2014/01/breaking-news-eu-commission-had-serious.html>.
- 139 See Hoeren – Yankova, “The liability of internet intermediaries – the German perspective”, 43 *IIC* (2012) 501, pp. 517–518; Verbiest et al. (n 23), pp. 54–55. Cf. Hoeren on German law misconceiving the goals of EU legislation in Angelopoulos, “Beyond the safe harbours: Harmonising substantive intermediary liability for copyright infringement in Europe”, (2013) *IPQ* 253, p. 269 fn 123; Observatory Report (n 55), pp. (PDF page numbers) 10, 24. Generally on Störerhaftung liability, see e.g. Leistner (n 16), pp. 78–81; Angelopoulos, pp. 266–270.
- 140 *Deutsche Telecom*, Hamburg District Court decision of 12.3.2010 (308 O 640/08), para. 42; Feiler (n 3), p. 27.
- 141 *G-Stream.in*, Hamburg Court of Appeals decision of 22.12.2010 (5 U 36/09); Feiler (n 3), p. 27.
- 142 *Hansenet*, Cologne District Court decision of 31.8.2011 (28 O 362/10), paras. 115–122. See Feiler (n 3), pp. 26–27.
- 143 *CB3ROB*, District Court of Hamburg decision of 6.5.2010 (310 O 154/10).
- 144 TorrentFreak, “Portugal Next in Line to Block The Pirate Bay” (26.9.2013), <http://torrentfreak.com/portugal-next-in-line-to-block-the-pirate-bay-130926/>.
- 145 Bright – Agustina (n 1), pp. 129–130; TorrentFreak, “Website Blocking Law Implemented by New Spanish Government” (2.1.2012), <http://torrentfreak.com/website-blocking-law-implemented-by-new-spanish-government-120102/>. Cf. TorrentFreak, “Court Jails Torrent Site Owner and Issues Three Year Website Work Ban” (8.11.2013). <http://torrentfreak.com/court-jails-torrent-site-owner-and-issues-three-year-website-work-ban-131108/>. TorrentFreak, “Pirate’ Site ISP Blockades Reversed by Court (17.7.2014). <http://torrentfreak.com/pirate-site-isp-blockades-reversed-by-court-140717/>. It is reported that the judge deemed that there were insufficient grounds for blocking “especially when it is not absolutely necessary for the continuation of the investigation. For earlier discussion of injunctions, see Verbiest et al. (n 23), pp. 49, 59.
- 146 See e.g. Liard – Hainsdorf, “French Courts Ordered to Block and Delist 16 Streaming Websites” (10.1.2014), <http://www.whitecase.com/articles-01102014/>. *Allostreaming*, TGI Paris decision of 28.11.2013 (11/60013). Website blocking after meeting the requirement of subsidiarity should be possible, however. See Verbiest et al. (n 23), p. 54.
- 147 *Grammo v Internet Service Providers*, Protodikeio (16.5.2012), see 44 *IIC* (2013) 468; TorrentFreak, “Court Orders ISP Blockades of ‘Pirate’ Music Sites” (21.5.2012), <http://torrentfreak.com/court-orders-isp-blockades-of-pirate-music-sites-210512/>.

- com/greek-court-orders-isp-blockades-of-pirate-music-sites-120521/>.
- 148 In Slovakia and Czech Republic, injunctions against intermediaries are not possible due to the lack of legal basis. See Observatory Report (n 55), pp. 10–11, 24–25.
- 149 See section B.IV and in particular the table therein.
- 150 It is submitted that the court must consider the absent operator's rights (to some degree) on its own motion; see Husovec (n 3), paras. 33–38.
- 151 Other recurring themes include specificity of the order, the procedure for updating the blocking list, and applicability of interlocutory injunctions, but these are less relevant from a proportionality perspective.
- 152 In slightly different words, six criteria were submitted: 1) subsidiarity, 2) effectiveness, 3) costs, 4) expansion of existing means, 5) duration and reactive/preventive nature and 6) various adequate safeguards. See Lodder – van der Meulen (n 1), paras. 70–76, 79.
- 153 Husovec (n 3, paras. 27–50) does not specifically propose criteria for proportionality, but some guidelines can be gleaned from general observations: 1) effectiveness, 2) method of implementation, 3) collateral damage to innovation, 4) operator's right to fair trial, 5) abusive use, 6) legality of blocking (out-of-court private agreements), 7) degree of illegality, 8) subsidiarity and 9) shifting of costs.
- 154 Considerations are 1) the goal of blocking and targeting, 2) effectiveness and suitability, 3) impact on users and third party communications, 4) subsidiarity i.e. alternatives and 5) costs and other burdens. These were initially submitted in Savola (n 118), pp. 183–199, and further refined in Savola, "Internet connectivity provider and fundamental rights" in Lohi (ed.), *Oikeustiede–Jurisprudentia XLVI:2013* (Suomalainen Lakimiesyhdistys, 2013) 127, pp. 195–199.
- 155 In the conflict between users and IPR holders: 1) preventive/reactive nature, 2) impact on legal material, 3) IPR holder's financial losses, 4) the extent of material and means, 5) subsidiarity and 6) communications of political or societal nature. Between provider and IPR holder: 1) IPR holder's financial losses and subsidiarity, 2) burden on the provider and 3) specific characteristics of the service. See Pihlajarinne, *Internetvälittäjä ja tekijänoikeuden loukkaus* (Lakimiesliiton Kustannus, 2012), pp. 51–61, 140–148.
- 156 See e.g. Lodder – van der Meulen (n 1), para. 76; Husovec (n 3), paras. 37–40.
- 157 This was done in Sweden. However, it is worth noting that the site has changed slightly since then. For example, instead of torrent files, it's serving only "magnet links", i.e. it is even one step further from the infringing act. See note 21. In contrast, in the Netherlands, only the artworks on the site were held to be infringing. See note 127 and corresponding text.
- 158 Examples of analysis are the UK injunctions in *Dramatic Entertainment* (No 2) (n 92), and *FAPL v Sky* (n 104). Some of the grounds could also be contested, however. See Angelopoulos (n 139), p. 257; Savola (n 9), p. 286.
- 159 On finding website operators liable, even though the site does not have any infringing content, see Savola (n 9), p. 285. On the inapplicability of hosting defences, also see note 21.
- 160 See Savola (n 118), pp. 170–173, 179–181.
- 161 For example, in *Newzbin2* (n 25), Arnold J noted that URL blocking might have been appropriate if the site had substantial legal uses (n 92). The A.G. in his Opinion in *UPC Telekabel Wien* (n 12), was also sensitive to this by referring to *Yildirim v Turkey* (n 73), where blocking the whole Google Sites site to block one site violated Article 10 ECHR in various ways. For example, Rome Court of Appeals rejected blocking the whole site (n 137).
- 162 See note 9. Husovec (n 3, paras. 37–39) notes that website blocking as a substitute for proceedings against infringers might lead to abusive or inappropriate use of blocking, citing an example of blocking a Spanish "HomeLifeSpain.com" site in Denmark due to allegations of trademark violation.
- 163 For example, Lodder and van der Meulen (n 1, para. 72) suggest that symbolic or insignificant mechanisms should not be used, but that normally means could be used when costs are not disproportionate. Pihlajarinne (n 155, pp. 135–136) observes optimism in effectiveness and converting wilfully infringing users to legal consumers, and (p. 145) that due to unavoidable negative externalities, sufficient effectiveness should be required. Husovec (n 3, paras. 27–29) calls for evaluation using the so-called Kaldor Hicks improvement test.
- 164 On users' and operators' possibilities to evade the blocking, see Savola (n 118), pp. 99–106 and Opinion in *UPC Telekabel Wien* (n 12), para. 99. On distinguishing accuracy and completeness (in information theory, "precision" and "recall", respectively), see Savola (n 118), pp. 106–108.
- 165 See e.g. note 101 and corresponding text. On further critical analysis, see note 167.
- 166 Poort et al. (n 126), pp. 387, 391. Wesselingh et al., "To Block or Not to Block?" (Work in progress, 4.6.2014). <<http://ssrn.com/abstract=2273453>> (also citing another University of Amsterdam study, where no significant measurable effect on infringement was discerned). Cf. IFPI, "Digital Music Report 2014", <<http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>>, p. 41, claim an 11% reduction of peer-to-peer traffic in EU countries where blocking has been adopted, in contrast to a 15% increase in others. It is not possible to evaluate the reliability of such claims.
- 167 See e.g. Savola (n 118), pp. 104, 112–117. Also IFPI (n 166, p. 42) claims that 74% of consumers are introduced to pirate services through search. This was based on research commissioned by the IPR holder organization MPAA, see MilwardBrown Digital: "Understanding the Role of Search in Online Piracy" (17.9.2013). <<http://www.mpa.org/wp-content/uploads/2014/03/Understanding-the-role-of-search-in-online-piracy.pdf>>, p. 8. Only domain names ("navigational searches") rather than other keywords were used 37% of time for first visits and 46% for repeated visits (p. 9). The study is questionable because a visit to the site within 20 minutes of search is considered a success, and a sharp drop was noticed the shorter the time was (p. 12). Even a minute of delay would seem like a long time and only a fraction of these searches were actually successful. In contrast, using a different methodology, another study found only a ca. 20% impact of search. See Computer & Communications Industry Association, "The Search Fixation: Infringement, Search Results and Online Content" (5.8.2013), <[http://www.cciainet.org/wp-content/uploads/2013/08/CCIA\\_TheSearchFixation.pdf](http://www.cciainet.org/wp-content/uploads/2013/08/CCIA_TheSearchFixation.pdf)>. Further, according to a study, 2% of Internet users committed 74% of all infringement, see Ofcom, "High volume infringers analysis report" (11.9.2013), <<http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/high-volume-infringers/>>. These users are obviously not deterred by any mechanism. Other sources of entry include for example social media sites. Nonetheless, in this kind of use of navigational search by typically recurring users, the percentage is likely somewhere between 20% to 50%. However, there is not much that can be done about it. Completely censoring such generic phrases would seem to infringe on the very substance of the freedom of expression.
- 168 This was measured by a CCIA report (n 167), and the impact seemed rather modest.
- 169 Pihlajarinne (n 155), p. 135. On high-volume infringers, see Ofcom (n 167).
- 170 It is suspect whether blocking could even in the best case educate users, given that access blocking is not necessarily

accompanied by any clear message. For novice users, this is likely indistinguishable from an Internet connectivity or site failure. For recurring users, this has no educational value.

- 171 For example, courts have held that the illegality of The Pirate Bay should be obvious to the users merely through its name; see e.g. *Elisa* (n 118), p. 17. Pihlajarinne (n 155, pp. 135–136) also rejects blocking as an educational signal, noting that users are very well aware of the illegal nature of the site and it is optimistic to assume that they would convert to using legal sources. Hargreaves, “Digital Opportunity: A Review of Intellectual Property and Growth” (May 2011), <<http://www.ipo.gov.uk/ipreview-finalreport.pdf>>, pp. 78–79, also cites reports from an education campaign from 2009 that 69% of average users understood the illegality of downloading after watching an educational advertisement. In contrast (p. 68), a 2010 study found that 44% of peer-to-peer users believed their actions to be lawful. On the other hand, in a recent Finnish Gallup poll commissioned by IPR holders from 2013, 83% of respondents said that downloading music or movies from unauthorized sources is illegal, and respectively 94% said the same for sharing music or movies. A majority of them had done both regardless. See Tekijänoikeusbarometri 2013, <[http://www.kulttuuriuutiset.net/gallupit/piratismitutkimus\\_2013/](http://www.kulttuuriuutiset.net/gallupit/piratismitutkimus_2013/)>. While these are somewhat contradictory, it seems obvious that the illegality of sites is indeed known, but respecting the rights is a different question.
- 172 See note 79 and corresponding text. Likewise Arnold J had similar arguments on blocking increasing the “transaction costs” of using a site; see note 91 and corresponding text. A similar argument and reference to blocking being “educational and helpful” can be found in *EMI v UPC* (n 132), para. 134.
- 173 On interpretations of the effectiveness principle, see note 42. A different reading of the “effectiveness” requirement is also possible: ineffective and merely symbolic means do not strike a fair balance.
- 174 Savola (n 154), p. 198.
- 175 Husovec (n 3), para. 47.
- 176 In *Newzbin2* (No 2) (n 70), paras. 30–34, the estimate for implementation costs was quoted (in the same ballpark as in Finland), and Arnold J noted that the distribution of costs is a national modality, and read “not excessively costly” as implying that the provider needs to cover the cost of carrying the Internet connectivity business. Other interpretations are also possible: that if costs are due, they must not be excessive; or IPR holder’s costs must not be excessive. See also Husovec (n 3), para. 49.
- 177 The principal opposition likely stems from the fear of expanding and extending blocking once “the genie is out of the bottle” and subjugating providers to the role of active web enforcers. See e.g. Schellekens (n 90). It has also been submitted that when implementation costs are minimal, it is not a good sole argument for rejecting blocking, and that it is easier to require blocking more sites once the provider has been subjected to blocking the first time. See Lodder – van der Meulen (n 1), paras. 73–74.
- 178 Feiler (n 3), p. 60.
- 179 The A.G. opined that proportionality might require that e.g. in some repeated cases IPR holders might be ordered to pay costs (n 80); Arnold J in *Newzbin2* (No 2) (n 70), also made a reservation that costs might be ordered in the future; see note 93.
- 180 Similarly on shifting business risks and liability to the provider, see Pihlajarinne (n 155), p. 147; Husovec (n 3), paras. 47–50.
- 181 This is exacerbated by *UPC Telekabel Wien* (n 12) holding that providers may also be responsible for taking into account the users’ interests. In practice this may call for legal evaluation and participation in the proceedings.
- 182 There are some signs of this at least in the UK and Ireland. In the UK, BT was reimbursed costs during refining the orders until 16 December 2010, but BT’s futile “all-out opposition” resulted in it having to compensate subsequent IPR holders’ costs; see *Newzbin2* (No 2) (n 70), paras. 53–55. In Ireland, one of the defendants that actively participated in drafting the order was compensated costs based on agreement with the claimants; see *UPC etc.* (n 133), paras. 19–22.
- 183 On the CJEU’s stance on the impact to business freedom, see notes 67–68 and corresponding text.
- 184 For example, DNS blocking increases the likelihood of users using less secure DNS resolvers, potentially leading to security problems or preventing the use of secure DNS extensions. This was also one of the reasons why the so-called SOPA/PIPA proposals failed. As a summary, see Savola (n 118), pp. 87–88. There are similar constraints with respect to other mechanisms.
- 185 Savola (n 118), p. 78.
- 186 *UPC Telekabel Wien* (n 12), para. 51.
- 187 This may be compared to industrial property rights regimes which include renewable terms that weed out those registrations that were later found out to be useless. On the requirement of regular re-assessment of preventive actions, see Lodder – van der Meulen (n 1), paras. 75, 79.
- 188 This makes more sense than imposing a monitoring duty on the provider or a third party, who have no knowledge and no reason to obtain knowledge of such changes.
- 189 See note 83 and corresponding text.
- 190 See notes 80–83 and corresponding text. Again, as the CJEU did not address the fourth question, it is impossible to conclude if it would have endorsed the A.G.’s opinion on the impact on proportionality.
- 191 In the review of the Enforcement Directive, the Commission has stated that “[a]ny amendments should have as their objective tackling the infringements at their source and, to that end, foster cooperation of intermediaries [...]”. At least in *de lege ferenda* there appears to be a priority to address the problems at their source. See COM(2011) 287 final, p. 19, “A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe”.
- 192 National courts seem reluctant to reject requests, however, and in essence state “go seek an injunction in a court closer to the source”. For extensive discussion of international aspects, see Savola (n 5).
- 193 Within EU it might also be possible to request a court order for the infringer’s ISP to disclose subscriber identification information that relates to the anonymous website operator.
- 194 On CJEU see note 72 and on A.G., note 79.
- 195 However, according to ECtHR, even illegal communications enjoy freedom of expression subject to proportionate limitations. See note 13.
- 196 See note 105. Similarly see Feiler (n 3), p. 57.
- 197 See e.g. Savola (n 118), pp. 87–88, 91–93, 115–117; Husovec (n 3), para. 30.
- 198 Further, it could be argued that this would incentivise the creation of new works and foster culture (as a public interest), but this has been disputed; see e.g. Patry, *How to Fix Copyright* (OUP, 2011), pp. 14–27, 77–78; Hargreaves (n 171), pp. 75–76.
- 199 On difficulties of quantifying the impact of infringement, see e.g. Hargreaves (n 171), pp. 72–76. Also, it is not obvious if stronger enforcement measures have reduced piracy (*ibid.*, pp. 77–78). Careful tracking and assessing the impact of enforcement and educational initiatives was also deemed

important (*ibid.*, p. 81). Notably, emphasising enforcement as an alternative to improved licensing and modernisation of copyright law was flat-out rejected (*ibid.*).

- 200** It is unclear if CJEU's statement on "seriously discouraging" accessing the site could be read to accept educational purposes.
- 201** See discussion and references in notes 169–172 and corresponding text.
- 202** See note 166 and corresponding text.
- 203** See notes 125–128 and corresponding text.
- 204** If blocking was indeed as effective as the best claims made of it, expansion might not be worthwhile. See Savola (n 118), pp. 112–113.
- 205** See notes 91 and 101 corresponding text. Arnold likely referred to the minority of infringing users. Likewise, Charleton J felt that blocking would be educational and helpful. See note 172.
- 206** It can be estimated that both providers and IPR holders have used at least 5 million euro in Europe on legal expenses in trying to block The Pirate Bay alone. This estimate is based on the number of countries, ISPs and the proceedings involved when the cost for one provider for one proceedings through appeals instances has been reported (where the information is available) to run at ca. 100,000 to 300,000 euro (see eg. note 120). It seems obvious that such expenses cannot be motivated by blocking (or resistance thereto) just one site, but both parties have more general agenda.
- 207** In *EMI v UPC* (n 132), para. 62, a reference was made to an attempt to educate the public with campaigns. The impact of reducing infringements lasted for only several months before returning to the previous level. As noted in the context of the research of blocking, there appears to be no evidence to suggest that attempts to educate already cognisant persons with inefficient blocking is any more useful. A key difference is that it shifts some expenses and responsibility to providers.
- 208** Unfortunately, such measurements and research are also often biased, so it may be of limited usefulness, especially if the connectivity provider does not wish to expend its resources to fighting it.
- 209** This has also been the only case where detailed public research has been notably part of the proceedings. In some other cases, this could also have made a difference.