

Copyright as One of Several Competing Rights in European Law

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16 May 2011: the special rapporteur on the promotion and protection of the right to freedom of opinion and expression of the United Nations General Assembly Human Rights Council

While blocking and filtering measures deny users access to specific content on the Internet, States have also taken measures to cut off access to the Internet entirely. The Special Rapporteur considers cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights. The Special Rapporteur calls upon all States to ensure that Internet access is maintained at all times, including during times of political unrest. In particular, the Special Rapporteur urges States to repeal or amend existing intellectual copyright laws which permit users to be disconnected from Internet access, and to refrain from adopting such laws.



Mr Justice Arnold in *Twentieth Century Film Corporation v Newsbinz*

The Studios relied on two recent studies of the scale of the problem so far as the film and television industries are concerned. A study by Ipsos MediaCAT dated April 2010 analysing the scale of film and television piracy in the UK in 2009 estimated the overall loss from film piracy at £477 million and the overall loss from television piracy at £58 million. A study by Tera Consultants dated March 2010 concluded that in 2008 the audio and audiovisual industries in the UK lost almost 670 million euros in revenues to physical and digital piracy, with the larger proportion of that lost revenue attributable to digital piracy.



The European Convention on Human Rights

- **Article 8:** *Everyone has the right to respect for his private and family life, his home and his correspondence.*

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

- **Article 10:** *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.



Article 1(3a) of the Framework Directive

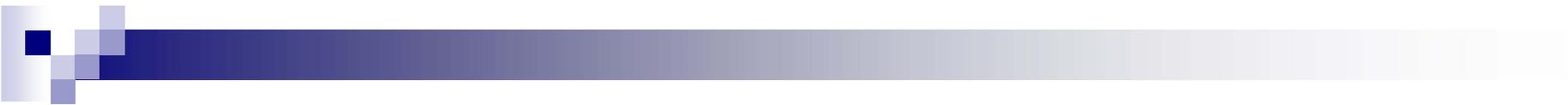
*Measures taken by Member States regarding end-users access' to, or use of, services and applications through electronic communications networks shall **respect the fundamental rights and freedoms of natural persons**, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.*

*Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms **may only be imposed if they are appropriate, proportionate and necessary within a democratic society**, and their implementation shall be subject to **adequate procedural safeguards** in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including **effective judicial protection and due process**. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. **A prior, fair and impartial procedure shall be guaranteed, including the right to be heard** of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed.*



Expert evidence agreed on both sides from *EMI v UPC*

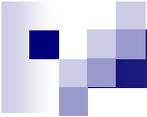
If to achieve the goal of identifying that you have to do other things, like store the IP addresses of where it came from and where it went to, and various other things, and you are spotting those for infringing and non infringing uses, then I would start to worry about that information being stored, and how it is being used, for what purposes... In a graduated response, they are not, the DtecNet guys are looking at every communication that goes through the UPC network. What they are doing they are joining a particular stream of communications that is in this peer-to-peer network, which has by default at this moment in time, lets say 60%, 70%, 90% of the people who are on it are sharing infringing material, and you pick those people and you store the information. Now I don't think so - I think that is reasonable... nobody is exposing anything in these networks, apart from the fact that they have an IP address, some made up user name, and the files that they are infringing, or the files they are not infringing. So, that information is made publicly available [over the network anyway] so, that is fine.



Professor Takis Tridimas on certainty of European law

- *The principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly. The affinity of the principle with the rule of law is evident. In Black Clawson Ltd v Papierwerke AG, Lord Diplock stated that “the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequence that will flow from it {[1975] AC 591 at 638}”... The principle acquires particular importance in economic law. Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business. Legal certainty may thus be seen as contributing to the production of economically consistent results.* [\[1\]](#)

[\[1\]](#) Tridimas, *The General Principles of EC Law*, (Oxford, 1999) at p. 163.



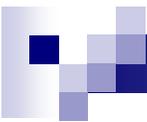
SABAM v Netlog Case-360/10

- *As paragraphs 62 to 68 of the judgment in Case C-275/06 Promusicae [2008] ECR I-271 make clear, the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the **protection of other fundamental rights**.*
- *More specifically, it follows from paragraph 68 of that judgment that, in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.*
- *Accordingly, such an injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly...*
- *In those circumstances, it must be held that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the **freedom to conduct business** enjoyed by operators such as hosting service providers...*
- *Moreover, the effects of that injunction would not be limited to the hosting service provider, as the contested filtering system may also infringe the fundamental rights of that hosting service provider's service users, namely **their right to protection of their personal data and their freedom to receive or impart information**, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.*
- ***Moreover, that injunction could potentially undermine freedom of information**, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned...*
- *Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would **not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other...***



Motion Picture Association of America 2012

- *When a movie or television program is “shared” over a P2P network by an individual, the ensuing illegal distribution is exponential. The recipients of the illegal download from that individual may redistribute that movie or TV show to several more computer users, who in turn redistribute to countless others, and so on. What begins as one distribution quickly results in hundreds, thousands, or millions of digital copies distributed throughout the world—without the knowledge, consent, or remuneration of the copyright owner. The copyright owner has no way of determining precisely how many people downloaded that movie or TV show down the redistribution chain after the first act of infringement. Thus, the copyright owner cannot estimate accurately the magnitude of actual harm caused by a specific distribution of a work because such harm is inexorably tied to the actual number of subsequent distributions of that work*



The Irish Times on 23 February 2012,

- *The European Union doesn't seem inclined to support the reasons given for needing such an instrument, either. Indications at European Commission level recently – following on EU level case law – are that the commission, like the European court, does not support injunctions for the purpose of web blocking.*
- *Officials in the European Commission's internal markets division and its justice division, which deal directly with legislation in the areas of the Internet, business and copyright, tell me the commission "strongly" opposed website blocking or requiring Internet service providers to "police" users or "screen the Internet".*
- *Justice commissioner Viviane Reding backed this position publicly at a German Internet conference in January, saying: "You'll never have from Europe a blocking of the Internet – that's not the European option." A spokesman for Reding told me a ruling by the European Court of Justice last November on the Sabam (Société Belge des Auteurs, Compositeurs et Editeurs/the Belgian society for collecting music royalties) case (Case C-70/10 Sabam) – which concluded it is unlawful to force an ISP to implement filtering and blocking technologies – "is quite significant".*
- *Notably, Reding last month proposed fresh data protection legislation precisely because, as she told a seminar in Brussels that I attended, the old legislation from the 1990s preceded the development of the Internet for services, social interaction and business. That, and inconsistency across member states in implementing the old directive, was limiting the growth of trade and Internet business in Europe, and damaging public confidence in the net.*

Naomh Colmcille, patron saint of Ireland, in an icon written in Russia by Ekaterina Platoshechkina:



Conclusion:



New York Times copyright: I claim a fair use defence!