

## **IPR ENFORCEMENT CASE-LAW COLLECTION**

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THE LIABILITY AND OBLIGATIONS OF  
INTERMEDIARY SERVICE PROVIDERS  
IN THE EUROPEAN UNION



**AUGUST - 2019**

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**IPR ENFORCEMENT CASE-LAW COLLECTION:**  
THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS  
IN THE EUROPEAN UNION

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## FOREWORD

The share of e-commerce in the EU economy keeps growing, with an increasing number of businesses and consumers routinely engaging in online transactions.

This rise in online activity has been accompanied by an expanding body of case-law affecting online intermediaries who bring together or facilitate transactions between third parties on the internet.

They provide a broad range of services by giving access to, hosting, transmitting or indexing content, products and services offered by third parties or providing internet-based services to third parties.

This case-law collection provides an overview of the latest developments in this fast evolving area and of the main conclusions of selected cases including decisions of the Court of Justice of the European Union and of national courts issued between 2016 and the beginning of 2019.

Online sales are not limited to the large well-known online marketplaces but are increasingly being used by small and medium-sized firms via websites or mobile apps. The latest statistics from Eurostat show that during 2017, 42 % of large enterprises in the EU, 28 % of medium-sized enterprises and 17 % of small enterprises engaged in e-sales.

In addition to legitimate transactions, there is a dark side, with some websites or online marketplaces being used to sell counterfeit goods or as the source of illegal downloads of music, videos or games.

The EUIPO's collaboration with intermediaries in addressing IP rights infringements has been intensified and this is one of the growing areas of work of the Observatory. An expert group on cooperation with intermediaries has been set up and the Office plans to work more closely with e-commerce platforms.

By bringing together these case-law decisions in a single report, the EUIPO hopes to make them more accessible and cast further light on the rights and obligations of the intermediaries that are increasingly being used by European consumers and businesses of all sizes.



Christian ARCHAMBEAU  
EUIPO Executive Director

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## EXECUTIVE SUMMARY

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Online intermediaries bring together or facilitate transactions between third parties on the internet, and can bring great benefits for European businesses. However, intellectual property rights (IPR) infringement may also be facilitated by the use of services from intermediary service providers.

European Union lawmakers have prepared a framework for the obligations and liability of intermediaries. Notably, EU law provides that rights holders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe IPR. The conditions and procedures relating to these injunctions, however, should be left to the national law of the Member States. In addition, according to the most recent Copyright in the Digital Single Market Directive, certain platforms can perform a communication to the public.

Courts have referred to the provisions of different EU instruments and to national law to determine the scope of the obligations and liability of intermediaries. This EUIPO case-law collection presents some of the latest jurisprudential developments in this fast-evolving area. It also gives an overview of the different criteria and the legal reasoning applied by courts in the European Union, and of the main conclusions or outcomes of selected cases.

Relevant and important decisions of the Court of Justice of the European Union (CJEU) and national courts, issued between 2016 and the beginning of 2019, have been included. A total of nine preliminary rulings were taken into account, as well as 34 judgments from courts in 14 Member States, namely the Czech Republic, Denmark, Germany, Ireland, Greece, Spain, France, Italy, Lithuania, the Netherlands, Austria, Poland, Sweden and the United Kingdom.

The CJEU has given guidance on the criteria for liability in cases of alleged online IPR infringements, notably of copyright and related rights, as well as trade mark rights. In a number of preliminary rulings, the CJEU shed light on the notion of ‘an intermediary’. It clarified the conditions for exemptions from liability and the scope of the obligations of different types of intermediaries for third-party infringements under the Electronic Commerce Directive, the Enforcement Directive and the Information Society Directive. In addition, the CJEU has clarified, to a certain extent, if and under what circumstances different types of intermediaries, and other parties, can be considered to have made a communication to the public in the sense of Article 3 of the Information Society Directive.

Around half of the national court decisions relate to injunctions granted against internet access providers to stop and/or prevent infringements by third parties. Some of these decisions also imposed injunctions on search engines. In cases collected from nine Member States, judges have

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elaborated on different aspects, including the type of injunction, the party responsible for implementing the measure and for bearing the costs or penalty payments.

Most of the other decisions discuss whether, and under what conditions, the operators of a platform or website, or other service providers, could be considered as infringing IP rights, or be otherwise liable. Most of these decisions relate to copyright, and the national judges often discuss the criteria for making a 'communication to the public'. Several decisions assess whether, and to what extent, a platform has an active role in the IPR infringement.

Finally, a few decisions relate to the possible obligations of other parties, and whether these parties could qualify as intermediaries. These decisions respectively concerned traders on an online sales platform, a holder of an internet connection and a payment service provider collecting payments from the users of a website.

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## BACKGROUND

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### PURPOSE AND SCOPE OF THE CASE-LAW COLLECTION

Online intermediaries bring together or facilitate transactions between third parties on the internet. They give access to, host, transmit and index content, products and services originated by third parties on the internet, or provide internet-based services to third parties. <sup>(1)</sup>

Especially in the online environment, intellectual property rights (IPR) infringement may be facilitated by the use of services of intermediary service providers. As the importance of intermediary service providers grew, the European Union Intellectual Property Office's (EUIPO) started studying the possible role of these entities in the enforcement of IPR.<sup>(2)</sup>

European Union law provides that rights holders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe IPR. The conditions and procedures relating to such injunctions should be left to the national law of the Member States.<sup>(3)</sup>

Courts have referred to provisions of EU instruments such as the E-Commerce Directive <sup>(4)</sup>, the Enforcement Directive <sup>(5)</sup>, or the Information Society Directive <sup>(6)</sup>, and to national law to determine

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<sup>(1)</sup> OECD, The economic and social role of internet intermediaries, April 2010 p.9, available at <https://www.oecd.org/internet/ieconomy/44949023.pdf>.

<sup>(2)</sup> See for example the [Study on Legislative Measures Related to Online IPR Infringements](#), a study commissioned by the EUIPO, September 2018, which amongst others looks at blocking of access to websites and actions targeted at hosts. See also T. Hoeren, G. Westkamp, [Study on voluntary collaboration practices in addressing online infringements of trade mark rights, design rights, copyright and rights related to copyright](#), a study commissioned by the EUIPO through the European Observatory on Infringements of Intellectual Property Rights, September 2016. More Observatory publications are available at: <https://euiipo.europa.eu/ohimportal/en/web/observatory/observatory-publications>

<sup>(3)</sup> See for example recital 23 of [Directive \(EC\) 2004/48](#) of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Text with EEA relevance) OJ L 157, 30.4.2004, p. 45–86 ('Enforcement Directive').

[Directive \(EU\) 2019/790](#) on copyright and related rights in the Digital Single Market, to be implemented by the EU Member States by 7 June 2021 (article 29(1)), lays down a specific liability regime for certain 'online content-sharing service providers' (see article 17 et seq.).

<sup>(4)</sup> [Directive \(EC\) 2000/31](#) 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 ('E-Commerce Directive')

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the scope of the obligations and liability of intermediaries. This case-law collection by the EUIPO provides an overview of the latest jurisprudential developments in this fast evolving area. It also presents an overview of the different criteria and the legal reasoning applied by courts in the European Union, and of the main conclusions or outcome of selected cases.

More specifically, the case-law collection presents relevant and important decisions of the Court of Justice of the European Union (CJEU) as well as national court decisions issued between 2016 and the beginning of 2019. This time frame was selected due to substantial developments in this area at the EU and national level. Judgments of national courts in 14 Member States were taken into account, namely the Czech Republic, Denmark, Germany, Ireland, Greece, Spain, France, Italy, Lithuania, the Netherlands, Poland, Austria, Sweden and the United Kingdom.

## **METHODOLOGY**

This case-law collection was prepared by the European Observatory on Infringements of Intellectual Property Rights (Observatory) <sup>(7)</sup>, through the ‘Knowledge Circle Enforcement (KCE)’ of the EUIPO.

The judgments included in the case-law collection have been identified through both the EUIPO’s internal database [eSearch Case Law](#) and publicly accessible online sources. Individual contributors, that is, members of the KCE, prepared summaries and provided information on decisions from jurisdictions and in languages with which they are familiar.

The draft report was sent to the members of the Legal Expert Group of the European Observatory on Infringements of Intellectual Property Rights (the Observatory, the OBD) <sup>(8)</sup> for comments and feedback. The members of the Legal Expert Group notably suggested a number of additional decisions from courts in different Member States, the most relevant of which were included in the case-law collection. Other comments were also considered and addressed.

The selected cases are listed in the report by country and the decision date.

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<sup>(5)</sup> [Directive \(EC\) 2004/48](#) on the enforcement of intellectual property rights

<sup>(6)</sup> [Directive \(EC\) 2001/29](#) of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19 (‘Information Society Directive’)

<sup>(7)</sup> An important activity of the European Observatory on Infringements of Intellectual Property Rights consists of monitoring, collecting, and analysing European case-law on the enforcement of intellectual property rights. For more information, see the Observatory’s case law page: <https://euiipo.europa.eu/ohimportal/en/web/observatory/case-law>

<sup>(8)</sup> Information about the Expert Groups of the Observatory and about their members is available on the Observatory website: <https://euiipo.europa.eu/ohimportal/en/web/observatory/about-us>

Apart from the CJEU decisions, the case-law collection reports national court decisions from Denmark, the Czech Republic, Germany, Ireland, Greece, Spain, France, Italy, Lithuania, the Netherlands, Poland, Austria, Sweden and the United Kingdom. These jurisdictions represent different regions of the EU, as well as small and large Member States, and were selected according to the availability of relevant case-law in the 28 EU Member States. It was not possible to identify relevant case-law for all EU Member States either because no relevant case-law exists or due to limitations in accessing the texts of relevant decisions.<sup>9</sup>

## **TERMINOLOGY USED**

Since the adoption of the Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the 'E-Commerce Directive'), the services offered and business models used by intermediary service providers have evolved. Nowadays, different types of information society service providers combine multiple functions.

In the absence of guidance from EU lawmakers and the Court of Justice, national courts have some leeway when it comes to defining or categorising these new intermediary service providers. In addition, the types of acts at stake, the type of liability and the remedies ordered are not always described and assessed in a uniform manner.

While the focus of this case-law collection is set on information society service<sup>10</sup> providers, cases relating to non-online intermediaries have also been included when appropriate. The report therefore often uses the term 'intermediary service providers', including in the title.

The list provided in ANNEX III: GLOSSARY gives some references for the terminology used in this case-law collection.

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<sup>(9)</sup> An important judgment for Belgium dating from before 2016 was reported (Belgian Court of Cassation, *Telenet, Tecteo and Brutele*, 22 October 2013).

<sup>(10)</sup> 'Any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services', Article 1(1)(b) of [Directive \(EU\) 2015/1535](#) of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance), OJ L 241, 17.9.2015, p. 1–15.

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## EU SECONDARY LAW ON THE LIABILITY AND OBLIGATIONS OF INTERMEDIARY SERVICE PROVIDERS

### *THE E-COMMERCE DIRECTIVE: CONDITIONS FOR EXEMPTION FROM LIABILITY, LEEWAY TO PROVIDE FOR OBLIGATIONS*

The E-Commerce Directive introduced rules on the liability of information society service providers. Articles 12, 13 and 14 E-Commerce Directive distinguish three types of intermediary activities:

- mere conduit: transmission over a communication network of information provided by the recipient of the service, or access to a communication network (Article 12 E-Commerce Directive);
- caching: automatic, intermediate and temporary storage of information transmitted via the communication network, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request (Article 13 E-Commerce Directive);
- hosting: storage of information provided by a recipient of the service (Article 14 E-Commerce Directive).

Information society service providers carrying out one of these activities are exempted from liability under a number of conditions:

- providers of mere conduit services (Article 12 E-Commerce Directive): do not initiate the transmission; do not select the receiver of it; do not select or modify its content;
- providers of caching services (Article 13 E-Commerce Directive): do not modify the information; comply with conditions on the access to the information; do not interfere with the lawful use of the technology; expeditiously remove or disable the access to the stored information upon obtaining actual knowledge that the information at the initial source has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement;
- providers of hosting services (Article 14 E-Commerce Directive): do not have actual knowledge of illegal activity or information; upon obtaining such knowledge, act expeditiously to remove or to disable the access to the information (also, recital 46 E-Commerce Directive).
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Recital 42 E-Commerce Directive states that the exemptions only cover cases in which the intermediaries carry out activities that are passive in nature. Furthermore, those activities are limited to the technical process of operating and giving access to a communication network over which

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information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient.

The fact that intermediaries can be exempted from liability does not affect the possibility of injunctions of different kinds (recital 45 E-Commerce Directive).

Finally, Article 15 E-Commerce Directive expressly forbids the Member States from imposing on the providers of such services a general obligation to monitor the information transmitted, or a general obligation to actively seek facts or circumstances indicating illegal activity.

As specified in recital 47 E-Commerce Directive, this prohibition does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

In particular, according to recital 48 E-Commerce Directive, it will not affect either the possibility for Member States to apply duties of care that can be reasonably expected from service providers in order to detect and prevent certain types of illegal activities. <sup>(11)</sup>

*THE INFORMATION SOCIETY DIRECTIVE AND THE ENFORCEMENT DIRECTIVE:  
INJUNCTIONS AGAINST INTERMEDIARIES FOR THIRD PARTY INFRINGEMENTS*

Article 8(3) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the 'Information Society Directive') provides that rights holders should have the possibility of applying for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

In the same sense, Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the 'Enforcement Directive') provides that, without prejudice to Article 8 Information Society Directive, rights holders are in a position to apply for injunctions against intermediaries whose services are used to infringe IP rights.

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<sup>(11)</sup> In the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, [COM/2017/0555 final](#), the Commission gave some guidance on the application of the E-Commerce Directive to platforms, and on the possibility for intermediaries to implement proactive measures. See for example p. 10 et seq.

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*THE COPYRIGHT IN THE DIGITAL SINGLE MARKET DIRECTIVE: LIABILITY AND  
OBLIGATIONS FOR CERTAIN ONLINE CONTENT-SHARING SERVICE PROVIDERS*

In addition to these rules, the newly adopted Directive (EU) 2019/790 on Copyright in the Digital Single Market<sup>(12)</sup> lays down a specific liability regime for certain ‘online content-sharing service providers’ (see the definition in ANNEX III: GLOSSARY). According to Article 17(1), online content-sharing service providers can be considered to perform an act of communication to the public or an act of making available. They should therefore obtain authorisation from rights holders for giving the public access to copyright protected works or other protected subject matter uploaded by their users. The liability exemption of Article 14(1) E-Commerce Directive will not apply to online content-sharing service providers.

However, Article 17(4)-(5) lays down a liability mitigation mechanism if no licence is obtained. It entails a ‘best effort obligation’ for online content-sharing service providers, which have to show that they have made their best efforts to: obtain an authorisation; and ensure the unavailability of specific works and other subject matter for which the rights holders have provided the service providers with the relevant and necessary information; and, upon notice from the rights holders, quickly disable access to, or remove the notified works or other subject matter, and to prevent future uploads. These criteria should be assessed in the light of the principle of proportionality. Less compelling obligations should apply to start-ups under certain conditions (Article 17(6)). Article 17(8) stresses that application of these rules will not lead to any general monitoring obligation.

The EU Member States have to transpose the provisions of the directive into their national laws by 7 June 2021.

*RELEVANT PRELIMINARY RULINGS FROM THE CJEU BEFORE 2016*

The CJEU has provided some guidance on the scope of liability for intermediaries in a number of important cases dating from before 2016.

In *Google/Louis Vuitton*<sup>(13)</sup>, the Court concluded that an intermediary service provider (in this case an internet search engine operator or ‘internet referencing service provider’) which has not played

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<sup>(12)</sup> [Directive \(EU\) 2019/790](#) of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L309, 17/05/2019, p. 92-125.

<sup>(13)</sup> [C-236/08 to C-238/08](#) (joined cases), *Google France and Google Inc. et al. v. Louis Vuitton Malletier et al.*, 23/10/2010, EU:C:2010:159.

an active role on the data stored cannot be held liable if, once it acquired knowledge of the unlawful nature of this data, it has removed or disabled access to it. In *eBay*<sup>(14)</sup>, the CJEU held that an operator of an online marketplace that plays an active role cannot fall under the exemption from liability of Article 14 E-Commerce Directive. Optimising the presentation of the offers for sale or promoting them amounts to playing an active role.

The CJEU also clarified some questions regarding the obligations that can be imposed on intermediary service providers to terminate or prevent IP infringement. In *Scarlet Extended SA v SABAM*<sup>(15)</sup>, it held that requiring an internet access provider to install a filtering system neither respects the balance to be achieved between the protection of intellectual property and the freedom of business, nor the prohibition of a general obligation to actively seek for infringing content. In *Netlog*<sup>(16)</sup>, the CJEU insisted that a general obligation to monitor infringes the intermediary's freedom to conduct business, and may violate the fundamental rights of the users. Furthermore, in *Telekabel*<sup>(17)</sup>, the CJEU held that EU law does not preclude an injunction requiring an internet access provider to block access to infringing websites when the injunction does not specify the particular measures to be taken. In such a case, an injunction does not necessarily infringe the provider's freedom to conduct business since it can choose to put in place measures best adapted to its resources and other obligations. An injunction is compatible with fundamental rights on two conditions: the measures taken by the provider do not unnecessarily deprive users of the possibility of lawfully accessing information; and the measures have the effect of preventing, hampering or discouraging unauthorised access to infringing material.

#### CASES CURRENTLY PENDING BEFORE THE CJEU

A number of important preliminary rulings are currently pending before the CJEU.

In *Youtube*<sup>(18)</sup>, the German Federal Supreme Court asked the Court of Justice to clarify whether an online video sharing platform performs an act of communication to the public within the meaning of Article 3(1) D 2001/29/EC when its users upload copyright infringing content to its platform. The

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<sup>(14)</sup> [C-324/09](#), *L'Oréal SA and others v. eBay*, 12/07/2011 EU:C:2011:474.

<sup>(15)</sup> [C-70/10](#), *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL*, 24/11/2011, EU:C:2011:771.

<sup>(16)</sup> [C-360/10](#), *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 16/02/2012, EU:C:2012:85.

<sup>(17)</sup> [C-314/12](#), *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, 27/03/2014, EU:C:2011:604.

<sup>(18)</sup> Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018, [Case C-682/18](#)— *LF v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH*.

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national court also asked about the conditions for exemption from liability under the E-Commerce Directive, and for the application of injunctions and damages under the Enforcement Directive.

The same German court asked similar questions in *Elsevier*<sup>(19)</sup>, about the operator of a shared hosting service via which files containing content protected by copyright are made publicly accessible by users without the consent of the rights holders. In this case the operator, via a system of remuneration paid for downloads, created an incentive to upload content protected by copyright that users could otherwise only obtain against the payment of a fee.

In *Stim and Sami*<sup>(20)</sup>, the Swedish Supreme Court asked the CJEU to clarify whether a person hiring out a car with radio receivers is a user who makes a communication to the public within the meaning of Article 3(1) D 2001/29/EC and Article 8(2) D 2006/115<sup>(21)</sup>.

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<sup>(19)</sup> Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018, [Case C-683/18](#) — Elsevier Inc. v Cyando AG.

<sup>(20)</sup> Request for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 30 November 2018, [Case C-753/18](#) — Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim), Svenska artisters och musikers intresseorganisation ek. för. (SAMI) v Fleetmanager Sweden AB, Nordisk Biluthyrning AB.

<sup>(21)</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27/12/2006, p. 28–35.

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## OVERVIEW AND MAIN FINDINGS

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This case-law collection presents selected court decisions on the liability for online intellectual property right (IPR) infringements, and in particular on the liability and obligations of intermediary service providers in the European Union. It includes preliminary rulings of the Court of Justice of the EU (CJEU) and judgments of national courts in 14 Member States<sup>(22)</sup> rendered between 2016 and the first half of 2019. Decisions relating to non-online intermediaries and other types of defendants were also included when some of the conclusions reached by the court appeared relevant for the case-law collection.

### GUIDANCE FROM THE COURT OF JUSTICE

The Court of Justice has given guidance on the criteria for liability in cases of alleged online IPR infringements, notably of copyright and related rights as well as trade marks. In a number of preliminary rulings, the Court of Justice shed light on the notion of ‘an intermediary’. It clarified the conditions for exemptions from liability and the scope of obligations of different types of intermediaries for third-party infringements under the E-Commerce Directive, the Enforcement Directive and the Information Society Directive. National courts have also asked the CJEU to clarify if and under what circumstances different types of intermediaries and other parties can be considered to have made a communication to the public in the sense of Article 3 of the Information Society Directive.

#### *INJUNCTIONS AGAINST ‘INTERMEDIARIES’ AND CONDITIONS FOR EXEMPTION FROM LIABILITY*

*Tommy Hilfiger*<sup>(23)</sup> did not relate to an online intermediary, but to a tenant of market halls. The Court clarified that a tenant who sublets sales points to third parties, some of whom are infringing IP rights, falls within the concept of ‘an intermediary’. The conditions for injunctions against an intermediary in a physical marketplace are identical to those injunctions which may be addressed to intermediaries

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<sup>(22)</sup> the Czech Republic, Denmark, Germany, Ireland, Greece, Spain, France, Italy, Lithuania, the Netherlands, Poland, Austria, Sweden and the United Kingdom.

<sup>(23)</sup> C-494/15 *Tommy Hilfiger Licensing LLC at al. vs. Delta Center a.s.*, 07/07/2016, EU:C:2016:528.

in an online marketplace as set out in *L'Oréal-eBay*<sup>(24)</sup>. In *Mc Fadden*<sup>(25)</sup>, the CJEU clarified that a business owner who operates a free anonymous Wi-Fi connection provides an 'information society service' when he or she does so for the purpose of advertising his goods or services. Such an operator is exempted from liability for infringements committed by third parties via that internet connection when the process is technical, automatic and passive. Whilst no compensation claims are possible, proportional injunctions are possible. In *Coöperatieve Vereniging SNB-REACT U.A.*<sup>(26)</sup>, the Court dealt with an online provider of IP address rental and registration that allowed the anonymous use of domain names and websites. Such a provider can be exempted from liability for trade mark infringement by third parties who use its services under the following conditions: the service must be a mere conduit, caching or hosting service and its activities of a merely technical, automatic and passive nature; it should not play an active role, by allowing its customers to optimise their online sales activities.

#### THE SCOPE OF THE RIGHT OF 'COMMUNICATION TO THE PUBLIC'

In *GS Media*<sup>(27)</sup>, the Court held that hyperlinking to works which were posted unlawfully on another website can be a communication to the public when the links are posted for profit. In such a case, the website operator's knowledge of the infringement must be presumed. Where, by contrast, links are posted without the pursuit of financial gain, and by a person who did not know or could not reasonably have known the illegal nature of the publication of the works freely available on the other website, there is no communication to the public. In *Zürs.net*<sup>(28)</sup>, the CJEU found that the re-broadcasting of TV and radio transmissions by a cable network provider constituted an act of communication through different technical means. However, the public targeted by that act was not a 'new public', since the subscribers were already taken into account by the rights holders. No separate consent was necessary. In *Ziggo BV*<sup>(29)</sup>, the Court held that making available and managing an online peer-to-peer file-sharing platform, and notably indexing metadata and providing a search engine, can be a communication to the public. The criteria taken into account included the deliberate nature of the action (act of communication), the number of persons that have access to the same work at the same time and in succession (public), the platform operators' knowledge of the infringement, and the profit-making purpose of managing the platform. According to *Frederik*

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<sup>(24)</sup> C 324/09 *L'Oréal-eBay*, 12/07/2011, EU:C:2011:474, see above (Relevant preliminary rulings from the CJEU before 2016).

<sup>(25)</sup> C-484/14 Tobias Mc Fadden vs Sony Music Entertainment Germany GmbH, 15/09/2016, EU:C:2016:689.

<sup>(26)</sup> C-521/17 *Coöperatieve Vereniging SNB-REACT U.A. v Deepak Mehta*, 07/08/2018, EU: C: 2018:639.

<sup>(27)</sup> C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others*, 08/09/2016, EU:C:2016:644.

<sup>(28)</sup> C-138/16 *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) vs. Zürs.net Betriebs GmbH*, 16/03/2017, EU:C:2017:218.

<sup>(29)</sup> C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV*, 14/06/2017, EU:C:2017:456.

*Wullems*<sup>(30)</sup>, selling a multimedia player that contains pre-installed add-ons with hyperlinks to websites with infringing content can be a communication to the public. There was an act of communication considering that without the seller's intervention, purchasers of the media player would find it difficult to identify the streaming websites. The 'public' consisted of a fairly large number of people who had purchased the multimedia player, and in everyone who could potentially acquire that media player and could stream the protected works at the same time. Other criteria taken into account were the profit-making purpose of selling the player, and the full knowledge of the consequences when installing the add-ons. In *VCAST*<sup>(31)</sup>, the CJEU held that a cloud-based video-recording service, when recording TV programmes and making them available to users on a cloud storage space, makes an act of communication to the public. There was an act of communication because the broadcaster's original transmission and the video-recording service's transmission use different technical means. The sum of the persons that the video-recording service targets constitute a different public. Moreover, the act cannot be justified on the basis of the private copying exception. In *Renckoff*<sup>(32)</sup>, the Court clarified that posting a photograph freely available online on a different website can be a communication to the public and therefore a copyright infringement. The photograph was communicated to a 'new public', since the rights holder who authorised the upload to the original website had in mind only the internet users visiting that website. The CJEU stressed that the exhaustion rule is not applicable to the right of communication, and that re-posting is different from hyperlinking. In the case of re-posting, the rights holder loses control over further uses of the work.

## DECISIONS FROM NATIONAL COURTS

A total of 34 decisions from courts in 14 EU Member States<sup>(33)</sup> were included in the case-law collection. Around half of the decisions (17) relate to injunctions against internet access providers to stop and/or prevent infringements by third parties. Three of these decisions also imposed injunctions on search engines. In cases collected from nine Member States<sup>(34)</sup>, judges have elaborated on different aspects, including the type of injunction, the party responsible for implementing the measure and for bearing the costs of it, or penalty payments.

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<sup>(30)</sup> C-527-15 *Stichting Brein vs. Jack Frederik Wullems*, 26/04/2017, EU:C:2017:300.

<sup>(31)</sup> C-256/16 *VCAST Limited v RTI SpA*, 29/11/2017, EU:C:2017:913.

<sup>(32)</sup> C-161/17 *Land Nordrhein-Westfalen v Dirk Renckoff*, 08/08/2018, EU:C:2018:634.

<sup>(33)</sup> Denmark, the Czech Republic, Germany, Ireland, Greece, Spain, France, Italy, Lithuania, the Netherlands, Austria, Sweden and the United Kingdom.

<sup>(34)</sup> DK, IE, ES, FR, IT, NL, AT, SE, UK.

14 decisions discuss whether, and under what conditions, the operators of a platform or a website or other service providers could be considered as infringing IP rights<sup>(35)</sup>. Most of these decisions relate to copyright and the national judges often discuss the criteria for making a ‘communication to the public’<sup>(36)</sup>. Several decisions assess whether, and to what extent, a platform has an active role (Italy, the Netherlands, Poland). A decision on trade marks from Germany concerns an online shop selling infringing products with third-party motives and bearing its own mark.

Finally, three decisions relate to the possible obligations of other parties, and whether such parties could qualify as intermediaries. Two of these decisions were from Germany, one concerning traders on an online sales platform and the other concerning a holder of an internet connection, and the third decision was from Lithuania concerning a payment service provider collecting payments from the users of a website.

#### *INJUNCTIONS AGAINST INTERNET ACCESS PROVIDERS AND SEARCH ENGINE OPERATORS*

In 17 cases included in the case-law collection, an injunction against an internet access provider (sometimes referred to as internet service provider)<sup>(37)</sup> was granted. In cases directed against internet access providers and/or search engines, the exclusive rights (copyright and related rights, trade marks) were infringed by a third party using the services of the provider.<sup>38</sup> The decisions do not always specify the initial infringer, but the facts suggest that the infringements stem from, amongst others, operators of websites or file-sharing platforms, users of these sites, or sellers and advertisers of counterfeit goods.

In Sweden, the Svea Court of Appeal annulled an injunction granted by the first instance court because it considered it to be disproportionate. In this case, one third of blocked domain names did not direct to any site at all or other sites than those initially claimed.

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<sup>(35)</sup> The Austrian decision discusses the issue in the context of a request for a website blocking order against an internet access provider.

<sup>(36)</sup> AT, CZ, DE, EL, NL, SE. Two Italian decisions refer to “copyright infringement”.

<sup>(37)</sup> UK, IE.

<sup>38</sup> In an Italian case, the Supreme Court held that the search engine was limited to mere technical search engine functions (caching) and therefore exempted from liability. Corte Di Cassazione (Italian Supreme Court) — No 7709/19 — 19 March 2019, see below.

Often, the injunction consisted of a website blocking order<sup>(39)</sup>. In a decision from 2017, the England and Wales High Court granted a live blocking order, requesting the providers to impede access to streaming servers during specific football seasons<sup>(40)</sup>.

In four cases (three from France and one from Spain), injunctions were also granted against search engine operators, which were requested to de-list infringing links from their search results, or to block searches that contain the locations that lead to the protected works<sup>(41)</sup>.

In a case from Ireland, the Court of Appeal confirmed that the Graduated Response System orders of the High Court are compliant with EU law<sup>(42)</sup>.

“Dynamic” injunctions were reported in one case against an access provider<sup>(43)</sup>.

Besides, the Paris Tribunal affirmed that search engines are able to detect the domain name giving access to the illegal content. Search engines give users the option to be redirected automatically to the website with the illegal content, which under a different domain name gives access to the same content<sup>(44)</sup>.

As to the party/parties responsible for implementing the measure and for bearing the costs of the measure, courts reached different conclusions. In a decision of the French Court of Cassation, both internet access providers and search engines were ordered to implement the measures and to bear the cost of the implementation, unless the performance of the measures would represent an unbearable sacrifice<sup>(45)</sup>. In a later decision of the Paris Tribunal, only the internet access providers had to bear implementation costs of the measures and the costs of the proceedings. In Denmark, the Maritime and Commercial Court found that it was an uncomplicated and less costly measure for a telecommunications company to block access to internet services accessible from certain domains.<sup>(46)</sup> In 2018, the UK Supreme Court found that rights holders should bear the costs of

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<sup>(39)</sup> See the cases from DK, ES, FR, NL, AT, SE, UK.

<sup>(40)</sup> England and Wales High Court (Chancery Division) Case No. HC-2017-000458 ([2017] EWHC 480 (Ch)) of 13/03/2017.

<sup>(41)</sup> Central Administrative Court (Juzgado Central de lo Contencioso-administrativo) No 3 Case No. 1/2015 of 20/04/2016.

<sup>(42)</sup> The Court of Appeal Case 2015 no. 338 of 28/07/2016.

<sup>(43)</sup> Tribunal of Milan (Tribunale di Milano), Case No. R.G. 51624/2017 of 11/06/2018.

<sup>(44)</sup> Paris Tribunal (Court of first Instance) Case No. 18/03028 of 25/05/2018; Tribunal de Grande Instance (French First Instance Court) Case No. 17/10652 of 14/12/2018.

<sup>(45)</sup> Cour de Cassation (Supreme Court of France) Case No. 16-17.217 of 06/07/2017.

<sup>(46)</sup> Sø- og Handelsretten (Maritime and Commercial Court), Case No. U.2018.1808S, 21/02/2018.

implementing the website blocking order, while the internet service providers should bear the litigation costs<sup>(47)</sup>. In two earlier decisions, lower instance courts ordered the internet service provider to bear the costs of implementing the order<sup>(48)</sup>. The costs for implementing an injunction under the Irish Graduated Response System are shared between the internet service provider (80 %) and the claimant/rights holders (20 %).

Penalty payments in case of non-compliance with the order were reported for two decisions from the Netherlands, one from Italy and one from Sweden.

### *INFRINGEMENT OF IPR VIA AND/OR BY ONLINE PLATFORMS AND SERVICES*

Thirteen decisions from seven Member States discuss whether and under what conditions the operators of a platform or a website, a search engine, as well as the provider of an Internet Protocol television (IPTV) service can be considered as infringing copyright or trade mark rights<sup>(49)</sup>, or to be otherwise liable. In most cases, the allegedly infringing acts include hyperlinking or hosting hyperlinks to content that has been posted unlawfully<sup>(50)</sup>. Cases from Austria and Poland concerned the operation of a file-sharing platform<sup>(51)</sup>. The criteria taken into consideration for assessing whether the allegedly infringing behaviour amounted to an act of communication to the public include whether the works are communicated to a 'new public', the knowledge of the infringing nature of the (initial) communication or the profit-making nature of the acts.

In four decisions, no infringement was found. The District Court of Prague found that the links on a website managed by a political party for a campaign were not posted for profit. There was therefore no presumption of knowledge of the infringement<sup>(52)</sup>. In the view of the German Federal Court of Justice, the commercial operator of a website with an image search function (linking to a search

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<sup>(47)</sup> According to the court, an innocent intermediary is ordinarily entitled to be indemnified by the rights-holder against the costs of complying with a website-blocking order. United Kingdom Supreme Court case No. [2018] UKSC 28 of 13/16/2018.

<sup>(48)</sup> Including the lower instance ruling of the above-mentioned case, England and Wales Court of Appeal, Civil Division Case No. A3/2014/ 3939 (Claim No: HC14 C01382) & A3/2014/4238 (Claim No: HC 14 C001056) ([2016] EWCA Civ 658) of 06/07/2016.

<sup>(49)</sup> The Austrian decision discusses the issue in the context of a request for a website blocking order against an internet access provider (therefore not included in the thirteen).

<sup>(50)</sup> In addition to linking, some cases mention embedding (CZ), making available "thumbnails" showing protected photographs (DE), or re-posting screenshots of clips available on YouTube on another website (SE), and offering and providing access to IPTV via subscriptions (NL).

<sup>(51)</sup> In several cases relating to content sharing platforms, the allegedly infringing act is not specified but is likely to consist of making protected works available online.

<sup>(52)</sup> District Court for Prague 4 (Obvodní soud pro Prahu 4) case No. 33T 54/2016 of 16/01/2017 (Criminal case).

engine) could not presume that the photographs shown as search results by a search engine had been posted unlawfully. According to the German court, the presumption of knowledge does not apply to search engines and links provided thereof<sup>(53)</sup>. In the view of the Italian Supreme Court, search engines simply carry out caching. They are exempted from liability under a number of conditions.<sup>54</sup> The Athens Court of Appeal found that the links provided by an online portal directed users to pages where the works were freely available for online streaming, without any technical or other restrictions (paywall or others). The requirement of a ‘new public’ was not fulfilled. In addition, the lucrative activity of the online portal was not proven<sup>(55)</sup>. In ten decisions included in the collection, national courts found an infringement of IP rights and/or a liability of operators of platforms or other services. In a decision of 2017, the Tribunal of Turin took the view that a content sharing platform should not be considered as an ‘active host’, and was therefore exempted from liability. However, providers become liable for copyright infringement when, after having been informed by the rights holder of the infringing content, they do not remove the content. The video sharing platform had been informed about the URLs, but some of the videos were still available in Italy and many abroad (the videos were only blacked out from access to users in Italy, but not removed)<sup>(56)</sup>. In the same month, the Court of Appeal of Rome applied a different reasoning in a case with similar facts, and held that a content sharing platform must be considered as an ‘active host’, meaning that no exemptions are applicable<sup>(57)</sup>. In January 2019, the Rome Court of First Instance held that a social media platform made a communication to the public by hosting links to third-party portals which make unlicensed content available. It stressed the knowledge requirement and the obligation of providers to put an end to the infringing activity once informed<sup>(58)</sup>. In March 2019, the Italian Supreme Court clarified under what conditions ‘active conduct’ can also be found in an omission. This would be the case when a provider does not remove unlawful content after either having been notified or when it can reasonably be expected to have checked the legality of the third party’s conduct<sup>(59)</sup>. In a trade mark infringement case, the Amsterdam District Court found that the social media platform Facebook was not exempted from liability because of its advertisement review policy. It partly determined the content of advertisements displayed on the platform, thus playing an active role<sup>(60)</sup>. The Appeal Court of Krakow held that a content-sharing platform is not ‘passive’ and

<sup>(53)</sup> Bundesgerichtshof (Federal Court of Justice) case No. I ZR 11/16 of 21/09/2017. The court specified that there was no direct liability or indirect liability for breach of duties of care (*Täter-/ Störerhaftung*).

<sup>54</sup> Italian Supreme Court, Case No. 7709/19 of 19/03/2019.

<sup>(55)</sup> Εφετείο Αθηνών (Athens Court of Appeals) Case No. No.1909/2017 of 26/04/2017.

<sup>(56)</sup> Tribunal of Turin (Tribunale di Torino) Case No. R.G. 38112/2013 – Judgement No. 1928/2017 of 07/04/2017.

<sup>(57)</sup> According to the appeal court, the selection of the advertisements, categorization of the infringing content and allocation to editorial teams are incompatible with a merely neutral hosting activity. These acts imply full liability of the provider, without any exception, as they show a voluntary cooperation with the third party in the infringement. Corte d’Appello di Roma (Court of Appeal of Rome), Case No. R.G. 4046/2016 – Judgment No. 2833/2017 of 29/04/2017.

<sup>(58)</sup> Rome Court of First Instance, XVII Sezione Civile, Sezione Specializzata in materia di impresa (già Sezione Specializzata in materia di Proprietà Intellettuale), Case No 3512/19 of 30/01/2019.

<sup>59</sup> Italian Supreme Court, Case No. 7708/19 of 19/03/2019

<sup>60</sup> Amsterdam District Court, Case No C-13-656859 of 21/12/2018.

therefore not exempted from liability. This type of platform is party to the transaction of infringing files as their (temporary) owner, and derives direct benefits from the unlawful sharing of protected works<sup>(61)</sup>.

In a decision from 2018, the District Court of Munich held that the operator of an online shop was liable as an infringer ('Täter') of trade mark rights for placing infringing third party products bearing its own trade mark on the market. The shop operator had claimed that it acted as a mere intermediary between third party artists and producers and distributors of the final products.<sup>(62)</sup>

The Austrian Supreme Court held that the operation and provision of a BitTorrent platform for online file-sharing is a communication to the public contrary to Austrian copyright law<sup>(63)</sup>. The District Court of Limburg found that the provider of an IPTV service that gives access to over 4 000 live TV channels via a hyperlink makes a communication to the public. The Dutch court stressed that the IPTV service provider was intervening in full knowledge of the consequences<sup>(64)</sup>. In Sweden, the Attunda District Court found that the commercial operator of a news portal was making a communication to the public. Hyperlinking to videos posted elsewhere is a communication of the work to a 'new public', and the profit-making intention implies knowledge that the hyperlink gives access to a work published unlawfully<sup>(65)</sup>.

Remedies ordered by national courts against platforms and other service providers include injunctions such as blocking injunctions with penalty payments (IPTV service provider, District Court of Limburg), or orders to take down, remove and prevent future uploads of illicit content (content-sharing platforms, Italy, Poland) or to cease and desist advertising, provide information about infringers (DE, NL), terminate agreements with advertisers and deny them access to the platform (Amsterdam District Court), surrender infringing goods for destruction (District Court Munich), as well as compensation for damages (decisions from Germany, Italy, Poland and Sweden).

#### *OBLIGATIONS OF OTHER PARTIES AND THE CONCEPT OF 'INTERMEDIARIES'*

A few decisions included in the collection discuss the possible obligations of other parties, and whether such parties could qualify as intermediaries.

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<sup>61</sup> Appeal Court of Krakow, Case No. I ACA 1494/15 of 18/09/2017.

<sup>62</sup> LG München (District Court of Munich), Case No. 33 O 8464/17 of 29/05/2018.

<sup>63</sup> Oberster Gerichtshof (Austrian Supreme Court, OGH) Case No. 4 Ob 121/17y of 24/10/2017.

<sup>64</sup> Rechtbank Limburg (District Court of Limburg) Case No. C/03/233371 / HA ZA 17-158 of 09/05/2018.

<sup>65</sup> Attunda Tingsrätt (Attunda District Court) Case No. FT 11052-15 of 13/10/2016.

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In 2016, the German Federal Court of Justice held that traders offering products on an online marketplace are obliged to monitor and possibly amend the product descriptions provided by third parties. Having failed to comply with these obligations, the traders contributed to the trade mark infringement<sup>(66)</sup>.

In the same year, the Lithuanian Supreme Court found that a payment service provider that collects payments from users of a website where films were made available for unlawful downloading, did not qualify as an ‘intermediary’ in the sense of EU and Lithuanian copyright law (under certain conditions)<sup>(67)</sup>.

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<sup>(66)</sup> Bundesgerichtshof (Federal Court of Justice) Case No. I ZR 140/14 of 03/03/2016.

<sup>(67)</sup> Lithuanian Supreme Court (Lietuvos Aukščiausiasis Teismas) Case No. 3K-3-85-378/2016 of 10/03/2016.

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## CASE-LAW OF THE CJEU

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### C-610/15 — STICHTING BREIN V ZIGGO BV AND XS4ALL INTERNET BV — 14 JUNE 2017

#### *NORMS*

Articles 3(1) and 8(3) of Directive 2001/29/EC, Article 11 of Directive 2004/48/EC

#### *FACTS*

Stichting Brein is a Dutch foundation, which safeguards the interests of copyright holders. Ziggo and XS4ALL are internet access providers. A large number of subscribers to both Ziggo and XS4ALL shared copyright protected content via the peer-to-peer (P2P) platform The Pirate Bay (TPB), with the help of torrent software. Stichting Brein requested a court order against Ziggo and XS4ALL to block all domain names and IP addresses related to TPB. The Court of First Instance upheld this request, but the Appeal Court rejected it. The High Court of the Netherlands found that the actions of the online sharing platform TPB make protected works available to the public without the rights holders' consent. It has also been established that subscribers to Ziggo and XS4ALL, through this platform, make protected works available without the rights holders' consent and thus infringe the copyright and related rights of those rights holders. The High Court was not able to establish, however, whether the actions of TPB could also be considered as a 'communication to the public'. The High Court asked the Court of Justice of the EU whether making available and managing a sharing platform on the internet that allows its users to locate protected works and share them in the context of a P2P network, constitutes 'communication to the public' (Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society).

#### *SUBSTANCE*

The Court stated that the concept of 'a communication to the public', within the meaning of Article 3(1) of Directive 2001/29/EC, should be assessed individually for each case. The concept contains two cumulative criteria: an 'act of communication' and 'a public'. To assess whether there is an 'act of communication' several, complementary criteria need to be taken into account: the deliberate nature of the action, the use of specific technical means different from those previously used or allowing to reach a 'new public' and the profit-making nature of the communication. In applying these criteria to the case, the Court found that making protected works available on the sharing platform constitutes an 'act of communication'. To reach this conclusion it referred to

previous case-law. The question remained, however, whether TPB itself could be held liable for this act of communication, as the protected works were placed online by TPB users and not by TPB itself. The Court ruled that the TPB operators play an essential role in making protected works available, as they make the platform available and manage it. Without this platform it would be impossible or very difficult for users to share the protected works. Thus, making an online sharing platform available, which provides its clients with access to protected works, and managing it, is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29/EC. The Court found that there was a ‘public’ since at least all the platform users, who were proven to be a large number, could access the works at any time, simultaneously. Furthermore, there was a ‘new public’ that had not been taken into account by the copyright holders when they authorised the initial communication. Since the operators were informed that the platform was used to provide access to works published without authorisation, they expressed their intention to make protected works available. Furthermore, the large number of torrent files on TPB indicates that the operators could not have been unaware thereof.

## **C-494/15 — TOMMY HILFIGER LICENSING LLC AT AL. V DELTA CENTER A.S. — 7 JULY 2016**

### *NORMS*

Articles 3 and 11 of Directive 2004/48/EC and Article 8(3) of Directive 2001/29/EC

### *FACTS*

The defendant — Delta Center is the tenant of a marketplace ‘Prague market halls’ in Prague, Czech Republic and sublets sales areas to market traders. The rental contracts concluded with those market traders impose on the latter the obligation to respect the regulations to which their activities are subject. In addition, in a brochure, which is distributed to them, it is clearly stated that the sale of counterfeits is forbidden and may lead to the termination of the contract. The applicants (Tommy Hilfiger and Others), who manufacture and distribute brand products of which counterfeit goods were sold in Prague market halls, brought an infringement action against the defendant. The courts of first and second instance rejected the applicants request for an injunction, both for different reasons. The applicants then appealed on a point of law before the Supreme Court, which stayed the proceedings and referred two questions to the Court in order to clarify whether an intermediary, whose services are used by a third party, infringes an intellectual property right within the meaning of Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, and whether it is possible to impose on this intermediary measures under the same conditions as those formulated in the ‘L’Oréal and Others’ judgment (12/07/2011, C-324/09, L’Oréal and Others judgment, EU:C:2011:474) with regard to the operators of an online marketplace.

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*SUBSTANCE*

Article 11 of Directive 2004/48/EC and Article 8(3) of Directive 2001/29/EC oblige Member States to ensure that an intermediary whose services are used by a third party in order to infringe an intellectual property right may be ordered to take measures aimed at bringing those infringements to an end. For an economic operator to be classed as an ‘intermediary’, it must be established that it provides a service capable of being used by one or more other persons with the intention to infringe intellectual property rights; regardless of whether it maintains a specific relationship with those persons. The Court states that the activity carried out by the defendant constitutes a provision of services by letting or subletting pitches on a marketplace, thanks to which a third party can offer for sale counterfeit goods of branded products. Therefore, the defendant must be classified as an ‘intermediary whose services are being used by a third party to infringe an intellectual property right’ within the meaning of Article 11 of Directive 2004/48/EC. As the Court already established in the L’Oréal judgment, the rules for the operation of the injunctions are a matter for national law. For the purpose of achieving the objectives of Directive 2004/48/EC, injunctions must be effective and dissuasive, equitable and proportionate. In the case that gave rise to the ‘L’Oréal’ judgment, the Court had to interpret Article 11 of Directive 2004/48/EC in the light of general provisions formulated in Article 3 of that Directive, without specific considerations relating to the nature of the marketplace. Thus, the condition for an injunction within the meaning of Directive 2004/48/EC against an intermediary in a physical marketplace is identical to those injunctions which may be addressed to intermediaries in an online marketplace.

**C-265/16 — VCAST LIMITED V RTI SPA — 29 NOVEMBER 2017**

*NORMS*

Article 3 and Article 5(2)(b) of Directive 2001/29/EC

*FACTS*

VCAST is a cloud-based video recording service. Its customers can select a certain television programme or time slot they want to record. VCAST then picks up the signals, records the selection and stores the recording in the data storage space in the cloud, indicated by the user. This storage space is space that the user has purchased beforehand from a data storage provider, independent from VCAST. Some of the signals recorded by VCAST are those of the channels of the Italian Television Organisation, RTI.

VCAST brought proceedings against RTI before the Turin District Court, seeking a declaration of lawfulness of its activity. The Turin District Court asked the Court of Justice of the EU (the CJEU) to clarify whether Article 5(2)(b) of Directive 2001/29/EC precludes national legislation, which allows a service such as the one VCAST provides.

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*SUBSTANCE*

The CJEU pointed out that Article 5(2)(b) of Directive 2001/29/EC (the ‘private copying exception’) constitutes an exception to the rights holder’s right to reproduction. Therefore, it has to be interpreted strictly. The rights holder may not use his or her exclusive right to authorise or prohibit private copies made by natural persons under certain conditions. However, the private copying exception does not deprive him or her from prohibiting access to the works of which those same natural persons wish to make private copies.

The service provided by VCAST has a dual functionality. It ensures the reproduction of the protected works, and it makes the protected works available. From the strict interpretation of exceptions, it follows that making the works available cannot fall within the scope of the exception provided by Article 5(2)(b) of Directive 2001/29/EC. Any communication to the public, including making a protected work or subject matter available, requires the rights holder’s consent. This covers any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. The concept of ‘communication to the public’ includes two cumulative criteria: an ‘act of communication’ and a ‘public’. The term ‘public’ refers to a ‘fairly large number of persons’ (31/05/2016, C-117/15, Reha Training, EU:C:2016:379). In applying these criteria, the CJEU found it to be evident that the sum of the persons targeted by VCAST constitutes a ‘public’, as VCAST makes the protected works available to its customers via the internet. The term ‘act of communication’ refers to any transmission of protected works, irrespective of the technical means used. Every (re)transmission, for which specific technical means are used, needs to be authorised individually by the author. In this case, the original transmission made by the broadcaster, and the second transmission made by VCAST, happen under specific technical conditions using different means of transmission. The two transmissions were therefore broadcast to different publics. Thus, the concerned right(s) holder(s) need to consent to each of the transmissions.

## **C-161/17 — LAND NORDHEIN-WESTFALEN V DIRK RENCKOFF — 8 AUGUST 2018**

*NORMS*

Article 3(1) and (3) of Directive 2001/29/EC

*FACTS*

A photographer authorised the operators of an online travel portal to publish one of his photographs on their website showing the city of Cordoba. A pupil in Germany downloaded that photograph, which was freely accessible on said website, and used it in a school presentation. The pupil’s presentation was later available on the website of his school. The artist initiated proceedings against the local and regional public authorities (responsible for the educational supervision of the school and the employer of the teaching staff) seeking an order prohibiting the use of the photograph on the school’s website, as well as damages. He claimed that he only gave a right of use to the operators of the travel website, and that the posting of the photograph on the school infringed his copyright.

The Bundesgerichtshof (Federal Court of Justice) asked the Court of Justice of the European Union (the CJEU) to clarify the scope of Article 3(1) of Directive 2001/29/EC. According to that provision, authors have the exclusive right to authorise or prohibit any communication to the public of their work. More precisely, the Bundesgerichtshof asked whether downloading a photograph, which is freely and lawfully accessible on the web, and posting it on another website constitutes an act of making available as covered by Article 3(1) of Directive 2001/29/EC.

#### *SUBSTANCE*

The Court of Justice answers in the affirmative.

The CJEU first reiterates that photographs may in principle be protected by copyright as works whenever they are intellectual creations reflecting their author's personality and expressing his or her free and creative choices in the creation of that photograph (01/12/2011, C-145/10, Painer, EU:C:2013:138).

It then recalls that the concept of 'communication to the public' includes two cumulative criteria, namely an 'act of communication' of a work and the communication to the public (referring to previous case-law). The posting on one website of a photograph previously posted on another website, after it has been previously copied onto a private server, must be considered as 'making available' and therefore as an 'act of communication'. The posting of a work protected by copyright on a website other than that on which it was initially communicated with the consent of the rights holder must, in circumstances such as in the present case, be regarded as making available to a new public. A rights holder who authorises the upload to the original website only has in mind the internet users visiting that website. The fact that the rights holder did not restrict access to the work is irrelevant since the enjoyment and exercise of the right may not be subject to any formality. The CJEU clearly distinguishes re-posting from the use of hyperlinks (13/02/2014, C-466/12 Svensson and Others, EU:C:2014:76). Hyperlinks contribute to the smooth functioning of the internet. The re-posting of a work without the authorisation of the rights holder does not contribute, to the same extent, to that objective. The work may remain available on the second website, irrespective of the removal of the work on the initial website. The Court also stresses the user's decisive role in the new communication to the public of the protected work.

### **C-521/17 — COÖPERATIEVE VERENIGING SNB-REACT U.A. V DEEPAK MEHTA — 7 AUGUST 2018**

#### *NORMS*

Article 4(c) of Directive 2004/48/EC, Articles 12 to 14 of Directive 2000/31/EC

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*FACTS*

The request for a preliminary ruling was made during the course of proceedings between Coöperatieve Vereniging SNB-REACT U.A. and Deepak Mehta over the latter alleged infringement of the intellectual property rights of ten trade mark proprietors. SNB-REACT, a body established in the Netherlands for the collective representation of trade mark proprietors, brought proceedings before the Harju Maakohus (Court of First Instance, Harju, Estonia) against Mr Mehta, seeking an injunction terminating the infringement of the rights of ten of its members and seeking damages for the loss caused by Mr Mehta. SNB-REACT submitted that Mr Mehta had registered internet domain names that were unlawfully using signs identical to trade marks owned by its members, together with websites unlawfully offering goods for sale bearing these signs. The Harju Maakohus (Court of First Instance, Harju) dismissed the action brought by SNB-REACT. SNB-REACT appealed before the Tallinna Ringkonnakohus (Court of Appeal) but the Court of Appeal states that it has doubts about the compatibility of Estonian law with EU law with Article 4(c) of Directive 2004/48/EC on the enforcement of intellectual property rights; and, secondly, of Articles 12 to 14 of 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 (Directive on electronic commerce) on certain legal aspects of information society services with the Estonian provisions transposing them into Estonian national law.

*SUBSTANCE*

Article 4(c) of Directive 2004/48/EC must be interpreted as meaning that the Member States are required to recognise a body collectively representing trade mark proprietors, such as the entity at issue in the case in the main proceedings, as a person entitled to seek, in its own name, for the purpose of defending the rights of those trade mark proprietors, on condition that that body is regarded by national law as having a direct interest in the defence of such rights and that that law allows it to bring legal proceedings to that end, these being matters for the referring court to verify.

Articles 12 to 14 of Directive 2000/31/EC must be interpreted as meaning that the exemptions from liability for which they provide apply to the provider of an IP address rental and registration service allowing the anonymous use of internet domain names, insofar as the activity of such a service provider is of a mere technical, automatic and passive nature, implying that they have neither knowledge of, nor control over, the information transmitted or cached by its customers, and insofar as they do not play an active role in allowing those customers to optimise their online sales activity, these being matters for the referring court to verify. If they play an active role, then service providers may be liable. The CJEU referred to the previous case-law, namely 'Google France and Google' (23/03/2010, C-236/08, Google France and Google, EU:C:2010:159).

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**C-138/16 — STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN,  
KOMPONISTEN UND MUSIKVERLEGER REGISTRIERTE GENOSSENSCHAFT MBH  
(AKM) V ZÜRS.NET BETRIEBS GMBH — 16 MARCH 2017**

*NORMS*

Article 3(1) and Article 5 of Directive 2001/29/EC

*FACTS*

AKM is a collective management organisation. Zürs.net operates a cable network in Austria. It transmits TV and radio broadcasts, which were initially broadcast either by the national broadcasting corporation, or by others. AKM requested Zürs.net to provide information about the number of subscribers to the cable network and the content broadcast and to pay fees. Zürs.net claims that it has no such obligation because of an exception in Austrian copyright law. AKM claimed that the exception was not compatible with EU law and the Berne Convention. The Handelsgericht Wien (Commercial Court of Vienna, Austria) asked the Court of Justice (CJEU) to clarify whether Article 3(1) and Article 5 of Directive 2001/29/EC and Article 11bis(1)(ii) of the Berne Convention preclude national legislation, which provides that (1) a simultaneous, full and unaltered transmission of programmes broadcast by the national broadcasting corporation, by means of cables in the national territory, and/or (2) a broadcast by means of a communal antenna installation, where the number of subscribers connected to that antenna does not exceed 500, do not require authorisation from the author pursuant to the exclusive right of communication to the public.

*SUBSTANCE*

The CJEU first examined whether a simultaneous, full and unaltered transmission of programmes that were broadcast by the national broadcaster by cable in the national territory, constituted a 'communication to the public'. According to previous case-law, the concept of communicating to the public under Article 3(1) of Directive 2001/29/EC includes two cumulative criteria: an 'act of communication', and the communication of the work to a 'public'. The transmission in question is an act of communication because it is made through cables, and therefore by a technical means different from that used for the initial broadcast transmission. However, Zürs.net does not distribute the works to a 'new public'. Zürs.net's subscribers in the national territory had already been taken into account by the rights holders when they consented to the broadcast of their works by the national broadcaster. Such a transmission does not therefore require separate permission from the rights holders.

Next, the CJEU examined the compatibility of the exception in Austrian copyright law with Article 5(3)(o) of Directive 2001/29/EC. According to that provision, Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3, in certain cases of minor importance, where such exceptions or limitations already existed. In the present case, Zürs.net a

‘small communal antenna installation’ also enables the transmission of broadcasts from broadcasters established in other Member States. Such transmissions may be regarded as acts of communication to the public. The national law in question permits economic operators to broadcast protected works by means of communal antennae installations, without having to seek authorisation from the authors of those works, on condition that the number of subscribers connected to such an antenna is no more than 500. In the CJEU’s view, this could lead to the continuous and parallel use of a multiplicity of communal antenna installations. Throughout the national territory, a large number of subscribers could thus have parallel access to the broadcasts. Considering this cumulative effect and the Directive’s objective of providing a high level of copyright protection to authors, such an exception could not be regarded as being ‘a use in certain ... cases of minor importance’. It is therefore not compatible with EU law.

## **C-527-15 — STICHTING BREIN V JACK FREDERIK WULLEMS — 26 APRIL 2017**

### *NORMS*

Article 3(1), Article 5(1) and (5) of Directive 2001/29/EC

### *FACTS*

Stichting Brein is a Dutch foundation for the protection of the interests of copyright holders. Mr Wullems sold media players that contained add-ons, which in turn connected to streaming websites, including websites on which protected works are made available unlawfully. Stichting Brein brought an action against Mr Wullems before the Rechtbank Midden-Nederland (District Court, Midden-Nederland, Netherlands) seeking an order for him to stop selling these multimedia players. The Rechtbank Midden-Nederland asked the Court of Justice of the EU to clarify whether the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC, must be interpreted as covering the sale of a multimedia player with pre-installed add-ons, available on the internet, containing hyperlinks to freely accessible websites on which copyright-protected works have been made available to the public without the consent of the right(s) holders. It asks whether there is no ‘lawful use’ within the meaning of Article 5(1)(b) of Directive 2001/29/EC if a temporary reproduction is made by an end user during the streaming of a copyright-protected work from such a website, or if such user behaviour is contrary to the ‘three-step test’ referred to in Article 5(5) of Directive 2001/29/EC.

### *SUBSTANCE*

The Court recalled the key principle established in its earlier jurisprudence that ‘communication to the public’ must be interpreted broadly and should provide a high level of protection for right(s) holders. The concept involves two cumulative criteria: an act of communication of a work; and the communication of that work to the public. In this case, there is an act of communication, notably because Mr Wullems pre-installs add-ons onto the multimedia player that specifically enable purchasers to have access to protected works published unlawfully. He does so with a full

knowledge of the consequences of his conduct. Without that intervention, purchasers of the media player would find it difficult to benefit from these protected works; the streaming websites in question are not readily identifiable by the public, and the majority of them change frequently. The works are communicated to a ‘public’ because the multimedia player has been purchased by a fairly large number of people; the communication in question covers all persons who could potentially acquire that media player and have an internet connection, and may stream the protected works at the same time. Besides, the player is sold with a view to making profit. Under Article 5(1) of Directive 2001/29/EC, an act of temporary reproduction may be exempted from constituting infringement if it satisfies five conditions. Inter alia, it must have the sole purpose of enabling a lawful use of protected works. Furthermore, it must comply with the ‘three-step-test’ (Article 5(5) of Directive 2001/29/EC); that is, the exception is to be applied in certain special cases, which do not conflict with the normal exploitation of work and do not unreasonably prejudice the legitimate interests of the right(s) holder. Notably, the Court pointed out that the main attraction of the media player for potential purchasers is the pre-installation of the add-ons concerned. Therefore, as a rule, purchasers of the player access a free and unauthorised offer of protected works deliberately and in full knowledge of the circumstances. Besides, as a rule, temporary acts of reproduction on the multimedia player of works obtained from streaming websites that offer such works unlawfully adversely affect the normal exploitation of those works and cause unreasonable prejudice to the legitimate interests of the right(s) holder(s). This practice usually results in a diminution of lawful transactions relating to the protected works, which would cause unreasonable prejudice to copyright holders. The copyright exception therefore does not apply.

## **C-484/14 — TOBIAS MCFADDEN V SONY MUSIC ENTERTAINMENT GERMANY GMBH — 15 SEPTEMBER 2016**

### *NORMS*

Article 12(1) of Directive 2000/31/EC

### *FACTS*

Mr Tobias McFadden was offering free ‘wireless local area network’ (WLAN) without a password or any kind of protection to his clients. A protected musical work was made available to the public using his WLAN. Sony Music Entertainment Germany GmbH (Sony Music), the producer of the phonogram of the protected work at issue, gave Mr McFadden a formal notice to respect its rights over the phonogram. Mr McFadden brought an action for a negative declaration. The referring court dismissed Mr McFadden’s action and upheld the counterclaims of Sony Music, which mainly consisted of the payment of damages on the ground of liability for infringement, an injunction against the infringement and the reimbursement of the costs of litigation. Mr McFadden appealed the judgment on the ground of the exemption from liability stemming from Article 12(1) of Directive 2000/31/EC as transposed in German law. Sony Music argued that Mr McFadden should be held liable for direct infringement, and alternatively, for indirect infringement as he had not taken steps to protect his WLAN. The Landgericht München I (Regional Court, Munich I, Germany) asked

the Court of Justice of the European Union to clarify the meaning of Article 12(1) of Directive 2000/31/EC. In essence, the German court asked whether indirect liability could be established when a service provider does not secure its network with a password, and a third party uses it to infringe copyrighted work.

### *SUBSTANCE*

The Court of Justice first found that offering free of charge Wi-Fi to the general public constitutes an ‘information society service’ within the meaning of the Directive. This applies where the activity is performed for the purposes of advertising the goods sold or services supplied by that service provider. It follows that a provider cannot be held liable for direct infringement if a user unlawfully uses his free Wi-Fi to make a work available without the consent of the right holder, as soon as it complies with the three requirements of Article 12(1) of Directive 2000/31/EC. That is, when access does not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information; no further conditions have to be satisfied. Therefore, copyright holders cannot claim compensation from the provider on these grounds, but they can seek injunctions to stop future infringements. The Court underlines that such an injunction would have to respect the balance between the interests at stake and protect fundamental rights (notably, the right to protection of intellectual property, the provider’s freedom to conduct business, and the freedom of information of the recipients of the service). One means to achieve this would be to protect the communication network with a password that would oblige the users to reveal their identity.

## **C-160/15 — GS MEDIA BV V SANOMA MEDIA NETHERLANDS BV, PLAYBOY ENTERPRISES INTERNATIONAL INC., BRITT GEERTRUIDA DEKKER — 8 SEPTEMBER 2016**

### *NORMS*

Article 3(1) of Directive 2001/29/EC

### *FACTS*

Sanoma Media Netherlands BV (Sanoma) is the publisher of Playboy magazine and was granted authorisation from the photographer Mr Hermès to publish photos of Ms Dekker in December 2011. Before the planned publication date, the website GeenStijl.nl, operated by GS Media BV (GS Media), provided a hyperlink to an Australian website where the photos at issue had been made accessible unlawfully. Sanoma brought an action claiming that by posting the hyperlink, GS Media had infringed Mr Hermès’ copyright. At first instance, the action was upheld, but the Amsterdam Court of Appeal found that by posting the hyperlinks, GeenStijl had not infringed copyright since the photos had already been made public. GS Media then appealed before the Supreme Court of the Netherlands, and Sanoma and Others cross-appealed, referring to previous CJEU decisions (13/02/2014, C-466/12, Svensson and Others, EU:C:2014:76 and 21/10/2014, C-348/13, BestWater

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International, EU:C:2014:2315). The Supreme Court of the Netherlands decided to stay the proceedings, and asked the CJEU to clarify whether, and in what circumstances, the posting of a hyperlink directing users to copyright-protected works that are freely available on another website constitutes communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC.

### *SUBSTANCE*

The CJEU reiterated previous case-law explaining that communication to the public requires an individual assessment, which takes several complementary criteria into account. First, the intervention of the user who gives access to a work should be deliberate; second, the public should be defined as a vague number of viewers and should be ‘new’; and third, the Court recalled that the profit-making nature of the communication is relevant. The Court stressed the importance of the internet to freedom of expression and of information; hyperlinks contribute to the sound operation of the internet. It may prove difficult for users to ascertain whether the works that are posted on the internet are protected or have been made available with the copyright holder’s consent. Therefore, there is no communication to the public when the person placing the hyperlink did not seek financial gain and acted without any knowledge that the works had been published illegally. On the other hand, there is communication to the public when the person knew that the hyperlink provided access to illegally published material. In addition, where hyperlinks were posted for commercial use, the owners ought to have checked in advanced if they contained illegally acquired work. In this case, knowledge must therefore be presumed.

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## CASE-LAW OF NATIONAL COURTS

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### AUSTRIA

#### OBERSTER GERICHTSHOF (AUSTRIAN SUPREME COURT, OGH) — NO. 4 OB 121/17Y — 24 OCTOBER 2017

##### *NORMS*

§ 18, 81 UrhG (Austrian Copyright Act), Article 3 and Article 8 of Directive 2001/29/EC

##### *FACTS*

The applicant is a collecting society, which enforces the rights of music producers and music artists in Austria. The defendants are mobile internet access providers, who provide access to BitTorrent platforms, among other services, to their customers. The applicant requested the blocking of access to a number of BitTorrent platforms from the respondent as far as they made protected content from some of its members available. The Court of First Instance granted the requested blocking order, considering the respondents as intentionally contributing to copyright infringements. The appellate court, however, lifted the blocking order upon the request of the respondents, based on the argument that the applicant did not attempt to raise its claims against the direct infringer first. The applicant appealed to the Supreme Court.

##### *SUBSTANCE*

The Supreme Court upheld the appeal and amended the decision of the appellate court to reinstate the preliminary injunction (blocking order) as granted by the Court of First Instance. In its decision, the Supreme Court concluded that the provision and operation of a BitTorrent platform aiming to provide online file-sharing amongst its users is an act of 'communication to the public', which qualifies as an act protected by copyright according to § 18a of the Austrian Copyright Act. An injunction may also be granted against intermediaries that contribute to copyright infringements on the internet. As the defendants have not submitted any exonerating evidence, the blocking order is admissible in light of the necessary balancing of conflicting fundamental rights. Under Austrian law, the present claim against the access providers is not subsidiary in relation to the claims against the direct infringer.

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## CZECH REPUBLIC

OBVODNÍ SOUD PRO PRAHU 4 (DISTRICT COURT FOR PRAGUE 4) — NO. 33T  
54/2016 — 16 JANUARY 2017

### *NORMS*

Article 3(1) of Directive 2001/29/EC, Sections 2 and 12, Act No 121/2001 Coll., Autorského zákona (Czech Copyright Act); Act No 40/2009 Trestního zákoníku (Coll., Criminal Code of Czech Republic); Act No 141/1961 Coll., Trestního řádu Criminal Procedure Code.

### *FACTS*

The Czech Pirate party started a political campaign claiming that ‘linking is not a crime’. In the context of that campaign, it operated a website for **non-profit purposes**. In this website, links to other websites containing protected works — uploaded without the consent of right holders — can be found. The website contained no advertisements. The Czech Anti-Piracy Union initiated criminal proceedings against the Czech Pirate before the District Court for Prague 4.

### *SUBSTANCE*

The court referred to the CJEU decisions ‘Svensson and Others’, ‘BestWater International’ and ‘GS Media’ (13/02/2014, C-466/12, Svensson and Others, EU:C:2014:76, 21/10/2014, C-348/13, BestWater International, EU:C:2014:2315 and 08/09/2016, C-160/15, GS Media, EU:C:2016:644). The CJEU had noted that ‘where links are provided for profit, the knowledge of illegality of initial communication must be presumed’. The Czech court inferred that embedding in this case was not carried out with the intention to make a profit. Therefore, the website operator did not know, and could not have known, that the initial communication was unlawful. The court applied the ‘GS Media’ (08/09/2016, C-160/15, GS Media, EU:C:2016:644) presumption without considering whether the knowledge, and in this criminal case, the intent, could have been established in some other way. On those grounds, the court ruled that no crime was committed.

## DENMARK

SØ- OG HANDELSRET TEN (MARITIME AND COMMERCIAL COURT) –  
NO U.2018.1808S — 21 FEBRUARY 2018

### *NORMS*

Section 2(2) of the Copyright Act. 1 cf. 3, Section 413, Nos 2 and 3 of the Administration of Justice Act, Section 414(1) of the Administration of Justice Act. 2.

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*FACTS*

A number of websites, including the website D.com, which was operated by D, offered furniture and lamps for sale, to which the plaintiffs, S, who were members of R, had copyright in Denmark. The case was brought against the telecommunications company T. D was informed of the main hearing on 22 January 2018 on 5 January 2018, and had thus had a reasonable opportunity to handle its interests throughout the case. The purpose of D.com was, among other things, to offer and sell replicas/copies of designs and articles from S, who had the exclusive right to make these available to the public in Denmark (cf. Section 2(2) of the Copyright Act.1 cf. 3). The designs and appliances concerned did not enjoy copyright protection in Ireland.

*SUBSTANCE*

The court found that Danish law was applicable during the case, as the D.com website, among others, addressed the Danish market. Danish customers had access to the website, and it was possible for Danish customers to purchase products from the website.

In this regard, the Court emphasised that on 24 May 2017, R was able to make a trial purchase at D.com of a 'Jacobsen style dining table Series 7 chair colour beech'. The purchase price of DKK 1 031.02, including freight, was paid, and the chair was subsequently delivered to R in Copenhagen. The relevant designs and appliances were thus made available to the public in Denmark via the website (cf. Section 2(2) of the Copyright Act. No 3).

The court also found, in this regard, that there was jurisdiction for the case in Denmark. It was proved that the website infringed the copyright that S administered (cf. Section 2(2) of the Copyright Act. 2, cf. 1). In 2018, after the establishment of the prohibition case, D had inserted a point 13 in their general conditions, after which delivery could not be made to Denmark. However, this had no impact on the purchase made by R on 24 May 2017. Thus, this did not in itself preclude the risk of further violations of the same kind (cf. Section 413, No 2 of the Administration of Justice Act) and S's right to obtain their right would be forfeited if they were referred to await the legal decision of the dispute (cf. Section 413 of the Administration of Justice Act, No 3).

It was less complicated and less costly for T to block access to the internet services accessed by the domains. A prohibition against T would thus not cause any damage or inconvenience that was in material disproportion to the interest that S had in the announcement of prohibitions and orders (cf. Section 414(1) of the Administration of Justice Act. 2).

In the agreement reached on the 'Code of Conduct' between the telecommunications industry and R, it was provided that prohibition requirements could be addressed to the individual network operators. The court found that the formulation of the prohibition and the injunction were sufficiently

precise and assumed that it was possible to find a technical solution that simply prevented access to the internet services that the domains currently gave access to in Denmark.

## FRANCE

### COUR DE CASSATION (SUPREME COURT OF FRANCE) — NO. 16-17.217 — 6 JULY 2017

#### *NORMS*

Article L 336-2 of Code de la Propriété Intellectuelle (French Intellectual Property code, CPI), Article 8(3) of the Information Society Directive (2001/29/EC), Article 12 of the Directive on electronic commerce (2000/31/EC) and the Loi No 2004-575 of 21 June 2004 (French implementation of the Directive on electronic commerce (2000/31/EC)).

#### *FACTS*

In the present case, several French professional unions for copyright defence initiated proceedings against major internet access providers and search engines to block and delist several websites, including Allostreaming, providing access to protected material via streaming and/or downloading on the grounds of Article L 336-2 CPI. The claimants also applied for the costs of the injunctions to be covered by the internet service providers and search engines (hosting) because they were not in the position to sustain these measures financially. The Court of Appeal relied on the CJEU decision (27/03/2014, C-314/12, UPC Telekabel Wien, EU:C:2014:192, § 46-47), and held that unless the intermediaries demonstrated unbearable sacrifices, they should bear the costs for blocking websites with illegal content. When the case reached the Supreme Court, the defendants claimed that the protection of IP rights does not fall within the professional or commercial purpose of their business. Moreover, they claimed that having to cover the full cost of the injunction was neither balanced nor adequate. They also claimed that the fact that they make profit out of the service in question is irrelevant to how the costs should be proportioned. The intermediaries considered that, even if injunctions serve the public interest, having only one category of commercial entities bear the costs, breaches the constitutional principle, which states that all citizens stand equal before charges levied by the State. They also argued that the second instance court misinterpreted some procedural rules, as well as the liability rules.

#### *SUBSTANCE*

According to the French Supreme Court, both Article L 336-2 CPI and Article 6, I-8 of Loi No 2004-575 of 21 June 2004, do not preclude that the costs, which are strictly necessary for the preservation of the author's rights at stake, be borne by the intermediaries, even if such costs are likely to be significant. These provisions should be construed in the light of Directive 2000/31/EC and Directive 2001/29/EC (recital 59), which provide that despite the principle of non-liability, hosting service providers and internet access providers, should contribute to the fight against illegal content

and copyright infringement as they are best placed to put an end to this type of infringement. Therefore, with respect to the balance between the freedom to conduct a business and the protection of IP rights, the French Supreme Court held that an injunction ordering an intermediary to implement blocking measures does not violate the freedom to conduct business. That said, the intermediaries remain free to determine which concrete measures to implement in order to achieve this result. This would be different if the measures resulted in unbearable sacrifices, which has not been proven in the present case.

## **TRIBUNAL DE GRANDE INSTANCE DE PARIS (PARIS TRIBUNAL) RULING IN A FORM OF RÉFÉRÉS (RULING ON AN EMERGENCY BASIS) — NO. 18/03028 — 25 MAY 2018**

### *NORMS*

Article L 336-2 of the Code de la Propriété Intellectuelle (French intellectual property code, CPI) and Article 8(3) of the Information Society Directive (D 2001/29/EC).

### *FACTS*

Several French professional unions for copyright defence initiated proceedings against major intermediaries (internet access providers and search engines) on the grounds of Article L 336-2 CPI to obtain the blocking of several known streaming websites for the unlawful exploitation of works protected by copyright. The plaintiffs initiated proceedings against internet access providers and a known search engine operator for violations of both the right of reproduction and the right of representation of several works protected under copyright law.

### *SUBSTANCE*

The Court confirmed that French law does not prevent costs, which are strictly necessary for the preservation of the copyrights at stake, ordered on the ground of Article L 336-2 of the CPI, being borne by intermediaries even if such costs are likely to be significant. On the ground of Article L 336-2 of the CPI, the Court ordered the intermediaries to bear the costs even if they are likely to be significant. This provision is construed in light of Directive 2000/31/EC and Directive 2001/29/EC. Despite their lack of direct liability for all online intermediaries, they will contribute to the fight against illegal content and, more particularly, against copyright infringement, given that they are in the best position to put an end to such infringements.

In order to examine the illegal nature of the websites in question, the judges mainly took into consideration the frequency of use of those websites, the number of protected works available on their pages and the different ways to access them. The Court considered that, in case of copyright infringements, both internet access providers and search engines have the obligation of implementing blocking measures against illegal streaming websites or deleting them from their

search engines. Moreover, following the example of the decision of the Cour de Cassation, 6 July 2017, 16-17.217 16-18.348 16-18.595, the Court held that intermediaries, and more specifically, internet access providers, have to bear the costs of implementing blocking measures. The judges ordered the internet providers and search engines to block the websites over 15 days, to remove the illegal content from their platform and to block access to any illegal content for the period of one year. The judges acted under Article L 336-2 of the CPI and Article 8(3) of Directive 2001/29/EC, regarding blocking injunctions against search engines. The Court noted that users search for keywords on search engines and the final result matches these keywords. Therefore, if the domain name of a website has changed, the user will be redirected to the new domain name. Following this reasoning, the court decided that search engines must delist all the targeted websites, as well as all the domain names or paths not listed in the judgment. This measure is not synonymous with the general obligation of monitoring the content uploaded on their platform but could be a more efficient way to guarantee the respect of intellectual property rights. The judges, however, brought up a new element in the obligation of intermediaries to contribute to the fight against illicit content. They stated that, should the dispute evolve (e.g. should there be a change of names) right holders will have the right to invoke articles of the civil procedure code to request, within the scope of Article L 336-2 of the French IP code (and after considering the evidence), a prompt judicial response to implement the adapted measures (directed towards internet access providers, not search engines).

## **TRIBUNAL DE GRANDE INSTANCE (FRENCH FIRST INSTANCE COURT) — NO 17/10652 — 14 DECEMBER 2018**

### *NORMS*

Article L 336-2 Intellectual Property Code, Recital 24, Directive 2004/48/EC

### *FACTS*

The plaintiffs, professional advocacy organisations, argued that internet access providers (Bouygues, Orange, SFR, Free, as well as Google, as the operator of a search engine) provide access to streaming websites where films and television series are made available without the rights holders' authorisation. On 5, 6 and 7 July 2018, the plaintiffs brought legal proceedings before the Tribunal de Grande Instance to order prohibitive measures towards these internet access.

### *SUBSTANCE*

The Tribunal judged on three main points.

First of all, in regard to the copyright and related rights infringement, the Tribunal held that the plaintiffs are able to base their action on Article L 336-2 of the Intellectual Property Code. The Tribunal found that websites accessible through domain names (e.g. enstreaming.org) are dedicated to the representation of films and television series without authorisation given by the rights holders. Therefore, the Court ordered the blocking of seven streaming websites by internet access providers.

Second, in regard to the blocking measures, the Tribunal ordered that the internet access providers have to take all the necessary actions to block access to the websites, within a period of 15 days from the date of notification of this decision and for a period of 12 months,. The Court also took a stand regarding the update and the extension of the delisting measures to the paths of the websites targeted in the judgment. In order to do so, the judge relies on recital 24 of Directive 2004/48/EC.

Finally, the Tribunal ordered the same actions for the search engine operator, as it is also considered to be an intermediary. Accordingly, the judge decided that the search engine operator should prevent future infringements and identify any new paths leading to the websites targeted in the decision.

The plaintiffs should also inform the internet access providers when websites become inactive or cease to be illicit.

## **TRIBUNAL DE GRANDE INSTANCE (FRENCH FIRST INSTANCE COURT) — NO 18/14194 — 7 MARCH 2019**

### *NORMS*

L. 111-1, L. 121-1, L. 122-1, L. 122-2, L. 122-3, L. 336-2 du Code de la propriété intellectuelle (French IP Code)

### *FACTS*

The plaintiffs, two scientific publishers, argued that websites (accessible via the domain names Sci-Hub and LibGen) bypass legal and authorised access to their platforms and databases. They considered that these accesses constituted a violation of their copyright and related rights. On 29 November 2018, the plaintiffs requested IP-blocking measures and dynamic injunctions against the internet access providers, namely Orange, Bouygues, SFR, Free (telephone operators).

The plaintiffs asked the Tribunal to order the telephone operators to take measures to prevent the access to these websites via the domain names within a period of 15 days from the date of notification of the decision and for a period of 12 months. Secondly, the plaintiffs claimed that the Tribunal should request that the telephone operators inform the two scientific publishers when these measures have been taken.

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*SUBSTANCE*

The Tribunal firstly reiterated that the two scientific publishers were the owners of the rights to exploit the copyright. Secondly, the Tribunal held that there was copyright infringement by the platforms Sci-Hub and LibGen. Thirdly, the Tribunal decided that the internet access providers could choose the blocking measures to be used and agreed to blocking the websites for 1 year. The internet access providers should set up the measures without delay and at the latest within 15 days from the date of notification of the decision; they should also inform the plaintiffs about this implementation.

Finally, the Tribunal clarified that the update of these measures can only be pronounced by a judge in a summary judgment if the plaintiffs can demonstrate that there is a patently unlawful disturbance which must be stopped. The Tribunal, as a reminder, stated that ‘the judge is the guardian of individual liberties and it is not possible to give internet access providers a monitoring mission which would violate their neutrality’.

## **GERMANY**

**BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) — NO. I ZR 140/14 —  
3 MARCH 2016**

*NORMS*

§ 14 V MarkenG (German Trademark Act)

*FACTS*

The claimant is the owner of the German trademark ‘TRIFOO’, which is registered for a number of computer hardware products. The defendant operates a marketplace via the Amazon trading platform, which offered, among other things, a ‘TRIFOO [...]’ computer mouse. This product, however, did not originate from the defendant, but from a third party who was using the defendant’s marketplace and who amended the original product description without the consent of the defendant. The claimant brought action against the defendant requesting, among others, to cease use of its trade mark. The Court of First Instance upheld the claims of the claimant. The decision was mainly confirmed by the appellate court. The defendant appealed to the Federal Court of Justice.

*SUBSTANCE*

The Federal Court of Justice dismissed the appeal.

The Court found that traders who are offering products via the Amazon online marketplace are obliged to monitor and control possible amendments of the product descriptions, which may have been introduced by third parties on their own motion, provided that the operator of the platform allows such amendments. According to the Court, the defendant contributed to a trade mark infringement and would have been in a legal and practical position to cease this infringement. The defendant was obliged to monitor and check the relevant product description. The fact that the defendant failed in its monitoring and control obligations led to the trade mark infringement and, as such, justifies the claims according to § 14 V MarkenG (German Trademark Act). The Court therefore concluded that the defendant is by all means liable for the trade mark infringement based on the principle of liability of disturbance (Störerhaftung).

## **BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) — NO. I ZR 11/16 — 21 SEPTEMBER 2017**

### *NORMS*

§ 15 II UrhG (German Copyright Act), Article 3(1) of Directive 2001/29/EC

### *FACTS*

The claimant operates a commercial website, which offers protected content (photographs) to registered members. The defendant offers a free search function for photographs on its website, making use of the Google search engine. The search engine lists photographs, which are freely accessible on the internet, and provides previews of these photographs on the website of the defendant. These previews include copyright-protected and access-restricted content from the claimant, which may have been made available by its members without the claimant's authorisation. The claimant brought an action against the defendant requesting it to cease the use of its copyrighted content, to provide information and damages. The Court of First Instance dismissed the action. The appellate court dismissed the claimant's appeal, so the claimant appealed to the Federal Court of Justice.

### *SUBSTANCE*

The Federal Court of Justice dismissed the appeal in its entirety.

Referring to the CJEU decision 'GS Media' (18/09/2016, C-160/15 GS Media, EU:C:2016:644) the Court concluded that placing a link to a freely available webpage, which provides access to protected content without the permission of the right holder, qualifies as communication to the public. However, providing this access may only be perceived as an infringement, if the operator who provided the link knew (or should reasonably have known) about the illegality of the communicated content on a third party website. The Court found that showing the previews of the photographs protected by copyright or neighbouring rights, which are displayed on the defendants

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webpage as a result of an automated search tool, does not infringe the claimants exclusive right of communication to the public according to § 15 II UrhG, even if said content was made available without the consent of the claimant.

According to the Court, the defendant could not have known that the photographs, which had been communicated by means of a search engine, had been made available without authorisation. While the Court confirmed that links to unauthorised content, stemming from a commercially operated website, are presumably provided with the knowledge of an existing lack of authorisation, it concluded that this presumption does not apply to search engines and links provided thereof. Search engines play a particular role in the functioning of the internet. The provider of a search tool cannot be expected to check whether photographs, which have been revealed in the course of an automated process, have been uploaded to the internet legally.

The defendant did not infringe its duties of care, which arose once it had received a cease-and-desist letter on 16/06/2009. It took appropriate measures to impede the repeated display of the photos on its website, which were not communicated via the search function after that date.

## **LG MÜNCHEN (DISTRICT COURT OF MUNICH) — NO 33 O 8464/17 — 29 MAY 2018**

### *NORMS*

Article 9(2)(a), (b), (c) EUTMR; Article 102(2) CTMR; § 14, § 18, § 125b Nr. 2, MarkenG, German Trade Mark Law; § 10 TMG, German Telemedia Law

### *FACTS*

The claimants are a German car manufacturer, which owns the rights to various EU and international trade marks, and its subsidiary, also an owner of EU trade marks. The defendant is a US company which holds the rights to an EU trade mark registered for mobile phone cases, pillows, and T-shirts.

The claimants consider that the use of their trade marks on products offered for sale in the defendant's online shop (e.g. t-shirts, mobile phones and tablet cases, pillows and duvet covers) amounts to trade mark infringement (double identity, risk of confusion, free-riding, Article 9(2)(a), (b), (c) EUTMR), and applied for an injunction. They had previously sent a cease and desist letter to the defendant. The claimants request compensation for damages (§ 14, para 6, MarkenG, German Trade Mark Law), information and disclosure of accounts (§ 125b Nr. 2, MarkenG in connection with § 19, MarkenG, § 242, BGB (German Civil Code), 19d, MarkenG and 19, MarkenG), surrender and destruction of remaining stocks (§ 18, MarkenG and §§ 18, 125b Nr. 2, MarkenG) and reimbursement of expenses (§ 14, Abs. 6, MarkenG).

The defendant argues that it acts as an intermediary; more precisely as a host provider, offering a platform for artists who offer their designs, as well as for manufacturers and distributors. The production process of the final products are organised in a fully automated production and supply chain. In addition, after having been informed by the claimants about the alleged infringement, the defendant would have taken immediate actions to prevent them. It would have fulfilled its obligations and not been liable in any form. In any event, it would be exempted from liability under § 10, S. 1, Nr. 1 TMG (German Telemedia Law).

#### *SUBSTANCE*

The District Court Munich I first confirms that the use in question constitutes trade mark use and infringes trade mark rights in the sense of Article 9 EUTMR.

The defendant is capable of being sued as an infringer ('Täter') for placing the t-shirts, pillows and mobile phone cases bearing the known trade marks of the claimant, or signs that are at least highly similar to those trade marks, on the market.

In the view of the relevant public, the defendant places products bearing signs identical or highly similar to the claimants' trade marks on the market as its own products. Even if the products were manufactured by a third party in an allegedly autonomous process, the defendant affixes its own trade mark to the products before placing them on the market. It thereby appropriates the final products. In this respect, the defendant differs significantly from other online platforms such as Ebay or Amazon, for which (German) case-law has, at most, admitted liability for Breach of Duty of Care ('Störerhaftung') for offering infringing products via third-party vendors. By affixing its own trade mark to the goods, and with no reference to a third party vendor, the defendant assumes product responsibility in the view of the relevant public. The exemption from liability (§ 10 TMG) does not apply to the sale of one's own products, but only to the storage of third party information.

The District Court Munich I ordered the defendant to cease the infringing use (with a possible fine for any breach of up to EUR 250 000, or an administrative detention of up to 6 months); to compensate all the damages caused in Germany as a result of the use; to give information and to render accounts about, inter alia, the scope of the infringing activities in Germany, and about the scope of the use, that is, turnover and profit, and about the distribution channels; to surrender all infringing goods in German territory for destruction, and to bear the costs of the proceedings.

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**BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) — I ZR 64/17 — 26 JULY 2018**

*NORMS*

§§ 19, 69, 97 UrhG (German Copyright Act); §§ 7 IV, 8 I German Telemedia Act (TMG)

*FACTS*

The claimant is the owner of the exclusive rights to use the computer game 'Dead Island'. The defendant operates an internet access, which was used by a file-sharing service enabling the partial download of the video game 'Dead Island'. The claimant brought action against the defendant requesting that it cease use of its copyrighted content and that it reimburse the costs of sending the cease-and-desist letter. The Court of First Instance granted the claimant's claims. The appellate court dismissed the defendant's appeal, so the defendant went on to appeal to the Federal Court of Justice.

*SUBSTANCE*

The Federal Court of Justice partially upheld the appeal. With regard to the appellate court confirming the request to cease, the Federal Court of Justice did revert the case back to the appellate court. With regard to the reimbursement of costs for the cease-and-desist letter, this was confirmed by the appellate court and the appeal of the defendant was dismissed.

The Court found that the defendant is obliged to bear the costs for the cease-and-desist letter. The defendant failed to protect its internet access against misuse by third parties. The defendant knowingly omitted to prevent illegal file-sharing by means of technical measures. As such, the defendant is liable for the disturbance (Störerhaftung) and for reimbursing the costs of the cease-and-desist letter. However, the decision of the appellate court to cease further infringements had to be lifted based on the new § 8 I of the German Telemedia Act (TMG). According to this provision, the internet access provider cannot be made liable for the illegal actions of its users. While this provision did not exist at the time of the ruling of the appellate court, it did exist when the Federal Court of Justice rendered its decision. Considering the fact that the defendant was no longer liable for the illegal action of its users at the time when the decision was rendered, the case had to be reverted back to the appellate court.

## GREECE

### ΕΦΕΤΕΙΟ ΑΘΗΝΩΝ (ATHENS COURT OF APPEALS) — NO. 1909/2017 — 26 APRIL 2017

#### *NORMS*

Article 3(1) of the Information Society Directive (2001/29/EC), Article 3(1) of Law 2121/1993 (Greek copyright act), Νόμος 2121/1993 για την 'Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα

#### *FACTS*

The website, [www.livemovies.gr](http://www.livemovies.gr), operates as an online inventory for audiovisual works (films, TV programmes and TV series). The website contained several hyperlinks (deep links) that directed users to third-party websites and usually (but not always) towards rights holders' websites or other official web locations (such as official YouTube channels), where the works were freely available for online streaming, without any technical or other restrictions (paywall, etc.). A Greek collecting society for musical works notified the plaintiff and sought to conclude a licence agreement for the communication to the public of the protected musical works through the site. However, in response, the administrator of the website filed an action against the collecting society, in order to, among others, have the absence of any licencing obligation for the website's activity judicially recognised.

#### *SUBSTANCE*

The Athens Court of Appeals, making reference to the 'GS Media' case (08/09/2016, C-160/15, GS Media, EU:C:2016:64, § 49), held that when hyperlinks, which direct consumers to protected works freely available on another website without the consent of the rights holder, are placed on another website for the pursuit of financial gain, the knowledge of the illegal nature of the communication must be presumed unless proven otherwise (fictitious presumption, paragraph 55). Hence, the pursuit of financial gain helps to establish the presumption of knowledge and, if such knowledge is proven, the hyperlinks constitute a 'communication to the public'.

Noting the findings of the CJEU in both the 'Svensson and Others' and 'BestWater International' cases (13/02/2014, C-466/12, Svensson and Others, EU:C:2014:76 and 21/10/2014, C-348/13, BestWater International, EU:C:2014:2315), the appeals court affirmed that the hyperlinks in question provided access to audiovisual works freely available online (on third-party websites), with the (assumed) consent of their rights holders: the requirement of a 'new public', therefore, was not fulfilled. However, taking into consideration the circumstances of the given case, the court made a distinction between official and unofficial websites and ruled on the knowledge before examining the financial gain of its activity.

Thus, it was firstly established that the administrator of livemovies.gr, the plaintiff, did not know and could not have known whether the third-party websites, to which the user was redirecting, had obtained a lawful licence from the respective authors and representative organisations for the transmission of such works. Secondly, the financial gain criterion was taken into account by the court. It was mentioned in the decision that, in the very few cases where the websites to which the user was redirected through the use of hyperlinks, had not obtained a lawful licence, the plaintiff had not acted with profit-making intention, since no involvement from the plaintiff in these third-party websites or reception of any profits generated from the unauthorised transmission of protected works had been established. Since the profit-making intention was not proven by the opposing party (collecting society), the court held that the act of simply posting the hyperlinks could not be considered as a communication to the public. In this sense, there was no liability for the website.

## IRELAND

### COURT OF APPEAL — 2015 NO. 338 — 28 JULY 2016

#### *NORMS*

Article 8(3) of Directive 2001/29/EC, Section 40(5A) of the Copyright and Related Rights Act 2000

#### *FACTS*

UPC Communications (the appellant/defendant) is an internet service provider (ISP). In the judgment under appeal (Sony Music Entertainment (Ireland) Ltd. v UPC Communications (Ireland) Ltd. (No 1) [2015] IEHC 317 delivered on 27 March 2015) the High Court ordered the ISP to implement a graduated response system (GRS) within its network for the benefit of the copyright holders (Sony).

According to the GRS, UPC Communications should have sent each relevant subscriber a cease-and-desist letter upon receipt of the first and second copyright infringement notifications that it received from the rights holders. After the third notification, the rights holders are entitled to apply to court for an order terminating the subscriber's internet broadband service. The order also provides that the rights holders should pay 20 % of any capital expenditure incurred by UPC Communications with a cap of EUR 940 000. Business users are excluded from the scheme. The order provides that the matter is to be listed for review before the High Court 5 years from the date of perfection of the order, but the order is otherwise to last indefinitely. On the hearing of the appeal, this Court was informed that **this was the first GRS order of this kind made anywhere within the European Union.**

#### *SUBSTANCE*

The appeal was dismissed by the Court of Appeal subject to minor variations by the deletion in the High Court order of the review provision after 5 years and the prohibition on UPC Communications

seeking costs in future proceedings. The Court of Appeal confirmed that the GRS order issued by the High Court was one which the High Court had jurisdiction to make and that it satisfies the requirements of Article 8(3) of Directive 2001/29/EC, as transposed by Section 40(5A) of the Copyright and Related Rights Act, 2000.

The Court confirms that Article 8(3) of Directive 2001/29/EC (as transposed by Section 40(5A) of the Copyright and Related Rights Act 2000) changes the substantive law by requiring Member States to provide their judicial systems with the authority to grant injunctions of this kind, subject only to certain safeguards (such as the prohibition against the general monitoring of users contained in Article 15(1) of the Directive on electronic commerce (2000/31/EC)). This gave the High Court the power for the first time to grant injunctions against persons and entities who in themselves had committed no legal wrong and who had never threatened to do so. The Court — by analysing the relevant EU case-law — confirmed that the measures in the order were in compliance with the requirements of necessity, proportionality, effectiveness, and the fundamental rights of the freedom of the hosting service provider to conduct its business, as well as the internet users' right to the protection of their personal data and their freedom to receive information. The Court also found that the cost sharing proposal was fair and reasonable and the fundamental rights of UPC Communications' subscribers were not breached.

## ITALY

### **TRIBUNAL OF TURIN (TRIBUNALE DI TORINO) — NO. R.G. 38112/2013 — JUDGMENT NO. 1928/2017 — 7 APRIL 2017**

#### *NORMS*

Articles 156 and 158 of Italian Copyright Law (Law 633/1941), Articles 16 and 17 of the D. Lgs. 70/2003, Articles 14, 15 and 16 of Directive 2001/31/EC.

#### *FACTS*

A TV broadcaster claimed that protected content it owned was uploaded without its permission on a video-sharing platform. The TV publisher sent a letter to the online platform asking them to take down the illicit content. The letter contained the names of the TV shows to take down; it didn't contain the URLs of the relevant videos, however. The sharing platform didn't proceed with the removal claiming that it couldn't identify the illicit content without the specific URLs. The TV publisher filed an action seeking a precautionary injunction for the takedown of the illicit content. Only with the writ of summons filed by the broadcasting operator in the preliminary proceeding were the URLs of the videos identified. The judge, as a precautionary measure, ordered the video-sharing platform to take down the illicit content. The broadcasting operator filed a further action seeking permanent confirmation of the preliminary injunction and compensation for damages.

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*SUBSTANCE*

The Tribunal shed light on different questions.

Firstly, it highlighted that the video-sharing platform should not be considered an ‘Active Host’. According to its interpretation, the categorisation, organisation, promotion or suggestion of similar content, even if applied to illicit videos, does not amount to an intervention on the content of the videos. It consists only of technological means with the aim of the commercial exploitation of the platform. In its opinion, the definition of ‘Active Host’, as a matter of fact is deceptive.

Secondly, the Tribunal underlined that sufficient notice for the takedown of the illicit content should provide the URLs of the infringing material: the simple indication of the titles of the infringing material is not sufficient for the removal of the illicit content. The ISP can only be considered liable when, having knowledge of the illicit content together with the URLs of the videos, it does not remove the infringing content. For these reasons, and considering that the video-sharing platform only had knowledge of the URLs of the infringing videos with the writ of summons and since then some of the videos were still available in Italy and many abroad (the videos were only blocked for Italian access, rather than removed), the Tribunal confirmed the takedown of the infringing videos and ordered the video-sharing platform to prevent further uploading of the illicit content.

Finally, it also ordered the content-sharing platform ISP to compensate the broadcasting operator for damages, to the amount of EUR 250 000, determined by equity, considering all the circumstances of the case. The costs of the proceedings were charged to the video-sharing platform, and were to be refunded to the plaintiff.

**CORTE D’APPELLO DI ROMA (COURT OF APPEAL OF ROME) — NO. R.G. 4046/2016  
— JUDGMENT NO. 2833/2017 — 29 APRIL 2017**

*NORMS*

Article 16 D, Lgs. 70/2003, Article 14 of Directive 31/2000/EC.

*FACTS*

A leading Italian broadcasting operator claimed that copyright-protected content it owned was uploaded without its permission on an online platform. The broadcasting operator sent two letters to the online platform seeking the takedown of the infringing content. However, the letters to cease the infringement and remove the illicit content, didn’t contain the URLs of the infringing videos. The broadcasting operator sought an injunction to take down the illicit content, as well as compensation for damages against the platform with the infringing content. The Tribunal of Rome, in judgment No 8437/2016, ordered the takedown of the illicit content and obliged the online platform to take

down any new infringing material found (owned by the broadcasting operator). It also ordered compensation for damages of EUR 115 000 and payment of the trial expenses. The platform containing the infringing content appealed the decision.

#### *SUBSTANCE*

The Court of Appeal of Rome rejected the appeal.

The Court of Appeal firstly highlighted that the online platform should be considered as an ‘Active Host’ according to the common definition given by the CJEU. According to the court, activities such as the selection of the advertisements associated to the videos, the categorisation of them or the attribution of that content to editorial teams in charge of organising them on the platform are incompatible with a merely technical and neutral hosting activity. These activities trigger the full liability of the provider, without any exception, as they highlight the scope of cooperation with the third party in the infringement.

Secondly, the court held that in this case, due to the broadcasting operator’s connection to the brands for the videos, the takedown notice for the illicit content did not require a specific indication of the URLs: the titles of the illicit videos should have been sufficient for the ISP to be able to identify the infringement and, therefore, take down the infringing material. As a matter of fact, the court confirmed that there is no legal basis for the online platform to require that the URLs be provided in the takedown notice in order to be able to act upon it.

Finally, it held that the amount determined by the Tribunal in the first instance as a compensation for damages should be considered fair, as it was determined according to two other similar transactions that Reti Televisive Italiane S.p.A. (RTI) concluded for granting licences for similar content.

### **TRIBUNAL OF MILAN (TRIBUNALE DI MILANO) — NO. R.G. 51624/2017 — 11 JUNE 2018**

#### *NORMS*

Articles 156 of Italian Copyright Law (Law 633/1941), Articles 14, 17 D, Lgs. 70/2003, Articles 12 and 15 of Directive 2000/31/EC, Points 22 and 24, Article 11 of Directive 2004/48/EC.

#### *FACTS*

A leading Italian book publisher claimed that copyrighted content it owned had been uploaded without its permission to an online portal. It applied for an injunction against Italian telecommunication providers, requesting them to block access to the portal. The judge granted the

blocking injunction against the portal in question, as well as all the second level websites with the same main name. Later, the publisher noticed that the main domain name, which had been the object of the injunction, had changed. Therefore, it asked the internet access providers to comply with the blocking injunction order and extend the access block to the new website. The telecommunication operators refused, affirming that the order only provided for the blocking of the second level domains of the same name, hence excluding the blocking of other main domain names. The publisher applied for an interlocutory blocking injunction for the new main domain name and obtained an interlocutory blocking injunction without hearing the other party. The Tribunal was asked to confirm the *inaudita altera parte* blocking injunction between the parties.

### SUBSTANCE

The Tribunal analysed different questions.

First, it held that the telecommunication providers should be considered as a 'mere conduit', according to the interpretation of Article 14 D, Lgs. 70/2003 (implementation of Article 12 of Directive 2000/31/EC). Mere conduit providers don't have any obligation to monitor and/or check for infringing content, as this would be disproportionate and onerous for the providers (12/07/2011, C-324/09, L'Oréal and Others, EU:C:2011:474 and 24/11/2011, C-70/10, Scarlet Extended, EU:C:2011:771). ISPs should not be considered liable for communicating illicit material, inasmuch as they inform the competent administrative or judiciary authority when they get knowledge of it and block any access when requested by the authority.

Secondly, the Tribunal held that the lack of a general obligation to monitor or actively search for infringing content, did not, however, affect the possibility of the copyright owner to seek blocking injunctions for infringement by third parties (27/03/2014, C-314/12, UPC Telekabel Wien, EU:C:2014:192 and points 45 and 47 of Directive 2001/29/EC). The measures should meet the principles of proportionality and effectiveness (as mentioned in the 'UPC Telekabel Wein' case) and should balance all the interests. Dynamic injunctions, to serve the purpose of effectiveness, can contemplate blocking all the different websites under pseudonyms, but still referring to the main infringing website (Guidelines on certain aspects of Directive 2004/48/EC). The judge granted a dynamic injunction, holding that such measures are compatible with the general prohibition of an obligation to monitor and search for infringing content. Subject to a specific order, the measure concerns specific infringements of the same website under different main names.

The court, considering all the circumstances of the given case, ruled that the complainant, that is the rights holder, should bear all the costs for blocking the access to the various aliases of the main website.

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## ROME COURT OF FIRST INSTANCE — NO. 3512/2019 — 30 JANUARY 2019

### *NORMS*

The court recalls Legislative Decree No 70/2003, implementing Directive 2000/31/EC on certain legal aspects of information society services, in particular, electronic commerce. The court refers to Articles 12, 13 and 14 of the Directive 2000/31/EC for the meaning of ‘mere conduit’, ‘caching’ and, ‘hosting’. The general rule on liability established that an internet service provider is not liable for the information and/or operations performed by its users. For the exemption of liability, Article 16 of Legislative Decree No 70/2003 is recalled, in compliance with Article 14 of the Directive.

### *FACTS*

In 2010, an internet user created a new profile on the social media platform Facebook, where, inter alia, they published links to videos hosted on YouTube. These videos consisted of extracts from the animated TV series Kilari owned by RTI, and transmitted by the broadcaster ‘Italia 1’. Facebook received five warning letters to deactivate the profile at issue, as well as to remove all images, videos, and links. The relevant profile was only removed in 2012, two years after the first request had been sent. On the merits, RTI submitted that Facebook was liable for infringement of its exclusive rights over Kilari and of the trade mark ‘Italia 1’.

### *SUBSTANCE*

The Rome Court stated that the publication of links to third-party portals, through which it is possible to access copyright-protected works, constitutes a form of communication to a new public. For the purpose of liability of the internet service provider, the Rome Court applied the regime of exemption. It is held that a passive hosting provider can be exempted from liability if they are either not aware of the illegality of the activities performed by the users or, as soon as they become aware of it, they immediately take action to put an end to the infringement (Article 16, § 1 of Legislative Decree No 70/2003, interpreted in compliance with Article 14 of Directive 31/2000/EC and with the relevant European case-law (12/07/2011, C-324/09, L’Oréal and Others, EU:C:2011:474).

On the compensation for damages, Article 158, § 2, of the Italian Copyright legislation is applicable. The calculation has been made taking into consideration the length of time the contested information was accessible online (2 years) and the duration of each video (5 minutes) for an amount of EUR 15 595,00 to correspond to RTI.

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## **CORTE DI CASSAZIONE (ITALIAN SUPREM COURT) – NO. 7708/19 – 19 MARCH 2019**

### *NORMS*

Articles 14-15-16-17, considering 46 and 48 of the Directive 2000/31/EC, Articles 16 and 17 of the Legislative Decree No. 70/2003, Articles 2043, 2055, 2082 Italian Civil Code

### *FACTS*

This decision of the Italian Supreme Court concerns the liability regime applicable to hosting providers for copyright infringements committed by users of the hosting services. The Supreme Court clarifies the notion of ‘active hosting provider’, and the conditions for liability.

In 2011, the Tribunal of Milan found Yahoo (Italy) S.p.A. liable for copyright infringement. The platform of the hosting provider had given access to various videos and programmes owned by RTI (Reti Televisive Italiane S.p.A.). In 2015, the Court of Appeal upheld the appeal brought by Yahoo, stating that the hosting provider had acted as a mere intermediary, without actively having processed data on its own. The rights holder appealed before the Supreme Court.

### *SUBSTANCE*

The Supreme Court recalled the meaning of the notion of ‘active hosting provider’ in the sense of Article 14 of the E-Commerce Directive (D 31/2000/EC) and Article 16 of the Italian Legislative Decree No 70/2003. An ‘active hosting provider’ carries out an activity which goes beyond a purely technical, automatic and passive service, contributing with others to the illegal activity.

The Supreme Court clarifies that active conduct can also be found in case of an omission<sup>(68)</sup> of the hosting provider, namely when the latter does not remove the illegal content under the following conditions: it was aware of the offences committed by the users after having been notified by the rights holder or by someone else (1); it could have verified for itself the unlawfulness of the other party’s conduct, and this verification can be considered as being reasonably expected from a professional operator. In this case, the hosting provider is liable of serious negligence (2). The provider had the chance to act usefully and immediately since it was aware of the illegality. This finding is in line with the relevant EU case-law (see amongst other C-324/09, L’Oréal SA, para. 120-121-122, ECLI:EU:C:2011:474) (3).

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<sup>(68)</sup> Doctrine of Italian Criminal Law (Article 40, para. 2 of the Criminal Code)

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As to the identification of the infringing videos, the judges in the main proceedings have to verify whether it is technically possible to identify those videos by the title of the transmission only or whether an indication of the URL address is necessary.

The judgment is annulled and sent back to the Court of Appeal of Milan in a different composition, for a new decision on the merits. The same Court of Appeal will evaluate the damages and the payment of the costs.

## **CORTE DI CASSAZIONE (ITALIAN SUPREME COURT) – NO. 7709/19 — 19 MARCH 2019**

### *NORMS*

Recital 42-43-44 and Article 13 of Directive 2000/31/CE; Article 15 of Law Decree 70/2003; Article 156 of the Italian Copyright Law

### *FACTS*

An Italian broadcasting company (R.T.I. s.p.a.) obtained a blocking injunction dated 9 September 2011 against Yahoo Italia s.p.a. Later, R.T.I. s.p.a., affirming that Yahoo s.p.a. (through the service Yahoo!Search) had not complied with the blocking injunction order, sought a proceeding on the violation of the injunction already obtained and the blocking of the most recent infringing activities. The Court in Milan rejected the claim and affirmed that the service provided by Yahoo! Italia Search should be considered different to the one initially carried out by Yahoo Italia Video, as it could be attributable to catching activity according to Article 15 of Law Decree 70/2003 and, therefore, exempted from liability. Upon appeal, the Milan Court of Appeal rejected the appeal and confirmed the first instance decision. R.T.I. went on to appeal before the Supreme Court.

### *SUBSTANCE*

The Supreme Court confirmed the appeal decision, rejecting the current appeal. It held that Yahoo! Italia Search is limited to mere search engine functions. In order to carry out this activity, the search engine creates copies of the websites which are stored in a cache, in order to perform the searches more quickly. This kind of activity, i.e. automatic recording, should be considered as the activity provided for in Article 15 of Law Decree 70/2003 (Article 13 of Directive 2000/31/CE). Activities such as embedding or suggest search still do not waiver the temporary and automatic character of the recording as no intervention in this information has been proven by the claimant.

Furthermore, the Supreme Court clarified that intermediaries providing catching activity are exempted from liability if they: a) do not modify the information; b) comply with the information access conditions in the websites for which they are providing catching; c) comply with the updating

rules according to which the information is updated; d) do not interfere with the information in order to obtain data on the usage of that information; e) promptly remove the information when they get notification that it has been removed or taken down further to an order from an administrative or judiciary entity.

Finally, it held that the online search engine, by informing the competent public prosecutor's office for copyright infringement upon receiving the notice letter, absolved its duty according to Article 17(2) of Law Decree 70/2003. Intermediaries carrying out catching activity of a mere technical nature are not requested by the law to spontaneously remove infringing content after an extrajudicial notice or the start of a proceeding.

## LITHUANIA

### **LIETUVOS AUKŠČIAUSIASIS TEISMAS (LITHUANIAN SUPREME COURT) — NO. 3K-3-85-378/2016 — 10 MARCH 2016**

#### *NORMS*

Article 78, Article 81(1)(3) of the Law on Copyright and Related Rights (Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas), Directive 2001/29/EC

#### *FACTS*

A cinema industry association applied to the Supreme Court of the Republic of Lithuania requesting that a payment service provider discontinue its payment collection service from the users of the filmai.in website (both by bank transfers via the mokejimai.lt payment system and by telephone) and to prohibit the provision of such services in the future. It also requested a fine to the amount of LTL 5 000 (EUR 1 448.10) against the defendant for each day of non-compliance with the ruling of the court.

The Court of First Instance stated that the defendant was not providing the services to the infringing website through electronic communications networks as specified by the plaintiff, that is, the defendant was not transmitting the information comprising the contents of the infringing website, nor were they providing a possibility for filmai.in to use the electronic communications networks or store the information comprising the contents.

The Court of Appeal, furthermore, noted that the defendant held a licence issued by the Bank of Lithuania to an e-money institution, granting the right to the defendant to perform money transfers. It held that the performing of money transfers was lawful.

Both the courts of first and second instance dismissed the cinema industry association's claim and held that the alleged violation of the copyright was groundless. The defendant was not providing these services to the infringing website, which would entitle the defendant to be considered as an intermediary within the meaning of Article 78 of the Law on Copyright and Related Rights.

### *SUBSTANCE*

The Cassation case examined the issues of application and interpretation of the substantive law rule laying down the possibility of applying prohibitions against intermediaries (Article 78, Article 81(1) and (3) of the Law on Copyright and Related Rights – Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas) and the scope of the definition of an 'intermediary' as used in that provision and in the EU Directives. It also analysed whether it was possible to file a precautionary claim against a person who is not engaged in particular unlawful acts, but whose services allow unlawful and damaging actions to be performed by other persons (Article 6.255 of the Civil Code of the Republic of Lithuania - Lietuvos Respublikos civilinis kodeksas).

The Supreme Court stated that when the respective entity does not provide the data related to the copyright infringement and does not provide the services through the specified electronic communications networks (i.e. it does not transmit the infringing content and does not provide the possibility of using the electronic communications networks, or of storing the infringing content) this may not be considered as intermediation and, as such, these activities may not be subject to any limitations, except the cases provided for in the law.

## **NETHERLANDS**

### **RECHTBANK MIDDEN-NEDERLAND (DISTRICT COURT OF MIDDEN — NEDERLAND) — NO. C/16/448423 / KG ZA 17-382 — 12 JANUARY 2018**

#### *NORMS*

Article 26d of the Dutch Copyright Act, Article 15 of the Dutch Neighbouring Rights Act, Article 3(1) of Directive 2001/29/EC, Article 8(1) of Directive 2001/29/EC and Article 11 of Directive 2004/48/EC

#### *FACTS*

Multiple internet access providers were providing services allowing their users to access The Pirate Bay (TPB) websites. Stichting Brein, an association for the Protection of the Rights of the Entertainment Industry of the Netherlands, applied to the Dutch courts for an injunction against the internet access providers to block access to TPB for their customers.

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*SUBSTANCE*

The court largely cited the ‘BREIN v ZIGGO/XS4ALL’ case (14/06/2017, C-610/15, Stichting Brein, EU:C:2017:456). The District Court, or first instance court, ordered blocking injunctions to the intermediaries. The Court of Appeal, however, reversed the first instance judgment and rejected Brein’s claims. Brein appealed to the Supreme Court in 2014, who suspended the proceedings and referred questions to the CJEU for a preliminary ruling. The CJEU, in turn, held that the concept of ‘communication to the public’ must be interpreted as covering the making available and management of a sharing platform such as TPB. The case is now before the Dutch Supreme Court.

The District Court of Midden-Nederland, in this case, approached the issue via the formula for finding communication to the public. The same District Court issued the same provisional blocking order as the District Court in The Hague, and ordered the internet access providers to block access to The Pirate Bay within 10 days or until such time as a decision has been given in the proceedings on the merits of the required blockade, or until such time as these proceedings have ended in another manner. The order concerns close to 200 IP addresses and domains that access the site. The principles of proportionality and effectiveness were respected.

The court also issued a penalty fee of non-compliance with the order of EUR 10 000 plus EUR 2 000 for each extra day of non-compliance up to a maximum of EUR 1 million. The service providers have to bear the costs of the proceeding.

**RECHTBANK DEN HAAG (DISTRICT COURT OF THE HAGUE) — NO C/09/485400/HA ZA 15-367 — 24 JANUARY 2018**

*NORMS*

Article 26 sub d Dutch Copyright Act; Article 2.22, para 6 Benelux Convention on Intellectual Property (BCIP); Article 8, para 3, Directive 2001/29/EC.

*FACTS*

FAPL (the claimant) is the organiser of the Premier League competition which includes 380 matches annually from the 20 best clubs in English professional football. The (live) image reports (with live commentary) of these competitions are broadcasted via licensed television channels. Ecatel (the defendant) is an internet service provider and offers various services. Among other things, it rents out dedicated servers.

In 2014, the claimant requested an immediate remedy against the defendant stating that it appeared that Ecatel hosted various illegal streaming platforms (e.g. wowcast.tv and micast.tv) on its servers and thereby made the distribution of those illegal streams possible. On the same day, the judge

ordered the defendant to discontinue and cease the copyright infringement. The defendant instituted summary proceedings to revise the orders and the judge set the orders aside. The claimant appealed against the judgment and the appeal is still pending.

### *SUBSTANCE*

The Court held that the disputed subject-matter was protected by copyright, and that FAPL's copyright was infringed. It referred to the CJEU decision 27/03/2014, C-314/12, UPC Telekabel Wien, EU:C:2014:192 where the CJEU had ruled that Article 8, paragraph 3 of the Copyright Directive does not require that the person infringing copyright and the intermediary have a contractual relationship. The requested order against the defendant results in a conflict between, firstly, the copyright, and secondly, the freedom of entrepreneurship enjoyed by economic operators such as Ecatel and, thirdly, the freedom of information of internet users.

The Court held that such an order does not seem to affect the freedom of entrepreneurship of an internet service provider such as Ecatel. Firstly, the claimant has provided sufficient insight that 'null routing' of the relevant server is relatively simple and involves few costs and, secondly, in accordance with the requested order, the defendant only needs to proceed with 'null routing' after prior notification by the claimant and only for a limited period.

The UPC Telekabel Wien judgment cited above states that measures are effective if they have the effect of preventing, or at least complicating, unauthorised communications of the protected works and seriously discourage internet users who use those services. This order is therefore proportionate, necessary and meets the objective of granting a high degree of protection to copyright holders such as the claimant in this case.

The Court therefore ordered Ecatel to discontinue and stop any service used by third parties to infringe FAPL's copyright, promptly (no later than 30 minutes after receipt of a request) to that effect, 24 hours after serving the judgment. Electronic reporting of an illegal stream positively identified by FAPL (or a designated third party) to cease and stop the service concerned for the duration of the competition concerned, with an immediately payable penalty fine of EUR 5 000 for each illegal stream in breach of the order, up to a maximum of EUR 1 500 000.

### **RECHTBANK LIMBURG (DISTRICT COURT OF LIMBURG) — C/03/233371 / HA ZA 17-158 — 9 MAY 2018**

### *NORMS*

Section 3:305a, Section 1019h of the Dutch Code of Civil Procedure, Sections 1 and 12 of the Dutch Copyright Act (Auteurswet, Aw), Sections 2, 6, 7a and 8 of the Dutch Neighbouring Rights Act (Wet

op de naburige rechten, WNR) in conjunction with Article 3 of the Information Society Directive (2001/29/EC).

### *FACTS*

Brein (the claimant) is a foundation that represents the interests of authors and right holders in the entertainment industry. Its objective is to combat the unlawful exploitation of information carriers and information in general, and to promote the interests of right holders in respect of this information and the lawful proprietors thereof, specifically those affiliated with Brein by maintaining, promoting and obtaining adequate legal protection for the rights and interests of those right holders and proprietors. Leaper (the defendant) is a business that operates a website on which it advertises the service 'FlicksStore', which enables users to view 4000+ live TV channels. Brein brought an action against Leaper pursuant to Section 3:305a of the Dutch Civil Code.

### *SUBSTANCE*

The District Court of Limburg assumed that the provision of information by the defendant was as follows: Leaper operates a website on which it advertises the service 'FlicksStore', which enables users to watch 4000+ live TV channels. Prospective viewers are required to pay the defendant a sum of money to receive a hyperlink that allows them to access these 4000+ channels. The court deduces that the majority of the channels that are made accessible in this way are not actually permitted to be viewed in this way. The main question for the court was whether the provision of hyperlinks in such a manner, for a sum of money, equated to a 'new communication to the public' within the meaning of Article 3(1) of the Information Society Directive (2001/29/EC). The court asked whether three cumulative conditions, as established by the CJEU, were satisfied: i) whether there was 'an act of communication' of a work; ii) whether this communication was to a 'public'; iii) whether the 'communication to the public' was made with the objective of making profit.

The court established that the provision of the shortened hyperlinks by the defendant was a 'communication to the public', and should be qualified as a disclosure within the meaning of s12 Copyright Act. The court further established that the defendant performs an act of communication by providing the modified hyperlinks to its customers as it is intervening in full knowledge of the consequences. The court ruled that, by providing access to IPTV subscriptions, and also by offering hyperlinks to sources where films and broadcasts are evidently offered without the consent of the right holders, the defendant makes a 'communication to the public'.

The court ordered the defendant to cease, and not to resume, any offering or provision of access to IPTV subscriptions without the consent of the right holders within 48 hours of the judgment, as well as any offering of hyperlinks that provide users with access to illegal streams or live streams, or other offering of protected works, performances, fixations and broadcasts. The defendant was also ordered to pay an immediate penalty fine of EUR 5 000 per individual IPTV subscription offered, per individual hyperlink offered, or per day that it fails to comply with the cease request, up to a maximum of EUR 1 000 000.

The court also ordered the defendant to provide, within 12 days of the judgment, all contact details or other details of the legal or natural persons with which it had contact while making the IPTV subscriptions and/or the provision of hyperlinks available. It was also ordered to pay EUR 5 000 per day that it fails to comply with this order of proceedings, up to a maximum of EUR 250 000. Finally, the defendant was ordered to pay the costs of proceedings, equal to EUR 20 703.21.

## **RECHTBANK AMSTERDAM (AMSTERDAM DISTRICT COURT) — NO. C-13-656859 – 21 DECEMBER 2018**

### *NORMS*

General Data Protection Regulation Article 6(1); Article 14(1) of the Directive on electronic commerce; Dutch Civil Code, Book 3 (Burgerlijk Wetboek Boek 3)

### *FACTS*

PVH Europe is a large clothing company and operates various brands, including Tommy Hilfiger. Facebook is an internet platform where advertisers can, inter alia, place advertisements in exchange for payment. Facebook reviews the advertisements in compliance with their advertising policy before they are placed. This policy also states that advertisements must not include content that infringes the right of third parties.

During the proceedings, PVH produced images of a number of advertisements for clothing which were not issued by the right holder and which referred to the websites where the items could be purchased. The advertisements appeared routinely, but PVH had been provided with ‘identifiers’ (Ad Account ID, Page ID and UID of Admin’) and infringing advertisements had always been removed. In a letter from August 2018, PVH requested that Facebook provide them with the advertiser’s details (including names, addresses and payment details) but Facebook did not comply with this order.

PVH has applied to the courts to grant a blocking injunction to prevent future trade mark infringement and, inter alia, to deny access to the advertisers in future and to terminate their agreements with the advertisers. PVH has demonstrated that Facebook has not been sufficiently effective as the contested advertisements always resurface.

### *SUBSTANCE*

The Court found that Facebook cannot rely on the ‘exemption provision’ of Article 14(1) of the Directive on electronic commerce. By reviewing the advertisements, Facebook is partly determining

their content and is thereby playing an active role. Therefore, they were ordered to cease and desist specific advertisements that, inter alia, use the words Tommy Hilfiger, as well as to terminate the agreements with the advertisement's providers and to deny these advertisers access to the platform in future.

Regarding the provision of names and addresses, the Court held that in light of the General Data Protection Regulation Article 6(1), the details of purchasers will be granted. Facebook has to pay a fine of EUR 10 000 for every day it fails to comply with the order and must pay the costs of the proceedings.

## POLAND

### SĄD APELACYJNY W KRAKOWIE (COURT OF APPEAL OF KRAKOW) — NO. I ACA 1494/15 — 18 SEPTEMBER 2017<sup>(69)</sup>

#### *NORMS*

Articles 14 and 15 of Directive 2001/31/EC (E-Commerce Directive); Articles 14 and 15 of the Polish Act on Rendering Electronic Services (Dz.U. 2002 nr 144 poz. 1204; implementing the E-Commerce Directive; Article 79 of the Polish Law on Copyright and Related Rights (Dz.U. 1994 nr 24 poz. 83); Article 439 of the Polish Civil Code (a general preventive injunctive relief provision).

#### *FACTS*

The defendant, Chomikuj.pl, is a Polish hosting provider that set up a file-sharing platform with a reward programme, awarding points to popular uploaders. Users of the platform were sharing illegal copies of three films. Despite numerous notices filed by the plaintiffs (The Polish Filmmakers Association, acting as a copyright collecting society and the film producers), the illegal files were not successfully blocked by the defendant and their copies were available on its servers. As a result, the plaintiff sued the service operator for copyright infringement, demanding, in addition to damages, that the service operator be ordered to remove any illegal copies of the films from the platform, including any which may be uploaded in the future. As a court of first instance, the Regional Court in Kraków accepted the plaintiffs' claims in large part and found Chomikuj.pl to be liable for contributory infringement of the copyright of the films at issue. The ruling was appealed by both parties.

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<sup>69</sup> The case was remitted to the first instance regarding additional claims but the judgment is final insofar as it confirms liability of the service provider and the obligation to monitor available content.

### *SUBSTANCE*

Firstly, the Court found that Chomikuj.pl is not a ‘hosting’ service under the E-Commerce Directive since the defendant’s role in file sharing is not passive. In fact, the defendant actively participates in file transactions as a party and becomes the (temporary) owner of the files. Moreover, it derives financial benefits from the rewards system featured on the platform. Therefore, there is no possibility of invoking the exemption from liability under Article 14 of the Polish Act on Rendering Electronic Services. Consequently, the court found that the defendant is liable for the contributory infringement of the copyright of the films based on Article 79 of the Polish Law on Copyright and Related Rights.

Secondly, the court issued a Notice and Search-Down injunction against the defendant. The court ordered the service operator to monitor content in the following way: once a month, for the following three years, the defendant has to search for the phrase ‘Chomikuj’ + ‘(title of each film)’ + ‘film’ using the Google and Bing search engines. The defendant is obliged to remove the files hosted on its platform that are featured in the first five pages of the search results obtained this way. The obligation also covers both the main domain name of the website, as well as any other administered by the defendant.

Finally, the Court condemned the defendant to compensate the plaintiffs for damages determined according to Article 79 of the Polish Law on Copyright and Related Rights.

## **SPAIN**

### **JUZGADO CENTRAL DE LO CONTENCIOSO-ADMINISTRATIVO (CENTRAL CONTENTIOUS-ADMINISTRATIVE COURT) NO.º3 — NO. 1/2015 — 20 APRIL 2016**

#### *NORMS*

Art. 20 Constitución Española de 27 de diciembre 1978, Art. 122 bis 2 L 29/1998 de 13 de julio (Jurisdicción contencioso-administrativa), Art. 23 RD 1889/2011 de 30 de diciembre (Funcionamiento de la Comisión de Propiedad Intelectual).

#### *FACTS*

In a previous judgment, Gear B.V. was ordered to withdraw musical works protected by copyright from its website (gear.com). Faced with a voluntary breach of the order to remove illegal content by the person responsible for the infringing website, the court was asked to assess whether it was appropriate to authorise the enforcement of the decision, which in a subsidiary manner, contemplated the elimination of search results containing the locations leading to the protected works, the suspension of the internet access service in relation to that domain and the blocking of access to it from Spanish territory by internet access providers such as Google y INC, Google

SPAIN S.L. L., Yahoo Iberia SLU, Yahoo EMEA LTD, Microsoft Luxemburg SARL, Microsoft ibérica SRL, Microsoft Corporation (Bing).

#### *SUBSTANCE*

The court pointed out that these subsidiary measures comply with Article 14 of the Spanish Constitution (they are treated equally by the law). It indicated that the administration encouraged the removal of IPR infringements by ordering the prior voluntary compliance of the plaintiff and only then established the conditional application mechanisms that are reflected as subsequent measures in the resolution itself. It emphasised that the authorisation of a judicial execution of an administrative act, applying the principle of proportionality, must be done from the perspective of Article 96 LRJAP-PAC, which says that if there are several admissible means of execution, the least restrictive of the individual freedoms should be chosen, and it understands that this has been observed by the administration. Finally, the judge did not appreciate that the request for measures pejoratively affects the fundamental rights contemplated in Article 20 of the Spanish Constitution (freedom of expression).

### **AUDIENCIA PROVINCIAL DE BARCELONA (BARCELONA APPEAL COURT), SECCIÓN 15ª — NO. 68/2017 — 20 FEBRUARY 2018**

#### *NORMS*

Art. 139(1)(h) RDLeg. 1/1996 de 12 de abril (TR de la Ley de propiedad intelectual), Art. 11 Ley 34/2002, de 11 de julio, de Servicios de la Sociedad de la Información y de Comercio Electrónico (ISSI)

#### *FACTS*

The Association of Management of Intellectual Rights (Asociación de Gestión de Derechos Intelectuales (AGEDI)) filed a lawsuit against Orange Catalunya Xarxes de telecomunicacions, S.A. (Orange Xarxes), Orange Espagne, S.A.U. (Orange E), Eurona Wireless Telecom, S.A. (Eurona), Telefónica de España, S.A.U. (Telefónica), Cableuropa, S.A — currently Vodafone Ono — Jazz Telecom, S.A.U. — currently Orange E, and Vodafone España S.A. (Vodafone E).

The application sought the following actions.

1) That they adopt all the necessary measures and take all the necessary steps to prevent real and effective access from Spanish territory to the [www.exvagos.com](http://www.exvagos.com) website. The period requested for the adoption of these measures was 72 hours after notification of the judgment.

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- 2º) That they inform the court and the plaintiff of the measures and steps mentioned once they had been adopted. This information was required to be immediate, clear and understandable.
  - 3º) That the defendants maintain the adopted measures until the restoration of legality was accredited before the court and, in any case, for one year after its adoption.
  - 4) That the defendants be ordered to pay the costs.

The actions were brought under the protection of the Intellectual Property Law (LPI), specifically the precepts that refer to the possibility of requiring entities that provide electronic communications and telecommunications services to cease activity in their networks that may be carried out by persons who are infringing intellectual property rights. The lawsuit also referred to Spanish and European legislation on the information society and electronic commerce.

The first instance court upheld all the actions.

#### *SUBSTANCE*

The Barcelona Appeal Court upheld the first instance judgment. It was thoroughly proven in the proceedings that the website, [www.exvagos.com](http://www.exvagos.com), facilitates access to musical works through a file exchange system that infringes intellectual property rights by means of links provided by users of the website through forums enabled by the website. In addition, the website also facilitates a routine search for links that allow a user to download files provided by another user.

On this basis, it was concluded that the main use of the site was linked to copyright-infringing behaviour and that the advertising revenues of the site were linked to this unlawful use.

The court held that it was not necessary to direct the legal action against the owner of the website and obtain a previous judicial declaration of infringement of copyright, when it had been sufficiently proved in the proceedings. Nor was it necessary to direct the action against all possible telecommunication companies in Spain.

Some of the biggest telecommunication companies (Orange/Telefonica/Vodafone) were ordered, within 72 hours, to adopt all the measures they deemed necessary to effectively block access to the exvagos.com website. The measures were considered proportional, since the defendants could adopt the most effective technical measures available.

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## SWEDEN

### ATTUNDA TINGSRÄTT (ATTUNDA DISTRICT COURT) — NO. FT 11052-15 — 13 OCTOBER 2016

#### *NORMS*

Section 1 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act), Section 46 and 49 of Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act), Section 54 of Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act), Directive 2001/29/EC (not cited in the judgment).<sup>(70)</sup>

#### *FACTS*

The copyright owner filmed a video of a bungee jumping session in 2012. An unknown individual uploaded the video to YouTube and the YouTube video was linked on the defendant's website (news website) to illustrate an article about an incident that happened in the bungee jumping session without the right holder's consent. A screenshot of a specific part of the video was also published in the article, but the defendant failed to acknowledge the claimant as the author of the video.

#### *SUBSTANCE*

The Attunda District Court concluded that the defendant infringed the claimant's exclusive rights by publishing the video and communicating the work to a 'new public'. The integration of the link had a profit-making intention judging by the specific nature of the defendant's website. The court followed the criteria given in the CJEU decision 'GS Media' (08/09/2016, C-160/15, GS Media, EU:C:2016:644) to examine if the copyright was infringed. It used the principle according to which the person who publishes hyperlinks with the intention to make a profit is presumed to know about the illegality of such a communication. The frozen still of the video was found to be a reproduction of a protected work, and posting it online, a communication to the public. The claimant was awarded damages of SEK 6 500.

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<sup>70</sup> Cited when the decision refers to C-160/15 — GS Media but not in the final reasoning.

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**SVEA HOVRÄTT DOM PATENT- OCH MARKNADSÖVERDOMSTOLEN (SVEA COURT OF APPEAL) — NO. PMT 11706-15 UNIVERSAL MUSIC AKTIEBOLAG AND OTHERS V B2 BREDBAND — 13 FEBRUARY 2017**

*NORMS*

Article 8(3) of Directive 2001/29/EC, Article 12(3) of Directive 2001/31/EC, Section b 53 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works (1960:729)) and Lag (2002:562) om elektronisk handel och andra informationssamhällets tjänster (Law (2002:562) on Electronic Commerce and Other Information Society Services).

*FACTS*

In this case, a number of film and music production companies claimed that an internet access provider, by giving to its customers access to The Pirate Bay and Swefilmer services through an internet connection provided by the company (ISP), contributed to copyright infringement. The film and music companies have therefore requested that the court, in accordance with b 53 §, first paragraph of the Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk Act (1960: 729) on Copyright in Literary and Artistic Works, prohibit the ISP from participating in the infringement. The internet service provider has objected that by providing internet connection to its customers, it doesn't contribute to the infringement within the meaning of the copyright law and that any injunction cannot therefore be ordered.

*SUBSTANCE*

In the judgment, the Patent and Market Court stated that the defendant provided internet connection and can be considered an intermediary according to Directive 2001/29/EC. According to the European Court of Justice this Directive implies that it is possible to file an injunction against an ISP whose services are used to commit copyright infringement, even if the ISP only provides its clients with internet access. The Patent and Market Court has therefore concluded that the ISP should be prohibited from participating in the infringement, with a penalty of SEK 500 000, by blocking the company's subscribers from accessing The Pirate Bay and Swefilmer by further blocking listed domain names and URLs (technical measures) excluding IP addresses. The court finally, condemned the internet access provider to bear the costs of the trial. The order is limited to three years and the ruling is final.

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**STOCKHOLMS TINGSRÄTT PATENT-OCH MARKNADSDOMSTOLEN (STOCKHOLM DISTRICT COURT) — NO. PMT 7262-18 — 15 OCTOBER 2018**

*NORMS*

Article 8(3) of Directive 2001/29/EC, Article 12(3) of Directive 2001/31/EC, Section b 53 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk Swedish Act on Copyright in Literary and Artistic Works (1960:729).

*FACTS*

Telia Sverige Ab is an internet access provider. Internet users can, inter alia, access sites such as The Pirate Bay, Dreamfilm, Nyafilmer and Fmovies via the connection, where users can then access links to protected works such as films and TV series that have been made available online without the rights holders' authorisation. Production companies and distributors requested the court, in accordance with b 53 §, first paragraph of the Act (1960:729) on Copyright in Literary and Artistic Works and Directive 2001/29/EC, to order Telia Sverige Ab to block access to these sites. Telia Sverige Ab objected that:

- by providing internet connection to its customers, it does not contribute to copyright infringement within the meaning of copyright law;
- the blocking would not be proportional;
- it is not clear what services exactly to block (e.g. a service could be available under a different domain).
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*SUBSTANCE*

The court first stated, referring to the 'GS Media' and 'Svensson and Others' cases (08/09/2016, C-160/15, GS Media, EU:C:2016:644 and 13/02/2014, C-466/12, Svensson and Others, EU:C:2014:76) that services such as The Pirate Bay, Dreamfilm, Nyafilmer and Fmovies are infringing copyright law. Moreover, the court, referring to the previous higher court decision PMT 11706-15 Universal Music Aktiebolag and Others v B2 Bredband from 2017, stated that there was no reason not to follow the criteria applied therein. The court referred to the 'UPC Telekabel Wien' decision (27/03/2014, C-314/12, UPC Telekabel Wien, EU:C:2014:192) and, in accordance with Directive 2001/29/EC and the Swedish Copyright Act, ordered Telia to block The Pirate Bay, Dreamfilm, FMovies, and NyaFilmer. Before deciding on an injunction, the court ensured that any blocking would be proportional, since sites like The Pirate Bay and similar platforms primarily offer illegally-distributed copyright-protected content. Article 53(b) of law (1960:729), according to EU law, should be interpreted in the sense that the intermediary who grants access to sites where third parties make infringing content available, should be considered as liable contributors and a blocking order is considered an appropriate response.

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**SVEA HOVRÄTT (SVEA COURT OF APPEAL) — NO. PMÖ 9945-18 — 1 FEBRUARY 2019**

*NORMS*

Section b 53 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works (1960:729)).

*FACTS*

Telia Sverige Ab is an internet access provider. This connection enables internet users to, inter alia, access sites where they can then access links to protected works that have been made available online without the rights holders' authorisation. Production companies and distributors sued the internet access provider for copyright infringement. The Court of First Instance (b 53 §, first paragraph of Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works (1960:729)) and Directive 2001/29/EC) ordered Telia Sverige Ab to block access to these sites via specifically listed domain names and URLs, finding contributory liability for copyright infringement according to the same provisions. The internet access provider appealed, claiming that according to the interpretation of EU law, it is not liable for copyright infringement. It also held that the domain names in the claims lead to different sites than those claimed by the right holders, and that some don't lead to any websites at all. Moreover, one of the services, which turned out to be a legal business, was made available via one of the specified webpages, explaining that now a legal service is provided. Right holders have waived the claim against Dreamfilm.

*SUBSTANCE*

The court, with reference to the CJEU decision 'UPC Telekabel Wien' (27/03/2014, C-314/12, UPC Telekabel Wien, EU:C:2014:192) set out that the purpose of a blocking injunction is to effectively and quickly block a copyright infringement and must be sufficiently effective to ensure the genuine protection of the fundamental right at issue. They must have, at least, the effect of preventing unauthorised access to the protected subject matter. The measures must be strictly targeted but without affecting internet users who are using the provider's services in order to lawfully access information. The court held that finding contributory liability by the internet access provider for providing internet access to sites in which users can access protected works without right holders consent, is not *contra legem*. However, the assessment of the proportionality and the fundamental rights of the internet users' information freedom, cannot be decided by means of a provisional blocking order. The decision of the Patent and Market Court must therefore be revoked. The right holder has to bear the procedural costs of the proceeding.

## UNITED KINGDOM

**ENGLAND AND WALES COURT OF APPEAL, CIVIL DIVISION — A3/2014/3939 (CLAIM NO: HC14 C01382) AND A3/2014/4238 (CLAIM NO: HC 14 C001056) ([2016] EWCA CIV 658) — 6 JULY 2016**

### *NORMS*

Senior Courts Act 1981 (c 54), s 37(1), Articles 3 and 11 of Directive 2004/48/EC

### *FACTS*

With this judgment of 6 July 2016, the Court of Appeal (Civil Division) on appeal from the High Court of Justice, Chancery division (intellectual property), represented by the Hon. Mr Justice Arnold, it was confirmed that in the case of trade mark infringements, internet service providers have the obligation of implementing blocking measures to prevent users accessing certain websites that are selling the counterfeit goods of the respondents, as well as bearing the costs for the blocking injunctions.

The respondents are the proprietors of a number of United Kingdom and international trade marks registered in relation to certain luxury goods, namely (1) Cartier International AG, (2) Montblanc-Simplo GMBH, (3) Richemont International SA and Cartier International AG (hereinafter ‘respondents’). The appellants, namely (1) British Sky Broadcasting Limited, (2) British Telecommunications plc, (3) EE Limited, (4) TalkTalk Telecom Limited and (5) Virgin Media Limited (hereinafter ‘appellants’) in the proceedings below (who did not participate in this appeal) are the five largest internet service providers (or ISPs) serving the United Kingdom. The respondents contended before the first instance court that their trade marks were being infringed by the activities of the operators of specified websites that sold counterfeit goods. They sought injunctions requiring the appellants to impede, or at least restrict, access by their subscribers to the offending sites. The court (first instance) granted the orders sought, holding, in the first decision, that the claimants had satisfied the requirements for the exercise of the court’s jurisdiction to grant such an order. The court also held that the ISPs should bear the costs of implementing the order.

### *SUBSTANCE*

The court held that the order was correct and the appeal should be dismissed. In addition, the court established that the ISPs should bear implementation costs.

The question that was raised by the court was whether Article 11 of Directive 2004/48/EC provided a further basis for developing the practice of the court in connection with the granting of injunctions in cases where it was necessary and appropriate to do so to avoid injustice. Article 11 did provide a

principled basis for extending the practice of the court in relation to the grant of injunctions to encompass, where appropriate, the services of an intermediary, such as one of the ISPs, which had been used by a third party to infringe a registered trade mark. The court had found that the threshold conditions for the exercise of the jurisdiction had been satisfied (the ISPs were intermediaries within the meaning of Article 11; users and/or operators of the website were infringing the claimant's trade marks; the services of the ISPs were used to infringe the claimants' trade marks; the ISPs had actual knowledge of this). The necessary principles when issuing a blocking order were identified and applied; safeguards against abuse of the order were put in place. The appellate court held that according to the facts stated above, the order did not give rise to any illegitimate or otherwise inappropriate limitation on the exercise of the rights and freedoms recognised by the Charter of Fundamental Rights of the European Union.

Regarding the implementation costs, the appellate court held that it was entirely appropriate for a national court to order that the costs of implementation of the injunction should be borne by the intermediary rather than the rights holder. Intermediaries made profits from the services that the operators of the target websites used to infringe the intellectual property rights of the right holders, and the costs of implementing the order could therefore be regarded as a cost of carrying on their business.

## **ENGLAND AND WALES HIGH COURT (CHANCERY DIVISION) — HC-2017-000458 ([2017] EWHC 480 (CH)) — 13 MARCH 2017**

### *NORMS*

Copyright, Designs and Patents Act 1988 — Section 97A ('CDPA'); Information Society Directive 2001/29/EC — Article 8(3); Senior Courts Act 1981 — Section 37(1); Enforcement Directive 2004/48/EC — Article 11, third sentence; EC Directive Regulations 2002, SI 2002/2013 — Regulation 2.

### *FACTS*

The Football Association Premier League (FAPL) (claimant) is the owner of copyright in films that comprise television footage of all Premier League matches. The defendants are the six main retail internet service providers (ISPs) in the UK. The application sought to combat a growing problem of live Premier League footage being streamed without the consent of the FAPL (or its licences) on the internet in the UK. By this claim, the FAPL sought an injunction against the defendants, requiring them to block their customer's access to streaming servers that deliver infringing live streams of Premier League footage to UK consumers.

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*SUBSTANCE*

Section 97A of the 1988 Act empowers the High Court ‘to grant an injunction against a service provider, if statutory conditions are met’. In order for the court to have jurisdiction to issue the order, four matters had to be established. First, that the defendants were service providers. Secondly, that the users and/or the operators of the target servers infringed the FAPL’s copyrights. Thirdly, that the users and/or the operators of the target servers used the defendants’ services to do that. Fourthly, that the defendants had actual knowledge of this.

The court established that the defendants could be considered as service providers according to well-established practice. Infringement of the FAPL rights was present and was done by the operators and users when they copied parts of the works in the memory of devices while streaming the infringing content. The infringement referred to above was committed by using the defendants’ internet access services, as this access to the internet is essential in enabling users to access the servers and thereby obtain copies of the works. Finally, the court also found that the defendants had actual knowledge of the infringing use of their services.

All of the four prerequisites for issuing the order were fulfilled, so it was up to the discretion of the court. The court raised a question of proportionality in regard to the competing rights of those affected by the order in question. However, the court reasoned that the defendants’ right to carry on business and the internet users’ freedom to impart or receive information will not be (disproportionately) impaired by issuing the order to block access to the target servers, since it found it to be the only effective and complete measure to protect the FAPL’s copyrights. The targeted nature of the order means that it avoids creating barriers to legitimate trade. The short duration of the order acts as a safeguard against misuse. For the reasons explained above, the court exercised its discretion and issued the order.

## **UNITED KINGDOM SUPREME COURT — NO. [2018] UKSC 28 — 13 JUNE 2018**

*NORMS*

Enforcement Directive 2004/48/EC — Articles 3, 8, 10(2), 11 and 15, Information Society Directive 2001/29/EC — Article 8 and the Directive on electronic commerce 2000/31/EC — Articles 12-15 and 18.

*FACTS*

The claimants are companies which design, manufacture and sell luxury goods under well-known trade marks. The defendants are the five largest internet service providers (ISPs) serving the UK. The claimants sought injunctions requiring the ISPs to block or attempt to block access to specified ‘target websites’, which were advertising and selling counterfeit copies of the claimants’ goods. The ISPs provide networks by which subscribers’ access content, but they neither provide nor store

content. They do not themselves infringe the relevant trade marks. The judge granted the injunction and ordered the ISPs to pay the costs, including the costs of implementing the website-blocking order. The Court of Appeal dismissed the ISPs' appeal. This appeal to the Supreme Court was only concerned with costs. The main issue was whether the respondents should have been required to bear the various costs of implementing the website-blocking order.

#### *SUBSTANCE*

The Supreme Court unanimously allowed the appeal, in so far as it concerned the cost of complying with the injunction. The respondents were ordered to indemnify the ISPs for the disputed implementation costs. The judge ordered the ISPs to pay the litigation costs, as he was entitled to do so.

The Court of Appeal took the view that EU law (namely the E-Commerce Directive 2000/31/EC, the Information Society Directive 2001/29/EC and the Enforcement Directive 2004/48/EC ('the Directives')) implicitly supports an order for the intermediary to bear the implementation costs. The Court of Appeal continued that liability for the costs of compliance was the *quid pro quo* for the immunities and the absence of any general obligation owed by ISPs to monitor information which they transmit or store.

The Supreme Court disagreed. First, the recitals refer the terms of an injunction against an intermediary to national law, without any further guidance. Second, the *quid pro quo* argument assumes what it seeks to prove: the Directives do not deal at all with the costs of complying with an injunction against an intermediary, so there is nothing from which such an inference could be drawn. The incidence of compliance costs is a matter for national law, within the broad limits set by the EU principles. In English law, the incidence of costs generally depends on the legal distribution of risk as found by the court. An innocent intermediary is ordinarily entitled to be indemnified by the rights holder for the costs of complying with a website-blocking order. The court held that there is no legal basis for requiring a party to shoulder the burden of remedying an injustice if he or she has no legal responsibility and is acting under the compulsion of an order of the court.

Furthermore, website-blocking injunctions are sought by rights holders in their own commercial interest. There is no reason why a rights holder should be entitled to look for a contribution to the cost of defending their rights from anyone other than the infringers. It follows that, in principle, the rights holders should indemnify the ISPs for the compliance costs, subject to the limits on relief set by EU law.

## ANNEX I: OVERVIEW TABLE PRELIMINARY RULINGS

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
1.	14/06/2017,C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV, EU:C:2017:456	Online sharing platform (third party)  Internet access provider	Operating an online sharing platform	<p>Complementary criteria for an <b>act of communication</b>:</p> <ul style="list-style-type: none"> <li>- the deliberate nature of the action</li> <li>- the use of specific technical means different from those previously used or which enable reaching a 'new public'</li> <li>- the profit-making nature of the communication.</li> </ul> <p>'Public':</p> <ul style="list-style-type: none"> <li>- number of persons that have access to the same work               <ul style="list-style-type: none"> <li>- at the same time, and</li> <li>- in succession.</li> </ul> </li> </ul> <p>Knowledge requirement:</p> <ul style="list-style-type: none"> <li>- platform operators were informed that the platform was used to provide access to works published without authorisation</li> <li>- platform operators expressed their intention to make protected works available</li> <li>- the large number of torrent files indicates that the platform operators could not have been unaware</li> </ul> <p>Profit-making purpose:</p> <p>It is clear that the management of the platform is</p>	<p>Article 3(1) D 2001/29/EC</p> <p>Article 8(3) D 2001/29/EC</p> <p>Article 11 D 2004/48/EC</p> <p>Making available and managing an online peer-to-peer file-sharing platform (indexation of metadata, provision of a search engine) can be a communication to the public.</p>

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
				done for the purpose of obtaining profit.	
2.	26/04/2017, C-527/15 Stichting Brein v Jack Frederik Wullems, EU:C:2017:300	<p>Seller of multimedia players enabling access to works made available online unlawfully</p> <p>Internet users (users of the player)</p>	<p>Sale of a multimedia player facilitating access to streaming websites via hyperlinks</p> <p>Streaming from unlawful sources</p>	<p>Sale of the multimedia player is an <b>act of communication</b>:</p> <ul style="list-style-type: none"> <li>- add-ons pre-installed with full knowledge of the consequences</li> <li>- without that intervention purchasers of the media player would find it difficult to identify streaming websites.</li> </ul> <p>Works are communicated to a ‘public’:</p> <ul style="list-style-type: none"> <li>- multimedia player purchased by a fairly large number of people</li> <li>- covers all persons who could potentially acquire that media player and may stream the protected works at the same time</li> <li>- player is sold with a view to making profit.</li> </ul> <p><b>Exception for transient copies <i>not</i> applicable</b> to streaming from unlawful sources by <b>end users</b> of the player:</p> <ul style="list-style-type: none"> <li>- access free and unauthorised offer of protected works <u>deliberately</u> and in <u>full knowledge of the circumstances</u></li> </ul>	<p>Article 3(1) D 2001/29/EC</p> <p>Article 5(1) and (5) D 2001/29/EC</p> <p>Selling a multimedia player that contains pre-installed add-ons with hyperlinks to websites with infringing content can be a communication to the public.</p>

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
				<ul style="list-style-type: none"> <li>- reproductions adversely affect the normal exploitation of those works and cause unreasonable prejudice to the legitimate interests of the right(s) holder(s) because they result in a diminution of lawful transactions.</li> </ul>	
3.	08/09/2016, C-160/15 GS Media BV v Sanoma Media Netherlands BV and others, EU:C:2016:644	Operator of a website	Hyperlinking to works freely available on another website, but without authorisation of the rights holder	<p>Profit-making purpose and knowledge requirement/presumption of knowledge:</p> <p>No 'communication to the public' when:</p> <ul style="list-style-type: none"> <li>- links are posted without the pursuit of financial gain</li> <li>- by a person who did not know or could not reasonably have known the illegal nature of the publication of the works on the other website.</li> </ul> <p>'Communication to the public' when:</p> <ul style="list-style-type: none"> <li>- links are provided for pursuit of financial gain.</li> </ul> <p>In this case knowledge must be presumed.</p> <p>Exceptions listed in Article 5(3) <i>not</i> applicable.</p>	<p>Article 3(1) D 2001/29/EC</p> <p>Article 5(3) D 2001/29/EC</p> <p>Posting hyperlinks to works that were posted unlawfully on another website can be a communication to the public when the links are posted for profit (presumption of knowledge).</p>
4.	15/09/2016, C-484/14 Tobias Mc Fadden v	Business owner operating a free anonymous access	Making a musical work available on	Offering free of charge Wi-Fi to the general public constitutes an ' <b>information society service</b> ' if done for the <b>purpose of advertising the goods sold or</b>	Article 12(1) D 2000/31/EC

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
	Sony Music Entertainment Germany GmbH, EU:C:2016:689	to a wireless local area network, WLAN (for use by its customers)	the internet free of charge without the consent of the rights holders (third parties – users of the internet connection)	<p><b>services supplied</b> by that service provider.</p> <p><u>Exemption from liability</u> for third party infringement when the process is:</p> <ul style="list-style-type: none"> <li>- technical</li> <li>- automatic</li> <li>- passive.</li> </ul> <p>No compensation claims, but <b>proportional injunctions</b> possible.</p> <p>Possibility to request <b>password protection</b>.</p>	<p>A provider cannot be held liable for direct infringement if a user unlawfully uses his free Wi-Fi.</p> <p>Therefore, copyright holders cannot claim compensation, though they can seek injunctions to stop future infringements.</p> <p>One means to achieve this would be to protect the communication network with a password which would oblige the users to reveal their identity.</p>
5.	08/08/2018, C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff, EU:C:2018:634	Operator of a school website	Posting a photograph, already available online, on a different website	<p><b>Act of communication:</b> yes. Re-posting a photograph, after it has been previously copied onto a private server, amounts to ‘making [that work] available’.</p>	<p>Article 3(1) D 2001/29/EC</p> <p>Article 3(3) D 2001/29/EC</p>

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
				<p><u>New public</u>: yes. A rights holder who authorises the upload to the original website only has in mind the internet users visiting that website.</p> <p>Exhaustion rule not applicable to the right of communication.</p> <p><b>Reposting is different from hyperlinking</b> (entails loss of control of rights-holder over further uses of the work).</p>	<p>Posting a photograph freely available online on a different website can be a communication to the public and therefore a copyright infringement.</p> <p>The right of the author to communicate his work is not exhausted after its first use (posting on the site of the agency) and his authorisation is needed for any act of reposting in the future.</p>
6.	07/07/2016, C-494/15 Tommy Hilfiger Licensing LLC at al. v Delta Center a.s, EU:C:2016:528	<p>Tenant of market halls subletting sales points</p> <p>(not an online intermediary!)</p>	<p>Sale of counterfeit goods of branded products by market traders, who sublet the sales points of the market</p>	<p>'Intermediary':</p> <ul style="list-style-type: none"> <li>- provides a service capable of being used by third parties to infringe IPR (regardless of whether it maintains a specific relationship with those parties)</li> <li>- the operator of a physical marketplace is an intermediary whose services are being used by a third party to infringe an intellectual property right.</li> </ul>	<p>Article 11 D 2004/48/EC</p> <p>Article 8(3) D 2001/29/EC</p> <p>The Court clarified that a tenant who sublets sales points to third parties, some of whom are infringing IP rights, falls within the concept of 'an intermediary'. Furthermore, it stated that</p>

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
			halls	<p>Conditions for injunction:</p> <p>The conditions for injunctions against an <b>intermediary in a physical marketplace</b> are <b>identical</b> to those injunctions which may be addressed to intermediaries in an <b>online marketplace</b>.</p>	<p>the conditions for injunctions against an <b>intermediary in a physical marketplace</b> are <b>identical</b> to those injunctions which may be addressed to intermediaries in an <b>online marketplace as set out by the Court in the judgment of 12/07/2011, C-324/09, L'Oréal and Others, EU:C:2011:474.</b></p>
7.	16/03/2017, C-138/16 Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH, EU:C:2017:218	Cable provider network	Rebroadcasting of TV and radio transmissions	<p>Communication to the public:</p> <ul style="list-style-type: none"> <li>- <b>act of communication:</b> yes; made through cable, that is, by a technical means different from that used for the initial broadcast transmission</li> <li>- communication of the work to a <b>public:</b> cable network providers <i>do not</i> distribute to a 'new' public. The subscribers are already taken into account by the rights holders; no separate consent needed.</li> </ul> <p>Incompatibility of Austrian copyright exception (no new broadcast when the number of subscribers connected via a communal antenna installation does</p>	<p>Article 3(1) D 2001/29/EC Article 5 D 2001/29/EC</p> <p>Transmission of programmes that were broadcast by cable by the national broadcaster in the national territory constitutes a 'communication to the public'.</p> <p>However, as Zürs.net does not distribute the works to</p>

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
				not exceed 500 users) with EU law: <ul style="list-style-type: none"> <li>- transmissions of broadcasts of broadcasters established in other Member States can be acts of communication to the public</li> <li>- uses covered by exception cannot be regarded as use of minor importance (Article 5(3)(o))</li> <li>- objective of high level of copyright protection</li> <li>- could lead to continuous and parallel use of a multiplicity of communal antenna installations leading to a large number of subscribers having access to the broadcasts.</li> </ul>	a 'new public' in the same way as a transmission does, it therefore does not require separate permission from the right(s) holders.
8.	07/08/2018, C-521/17 Coöperatieve Vereniging SNB-REACT U.A. v Deepak Mehta, EU: C: 2018:639	Online provider of IP address rental and registration services.	Trade mark infringement	Exemption from liability if: <ul style="list-style-type: none"> <li>- the activity is of a merely technical, automatic and passive nature</li> <li>- providers do not play an active role in the customer's activity</li> <li>- providers have no control or knowledge of the information transmitted.</li> </ul>	Article 4(c) D 2004/48/EC Article 12 D 2000/31/EC Article 14 D 2000/31/EC  In order to assess whether the limitations of liability apply to the provider of an information society service, it is necessary to determine whether the service in question constitutes a mere conduit,

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
					<p>caching or hosting service.</p> <p>If yes, then it was necessary to demonstrate whether the service provider's activities were of a mere technical, automatic and passive nature.</p> <p>It should also be considered whether or not the service provider played an active role by allowing its customers to optimise their online sales activities, in which case, the limitations on liability would not apply.</p>
9.	29/11/2017, C-256/16 VCAST Limited v RTI SpA, EU:C:2017:913	Cloud-based video-recording service	Recording TV programmes and making them available to users on a cloud storage space	<p>Communication to the public:</p> <p><b>'act of communication':</b></p> <ul style="list-style-type: none"> <li>- yes; cloud-based video-recording service makes protected works available</li> <li>- original transmission (made by the broadcaster) and second transmission (made by the recording service) use different technical means of</li> </ul>	<p>Article 5(2)(b) D 2001/29/EC Article 3 D 2001/29/EC</p> <p>Recording TV programmes and making them available to users on a cloud storage space may constitute an act of</p>

	Case reference	Type of party whose liability/obligations are discussed	Type of act discussed in relation to infringement	Criteria for infringement/liability/obligations	Legal provisions and main conclusions
				<p>transmission</p> <p>'public':</p> <ul style="list-style-type: none"> <li>- the number of people targeted by the service constitute a 'public' that is different from that of the original broadcasters</li> <li>- Thus, rights holders need to give their consent.</li> </ul> <p>Private copying exception:</p> <ul style="list-style-type: none"> <li>- should be interpreted strictly and, in the present case, would not be applicable</li> <li>- should not deprive rights holders from prohibiting access to their works.</li> </ul>	<p>communication to the public.</p> <p>The private copying exception is not applicable.</p>

## ANNEX II: OVERVIEW TABLE NATIONAL CASE-LAW

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM). Third party act?	Reasoning/criteria applied Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs) Legal provisions
(Austria)  Oberster Gerichtshof (Austrian Supreme Court, OGH), case No. 4 Ob 121/17y of 24/10/2017	Internet access provider	Third parties (file-sharing platform):  Running a file-sharing platform	The operation and provision of a BitTorrent platform for online file sharing is <b>a communication to the public</b> contrary to § 18a UrhG (Austrian Copyright Act).  Injunctions may be granted against intermediaries that provide access to BitTorrent platforms, therefore contributing to the infringement.  §§ 18 and 81 UrhG (Austrian Copyright Act)  Article 3 of D 2001/29/EC	Website blocking order  Reinstatement of the decision of the Court of First Instance [blocking order granted]  §§ 18, 81 UrhG (Austrian Copyright Act)  Article 8 of D 2001/29/EC
(Czech Republic)  Obvodní soud pro Prahu 4 (District Court for	Non-profit website operator	Embedding  Hyperlinking	Knowledge requirement:  When links provided for profit, knowledge of unlawfulness presumed ('GS Media' principle).	No copyright infringement

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM). Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
Prague 4), case No. 33T 54/2016 of 16/01/2017 (Criminal case)			This case concerned a website managed by a political party for a campaign. Hyperlinking was not carried out with the intention of making profit. No presumption of knowledge.  Sections 2 and 12, Act No 121/2001, Autorského zákona (Czech copyright Act)  Article 3 of D 2001/29/EC	
(Denmark)  Sø- og Handelsretten (Maritime and Commercial Court) case No U.2018.1808 S of 21/02/2018	Internet access provider	Third parties (website selling infringing products)	Copyright infringement  Purpose of the website was to offer and sell replicas/copies of designs, targeting Danish consumers. The claimant had the exclusive right to make these designs available to the public in Denmark.  Blocking Order  Less complicated and costly for the telecommunication operator to block access to the internet service	Copyright infringement  Blocking order to be implemented by the internet access providers  Section 414(1) of the Administration of Justice Act. 2

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM). Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
			accessed in Denmark.  The prohibition and the injunction were sufficiently precise.  It was possible to prevent access to the internet services currently accessed in Denmark.  Section 2 (2) of the Copyright Act. 1 cf. 3, Section 413, Nos 2 and 3 of the Administration of Justice Act	
(France)  Cour de Cassation (Supreme Court of France) case No 16-17.217 of 06/07/2017	Internet access providers  Search engine operators	Third parties (websites, but not clarified):  Making protected material available for streaming or downloading	<b>Principle: exemption from liability</b> for the benefit of Internet access providers and hosting services providers.  Criteria for responsibility Active role:  Internet access providers assume their responsibility for the contents for which they ensure the transmission, but only in those cases where they are	Exemption from liability, but obligations  Website-blocking injunction (access providers)  Delisting of infringing links (search engines)

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
			<p>at the <b>origin of the transmission request</b> in question, or where they <b>select or modify the contents</b> that are to be the subject of the transmission.</p> <p>Knowledge requirement:                      The hosts cannot be held responsible for the information they store if they did not have knowledge of their illicit character or the facts and circumstances that made their illicit character apparent, and if, from the moment they did become aware, they acted promptly to withdraw the data or to make access impossible.</p> <p>No general monitoring obligations:                      Moreover, access providers and web hosts are not obliged to monitor the information they transmit or store, nor to search for facts or circumstances revealing unlawful activities.</p> <p>Implementation costs:</p>	<p>Intermediaries to implement the measures and to bear the cost of the implementation, unless they prove the existence of unbearable sacrifices</p> <p>Article L-336-2 Code de la Propriété Intellectuelle (French Intellectual Property Code)                      12 D 2000/31/EC                      Article 8(3) D 2001/29/EC</p>

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			<p>French law does not prevent the costs, which are strictly necessary for the preservation of the author's rights at stake, being borne by intermediaries, even if such costs are likely to be significant.</p> <p>Fundamental rights:                      Blocking measures do not violate the freedom of business in so far as intermediaries remain free to determine the concrete measures needed to achieve this result.</p> <p>Articles L 336-2 CPI                      Article L-6 Loi n° 2004-575 of 21/06/2004                      Article 12 D 2000/31/EC</p>	
(France)  Paris Tribunal (Court of First	Internet access providers  Search engine operator	Third parties (websites, but not clarified):	Principle: Exemption from liability For the benefit of internet access providers and hosting service providers. Injunctions against internet access providers to end or prevent (third party)	Exemption from liability, but obligations  Dynamic injunctions

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	Instance) ruling in a form of <i>référé</i> s (ruling on an emergency basis) case No. 18/03028 of 25/05/2018		Making protected material available for streaming or downloading	infringements compatible with EU law (D 2000/31/EC).  Implementation costs Internet providers have to bear the costs for the implementation  Blocking injunctions against internet access providers and search engines: Search engines are able to detect the domain name giving access to the illegal content. They are able to give their users the option to be redirected automatically to the website with the illegal content while using a different domain name to access the same content. Therefore 'dynamic' blocking injunctions were ordered (note that the court does not use the term).  No general monitoring obligations ISPs and web hosts are not subject to any obligation to monitor the information they transmit or store, or to	against search engines (Delisting of infringing links)  Website blocking injunction (access providers)  Search engines and access providers to implement the measures  Internet access providers to bear implementation costs of the measures and costs of proceedings  Article L 336-2 Code de la Propriété Intellectuelle (French Intellectual Property Code)

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM). Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
			search for facts or circumstances revealing unlawful activities.  Articles L122-1 and L 336-2 Code de la Propriété Intellectuelle (French Intellectual Property Code)	Article 8(3) D 2001/29/EC Article 12 D 2000/31/EC Article 11 D 2004/48/EC
(France) Tribunal de Grande Instance (French First Instance Court), case No 18/10652 of 14/12/2018	Internet access providers/ISP  Search engine operator	Third parties (streaming websites and platforms)  Infringement of copyright and related rights	Obligations for ISP: The ISP have to take all the necessary actions, within a period of 15 days from the date of notification of the decision, and for a period of 12 months. The plaintiffs must inform ISP when websites become inactive or cease to be illicit.  Article L336-2 French Intellectual Property code Recital 24 of the 2004/48/EC directive Articles L122-1 to L122-4 French Intellectual Property Code	Blocking of streaming websites  Article L336-2 French Intellectual Property Code

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			Article L215-1 French Intellectual Property Code	
(France) Tribunal de Grande Instance (French First Instance Court) case No 18/14194, of 07/032019	Internet access providers/ISPs	Third parties (internet platform)  Bypass legal access to platforms and databases of scientific publishers via pirate domain names	Obligations for ISPs:  Only ISP can choose the blocking measures to be used and agreed to the blocking of the websites for one year.  ISP have to inform the plaintiffs about the implementation of the measures.  Article L336-2 French Intellectual Property Code	Blocking measures (ISP)  Article L111-1, L121-1, L122-1, L122-2, L122-3 French Intellectual Property Code  Article L336-2 French Intellectual Property Code
(Germany)  Bundesgerichtshof (Federal Court of Justice) case No. I ZR 140/14 of 03/03/2016	Traders on an online sales platform (Amazon marketplace)	Third parties (other traders):  Offering counterfeit goods for sale	Obligations:  Traders offering products online on amazon are obliged to <b>monitor and possibly amend the product descriptions</b> provided by <b>third parties</b> .  Failure to comply with obligations:	Cease trade mark infringement ( <i>Störerhaftung</i> )  Monitoring obligations for traders in online market places

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		online	<p>The defendants would have been in a legal and practical position to cease the infringement. Failing its monitoring and control obligations, the defendant <b>contributed to the trade mark infringement</b>. The claims were justified.</p> <p>§ 14 V MarkenG (German Trademark Act)</p>	<p>§ 14 V MarkenG (German Trademark Act)</p>
(Germany)  Bundesgerichtshof (Federal Court of Justice) case No I ZR 11/16 of 21/09/2017	Commercial operator of a website with an image search function (linking to a search engine)	Hyperlinking  Making available 'thumbnails' showing protected photos	<p>Placing freely available links to web pages providing access to protected content without permission of the rights holder, is a communication to the public.</p> <p>Knowledge requirement:  However, providing access may only be perceived as an infringement when the operator knew (or reasonably should have known) about the illegality of the communicated content.</p> <p>No presumption of knowledge:  The defendant could not presume that the</p>	<p>No copyright infringement</p> <p>No direct liability or indirect liability for breach of duties of care (<i>Täter-/Störerhaftung</i>)</p> <p>§ 15 II UrhG (German Copyright Act)  Article 3 D 2001/29/EC</p>

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			<p>photographs shown as part of a search result by a search engine had been made available without the authorisation of the rights holder. <b>The presumption of knowledge does not apply to search engines and links provided thereof.</b></p> <p>§ 15 II UrhG (German Copyright Act)                      Article 3 D 2001/29/EC</p>	
(Germany)  LG München (District Court of Munich) case No 33 O 8464/17 of 29/05/2018	Operator of an online shop	Offer for sale of products bearing protected trade marks, and affixing own trade mark	<p>In the view of the <b>relevant public</b>, the online shop operator <b>places products</b> bearing signs identical or highly similar to the claimants' trade marks <b>on the market as its own products.</b></p> <p>By <b>affixing its own trade mark</b> on the products before placing them on the market, the operator <b>appropriates</b> the final products.</p> <p><b>It differs significantly from other online platforms such as Ebay or Amazon</b>, for which (German) case-law has at most admitted liability for Breach of Duty of</p>	<p>Liability as infringer (<b>'Täterhaftung'</b>) for placing infringing third party products on the market when they are appropriated by affixing own trade mark.</p> <p>Cease infringement (fine in case of breach of order)</p> <p>Compensate damages</p> <p>Give information, render accounts (turnover and profit, the distribution</p>

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			<p>Care ('Störerhaftung') for offering infringing products via third-party vendors.</p> <p>The exemption from liability (§ 10 TMG) does not apply to the sale of own products, but only to the storage of third party information.</p> <p>Article 9(2)(a), (b), (c) EUTMR</p>	<p>channels)</p> <p>Surrender infringing goods for destruction</p> <p>Costs of proceedings</p> <p>Article 102(2) CTMR</p> <p>§ 14, § 18, § 125b, Nr. 2, MarkenG (German Trade Mark Law)</p>
(Germany)  Bundesgerichtshof (Federal Court of Justice) case No. I ZR 64/17 of 26/07/2018	Holder of an internet connection	<p>Third parties (internet users):</p> <p>Making parts of works available online (file-sharing)</p>	<p>The defendant failed to protect its internet access against misuse by third parties, and is therefore obliged to bear the costs for the cease-and-desist letter.</p> <p>The case had to be lifted based on the new § 8 I of the German Telemedia Act (TMG). According to these provisions internet access providers cannot be considered liable for the illegal actions of their users.</p> <p>§§ 19, 69 and 97 UrhG (German Copyright Act) – §§ 7</p>	<p>According to the new law, no liability for third-party infringements</p> <p>The case was reverted back to the appellate court.</p>

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			IV, 8 I German Telemedia Act (TMG)	
(Greece)  Εφετείο Αθηνών (Athens Court of Appeals) case No. 1909/2017 of 26/04/2017	Online portal with links to third-party streaming websites	Hyperlinking	<p>Requirement to reach a 'new public':</p> <p>The hyperlinks directed users to third-party websites; mainly (but not exclusively) rights holders' websites or other mostly official web locations (such as official YouTube channels), where the works were freely available for online streaming, without any technical or other restrictions (paywall or others). The requirement of a 'new public' was not fulfilled.</p> <p>Profit-making purpose: The financial gain was <b>not proven</b>.</p> <p>Simple posting of hyperlinks cannot be considered a communication to public. The lucrative activity of the online portal was not proven.</p> <p>Article 3(1) D 2001/29/EC</p>	<p>No copyright infringement</p> <p>Article 3(1) of Law 2121/1993 (Greek Copyright Act) Νόμος 2121/1993 για την 'Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα'</p> <p>Article 3(1) D 2001/29/EC</p>
(Ireland)	Internet access	Third parties	The Court of Appeal confirmed that the Graduated	Safeguards (e.g.

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	The Court of Appeal, case 2015 No. 338 of 28/07/2016	provider	(internet users):  Making available and downloading protected content	Response System (GRS) orders of the High Court were compliant with EU law.  Article 8(3) of D 2001/29/EC (as transposed in Section 40(5A) of the 2000 Act) grants authorities the power of issuing injunctions against subjects who have committed no legal wrong and who have never threatened to do so.  Fundamental rights/proportionality:  The measure (GRS) is in compliance with the requirements of necessity, proportionality, general cost-effectiveness, and the fundamental rights of internet users (access to the internet, protection of personal data) and of ISP (freedom to conduct a business).  Section 40(5A) of the 2000 Act  Article 8(3) of D 2000/29/EC	prohibition of general monitoring obligation)  Injunction of a graduated response system (GRS)  Cost sharing for implementing the system (80 % ISP — 20 % claimant)
	(Italy)  Tribunale di Torino (Turin)	Content-sharing platform	Third parties (users of the platform):	'Active hosting':  The content-sharing platform is not an 'active host'; exemption from liability. Categorising, organising or promoting videos does not amount to an intervention	Exemption — no 'active host', but obligations  Take down and remove

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<p>Court of First Instance) case No. R.G. 38112/2013 – Judgment No. 1928/2017 of 07/04/2017</p>		<p>Making works available online</p>	<p>on the content of the videos, but to the commercial exploitation of the platform.</p> <p>Contents of a notice for take-down:                      A sufficient notice for take-down of illicit content requires the indication of the <b>URLs</b> of the infringing material.</p> <p>Knowledge requirement, failure to comply with obligation to remove infringing content:</p> <p>Providers become liable for copyright infringement when, after specifically being informed <i>ab origine</i> by the rights holder of the infringing content, they do not remove the content.</p> <p>The video-sharing platform got knowledge of the URLs with the writ of summons, but since then some of the videos have still been available in Italy and many abroad (the <b>videos were only blocked from Italian access, but not removed</b>).</p> <p>Articles 16, 17 of the D. Lgs. 70/2003                      Articles 14, 15 and 16 of D 2001/31/EC</p>	<p>illicit content</p> <p>Prevent future uploads of illicit content</p> <p>Compensation for damages (EUR 250 000)</p> <p>Procedural costs to be borne by the content-sharing platform</p> <p>Articles 156 and 158 of Legge sul Diritto d’Autore No 633/1941 (Italian Copyright Law)</p>

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	(Italy)  Corte d'Appello di Roma (Court of Appeal of Rome), Case No. R.G. 4046/2016 – Judgment No 2833/2017 of 29/04/2017	Content-sharing platform	Third parties (users of the platform):  Making works available online	'Active hosting': The content sharing platform is an 'active host'. <b>Selection of the advertisements, categorisation of the infringing content and allocation to editorial teams</b> are incompatible with a merely neutral hosting activity. They imply full liability of the provider, without any exception, as they show a voluntary cooperation with the third party in the infringement.  Contents of a notice for takedown: Sufficient notice for takedown of illicit content doesn't require the indication of the URLs of the infringing material: the <b>indication of the titles</b> is considered <b>sufficient</b> .  Knowledge requirement, failure to comply with obligation to remove infringing content: Once informed by the copyright owner, the platform did not remove the illicit content.	No exemptions applicable ('active host')  Confirming the first instance ruling: Takedown of existing and future illicit content Compensation for damages  Procedural costs of the second instance proceeding to be shared between the parties

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				Amount of compensation:  The <b>compensation</b> determined by the first instance tribunal is fair, since it is determined according to <b>two other similar transactions</b> concluded by RTI.  Article 16 D. Lgs. 70/2003 Article 14 of D 31/2000/EC	
	(Italy)  Tribunale di Milano (Milan Court of First Instance), case No. R.G. 51624/2017 of 11/06/2018	Internet access provider	Third parties:  Making works available online	<b>'Mere Conduit'</b> providers: <b>no general obligation</b> to actively monitor any potential illegal activity.  Conditions for civil liability: Failure to remove infringing content when requested by competent administrative or judicial authority Obligation to inform the competent administrative or judicial authority when acquiring knowledge of infringing activities committed through its services.  Proportionality of dynamic injunctions: Dynamic injunctions are proportional and effective measures, and therefore compatible with the general	No liability, but obligations  Dynamic blocking injunction  Penalty payment of EUR 5 000 in case of non-compliance with the court order  Rights holder (plaintiff) to reimburse implementation costs of blocking  Articles 156 of Legge sul Diritto D'Autore

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			prohibition as they concern <b>specific infringements</b> .  Articles 14, 17 D. Lgs. 70/2003 Article 12, 15 D 2000/31/EC Recitals 22, 24, Article 11 D 2004/48/EC	No 633/1941 (Italian Copyright Law)
(Italy)  Tribunale di Roma Sezione Civile XVII, Sezione Specializzata in materia di impresa (già Sezione Specializzata in materia di Proprietà Intellettuale) (Rome Court of	Social media platform	Hosting links to third-party portals which make unlicensed content available	Communication to public: The publication of links to third-party portals, through which it is possible to access copyright-protected works, constitutes a communication to the public.  'New public' requirement: It infringes the rights of the copyright owner since the public differs from the one authorised when making the initial communication.  Article 3, para. 1, D 2001/29/EC  Knowledge requirement:	Copyright infringement/communication to the public  Compensation of damages  Procedural Costs  Article 158, para. 2, of the Italian Copyright legislation

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First Instance) case No. 3512/19 of 30/01/2019			<p>The hosting provider can be found liable for illegal activities carried out by its users when it is aware of the illegality of the information and/or it is aware of the illegality of the activities performed by its users, or, as soon as it became aware of them and it chose not to take any action to end the infringement.</p> <p>Evidence to be submitted</p> <p>A rights holder does not have any obligation to indicate specific URLs since they are only technical tools representing the 'location' where the content is available. Therefore, they do not coincide with the individual harmful content on the digital platform.</p> <p>Article 16, para. 1 Legislative Decree No 70/2003</p>	
(Italy) Corte di Cassazione (Italian Supreme Court), case	Platform of a hosting provider	Providing access to the videos and programmes	The Court identifies the conditions it considers an omission as also contributing to 'active conduct', for the purpose of determining the liability of the hosting provider:	Articles 14-15-16-17, considering Articles 46 and 48 of the Directive 2000/31/EC; Articles 16 and 17 of the Legislative Decree No 70/2003;

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No. 7708/19 of 19/03/2019		of a copyright owner to third parties	<ul style="list-style-type: none"> <li>- it could have verified the unlawfulness of the other party's conduct itself, as this kind of verification could be reasonably expected from a professional operator;</li> <li>- it had the chance to usefully and immediately act as it was aware of the illegality.</li> </ul>	<p>Articles 2043, 2055, 2082 of the Italian Civil Code</p> <p>Under the conditions above, the hosting provider can be found liable of serious negligence.</p>
(Italy)  Corte di Cassazione (Italian Supreme Court) case No. 7709/19 of 19/03/2019	Online search engine	Making works protected by copyright available	<p>Exemption from liability</p> <p>Yahoo! Italia Search is limited to mere technical search engine functions (catching). These intermediaries are not requested to spontaneously remove infringing content after an extrajudicial notice or the start of proceedings.</p> <p>Criteria for exemption:</p> <ul style="list-style-type: none"> <li>- no modification of the information;</li> <li>- compliance with the information access conditions in the websites for which they are providing catching;</li> <li>- compliance with the updating rules;</li> <li>- no intervention in the information for the purposes</li> </ul>	<p>Exemption from liability (merely technical catching activity)</p> <p>Article 15 of Law Decree 70/2003 (Article 13 of Directive 2000/31/CE) and Article 17(2) of Law Decree 70/2003</p>

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			of obtaining usage data; - prompt removal as soon as alerted or if ordered by the authorities.	
(Lithuania)  Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) case No. 3K-3-85-378/2016 of 10/03/2016	Payment service provider for users of a website	Third parties (website from whose users the defendant collects payments, users of that website who use the payment service) Making films available online, downloading	Definition of 'intermediary': The payment service is <i>not</i> an 'intermediary' under the following conditions: it does <i>not</i> : <ul style="list-style-type: none"> <li>- provide data related to the copyright infringement;</li> <li>- provide services through specified electronic communications networks, i.e. does not transmit the infringing contents;</li> <li>- provide a possibility to use the electronic communications networks;</li> <li>- store the infringing contents;</li> <li>- except the cases provided for in the law.</li> </ul>	No 'intermediary' in the sense of EU and LT copyright law under certain conditions  Article 78, Article 81 (1)(3) of the Law on Copyright and Related Rights  Article 6.255 of the Civil Code of the Republic of Lithuania  D 2001/29/EC
(Netherlands)  Rechtbank Midden-	Internet access provider	Third parties (file-sharing platform):	Communication to the public: Reference to CJEU case-law (' <i>BREIN v Ziggo/XS4ALL</i> ') where the CJEU recognised that The Pirate Bay's modus operandi can be regarded as a	Website-blocking injunction (access providers)  Dynamic injunctions

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<p>Nederland (District Court of Midden-Nederland), case No. C/16/448423 / KG ZA 17-382 of 12/01/2018</p>		<p>Providing access to websites where works are made available unlawfully</p>	<p>communication to the public.</p> <p>Blocking order:                      The court issued a blocking order against internet access providers in preliminary relief proceedings until a decision has been given in the proceedings on the merits of the case which are currently pending before the District Court. The court ordered blocking not only the domain names and IP addresses through which TPB operates but also other/additional ones through which TPB could be accessible. Therefore ‘dynamic’ blocking injunctions were ordered (note that the court does not use the term).</p> <p>Proportionality and effectiveness:                      The risk of denying access to lawful material is small enough to be negligible. Statistics show that ‘dynamic’ blocking injunctions work effectively and are easy to implement. The principles of proportionality and effectiveness were respected.</p>	<p>against search engines</p> <p>Internet access provider to bear procedural costs</p> <p>Penalty payment in case of non-compliance</p> <p>Article 26d of the Dutch Copyright Act</p> <p>Article 15 of the Dutch Neighbouring Rights Act</p> <p>Article 8(3) of D 2001/29/EC</p> <p>Article 11 of D 2004/48/EC</p>

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			Article 26d of the Dutch Copyright Act Article 15 of the Dutch Neighbouring Rights Act	
(Netherlands)  Rechtbank Den Haag (District Court of The Hague), case No C/09/485400 / HA ZA 15-367 of 24/01/2018	Internet service provider (various services including rental of servers)	Third parties (streaming websites): distribute illegal streams of football matches	Intermediary: ISP renting out servers is an intermediary against whom an injunction may be requested. Article 8(3) of D 2001/29/EC does not require that the person infringing a copyright and the intermediary have a contractual relationship. The fact that the uploader is not a contractor of the ISP does not preclude an injunction. Effectiveness of the measure: Measures are effective if they prevent or at least complicate unauthorised access to protected works and seriously discourage internet users from using the services. Balancing of interests: The order does not seem to affect the <b>freedom of</b>	Order to discontinue and stop any service used by third parties to infringe the copyright is proportionate, necessary and meets the objective of granting a high degree of protection to copyright holders such as the claimant in this case. Article 26, sub d Dutch Copyright Act Article 2.22, para 6 Benelux Convention on Intellectual Property (BCIP) Article 8(3) D 2001/29/EC

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			<p><b>entrepreneurship</b> of an <b>internet service provider</b> in this case:</p> <ul style="list-style-type: none"> <li>- the claimant has provided sufficient insight that 'null routing' of the relevant server is relatively simple and involves few costs;</li> <li>- in accordance with the requested order, the defendant only needs to proceed with 'null routing' after prior notification by the claimant and only for a limited period.</li> </ul>	
(Netherlands)  Rechtbank Limburg (District Court of Limburg) case No. C/03/233371 / HA ZA 17-158 of 09/05/2018	Provider of an IPTV service that gives access to TV channels made available unlawfully (and lawfully) via a hyperlink	Offering and providing access to IPTV via subscriptions  Hyperlinking to unlawful sources	<p>Provision of the shortened hyperlink giving access to over 4 000 live TV channels is a '<b>communication to the public</b>', and should be qualified as a <b>disclosure</b> within the meaning of s12 Copyright Act.</p> <p>Knowledge requirement:                      The IPTV service provider is intervening in <b>full knowledge of the consequences</b>.</p> <p>By providing access to IPTV subscriptions, and also by offering hyperlinks to <b>sources where films and broadcasts are evidently offered without the consent of the rights holders</b>, the IPTV service</p>	<p>Copyright infringement – communication to the public</p> <p>Blocking Injunction</p> <p>Penalty payment in case of non-compliance with the blocking order                      (EUR 5 000 per IPTV subscription hyperlink)</p>

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				provider makes a 'communication to the public'.	<p>offered <u>or</u> per day if blocking <u>order</u> not complied with – up to max. EUR 1 000 000)</p> <p>Section 3:305a,                      Section 1019h of the Dutch Code of Civil Procedure                      Sections 1 and 12 of the Auteurswet, Aw (Dutch Copyright Act)</p> <p>Sections 2, 6, 7a and 8 of the Wet op de naburige rechten, WNR (Dutch Neighbouring Rights Act) in conjunction with</p> <p>Article 3 of D 2001/29/EC</p>
	(Netherlands)  Rechtbank Amsterdam (Court of	Social media platform	Third parties (advertisers):  Advertise counterfeit	Facebook cannot rely on the 'exemption provision' of Article 14(1) of the E-Commerce Directive because Facebook is partly determining their content and playing an active role.	Provide all information about advertisers (infringers).  Prevention of specified

	Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
	Amsterdam) case No. C-13-656859 of 21/12/2018		goods on a social media platform  Platform: failure to prevent infringing ads despite review policy	Article 14(1) of the Directive on electronic commerce	unlawful actions towards the claimant.  Actively 'terminate' all agreements with the infringers.  Deny access to those infringers in the future.  Respond to similar requests from the claimant within 14 days of the request.  Pay the lawyer's fees.  Penalty fee in case of non-compliance.
	(Poland) Sąd Apelacyjny w Krakowie (Court of Appeal of Krakow) – case No. I ACa	Online content-sharing platform	Operating a content-sharing platform with unauthorised content	The online sharing platform cannot rely on the 'exemption provision' of Article 14(1) of the Directive on electronic commerce as it is not 'passive' because: <ul style="list-style-type: none"> <li>- it is a party to the transaction of infringing files as their (temporary) owner;</li> <li>- it derives direct benefits from unlawful sharing of</li> </ul>	Injunctions:  Take-down of the illicit content.  Notice and Search-Down:

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
1494/15 of 18/09/2017			<p>the protected works.</p> <p>Articles 14 and 15 D 2001/31/EC (E-Commerce Directive) ; Articles 14 and 15 of Polish Act on Rendering Electronic Services (Dz.U. 2002 nr 144 poz. 1204; (implementing the E-Commerce Directive);</p>	<p>monitoring of the platform's content by regular searches with search engines (monthly during 3 years); blocking access to infringing files.</p> <p>Compensation to the right holders for damages.</p> <p>Article 79 of the Polish Law on Copyright and Related Rights (Dz.U. 1994 nr 24 poz. 83);</p> <p>Article 439 of the Polish Civil Code (a general preventive injunctive relief provision).</p>
(Spain)	Search engines	Third party (Platform/web site offering	Scope of obligations (remove and impede access to infringing content):	Blocking injunction

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
Central Administrative Court (Juzgado Central de lo Contencioso-administrativo) No 3, case No. 1/2015 of 20/04/2016	Internet access providers	musical works protected by copyright)  Making works available online	It is not simply about <b>removing URLs</b> , but about <b>preventing access</b> from the site to the <b>relevant works</b> or protected matters. The judgment rules that Goear has <b>not provided any evidence</b> in this respect.  Blocking injunctions:  <b>Internet search engines</b> (Google, Yahoo, Bing) had to <b>block searches</b> that contain the locations that lead to the protected works.  <b>Internet access providers</b> had to suspend the Internet access service in relation to that domain and block access to it from the Spanish territory.	Art. 20 Constitución Española de 27 Dic. 1978  Art. 122 bis.2 L 29/1998 de 13 Jul. (jurisdicción contencioso-administrativa)  Art. 23 RD 1889/2011 de 30 Dic. (funcionamiento de la Comisión de Propiedad Intelectual).
(Spain)  Audiencia Provincial de Barcelona (Barcelona)	Internet access providers	Third party (website administrator):  Linking to websites	Evidence of infringement by third parties:  No requirement to bring legal action against the owner of the infringing website or to obtain a previous judicial declaration of infringement of copyright if it is	Website-blocking injunction  Artículo 11 Ley 34/2002, de 11 de julio, de Servicios de la Sociedad de la Información y de Comercio

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
Provincial Court), Section 15, case No. 68/2017 of 20/02/2018		where works are made available unlawfully	sufficiently proven in the proceedings.  It is not necessary to direct the action against all possible telecommunication companies in Spain.  Proportionality:  Blocking injunctions are proportional, since the defendants could adopt the most effective measures in the available technical means.  Art. 139.1 h) RDLeg. 1/1996 de 12 Abr. (TR de la Ley de propiedad intelectual)	Electrónico (ISSI)  Article 8(3) of D 2001/29/EC
(Sweden)  Attunda Tingsrätt (Attunda District Court) case No. FT 11052-15 of 13/10/2016	Commercial operator of a newsportal	Hyperlinking  Reposting screenshots of video clips available on YouTube on another	'New public' requirement:  Hyperlinking to videos is a communication of the work to a 'new public'.  Profit-making intention, presumption of knowledge:	Infringement of economic and moral rights (communication to the public, right of attribution)  Compensation for

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM). Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
		website	Profit-making intention implies knowledge that the hyperlink provides access to a work published without the rights holder's consent ('GS Media' principle).  <i>Sections 1, 46, 49 and 54 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act)</i>	damages  Section 1, 46, 49 and 54 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act)
(Sweden)  Svea Hovrätt Dom Patent- och marknadsöverdomstolen (Svea Court of Appeal), case No. PMT 11706-15 of 13/02/2017	Internet access provider	Third parties:  Linking to websites where works are made available unlawfully	'Intermediary':  The defendant provides an internet connection and is an intermediary according to D 2001/29/EC.  According to CJEU case-law, D 2001/29/EC implies that it must be possible to file an injunction against an ISP whose services are used to commit copyright infringement, even if the ISP only provides its customers with internet access.	Blocking injunction  ISP to bear litigation costs  Penalty payment in case of non-compliance with the order  Section b 53 Lag

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM). Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
			Section b 53 Swedish Act on Copyright in Literary and Artistic Works (1960:729)  Law (2002:562) on Electronic Commerce and Other Information Society Services	(1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works, 1960:729)  Lag (2002:562) om elektronisk handel och andra informationssamhällets tjänster (Law (2002:562) on Electronic Commerce and Other Information Society Services)  Art 8(3) of D 2001/29/EC  Art 12(3) of D 2001/31/EC
(Sweden)  Stockholm District Court	Internet access provider	Third parties:  Providing access to	Role of internet access providers (contributory liability):  Services that make infringing content available need to act through internet access providers in order to make	Website-blocking injunction  Section b 53 Lag (1960:729) om upphovsrätt

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
<p>(Stockholms Tingsrätt Patent- och marknadsdomstolen) case No. PMT 7262-18 of 15/10/2018</p>		<p>websites where works are made available unlawfully</p>	<p>that content available.</p> <p>According to Article 53(b) of law (1960:729), interpreted in the light of EU law, an intermediary who grants access to websites where third parties make infringing content available, should be considered as <b>contributory liable ('Medverkan till intrång')</b>.</p> <p>Contributory liability does <b>not require active cooperation</b> between the intermediary and the third party.</p> <p>Proportionality:                      Reference to 'GS Media', 'Svensson and Others' and 'UPC Telekabel Wien'. A blocking injunction is a proportionate measure.</p> <p>Section b 53 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on</p>	<p>till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works (1960:729))</p> <p>Article 8 (3) D 2001/29/EC</p>

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
			Copyright in Literary and Artistic Works (1960:729) Article 3(1) of D 2001/29/EC	
(Sweden) Svea Hovrätt Dom Patent- och marknadsöverdomstolen (Svea Court of Appeal), case No. PMÖ 9945-18 of 01/02/2019	Internet access provider	Third parties  Providing access to websites where works are made available unlawfully	Scope of blocking injunctions/proportionality: Blocking injunctions must be strictly targeted. Their purpose is to bring an end to a third party's infringement. They cannot violate the freedom to conduct business or the freedom to access information ( <i>C-314/12 UPC Telekabel</i> ).  One third of blocked domain names did not direct to any site at all or other sites than those initially claimed. The injunction is not proportionate.  Liability: The internet access provider could have <b>contributory liability</b> according to Section b 53 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works, 1960:729) when it provides internet access to websites where users can access illegal content.	The first instance injunction was not considered proportionate and therefore annulled  Procedural costs  Section b 53 Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Act on Copyright in Literary and Artistic Works, 1960:729)  Art 8(3) of D 2001/29/EC

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
<p>(United Kingdom)</p> <p>England and Wales Court of Appeal, Civil Division case No. A3/2014/3939 (Claim No: HC14 C01382) and A3/2014/4238 (Claim No: HC 14 C001056) ([2016] EWCA Civ 658) of 06/07/2016</p> <p><i>Lower instance decision of [2017] EWHC 480</i></p>	<p>Internet service providers/internet access providers</p>	<p>Third parties (sellers and advertisers of counterfeit goods):</p> <p>Selling counterfeit luxury goods on various websites</p>	<p>‘Intermediary’ (Article 11 of D 2004/48/EC): users/operators of the websites were infringing the claimant’s trade marks; users/operators of the infringing websites used the services of the ISPs</p> <p>Knowledge requirement: The ISPs had actual knowledge of the infringement</p> <p>Proportionality: Relief has to be necessary, effective, dissuasive, not unnecessarily complicated or costly, avoid barriers to legitimate trade, be fair, equitable and proportionate.</p> <p>Implementation costs: National courts may order that the ISP bear the costs of implementation: The ISPs made profits from the infringing services and the costs of implementing the order could be regarded as a cost of carrying on the business.</p>	<p>Blocking of/impeding access to specific websites (obligation)</p> <p>ISP to bear all costs</p> <p>c 54 and s 37(1) of the Senior Courts Act 1981</p> <p>Articles 3 and 11 of D 2004/48/EC</p>

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
			c 54 and s 37(1) of the Senior Courts Act 1981	
(United Kingdom)  England and Wales High Court (Chancery Division) case No. HC-2017-000458 ([2017] EWHC 480 (Ch)) of 13/03/2017	Internet service providers/internet access providers	Third-party users of a streaming service, and, accessorially, operators of the service  Making works (relating to live footage of football matches) available online for streaming without the consent of the copyright	‘Intermediary’: The ISPs were enabling the infringement.  Knowledge requirement: ISPs had <b>actual knowledge</b> of the infringing use. Reasonable belief that streaming servers were used with the sole purpose of infringing.  Proportionality: Blocking order was proportionate; it was the <b>only effective measure</b> for protecting copyright.	Blocking order to impede access to streaming servers during specific football seasons (‘live blocking order’)  ISP to bear costs of implementing the order  Section 97A Copyright, Designs and Patents Act 1988 (‘CDPA’)  Article 8(3) of D 2001/29/EC  Article 11 of D 2004/48/EC

Case	Type of defendant	Type of act allegedly affecting exclusive right (©/TM).  Third party act?	Reasoning/criteria applied  Legal provisions	Outcome (exemptions, obligations, remedies, implementation costs)  Legal provisions
		owner		
(United Kingdom)  United Kingdom Supreme Court case No. [2018] UKSC 28 of 13/16/2018	Internet service providers/inter-net access providers	Third parties (sellers and advertisers of counterfeit goods):  Selling counterfeit luxury goods on various websites	Directives do not deal at all with the costs of complying with an injunction against an intermediary.  The incidence of compliance costs is <b>a matter for national law</b> , within the broad limits set by the EU principles. In <b>English law</b> , the incidence of costs generally depends on <b>the legal distribution of risk</b> as found by the court. An <b>innocent intermediary</b> is ordinarily <b>entitled to be indemnified</b> by the rights holder against the costs of complying with a website-blocking order.  Implementation costs:  The court held that there is no legal basis for requiring a party to shoulder the burden of remedying an injustice if they have no legal responsibility for the infringement and are acting under the compulsion of an order of the court.	Rights holders to bear the costs of implementing the website-blocking order  ISP to bear litigation costs  Articles 3, 8, 10(2), 11 and 15 D 2004/48/EC  Article 8 D 2001/29/EC  Articles 12-15, D 2000/31/EC

## ANNEX III: GLOSSARY

The definitions below give some references for the terminology used in this case-law collection.

TERM USED	MEANING/REFERENCE
<b>Injunction</b>	An order aimed at prohibiting the continuation of infringement <sup>(71)</sup>
<b>Website blocking injunction</b>	'A blocking injunction is an order requiring an internet intermediary to implement technical measures directed at preventing or disabling access to a specific internet location.' <sup>(72)</sup>
<b>Dynamic injunction</b>	Injunctions which can be issued, for example, in cases in which materially the same website becomes available immediately after issuing the injunction with a different IP address or URL, and which are drafted in a way that makes it possible to also cover the new IP address or URL, without the need for a new judicial procedure to obtain a new injunction <sup>(73)</sup>
<b>Information society service</b>	Any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services <sup>(74)</sup>
<b>Internet/online intermediary</b>	Brings together or facilitates transactions between third parties on the internet  Gives access to, hosts, transmits and indexes content, products and services originated by third parties on the internet, or provides internet-based services to third parties <sup>(75)</sup>

<sup>(71)</sup> Article 11(1) Enforcement Directive.

<sup>(72)</sup> Jaani Riordan, *The Liability of Internet Intermediaries*, Oxford University Press, Oxford, United Kingdom, 2016, p. 461. See also the Study on Legislative Measures Related to Online IPR Infringements, a study commissioned by the EUIPO, EUIPO, September 2018, available at <https://euiipo.europa.eu/ohimportal/en/web/observatory/observatory-publications>, p 42 et seq.: 'If an IPR infringing activity takes place on or through a dedicated website [...] it will be an effective way to disrupt the current activities and to prevent them from taking place in the future if the access to the website by the internet users in general is blocked.'

<sup>(73)</sup> e.g. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of Intellectual Property Rights, [COM\(2017\)708 final](#) (the 'Guidance') p. 21.

<sup>(74)</sup> Article 1(1)(b) of [Directive \(EU\) 2015/1535](#) of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance), OJ L 241, 17.9.2015, p. 1–15.

<sup>(75)</sup> OECD, *The economic and social role of internet intermediaries*, April 2010 p. 9, available at <https://www.oecd.org/internet/ieconomy/44949023.pdf>.

<b>Internet access provider/internet service provider (“ISP”)</b>	Provides subscribers with a data connection allowing access to the internet through physical infrastructure <sup>(76)</sup>
<b>Live blocking order</b>	Blocking order impeding the access to streaming servers during a specific timeframe <sup>(77)</sup>
<b>Online content-sharing provider</b>	Provider of an information society service whose main purpose, or one of its main purposes, is to store and provide public access to a large amount of copyright protected works or other protected subject matter uploaded by its users which it organises and promotes for profit-making purposes <sup>(78)</sup>
<b>Online intermediation service / online platform</b>	<p>Information society service;</p> <p>that allows business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; and</p> <p>that is provided to business users on the basis of contractual relationships between the provider of those services and business users, which offer goods or services to consumers <sup>(79)</sup></p> <p>Examples: online e-commerce marketplaces, including collaborative ones on which business users are active, online software applications services, such as application stores, and online social media services, irrespective of the technology used to provide such services <sup>(80)</sup></p>
<b>Online search engine</b>	A digital service that allows users to input queries in order to perform searches of, in principle, all websites or websites in a particular language on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which

<sup>(76)</sup> OECD, The Economic and social role of internet intermediaries, April 2010, p. 11.

<sup>(77)</sup> See England and Wales High Court (Chancery Division) — HC-2017-000458 ([2017] EWHC 480 (Ch)) — 13 March 2017.

<sup>(78)</sup> Article 2(6) Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC2.

<sup>(79)</sup> Article 2(2) of the proposed Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, see inter-institutional file 2018/0112(COD), Council text 19 February 2019, at the link: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_6090\\_2019\\_INIT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6090_2019_INIT&from=EN).

<sup>(80)</sup> Recital 11 of the proposed Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

	information related to the requested content can be found <sup>(81)</sup>
<b>Payment service provider</b>	Any natural or legal person which provides payment systems through credit or directly or indirectly associated with a bank account for enabling transactions <sup>(82)</sup>
<b>Search engine operator</b>	Any natural or legal person which provides, or which offers to provide, online search engines to consumers <sup>(83)</sup>
<b>Online social media providers</b>	‘Online social media providers are online platforms that host, enable and encourage the exchange of user-generated and other content between individuals through social interaction. [...]’ <sup>(84)</sup>

<sup>(81)</sup> Article 2(5) of the proposed Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

<sup>(82)</sup> OECD, The Economic and social role of internet intermediaries, April 2010, definition of “participative networked platforms”, p. 13, in the at the link <https://www.oecd.org/internet/ieconomy/44949023.pdf>.

<sup>(83)</sup> Article 2(6) of the proposed Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services No. 2018/0112(COD), link: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_6090\\_2019\\_INIT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6090_2019_INIT&from=EN).

<sup>(84)</sup> European Commission, Behavioural Study on Advertising and Marketing Practices in Online Social Media, 2018, p. 12, available at [https://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practices-social-media-0\\_en](https://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practices-social-media-0_en)

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**IPR ENFORCEMENT CASE-LAW COLLECTION**

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