

3. Copyright strengthened by the Court of Justice interpretation of Article 17(2) of the EU Charter of Fundamental Rights

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1 INTRODUCTION

With the adoption of Article 17, paragraph 2 of the European Union (EU) Charter of Fundamental Rights (Charter), intellectual property (IP) was for the first time expressly recognized in a legally binding international instrument on fundamental rights.¹ The Explanations relating to the Charter (hereinafter: ‘Explanations’), which represent a first-hand ‘interpretation tool’, highlight both the continuity between the protection specifically recognized for intellectual property and the traditional protection of material property as well as the congruence between the approach of the Charter and of the European Convention on Human Rights (ECHR) concerning the right to property.

The Explanations present intellectual property as ‘one aspect of the right to property’. This connection to property is understandable and justifiable, but it also obscures the links between certain aspects of those IP rights, for example the moral and personal prerogatives of creators, and the fundamental rights to the protection of the person and to private life (enshrined in Articles 3 and 7 of the Charter). Similarly the reference to property cuts the close relationships those rights have with freedom of expression, which includes the freedom of creation (Article 11 of the Charter), or with the freedom of the arts and sciences (Article 13 of the Charter). Other aspects of intellectual property rights – especially of trademark law which appears as an important guarantee for fair competition and a vector of information for consumers – can be linked

¹ However *certain* intellectual rights have already been recognized in the Universal Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights (see *infra*, section 3).

either to freedom of enterprise (Article 16 of the Charter) or to consumer protection (Article 38 of the Charter).

These freedoms which, alongside the ‘property matrix’, can serve as a foundation for intellectual property rights impose in other circumstances limits on the exercise or expansion of these IP rights. We shall discuss below some examples of the balances carried out by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights, in particular regarding freedom of expression and protection of privacy (see sections 3 and 4). Other fundamental rights are clearly in tension with the protection of intellectual property. Thus, the right to access health care (contained in Article 35 of the Charter) will in certain cases be opposed to the protection (and extension) of patents in the pharmaceutical field. On one hand, the protection of property (Article 17) – alongside professional freedom (Article 15 of the Charter) and the freedom to conduct a business (Article 16 of the Charter) – constitute the foundation ‘of the same fundamental economic right’.² Indeed companies often rely on those three rights concomitantly. On the other hand, conflicts between these economic freedoms may also arise. Indeed, the right to intellectual property claimed by one undertaking in order to control the access to a market may affect the professional or business freedom of another operator.³

The rights and freedoms enshrined in the Charter reflect the human rights of the ECHR. In particular, Article 17 of the Charter overlaps with Article 1 of Protocol No. 1 to the ECHR.⁴ These rights must therefore be interpreted in the same sense, as required by Article 52(3) of the Charter. The case law of the European Court of Human Rights (ECtHR) in the field of intellectual property rights (see below section 4) is therefore useful in assessing the extent of the protection of intellectual property by the Charter. Judges in Strasbourg, like those in Luxembourg, were led to rule on the balance to be struck between intellectual property and other freedoms, starting with the freedom of expression. In practice, the Court of Justice is bolder than the ECtHR as regards the balance to be achieved between intellectual property rights and other fundamental freedoms (see section 5): it leaves less room for the national judges

² Eric Carpano, ‘La Charte, une constitution de la liberté économique des entreprises?’ (2018) 2 *Revue des affaires européennes* 229 which relies on the CJEU Case C-390/12 *Pfleger et al.* [2014] ECLI:EU:C:2014:281, paras 57–60.

³ See *infra*, section 5.2. The Court of Justice had already clearly highlighted these conflicts by opposing, prior to the adoption of the Charter, the general principle of the free exercise of an economic or professional activity, attached to the protection of intellectual property rights (CJEU, Case C-200/96 *Metronome Musik* [1998] ECLI:EU:C:1998:172, para 26).

⁴ The freedom of the arts and sciences as well as the freedom of enterprise, both of which play a role in founding intellectual rights, are not expressly mentioned in the ECHR, but rather in the Charter (Arts 13 and 16).

to define adequate balancing.⁵ Before analysing these precedents, the scope of Article 17, paragraph 2 must be highlighted (see section 2) and the link of this provision with other international instruments on human rights must be clarified (see section 3).

2 SCOPE: DELIMITATION OF INTELLECTUAL PROPERTY

According to the Explanations, the ‘growing importance’ of intellectual property justifies its independent and explicit recognition in paragraph 2 of Article 17 of the Charter. The Explanations seem to refer here to the growing economic role of intellectual property, which has the effect of classifying this fundamental right among other economic rights. Moreover, these Explanations state that ‘[t]he guarantees provided for in paragraph 1 apply as appropriate to intellectual property’.

Like other fundamental rights of the Charter, the protection of IP rights is geared towards the institutions, bodies, offices and agencies of the EU as well as to the Member States ‘when they implement the law of the Union’. The reference to, and reliance on, the fundamental right of IP greatly influences national court decisions pertaining to the exercise of IP rights, because many instruments of European law are interpreted and applied by national administrative or judicial authorities. The number of instruments of secondary European intellectual property law has in fact increased significantly over the recent decades.⁶ The limitation imposed by Article 51 of the Charter, limiting its application to EU bodies and to Member States only when they are implementing EU law, is therefore marginal in the IP field.⁷ In addition, the case law of the Court of Justice concerning intellectual property rights is very extensive,⁸ further amplifying the relevance of European law in intellectual property disputes.

⁵ Alain Strowel, ‘Pondération entre liberté d’expression et droit d’auteur sur Internet: de la réserve des juges de Strasbourg à une concordance pratique par les juges de Luxembourg’ (2014) *Revue trimestrielle des droits de l’homme* 889.

⁶ See Sir Richard Arnold, ‘An overview of European harmonization measures in intellectual property law’ in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013) 25–35.

⁷ Paul Torremans, ‘Article 17(2)’, in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 491.

⁸ According to the activity reports of the Registry of the Court of Justice, intellectual property belongs to the areas of European law which generate most decisions (often intellectual property comes first out of the 34 branches of law distinguished by

Intellectual property rights harmonized, unified or created by directives and regulations include, at the very least, patent right, supplementary protection certificates (SPC), trademark rights, copyrights, the neighbouring rights of performers, producers and broadcasting organizations, the rights of makers of databases, designs and models, designations of origin, plant varieties, rights in semiconductor topographies and trade names.⁹ However, there is no commonly accepted definition of the term ‘intellectual property’. Certain international instruments such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, concluded on 15 April 1994 under the framework establishing the World Trade Organization (WTO), or the Paris Convention for the Protection of Industrial Property of 20 March 1883 include not only protection of business secrets¹⁰ but also protection against unfair competition. It is not certain that these two last protections are covered by Article 17, paragraph 2 of the Charter. On the other hand, intangible assets not recognized by the European legislator but protected by contractual arrangements can

the report of the Registry, as having most decisions). On the evolution of the number of cases on intellectual property brought before the General Court (ex Court of First Instance) and the Court of Justice between 1999 and 2015, see Vincent Cassiers and Alain Strowel, ‘Intellectual property law made by the Court of Justice of the European Union’ in Christophe Geiger, Craig A. Nard and Xavier Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar Publishing 2018) 175. The numbers are as follows (for the later years, the number in parentheses indicates whether intellectual property appears first, second or third in terms of the number of decisions):

	99	00	01	02	03	04	05	06	07	08	09
CFI-GC	18	34	37	83	100	110	98	143	168	198	207
ECJ	2	6	15	8	9	8	24	23	28	36	39
	09	10	11	12	13	14		16	17	18	
CFI-GC	207	207	219	238		295	303	288 (1)	376 (1)	349 (1)	
ECJ	39	49	58	59	62	47	88	80 (1)	60 (3)	74 (2)	

See also the analysis by Alain Strowel and Hee-Eun Kim, ‘The balancing impact of general EU law on European intellectual property jurisprudence’ in Ohly and Pila (n 6), 121 ff.

⁹ This non-exhaustive list corresponds to that of the Commission Declaration concerning Article 2 of Directive 2004/48/EC on the enforcement of intellectual property rights ([2005] OJ L94/37).

¹⁰ Now harmonized within the European framework by Directive 2016/943/EU of 8 June 2016 on the protection of undisclosed know-how and commercial information (business secrets) against their unlawful acquisition, use and disclosure.

claim the protection of Article 17, paragraph 2 of the Charter because of their property-like nature (see below, section 3).

The existence of an arsenal of sometimes very precise secondary law provisions does not prevent the courts from referring to intellectual property protection, from applying the type of reasoning based on the principle of proportionality and from reaching balances between competing rights, in an approach that is characteristic of constitutional law and of the law of fundamental freedoms.¹¹ For example, the delimitation by the EU legislator of the exceptions to copyright in matters of quotation or parody¹² does not preclude carrying out additional balancing based on the fundamental protections of IP, on the one side, and freedom of expression, on the other side.¹³ Accordingly, the question of the responsibility or liability of intermediaries in promoting the circulation of information and works on the internet has been partly resolved through a balance between the protection of intellectual property and that of other freedoms. On this issue in particular, the Court of Justice has shown its inclination to seek a ‘fair balance’ between fundamental freedoms despite the extensive framing of the issues by secondary EU provisions pertaining to private law¹⁴ (see below section 5). In the field of trademarks too, the determination of infringement beyond the cases of confusion for the average consumer requires determining whether the use takes ‘undue advantage’ of the distinctive character or the reputation of the brand and is carried out ‘without just cause’.¹⁵ Undue or unfair use and absence of just cause can be assessed in light of the distinctions made to conceptualize the limitations to freedom of expression. Thus, parodic uses of brands by non-governmental organizations (NGOs) and activists in the context of political and social criticism should be more easily accepted than between competitors, given the different weighting given by European case law to discourse on questions of general interest and

¹¹ See the analysis followed here by Ansgar Ohly, ‘European fundamental rights and intellectual property’ in Ohly and Pila (n 6) 156–9. This is no doubt partly explained by the careers and specialization in public law of many judges at the CJEU.

¹² Art. 5(3)(d) and (k) of Directive 2001/29 on copyright and related rights in the information society.

¹³ Regarding parody, see CJEU, Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (the judgment invokes the prohibition of discrimination based on race and ethnic origin enshrined in Art. 21(1) of the Charter to limit the the freedom of parody, which is itself enshrined in the copyright exception of Art. 5(3)(k) of Directive 2001/29 on copyright and related rights in the information society).

¹⁴ Arts 12 to 15 of Directive 2000/31/EC of 8 June 2000 on electronic commerce.

¹⁵ Art. 9(1)(c) of Regulation (EU) 2017/1001 of 14 June 2017 on the EU trademark and Art. 10(2)(c) of Directive (EU) 2015/2436 of 16 December 2015, approximating the laws of the Member States relating to trademarks.

to commercial speech. On the other hand, in many other fields of intellectual property, especially patent law, the balancing between fundamental rights plays a much more limited role because the legislative provisions tend to use formulations which appear less broad and flexible.¹⁶

3 RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS AND FUNDAMENTAL RIGHTS

In recent decades, intellectual property rights have gradually become associated with, and even considered as, fundamental rights.¹⁷ This is particularly true with copyright, a term which will be used here to refer to the institutions designed to protect authors and works, whether in the common law or in the continental civil law tradition (in Continental European systems, the equivalent legal institution is given the name of ‘author’s right’ in various languages: ‘droit d’auteur’, ‘diritto d’autore’, ‘Urheberrecht’, etc.). This consecration has partly resulted from the inclusion of copyright in the Universal Declaration of Human Rights. Its Article 27, paragraph 2 states: ‘Everyone has the right to the protection of moral and material interests resulting from any scientific production, literary or artistic, of which he is the author’. René Cassin, one of the architects of the human rights system at the end of the Second World War, claimed that the capacity for creation is a fundamental trait of all humans and therefore deserves to be recognized and protected.¹⁸ However, such protection appears to operate in tension with the right to culture (or the right to scientific progress) recognized in the first paragraph of Article 27 of the Declaration: ‘Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and participate in scientific progress and the

¹⁶ In patent law, the exclusion of certain inventions from the field of patentability for contrariety to ‘ordre public or morality’ (Art. 53 of the the European Patent Convention) nevertheless offers the possibility of contesting certain patents in the light of fundamental rights. In a Grand Chamber judgment on the patentability of stem cells from human embryos (CJEU, Case C-34/10 *Oliver Brüstle v Greenpeace* [2011] ECLI: EU:C:2011:669, para 34), the Court of Justice invoked the fundamental right to dignity to propose a broad interpretation of the restrictions contained in Directive 98/44/EC on the protection of biotechnological inventions, but did not take into account other competing rights such as the right to scientific development or to health (Arts 13 and 35 Charter).

¹⁷ Claude Colombet, *Grands principes du droit d’auteur et des droits voisins dans le monde* (Litec, UNESCO 1990).

¹⁸ René Cassin, ‘L’intégration, parmi les droits fondamentaux de l’homme, des droits des créateurs des œuvres de l’esprit’ in *Mélanges Marcel Plaisant: Studies on Industrial, Literary and Artistic Property* (Sirey 1959) 229.

resulting benefits'. The same tension appears between access to culture and the protection of works in Article 15 of the International Covenant on Economic, Social and Cultural Rights, which has a binding value for the states which have ratified it.¹⁹

In the European Union, copyright, as an intellectual property right falling under Article 17(2) of the Charter, is viewed through the prism of property. Indeed, the first paragraph of Article 17 protects 'the right to own, use, dispose of ... his or her lawfully acquired possessions' and defines the conditions for the taking of property. The property-focused approach of the Charter diverges from the view adopted in international instruments. Article 17(2) of the Charter does not mention the protection of the author's 'moral interests' (mentioned in the Universal Declaration; see *supra*),²⁰ which are reflected in the moral rights, such as the rights of attribution and of integrity of the work. Under the property perspective legal persons are more easily qualified to invoke the copyright/property protection, the sole requirement being that the author's right has been assigned to them. In practice, as with other fundamental rights with an economic significance, legal persons more often than individuals claim the fundamental protection of intellectual property before the courts, in particular before the Court of Justice and the General Court of the European Union.²¹ Because of this, the consideration of this right as property wipes out the link between copyright protection and the natural person of the author,²² which is regarded as the only possible source of creativity. Stressing the property dimension might as well put corporate interests at the centre of other IP rights, such as patents, reducing at the same time the role of the human inventor within patent law.

¹⁹ Article 15:

The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

²⁰ It is true that Art. 17(2) of the Charter covers all intellectual rights, including those which, unlike copyright, have almost exclusively an economic and commercial dimension (trademark, patent, etc.).

²¹ A study has thus pointed out that out of 650 cases (over the years 2013–2018) of the Court of Justice and the General Court, involving a question of application or interpretation of the Charter, almost two-thirds concerned legal persons claiming a breach of their fundamental rights (Carpano (n 2) 227).

²² *Contra* the recognition of this right in the Declaration and the Covenant (see *supra*).

By promoting intellectual property as fundamental right, the Charter also obliterates the relationship that copyright entertains with the cultural sector and the right to culture. When interpreting Article 17, paragraph 2, the Court of Justice does not absolutize copyright or other intellectual property rights (see *infra*). Recognition of the property feature of the intangible rights has not resulted in their full ‘propertization’ (in the sense of *in dubio pro proprietate*).²³ But the central role played by the reference to the fundamental right to property in the case law of the CJEU has led to a strengthening of copyright and of the tools for enforcing intellectual property rights.²⁴ In addition, the European framework, whether the Charter or the ECHR, facilitates the obliteration of the link between copyright and culture that is identified in the Universal Declaration of Human Rights.²⁵ Copyright is undoubtedly a property right that governs the market for works but it cannot be reduced to just a property right. Likewise, cultural goods are goods but of a different kind than other goods.

Intellectual property rights belong to the fundamental rights of the first generation: they do not translate into a claim against the state; they are not ‘rights to’ (a benefit),²⁶ but ‘rights over’ (a resource), because they essentially control the use and the circulation of intangible assets. Thus, the exclusive rights included, for instance, within the copyright bundle require no state intervention in the form of a transfer of public money, unlike cultural rights, which are based on public subsidies.²⁷ Nevertheless, the collectivization of copyright through the replacement of exclusive rights by multiple rights remunerating or compensating the natural persons contributing to the creation (the authors and the performers) testifies to the importance of cultural and social concerns. In Germany, the evolution from an exclusive right to a right to simple remuneration associated with levies, for instance for private copying, was imposed by the Constitutional Court, which limited the right to property in order to find

²³ See the enlightening analysis of Ohly (n 11) 162.

²⁴ See *infra* sections 5.1 and 5.2.

²⁵ With the risk that copyright becomes nothing more than ‘a property right in its superb self-sufficiency’: the expression is by Gérard Farjat, *Pour un droit économique* (PUF 2004) 68 and quoted by Fabrice Siirainen, ‘Le droit à la culture et l’accès aux œuvres de l’esprit. Réflexions sur la “fonction” du droit d’auteur dans le cadre de sa “fondamentalisation”’, in Laurence Boy, Jean-Baptiste Racine and Fabrice Siirainen (eds), *Droit économique et droits de l’homme* (Larcier 2009) 448.

²⁶ See the developments on this category of right in Marc Pichard, *Le droit à: Etude de législation française* (Economica 2006).

²⁷ Alain Strowel, ‘Quelles considérations culturelles dans la régulation du droit d’auteur à l’ère de la société de l’information?’ in Céline Romainville (ed.), *European Law and Cultural Policies: Droit communautaire et politiques politiques* (Peter Lang 2015) 135–66.

an adequate balance with the protection of privacy, when copying is done at home.²⁸

4 THE ECHR AND THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

4.1 Intellectual Property Protected as Property

Within the framework of the ECHR, intellectual property rights are also viewed as property and are protected under Article 1 of Protocol No 1:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The ECtHR has confirmed the property nature of intellectual property rights, most clearly in the Grand Chamber judgment *Anheuser-Busch v Portugal*: ‘The concept of “possessions” referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision’.²⁹ Intangible assets are therefore protected as property because they have some (monetary) value. This has been confirmed for copyright³⁰

²⁸ In a 1971 judgment (BVerfGE 31, 229), the German Constitutional Court held that the first version of the copyright law of 1965, which provided a broad exception to copyright by allowing the inclusion of protected works in collections used by churches and schools, did not respect the constitutional guarantee of property. While recognizing the legitimacy of the exception (facilitating access to works in the context of religious or educational activities), the Court held that a measure less harmful to property was possible: the copyright limitation imposed by law must be complemented by an obligation to remunerate the rights holders (compulsory licence or copyright levy system).

²⁹ *Anheuser-Busch v Portugal* App No. 73049/01 (ECtHR (GC), 11 January 2007), para 63. The judgment relied in particular on the case law of the European Commission of Human Rights in a patent case involving a compulsory licence which is a form of expropriation (*Smith Kline and French Laboratories Ltd v Netherlands* App No. 12633/87 (Commission Decision, 4 October 1990) 66 DR 70).

³⁰ *Melnitchouk v Ukraine* App No. 28743/03 (ECtHR, July 2005), para 409; see *Breierova v Czech Republic* App No. 57321/00 (ECtHR, 8 October 2002).

and trademarks.³¹ In addition to the intellectual property rights mentioned in specific laws, other intangible assets created by contract are likely to be protected under the property umbrella. In the contemporary economy of market exchanges, many unknown intangible assets are created by the will of the parties³² and are often deemed protected property under Article 1 of Protocol No. 1 ECHR or under Article 17, paragraph 2 of the Charter.

An application for an intellectual property right (e.g. patents) *rejected* by the national competent body (e.g., a patent office) does not benefit from the protection of Article 1 of Protocol No. 1.³³ In this case, the property is ‘not present’ and there is no ‘legally protected legitimate expectation’. Conversely, an application for the registration of a trademark that is *still pending* constitutes a possession³⁴ that has an economic interest because it can be transmitted (for a fee) and used to benefit from a priority right.³⁵

According to the ECHR, three distinct rules are recognized in Article 1 of Protocol No. 1:

[T]he first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, ‘distinct’ in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.³⁶

In the field of intellectual property, the second rule is applicable when compulsory licences (associated with ‘fair compensation’ or levies as under Article 5(2)(b) of Directive 2001/29) are imposed by the legislator or an administrative authority. The third rule is applicable when exceptions or other limitations

³¹ *Anheuser-Busch v Portugal* (n 29).

³² See Alain Strowel, ‘Le licensing d’actifs immatériels à la lumière de la théorie des contrats relationnels’ (2016) 76 *Revue interdisciplinaire d’études juridiques* 147.

³³ *British-American Tobacco Company Ltd v Netherlands* (Commission Opinion, 20 November 1995), paras 71–2, Series A, No. 331.

³⁴ *Anheuser-Busch v Portugal* (n 29), para 78.

³⁵ According to Art. 4 of the Paris Convention for the Protection of Industrial Property (March 20, 1883).

³⁶ *James v United Kingdom* App No. 8793/79 (ECtHR, 21 February 1986), para 37, repeated in *Anheuser-Busch v Portugal* (n 29), para 62.

to intellectual property rights are provided for by law in order to achieve the general interest.³⁷

4.2 Conflicts between Intellectual Property and Other Fundamental Freedoms

In cases relating to intellectual property, the ECtHR has only limited jurisdiction in view of the Member States' margin of appreciation: its role consists 'above all in ensuring that the decisions of the latter are not vitiated by arbitrariness or manifest irrationality'.³⁸

The ECtHR has had the opportunity to rule on the conflict between the protection of intellectual property and freedom of expression in several cases involving the liability of internet intermediaries for copyright violations.³⁹

In *Ashby Donald v France*, photographs of fashion shows had been posted on an American commercial site, but the photographer and his associates in charge of the site had no authorization. A criminal prosecution was therefore initiated against them. Convicted to pay damages set at more than 255,000 euros in total to the fashion houses, the applicants appealed to the Strasbourg Court, alleging in particular the violation of freedom of expression (Art. 10 ECHR).

In a second case, *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden* (hereinafter '*The Pirate Bay*' case), the two applicants established and managed one of the largest internet file sharing services known as '*The Pirate Bay*'.⁴⁰ They were sentenced by the Swedish courts to prison terms (ten and eight months, respectively) and had to pay damages to several media companies (approxi-

³⁷ See Torremans (n 7) 502.

³⁸ *Anheuser-Busch v Portugal* (n 29), para 83; *SIA AKKA/LAA v Latvia* App No. 562/05 (ECtHR, 12 July 2016), paras 69–70.

³⁹ *Ashby Donald v France* App No. 36769/08 (ECtHR, 10 January 2013); *Fredrik Neij and Peter Sunde Kolmisoppi v Sweden* App No. 40397/12 (ECtHR, 19 February 2013), decision known as *The Pirate Bay*; *Yaman Akdeniz v Turkey* App No. 20877/10 (ECtHR, 11 March 2014).

⁴⁰ This service using the BitTorrent protocol allows internet users to get in touch and exchange files, which may contain protected works (music, films, games, etc.), without having to expressly refer to the servers of The Pirate Bay. As soon as several internet users have installed the software on their machines, this peer-to-peer system (or 'P2P' in English) works in a completely decentralized manner, without any intervention from The Pirate Bay. The service allows internet users to make copies and to communicate to the public, possibly in violation of copyright, but there is no direct infringement of copyright by the operator of the service. As it facilitates the commission of infringing acts by third parties, only the indirect responsibility of The Pirate Bay is at stake.

mately 5 million euros). The applicants appealed to the ECtHR on the grounds that their conviction had violated their right to freedom of expression.

In *Ashby* and *The Pirate Bay*, the Court first recalled that ‘two competing interests ... both protected by the Convention’ were at stake. On one hand the applicants have an interest in facilitating the exchange of information (through the peer-to-peer system), which falls under freedom of expression and information (Art. 10 ECHR); on the other hand, the copyright holders can claim the protection of property (point D; see also *Ashby*, paragraph 40).

Next, the Court highlighted the type of speech or information at hand: in the two cases, freedom of expression was exercised in the commercial field. Indeed, in *Ashby*, the publication of the photographs on an internet site with the aim of selling them demonstrated that the applicants’ objective was ‘above all commercial’ (*Ashby*, paragraph 39). With regard to *The Pirate Bay*, the Court stressed that the information at stake did not enjoy the same level of protection as political debate and expression.

The obligation to take into account two rights protected by the Convention⁴¹ as well as the strictly commercial nature of the expression in question led the Strasbourg judges to conclude that the domestic authorities ‘had in this case a particularly large margin of appreciation’ (*Ashby*, paragraph 41 repeated in *The Pirate Bay* under point D).

In *Ashby*, the European Court held that by placing ‘the right to the peaceful enjoyment of the property of fashion designers over the right to freedom of expression’, the domestic judge had not exceeded his margin of appreciation. Recalling that intellectual property enjoys the protection of Article 1 of Protocol No. 1, the Court in *The Pirate Bay* stated that protection may require affirmative action by the state.⁴² These measures include sanctions against those who violate the protection afforded to property.

Nevertheless, the sanctions must be proportionate, which requires examining the nature and severity of the sanctions imposed. The type and severity of the sanctions, including their degree of invasiveness, is another important factor that intervenes in the balancing process involving freedom of expres-

⁴¹ In the event of competing rights, the Court reiterates that ‘the Contracting States must have a wide margin of appreciation in this regard. These considerations also apply in the context of Article 10 of the Convention, when the aim pursued by the interference is the protection ‘of the rights of others’ within the meaning of this provision’ (*Ashby Donald* (n 39) para 40 and *The Pirate Bay* (n 39), para D).

⁴² The positive obligations under Art. 1 of Protocol Nr. 1 have been highlighted in the judgment *Broniowski v Poland* App No. 31443/96 (ECtHR (GC), 22 June 2004). See Sébastien Van Drooghenbroeck, *La Convention européenne des droits de l’homme. Trois années de jurisprudence 2002–2004*, vol. 2 (Larcier 2006) 166.

sion.⁴³ In the two cases examined here, the Court concluded that the penalties and civil damages were proportional: in *Ashby*, significant criminal fines and damages were imposed following adversarial proceedings by a duly substantiated decision, without the applicants being able to demonstrate that these sanctions were going to ‘strangle them financially’; in *The Pirate Bay*, the terms of imprisonment and the award of significant damages were not disproportionate because the applicants had taken no steps to remove the copyright-infringing torrent files, despite pressing requests sent to them (and the Court noted they had derived very significant advertising revenues from the exchange of files through *The Pirate Bay*).

When the protection of intellectual property conflicts with the freedom of expression under the framework of the ECHR, it is then essential for the national courts to operate what may be called ‘practical concordance’ between competing human rights.⁴⁴

5 THE ‘FAIR BALANCE’ BETWEEN COMPETING RIGHTS IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

In some judgments, the Court of Justice of the EU applies the protection of Article 17(2) to industrial property rights (for example, to patents⁴⁵ and trademarks⁴⁶), but most of its case law referring to Article 17(2) concerns copyright. The case law involving copyright deals with the scope of the exclusivity conferred (delineation of the protected works, of the various rights, of the exceptions, etc.; see *infra*, section 5.1) or with the civil measures for enforcing copyright (the right to information on counterfeit networks, the assessment of damages, recovery of attorneys’ fees, etc.; see *infra*, section 5.2). The fundamental right to intellectual property is therefore invoked to determine either the substance of copyright or the procedural aspects and remedies. In any case,

⁴³ See Van Drooghenbroeck (n 42) 97 ff.

⁴⁴ Sébastien Van Drooghenbroeck, ‘Conflits entre droits fondamentaux, pondération des intérêts: fausses pistes (?) et vrais problèmes’ in Jean-Louis Renchon (ed.), *Les Droits de la personnalité. Actes du X^e colloque de l’Association ‘Famille et droit’* (Bruylant 2009), 315 ff. The principle of ‘practical concordance’ is a principle of German constitutional law which requires that the two fundamental rights be implemented in a harmonious manner so as to solve conflicting rules according to the circumstances of each case.

⁴⁵ CJEU, Case C-170/13 *Huawei Technologies v ZTE* [2015] ECLI:EU:C:2015:477.

⁴⁶ CJEU, Case C-580/13 *Coty Germany v Stadtparkasse Magdeburg* [2015] ECLI:EU:C:2015:485.

this case law largely supports the strengthening of intellectual property and of copyright in particular.

In several judgments concerning the enforcement of intellectual property rights in the context of civil proceedings (see *infra*, section 5.2.1), especially of copyright on the internet (see *infra*, section 5.2.2), the Court of Justice has reaffirmed that copyright is protected as a fundamental right through its assimilation to property and has defined in various circumstances the ‘fair balance’⁴⁷ between copyright and other fundamental freedoms enjoyed by the online intermediaries and the internet users. The information society and the increasing role of digital networks have rendered it increasingly important – and complicated – to find the ‘fair balance’ between intellectual property and other fundamental rights, such as freedom of expression (Article 11 Charter) and the protection of personal data (Article 8 Charter).

5.1 Article 17(2) in Support of an Extension of the Scope of Exclusivity

The Court of Justice relies on Article 17(2) to support an extensive interpretation of the prerogatives of copyright, in particular the right of communication to the public.

In the *GS Media* case⁴⁸ relating to the freedom to establish hyperlinks to photographs posted without authorization on the internet, the reference to the Charter supports a broad interpretation of the right of communication to the public enshrined in Article 3 of the Directive 2001/29 on copyright and related rights in the information society. The challenge of the already well-developed case law⁴⁹ on the freedom of hyperlinks is whether authorization must be requested before establishing a hyperlink to some copyrighted content accessible on the web and therefore already communicated to the public. The Court had clarified that the placement of a hyperlink does not in principle constitute

⁴⁷ On the search by the Court of Justice for the ‘fair balance’ in copyright, see Julien Cabay, *Liberté de création – Objet, étendue et limites de la protection du droit d’auteur – Droit de l’Union européenne, droit belge et droit comparé* (Larcier 2019).

⁴⁸ CJEU, Case C-160/15 *GS Media v Sanoma et al.* [2016] ECLI:EU:C:2016:644, paras 31–49.

⁴⁹ See on the issue of simple hyperlinks: CJEU, Case C-466/12 *Svensson and Others* [2014] ECLI:EU:C:2014:76; Case C-348/13 *BestWater International* [2014] ECLI:EU:C:2014:2315. The cases involving hyperlinks to manifestly unauthorized content include: CJEU, Case C-610/15 *Stichting Brein v Ziggo et al.* [2017] ECLI:EU:C:2017:456; Case C-527/15 *Stichting Brein v Jack Frederik Willems* [2017] ECLI:EU:C:2017:300. To rule on those last cases, the Court does not rely on a balance of fundamental rights, as the infringement of intellectual property is more obvious in these cases.

a new instance of communication to the public because the placing of the hyperlink does not have the effect of extending the audience for the work, which is already accessible to the same public on the site referred to by the hyperlink. However, when photos are posted online without the authorization of the author, as the case was in *GS Media*, any hyperlink to these photos when knowingly established⁵⁰ constitutes a new mode of communication to the public subject to the authorization of the owner of copyright on the photos.

Article 17(2) of the Charter was also cited in an attempt to consolidate a broad interpretation of the right of communication to the public in the *Renckhoff* case relating to the publication on a public school's website of pupils' work, which included a photo of the city of Cordoba, the previous use of which on a travel site had been authorized by the photographer. Distinguishing this case from previous cases on hyperlinks to lawful content online, the Court considered that authorizing such an online publication by the school without the copyright owner being able to exercise his rights provided for in Article 3 of Directive 2001/29 'would fail to have regard to the fair balance, referred to in recitals 3 and 31 of that directive, which must be maintained in the digital environment between, on one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights, as well as the public interest'.⁵¹ Nevertheless, the Court was satisfied with this assertion regarding the disruption of the balance without giving further reasons, which was regrettable because it reduced the balancing of freedoms to a fairly formal and not very transparent exercise.


In the judgments⁵² issued by its Grand Chamber on 29 July 2019, in three cases for preliminary ruling requested by the Federal Court of Justice of Germany (*Bundesgerichtshof*), the Court of Justice proposed an interpretation of European law that to a certain extent strengthens the protection of copyright

⁵⁰ This knowledge exists 'where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet' (CJEU, Case C-160/15 *GS Media v Sanoma et al.* [2016] ECLI: EU:C: 2016:644, para 49).

⁵¹ CJEU, Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] ECLI: EU:C:2018:634, para 41.

⁵² CJEU, Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623; Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] ECLI:EU:C:2019:625; Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] ECLI:EU:C: 2019:624. 

holders and limits the possibility for Member States to introduce flexibilities in the copyright exceptions, while allowing for some flexibility in the interpretation of those exceptions.

Funke Medien v Federal Republic of Germany concerned the uploading by a newspaper (*Westdeutsche Allgemeine Zeitung*) of military status reports on the interventions of German soldiers in Afghanistan that the German army prepares and regularly addresses to certain members of Parliament and other officials in federal departments. These documents are considered classified or restricted, the lowest of the four levels of confidentiality provided for in German law. In the context of the action for copyright infringement brought by the German state, the Federal Court of Justice asked the Court of Justice whether and to what extent secondary legislation (in particular Articles 2 and 3 of the above-mentioned Directive 2001/29 respectively defining the right of reproduction and the right to communication to the public, as well as Article 5, paragraphs 2 and 3 on the exceptions to copyright) leaves some margin of appreciation for their transposition into national law. The Court of Justice was also asked how and to what extent the fundamental rights of the Charter should be taken into account in assessing the scope of the rights within copyright. Expressing some reservation as to the protection by copyright of these military status reports,⁵³ a question that was left to the German judges, the Court of Justice considered that the provisions determining the scope of the exclusive rights are fully harmonizing the content of the rights, in contrast to the provisions on the exceptions, in particular for reproduction by the press and for quotation (Art. 5(3)(c) and (d) of Directive 2001/29). However, despite their optional nature, the Member States' discretion when transposing these exceptions is circumscribed, in particular by the general principle of proportionality, by the objectives of Directive 2001/29, i.e., to establish a high level of protection for authors, and by the need for a fair balance between fundamental rights.⁵⁴ Confirming its judgment in *Renckhoff* on the balance in the electronic environment (and repeating paragraph 41 of *Renckhoff* quoted above), the Court considered that 'the mechanisms to ensure a fair balance' between the various rights are contained  Directive 2001/29 itself, thereby excluding the possibility for Member States to provide for other exceptions to copyright that could be justified by the fundamental rights of the Charter. Concluding in the opposite direction 'would endanger the effectiveness of the harmonization of copyright and related rights effected by that directive [2001/29] as well as the objective of legal certainty pursued by it'.⁵⁵ The objec-

⁵³ *Funke Medien* (n 52) paras 23 ff and 75.

⁵⁴ *Ibid*, paras 45, 49, 53 and 54.

⁵⁵ *Ibid*, para 62.

tives of harmonization and legal certainty limit the Member States' room for discretion. Consequently, 'freedom of information and freedom of the press, enshrined in Article 11 of the Charter, are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author's exclusive rights of reproduction and of communication to the public'.⁵⁶

Spiegel Online v Volker Beck relates to the right of a press publisher (Spiegel) to put online a manuscript that had previously been included in a collection of essays and later posted by a member of Parliament, Mr Beck, on his own website with the warning that further publication of his text was not authorized as the version on his website had been altered by the publisher.⁵⁷ In this case, the Court reproduced the same reasoning, which limits the Member States' ability to introduce new exceptions (by legislative or even judicial means), because the Directive as secondary European law does not allow this.⁵⁸ However, in both *Funke Medien* and *Spiegel Online*, the Court found that the national court's interpretation of existing exceptions, especially those used to report on current events or for quotation (Article 5(3)(c) and (d) of Directive 2001/29) can – and indeed must – abandon a restrictive interpretation in favour of an interpretation that takes full account of the need to respect freedom of expression (Article 11 Charter) and other fundamental rights. The exceptions 'confer rights for the users of works', while protection by Article 17, paragraph 2 of the Charter must not 'be protected as an absolute right'⁵⁹. Recalling the need to take account of the case law of the European Court of Human Rights on freedom of expression (Article 10 ECHR) and in particular its *Ashby* judgment,⁶⁰ the Court of Justice underlines the need to consider the type of speech in question, especially whether it constitutes information in the context of a political debate or a debate affecting the general interest⁶¹. In *Funke Medien*, the Court noted that the press publisher had not only published

⁵⁶ Ibid, para 64.

⁵⁷ By uploading on his own site this article on the criminal policy regarding sexual offences against minors, the member of the Parliament, Mr Beck, intended to demonstrate that this text had been revised when previously published. The mentions that Mr Beck had added on each page of the article (not taken up by Spiegel Online) specified: 'I dissociate myself from this contribution. Volker Beck'. Also included was: '[The publication of] this text is unauthorised and has been distorted by the publisher's editing at its discretion of the heading and body of the text'. Spiegel Online wanted to establish that, contrary to Mr Beck's claims, his manuscript had not been altered by the publisher.

⁵⁸ CJEU, *Spiegel Online* (n 52) paras 30, 34, 38, 39, 42, 43 and 49.

⁵⁹ Ibid, paras 54 and 56; *Funke Medien* (n 52) paras 70 and 72.

⁶⁰ See *Ashby Donald* (n 39), and the presentation of the judgment above in section 4.2.

⁶¹ CJEU, *Spiegel Online* (n 52) paras 57–8; *Funke Medien* (n 52) paras 73–4.

documents on Afghanistan on its site, but had presented them in a systematic form, accompanied by an introductory statement, by other links and an invitation to interact, all of which demonstrated his willingness to initiate a public debate. Therefore, the publication of the German military reports was seen as constituting the use of works in order to report on current events, and the Court invites the national judge to verify the other conditions required to apply this exception.⁶²

In *Pelham v Ralf Hütter and Florian Schneider-Esleben*, the third copyright case decided by the Court of Justice on 29 July 2019, the question is whether sampling, that is the taking of a very short extract (approximately two seconds) from a musical sequence of a title (by the group Kraftwerk) and using it in another musical piece, infringes the right of the producer of the phonogram, or may be exempted on the basis of the quotation exception, taking into account the fair balance to be struck between fundamental rights. The balance had to be struck here between Article 17, paragraph 2 and Article 13 of the Charter, which protects freedom of the arts, as well as Article 11 on freedom of expression, which includes freedom of creation. This led the Court to rule that the producer can oppose the use of even a very brief sound sample of a phonogram, unless the sample is used ‘in a modified form unrecognizable to the ear’.⁶³ ‘Read in the light of Article 13 of the Charter’, which protects the freedom of the arts and sciences, the exception for quotation of Article 5, paragraph 3(d) of Directive 2001/29 is only valid if the use of the sound sample ‘has the intention of entering into dialogue with the work from which the sample was taken’.⁶⁴ In this case, the protection of intellectual property apparently weighed less in the balance found by the Court of Justice.

It therefore appears that the pre-emption by Directive 2001/29 of the power to legislate and to depart from the existing framework as regards exceptions to copyright does not reduce the relevance of fundamental rights for the determination by the judges of the substantial content and scope of copyright.

The fair balance between fundamental rights is also essential for the liability of internet intermediaries and for the determination of the enforcement measures against them (see *infra*, section 5.2). In general, Article 17(2) has a major role to play so as to determine the meaning of the enforcement measures for intellectual property (see *infra*, section 5.2.1).

⁶² CJEU, *Funko Medien* (n 52) para 75. In *Spiegel Online*, the Court does not consider that the publication by Spiegel Online contributes to a debate of general interest.

⁶³ CJEU, *Pelham GmbH and others v Ralf Hütter and Florian Schneider-Esleben* (n 52) paras 34–9.

⁶⁴ *Ibid*, para 72.

5.2 Article 17(2) in Support of Strengthening the Enforcement Measures

In the case law of the CJEU, the protection of intellectual property under Article 17(2) of the Charter has often been discussed in relation to the measures (access to information, injunction, reimbursement of legal costs, etc.) that one can obtain to enforce intellectual property rights. In this context, Article 17(2) operates partly as a fundamental *procedural* right. Directive 2004/48 on the enforcement of intellectual property rights,⁶⁵ which mentions in its recital 32 that it ‘respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union’ is the main source of secondary European law whose interpretation is arguably affected by the references made by the Court of Justice to Article 17(2). ‘[T]his Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of [the Charter]’. Recital 2 of the Directive also calls for a ‘fair balance’: indeed, ‘[t]he protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. It should also allow the widest possible dissemination of works, ideas and know-how. At the same time, the protection of intellectual property should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.’

We distinguish here the cases where the Court rules on the civil enforcement measures in general (see *infra*, section 5.2.1) from those where it is necessary to balance the enforcement measures with other interests and freedoms on the internet (see *infra*, section 5.2.2). The reference to Article 17(2) in the first cases serves to highlight the requirement of a high level of protection; for the second line of cases, the reference is made with a view of reaching a ‘fair balance’.

5.2.1 Strengthening of enforcement measures (general)

Several judgments have relied on Article 17(2) of the Charter to justify a high level of procedural protection of intellectual property.

In the case of *Huawei v ZTE* concerning the question whether an undertaking holding a patent essential to a technical standard commits an abuse of a dominant position (Art. 102 TFEU) by bringing an action aimed at obtaining an injunction against the marketing of a product by a competitor, the Court of Justice appears to deduce from Article 17(2) of the Charter a high obligation of protection: ‘Thus, the need to enforce intellectual property rights, covered by, inter alia, Directive 2004/48, which – in accordance with Article 17(2) of the

⁶⁵ [2004] OJ L157/45.

Charter – provides for a range of legal remedies aimed at ensuring a high level of protection for intellectual-property rights in the internal market, and the right to effective judicial protection guaranteed by Article 47 of the Charter, comprising various elements, including the right of access to a tribunal, must be taken into consideration.⁶⁶

In *United Video Properties v Telenet*, the Court had to rule on the conformity of the Belgian system requiring the unsuccessful party to bear ‘reasonable’ legal costs, with the obligation laid down in Article 14 of Directive 2004/48 as regards the reimbursement of costs of justice in civil infringement proceedings.⁶⁷ The Court of Justice considered that Belgian law imposes amounts that do not ensure that a significant and appropriate part of the reasonable costs are covered by the unsuccessful party (given the excessively low ceilings contained in the Belgian law)⁶⁸ and that this system cannot be reconciled with the requirement imposed by Directive 2004/48 that the procedures and remedies be ‘dissuasive’. Moreover, the legislation ‘compromises the principal aim pursued by Directive 2004/48, of ensuring a high level of protection of intellectual property rights in the internal market, an aim expressly mentioned in recital 10 to that directive, in accordance with Article 17(2) of the Charter of Fundamental Rights of the European Union’.⁶⁹

Likewise, in *New Wave v Alltoys*, the Court held that Article 8 of Directive 2004/48, conferring on rights holders a right of information regarding the distribution networks of goods infringing upon their intellectual right, may be invoked in an autonomous, subsequent procedure to that which led to the finding of counterfeiting. This right to information ensures the ‘effective exercise’ of the fundamental intellectual property right, as it conditions the

⁶⁶ CJEU, Case C-170/13 *Huawei Technologies v ZTE* [2015] ECLI: EU:C: 2015:477, para 57 (see also para 58: ‘This need for a high level of protection for intellectual-property rights means that, in principle, the proprietor may not be deprived of the right to have recourse to legal proceedings to ensure effective enforcement of his exclusive rights, and that, in principle, the user of those rights, if he is not the proprietor, is required to obtain a licence prior to any use’).

⁶⁷ According to Art. 14, ‘Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.’

⁶⁸ The Court of Justice has criticized the fact that the amounts prescribed by law for the recovery of fees are much lower than the average fees actually applied to the services of lawyers in Belgium.

⁶⁹ CJEU, Case C-57/15 *United Video Properties v Telenet* [2016] ECLI:EU:C: 2016:611, para 27.

possibility of taking action in order to obtain interim measures or damages. It thus guarantees a ‘high level of protection of intellectual property’.⁷⁰

In this case law, the reference to the protection of the fundamental right to intellectual property supports an interpretation that aims above all to effectuate the objective pursued by the European legislator to ensure a ‘high level of protection’ to intellectual property. In so doing, beyond the rhetoric of the ultimate foundation in the Charter, the case law of the Court relays the political considerations anchored in secondary European law (Directive 2004/48), at the risk of evading the exercise of a rigorous balancing between competing fundamental rights.⁷¹

5.2.2 The enforcement of intellectual property rights and the respect for other freedoms on the internet

In the *Promusicae* case,⁷² the question was whether intermediaries in online communication, namely internet service providers, could be required in the context of civil proceedings to disclose the personal data of their subscribers who were sued for illegally sharing copyrighted files. The Court of Justice referred to the protection of intellectual property (Art. 17(2) Charter), but insisted on the need to find a ‘fair balance’ with the fundamental right to privacy (Art. 8 Charter). In this case, it concluded by leaving a wide margin of appreciation to the national authorities, there being nothing in European law that requires or prohibits Member States from providing for a disclosure requirement in the context of a civil procedure. After *Promusicae*, the Court of Justice has been more inclined to determine the result of the balancing exercise, sometimes even adding some details or requirements for the enforcement procedure (see *infra* on *UPC Telekabel*).⁷³

In *Coty Germany*, a case concerning the possibility of a banking establishment invoking bank secrecy to refuse to supply information on the holder of an account that had been credited following the sale of perfume bottles infringing a trademark, the Court sought ‘to reconcile the requirements of the protection of different fundamental rights, namely the right to an effective remedy and

⁷⁰ CJEU, Case C-427/15 *New Wave v Alltoys* [2017] ECLI:EU:C:2017:18, paras 23–4.

⁷¹ In this sense, see Martin Husovec, ‘Intellectual property rights and integration by conflict: The past, present and future’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 239.

⁷² CJEU, Case C-275/06 *Promusicae v Telefonica* [2008] ECLI:EU:C:2008:54.

⁷³ In this sense, to wit the prediction from Ohly (n 11) 153: ‘The more the CJEU is faced with the need to balance fundamental rights in IP [Intellectual Property] cases, the closer the net of European precedents will become and the more the Court will tend to determine the exact outcomes of balancing exercises.’

the right to intellectual property, on the one hand, and the right to protection of personal data, on the other'.⁷⁴ By authorizing a banking establishment to refuse to provide this information within the framework of civil proceedings, without imposing any limitation or condition on this refusal, the national provision on bank secrecy 'is capable of seriously impairing ... the effective exercise of the fundamental right to intellectual property'⁷⁵ and is therefore not compatible with European law.

In other circumstances, the search for the 'fair balance' tilts in favour of other fundamental rights. In *Scarlet*,⁷⁶ the question was whether a national court could order an access provider to use a filtering system for all the electronic communications using its network, and this without any time limit. Other aspects of the requested measure (it should apply to all customers of the access provider; the filtering measure was preventive and formulated *in abstracto*, that is to say without reference to specific copyright violations; the cost of filtering was to be borne by the sole intermediary, etc.) clearly indicated its general, non-targeted nature. The final objective of the measure sought was to combat the multiple copyright infringements committed by the subscribers of the access provider. The Court noted that 'the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights ... There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected' (paragraph 43). In *Scarlet*, the Court tipped the balance of fundamental rights in favour of the freedom of enterprise of the intermediaries. Indeed, the injunction measures requested would impose disproportionate obligations on these intermediaries (they should filter all incoming and outgoing communications, at their own cost, for an indefinite period, etc.) and would therefore not allow the 'fair balance' to be achieved. The Court also held that the users' freedom of information prevails over the right to property. Certainly, recognizing the possibility of ordering such broad and non-specific injunctions 'could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications' (paragraph 52 of *Scarlet*). Stressing the risk of an overly broad measure, the Court noted that its lawful or unlawful nature could vary according to the legal exceptions to copyright

⁷⁴ CJEU, Case C-580/13 *Coty Germany v Stadtsparkasse Magdeburg* [2015] ECLI:EU:C:2015:485, para 33.

⁷⁵ *Ibid*, para 40.

⁷⁶ CJEU, Case C-70/10 *Scarlet v SABAM* [2011] ECLI:EU:C:2011:771. See also the parallel case concerning an injunction against a hosting provider (a social network): CJEU, Case C-360/10 *SABAM v Netlog* [2012] ECLI:EU:C:2012:85.

(which differ from one Member State to another) or could depend on whether the copyright owners have decided or not to put the works online for free.

In a judgment of 27 March 2014, the Court of Justice recognized the possibility of obtaining a court injunction against an intermediary (*UPC Telekabel*) whose internet access services are used to download or ‘stream’ illegally uploaded films from a third-party site and such injunction can be implemented through a measure blocking access.⁷⁷ The court requesting the interpretation of the Court of Justice planned to order an unspecified injunction as to the concrete measures (type of filtering) that the access provider must take to respect the injunction. The national court was also considering the exoneration of the access provider from the penalty payments (owed in the event of a violation of the injunction) if it could prove that it had taken all reasonable steps. The injunctive measure could be implemented in various ways: blocking the domain name of the illegal site, blocking the internet protocol (IP) address of this site, or blocking any other IP address that this site may use in the future and of which the intermediary may have knowledge (after notification by the copyright holders). The Court recognized that the purpose of the measure could be to put an end to the infringements or to prevent them. In order to assess the conformity with Union law of an injunction with a preventive effect and without the details as to its implementation, the Court of Justice considered that account must be taken of the requirements resulting from the protection of fundamental rights. According to the *Scarlet* (and *Netlog*) case law, the Court of Justice therefore sought ‘the fair balance between the fundamental rights applicable’, while stressing that it would then be up to the courts of the Member States to be careful not to rely upon an interpretation that would conflict with the fundamental rights or with other general principles of Union law, such as the principle of proportionality.⁷⁸ The Court of Justice commonly attempts, and in addition invites the national judges, to achieve a ‘practical concordance’ of the fundamental rights, that is, to show how they can be harmoniously reconciliated through some compromises derived from the specific circumstances of each case. The CJEU often plays an active role in the cases involving internet intermediaries, while the European Court of Human Rights tends to remain more prudent (see *supra*). In *UPC Telekabel*, the Court of Justice did not shy away from the balancing exercise and did not leave the national judges completely free to use their discretion in balancing the fundamental rights: the Court of Justice in *UPC Telekabel* considers that

⁷⁷ CJEU, Case C-314/12 *UPC Telekabel Wien v Constantin Film Verleih and Wega* [2014] ECLI:EU:C:2014:192.

⁷⁸ *Ibid*, para 46.

it has all of the necessary elements required to carry out the balancing.⁷⁹ As in the *Scarlet* and *Netlog* cases, the Court strikes a balance between the protection of intellectual property (Art. 17(2) Charter), the freedom to conduct a business (Art. 16 Charter), and the freedom of information of the internet users (Art. 11 Charter). Having considered that the injunction requested by the copyright holders did not appear to encroach on the substance of the freedom of enterprise of the internet service provider,⁸⁰ the Court of Justice assesses the balance with the freedom of information of the internet users as follows: ‘the provider’s interference in the freedom of information of those users would be unjustified in the light of the objective pursued’ (i.e., put an end to copyright infringements) if the measures are not ‘strictly targeted’, therefore the measure must not prevent the internet users from ‘using the provider’s services in order to lawfully access information’.⁸¹ In this case, the national court that ordered an injunction without specifying the mode of implementation (the blocking measure) did not have the possibility of verifying later whether the implementing measure chosen by the access provider would respect the freedom of information of the users (except in the event of a later, new dispute). To guarantee the absence of interference with the freedom of information, the Court of Justice is rather prescriptive towards the Member States because it imposes a procedural obligation: ‘the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known’.⁸² This procedural obligation imposed by the Court of Justice goes far enough in the definition of the ‘practical concordance’ between the fundamental rights and arguably requires the Member States to adjust their procedural rules for online copyright infringements.

Furthermore, according to the Court of Justice, the protection of copyright on the basis of property requires that the measures taken by the access provider are ‘sufficiently effective’: they must ‘have the effect of preventing unauthor-

⁷⁹ The Court of Justice nevertheless recognizes that the interpretation in accordance with the law of the European Union leaves room for discretion to national judges, who must be guided in this exercise by the fundamental rights and the principle of proportionality. This suggests that ‘practical concordance’ can take place at two levels in the EU legal order: it can be achieved in the preliminary ruling by the CJEU and then further strengthened through its application to the case by the national jurisdiction.

⁸⁰ Such an injunction leaves the recipient free of determining the concrete measures to be taken to achieve the desired result (the recipient of the injunction can therefore choose the measures best suited to the resources and capacities at his disposal). It also allows him to be exempted from liability by proving that he took all reasonable steps (see *UPC Telekabel Wien v Constantin Film Verleih and Wega* (n 77) paras 50–54).

⁸¹ *Ibid.*, para 56.

⁸² *Ibid.*, para 57.

ised access to protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing' the protected content. The Court concluded that even if the measures are not likely to lead 'to a complete cessation of the infringements of the intellectual property right', they are nonetheless compatible with the requirement of a fair balance between fundamental rights under Article 52, paragraph 1 of the Charter.⁸³

While it is true that blocking measures must not 'do too much' (indeed, they must be 'strictly targeted' in the words of the Court of Justice), they must also 'do enough'⁸⁴ (therefore be 'sufficiently effective' according to the Court of Justice). However, the effectiveness of a judicial sanction is of course always questionable, especially when it comes to controlling access to information on the internet.

In *Tobias McFadden*, a case relating to the obligation to implement secure connections to a Wi-Fi network, the Court of Justice followed the same reasoning and established a similar reconciliation between, on the one hand, the protection of intellectual property and, on the other, the freedom of enterprise of intermediaries and the freedom of information of the recipients of an access service provided through a professional wireless local area network (WLAN).⁸⁵ The same requirement of efficiency in the protection of intellectual property was emphasized by the Court⁸⁶ and this led the Court to require a secure Wi-Fi access with a password. Failure to impose this obligation would 'deprive the fundamental right to intellectual property of any protection, which would be contrary to the idea of a fair balance'.⁸⁷

⁸³ Ibid, para 63. Art. 52(1) of the Charter imposes a triple test of legality, legitimacy and proportionality similar to that of the ECHR.

⁸⁴ As noted by Quentin Van Enis ('Les mesures de filtrage et de blocage de contenus sur l'internet: un mal (vraiment) nécessaire dans une société démocratique? Quelques réflexions autour de la liberté d'expression' (2013) 96 *Revue trimestrielle des droits de l'homme* 859, 862), in terms of filtering, 'there is always the risk of doing too much and, at the same time, of not doing enough'.

⁸⁵ CJEU, Case C-484/14 *Tobias McFadden v Sony Music Entertainment Germany* [2016] ECLI:EU:C:2016:689, paras 89 ff and in particular para 100. See also on the fair balance of rights and the question of liability in the event of an internet connection used by several members of the same family: Case 149/17 *Bastel Lübke v Michael Strotzer* [2018] ECLI:EU:C:2018:841, paras 51 ff.

⁸⁶ CJEU, *Tobias McFadden v Sony Music Entertainment Germany* (n 85) para 95.

⁸⁷ Ibid, para 98.

6 CONCLUDING WORDS

Although the Court of Justice systematically stresses the need for a ‘fair balance’, the way it has referred to the fundamental right to intellectual property shows that Article 17(2) has on the whole contributed to a strengthening of intellectual property rights. This applies to their substance and scope or in relation to the measures to enforce them. This trend in the case law of the Court of Justice on intellectual property, and the increasing role of the reference to the fundamental protection of property, must be acknowledged and closely watched. It implies that the fundamental rights perspective brought within the discussion and adjudication of IP cases does not have the effect of making non-economic interests prevail.