Court of Justice EU, 27 March 2014, UPC Telekabel v Constantin Film

COPYRIGHT – RELATED RIGHTS

A person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, is using the services of the internet service provider of the persons accessing that subject-matter

- In view of the above, the answer to the first question is that Article 8(3) of Directive 2001/29 must be interpreted as meaning that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29.

Injunction to ISP to provide customers access to a website that does not specify what measures should be taken does not conflict with freedom of enterprise

- First, an injunction such as that at issue in the main proceedings leaves its addressee to determine the specific measures to be taken in order to achieve the result sought, with the result that he can choose to put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.
- Secondly, such an injunction allows its addressee to avoid liability by proving that he has taken all reasonable measures. That possibility of exoneration clearly has the effect that the addressee of the injunction will not be required to make unbearable sacrifices, which seems justified in particular in the light of the fact that he is not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction.

Measures Internet provider must take to implement injunction to access a website must be effective and prevent or at least hinder unauthorized notices of protected works: complete cessation not required

- Consequently, even though the measures taken when implementing an injunction such as that at issue in the main proceedings are not capable of leading, in some circumstances, to a complete cessation of the infringements of the intellectual property right, they cannot however be considered to be incompatible with the requirement that a fair balance be found, in accordance with Article 52(1), in fine, of the Charter, between all applicable fundamental rights, provided that (i) they do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that they have the effect of preventing unauthorised 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 subject-matter that has been made available to them in breach of the intellectual property right.

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Court of Justice EU, 31 March 2010
(L. Bay Larsen, K. Lenaerts, M. Safjan, J. Malenovský (Rapporteur), A. Prechal)
JUDGMENT OF THE COURT (Fourth Chamber)
27 March 2014 (*)
(Request for a preliminary ruling — Approximation of laws — Copyright and related rights — Information society — Directive 2001/29/EC — Website making cinematographic works available to the public without the consent of the holders of a right related to copyright — Article 8(3) — Concept of 'intermediaries whose services are used by a third party to infringe a copyright or related right' — Internet service provider — Order addressed to an internet service provider prohibiting it from giving its customers access to a website — Balancing of fundamental rights)
In Case C‑314/12,
REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 11 May 2012, received at the Court on 29 June 2012, in the proceedings
UPC Telekabel Wien GmbH
v
Constantin Film Verleih GmbH,
Wega Filmproduktionsgesellschaft mbH,
THE COURT (Fourth Chamber),
composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a judge of the Fourth Chamber, M. Safjan, J. Malenovský (Rapporteur) and A. Prechal, Judges,
Advocate General: P. Cruz Villalón,

Registrar: A. Impellizzeri, Administrator,
having regard to the written procedure and further to the hearing on 20 June 2013,
after considering the observations submitted on behalf of:
– UPC Telekabel Wien GmbH, by M. Bulgarini and T. Höhne, Rechtsanwälte,
– Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH, by A. Manak and N. Kraft, Rechtsanwälte,
– the Austrian Government, by A. Posch, acting as Agent,
– the Italian Government, by G. Palmieri, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,
– the Netherlands Government, by C. Schillemans and C. Wissels, acting as Agents,
– the United Kingdom Government, by L. Christie, acting as Agent, assisted by S. Malynicz, barrister,
– the European Commission, by J. Samnadda and F.W. Bulst, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 26 November 2013,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(1) and (2)(b) and Article 8(3) 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 (OJ 2001 L 167, p. 10), and of certain fundamental rights enshrined in EU law.

2 The request has been made in proceedings between (i) UPC Telekabel Wien GmbH ('UPC Telekabel') and (ii) Constantin Film Verleih GmbH ('Constantin Film') and Wega Filmproduktionsgesellschaft mbH ('Wega') concerning an application for UPC Telekabel to be ordered to block the access of its customers to a website making available to the public some of the films of Constantin Film and of Wega without their consent.

Legal context

EU law

3 Recitals 9 and 59 in the preamble to Directive 2001/29 state:

'(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. ... Intellectual property has therefore been recognised as an integral part of property.

...

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. ... The conditions and modalities relating to such injunctions should be left to the national law of the Member States.'

4 Article 1 of that directive, headed 'Scope', provides in paragraph 1:

'This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.'

5 Article 3 of the same directive, headed 'Right of communication to the public of works and right of making available to the public other subject-matter', provides in paragraph 2:

'Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

...

(c) for the producers of the first fixations of films, of the original and copies of their films;

...'

6 Article 8 of Directive 2001/29, headed 'Sanctions and remedies', states in paragraph 3:

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

Austrian law

7 Paragraph 18a(1) of the Law on copyright (Urheberrechtsgesetz) of 9 April 1936 (BGBl. 111/1936), as amended by the new law of 2003 on copyright (Urheberrechtsgesetz-Novelle 2003, BGBl. I, 32/2003, 'the UrhG'), reads:

'The author has the exclusive right to make the work available to the public, by wire or wireless means, in such a way which allows members of the public to access it from a place and at a time chosen by them.'

8 Paragraph 81(1) and (1a) of the UrhG state:

'(1) A person who has suffered an infringement of any exclusive rights conferred by this Law, or who fears such an infringement, shall be entitled to bring proceedings for a restraining injunction. Legal proceedings may also be brought against the proprietor of a business if the infringement is committed in the course of the activities of his business by one of his employees or by a person acting under his control, or if there is a danger that such an infringement will be committed; Paragraph 81(1a) shall apply mutatis mutandis.

(1a) If the person who has committed such an infringement, or by whom there is a danger of such an infringement being committed, uses the services of an intermediary for that purpose, the intermediary shall also be liable to an injunction under subparagraph (1). ...'.

9 Paragraph 355(1) of the Code of Enforcement (Executionsordnung) states:

'Enforcement against the person obligated to desist from an activity or to tolerate the carrying out of an activity shall take place, at the time of consent to enforcement, by the imposition by the enforcement

court, upon application, of a fine for any non-compliance after the obligation became executory. In the event of further non-compliance, the enforcement court shall, upon application, impose a further fine or a period of imprisonment of up to one year in total. …'.

10 It is apparent from the explanations given by the referring court in its request for a preliminary ruling that, at the stage of the enforcement procedure, the addressee of the prohibition can argue, in order to avoid liability, that he has taken all of the measures that could be expected of him in order to prevent the result prohibited.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Having established that a website was offering, without their agreement, either a download or 'streaming' of some of the films which they had produced, Constantin Film and Wega, two film production companies, referred the matter to the court responsible for hearing applications for interim measures with a view to obtaining, on the basis of Article 81(1a) of the UrhG, an order enjoining UPC Telekabel, an internet service provider, to block the access of its customers to the website at issue, inasmuch as that site makes available to the public, without their consent, cinematographic works over which they hold a right related to copyright.

12 By order of 13 May 2011, the Handelsgericht Wien (Commercial Court, Vienna) (Austria) prohibited UPC Telekabel from providing its customers with access to the website at issue; that prohibition was to be carried out in particular by blocking that site's domain name and current IP ('Internet Protocol') address and any other IP address of that site of which UPC Telekabel might be aware.

13 In June 2011, the website at issue ceased its activity following an action of the German police forces against its operators.

14 By order of 27 October 2011, the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria), as an appeal court, partially reversed the order of the court of first instance in so far as it had wrongly specified the means that UPC Telekabel had to introduce in order to block the website at issue and thus execute the injunction. In order to reach that conclusion, the Oberlandesgericht Wien first of all held that Article 81(1a) of the UrhG must be interpreted in the light of Article 8(3) of Directive 2001/29. It then held that, by giving its customers access to content illegally placed online, UPC Telekabel had to be regarded as an intermediary whose services were used to infringe a right related to copyright, with the result that Constantin Film and Wega were entitled to request that an injunction be issued against UPC Telekabel. However, as regards the protection of copyright, the Oberlandesgericht Wien held that UPC Telekabel could only be required, in the form of an obligation to achieve a particular result, to forbid its customers access to the website at issue, but that it had to remain free to decide the means to be used.

15 UPC Telekabel appealed on a point of law to the Oberster Gerichtshof (Supreme Court) (Austria).

16 In support of its appeal, UPC Telekabel submits inter alia that its services could not be considered to be used to infringe a copyright or related right within the meaning of Article 8(3) of Directive 2001/29 because it did not have any business relationship with the operators of the website at issue and it was not established that its own customers acted unlawfully. In any event, UPC Telekabel claims that the various blocking measures which may be introduced can all be technically circumvented and that some of them are excessively costly.

17 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 8(3) of Directive 2001/29 … to be interpreted as meaning that a person who makes protected subject-matter available on the internet without the rightholder's consent [for the purpose of Article 3(2) of Directive 2001/29] is using the services of the [internet] access providers of persons seeking access to that protected subject-matter?

If the answer to the first question is in the negative:

2. Are reproduction for private use [within the meaning of Article 5(2)(b) of Directive 2001/29] and transient and incidental reproduction [within the meaning of Article 5(1) of Directive 2001/29] permissible only if the original of the reproduction was lawfully reproduced, distributed or made available to the public?

If the answer to the first question or the second question is in the affirmative and an injunction is therefore to be issued against the user's [internet] access provider in accordance with Article 8(3) of [Directive 2001/29]:

3. Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to prohibit in general terms an [internet] access provider from allowing its customers access to a certain website (thus without ordering specific measures) as long as the material available on that website is provided exclusively or predominantly without the rightholder's consent, if the access provider can avoid incurring coercive penalties for breach of the prohibition by showing that it had nevertheless taken all reasonable measures?

If the answer to the third question is in the negative:

4. Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to require an [internet] access provider to take specific measures to make it more difficult for its customers to access a website containing material that is made available unlawfully if those measures require not inconsiderable costs and can easily be circumvented without any special technical knowledge?'

Consideration of the questions referred

Admissibility of the questions referred

18 As a preliminary point, it should be noted that the fact that the website at issue in the main proceedings has ceased its activity does not make the questions referred inadmissible.

19 In accordance with settled case-law, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court (see, to that effect, Case C‑415/11 Aziz [2013] ECR, paragraph 34).

20 Thus, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Aziz, paragraph 35).

21 However, that is not the case in the dispute in the main proceedings because it is apparent from the request for a preliminary ruling that, under Austrian law, the referring court must make its decision on the basis of the facts as set out in the decision at first instance, that is to say at a time when the website at issue in the main proceedings was still accessible.

22 It follows from the above that the request for a preliminary ruling is admissible.

The first question

23 By its first question, the referring court asks, essentially, whether Article 8(3) of Directive 2001/29 must be interpreted as meaning that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons accessing that subject-matter, which is to be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29.

24 As a preliminary point, it should be noted that, in the case in the main proceedings, it is common ground that the protected subject-matter was made available to users of a website without the consent of the rightholders mentioned in Article 3(2) of Directive 2001/29.

25 Given that, according to that provision, rightholders have the exclusive right to authorise or prohibit any act of making available to the public, it must be stated that an act of making protected subject-matter available to the public on a website without the rightholders' consent infringes copyright and related rights.

26 In order to remedy such a situation of infringement of the rights at issue, Article 8(3) of Directive 2001/29 provides for the possibility for rightholders to apply for an injunction against intermediaries whose services are used by a third party to infringe one of their rights.

27 As Recital 59 in the preamble to Directive 2001/29 states, since the services of intermediaries are increasingly used for infringing copyright or related rights, such intermediaries are, in many cases, best placed to bring such infringing activities to an end.

28 In the present case, the Handelsgericht Wien and then the Oberlandesgericht Wien ordered UPC Telekabel, the internet service provider addressed by the injunction at issue in the main proceedings, to bring the infringement of the rights of Constantin Film and of Wega to an end.

29 However, UPC Telekabel disputes that it may be considered, for the purposes of Article 8(3) of Directive 2001/29, to be an intermediary whose services are used to infringe a copyright or related right.

30 In this respect, it follows from Recital 59 in the preamble to Directive 2001/29 that the term 'intermediary' used in Article 8(3) of that directive covers any person who carries a third party's infringement of a protected work or other subject-matter in a network.

31 Having regard to the objective pursued by Directive 2001/29, as shown in particular by Recital 9 thereof, which is to guarantee rightholders a high level of protection, the concept of infringement thus used must be understood as including the case of protected subject-matter placed on the internet and made available to the public without the agreement of the rightholders at issue.

32 Accordingly, given that the internet service provider is an inevitable actor in any transmission of an infringement over the internet between one of its customers and a third party, since, in granting access to the network, it makes that transmission possible (see, to that effect, the order in Case C‑557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten [2009] ECR I‑1227, paragraph 44), it must be held that an internet service provider, such as that at issue in the main proceedings, which allows its customers to access protected subject-matter made available to the public on the internet by a third party is an intermediary whose services are used to infringe a copyright or related right within the meaning of Article 8(3) of Directive 2001/29.

33 Such a conclusion is borne out by the objective pursued by Directive 2001/29. To exclude internet service providers from the scope of Article 8(3) of Directive 2001/29 would substantially diminish the protection of rightholders sought by that directive (see, to that effect, order in LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten, paragraph 45).

34 That conclusion cannot be called into question by the argument that, for Article 8(3) of Directive 2001/29 to be applicable, there has to be a contractual link between the internet service provider and the person who infringed a copyright or related right.

35 Neither the wording of Article 8(3) nor any other provision of Directive 2001/29 indicates that a specific

relationship between the person infringing copyright or a related right and the intermediary is required. Furthermore, that requirement cannot be inferred from the objectives pursued by that directive, given that to admit such a requirement would reduce the legal protection afforded to the rightholders at issue, whereas the objective of that directive, as is apparent inter alia from Recital 9 in its preamble, is precisely to guarantee them a high level of protection.

36 Nor is the conclusion reached by the Court in paragraph 30 of this judgment invalidated by the assertion that, in order to obtain the issue of an injunction against an internet service provider, the holders of a copyright or of a related right must show that some of the customers of that provider actually access, on the website at issue, the protected subject-matter made available to the public without the agreement of the rightholders.

37 Directive 2001/29 requires that the measures which the Member States must take in order to conform to that directive are aimed not only at bringing to an end infringements of copyright and of related rights, but also at preventing them (see, to that effect, Case C-70/10 Scarlet Extended [2011] ECR I-11959, paragraph 31, and **Case C-360/10 SABAM [2012] ECR, paragraph 29**).

38 Such a preventive effect presupposes that the holders of a copyright or of a related right may act without having to prove that the customers of an internet service provider actually access the protected subject-matter made available to the public without their agreement.

39 That is all the more so since the existence of an act of making a work available to the public presupposes only that the work was made available to the public; it is not decisive that persons who make up that public have actually had access to that work or not (see, to that effect, Case **C-306/05 SGAE [2006] ECR I-11519, paragraph 43**).

40 In view of the above, the answer to the first question is that Article 8(3) of Directive 2001/29 must be interpreted as meaning that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29.

The second question

41 In the light of the reply to the first question, it is not necessary to reply to the second question.

The third question

42 By its third question, the referring court asks, essentially, whether the fundamental rights recognised by EU law must be interpreted as precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures.

43 In this respect, as is apparent from Recital 59 in the preamble to Directive 2001/29, the rules for the injunctions which the Member States must lay down pursuant to Article 8(3) of the directive, such as those relating to the conditions to be met and the procedure to be followed, are a matter for national law.

44 That said, those national rules, and likewise their application by the national courts, must observe the limitations arising from Directive 2001/29 and from the sources of law to which Recital 3 in its preamble refers (see, to that effect, Scarlet Extended, paragraph 33 and the case-law cited there).

45 In order to assess whether an injunction such as that at issue in the main proceedings, taken on the basis of Article 8(3) of Directive 2001/29, is consistent with EU law, it is therefore necessary to take account in particular of the requirements that stem from the protection of the applicable fundamental rights, and to do so in accordance with Article 51 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to that effect, Scarlet Extended, paragraph 41).

46 The Court has already ruled that, where several fundamental rights are at issue, the Member States must, when transposing a directive, ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the applicable fundamental rights protected by the European Union legal order. Then, when implementing the measures transposing that directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that directive but also ensure that they do not rely on an interpretation of it which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality (see, to that effect, Case **C-275/06 Promusicae [2008] ECR I-271, paragraph 68**).

47 In the present case, it must be observed that an injunction such as that at issue in the main proceedings, taken on the basis of Article 8(3) of Directive 2001/29, makes it necessary to strike a balance, primarily, between (i) copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter, (ii) the freedom to conduct a business, which economic agents such as internet service providers enjoy under Article 16 of the Charter, and (iii) the freedom of information of internet users, whose protection is ensured by Article 11 of the Charter.

48 As regards the freedom to conduct a business, the adoption of an injunction such as that at issue in the main proceedings restricts that freedom.

49 The freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the

economic, technical and financial resources available to it.

50 An injunction such as that at issue in the main proceedings constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions.

51 However, such an injunction does not seem to infringe the very substance of the freedom of an internet service provider such as that at issue in the main proceedings to conduct a business.

52 First, an injunction such as that at issue in the main proceedings leaves its addressee to determine the specific measures to be taken in order to achieve the result sought, with the result that he can choose to put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.

53 Secondly, such an injunction allows its addressee to avoid liability by proving that he has taken all reasonable measures. That possibility of exoneration clearly has the effect that the addressee of the injunction will not be required to make unbearable sacrifices, which seems justified in particular in the light of the fact that he is not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction.

54 In that regard, in accordance with the principle of legal certainty, it must be possible for the addressee of an injunction such as that at issue in the main proceedings to maintain before the court, once the implementing measures which he has taken are known and before any decision imposing a penalty on him is adopted, that the measures taken were indeed those which could be expected of him in order to prevent the proscribed result.

55 None the less, when the addressee of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.

56 In this respect, the measures adopted by the internet service provider must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued.

57 It must be possible for national courts to check that that is the case. In the case of an injunction such as that at issue in the main proceedings, the Court notes that, if the internet service provider adopts measures which enable it to achieve the required prohibition, the national courts will not be able to carry out such a review at the stage of the enforcement proceedings if there is no challenge in that regard. Accordingly, in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, 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.

58 As regards intellectual property, it should be pointed out at the outset that it is possible that the enforcement of an injunction such as that in the main proceedings will not lead to a complete cessation of the infringements of the intellectual property right of the persons concerned.

59 First, as has been stated, the addressee of such an injunction has the possibility of avoiding liability, and thus of not adopting some measures that may be achievable, if those measures are not capable of being considered reasonable.

60 Secondly, it is possible that a means of putting a complete end to the infringements of the intellectual property right does not exist or is not in practice achievable, as a result of which some measures taken might be capable of being circumvented in one way or another.

61 The Court notes that there is nothing whatsoever in the wording of Article 17(2) of the Charter to suggest that the right to intellectual property is inviolable and must for that reason be absolutely protected (see, to that effect, Scarlet Extended, paragraph 43).

62 None the less, the measures which are taken by the addressee of an injunction, such as that at issue in the main proceedings, when implementing that injunction must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is to say that they must have the effect of preventing unauthorised access to the 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 subject-matter made available to them in breach of that fundamental right.

63 Consequently, even though the measures taken when implementing an injunction such as that at issue in the main proceedings are not capable of leading, in some circumstances, to a complete cessation of the infringements of the intellectual property right, they cannot however be considered to be incompatible with the requirement that a fair balance be found, in accordance with Article 52(1), in fine, of the Charter, between all applicable fundamental rights, provided that (i) they do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that they have the effect of preventing unauthorised 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

subject-matter that has been made available to them in breach of the intellectual property right.

64 In the light of the foregoing considerations, the answer to the third question is that the fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the 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 subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.

The fourth question

65 In the light of the reply to the third question, it is not necessary to reply to the fourth question.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. Article 8(3) 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 must be interpreted as meaning that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29.

2. The fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the 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 subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 26 November 2013 (1)
Case C‑314/12
UPC Telekabel Wien GmbH
v
Constantin Film Verleih GmbH
and
Wega Filmproduktionsgesellschaft GmbH
(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))
(Information society – Intellectual property rights – Directive 2001/29/EC – Article 8(3) of Directive 2001/29/EC – Article 16 of the Charter of Fundamental Rights – Measures against a website massively infringing copyright – Injunction against an Internet access provider as an intermediary whose services are used by a third party to infringe a copyright – Injunction ordering the blocking of a copyright-infringing website)

1. The present case affords the Court the opportunity to develop further its case‑law on the protection of copyright on the Internet. (2) In addition to the content and procedure for the issuing of an injunction pursuant to Article 8(3) of Directive 2001/29/EC, (3) it concerns the question whether an injunction can be issued at all against an Internet service provider ('ISP') which provides Internet access not to the operator of a website massively infringing copyright, but only to users accessing that website.

I – Legal framework

A – European Union law

2. Recital 59 in the preamble to Directive 2001/29 states:

'In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.'

3. Article 3 of Directive 2001/29 provides:

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

4. Article 15 of Directive 2000/31/EC (4) provides, under the heading 'No general obligation to monitor':

'(1) Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

(2) Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged unlawful activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

5. Article 3 of Directive 2004/48 (5) provides as follows:

'(1) Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

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

B – National law

6. Paragraph 81 of the Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Austrian Federal Law on copyright in literary and artistic works and related rights (Urheberrechtsgesetz; 'the UrhG') (6) provides:

'(1) A person who has suffered an infringement of any exclusive rights conferred by this Law, or who fears such an infringement, shall be entitled to bring proceedings for a restraining injunction. Legal proceedings may also be brought against the proprietor of a business if the infringement is committed in the course of the activities of his business by one of his employees or by a person acting under his control, or if there is a danger that such an infringement will be committed; Paragraph 81(1a) shall apply mutatis mutandis.

(1a) If the person who has committed such an infringement, or by whom there is a danger of such an infringement being committed, uses the services of an intermediary for that purpose, the intermediary shall also be liable to an injunction under subparagraph (1). However, where the conditions for an exclusion of liability in accordance with Paragraphs 13 to 17 of the ECG exist in the case of that intermediary, proceedings may be brought against him only after he has been given a warning.'

7. Paragraph 13 of the E-Commerce-Gesetzes (Law on e‑commerce, 'the ECG') (7) deals with the exclusion of the liability of service providers acting as conduits. Paragraph 13(1) reads as follows:

'A service provider who transmits in a communication network information provided by a recipient of the service or who provides access to a communication network shall not be liable for the information transmitted, provided that he

1. does not initiate the transmission;

2. does not select the receiver of the transmission; and

3. does not select or modify the information contained in the transmission.'

8. Paragraph 355(1) of the Exekutionsordnung (Code of Enforcement) (8) reads:

„Enforcement against the person obligated to desist from an activity or to tolerate the carrying out of an activity shall take place at the time of consent to enforcement, by the imposition by the enforcement court, upon application, of a fine for any non-compliance after the obligation became executory. In the event of further non-compliance, the enforcement court shall, upon application, impose a further fine or a period of imprisonment of up to one year in total. …'

II – Facts and main proceedings

9. The website operating under the domain name kino.to enabled users to access a wide range of films protected by copyright. The films could either be watched by streaming or downloaded. The former implies the creation of a transient reproduction on the terminal equipment, the latter a permanent reproduction, generally for private use.

10. Among the films made available to the public on the website were works in which the rights are held by the plaintiffs in the main proceedings, namely Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH ('the plaintiffs'). The plaintiffs had not given consent for that purpose.

11. UPC Telekabel Wien GmbH ('the defendant') is a major Austrian ISP. It has no legal relationship with the operators of the website kino.to and made neither Internet access nor storage space available to them. According to the findings of the referring court, however, it can almost certainly be assumed that individual customers of the defendant availed themselves of the kino.to offer.

12. The plaintiffs requested the defendant out of court to block the website kino.to. When it did not comply with that request, the plaintiffs applied to the Handelsgericht Wien (Commercial Court, Vienna) for an injunction prohibiting the defendant from providing its customers with access to the website kino.to if certain films belonging to the plaintiffs were made available to customers on that website, either in full or in the form of clips. The main claim was given concrete expression in a number of further claims, described as 'requests in the alternative' and not restrictive of the main claim, by examples of specific blocking measures

(DNS blocking of the domain name, blockade of the website's current IP address at any given time, the latter, should the need arise, only after notification by the plaintiffs).

13. The plaintiffs based their application on Paragraph 81(1a) of the UrhG and stated as their ground for it that the defendant was providing access to content made available illegally. The provision of the access should be prohibited. Specific measures should only be considered in the enforcement process. The defendant, on the other hand, argues that it has no relationship with the operators of the website kino.to and only provides its customers, who are not acting illegally, with access to the Internet. Moreover, a general blocking of access to a website is neither possible nor reasonable. The specific measures proposed, on the other hand, are disproportionate.

14. By order of 13 May 2011, the Handelsgericht Wien prohibited the defendant from providing its customers with access to kino.to if the films named by the plaintiffs were made available there, in particular by DNS blocking of the domain name and blocking of the defendant's current IP addresses and any shown in future to belong to it. The court regarded it as established that both those measures could be taken without major expense but could very easily be circumvented. Nevertheless, they represented the most effective methods of preventing access. It was not established that kino.to shared its IP address with servers offering harmless content. Both parties lodged appeals against the order.

15. In June 2011, the website kino.to closed after the German prosecuting authorities took action against its operators.

16. The Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as the appellate court, amended the injunction of the court of first instance by order of 27 October 2011 to the effect that it prohibited the provision of access to kino.to without mentioning specific measures to be taken. Paragraph 81(1a) of the UrhG transposed Article 8(3) of Directive 2001/29 and was to be interpreted in conformity with European Union law as referred to in recital 59 in the preamble to Directive 2001/29. The defendant was enabling its customers to access content made available illegally and was thus an intermediary within the meaning of the Law, irrespective of whether its customers themselves acted illegally. The defendant was to be prohibited from interfering with the plaintiffs' intellectual property in general, without mentioning specific measures. It would be required by the injunction to achieve an outcome (namely the prevention of interference with the intellectual property right). The choice of the means of achieving that outcome was a matter for the defendant, which must do everything that could possibly and reasonably be expected of it. Whether a particular measure called for to prevent the interference was disproportionate, as the defendant maintained, was to be reviewed only in the 'enforcement process', in which the question whether all reasonable measures had been taken or whether a breach of the injunction remained an issue would be examined.

17. The defendant appealed on a point of law against that decision to the Oberster Gerichtshof (Supreme Court) and seeks the dismissal of all the plaintiffs' claims.

III – Reference for a preliminary ruling and procedure before the Court of Justice

18. The Oberster Gerichtshof stayed the proceedings and referred the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Is Article 8(3) of Directive 2001/29 to be interpreted as meaning that a person who makes protected subject-matter available on the Internet without the rightholder's consent (Article 3(2) of Directive 2001/29) is using the services of the access providers of persons seeking access to that protected subject-matter?

2. If the answer to the first question is in the negative: Are reproduction for private use (Article 5(2)(b) of Directive 2001/29) and transient and incidental reproduction (Article 5(1) of Directive 2001/29) permissible only if the original of the reproduction was lawfully reproduced, distributed or made available to the public?

3. If the answer to the first question or the second question is in the affirmative and an injunction is therefore to be issued against the user's access provider in accordance with Article 8(3) of Directive 2001/29: Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to prohibit in general terms an access provider from allowing its customers access to a certain website (thus without ordering specific measures) as long as the material available on that website is provided exclusively or predominantly without the rightholder's consent, if the access provider can avoid incurring coercive penalties for breach of the prohibition by showing that it has nevertheless taken all reasonable measures?

4. If the answer to the third question is in the negative: Is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to require an access provider to take specific measures to make it more difficult for its customers to access a website containing material that is made available unlawfully if those measures require not inconsiderable costs and can easily be circumvented without any special technical knowledge?

19. The plaintiffs, the defendant, the Republic of Austria, the Italian Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Commission submitted written observations.

20. At the hearing on 20 June 2013, the plaintiffs, the defendant, the Republic of Austria and the Commission presented oral argument.

IV – Legal assessment

A – Preliminary considerations and technical background

21. Few inventions have changed our habits and our media consumption as completely as that of the Internet. In the form familiar to us, the network, which is not yet 30 years old, (9) allows communication and data exchange worldwide. The new forms of communication have, within an extremely short space of time, become something which we take so much for granted that the United Nations Special Rapporteur on freedom of opinion and expression considers that the access to information that the Internet provides is essential in a democratic society. (10)

22. However, the new technologies also offer scope for abuse. That is particularly true in regard to the infringement of copyright on the Internet. Seldom does that involve such flagrant cases as the present. According to the plaintiffs, on the website kino.to, accessed daily by over four million users at times, over 130 000 film works were being offered for streaming or download without the rightholders' consent. The website operators profited from their offer with advertising revenues of several million euros annually before the website could be shut down in June 2011 following investigations by the Dresden prosecuting authority which were triggered by a whistleblower. None of the parties considers the content of the website to be lawful, its operators having, on the contrary, already been prosecuted under criminal law in the Federal Republic of Germany for unauthorised exploitation on a commercial basis of works protected by copyright. (11)

23. Rightholders fight against such websites which engage in massive copyright infringement. However, the people behind the websites and the ISPs which give them access to the Internet often operate abroad outside Europe or conceal their identity. Rightholders therefore try to achieve their objective by applying for injunctions against ISPs in order to compel them to block the infringing content offered. There is lively debate in many Member States regarding the admissibility in law of such blocking injunctions against ISPs. (12)

24. The fact that blocking of websites by ISPs is not technically unproblematic contributes to the complexity of the debate. (13) In that regard, the referring court mentions in particular the possibility of an IP block and a DNS block.

25. IP addresses are numerical addresses which are assigned to devices interlinked on the Internet in order thus to enable them to communicate with one another. (14) In the case of a blockade by an ISP, requests are no longer forwarded to the blocked IP address by that ISP's services. DNS (Domain Name System) blocks, on the other hand, concern domain names which are used instead of unwieldy IP addresses by users. DNS servers, which are operated by every ISP, 'translate' domain names into IP addresses. In the case of a DNS block, that translation is prevented. In addition to those two methods of blocking a website, an ISP's entire Internet traffic can be routed through a proxy server and filtered. However, all those methods can be circumvented. (15) According to the findings of the referring court, users can easily access the infringing website even without any special technical knowledge. The operators of the infringing website can also make it available under a different address.

26. In Directive 2001/29, the European Union legislature established special rules for the protection of copyright in the information society. In addition to harmonising the author's rights and the reproduction right (Article 2), the right of communication to the public of works and the right of making available to the public other subject-matter (Article 3), the distribution right (Article 4) and the exceptions and limitations (Article 5), the directive also provides that Member States are to provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in the directive, including, in particular, the possibility for the rightholder to be in a position to apply for an injunction against intermediaries 'whose services are used by a third party to infringe a copyright or related right' (Article 8, in particular Article 8(3)). Directive 2004/48 also requires Member States to provide for fair, equitable, effective, proportionate and dissuasive measures to ensure the enforcement of intellectual property rights (Article 3), including injunctions (Article 11).

27. At the same time, however, the legislature also reacted to the special significance of the infrastructure of the Internet and, in Articles 12 to 15 of Directive 2000/31, established rules on the liability of intermediary service providers in electronic commerce, which, according to recital 16 in the preamble to Directive 2001/29, are not affected either by Directive 2001/29 or, according to Article 2(3)(a) of Directive 2004/48, by Directive 2004/48 either. Despite those provisions, providers must in practice observe requirements which vary from one Member State to another when handling infringing content of which they are aware. (16)

28. Finally, the blocking of websites constitutes interference with a fundamental right and must also be examined from that point of view.

B – Admissibility

29. At first glance there could be doubt as to the admissibility of the present request for a preliminary ruling. The plaintiffs in the main proceedings are seeking an interim injunction intended to prohibit the defendant from providing access to a website which has no longer been accessible since as long ago as June 2011. To that extent, it may be doubted whether there is any need for legal redress.

30. The request for a preliminary ruling is admissible, however. In that respect, it should be borne in mind that the referring court is entitled, under Article 267 TFEU, to refer a question concerning the interpretation of European Union law if it considers that a decision on the question is necessary to enable it to give judgment. According to the Court's settled case-law, it is in principle for the national court before which the proceedings are pending to determine, having regard to the particular features of the case, the

need for a preliminary ruling and the relevance of the questions which it refers to the Court. (17)

31. The Court derogates from that principle only if it is 'quite obvious' (18) that the interpretation of European Union law is irrelevant to the pending case, the question referred is of a purely hypothetical nature (19) or indeed the dispute in the case at issue has been artificially created. (20)

32. According to the referring court, however, it is required to give its judgment on the basis of the factual position at the time of the decision at first instance, that is to say, at a time when the website at issue was still available. To that extent, a genuine dispute still exists, to which the questions referred are undoubtedly of relevance.

C – First question referred

33. The referring court wishes to know whether Article 8(3) of Directive 2001/29 is to be interpreted to the effect that the ISP of the person accessing a work infringing Article 3(2) of Directive 2001/29 can be regarded as an intermediary whose services are being 'used' by the copyright infringer.

34. If that is the case, an injunction pursuant to Article 8(3) of Directive 2001/29 can in fact also be issued against the ISP of the accessing Internet user and not only against that of the infringing website. In support of the lawfulness of such an injunction against that ISP, two lines of argument are, in theory, relevant, which form the background to the first two questions referred by the national court. Firstly – this is the reasoning behind the first question referred –, it could be argued that an injunction against the accessing user's ISP is permissible since that ISP is an intermediary whose services are being used by the operator of the infringing website to infringe copyright. Secondly – this is the background against which the national court raises the second question referred –, such an injunction could however also be justified on the basis that the ISP's customers accessing the infringing website are themselves acting illegally and thus the ISP's services are being used by its own customers to infringe copyright, which again falls within the scope of the provision.

35. The plaintiffs, Italy, the Netherlands, the United Kingdom and the Commission take the view that a person who makes a protected work available on the Internet without the rightholder's consent is using the services of the ISP of the person accessing the work. The referring court also inclines to that view. Only the defendant holds a different opinion.

36. I am also of the view that the user's ISP must be regarded as an intermediary whose services are used by a third party to infringe copyright. That follows from the wording, context, spirit and purpose of the provision. Before I analyse the provision, the previous case-law should be summarised.

1. The Court's previous case-law

37. The present case is not the first occasion on which the Court has been required to examine the role of an ISP as an intermediary whose 'services are used by a third party to infringe a copyright' within the meaning of Article 8(3) of Directive 2001/29.

38. In LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten, the Court held that '[a]ccess providers which merely provide users with Internet access, without offering other services such as email, FTP or file-sharing services or exercising any control, whether de iure or de facto, over the services which users make use of, must be regarded as "intermediaries" within the meaning of Article 8(3) of Directive 2001/29.' (21)

39. The Court's reasoning to support this was that the ISP provides the customer with a service which is capable of being used by a third party for copyright infringement. That also follows from recital 59 in the preamble to Directive 2001/29, since the ISP, in granting access to the Internet, makes infringing activity possible. Finally, that conclusion also follows from the aim of the directive, which consists in particular in ensuring effective protection of copyright. (22) Unlike the present case, that case concerned 'file-sharing systems' in which the ISP's users themselves also offer copyright-infringing works on the Internet.

40. The interpretation of Article 8(3) of Directive 2001/29 made in LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten was confirmed in the judgment in Scarlet Extended. There the Court further held that, under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, holders of intellectual property rights may apply for an injunction against intermediaries, such as, for example, ISPs, aimed not only at bringing to an end infringements already committed, but also at preventing further infringements. (23)

41. According to the Court's case-law, operators of online social networking platforms also fall under the concept of intermediary within the meaning of Article 8(3) of Directive 2001/29. (24)

42. In summary, it can therefore be stated that the case-law has already made it clear that ISPs may in principle be considered as 'intermediaries whose services are used by a third party to infringe a copyright' within the meaning of Article 8(3) of Directive 2001/29 and thus as addressees of the injunction mentioned in the provision. However, it still remains unclear, as the referring court correctly states, whether Article 8(3) of Directive 2001/29 also provides for an injunction against a ISP where the latter has granted Internet access, not to the copyright infringer itself, but only to the user accessing the infringing supply, that is to say, whether (in the words of the provision) the copyright-infringing supplier is using the services of the accessing user's ISP to infringe copyright.

2. Interpretation of the provision

a) Wording

43. The defendant is of the view that such an ISP cannot be considered as an addressee of an injunction pursuant to Article 8(3) of Directive 2001/29 since, in the absence of any contractual relationship with the

person infringing the copyright, that ISP has no possibility of exerting influence on him and the infringement is being committed by making the work available to the public without that ISP's involvement. The ISP's services are thus not being 'used by a third party to infringe a copyright' within the meaning of Article 8(3) of Directive 2001/29. Such a broad interpretation of the expression 'are used' would ultimately also include electricity suppliers, parcel services and others.

44. I am not persuaded by this argument. As already reiterated several times, in accordance with Article 8(3), an injunction must be available against intermediaries 'whose services are used by a third party to infringe a copyright'. The provision does not, therefore, explicitly require there to be a contractual relationship between the intermediary and the person infringing the copyright. (25)

45. However, it is questionable whether the services of the ISP of the user accessing infringing information are also being 'used' to infringe copyright by the person who made that information available to the public and has thus infringed Article 3(2) of Directive 2001/29.

46. Here the referring court and the defendant express doubts, since the factual preconditions for the application of Article 3 of Directive 2001/29 are already met as soon as the operator of the copyright-infringing website has made the page available on the Internet via its ISP.

47. It is certainly true that, from the time of its activation via the website operator's ISP, a website has already been 'ma[de] available to the public … in such a way that members of the public may access [it] from a place and at a time individually chosen by them' within the meaning of Article 3(2) of Directive 2001/29. However, that access is provided to the members of the public primarily by their own ISPs. Although it is true that a particular ISP could cease to exist without the website thereby ceasing to be available, as a collective the ISPs of Internet users are necessary in order for 'making available to the public' to be possible on the Internet. (26) The referring court correctly notes in this respect that making available only becomes factually relevant when access by Internet users becomes possible.

48. However, this means that, according to the wording of the provision, the services of the Internet user's ISP are also used by the infringer to infringe copyright, (27) regardless of whether the infringer itself is in a contractual relationship with the ISP.

b) Context

49. The context of the provision also supports that conclusion.

50. In this connection, reference must first be made to recital 59 in the preamble to Directive 2001/29, according to which 'the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network.'

51. The recital makes it clear that intermediaries are regarded by Directive 2001/29 as the best possible addressees of measures to terminate copyright infringements, primarily because they carry data 'in a network'. The wording makes it clear that this does not necessarily mean the first transmission of the data in a network, but also the further carrying in the network. This is even more clearly expressed in the English and Spanish versions of the directive: 'who carries a third party's infringement of a protected work … in a network' and 'que transmita por la red la infracción contra la obra … por un tercero'. The ISPs of the accessing users are therefore also included as possible addressees of the injunction.

52. The liability rules for intermediaries, which are laid down in Directive 2001/31, do not, in principle, preclude the issuing of an injunction under Article 8(3) of Directive 2001/29 against ISPs. It is true that Article 12 of that directive contains special rules on the liability of intermediary service providers as mere conduits of information. However, under paragraph 3 of that provision, those rules do not affect the possibility for a court or administrative authority of requiring the service provider to terminate or prevent an infringement.

53. The possibility of issuing an injunction against an ISP is also contained in Directive 2004/48 which, in the third sentence of Article 11, also provides for injunctions against intermediaries whose services are used by a third party to infringe an intellectual property right.

54. A schematic interpretation therefore also supports the view that Article 8(3) of Directive 2001/29 includes ISPs as possible addressees of an injunction even if they are not the infringer's ISP but ISPs of users accessing the copyright-infringing website.

c) Spirit and purpose

55. Finally, the spirit and purpose of the provision also supports an interpretation of Article 8(3) of Directive to the effect that the infringer uses the services of the accessing user's ISP.

56. Such an interpretation accords with the legislature's intention to ensure a high level of protection of copyright. (28) According to the legislature's intention, a 'rigorous, effective' system for the protection of copyright is necessary to ensure European cultural creativity. (29)

57. Directive 2001/29 is intended to ensure that high level of protection precisely in the face of the challenges posed by the information society. (30) As is apparent from recital 59 in the preamble to Directive 2001/29, in the light of technical developments, the legislature saw the intermediary conveying the information as often the most appropriate person to act against infringing information. The example of a website placed online by an ISP located abroad outside Europe illustrates why the intermediary is seen by the

legislature as being in such a key position. In such a case, the website and its operators often cannot be prosecuted. The intermediary remains as the appropriate starting point.

58. It is obvious that an intermediary who is not contractually linked to the copyright infringer can in no circumstances be held unconditionally responsible for the termination of the infringement. In the context of my proposals concerning the answers to the third and fourth questions referred, I shall make some remarks on conditions to be observed in that regard.

59. The answer to the first question referred is therefore that Article 8(3) of Directive 2001/29 must be interpreted as meaning that a person who makes protected subject-matter available on the Internet without the consent of the rightholder and thereby infringes rights under Article 3(2) of Directive 2001/29 uses the services of the ISPs of those persons who access that protected subject-matter. Since I am thus answering the first question referred in the affirmative, I shall proceed directly to my observations on the third question.

D – Third question referred

60. The third question stands out solely by its complexity in terms of its formulation. It links two elements. Thus, the referring court first asks whether it is compatible with European Union law, and in particular with fundamental rights, to prohibit an ISP judicially in quite general terms under Article 8(3) of Directive 2001/29 from allowing its customers access to a particular website on which content is made available exclusively or predominantly without the consent of the rightholders. The referring court describes the injunction so formulated as an 'outcome prohibition' ('Erfolgsverbot'), by which is meant that the addressee of the injunction must prevent a particular outcome (namely access to the website) without the measures to be taken for that purpose by the addressee of the injunction being specified. (31)

61. However, this question is couched – and this is the second element of the question – in particular procedural language. The ISP can avoid incurring coercive penalties for breach of the 'outcome prohibition' by showing that it has taken all reasonable steps to comply with it. The background to this element is found in the particular national rules for the issuing and enforcement of an injunction such as that described here by the referring court.

62. I shall first set out below the positions of the parties; then it would seem appropriate, for a better understanding, to summarise the national rules briefly and in simplified terms. Finally, the legal assessment of the question will follow.

1. The views of the parties

63. The parties have taken different positions on the question referred.

64. Italy, the Netherlands and the United Kingdom essentially consider it to be the task of the national courts to examine the nature of the injunction in the specific case in the light of certain requirements, in particular of the principle of proportionality and of a fair balance between the rights of the parties concerned. Italy and the Netherlands deal with the third and fourth questions referred together.

65. The plaintiffs and the Republic of Austria submit that an outcome prohibition, even in the specific procedural form in question, is compatible with European Union law. The plaintiffs put forward as their basis for this view the interest in an effective legal remedy against copyright infringement and the technologically neutral approach of the case-law. There is no objection to the procedure, since the national courts had examined the proportionality, namely the question whether the website at issue made content available exclusively or predominantly without the rightholders' consent, in the course of issuing the blocking injunction. The ISP must tolerate the uncertainty regarding the measures to be taken on account of the flagrant infringements involved and of the aim of openness to technology. The ISP's justified interests are taken into account in the enforcement process. Austria also regards the procedure as admissible in the interests of effective legal protection in the case of massive copyright infringements, particularly as the ISP is in a better position than the rightholder to choose the correct blocking measure.

66. The defendant and the Commission submit that an outcome prohibition in the procedural form described is not permissible. In the view of the defendant, a general outcome prohibition does not meet the requirements laid down by the case-law in relation to Article 8(3) of Directive 2001/29. The ISP is not in a contractual relationship to the infringer. The outcome prohibition would burden the ISP unreasonably with the task of assessing which blocking measures are reasonable, given that wrong assessments involve risks of liability as regards the outcome prohibition or towards its customers. The Commission sees a breach of the principle of proportionality in the inability of the national court to undertake a review of proportionality for lack of knowledge of the scope of the necessary measures. The possibility of avoiding incurring coercive penalties is no substitute for a proper review of proportionality when an injunction is issued.

2. Austrian law

67. For a better understanding of, in particular, the procedural language in which the question raised by the referring court is couched, some observations on Austrian law appear to me to be appropriate. (32)

68. For the protection of absolute rights, that is to say, rights which can be enforced by the holder as against anyone, (33) Austrian law provides in principle for the possibility of granting an outcome prohibition. According to the defendant's submissions, such an outcome prohibition is regularly imposed against the person directly interfering with an absolute right. It obliges the addressee to prevent a specific outcome from occurring. What means he uses to prevent the outcome is left to the addressee himself. Whether complete prevention of the outcome is possible at all and whether the measures necessary for that purpose take reasonable account of the parties' fundamental

rights is not examined before the outcome prohibition is issued. (34)

69. If the outcome to be prevented now occurs (that is to say, in the present case, a user gains access to the website), there is a breach of the outcome prohibition and a coercive penalty can be applied for (in the course of the enforcement process) against the defendant. (35) In that regard, according to the submissions of the Republic of Austria, the judgment creditor carries the burden of proof for the breach. Only now, in the course of the enforcement process, can the addressee of the outcome prohibition argue by bringing legal proceedings that he has taken all reasonable steps to comply with the outcome prohibition and thus avoid incurring a coercive penalty.

70. At first glance, it appears advantageous to examine the outcome prohibition and the particular procedural features separately in terms of their conformity with European law. However, the outcome prohibition in question here affords the possibility, subsequently in the enforcement process, of averting a coercive penalty. In that respect it constitutes (despite the particular procedural features which are formulated very disadvantageously for the ISP) a milder measure than a pure outcome prohibition. Disregarding the other particular procedural features, I shall examine below, as also formulated by the referring court, the outcome prohibition with a subsequent possibility of avoiding a penalty, in terms of its admissibility under European law.

3. Legal assessment

71. In my view, an outcome prohibition which does not specify the measures to be taken, issued against an ISP who is not contractually linked to the infringer, does not satisfy the requirements laid down by the case-law in relation to Article 8(3) of Directive 2001/29. The possibility of claiming in the subsequent enforcement process that the possible measures to comply with the prohibition are unreasonable does not protect such an outcome prohibition from the verdict that it is illegal under European Union law.

72. In principle, the conditions and modalities for the injunctions for which the Member States must provide under Article 8(3) of Directive 2001/29, as well as the conditions to meet and procedure to be followed, are a matter for the national law of the Member States. This follows from recital 59 in the preamble to Directive 2001/29 and, in similar form, from recital 23 in the preamble to Directive 2004/48. (36)

73. However, the Member States are not completely at liberty to design the injunctions at their own discretion. On the contrary, those national rules, and likewise their application by the national courts, must observe the limitations arising from Directives 2001/29 and 2004/48 and from the sources of law to which those directives refer. (37) Regard must always be had to the fundamental rights under Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6 TEU.

74. I shall examine in detail below three of those restrictions on the Member States' discretion and consider them in the sequence applied in the case-law cited: the interpretation of the directive with a view to an effective pursuit of its objectives, Article 15(1) of Directive 2000/31, and fundamental rights. The measure to be examined here fails in regard to the latter.

a) Effective protection of copyright

75. The first consideration to be borne in mind is that Directive 2001/29 must be interpreted in such a way that the objective pursued by it, that is, effective legal protection of copyright, may be achieved. (38) Thus, sanctions as provided for in Article 8(1) must be 'effective, proportionate and dissuasive'. (39) In addition, pursuant to Article 3 of Directive 2004/48, measures, procedures and remedies to enforce the intellectual property rights covered must be fair, equitable, effective, proportionate, dissuasive and not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays and be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. It follows from this inter alia that, as the Court has already held, Member States must take measures which contribute, not only to bringing to an end infringements already committed, but also to preventing further infringements. (40)

76. On the other hand, and as already indicated by the requirements of proportionality, fairness and equity, the measures must strike a fair balance between the various rights and interests of the parties, as the Court has repeatedly held, beginning with the Promusicae case. (41)

b) Article 15(1) of Directive 2000/31

77. Article 15(1) of Directive 2000/31, under which Member States are not to impose a general obligation on ISPs to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity, must also be complied with. Pursuant to recital 16 in the preamble to Directive 2001/29 and Article 2(3)(a) of Directive 2004/48 (Article 15(1), that provision remains unaffected by those directives. (42)

78. It would constitute such an inadmissible measure if the court had ordered the ISP actively to seek copies of the infringing page among other domain names or to filter all the data carried in its network in order to ascertain whether they constitute transfers of specific protected film works and to block such transfers. However, such a measure is not in issue in the present case. Rather, the referring court is required to decide on the blocking of a specific website. The measure therefore does not infringe Article 15(1) of Directive 2000/31.

c) Fundamental rights

79. The measure to be examined does however infringe the requirements relating to fundamental rights which, in accordance with the case-law, (43) are to be applied to injunctions pursuant to Article 8(3) of Directive 2001/29. In this respect, the measure is

neither 'fair and equitable' nor 'proportionate' within the meaning of Article 3 of Directive 2004/48.

80. Fundamental rights, which now, pursuant to Article 6(1) TEU, are guaranteed in the Charter with the same legal value as the Treaties, apply to the Member States when implementing European Union law. The Member States are therefore obliged, when adopting regulations pursuant to Article 8(3) of Directive 2001/29, to observe the fundamental rights guaranteed in the Charter. In particular, the national courts must also observe those rights. (44)

81. In the present case it must, on the one hand, be borne in mind that an injunction pursuant to Article 8(3) of Directive 2001/29 is intended to protect copyright. The protection of intellectual property is guaranteed as a fundamental right by Article 17(2) of the Charter. (45) According to the Court's case-law, however, that right is not inviolable and for that reason is not absolutely protected. Instead, the protection of the fundamental right to property, which also includes intellectual property, must be balanced against the protection of other fundamental rights, in order thus, in the context of measures adopted to protect copyright holders, to strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures. (46)

82. So far as concerns the ISP, against which a measure under Article 8(3) of the directive is being adopted, a restriction of freedom of expression and information (Article 11 of the Charter) must first be examined. Although it is true that, in substance, the expressions of opinion and information in question are those of the ISP's customers, the ISP can nevertheless rely on that fundamental right by virtue of its function of publishing its customers' expressions of opinion and providing them with information. (47) It must be ensured in that regard that the blocking measure does actually affect infringing material and that there is no danger of blocking access to lawful material. (48)

83. According to the case-law, regard must also be had, in particular, to the ISP's freedom to conduct a business, which is protected by Article 16 of the Charter. (49)

84. In this regard, according to the case-law, a fair balance is to be struck between the protection of those rights enforceable by the ISP and the intellectual property right. (50)

85. No such balance can be said to exist in the case of an outcome prohibition not specifying the measures to be taken, which is issued against an ISP.

86. As I have already mentioned at the beginning, there are a number of measures which can be considered for the purpose of blocking a website, that is to say, for possible compliance with the outcome prohibition. They include highly complex methods, such as diverting Internet traffic through a proxy server, but also measures which are less difficult to implement. The measures thus differ significantly as regards the degree to which they interfere with the fundamental rights of the ISP. Moreover, it is not inconceivable that full compliance with the outcome prohibition is impossible from a purely practical point of view.

87. As I have already observed, however, the outcome prohibition at issue in the present case is not a pure outcome prohibition but an outcome prohibition in which the addressee of the prohibition can claim, by bringing proceedings in the subsequent enforcement process, that he has taken all reasonable steps to comply with the outcome prohibition. The question arises whether that downstream opportunity for the addressee of the outcome prohibition to defend itself strikes the necessary balance.

88. That is not the case. In logical terms alone, such a 'restoration' of the necessary balance is excluded. According to the case-law, the balance between the fundamental rights must be observed when the injunction is issued. In this case it is expressly not being observed; instead many considerations relevant to fundamental rights will only be examined at a later stage. That is in breach of the rule that a balance is to be struck between the rights of the parties under Article 8(3) of Directive 2001/29.

89. An examination of the ISP's situation also shows that no balance between the fundamental rights is struck by that procedural opportunity. The ISP must suffer the issuing of an injunction against it, from which it is not apparent what measures it is required to take. If, in the interest of its customers' freedom of information, it decides on a mild blocking measure, it must fear a coercive penalty in the enforcement process. If it decides on a more severe blocking measure, it must fear a dispute with its customers. The reference to a possible opportunity to defend itself in the enforcement process does not in any way alter the ISP's dilemma. It is true that the originator can rightly refer to the danger of massive infringement of its rights by the website. However, in cases like the present, the ISP has no connection with the operators of the copyright-infringing website and has itself not infringed the copyright. To that extent, the measure to be examined cannot be said to strike a fair balance between the rights of the parties.

90. In the light of all the foregoing, the answer to the third question referred must be that it is not compatible with the necessary balance to be struck under Article 8(3) of Directive 2001/29 between the fundamental rights of the parties to prohibit an ISP, in quite general terms and without ordering specific measures, from allowing its customers access to a particular copyright-infringing website. This also applies if the ISP can avoid incurring coercive penalties for breach of that prohibition by showing that it has taken all reasonable steps to comply with the prohibition.

E – Fourth question referred

91. Once the referring court has dealt in the third question referred with the admissibility of a general outcome prohibition, its fourth question deals with specific blocking measures. The court asks whether ordering an ISP to take specific measures to make it more difficult for customers to access a website with

content made available illegally is consistent with a balancing of the parties' fundamental rights, in particular if the measures entail not inconsiderable costs and can also easily be circumvented without any special technical knowledge. In that regard, the referring court seeks only to be given guidelines for assessing the proportionality of specific blocking measures, since the facts of the case have not yet been definitively clarified in that respect.

92. Only the defendant is of the view that the ordering of specific blocking measures in the aforementioned circumstances is not compatible with the parties' fundamental rights. The plaintiffs, the Republic of Austria, the Italian Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Commission consider that such a specific blocking measure is not precluded in principle and give, in part, detailed particulars regarding the guidelines to be followed by national courts.

93. I also am of the view that a specific blocking injunction is not precluded in the circumstances referred to.

94. As already set out, the Court has laid down detailed guidelines for the examination of Article 8(3) of Directive 2001/29. One of the guidelines to be followed by national authorities and courts is that those bodies must strike a fair balance between the protection of the intellectual property right enjoyed by the holders of copyrights and the protection of the legal positions as regards fundamental rights of the ISP. The latter can, as stated above, rely in particular on the freedom of economic operators to conduct a business pursuant to Article 16 of the Charter and on freedom of expression and information (Article 11 of the Charter). According to the latter, in particular, no protected information may be covered by an access block. The referring court's question concerns the costs of the specific blocking measures to be taken by the ISP and the possibility of circumventing blocks. The referring court is thus expressly aiming at the review of proportionality. The aforementioned considerations are of relevance to the examination of both fundamental rights. In addition, Article 3(2) of Directive 2004/48 also requires that legal remedies for the enforcement of the intellectual property rights be proportionate. To avoid repetition, I shall confine my account below to Article 16 of the Charter, particularly since the referring court has not referred any questions concerning freedom of expression and information.

95. In Scarlet Extended and Sabam, the Court classified the injunction requiring an ISP to install a complicated, costly and permanent filtering system at its own expense in order to monitor data in its network as a serious infringement of the ISP's freedom to conduct its business. (51) A specific blocking measure involving not inconsiderable costs may admittedly constitute a lesser interference, but its aim and effect are nevertheless to restrict the right and it thus constitutes an intrusion into the sphere of protection (52) of the right. (53)

96. However, according to the Court's case-law, the freedom to conduct a business is not absolute, but must be viewed in relation to its social function and – including in the light of the wording of Article 16 of the Charter – is subject to interventions on the part of public authorities which 'may limit the exercise of economic activity in the public interest'. (54)

97. The requirements to be met in that regard are those of Article 52(1) of the Charter, according to which, inter alia, regard must be had to any limitations provided for by law and to observance of the principle of proportionality. I have already set out my views on limitations provided for by law in my Opinion in Scarlet Extended. (55) In the light of the wording of the question referred, I think it appropriate to confine my observations in the present case to proportionality.

98. According to the Court's settled case-law, for the observance of the principle of proportionality, measures adopted by Member States must 'not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'. (56) In substance, that corresponds to the rule in Article 52(1) of the Charter, under which limitations must be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

1. Appropriateness

99. The injunctions in question, by protecting copyright and thus the 'rights of others' within the meaning of Article 52(1) of the Charter, undoubtedly pursue a legitimate aim. However, it is questionable whether they are appropriate for the furtherance of the aim, that is to say, make a contribution to the attainment of the aim. (57) Doubts in this regard arise from the findings of the referring court, according to which blocking measures 'can easily be circumvented without any special technical knowledge'. Thus, on the one hand, the Internet users can circumvent the blocking measure without major difficulty and, on the other, the operators of the copyright-infringing website can provide the page in identical form under a different IP address and domain name.

100. In my view, however, those considerations are not sufficient for every specific blocking measure to be described as inappropriate. This applies first to the possibilities of circumvention by users. It is true that potentially many users may be in a position to circumvent a block. However, it by no means follows from this that every one of those users will actually circumvent it. Users who learn, as a result of a website's being blocked, that the page is illegal may well forgo access to the website. To presume an intention of the part of every user to gain access to a website despite a block would, in my view, mean that one assumes inadmissibly that every user intends to further a breach of the law. Finally, it should be observed that, while it is true that quite a few users may

be in a position to circumvent a block, far from all users would be in such a position.

101. Similarly, the possibility that the operator may provide the page in identical form under a different IP address and domain name does not, in principle, preclude the appropriateness of blocking measures. Firstly, here too, users, having had their attention drawn by the blocking measure to the illegality of the content, may forgo visiting the page. Secondly, users will have to resort to search engines in order to find the page. With repeated blocking measures, even a search via search engines will be difficult.

102. In the light of all the foregoing, a blocking injunction mentioning the specific blocking measure to be taken is not, in general, inappropriate for the purpose of furthering the aim of protecting the originator's rights.

2. Necessity and proportionality

103. The measure ordered must also not go beyond what is necessary to achieve the objective, (58) and, of several appropriate measures, recourse must be had to the least onerous. (59) Finally, the disadvantages caused by the measure must not be disproportionate to the aim pursued. (60)

104. It is the task of the national court to examine those requirements in relation to the measure envisaged in the specific case. Having regard both to the division of functions of the courts in the relationship of cooperation between the Court of Justice and the courts of the Member States and to the incomplete clarification of the facts and lack of particulars regarding the specific measure in the present case, it is neither appropriate nor possible to undertake a full examination of the necessity and proportionality here. Rather, the national court can only be provided with a few considerations. Moreover, these by no means constitute an exhaustive list of the factors to be weighed. Rather, the national court must fully weigh up all the relevant facts and circumstances of the specific case.

105. The first point to note in this regard is that the possibility of circumventing a blocking injunction which has been issued does not, in principle, preclude every blocking injunction. I have already stated the reasons for this under the section on appropriateness. The quantitative assessment of the foreseeable success of the blocking measure is one factor to be weighed.

106. According to the Court's case-law, the complexity, costs and duration of the measure must also be weighed together with the other factors. (61) In that regard, it must be borne in mind that the blocking measure in question will very probably not be a one-off blocking measure against the defendant. Rather, the court weighing these factors must assume that it may be a test case and in future numerous similar cases against every ISP may be dealt with before the national courts, so that numerous similar blocking injunctions may arise in future. Should a specific measure prove to be disproportionate in that regard in view of its complexity, costs and duration, it must be considered whether proportionality can be established by a partial or full assumption of the cost burden by the rightholder.

107. On the part of the plaintiffs, it must be borne in mind that the rightholder must not be rendered unprotected from a website massively infringing its rights. On the other hand, however, in cases such as the present, it should be noted that the ISP is not in a contractual relationship with the operator of the copyright-infringing website. As a consequence of that particular factual situation, a claim against the ISP is, admittedly, not completely out of the question, but the originator must, as a matter of priority, so far as is possible, claim directly against the operators of the illegal website or their ISP.

108. Finally, it must be borne in mind that Article 16 of the Charter protects commercial activity. A blocking injunction is, in that respect, not proportionate in any case if it jeopardises an ISP's business activity as such, that is, the commercial activity of making Internet access available. To that extent, an ISP can also rely on the social importance of its activity. As I have already stated in my introductory reflections, the access to information afforded by the Internet is today considered essential in a democratic society. The European Court of Human Rights ('the ECHR') has stated in that regard that a comparative law survey of twenty Council of Europe member states reveals that the right to Internet access is protected in theory by the constitutional guarantees applicable to freedom of expression and freedom to receive ideas and information. (62) In the view of the ECHR, the Internet plays an important role in enhancing access to news and facilitating the dissemination of information. (63)

109. In the light of all the foregoing, the answer to the fourth question referred must be that a specific blocking measure relating to a specific website, which is imposed on an ISP pursuant to Article 8(3) of Directive 2001/29, is not, in principle, disproportionate solely because it entails not inconsiderable costs but can easily be circumvented without any special technical knowledge. It is for the national courts, in a specific case, taking into account all relevant circumstances, to weigh the fundamental rights of the parties against one another and thus strike a fair balance between those fundamental rights.

V – Conclusion

110. On the basis of the reasons presented above, I propose that the Court should answer the questions referred by the Oberster Gerichtshof as follows:

1. Article 8(3) 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 must be interpreted to the effect that a person who makes protected subject-matter available on the Internet without the consent of the rightholder and thus infringes rights under Article 3(2) of Directive 2001/29 uses the services of the ISPs of those persons who access that protected subject-matter.

2. It is not compatible with the weighing of the fundamental rights of the parties that is necessary under

Article 8(3) of Directive 2001/29 to prohibit an ISP, in quite general terms and without ordering specific measures, from allowing its customers access to a particular copyright-infringing website. This applies even if the ISP can avoid incurring coercive penalties for breach of that prohibition by showing that it has taken all reasonable steps to comply with the prohibition.

3. A specific blocking measure relating to a specific website, which is imposed on an ISP pursuant to Article 8(3) of Directive 2001/29, is not, in principle, disproportionate solely because it entails not inconsiderable costs but can easily be circumvented without any special technical knowledge. It is for the national courts, in a specific case, taking into account all relevant circumstances, to weigh the fundamental rights of the parties against each other and thus strike a fair balance between those fundamental rights.

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1 – Original language: German.

2 – Case C-360/10 Sabam [2012] ECR I-0000 and Case C-70/10 Scarlet Extended [2011] ECR I-11959.

3 – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

4 – 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') (OJ 2000 L 187, p. 1).

5 – Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).

6 – BGBl. No 111/1936.

7 – BGBl. I No 152/2001.

8 – RGBl. No 79/1896.

9 – On the history of the Internet, Naughton, J., A Brief History of the Future, Phoenix, London, 2nd edition 2000.

10 – Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/66/290 of 10 August 2011, paragraph 87.

11 – See the judgment of the Landgericht Leipzig (Regional Court, Leipzig) of 11 April 2012, 11 KLs 390 Js.

12 – Heidinger, R., Die zivilrechtliche Inanspruchnahme von Access-Providern auf Sperre urheberrechtsverletzender Webseiten, ÖBl 2011, 153; Maaßen, S. and Schoene V., Sperrungsverfügung gegen Access-Provider wegen Urheberrechtsverletzung?, GRUR-Prax 2011, 394; Stadler, T., Sperrungsverfügung gegen Access-Provider, MMR 2002, 343; Kulk, S., Filtering for copyright enforcement in Europe after the Sabam cases, EIPR 2012, 791; Barrio Andrés, M., Luces y sombras del procedimiento para el cierre de páginas web, La Ley 48/2012, Castets-Renard, C., Le renouveau de la responsabilité délictuelle des intermédiaires de l'Internet, Recueil Dalloz 2012, 827.

13 – The technical analysis of the blocking injunction remains a matter for the referring court. See my Opinion in Case C-70/10 Scarlet Extended [2011] ECR I-11959, point 50. The technical realities of the Internet do however have a direct influence on its legal structures. Lessig, L., Code, version 2.0, Basic Books, New York, 2006.

14 – In detail, Opinion of Advocate General Kokott in Case C-275/06 Promusicae [2008] ECR I-271, points 30 and 31.

15 – The individual filtering methods are described in detail in the order of the Handelsgericht Wien, the court hearing the case at first instance. See also Ofcom, 'Site Blocking' to reduce online copyright infringement, 27 May 2010.

16 – COM(2011) 942 of 11.1.2012, pp. 14 and 15.

17 – Case 83/78 Redmond [1978] ECR 2347, paragraph 25, and Case C-134/94 Esso Española [1995] ECR I-4223, paragraph 9.

18 – Case 126/80 Salonia [1981] ECR 1563, paragraph 6.

19 – Case C-83/91 Meilicke [1992] ECR I-4871, paragraphs 31 to 34.

20 – Case 104/79 Foglia [1980] ECR 745, paragraphs 10 and 11.

21 – Order in Case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten [2009] ECR I-1227, paragraph 46).

22 – Order in LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten, cited above in footnote 21, paragraphs 43 to 45.

23 – Scarlet Extended, cited in footnote 2 above, paragraphs 30 and 31. See also Case C-324/09 L'Oréal and Others [2011] ECR I-6011, paragraph 131.

24 – Sabam, cited in footnote 2 above, paragraph 28. See, with regard to the third sentence of Article 11 of Directive 2004/48, L'Oréal and Others, cited above in footnote 23, paragraph 143.

25 – It should be mentioned that, in its Report on the application of Directive 2004/48, the Commission notes that intermediaries with no direct contractual relationship or connection with the infringer are included within its scope (COM(2010) final 779 of 22 December 2010, p. 6).

26 – See also my Opinion in Case C-173/11 Dataco and Others [2012] ECR I-0000, point 58, on the concept of 'making available to the public' in the context of the concept of 're-utilisation' under Directive 96/6/EC.

27 – Also according to the judgment of the High Court of Justice, Chancery Division, of 28 July 2011, Twentieth Century Fox v. British Telecommunications, paragraph 113, confirmed in the judgment of the High Court of Justice, Chancery Division, of 28 February 2013, EMI Records v. British Sky Broadcasting, paragraph 76.

28 – Recitals 4 and 9 in the preamble to Directive 2001/29.
29 – Recital 11 in the preamble to Directive 2001/29.
30 – Article 1(1) of Directive 2001/29.
31 – See Klicka, T. in Angst, P. (editor), Kommentar zur Exekutionsordnung, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2nd edition 2008, § 355 paragraph 4.
32 – The description of the national law is based, unless indicated otherwise, on the referring court's account and on the parties' explanations which do not contradict it.
33 – In Austria, these include rights in rem, personality rights and incorporeal rights, Holzammer, R. and Roth, M., Einführung in das Bürgerliche Recht mit IPR, Springer, Vienna, 5th edition 2000, p. 29.
34 – The plaintiffs point out that, in issuing the outcome prohibition, the court at least examined whether access to lawful information might be noticeably affected by the block. A review of proportionality already takes place in that respect at the time of deciding on the access block or in several stages or twice also in the enforcement process. However, according to the information provided by the referring court and which is relevant for the Court of Justice, the appropriateness and reasonableness, at least, of the measures available to the defendant for the purpose of complying with the outcome prohibition are not examined.
35 – The enforcement of the outcome prohibition takes place pursuant to Paragraph 355 of the Exekutionsordnung.
36 – Scarlet Extended, cited above in footnote 2, paragraph 32, and Sabam, cited above in footnote 2, paragraph 30. The same applies to the third sentence of Article 11 of Directive 2004/48 (L'Oréal and Others, cited above in footnote 23, paragraph 135). See also recital 45 in the preamble to Directive 2000/31, according to which 'the possibility of injunctions of different kinds' against intermediary service providers remains unaffected, including, in particular, the possibility of court orders requiring the removal of or disabling of access to illegal information.
37 – Scarlet Extended, cited above in footnote 2, paragraph 33, L'Oréal and Others, cited above in footnote 23, paragraph 138.
38 – Order in LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten, cited above in footnote 21, paragraph 45, and L'Oréal and Others, cited above in footnote 23, paragraph 136.
39 – See recital 58 in the preamble to the directive.
40 – Sabam, cited above in footnote 2, paragraph 29, Scarlet Extended; cited above in footnote 2, paragraph 31; and L'Oréal and Others, cited above in footnote 23, paragraph 144 (concerning the third sentence of Article 11 of Directive 2004/48).
41 – Case C‑275/06 Promusicae [2008] ECR I‑271, paragraphs 65 to 70, and L'Oréal and Others, cited above in footnote 23, paragraph 143.
42 – Sabam, cited above in footnote 2, paragraphs 32 and 36 to 38, and Scarlet Extended, cited above in footnote 2, paragraph 36.
43 – Sabam, cited above in footnote 2, paragraph 39, and Scarlet Extended, cited above in footnote 2, paragraph 41.
44 – See Promusicae, cited above in footnote 41, paragraph 68.
45 – See also Case C‑479/04 Laserdisken [2006] ECR I‑8089, paragraph 65.
46 – Sabam, cited above in footnote 2, paragraphs 41 to 43, and Scarlet Extended, cited above in footnote 2, paragraphs 43 to 45.
47 – See Öztürk v. Turkey, no 22479/93, § 49, ECHR 1999-VI.
48 – See, with regard to the collateral effect of a blocking measure, Yildirim v. Turkey, no. 3111/10, ECHR 2012.
49 – Sabam, cited above in footnote 2, paragraph 44, and Scarlet Extended, cited above in footnote 2, paragraph 46. With regard to further fundamental rights which may be relevant in the context of blocking injunctions, I refer to my Opinion in Scarlet Extended, points 69 to 86.
50 – Sabam, cited above in footnote 2, paragraphs 43 and 44, and Scarlet Extended, cited above in footnote 2, paragraphs 45 and 46.
51 – Sabam, cited above in footnote 2, paragraph 46, and Scarlet Extended, cited above in footnote 2, paragraph 48.
52 – I have set out detailed observations on the scope of the right under Article 16 of the Charter in my Opinion in Case C‑426/11 Alemo-Herron and Others [2013] ECR I‑0000, points 48 to 58. See also Oliver, P., What Purpose Does Article 16 of the Charter Serve, in: Bernitz, U. and others (editors), General Principles of EU Law and European Private Law, Wolters Kluwer, Alphen aan den Rijn, 2013, p. 281; Jarass, H., Die Gewährleistung der unternehmerischen Freiheit in der Grundrechtecharta, EuGRZ 2011, 360.
53 – See Article 52(1) of the Charter; Case C‑219/91 Ter Voort [1992] ECR I‑5485, paragraph 37; and Case C‑200/96 Metronome Musik [1998] ECR I‑1953, paragraph 28.
54 – Case C‑283/11 Sky Österreich [2013] ECR I‑0000, paragraphs 45 and 46; see also Joined Cases C‑184/02 and C‑223/02 Spain and Finland v Parliament and Council [2004] ECR I‑7789, paragraphs 51 and 52, and Case C‑544/10 Deutsches Weintor [2012] ECR I‑0000, paragraph 54.
55 – Opinion in Scarlet Extended, cited above in footnote 13.
56 – Case C‑2/10 Azienda Agro-Zootecnica Franchini and Eolica di Altamura [2011] ECR I‑6561, paragraph 73; Case C‑28/05 Dokter and Others [2006] ECR I‑5431, paragraph 72; and Case C‑434/02 Arnold André [2004] ECR I‑11825, paragraph 45.

57 – Jarass, H., Charta der Grundrechte der Europäischen Union, C.H. Beck, Munich, 2nd edition 2013, Article 52, paragraph 37.

58 – Case C‑265/08 Federutility and Others [2010] ECR I‑3377, paragraph 36.

59 – Case C‑375/96 Zaninotto [1998] ECR I‑6629, paragraph 63.

60 – Zaninotto, cited above in footnote 59, paragraph 63.

61 – Sabam, cited above in footnote 2, paragraph 46, and Scarlet Extended, cited above in footnote 2, paragraph 48.

62 – Yildirim v. Turkey, no. 3111/10, § 31, ECHR 2012.

63 – Yildirim v. Turkey, no. 3111/10, § 48, ECHR 2012; Times Newspapers Ltd. v. United Kingdom, nos. 3002/03 and 23676/03, § 27, ECHR 2009.