

By Alain Strowel, 30 September 2014

When solving copyright cases requires to balance fundamental rights



Copyright cases until recently were mainly decided with reference to the rules contained in the statutes (the relevant Copyright Acts) and on the basis of the principles deriving from case law. Under the influence of the Court of Justice of the EU (CJEU) and of the European Court on Human Rights (ECtHR), a growing number of copyright cases are now assessed by balancing several fundamental rights.

In particular, the CJEU was asked to balance several fundamental rights in actions against online intermediaries for copyright infringements committed by third parties. In [SABAM v. Scarlet](#) (case C-70/10; see also [SABAM v. Netlog](#), case C-360/10), the CJEU defined the outer limits for “injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right” (Art. 8(3) of the [2001/29 Copyright Directive](#)). On 27 March 2014, the Court of Justice in [UPC Telekabel](#) (case C- 314/12) went further in delineating the requirements for copyright injunctions against online access providers and the implementation of filtering measures.

In the last years, the ECtHR ruled three times on the proportionality of some interferences with the freedom of expression online resulting from the protection and enforcement of copyright. One case ([Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden](#), 18 Febr. 2013) involves the operators of the infringing website *The Pirate Bay*. In [Ashby Donald v. France](#) (10 Jan. 2013), the question was whether the sanctions imposed by the French courts on the managers of a website containing photographs of fashion shows were passing the test of proportionality for restricting freedom of expression. In a March 11, 2014 decision ([Yaman Akdeniz v. Turkey](#)), the ECtHR considers as inadmissible the request made by the user of musical websites to which access has been blocked.

Here are a list of questions for you to consider at the light of (at least) the two decisions [UPC Telekabel](#) and [Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden](#):

- What are the fundamental rights that are most often referred to by the Court in Luxembourg and by the Court in Strasbourg?
- Is Article 10 of the ECHR applicable to the Internet in the same way as it is applicable to other means of communication?

- Does the protection of property as a fundamental right play a role in the balancing made by the CJEU and the ECtHR?
- Is it possible to rely on other fundamental rights to support the view that copyright is a fundamental/human right?
- Do you see a difference in the way the balancing is done by the CJEU and the ECtHR?
- What are the implications of a reasoning based on the balancing of fundamental right?
- As a result of those decisions, does copyright move from the sphere of private law to the realm of public law?

You do not necessarily have to respond to all those questions, you can select a few of them. What is important: your text should be concise, well-structured and to the point. Also it should flow well.

You do not have to be too ... balanced in your response!

(You might as well take into account this additional question: Do you think the decision *Akdeniz* is completely in line with the previous case law of the ECtHR?).

