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Copyright and ISP Liability

- The Future Implications of Recent ECJU Decisions

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Providers or publishers

- Technical (hosting) service providers
 - Internet providers
 - Online social networks
 - Aggregator internet sites
 - Search engines
 - Online marketplaces
 - Etc
- Content publishers
 - Newspapers
 - Companies websites
 - Etc



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Copyright Infringements

- Legal framework
 - Directive on Copyright in the information society (2001/29/EC)
 - Reproduction
 - Communication to the public
 - Contributory liability



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Copyright Infringements

- Filtering
- Take down
- Stay down
- Blocking
- Etc



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Copyright Infringements

- Legal definition of intermediaries
 - ISPs and Art. 8(3) of the Copyright Directive



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Copyright Infringements

- Filtering
 - CJEU C-360/10 SABAM v. Netlog [2012]
 - CJEU C-70/10 Scarlet v. SABAM [2011]
- Blocking
 - AG opinion C-314/12 UPC Telekabel v. Constantin Film [Nov 2013]



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Filtering

- CJEU C-360/10 SABAM v. Netlog [2012]
- CJEU C-70/10 Scarlet v. SABAM [2011]



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Filtering

- Legal framework
 - Directive on copyright in the information society (2001/29/EC)
- v.
- Directive on electronic commerce (2000/31/EC)
- Directive on the enforcement of IPR (2004/48/EC)
- Directive on individuals personal data (95/46/EC)
- Directive on privacy in the electronic communications sector (2002/58/EC)



Filtering

- CJEU C-360/10 SABAM v. Netlog [2012] and C-70/10 Scarlet v. SABAM [2011]
 - “[I]njunctions under Article 8(3) of the Copyright Directive must respect the prohibition on general monitoring obligations for ISPs under Article 15 of the E-Commerce Directive”
 - According to Article 3 of the IPR Enforcement Directive, measures must be:
 - fair,
 - proportionate, *and*
 - not impose excessive costs



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Filtering

- Filtering system = preventive monitoring
 - Identify
 - Within all of the electronic communications of all its customers
 - Determine
 - Which files are stored and made available to the public unlawfully
 - Prevent
 - Block file-sharing/uploading etc.



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Filtering

- A delicate balancing act

Copyright \longleftrightarrow Other fundamental rights

- IPRs not absolutely protected
- IPRs must be balanced against the protection of other fundamental rights



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Filtering

- The balancing act
 - General monitoring is prohibited
 - Art. 15(1) E-Commerce Directive 2000/31
 - Serious infringement of the freedom to conduct its business
 - Art. 16 Charter, cf. 3(1) IPR Enforcement Directive 2004/48
 - Infringe the customers right to protection of their personal data and their freedom to receive or impart information
 - Art. 8 and 11 Charter



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Filtering

- ISPs cannot be required to install filtering systems if
 - Applies indiscriminately to all its customers,
 - As a preventive measure
 - Exclusively at its expense, *and*
 - For an unlimited period



Blocking

- AG opinion C-314/12 UPC Telekabel v. Constantin Film [Nov 2013]
 - An ISP can also be regarded as an intermediary under Art. 8(3) of the Copyright Directive
 - ISPs services can used by a third party to infringe copyright
 - ISPs can be granted injunctions
 - “That is apparent from the wording, context, spirit and purpose of the provision of EU law”



Blocking

- AG opinion C-314/12 UPC Telekabel v. Constantin Film [Nov 2013]
 - ISPs can be required to block access by its customers to a website which infringes copyright if:
 - specific blocking measure
 - a specific website
 - But, in every specific case:
 - the fundamental rights of the parties has to be weight against each other
 - has to strike a fair balance



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Blocking

- AG opinion C-314/12 UPC Telekabel v. Constantin Film [Nov 2013]
 - ISPs responsibilities
 - is not “in principle” disproportionate even if it is expensive and can easily “be circumvented without any special technical knowledge”



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Implications for the future

- Injunctions claimed by copyright holders to protect their rights are not absolute
 - Requires a delicate balancing against the protection of both customers and companies fundamental rights
- Copyright holders cannot delegate economic and legal responsibility of combating copyright piracy to online operators!



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Implications for the future

- But, what if:
 - Partly monitoring the communication?
 - Cf. Specific blocking measures
 - Or all communication under a limited time period?
 - Copyright holders pay for the monitoring?
 - Cf. AG opinion Case 314/12



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Thank you!

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