

The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective

Elena Izyumenko

CEIPI, University of Strasbourg

This paper analyses the influence of the right to freedom of expression and information on European copyright law in the digital context. Drawing on the practice of the two major European courts—the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)—it begins by exploring how this fundamental right shapes both the scope of copyright protection in Europe and what is traditionally termed as “exceptions and limitations” to exclusive rights. Specifically, a long-standing practice of the ECtHR, in accordance with which copyright in turn may be viewed as an exception to freedom of expression and must hence be narrowly interpreted, is scrutinized. On a related note, a recent recourse by the CJEU to the language of “users’ rights” is examined, inasmuch as it allows for a reconceptualization—in a normative framework of freedom of information—of copyright “exceptions” not as the exceptions as such, but as the equal rights of users of protected subject-matter. In this regard, the *locus standi* of “mere users” of online content and the somewhat diverging approaches of the Strasbourg and Luxemburg courts toward granting thereof are addressed. The paper then turns to discuss the recent recourse by the European courts to freedom of expression as a means to define the role of internet service providers in digital copyright enforcement, implicating issues ranging from the providers’ liability in respect of the third-party content posted online to the often far-reaching injunctions imposed on non-liable intermediaries. Several conclusions are drawn from the above analysis, reflecting on the potential of freedom of expression and information to inform the development of European standards applicable in the field of digital copyright.

Keywords freedom of expression; copyright; users’ rights; Internet

Over the past few years, European courts, responsive to the growing expansion of copyright protection, and notably its enforcement mechanisms in the digital environment, have been devoting increased attention to freedom of expression and information as a mechanism of external constraints on copyright law. The present paper analyses this recent dynamic, which deviates from the conventional approach toward copyright law as a legal regime wherein any potential conflict with freedom of expression has been already resolved internally through the idea/expression dichotomy and the so-called “exceptions and limitations” to copyright. The first section outlines the recent case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), explicitly dislodging the copyright’s immunity from external free speech checks. The newly emerging concept of “users’ rights” engendered by this approach is scrutinized in section two. The third and final section concentrates on how the right to freedom of expression is influencing the role of online intermediaries in copyright enforcement process—an issue that is now at the center of policy discussions on the future of EU copyright.¹

Freedom of Expression as an External Limit to Copyright

The ECtHR: An Exception-to-Rule Paradigm

Whereas no later than at the end of 90s the European Commission of Human Rights was contending on the unusualness—if not the lack of competence—for it to resolve a conflict between copyright and freedom of expression,² recent years have seen a notable increase in the involvement of Strasbourg judges in regulating copyright disputes.

Since 2013, the Court has rendered three important copyright decisions in which the freedom of expression and information was at stake. Not without a reason, all these cases centered upon unauthorized dissemination of copyright-protected works on the internet.

The first case, *Ashby Donald and Others v France*, concerned the conviction in France of the three fashion photographers for copyright infringement, following unauthorized online publication of photographs of designers' clothes taken by one of them at the fashion shows in Paris.³ The ECtHR, which had been called upon to decide whether the posting of the photographs on an internet fashion magazine managed by two of the applicants amounted to a proportionate exercise of freedom of expression, categorically admitted the latter's relevance to the dispute at issue. The Court noted in particular that the publication of photographs, even for sale and in breach of national copyright laws,⁴ was covered by freedom of expression, guaranteed under Article 10 of the European Convention on Human Rights (ECHR) (Council of Europe, 1950). The applicants' convictions hence constituted an *interference* with that provision.⁵ Although no violation was found on the merits of the case,⁶ the relevance of *external* freedom of expression checks and balances to the disputes traditionally conferred exclusively to copyright law was clearly admitted by the ECtHR. The Court has also advanced a number of criteria for shaping—from the freedom of expression perspective—the so-called “exceptions and limitations” to copyright protection,⁷ but also the scope thereof.⁸

Shortly following the above developments, yet another case on conflicting copyright and freedom of expression was rendered by the Strasbourg Court in early 2013.⁹ The issue revolved this time around notorious The Pirate Bay file-sharing service, the co-founders of which were convicted in Sweden for complicity to commit crimes in violation of the Swedish Copyright Act in that they had furthered, through their service, the other persons' infringement of copyright concerning music, films and computer games. Similarly to the French case, the ECtHR was of the opinion that domestic copyright regulation that resulted in finding the applicants liable for their involvement in the running of a website interfered with Article 10 ECHR. In the Court's view, insofar as The Pirate Bay provided—albeit in breach of copyright law—the means for others to impart and receive information, running of this file-sharing platform was afforded Article 10 protection. Nevertheless, no violation of the applicants' expression was established this time either, for reasons largely similar to those advanced by the Court in *Ashby Donald*.¹⁰

Most recently, in a case of *Akdeniz* from March 2014, the ECtHR was confronted with an issue of blocking access in Turkey to the websites *myspace.com* and *last.fm* because they were disseminating musical works in violation of copyright.¹¹ The applicant, who was a regular user of the websites, complained about the collateral effects of blocking, which amounted, according to him, to a disproportionate response based on Article 10 ECHR. Whereas admitting the need to balance in the cases such as this one the possibly conflicting copyright and freedom to receive information,¹² the Court nevertheless stated that the sole fact that the applicant—like other Turkish users of the two music-sharing websites—had been indirectly affected by blocking did not suffice for him to be regarded as a “victim” for the Convention purposes.¹³ The Court noted in particular that the blocking did not concern the applicant's own website¹⁴ and neither did it deprive the applicant of other—legitimate—ways of accessing the musical works at issue.¹⁵

Although in all these cases the applicants lost, the above decisions share one important feature—an approach to copyright as an *exception* to the right to freedom of expression. This approach, rather natural to Convention organs, inasmuch as the case is lodged under Article 10 ECHR, might strike as unusual a European copyright scholar, accustomed to a quite opposite perspective: of copyright being a rule, with all unauthorized uses thereof constituting (at most) an “exception” or “limitation” to it. In accordance with this latter approach, repeatedly echoed by the CJEU, any derogation from the “general principle” of copyright protection “must be interpreted strictly”.¹⁶

The new, Strasbourg Court-driven perspective on copyright law clearly challenges this premise. Coming as a response to a failure by the European legislator to provide a flexible framework to regulate the

rapidly changing technological reality, it calls for the reconsideration of what is traditionally termed as “exceptions” to copyright protection. This is all the more so in the light of the long-established recognition in Europe of the need to construe “strictly” and with particular vigilance any exception to freedom of expression.¹⁷ Considering that many copyright exceptions derive their legitimacy from this fundamental right and that copyright itself has been recognized by the ECtHR as an exception to freedom of expression,¹⁸ a strictly restrictive approach of the EU legislator to copyright protection does not sustain the human rights test.

The CJEU: A “Fair Balancing” Exercise

Although the rhetoric of “strict interpretation” of copyright exceptions occasionally re-occurs in the Luxemburg Court’s case law, the parallel tendency of “fair balancing” of all competing rights and interests at stake seems to be gradually taking place of this restrictive approach. It is also “mainly from the angle of fundamental rights”¹⁹—and not the secondary copyright legislation—that the examination of many intellectual property (IP) disputes implicating the rights of users in the digital context starts being conducted by the Luxemburg judges.

In one of the first of such cases, *Scarlet Extended v SABAM*, the CJEU held that a fair balance had to be struck between copyright and the internet users’ freedom of information when it concerned an injunction requiring an internet access provider to filter and subsequently block all electronic communications on its services liable to infringe copyright.²⁰ In the Court’s view, adopting such an injunction, which was to be applied indiscriminately to all users and for an unlimited period of time, would have amounted to a violation of Article 11 (freedom of expression and information) of the EU Charter (European Union, 2000),²¹ as it might not have distinguished properly between unlawful and lawful content, with the potential result of blocking lawful communications.²²

A similar conclusion was reached by the Court in *SABAM v Netlog* with regards to injuncting the hosting provider (in this case—the owner of an online social networking platform), to filter, with a view to blocking, information stored on its services by its users in order to prevent any copyright-infringing activity.²³ For the reasons analogous to those advanced in *Scarlet Extended*, the effects of such injunction were likewise regarded by the Court as violative of the information rights of users.²⁴

Most recently, in *UPC Telekabel*, which—alike *Akdeniz* from the Strasbourg Court—revolved around an issue of website blocking for the purpose of copyright enforcement, the Court once again highlighted the need to *externally* balance copyright with freedom of information.²⁵ The case concerned ordering a major Austrian internet access provider, UPC Telekabel Wien GmbH, to block access of its customers to the website *kino.to*, offering the copyright-protected films for streaming or download without the consent of the rightholders. The crux of the case was in that the order was result-oriented, that is to say—it did not specify the means by which the internet service provider (ISP) should have achieved the blocking.

The CJEU held that such an order (the so-called “outcome prohibition”)²⁶ was legitimate in principle, but made it necessary to reconcile, among others, copyright with freedom of information of internet users.²⁷ In order to achieve such a reconciliation, the Court held, the blocking should have been “strictly targeted” in the sense of not unnecessarily depriving internet users of access to legitimate content.²⁸ Furthermore, the CJEU was of the opinion that the users were to be accorded standing before the national courts once the implementing measures liable to infringe their information rights were known.²⁹

As could be seen from *UPC Telekabel* and other cases discussed above, the CJEU, alike the ECtHR, is repeatedly taking a position that the freedom of expression interests should be accounted for in the copyright discourse, especially as far as the digital environment is concerned.³⁰

The Rights of Users

Substantive Content

Much in line with the reconceptualization by both European courts of the place of freedom of expression in copyright sphere, the so-called “users’ rights”—understood as the equal rights of users of protected subject-matter, and not as mere defences in a copyright infringement suit—are progressively taking shape in European copyright law and policy.³¹

Starting with *Padawan* in 2010,³² the CJEU has been repeatedly stating, with reference to recital 31 in the preamble to InfoSoc Directive,³³ that exceptions to copyright “seek to achieve a ‘fair balance’ between, in particular, the rights and interests of authors on the one hand, and the *rights of users of protected subject-matter* on the other”.³⁴ In most of such cases, it was freedom of expression and information that gave a substantive content to the rights of users.³⁵ In *Deckmyn*, for example, it was “not disputed” by the CJEU that the parody exception that was at stake in that case was “an appropriate way to express an opinion”.³⁶ It hence followed that the rights of authors were to be balanced not against the *exception* for parody, but against the *right* to “freedom of expression of the user of a protected work” relying on that exception.³⁷ Similarly, in *Painer* (on quotation exception), it was from the angle of “fair balancing” of the users’ *right* to freedom of expression against the reproduction right conferred on authors that the situation at issue was resolved.³⁸ Most recently, in *Ulmer* from September 2014, the CJEU characterized the right to digitize works contained in the publicly accessible libraries collections as an “*ancillary right*” that such establishments enjoyed as the *users* of protected works wishing to communicate them to the public.³⁹

Procedural Guarantees: Users’ Locus Standi

However, perhaps the most distinct recognition of users’ rights came with the Luxembourg Court’s judgment in *UPC Telekabel*. As noted above, the CJEU was of the opinion in that case that, in order to safeguard the freedom of information of the ISP’s customers, “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”.⁴⁰ A hereby recognized *locus standi* of users came as a vivid illustration of the important differences between safeguarding the information freedoms through the “mere” defences to copyright infringement or by means of “rights”—that is to say, legal claims calling, among others, for procedural safeguards of their implementation.

Securing that the users are granted standing on free expression grounds, particularly in the context of progressively expanding copyright enforcement measures, is indeed much needed in the democracy-sensitive and rapidly changing online environment. As observed by Article 19, a reputable independent human rights organization working to protect and promote the right to freedom of expression, the proper “mechanisms for users to appeal against decisions by ISPs to censor user-generated content” are currently lacking in the EU (ARTICLE 19, 2016).⁴¹ Majority of national courts habitually undertake proportionality analysis with regards to the rights of copyright holders, ISPs and (at most) infringers, but not the affected users. As such, it is submitted that in some countries “extraordinary circumstances seem to be required before a court would take third parties into account when balancing interests” (Savola, 2014, paragraph 54).⁴² The CJEU had since *UPC Telekabel* obliged the national procedural rules to remedy this situation, albeit within a quite limited context of the result-tailored prohibitions.

Likewise noteworthy in this respect is an Opinion of the Advocate General Jääskinen in *L’Oréal and Others*, even though the case concerned trademarks and not copyright. As pointed therein, freedom of expression and information “entails that the protection of trade mark proprietor’s rights in the context of electronic commerce may not take forms that would infringe the rights of innocent users of an electronic marketplace or leave the alleged infringer without due possibilities of opposition and defence.”⁴³

Despite the clear growth in attention to the rights of users in IP cases, it must, however, be admitted that the European law still leaves a fair share of controversy on the issue of users’ *locus standi* on free

expression grounds. First, as already mentioned, the *UPC Telekabel* Court envisaged a mandatory provision on the users' standing only with regard to a quite peculiar construction of an outcome prohibition and alike. Under the procedural laws of certain Member States comparable types of orders are simply not envisaged (Angelopoulos, 2014; Husovec, 2014, p. 633). For those States the question of the users' capacity to bring proceedings challenging the measure-specific blocking orders might still need to be fought out in their respective courts.⁴⁴

Finally, the recent judicial practice of the ECtHR does not add much clarity on the users' rights issue. Specifically, the Strasbourg Court's decision in *Akdeniz* (discussed above) suggests that no victim-status can be asserted by the "mere user" of a website being blocked for breach of copyright.⁴⁵ According to the ECtHR, the *locus standi* seems to be available for those only who *own* the websites affected⁴⁶ or actively impart information on the internet,⁴⁷ and not those who "simply" *use* such websites. This stance might, however, appear in contradiction to that of the CJEU in both *UPC Telekabel* and *SABAM* cases, all of which indeed concerned the effects of website blocking on the rights of the "mere" users to freely receive and impart information. Moreover, in *SABAM* cases the balancing of interests at issue even resulted in favouring the rights of users over those of the rightholders.

The ISPs Role in Digital Copyright Enforcement: Toward a Private-Party Censorship?

As could be noted from above, much of the issues at the intersection of copyright and freedom of expression in the digital environment arise from the rapidly evolving techniques of copyright enforcement online,⁴⁸ most of which are characterized by shifting enforcement burdens on the intermediaries.⁴⁹

The mechanisms through which the ISPs are getting more actively involved in the digital copyright enforcement process boil down, very generally, to secondary liability and injunctive relief. Under the former, the ISPs may be held liable for the infringing acts of their users, whereas injunctive relief insures that intermediaries would cooperate in terminating or preventing an online infringement, even if no ground for their own liability can be established.

Both the secondary liability and injunctions regimes, however, pose a risk of the private-party censorship "chilling" freedom of expression online. Thus, uncertainties surrounding the circumstances under which the ISPs can be held liable for the third-party infringement of copyright provide strong incentives to overblock, just in case, substantial portions of legitimate content. Analogously, ambiguity as to the scope of injunctions that can reasonably be required from intermediaries in order to "effectively" enforce copyright and associated fears of coercive penalties for non-compliance, may lead to additional self-censorship by the ISPs.

It is, therefore, not surprising that the courts in Europe had had recourse to the right to freedom of expression and information in testing the boundaries of the ISPs' liability for the third-parties' infringements of copyright and in determining which types of injunctions could be allowed against non-liable intermediaries in order to tackle the so-called online "piracy".

Liability

In the EU, the limits of the ISPs' liability are set forth in Articles 12–4 of the E-Commerce Directive,⁵⁰ providing for the so-called "safe harbour" exemptions from liability for the three categories of service providers: "mere conduit", "caching" and hosting. In order to qualify for "safe harbours", however, the service providers have to fulfil certain conditions. Notably, they should act as "passive" intermediaries, that is to say—they should have "neither knowledge of nor control over the information which is transmitted or stored."⁵¹ The "mere conduit" and "caching" service providers, in particular, benefit from safe harbours when they are "in no way[s] involved with the information transmitted; this requires among other things that [they] do[] not modify the information that [they] transmit[]." ⁵² As regards the hosting providers, in order to benefit from a limitation of liability, they have to "act expeditiously to remove or to

disable access to the information concerned” “upon obtaining actual knowledge or awareness of illegal activities”.⁵³ However, apart from these general provisions on liability outlined in the E-Commerce Directive, the exact conditions under which intermediaries could be deemed passive, or neutral, remain fragmented under European law, and the CJEU has already been called upon on several occasions to fill into this legislative gap.

In *Google France and Google*, for example, the Court held that Article 14 (hosting) E-Commerce “safe harbour” applied to an internet referencing service provider, such as Google’s “AdWords”, in the case where that service provider had not played an active role of such a kind as to give it knowledge of, or control over, the data stored.⁵⁴ If it had not played such a role, that service provider could not be held liable for the data which it had stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it had failed to act expeditiously to remove or to disable access to the data concerned.⁵⁵ Although leaving it for the national court to decide whether the role played by Google was neutral, the Court provided some guidance as to what criteria could be decisive in such an examination.⁵⁶ It observed in particular that the mere fact that the advertising service was subject to payment, that Google set the payment terms or that it provided general information to its clients could not have had the effect of depriving Google of the exemptions from liability.⁵⁷

By contrast, as was made clear in *L’Oréal and Others*, when the online-marketplace operator provided assistance which entailed the knowledge of, or control over, the data relating to the information it stored, its position could not be considered as neutral.⁵⁸

Further clarifications of the neutrality rule have followed, nevertheless, not from the CJEU, as could have been expected, but from another principal supranational court in Europe—the ECtHR. The case at issue, *Delfi v Estonia*, revolved around the question of liability (or the lack thereof) of online platforms for the clearly infringing content generated by their users.⁵⁹ In Estonia, the owner of one of the country’s largest internet news portals, Delfi, was held liable for defamatory comments posted by its readers in the portal’s online commenting environment. Despite the fact that the comments were removed by Delfi immediately upon notification by the injured person’s lawyers (which happened though some six weeks after they were uploaded on the website), Estonian Supreme Court found the portal liable for failing to remove the comments on its *own* initiative *immediately* after they had been published. In ruling so, it rejected the portal’s argument that its liability, as a hosting provider, was excluded under Article 14 of the E-Commerce Directive. It held in particular that the activities of the portal in publishing the comments were not merely of a technical, automatic and passive nature. In this connection, it had regard to the fact that the readers were actively called to comment on the news items appearing on the portal; the defendant had an economic interest in the posting of comments, which increased the number of visits to the portal and hence a revenue earned from advertisements; the portal, in contrast to the users who could no longer delete or modify a comment once it was uploaded, had an active control over the commenting environment. It followed that the applicant company was to be classified as an active intermediary (media publisher), *including* with regard to its users’ comments, with a consequence that the E-Commerce Directive did not apply. Instead, the Supreme Court relied on the national Obligations Act, in accordance with which Delfi could not be exempt from liability for the publication of the clearly unlawful content.

Before the ECtHR, Delfi complained that holding it liable for the comments posted by its readers infringed its freedom to impart information as provided in Article 10 ECHR.⁶⁰ It argued in particular that there was no domestic law according to which an intermediary had to be taken as a professional publisher of comments posted on its website by third parties regardless of whether it was aware of their specific content. It further argued that finding it liable would have left it with two choices: to either over-censor any sensitive comments “that could be labelled defamatory (or that could infringe intellectual property rights, *inter alia*)”;⁶¹ or to simply avoid any liability risks by shutting down the comment feature altogether.⁶²

In its Grand Chamber judgment delivered in June 2015, the Court held, by 15 votes to 2, that finding Delfi liable had not infringed upon its right to freedom of expression. Although acknowledging that the difference in the parties' opinions as regards applicability of the E-Commerce Directive stemmed from their diverging views on the issue of how the applicant company was to be classified,⁶³ it, however, found that it was for the national courts to interpret and apply domestic law.⁶⁴ Thereby, the ECtHR avoided pronouncing on the appropriateness of the domestic courts' decision not to apply the E-Commerce Directive, limiting itself to examining whether the application of the general provisions of the Obligations Act to the applicant's situation was foreseeable and proportionate for the purposes of Article 10(2) ECHR.

As concerned the law's foreseeability, it held that Delfi, as a professional publisher and one of the largest news portals in Estonia, in relation to which there was moreover a known public concern about the controversial nature of the comments it attracted, was in a position to assess risks related to its activity.⁶⁵

As to the proportionality of an interference with the applicant's freedom to impart information, the Court conceded, first, with the domestic courts' reasoning that Delfi's involvement in making public the comments on its news articles went beyond that of a passive, purely technical service provider.⁶⁶ It further noted that shifting the liability risks from the actual authors of the comments to the service provider "was not as such a disproportionate interference with the media company's right to freedom of expression",⁶⁷ regard being had to the "uncertain effectiveness of measures allowing the identity of the authors of the comments to be established" and a better financial position of the media company.⁶⁸ Thirdly, although acknowledging that Delfi took certain measures to filter comments with clearly unlawful contents,⁶⁹ the Court regarded those measures as insufficient.⁷⁰ Hence the Contracting States were entitled "to impose liability on internet news portals, without contravening Article 10 of the Convention, if they fail[ed] to take measures to remove clearly unlawful comments without delay, *even without notice from the alleged victim or from third parties*".⁷¹ Finally, the Court considered that the modest sum Delfi had been ordered to pay in compensation for non-pecuniary damage (EUR 320) did not compromise the proportionality of the interference with the applicant's expression on that account either.⁷²

Although *Delfi* was not concerned with copyright as such, it illustrates a general idea. The Court has approved, with 15 votes against 2, a liability system that imposes a requirement of constructive knowledge on active internet intermediaries.⁷³ That means that "active intermediaries must remove comments 'without delay' after publication..., and not upon notice or on other grounds linked to actual knowledge."⁷⁴ The two dissenting judges, however, voiced the potential troubling consequences of this standard, naming it no less than "an invitation to self-censorship at its worst".⁷⁵ According to them, "[t]o avoid trouble, for active intermediaries the safe harbour [would] simply be to disable comments",⁷⁶ and "the fear of liability may lead to additional self-censorship by operators."⁷⁷ At the same time, "[i]n the overwhelming majority of the member States of the Council of Europe, and also in genuine democracies all over the world, the regulatory system (in conformity with the expectations of the rule of law) is based on the concept of actual knowledge. A safe harbour is provided by the rule of notice and action (primarily 'notice and take down')."⁷⁸ The dissenting judges further observed that "[n]either the domestic authorities nor the Court explain[ed] why the provision of binding European law that [was] part of the national legal system [had been] immaterial, except to say that the present case concern[ed] a matter of publication rather than data storage."⁷⁹ Although conceding that it was not for the Strasbourg Court to interpret EU law as such, this did not mean that this law was not a part of the domestic system.⁸⁰ To the contrary, the national incorporation of the E-Commerce Directive provided a "safe harbour" rule for service providers in the case of storage, and hence a reasonable justification was required, in the dissenting judges' opinion, for the choice of the higher level of liability.⁸¹

Neither did it follow that the publisher's liability was foreseeable.⁸² According to the dissenting judges, the applicable law was not obvious and "[o]nly divine legal counsel could have been sufficiently

certain that a portal operator would be liable for a comment it was not aware of, under a kind of strict liability that applied to publishers (editors) who operated in full knowledge of the whole publication.”⁸³

As to the proportionality of an interference with *Delfi*’s right to enable others to impart and receive information and associated balancing approach, the dissenting judges pointed to a number of considerations that had been left out of the Court’s analysis, including the fact that the interference concerned the press and journalism and that the debate was on a matter of public interest.⁸⁴ Inappropriateness of “equat[ing] the expressions used by the commenters with the activities of an active intermediary” had also been highlighted.⁸⁵

It needs to be noted, however, that, since *Delfi*, the ECtHR seemed to have attempted to remedy its rather radical approach toward the standards of liability for online intermediaries. In a judgment in the *MTE* case rendered in February 2016, the Court ruled that holding an ISP liable for the infringing content posted by its users indeed violated that ISP’s freedom of expression.⁸⁶ The two main considerations that, in the opinion of the Court, distinguished this case from *Delfi* were: (i) the nature of the content at issue (which did not constitute, as in *Delfi*, clearly unlawful hate speech) and (ii) the non-for-profit status of one of the applicants in *MTE*.⁸⁷ No analysis was advanced with regards to the neutrality rule though.

It remains only to be seen what consequences this disparate practice, coupled with the lack of clarity with respect to the secondary liability of online intermediaries and their role in policing their users’ content will bring for freedom of information, net neutrality and digital IP enforcement in Europe.

Injunctions

Distinct from the question of liability, a separate regime implicating a greater involvement of the ISPs in copyright enforcement and speech-regulation online is that of the injunctive relief. As the E-Commerce Directive makes it clear, “[t]he limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.”⁸⁸ The legal basis of injunctions rests upon Articles 12(3), 13(2), and 14(3) of the E-Commerce Directive, as well as on the almost identical wording of Articles 8(3) InfoSoc and Article 11, third sentence, of the Enforcement Directive.⁸⁹ In addition, although not saying anything on the level of specificity of injunctions, Article 15 of the E-Commerce Directive outlaws the general monitoring obligation.

As pointed in the *EU Study on the Single Market for the Information Society*, “[t]he possibility to issue injunctions against service providers should not be underestimated: while liability claims against mere conduit service providers (and caching service providers) are not important in court practice, injunctions are frequently issued against them” (DLA Piper, 2009, p. 21).

However, much alike the issue with secondary liability, “[t]he conditions and modalities relating to such injunctions [are] left to the national law of the Member States”,⁹⁰ generating concerns about the collateral private-party censorship of online content.

These concerns have already led the CJEU to outlaw the general filtering systems at issue in *SABAM* cases as being contrary to the EU law, but also and foremost—to its fundamental rights legal order. The Court held in particular with regards to freedom to receive and impart information of the ISP’s customers that such systems could result in a violation thereof.⁹¹ In the Court’s view, an injunction requiring an intermediary to install, as a preventive measure and for an unlimited period, a permanent filtering system blocking all electronic communications on its services liable to infringe copyright, did not appear to guarantee the blockage only of exchanges specifically identifiable as unlawful, potentially affecting lawful communications.⁹² The CJEU had particular regard to the fact that lawfulness or otherwise of a given transmission depended on the application of statutory exceptions to copyright which varied from country to country and therefore fell outside the sphere of technology.⁹³

The need to preserve a “strictly targeted” character of blocking had been likewise highlighted by the CJEU in *UPC Telekabel*,⁹⁴ where the Court stressed that the blocking “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.”⁹⁵ Failing that, according to the Court, “the provider’s interference in the freedom of information of those users would be unjustified in the light of the objective pursued.”⁹⁶

It worth, however, noting that—unlike in *SABAM* cases—the measure at issue in *UPC Telekabel* was not outlawed by the CJEU *per se*. The Court simply shifted a great share of responsibility for ensuring a “strictly targeted” character of blocking to the ISPs. According to the Court, it was for an intermediary to ensure, when choosing which blocking measure to adopt in order to comply with an outcome prohibition, that the fundamental right of internet users to freedom of information had been complied with. Failing that, an ISP could fear a freedom of information dispute with its customers.⁹⁷ Arguably, there might have been better ways to reconcile the conflicting copyright and freedom of information at stake, one of which would be agreeing with Advocate General, in whose opinion the outcome prohibition simply was not precise enough to comply with the Union legal order, given that “[w]hether complete prevention of the outcome is possible at all and whether the measures necessary for that purpose take account of the parties’ fundamental rights is not examined before the outcome prohibition is issued”.⁹⁸ According to the Advocate General, the result-tailored injunctions (unlike the specific ones) thus failed in regard to proportionality “[i]n logical terms alone”, but also in light of the case law requirement that a balance of rights is observed *when*, not *after*, the injunction is issued.⁹⁹

All in all, although particular means of preserving the users’ information freedoms might be a subject of discussion, the general message from the Luxemburg judges remains clear—copyright enforcement should be safeguarded from collateral effects.

The same message is being transmitted by the Strasbourg Court which, in one of its first cases on website blocking made it clear that any blocking measure rendering—absent the tight control over the scope of the ban—large quantities of information inaccessible, “substantially restrict[s] the rights of internet users and ha[s] a significant collateral effect”.¹⁰⁰ The case at issue, *Yıldırım*, concerned the blocking in Turkey of an entire internet domain (Google Sites) in the context of criminal proceedings brought against a single third-party website. Before the ECtHR, the applicant complained that the blocking made it impossible for him to access his own website hosted on the same internet domain, but which had no connection with the illegal content that had given rise to blocking. In ruling on a violation of Article 10 of the Convention, the Court considered that the blocking produced significant collateral effects, whereas the judicial-review procedures concerning the order were insufficient to meet the criteria for avoiding abuse.¹⁰¹

In *Akdeniz*, that followed two years after, the Court reaffirmed that “any measure blocking access to a website had to be part of a particularly strict legal framework ensuring both tight control over the scope of the ban and effective judicial review to prevent possible abuse, because it could have significant effects of ‘collateral censorship’”.¹⁰² That was not the case, however, in *Akdeniz*, where the blocking targeted specifically the infringing websites and not—as in *Yıldırım*—all websites hosted on the same internet domain with an infringing one.

Summing up, an emerging European case law on injunctions suggests that those are most likely to be dismissed on the freedom of expression grounds once a strong likelihood of the adverse chilling effects on legitimate information is established. At the same time, the collateral effects on legitimate content do not impose an unconditional ban on enforcement. As it concerns in particular the website blocking, the studies on their different techniques demonstrate that *each* blocking measure carries the risk of overblocking (Ofcom, 2010, p. 4 *et seq.*). The most problematic in this regard is IP address blocking, since multiple websites commonly share a single IP address. As a result, the blocking of one of such websites leads to an

automatic block of all of its “neighbours” (Ofcom, 2010, p. 30). It is for this reason the Antwerp Court of Appeals, for example, expressly dismissed IP address blocking based on a strong likelihood of collateral effects on the websites sharing the same IP address with The Pirate Bay.¹⁰³ Then again, if only unsubstantial portion of legitimate content is affected by blocking, it is likely to be considered proportionate, as *inter alia* the recent decision of the ECtHR in *Akdeniz* demonstrated.¹⁰⁴

Conclusion

In conclusion, although it is apparent that the European courts are having hard times figuring out the standards applicable in the field of digital copyright, the case law of recent years marks an important shift. It points to a greater consideration of the interests of all parties to copyright enforcement process, including those of the internet users.

The fact that the external freedom-of-expression checks and tests have been admitted to the internal copyright regulation is important, as it provides a weighty counter-balance to some one-sided digital copyright enforcement strategies.¹⁰⁵ The CJEU has even went as far as to mandate the “users’ rights” which could be enforced in courts,¹⁰⁶ hence arguably being more attentive to freedom of expression than was the ECtHR in its first case on copyright-defensive website blocking.¹⁰⁷ From this perspective, it can be said that the CJEU moves toward understanding of freedom of information as an integral part of the European copyright order in full recognition of its underlying rationales. On the other hand, it also appears that both European courts expect online intermediaries to be very actively involved in copyright enforcement process, which might prove problematic in terms of prior restraints and the private-party censorship.

All this leaves without doubt a wide room for further clarifications, all the more precious in anticipation of the EU obligatory accession to the ECHR,¹⁰⁸ which is likely to only reinforce the current tendency to test copyright and its enforcement strategies from the angle of fundamental rights.

About the Author

Elena Izyumenko, PhD Candidate and Researcher at the Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg (France); LL.M, Lund University (Sweden); e-mail: elena.izyumenko@ceipi.edu

Notes

1. See e.g. European Commission (2015), listing clarification of the rules on intermediaries in relation to copyright-protected content among the priorities of the Juncker Commission.
2. ECommHR, *Société Nationale de Programmes FRANCE 2 v France* (dec.), no. 30262/96, 15 January 1997: “[The Commission] recalls that it is normally not for the Convention organs to resolve, under paragraph 2 of Article 10 (Article 10–2), the conflicts which may arise between, on the one hand, the right to freely communicate information and, on the other hand, the right of authors whose works are communicated” (translation from French by the author). For an overview of the case law of the ECtHR and its former Commission in the field of copyright and freedom of expression, as well as of some cases from national European jurisdictions, see, among others, Hugenholtz (2001); Geiger (2004); Strowel and Tulkens (2006); Strowel (2014); Voorhoof (2015).
3. ECtHR, *Ashby Donald and Others v France*, no. 36769/08, 10 January 2013.
4. In France, both designers’ clothes and fashion shows are protected by copyright, provided that they display original character. Accordingly, the fashion houses concerned were entitled to authorise or forbid the reproduction or dissemination of their creations (*Ashby Donald* (*supra* note 3), paragraph 13).

5. *Ashby Donald* (*supra* note 3), paragraph 34.
6. This was largely due to the nature of information disseminated (not contributing, in the Court's opinion, to the public debate of general interest) and commercial undertones of the applicants' actions. An important factor in favoring the rights of the fashion houses over those of the photographers was also the weight afforded by the ECtHR to the protection of intellectual property. According to the Court, the interests of copyright holders themselves benefited from the Convention protection afforded by Article 1 of First Protocol (protection of property) to the ECHR. It thus followed that the Court had to balance two competing interests both protected by the Convention—a delicate exercise, leaving the States a wide margin of discretion in regulating the dispute at issue (*Ashby Donald* (*supra* note 3), paragraph 40).
7. An “exception” at issue in *Ashby Donald* was that for the purpose of news reporting, envisaged in Article L. 122–5 9° of the French Intellectual Property Code—a national transposition of Article 5(3)(c) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc) [2001] OJ L 167/10.
8. Among such criteria are: the nature of information disseminated; the character of expression; the comparative importance of a counterbalanced interest; the proportionality of the restrictions, etc.
9. ECtHR, *Neij and Sunde Kolmisoppi v Sweden* [“*The Pirate Bay*”] (dec.), no. 40397/12, 19 February 2013.
10. For a joint comment of “*The Pirate Bay*” and *Ashby Donald* decisions, see Geiger and Izyumenko (2014). See also Voorhoof (2015).
11. ECtHR, *Akdeniz v Turkey* (dec.), no. 20877/10, 11 March 2014.
12. *Id.*, paragraph 28.
13. *Id.*, paragraph 24.
14. *Id.*, paragraph 27.
15. The Court noted further that the websites were blocked because they did not comply with copyright legislation and that neither the collateral effects of blocking, nor the nature and the character of disseminated information were such as to raise an important question of general interest (*Akdeniz* (*supra* note 11), paragraphs 25, 26 and 28).
16. See e.g. ECJ, Judgment in *Infopaq*, C-5/08, EU:C:2009:465, paragraph 56. To that effect, see also, among other authorities, CJEU, Judgment in *Deckmyn*, C-201/13, EU:C:2014:2132, paragraph 22; CJEU, Judgment in *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195, paragraph 23; CJEU, Judgment in *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 23; and CJEU, Judgment in *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 162.
17. This principle has been summarised by the ECtHR as follows: “As set forth in Article 10, this freedom is subject to exceptions, which . . . must, however, be construed strictly, and the need for any restrictions must be established convincingly”. See, among many others, ECtHR, *Delfi AS v Estonia* [GC], no. 64569/09, 16 June 2015, paragraph 131, ECHR 2015; ECtHR, *Animal Defenders International v the United Kingdom* [GC], no. 48876/08, 22 April 2013, paragraph 100, ECHR 2013; ECtHR, *Mouvement raëlien suisse v Switzerland* [GC], no. 16354/06, 13 July 2012, paragraph 48, ECHR 2012; ECtHR, *Stoll v Switzerland* [GC], no. 69698/01, 10 December 2007, paragraph 101, ECHR 2007-V; ECtHR, *Steel and Morris v the United Kingdom*, no. 68416/01, 15 February 2005, paragraph 87, ECHR 2005-II; ECtHR, *Perna v Italy* [GC], no. 48898/99, 6 May 2003, paragraph 39, ECHR 2003-V; ECtHR, *Ceylan v Turkey* [GC], no. 23556/94, 8 July 1999, paragraph 32, ECHR 1999-IV; ECtHR, *Hertel v Switzerland*, no. 25181/94, 25 August 1998, paragraph 46, ECHR 1998-VI; and ECtHR, *Zana v Turkey* [GC], no. 18954/91, 25 November 1997, paragraph 51, ECHR 1997-VII.
18. See *Société Nationale de Programmes FRANCE 2* (*supra* note 2); *Ashby Donald* (*supra* note 3), paragraph 40; *Neij and Sunde Kolmisoppi* (*supra* note 9); and (somewhat implicitly) *Akdeniz* (*supra* note 11), paragraph 28.
19. CJEU, Opinion of Advocate General Cruz Villalón in *Scarlet Extended*, C-70/10, EU:C:2011:255, paragraph 5.
20. CJEU, Judgment in *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraph 53.

21. Notably, the meaning and scope of Article 11 of the EU Charter are the same as those guaranteed by Article 10 ECHR (see Article 52(3) of the EU Charter, as well as the *Explanations Relating to the Charter of Fundamental Rights* [2007] OJ C 303/17, p. 21).
22. *Scarlet Extended* (*supra* note 20), paragraph 52.
23. CJEU, Judgment in *SABAM v Netlog*, C-360/10, EU:C:2012:85.
24. *Id.*, paragraph 50.
25. CJEU, Judgment in *UPC Telekabel*, C-314/12, EU:C:2014:192, paragraph 47.
26. *Erfolgsverbot* under the Austrian procedural law.
27. *UPC Telekabel* (*supra* note 25), paragraph 47.
28. *Id.*, paragraph 56.
29. *Id.*, paragraph 57.
30. See also, highlighting the importance of the internet in the exercise of freedom of expression, ECtHR, *Annen v Germany*, no. 3690/10, 26 November 2015, paragraph 66; *Delfi AS* (*supra* note 17), paragraph 133; *Akdeniz* (*supra* note 11), paragraph 24; ECtHR, *Ahmet Yildirim v Turkey*, no. 3111/10, 18 December 2012, paragraphs 48–9, ECHR 2012; ECtHR, *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, 10 March 2009, paragraph 27, ECHR 2009.
31. Further on users' rights, see Elkin-Koren (2016); Geiger (2016); Chapdelaine (2013); Vaver (2013). On the rights of users in the practice of the Canadian Supreme Court, see *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 SCR 339; *SOCAN v Bell Canada*, [2012] 2 SCR 326; *Alberta (Minister of Education) v Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345.
32. CJEU, Judgment in *Padawan*, C-467/08, EU:C:2010:620.
33. Directive 2001/29/EC (*supra* note 7).
34. *Deckmyn* (*supra* note 16), paragraph 26 (emphasis added). See, to the same effect, starting with *Padawan* (*supra* note 32), paragraph 43; CJEU, Judgment in *Stichting de Thuisakopie v Opus Supplies Deutschland GmbH and Others*, C-462/09, EU:C:2011:397, paragraph 25; *Football Association Premier League* (*supra* note 16), paragraph 164; CJEU, Judgment in *Painer*, C-145/10, EU:C:2011:798, paragraph 132; *Public Relations Consultants Association* (*supra* note 16), paragraph 24; *UPC Telekabel* (*supra* note 25), paragraph 47.
35. Another important human right often giving substantive content to the rights of users is the right to privacy and personal data protection, guaranteed by Article 8 ECHR and corresponding Articles 7 and 8 of the EU Charter.
36. *Deckmyn* (*supra* note 16), paragraph 25.
37. *Id.*, paragraph 27.
38. *Painer* (*supra* note 34), paragraphs 134 and 135.
39. CJEU, Judgment in *Ulmer*, C-117/13, EU:C:2014:2196, paragraph 43 (emphasis added).
40. *UPC Telekabel* (*supra* note 25), paragraph 57 (emphasis added).
41. Furthermore, according to the ECtHR, there existed—at least by December 2012—"no specific provisions governing appeals against measures restricting access to an Internet page" in several Member States, including Belgium, the Czech Republic, Lithuania, Spain and the United Kingdom (*Ahmet Yildirim* (*supra* note 30), paragraph 37).
42. Referring in particular to Norway, Denmark and Sweden.
43. CJEU, Opinion of Advocate General Jääskinen in *L'Oréal and Others v eBay*, C-324/09, EU:C:2010:757, paragraph 158. More generally on the interplay of trademarks and freedom of expression, see Senftleben (2015); Ramsey (2015); Sakulin (2010); Burrell and Gangjee (2010).
44. Some commentators, however, considered that the users' *locus standi* could also extend to specific orders (Savola, 2014, paragraph 36; Husovec, 2014, p. 633).
45. *Akdeniz* (*supra* note 11), paragraph 27 (emphasis added).
46. *Akdeniz* (*supra* note 11), paragraph 27, with further references to *Ahmet Yildirim* (*supra* note 30), paragraph 46.
47. ECtHR, *Cengiz and Others v Turkey*, nos. 48226/10 and 14027/11, 1 December 2015, paragraphs 49–50.

48. Suspensions of internet access (in particular via the so-called “graduated response” procedures), traffic shaping, content filtering and website blocking are currently among the most common “Internet-focused policy responses to online copyright infringement” (Internet Society, 2011, p. 11).
49. Further on this trend, see Raymond (2013); Lodder and van der Meulen (2013); Karjala (2013); Elkin-Koren (2014); Giblin (2014); de Beer and Clemmer (2009); Zittrain (2006).
50. 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 (E-Commerce Directive) [2000] OJ L 178/1.
51. Recital 42 of the E-Commerce Directive.
52. Recital 43 of the E-Commerce Directive.
53. Recital 46 of the E-Commerce Directive.
54. CJEU, Judgment in *Google France and Google*, C-236/08 to C-238/08, EU:C:2008:389, paragraph 120.
55. *Id.*
56. *Id.*, paragraphs 116–8.
57. *Id.*, paragraph 116.
58. CJEU, Judgment in *L’Oréal and Others v eBay*, C-324/09, EU:C:2011:474, paragraph 116. In the context of the present case, such active role consisted in optimizing the presentation of the offers for sale in question or promoting those offers.
59. *Delfi AS* (*supra* note 17).
60. *Id.*, paragraph 59.
61. *Id.*, paragraph 72.
62. *Id.*
63. *Id.*, paragraph 125.
64. *Id.*, paragraph 127.
65. *Id.*, paragraph 129.
66. *Id.*, paragraph 146.
67. *Id.*, paragraph 151.
68. *Id.*
69. Importantly, in the Court’s view, the contents of the comments in question amounted to hate speech and incitement to violence (*Delfi AS* (*supra* note 17), paragraph 115).
70. *Delfi AS* (*supra* note 17), paragraphs 154–9. The measures at issue encompassed an automatic system of deletion of comments that included certain stems of obscene words. Furthermore, there was a notice-and-take-down system in place, whereby any reader could mark a comment as inappropriate and the comment was removed expeditiously by the portal administrators. In addition, on some occasions inappropriate comments were removed by the administrators on their own initiative.
71. *Delfi AS* (*supra* note 17), paragraph 159 (emphasis added).
72. *Id.*, paragraph 161.
73. ECtHR, Joint Dissenting Opinion of Judges Sajó and Tsotsoria in *Delfi AS v Estonia* [GC], no. 64569/09, 16 June 2015, paragraph 1, ECHR 2015.
74. *Id.*, paragraph 8.
75. *Id.*, paragraph 1.
76. *Id.*, paragraph 8.
77. *Id.*, paragraph 1.
78. *Id.*, paragraph 7.
79. *Id.*, paragraph 17.
80. *Id.*
81. *Id.*

82. *Id.*
83. *Id.*, paragraph 20.
84. *Id.*, paragraph 39. Notably, the press-factor has also escaped the Court's analysis in another case on freedom of expression and digital copyright, *Ashby Donald (supra note 3)* (further on this, see Geiger and Izyumenko (2014), pp. 335–6).
85. Joint Dissenting Opinion of Judges Sajó and Tsotsoria in *Delfi AS (supra note 73)*, paragraph 23.
86. ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, no. 22947/13, 2 February 2016.
87. *Cf. Google France and Google (supra note 54)*, paragraph 116, finding that the mere fact that Google had economic interests did not render the liability exemption inapplicable to it.
88. Recital 45 of the E-Commerce Directive.
89. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L 195/16.
90. Recital 59 of the InfoSoc Directive. See also recital 23 of the Enforcement Directive.
91. *Scarlet Extended (supra note 20)*, paragraph 50; *SABAM v Netlog (supra note 23)*, paragraph 48.
92. *Scarlet Extended (supra note 20)*, paragraph 52; *SABAM v Netlog (supra note 23)*, paragraph 50.
93. *Id.*
94. *UPC Telekabel (supra note 25)*, paragraph 56.
95. *Id.*
96. *Id.*
97. *Id.*, paragraph 57.
98. CJEU, Opinion of Advocate General Cruz Villalón in *UPC Telekabel*, C-314/12, EU:C:2013:781, paragraph 68 (emphasis added).
99. *Id.*, paragraph 88.
100. *Ahmet Yıldırım (supra note 30)*, paragraph 66.
101. *Id.*, paragraphs 66 and 68.
102. *Akdeniz (supra note 11)*, paragraph 28.
103. Antwerp Court of Appeals (*Hof van Beroep, Antwerpen*), *VZW Belgian Anti-Piracy Federation v NV Telenet*, no. 2011/8314, 26 September 2011, p. 14, available (in Dutch) at http://nurpa.be/files/20111004_BAF-Belgacom-Telenet-DNS-blocking.pdf [accessed on March 2016], cited in Feiler (2012), pp. 23–24; Savola (2014), note 130.
104. *Akdeniz (supra note 11)*, paragraph 28. See also, on the national level, *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch) (28 July 2011), paragraphs 185–6; Maritime and Commercial Court in Copenhagen, *Fritz Hansen A/S and Others v Telia Danmark*, no. A-38-14, 11 December 2014, transcript from the record of judgments, p. 10, available at <http://kluwercopyrightblog.com/wp-content/uploads/sites/49/2015/01/IA11122014EN.pdf> [accessed on March 2016]; Oslo District Court (*Oslo Tingrett*), *Warner Bros. Entertainment Norge AS and Others v Telenor Norge AS and Others*, no. 15-067093TVI-OTIR/05, 1 September 2015, available (in Norwegian) at <http://www.dagbladet.no/f/15067093tviotirkjennelse.pdf> [accessed on March 2016]; German Federal Supreme Court of Justice (*Bundesgerichtshof*), I ZR 3/14 and I ZR 174/14, Judgments of 26 November 2015, Press Release No. 194/2015, available (in German) at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2015&Sort=3&nr=72928&pos=14&anz=209> [accessed on March 2016].
105. Further on (un)suitability of deterrence enforcement strategies in the context of unauthorised uses of copyrighted works online, see Geiger (2014).
106. *UPC Telekabel (supra note 25)*.
107. *Akdeniz (supra note 11)*.
108. See Article 6(2) of the Treaty on European Union (Consolidated version of the Treaty on European Union [2012] OJ C 326), as amended by Article 1(8) of the Treaty of Lisbon (Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01); and Article 59(2)

ECHR as amended by Article 17 of Protocol No. 14 to the ECHR. Despite the fact that the latest draft accession agreement was rejected by the CJEU (Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454), this did not change the binding nature of the accession.

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