



Reports of Cases

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,

* Language of the case: German.

- 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.**

[Signatures]