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The mythology of proportionality in the EU Court of Justice's judgments on internet and fundamental rights.

Filippo Fontanelli*

Abstract: Proportionality is the tool of choice for the EU Court of Justice's review of measures affecting the enjoyment of fundamental rights. The use of proportionality is normally beneficial, as it ensures that public authorities pursue public policies without any avoidable waste of fundamental rights protection. In the field of internet-based activities, however, certain recurrent elements make proportionality unfit for the purpose. This article argues against the systematic recourse to the mythology of proportionality in the judgments of the Court of Justice of the EU. Most instances of putative proportionality assessment are in fact window-dressing for pragmatic or policy-based arguments. The claim relies on a critical reading of the recent case law of the Court in internet-related disputes. Accordingly, it is preferable to abandon the proportionality test when certain factual conditions – which are commonplace in the digital *milieu* – prevail.

Keywords: proportionality, fundamental rights, internet, Court of Justice of the European Union, adjudication, legal reasoning

1. Introduction

Society evolves over time and law must apply to an ever-changing *substratum*. This has always been the case and the application of EU law to internet-related matters is no exception.¹ The practice of legal interpretation and application in this field is complicated by the engagement of fundamental

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¹ Niilo Jääskinen, 'Internet et la Cour de Justice', in Antonio Tizzano et al. (eds), *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015)* (Bruylant 2015) 253-269.

rights (FRs), which also lend themselves to evolutive construction,² because their formulation through principles requires actualisation in particular cases.³

FR-adjudication concerning novel technologies occurs in an epistemic scene which changes continuously. Namely, its coordinates inevitably shift along two different axes. On the one hand, technological advancement causes social practices to reconfigure and take new shapes; on the other hand, the flexible application of general principles to specific circumstances cannot be assessed statically or *a priori*. The process of normative refinement required to regulate these activities can take place at the legislative level and/or through legal interpretation and application, including through the activity of judicial bodies. The nature of technological advancement makes it impossible to rely on a backward-looking analysis of established general practice to build appropriate analogies for the regulation of future circumstances. To be effective, refinement must instead take the form of reformative law-making (or judicial standard-setting) rather than codification or consolidation of practice.

Whereas law cannot anticipate technological innovations, it should react to them as promptly as possible. As Advocate General Cruz Villalón noted, ‘there are currently many legal categories the conception and scope of which require a reconsideration where they affect social and commercial relationships occurring on the internet.’⁴

This article raises a warning against received thinking. Namely, it posits that the proportionality test – as we know it – is an inadequate heuristic device to resolve legal disputes in which fundamental

² Kanstantsin Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’ (2011) 12 *German LJ* 1730, 1732; Christos L Rozakis, ‘The European Judge as Comparatist’ (2005) 80 *Tul. L. Rev.* 257, 260 (referring to the rudimentary nature of the provisions of the ECHR).

³ This simplification draws from the famous notion of principles in Ronald Dworkin’s *Taking Rights Seriously* (HUP, 1978) 35, where he notes that rules determine the outcome of a dispute and, if they do not, they have been disregarded. Instead, ‘[p]rinciples do not work that way; they incline a decision one way, though not conclusively, and they survive intact when they do not prevail’.

⁴ Joined Cases C-509/09 *eDate Advertising GmbH* and C-161/10 *Olivier Martinez and Robert Martinez v MGN Limited* ECR 2011, I-10269, Opinion of AG Cruz Villalón, para 31.

rights are affected by internet activities.⁵ Consequently, judgments turning on a determination of proportionality are ultimately ill-founded or seek artificial authority for conclusions based on policy trade-offs.⁶ The language of proportionality has become a mythology,⁷ a shorthand for legitimacy. It used to imply correctness through careful judicial evaluation, but has gradually turned into a self-serving proclamation. Proportionality is a sign that feeds its own signified, it is a myth in which the form draws its nourishment from an impoverished meaning.⁸

Constitutional (that is, FR-based) adjudication in the hands of the Court of Justice of the European Union (the Court) is increasingly impracticable and the discipline of internet-based activities that have FR-implications is better left to regulators or to different ways of judicial reasoning. This conclusion is reminiscent of Balkin's own regarding the realisation (regarding free speech) that case-law could hardly moderate the digital brave new world. Technical and regulatory decisions are preferable to constitutional elaboration through judicial precedents:

Protecting free speech values in the digital age will be less and less a problem of constitutional law – although these protections will remain quite important – and more and more a problem of technology and administrative regulation.⁹

⁵ On the risks of basing moral and legal judgments on generic heuristic short-cuts, see Cass R. Sunstein, 'Moral heuristics' (2005) 28(4) *Behavioral and Brain Sciences* 531.

⁶ Criticism of proportionality in FR-adjudication is commonplace. See Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7(3) *I-Con* 468; Matthias Klatt and Moritz Meister, 'Proportionality—a benefit to human rights? Remarks on the I-CON controversy' (2012) 10(3) *I-Con* 687. For a response to this criticism, see Kai Möller, 'Proportionality: Challenging the critics' (2012) 10(2) *I-Con* 709. On the specific problem of incommensurability contrast Paul-Erik N Veel, 'Incommensurability, Proportionality, and Rational Legal Decision-making' (2010) 4(2) *Law & Ethics of Human Rights* 178 with Timothy AO Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W Miller, Gregoire Webber (eds), *Proportionality and the Rule of Law* (CUP 2014) 311. For a critique of the allocation of evidentiary *onus* within the test, see Julian Rivers, 'The Presumption of Proportionality' (2014) 77(3) *MLR* 409.

⁷ Roland Barthes, *Mythologies* (Seuil 1957), last chapter: 'Le mythe, aujourd'hui'.

⁸ *Ibid*, (English translation, Vintage 2000) 118: 'The meaning will be for the form like an instantaneous reserve of history, a tamed richness, which it is possible to call and dismiss in a sort of rapid alternation'.

⁹ Jack M Balkin, 'The Future of Free Expression in a Digital Age' (2008) 36 *Pepp. LR* 427, 441. Balkin discusses the continuing relevance of the Constitution's First Amendment on free speech, arguing somewhat similarly to the gist of this article that the technological revolution amounts to 'a transition of enormous irony. At the very moment that our economic and social lives are increasingly dominated by information technology and information flows, the First Amendment seems increasingly irrelevant to the key free speech battles of the

The assumption that the Court performs constitutional adjudication requires a clarification.¹⁰ Substantively, the Court reviews the compatibility of EU secondary legislation with the Treaties and international law. Fundamental rights provisions are among the primary norms which secondary legislation must respect to be valid. In the present analysis, the interpretation or validity of EU law acts¹¹ or national law implementing EU law turn on their compliance with fundamental rights: this kind of judicial review is, in the substance, typically constitutional. Besides the substantive affinity, the Court has also a formal mandate to engage in constitutional adjudication. Namely, it arbitrates the vertical division of powers between Member States and the Union, as domestic constitutional courts often do.¹² In particular, the review of secondary legislation for compliance with Treaty law ultimately implicates the compliance with the principle of conferral. Formally, therefore, respect of Treaty law is a safeguard against undue encroachment of Member States' competences.

This article introduces a distinction between internet-native rules and other rules that might be applicable in internet-related cases (section 2). The purpose of this distinction is to focus on the constitutional component of the Court's case-law, which is more clearly visible when it considers the compatibility of internet-native rules with fundamental rights. Section 3 uses the *Google Spain* case as an illustration of the shortcomings of proportionality in this field. The analysis develops in Section 4, which discusses other judgments to support the idea that the Court is less engaged in actual proportionality than in a pragmatic moderation of conflicting interests. The core argument of this

future. Or, more precisely, the judge-made doctrines that I teach in my First Amendment classes seem increasingly irrelevant'.

¹⁰ On the Court's activity as constitutional tribunal, see Eleanor Sharpston and Geert De Baere, 'The Court of Justice as a Constitutional Adjudicator' in Anthony Arnull et al. (eds), *A Constitutional Order of States?* (Hart 2011) 123; Bo Vesterdorf, 'A constitutional court for the EU?' (2006) 4(4) I-Con 607; Andreas M Donner, 'The Constitutional Powers of the Court of Justice of the European Communities' (1974) 11 CMLR 127; Francis G Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in Deirdre Curtin et al. (eds), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O'Higgins* (Butterworths 1992) 25.

¹¹ Submitted to the Court under Articles 263 or 267 of the Treaty on the Functioning of the European Union (TFEU).

¹² Michel Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the US Supreme Court' (2006) 4(4) I-Con 618, 623.

work, synthesised in the conclusive section, is that the Court should let go of the proportionality parlance and expose the policy-oriented thrust of its decisions on internet-related matters.

This article does not purport to criticise proportionality in general, the use of balancing by the regulator or the generic taking into account of conflicting interests in adjudication. The narrow claim is that the three-step proportionality test is helpless to arbitrate FR-implications in internet disputes. Möller's warning is wise: '[w]e should assess the value of proportionality not by asking whether there are cases where it does *not* add much, but by asking whether there are cases where it does'.¹³ However, in the digital arena, proportionality is structurally unable to add anything, most of the times. Its damage to legal reasoning far outreaches the benefit, and should be noted.

2. Regulatory connection of internet-native and non-internet norms

FR-adjudication inevitably entails the interpretation and application of principles. Regulation of conduct relating to the use of internet, conversely, can be very thorough and comprise detailed rules. In fact, the EU has legislated copiously in the field.¹⁴ The process of refinement of the nexus between EU law and internet activities has resulted in a flurry of regulation. This process has aimed to achieve, maintain and renew 'regulatory connection',¹⁵ that is, the alignment between regulation and regulated practices. New legal disciplines have emerged governing the impact that internet technologies have on several human activities (production, distribution and consumption of information, access to intellectual products, entertainment, marketing strategies, management of personal data, use of intangible networks to support the activity of public entities). Resultantly, the EU relies on a wide basis of internet-native regulation. Other EU rules (non-internet specific) antedate internet or do not mention it specifically, but nevertheless apply to its use. When EU and domestic

¹³ Möller n 6, 727. Emphasis in the original.

¹⁴ For instance, see Directive 95/46; Directive 2000/31; Regulation 45/2001; Directive 2002/22; Directive 2002/58 (replacing Directive 97/66); Directive 2006/24.

¹⁵ Roger Brownsword, 'The shaping of our on-line worlds: getting the regulatory environment right' (2012) 20(4) *IJL&Inf. Tech.* 249, 263-265.

judges apply rules that are not internet-specific to internet matters, regulatory connection must take place in the courtroom, more or less *ad hoc*.

The subject-matter of this article is the Court's constitutional case-law in the digital *milieu*. The cases are selected to gauge the process of evolutive refinement described above, whereby adjudication secures alignment between the digital world and a subset of EU law, i.e., its fundamental rights standards. All the disputes considered fall in a casuistic spectrum of EU applicable norms (the application of EU law is a prerequisite for the CJEU to exercise jurisdiction). At one end, the Court interprets or applies internet-native rules and the refinement relates to their compliance with fundamental rights. At the other end, the Court must apply rules that are not internet-specific to an internet-related situation; this might result from technology advancements that have not been matched by regulatory action, or from the application of rules drafted deliberately to be 'technology neutral',¹⁶ which require 'purposive interpretation in the courts'.¹⁷

In the latter case, the regulatory connection hinges on the optimisation of existing rules to new practices, and the constitutional duty of the Court to monitor compliance with fundamental rights is mixed with its task to secure regulatory connection through the interpretation of non-internet rules. Quite simply, the updated application of the rule of conduct must also respect fundamental rights. This is a routine check that the Court must perform on all EU rules.¹⁸

Two examples illustrate this distinction, which is not clear-cut but is helpful to appreciate the Court's work.

Type 1: Consistent interpretation of internet-native rule to fundamental rights

¹⁶ Bert-Jaap Koops, 'Should ICT regulation be technology-neutral?' in Bert-Jaap Koops et al. (eds), *Starting Points for ICT Regulation. Deconstructing Prevalent Policy One-Liners* (TMC Asser 2006) 77.

¹⁷ Brownsword n 15, 265.

¹⁸ The FR-compliance of all acts of the EU, including normative sources, is mandated by Art. 51 of the EU Charter of Fundamental Rights. Domestic measures implementing EU law are similarly subject to the Charter. See, generally, Filippo Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights—Does curia.eu Know iura.eu?' (2014) 14(2) HRLR 231-265.

Art. 15 of Directive 2000/31 (on e-Commerce)¹⁹ provides that ‘Member States shall not impose a general obligation on providers ... to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.’

This article forms part of a set of provisions which grant a ‘safe harbour’ to selected categories of internet service providers. These are exempted from liabilities by reason of their content-neutral activity (caching, hosting, mere conduit).²⁰ Article 15 clarifies that the safe harbour cannot be frustrated by imposing filtering duties on these providers. The application of this internet-specific rule might raise issues of compatibility with fundamental rights. For instance, certain stakeholders might question the compatibility of this rule with their right to protection of property, insofar as this provision spares internet service providers from a duty of monitoring and preventing a) the use of IP-rights (see *Promusicae*,²¹ *L’Oréal*,²² *Scarlet*,²³ *SABAM*,²⁴ *Bonnier*²⁵, *PRCA*,²⁶ *Papasavas*²⁷); b) access to pictures taken and distributed illegally (see *Max Mosley v Google*, French²⁸ and German²⁹ orders); c) the exchange of tickets for which re-sale is prohibited (see UK SC’s judgment *Rugby Football Union v. Viagogo*³⁰). Type 1 cases involve balancing.³¹

¹⁹ 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, Official Journal L 178, 17.7.2000, 1–16

²⁰ See Articles 12 to 14 of Directive 2000/31. For a commentary and a comparison with the corresponding US regime, see Miquel Peguera, ‘The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems’ (2009) 32 Col. JL& Arts 481.

²¹ Case C-275/06 *Productores de Música de España (Promusicae)* [2008] ECR I-271.

²² Case C-324/09 *L’Oréal and others* [2011] ECR I-6011.

²³ Case C-70/10 *Scarlet Extended* [2011] ECR I-11959.

²⁴ Case C-360/10 *SABAM* (judgment of 16 February 2012).

²⁵ Case C-461/10 *Bonnier Audio and others* (judgment of 19 April 2012).

²⁶ Case C-360/13 *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd and Others* (judgment of 5 June 2014).

²⁷ Case C-291/13 *Sotiris Papisavvas v O Fileleftheros Dimosia Etaireia Ltd and Others* (judgment of 11 September 2014).

²⁸ TGI Paris, 17e ch., 6 November 2013, RG 11/07970, *Max Mosley c. Google Inc et Google France*, text available at <http://droitdu.net/2013/11/tgi-paris-17e-ch-6-novembre-2013-rg-1107970-max-mosley-c-google-france-et-google-inc/>.

²⁹ Landgericht Hamburg, 24 January 2014, case 324 O 264/11, text available at <http://tlmd.in/u/1456>.

³⁰ *The Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55 (21 November 2012), available at <http://www.bailii.org/uk/cases/UKSC/2012/55.html>.

³¹ For instance, see how the Court determined the legality of a court injunction requiring an internet provider to monitor the users’ activity, in *Scarlet* n 23, 40-41: ‘that injunction would require the [provider] to carry out

Type 2: Update of non-internet specific rule

Art. 5(3) of Regulation 44/2001³² provides that '[a] person domiciled in a Member State may, in another Member State, be sued: ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.'

In this case, the interpretation of this general principle of territorial connection might prove critical when the alleged wrongdoing and its effects (the 'harmful event') take place over the internet. For web-based defamation, indeed, it is doubtful whether 'the place' where the event occur or might occur is any State where the incriminated webpage is merely accessible. If so, the defendant could be sued in any State of the world where an internet connection exists.³³

From this example (and others³⁴) it is clear that fundamental rights are somewhat ancillary to the main legal question (i.e., whether a simple possibility to access the defamatory material online qualifies as 'harmful event,' and whether the location of the internet user identifies where the 'harmful event' occurs for the purpose of establishing jurisdiction). In this case, fundamental rights guarantees inform the finding of the Court only insofar as it must be ensured that the application of Art. 5(3) of Regulation 44/2001 does not restrict disproportionately the plaintiff's right to privacy and the ensuing right to seek judicial protection for it.³⁵ Type 2 cases involve primarily legal subsumption

general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31. In order to assess whether that injunction is consistent with European Union law, *account must also be taken* of the requirements that stem from the protection of the applicable fundamental rights' (emphasis added).

³² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012 , 16.01.2001.

³³ An extreme case is Case C-441/13 *Hejduk* (judgment of 22 January 2015).

³⁴ For instance, consider the Court's reflection on the application of Article 5(3) of Directive 89/104, which lists the exclusive uses of a trademark by the holder, to the purchase from Google AdWords of words identical to a trademark, in Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-2417, para 66: 'an interpretation according to which only the uses mentioned in that list are relevant would fail to have regard for the fact that that list was drawn up before the full emergence of electronic commerce and the advertising produced in that context. It is those electronic forms of commerce and advertising which can, by means of computer technology, typically give rise to uses which differ from those listed'.

³⁵ This was one of the issue in the cases *eDate* and *Martinez* n 4.

(i.e., the determination of whether a norm applies to a set of facts), to which any FR-balancing – if any – is incidental.³⁶

This distinction is relevant because it allows discerning the parts of the Court's reasoning which use FR-argumentation as a decisive thrust towards the finding, as opposed to a simple standard of legality applied by way of routine. To simplify, Type 1 cases have a clearer constitutional imprint, on average, because the reasoning is free from false positives. The evolutive component in Type 2 cases, instead, is often about updating pre-internet rules rather than about FR-based consistent interpretation. In this sense, Type 1 cases are noise-free, because they are less concerned with regulatory connection; the judicial reasoning on fundamental rights is at the forefront.

Make no mistake: regulatory connection is critical and probes the ability of the Court to mould the interpretation of EU law to modern needs. However, when Type 1 reasoning is deployed, the interpretive exercise regards precisely (and exclusively) the fundamental rights standards. To simplify, argumentation of the first category (dealing with internet-native rules) calls upon the Court to interpret fundamental rights as living instruments, thus exalting the connection between regulation and fundamental rights, not between technology and regulation. It forces the Court to devise the particularisation of human rights principles for new factual predicaments and legal regulations, often without precedents that can apply by analogy.³⁷ Type 1 reasoning is therefore more directly constitutional, in the limited sense explained. Its deployment is clearly visible in the application of internet-native rules, but it can be traced also when Type 2 rules apply. Simply, there can be hybrid cases where the updating of non-internet-specific rules occurs alongside, or even through, FR-based arguments appealing to the balancing discretion of the Court. If the Type 1/2 distinction is relatively clear, any case can be decoded without worrying too much about whether it is a pure example of

³⁶ For a distinction between subsumption and balancing, and an attempt to describe the latter process as a neutral process (like the former), see Robert Alexy, 'On balancing and subsumption. A structural comparison' (2003) 16(4) *Ratio Juris* 433.

³⁷ Thomas M Scanlon, 'Adjusting Rights and Balancing Values' (2004) 74 *Ford. LR* 1477.

either category. Most cases are not pure specimens. Yet tracing the constitutional undercurrent of each is easier by isolating it from the concurring elements of the Court's reasoning. It allows to distinguish amidst the Court's reasoning 'constitutional connection' (alignment between rules and fundamental rights) from 'regulatory connection'.

Two recent Type 2 cases (*PRCA*³⁸ and *Papasavvas*³⁹) illustrate how regulatory connection works and why these cases are not ideal to observe the Court's handling of fundamental rights. The disputes revolved around the potential liabilities of internet service providers for infringement of intellectual property rights and the possible application of a safe-harbour. They are exemplary of the potential for litigation in circumstances of regulatory disconnection, actual or alleged. In each case, there was a far-fetched claim. In *PRCA*, a licensing agency claimed that the appearance of a website's content on a computer screen was, in and of itself, an instance of reproduction requiring a specific clearance for the use of any IPs contained on the website.⁴⁰ The defendant objected that the appearance on the screen of a website's content was a 'temporary act of reproduction' incidental and essential to the mere viewing of webpages, and that it was therefore exempted from the IP regime.⁴¹ Conversely, in *Papasavvas*, a news company argued that the publication its newspaper online was merely hosting and fell under the safe harbour of the e-commerce Directive (see above). Accordingly, the company claimed immunity from an action for defamation regarding articles it published online.

Obviously, the Court rejected the characterisations offered by the licensing agency in *PRCA* and the newspaper company in *Papasavvas*. Even *prima facie*, on-screen projection of websites cannot require a separate authorisation of IP use, and the for-profit operation of an online newspaper cannot be considered a content-neutral conduit. However, attempts were made to stretch or limit the reach of the safe harbours in the applicable Directives, in a bid to trick the Court into an adjustment of the

³⁸ n 26.

³⁹ n 27.

⁴⁰ That is, in addition to that required to upload content on the website.

⁴¹ Under Article 5(1) 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.

regulatory connection of norms that needed none. As preposterous as these attempts were, the Court needed to take them seriously. It declared that IP liability exemptions ‘must allow and ensure the development and operation of new technologies, and safeguard a fair balance between the rights and interests of rights holders and of users of protected works who wish to avail themselves of those technologies’.⁴² Whereas in the specific cases balancing was not required (the scope of the exemptions was clear), the quote bears testimony to the occasional blending of regulatory connection and right balancing in Type 2 reasoning.⁴³

The suggestion, above, that precedents are of little help for FR-based adjudication in internet matters requires a brief explanation. After all, there exists an established practice of human rights adjudication, both at the Court and in other jurisdictions from which it can draw inspiration. Yet, internet-related activities fit hardly into the traditional models of fundamental right conflicts: we need new bottles for the new wine.⁴⁴ As a matter of legal technique, application of FR principles to digital activities is less a question of subsumption of new facts under existing standards than it is a question of setting new policies. The best way to illustrate the unsettling novelty of internet-based activity is through selected cases. The discussion below remarks the aspects of these cases which are capable of generalisation; likewise the commentaries thereon are arguably valid in general and not only *ad casos*.

The precursor in this gallery is the *Lindqvist* case.⁴⁵ A volunteer catechist uploaded the personal information about some colleagues on a webpage, without their consent. From the factual background of the main proceedings, one can appreciate Mrs Lindqvist’s good faith (she promptly

⁴² *PRCA* n 38, para 24.

⁴³ A less obvious case was the qualification of Google – in its capacity as AdWords, providing advertising services – as a neutral subject storing information under Article 14(1) of Directive 2000/31 or, instead, as a subject with IP-related liabilities. See *Google France* n 34, paras 106 ff.

⁴⁴ Variations of this metaphor are commonplace in the discussion of internet regulation. See for instance Martin H Redish, ‘Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution’ (1998) 38 *Jurimetrics* 575; Chris Reed, *Internet law: text and materials* (CUP 2004) 173 (“Old wine in new bottles: traditional transactions in the Internet environment”); John P Barlow, ‘The Economy of Ideas’ (WIRED 2.03 1994) <http://archive.wired.com/wired/archive/2.03/economy.ideas.html>.

⁴⁵ C-101/01 *Lindqvist* [2003] ECR I-12971. For a comment, see Ludovic Coudray, ‘Case C-101/01, Bodil Lindqvist’ (2004) 41(5) CMLR 1361.

removed the information when things got serious). However, criminal prosecution was launched, and Mrs Lindqvist had to endure it: this is a watershed case, symbolising internet's loss of innocence – or legal impunity. Among the relevant issues, the Court considered whether the mere fact that the incriminated webpages were accessible anywhere in the world made Mrs Lindqvist liable for transfer of the personal information to a third country, a practice restricted under Directive 95/46.⁴⁶ The reasoning of the Court is critical and exemplary:

Given ... the state of development of the internet at the time Directive 95/46 was drawn up ... one cannot presume that the Community legislature intended the expression transfer [of data] to a third country' to cover the loading, by an individual ... of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them.

If Article 25 of Directive 95/46 were interpreted to mean that there is transfer [of data] to a third country every time that personal data are loaded onto an internet page, that transfer would necessarily be a transfer to all the third countries where there are the technical means needed to access the internet. The special regime provided for by Chapter IV of the directive would thus necessarily become a regime of general application, as regards operations on the internet. Thus, if the Commission found, pursuant to Article 25(4) of Directive 95/46, that even one third country did not ensure adequate protection, the Member States would be obliged to prevent any personal data being placed on the internet.

On its face, this is a schoolbook example of a Type 2 question: update of a non-internet rule to a world-*cum*-internet. However, it reveals the Court's readiness to alter the balance of established principles, if only slightly. The rationale of the applied rule is to prevent that personal data be diffused where insufficient guarantees exist for their protection. If the rationale is valid, indeed, internet amplifies

⁴⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 , 23/11/1995, 31-50, see in particular Article 25.

this concern indefinitely; this much is unquestionable. The protection of the affected parties would then require Member States ‘to prevent any personal data being placed on the internet.’ However, the Court discarded this conclusion as absurd, implicitly relying on a reapportioning of the responsibilities based on a new analysis of expected costs, that is, a covert utilitarian assessment. Since anybody uploading any personal data online would likely to incur liability, this liability is lifted, even if it was effectively designed to protect a fundamental right.

Invoking arguments relating to the original intention of the legislator (that could not foresee the functioning of internet) and a sloppy reasoning *ex absurdo* (every uploader would be liable) the Court produced a Type 1 determination in disguise, where strict proportionality determined the outcome. Specifically, it altered the established balance between the right to privacy and the right to impart information, acknowledging that the current social and technological situation validates an irreversible erosion of the former in favour of the latter. In a sense, this judgment has inadvertently signalled the demotion of privacy protection to a policy objective (down from fundamental right). It also raises the question whether proportionality is a valid tool to manage the impact of new technologies on fundamental rights.

3. Proportionality between fundamental rights in digital matters – unworkable *formulae*

A constant of constitutional adjudication in Europe is the use of the proportionality test to balance competing values.⁴⁷ The European Union applies a homonymous principle (alongside subsidiarity) to prevent its rules from encroaching on Member States’ competences,⁴⁸ but it should be noted that what is examined here is exclusively the use of proportionality as a judicial test, distilled from repeated

⁴⁷ A history of the principle is provided in Eric Engle, ‘The General Principle of Proportionality and Aristotle’ (2013) in Liesbeth Huppens-Cluysenaer and Nuno MMS Coelho (eds), *Aristotle and The Philosophy of Law: Theory, Practice and Justice* (Springer 2013) 265.

⁴⁸ Article 5 of the Treaty of the European Union; Protocol 12 on the application of the principles of subsidiarity and proportionality.

use.⁴⁹ Other intimations of the principle and other instances of balancing *lato sensu* (for instance, the balancing inherent in policy-making) are without the narrow scope of this critique.

Proportionality, or the process that the test entails, is a defining element of constitutionalism globally.⁵⁰ The test of proportionality is normally used to assess the justification of restrictions to fundamental rights caused by private or, more commonly, public measures.⁵¹ A certain proportion must exist between the interference to a given right and the benefit that that interference brings to another right or public interest. Proportionality has become a general principle of EU law⁵² and has informed the case-law of the ECtHR,⁵³ under the moniker of necessity.

Roughly, the proportionality test used by the Court traces the one developed by the German Federal Constitutional Court (the BvFG)⁵⁴ and theorised as a prototype by Robert Alexy.⁵⁵ It is a three-step test informed by the principle of Pareto-optimisation⁵⁶; each step ensures that the measure under scrutiny is efficient, that is, there cannot be any unnecessary waste of rights' protection. It is a device of FR-maximisation. The measure must be suitable to achieve the goal it is designed for (step 1) and must be, among those equally suitable and reasonably available, the least encroaching on the right restricted (step 2). The third step, usually called proportionality *stricto sensu*, requires weighing the values at stake, when it is inevitable that some of them must suffer a restriction.⁵⁷ Again, the purpose is to preserve efficiency: a measure is disproportionately restrictive of a right if its

⁴⁹ On the 'cut-and-paste' approach of the Court of Justice, which uses judicial tests codified in its own precedents, see Jan Komarek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 AJCL 149.

⁵⁰ Alec Stone Sweet and Jud Mathews, 'Proportionality balancing and global constitutionalism' (2008) 47 *Colum. JTL* 72; Mads Andenas and Stefan Zleptnig, 'Proportionality and balancing in WTO law: a comparative perspective' (2006) 42 *Tex. ILJ* 371; T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *YLJ* 943.

⁵¹ Julian Rivers, 'Proportionality and variable intensity of review' (2006) 65(1) *CLJ* 174.

⁵² Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *ELJ* 158.

⁵³ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002).

⁵⁴ The seminal case is *Lüth*, BVerfGE 7, 198 (1958).

⁵⁵ Robert Alexy, 'Constitutional rights, balancing, and rationality' (2003) 16(2) *Ratio Juris* 131.

⁵⁶ Aurelien Portuese, 'Principle of Proportionality as Principle of Economic Efficiency' (2013) 19(5) *ELJ* 612.

⁵⁷ That is, when there is no measure available that is Pareto-superior to the *status quo* with respect to all values involved.

contribution to the competing value is inferior to the restriction caused, in terms of intensity. The test, at a closer look, invites to a comparison between states of the world (rather than values as such): one in which the interference operates and one where it does not.

This “Disproportionality Rule”⁵⁸ is defined by the BvFG – convolutedly but correctly – as follows:

An interference with a constitutional right is disproportional if it is not justified by the fact that the omission of this interference would give rise to an interference with another principle (or with the same principle with respect to other persons or in other respects), provided that this latter interference is at least as intensive as the first one.⁵⁹

The proportionality test has been for decades the Court’s tool of choice to deliver judgments in hard cases without forfeiting its legitimacy. Proportionality’s high level of proceduralisation and its operation reminiscent of a mathematical formula facilitate the thankless task to second-guess Member States’ preferences and review EU law’s compliance with FRs. This section discusses the use of proportionality and FR-adjudication in selected judgments.

The case of *Google Spain*,⁶⁰ like *Lindqvist*, is a hybrid of Type 1 and 2. Unlike in *Lindqvist*, however, the Type 1 component (the evolutionary interpretation of fundamental rights) is not disguised. The facts warrant a synthetic account. Mr Costeja Gonzalez, a martyr of the digital age if ever there was one, Googled his own name on one fateful day of 2009. The first results were links to the digitalised copy of the 1998 edition of a local newspaper, reporting the notice of a public auction on real estate properties, including his own, seized to recover social security debts. He requested Google to remove these links from the results of a search under his name, invoking his right to privacy. More specifically,

⁵⁸ Alexy, *Constitutional rights* n 55, 139.

⁵⁹ *Ibid.*, from the *Titanic* judgment, BVerfGE vol. 86, 1 (1992).

⁶⁰ Case C-131/12 *Google Spain and Google* (judgment of 13 May 2014).

he invoked a right to have certain past events not reported in widely and easily accessible documents lacking an overriding public interest.⁶¹

First, we can observe the Type 2 component of the ruling. The Court considered a gateway question, namely whether Google qualified as controller of personal data under Directive 95/46. Google claimed that it did not, because it only performed a content-blind indexing of all words uploaded online, to populate search results for its users.⁶² The Advocate General, after a short reflection on how internet has taken EU law by surprise,⁶³ advocated a ‘rule of reason’ akin to the *Lindqvist* rationale.⁶⁴ Drawing support from the Article 29 Working Party reports, he concluded that holding Google responsible for the managing of personal data on the webpages listed would lead to absurd results.⁶⁵ The Advocate General’s approach is indeed reminiscent of *Lindqvist*: subsumption (the application of the Directive to Google’s acts) is determined through a reasoning *ex absurdo* regarding practical consequences. Regulatory connection is managed through proportionality: Type 1 and Type 2 are entangled. The Court instead rejected Google’s argument that its listing entailed an automated processing without meaningful editorial intervention.⁶⁶ Google, by indexing online data, performs a deliberate commercial activity that can attract liability. Accordingly, Google is a controller under the Directive (a Type 2 finding).⁶⁷

⁶¹ Two insightful commentaries are Eleni Frantziou, ‘Further Developments in the Right to be Forgotten: The European Court of Justice’s Judgment in Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos’ (2014) 14 HRLR 761; John W. Kropf, ‘Google Spain SL v. Agencia Española de Protección de Datos (AEPD). Case C-131/12’ (2014) 108(3) AJIL 502.

⁶² On the nature of indexing performed by search engines and the algorithms used, see Emily B Laidlaw, ‘Private power, public interest: An examination of search engine accountability’ (2009) 17(1) IJL& Tech. 113, 128-133.

⁶³ *Google Spain* n 60, Opinion of AG Jääskinen, para 29: ‘the potential scope of application of the Directive in the modern world has become be [sic] surprisingly wide’.

⁶⁴ *Ibid*, para 30.

⁶⁵ *Ibid*, paras 89-90.

⁶⁶ Contrast this characterisation with Google’s own statement that search results are a form of protected free speech, made in US proceedings. Google’s position was frequently upheld, see for instance *S. Louis Martin v. Google Inc.*, case number CGC 14 539972, in the Superior Court of the State of California, County of San Francisco, order of 13 November 2014. Google also commissioned a scientific paper that supports this notion, see Eugene Volokh and Donald M Falk, *First Amendment Protection for Search Engine Search Results*, April 20, 2012 at <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>.

⁶⁷ *Google Spain* n 60, paras 32-34.

The openly constitutional reasoning, however, is deployed in the Type 1 part of the judgment. The Court laid the groundwork for its determination noting that the outcome, seemingly framed as a question of principle, depended on the context. Quite simply, information loaded online is too readily available, to anyone. Availability of truthful information published lawfully has become a problem – not a matter of concern in pre-internet times.⁶⁸ Now, instead, regulation is required to manage the negative externalities of this information overload. This is partly due to how good online search engines are: information is only as public as search engines makes it accessible.

The Court concluded that the search provider is a controller which processes personal data. Therefore, if Google refuses to remove certain links from the results of a name-based search upon request, State regulatory agencies can review the application and order the removal.⁶⁹ This order can be granted when the results of a search entail an excessive interference in the data subject's private life, without a concurring (and overriding) justification. Because time soothes out some of the available justifications based on public interest, this finding was saluted as establishing a 'right to be forgotten.' The resulting instruction of the Court, which read into the applicable rules of the Directive a specific duty (for the controller) and a right (for the data subject), stems from an overt use of proportionality.

The passage where the reasoning of the CJEU reveals the use of proportionality *stricto sensu* calls for closer analysis:

As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general

⁶⁸ Ibid, para 80: 'It must be pointed out at the outset that ... processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.'

⁶⁹ Ibid, para 99.

public by its inclusion in such a list of results, it should be held ... that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.⁷⁰

This excerpt contrasts at least four discrete principles/values. First, the data subject's 'right to oblivion' (in turn an elaboration of her rights to private life and data protection under Articles 7 and 8 of the Charter, read through the 'compelling reasons' under Article 14(a) of the Directive). Second, the operator's economic interest, protected by Articles 15-17 of the Charter. Third, the public's right to impart and obtain information, protected by Article 11 of the Charter. Fourth, unspecified 'particular reasons' that could tip the balance in favour of the general public's interest at the expense of the data subject's own.

Balancing four rights is a devilish task even if we assume, for the sake of ease, that a given measure x can only either respect or breach each of them (that is, we disregard the degree of contribution to the achievement of each right and the intensity of the breach thereof⁷¹). A mere head-count does not work: the Court itself noted that the data subject's right prevails over two competing interests (of the public and of the economic operator). Adding the analysis of the intensity of the measure's marginal impact on the enjoyment of each right,⁷² it would perhaps be possible to determine it statically.⁷³ For

⁷⁰ Ibid, para 97.

⁷¹ On the problem of commensurability between values and between interferences to values, see Niels Petersen, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 GLJ 1387. For a discussion of how to represent commensurate values without using numerical indications, see Giovanni Sartor, 'Logic of Proportionality: Reasoning with Non-Numerical Magnitudes' (2013) 14 GLJ 1419, 1429 ff.

⁷² Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 L&Ethics HR 1, 8.

⁷³ That is, we could try to analyse its collective 'realisation-impact' across the relevant values. Sartor n 71, 1436: '[t]he realisation-impact of an action α on a value v is the difference between the realisation-quantities of v resulting from and \emptyset [the status quo]'.

instance, it could be agreed that the solution envisaged by the Court protected the rights of Mr Costeja Gonzalez and of those like him from a *substantial* harm, restricting *slightly* the interests of the public to know about their past, as well as the newspaper's right to inform the public about it through online diffusion. It also imposed a *significantly burdensome* restriction on the right to exercise a business onto Google and other search engines. The Court, however, did not explain how these magnitudes relate to, possibly off-set, each other.

It is not clear whether the Court even attempted to factor into the equation the degree of restriction of all values involved. In fact, certain wording suggests instead that privacy prevails by default over freedom of information and of conducting business:

[the rights under] Articles 7 and 8 of the Charter ... override, *as a rule*, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name.⁷⁴

It cannot be conclusively excluded that the Court performed an accurate proportionality test but, since this does not emerge from the ruling, we have to re-create it and compare the results of the actual decision with the hypothetical exercise. It is doubtful that the "Disproportionality Rule" could clarify the calculus.

Under this rule, the solution envisaged by the Court is proportionate insofar as its absence would determine a graver breach of rights than the restriction it causes (a negative aggregate utility balance with respect to $r_1, r_2 \dots$ to r_n).⁷⁵ In other words, we should ascertain whether establishing Google's obligation to enforce the 'right to oblivion' is less restrictive of the rights under Articles 11, 15, 16 and 17 of the Charter than rejecting it would be of the rights under Articles 7 and 8. Each variable in the calculation is adjusted for the intensity of the restriction and, presumably, for the number of people

⁷⁴ *Google Spain* n 60, para 99. Emphasis added.

⁷⁵ Sartor n 71, 1391: '[W]e do not compare the weight of the stone to the length of the line. Instead, we analyze whether we add proportionally more length to the line than we shed weight of the stone.'

actually or potentially affected. In short, although certainly it is possible to explain the outcome of the Court along these lines, the outcome is not falsifiable because too many variables hinge on unprincipled approximation. An outcome opposite to the one indicated by the Court, indeed, would be just as plausible, owing to the magnitude of the burden imposed on Google and the number of people whose access to the relevant information is restricted. Unsurprisingly, the reasoning of the Court is very cavalier in treating the steps of the proportionality analysis, and in specifying the relative strength of its variables.⁷⁶

The proportionality test, in this field, is not a heuristic device to reach the right decision. Indeed, the outcome of this contrived proportionality calculus is not falsifiable, but only opinable or contestable. Instead of selecting the outcome of the decision, the balancing provides a malleable template that shapes only its supporting reasoning. In the particular circumstances of this dispute, Habermas's critique to the notion of proportionality rings true: '[in the proportionality test, v]alues must be brought into a transitive order with other values from case to case. Because there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies'.⁷⁷ The factual matrix of the Google case is, *ab initio*, hard to frame as a stand-off between established fundamental rights.

What bothered Mr Costeja, in whose honour the Streisand-effect⁷⁸ should be re-named, was not the existence of that piece of news in the public domain, buried as it was at p. 23 of an old magazine. Of course, the real problem was his unflattering 'Google-identity' or 'Google-footprint'; consequently, he requested that Google obey, to an extent, to his instructions on which aspects of his web-relevant *persona* should pop out first through a name-search. The 'right to be forgotten' tag is misleading, and so is the reference to the removal of the link from the results: what really mattered is that the

⁷⁶ Frantziou n 61, 8: 'while Articles 7 and 8 of the Charter suggest the creation of some obligations for EU institutions and Member States, they do not specify what the role of private actors such as Google should be in the enforcement of the relevant standards, or what limitations to these rights are acceptable and how they ought to be balanced against other, equally fundamental, rights'.

⁷⁷ Jürgen Habermas, *Between Facts and Norms* (MIT 1996), 259 ff.

⁷⁸ http://en.wikipedia.org/wiki/Streisand_effect.

bothering results came on top. Had the infamous links been listed at page 23 of the Google research results, Mr Costeja would have just not cared, exactly as he presumably did not care in 2009 about the 1998 print publication of the very same tainting news. There is some truth in connecting one's rights to an apparently circumstantial fact like Google-ranking: after all, 'to be seen is ... to be highly ranked',⁷⁹ and this author (and this Journal) would plausibly resent discovering that Google Scholar does not host a link to the electronic version of this article, or that it shows it at page 23 of an author-based search.⁸⁰ The idea that Google can act as arbitrary gatekeeper of all information available online, including personal data, justifies the attempts to brace its power as a matter of policy.⁸¹

Perhaps *Google v Spain* announces a nascent fundamental right to the fairness, accuracy or representativeness of our digital *persona*. If so, the judgment should explain – through proportionality – why this right trumps Google's interest to carry out its distinctive line of business, through a lawful collection of lawfully published content. Clearly, Google's business performance has unintended consequences on somebody's life, which are perceived as unfair even if they derive from lawful facts and acts. Google's mind-blowingly efficient archiving and sorting activity are treated by the Court as the kind of dangerous conduct that, although legal *per se*, imposes a surplus of responsibility on the subject.⁸² In turn, online personality is deemed to be so vulnerable that it deserves protection also against certain lawful acts.⁸³

⁷⁹ Laidlaw n 62, 125.

⁸⁰ Litigation based on low search ranking was brought, without success, in the USA. See *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *Kinder-start.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806 (N.D. Cal. Mar. 16, 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WE 21464568 (W.D. Okla. May 27, 2003).

⁸¹ Andrew L Shapiro, *The control revolution: How the Internet is putting individuals in charge and changing the world we know* (PublicAffairs 1999) 225: 'In a democratic society, those who control access to information have a responsibility to support the public interest'.

⁸² Laidlaw n 62, 137, referring to the notion that search engines attracts criticism 'for being good at what they do'.

⁸³ This is one step further from the AG's remark that 'the universal scope of the information contributes to the harm being potentially more acute than that suffered, for example, by means of a conventional medium' (see *eDate* n 4, para 48).

In the folds of the Court's reasoning lays the idea that, in a context of obsolescence of public authorities, Google must operate as a quasi-public authority.⁸⁴ Therefore, it has non-reciprocal and non-contractual obligations towards its stakeholders (both the users and the persons affected by its activity). Alternatively, Google's duties can be framed as a regulatory brace imposed on a quasi-monopolistic actor with predominant power over information and public opinion.⁸⁵ In both constructions, the critical element is Google's *de facto* control over a public good.⁸⁶ This notion, however reasonable and legitimate, is not the result of balancing, but a regulatory choice. Consider Lord Brown's dissent, concerning the UK Supreme Court's use of proportionality to review the requirement that visa be granted only to foreign couples when both partners are at least 21 years old (to prevent forced marriages at an earlier age):

What value ... is to be attached to preventing a single forced marriage? What cost should each disappointed couple be regarded as paying? Really these questions are questions of policy and should be for government rather than us.⁸⁷

The argument here is not that *Google Spain* was wrong on the merits. The crucial point is how much novelty the Court has nonchalantly reined through legislator-like discretion, simply dangling proportionality before the beholders. The Court combined the right to private life and the right to a lawful use of personal data (neither of which was breached by the publication) to enforce an unprecedented right, in unprecedented circumstances and implicating an unprecedented role for

⁸⁴ Johan Eriksson and Giampiero Giacomello, 'Who Controls the Internet? Beyond the Obstacity or Obsolescence of the State' (2009) 11 *International Studies Review* 205.

⁸⁵ Wolfgang Schulz, Thorsten Held and Arne Laudien, 'Search Engines as Gatekeepers of Public Communication: Analysis of the German Framework Applicable to Internet Search Engines Including Media Law and Anti-Trust Law' (2005) 6 GLJ 1418.

⁸⁶ Laidlaw n 62, 126: 'The act of framing a user's information experience makes search engines indispensable to access to information on the Internet thus elevating their product to public good status', pointing to the discussion in Lucas D Intronza and Helen Nissenbaum, 'Shaping the Web: Why the politics of search engines matters' (2000) 16(3) *Inf. Soc.* 169.

⁸⁷ *R (Quila and another) v Sec of State for the Home Dept* [2011] UKSC 45, para 91 of the dissent.

Google, and in the process established Google's unprecedented duty to arbitrate individual applications of data removal.

In other words, there is no manifest error in the static assessment of the values at stake and of the relative restrictions entailed by the *status quo*. What is unsatisfactory is the lack of reasoning regarding the proportionality of the indicated solution (Google's duty to remove the link upon meritorious requests). Proportionality *stricto sensu* only operates – as seen above – through the comparison between the aggregate right-implementation of the *status quo* and an alternative measure. The Court found a putative disproportion in the *status quo* and jumped to the solution. The better option would have been to show that the solution causes a more favourable scenario of right-implementation. The Court failed to show the critical element of proportionality which is the putative advantage of changing (or retaining) the *status quo*. Nothing suggests that it would have been easy or even possible, but it was unavoidable if proportionality is taken seriously. The result of attributing duties to Google is perhaps reasonable, but given the circumstances it would be preferable that the regulator had done that⁸⁸ or that the Court had appealed to the reasonableness of the decision, rather than to its putative proportionality.

4. Low-intensity actions with momentous reach. Protecting collateral victims of internet measures

Proportionality does not compare values, but marginal variations of value-realisation entailed by alternative states of the world (induced or mandated by identified normative measures). However, as argued in the previous section, internet-based activities do not lend themselves to the intuitive generalisations that allow reviewers to attach quantitative judgments to the realisation of rights. Deprived of workable comparisons, proportionality misses its critical hinge.

⁸⁸ Shapiro n 81, 225.

This difficulty was prefigured in *Lindqvist* (where the low-intensity threat to privacy was multiplied by the accessibility of online content, causing a formal disproportion that required a policy-oriented ruling). A less risky assessment was necessary in *Schecke*.⁸⁹ The applicants claimed that the publication online of their companies' names among the recipients of EU funding (within the Common Agricultural Policy) was unnecessarily restrictive of the company's privacy. The values involved were the public's interest in knowing the exact allocation of EU funds, the Union's duty to transparency and the recipients' interest to privacy. In that occasion, however, the problem was solved through simple Pareto-optimisation. The *status quo* entailing the diffusion of unnecessary information, it was sufficient to reduce or qualify the range of published data to increase the implementation of the right to privacy without decreasing the enjoyment of the concurring values.

When Pareto-optimisation cannot occur, however, internet cases reveal their non-manageability through balancing. A case on point is *L'Oréal v eBay*, which mixes the Type 1 and Type 2 reasoning in one judgment. Apparently, the case revolved around a purely Type 2 issue and regarded fundamental rights only tangentially. Nonetheless, the involvement of several stakeholders and several fundamental rights makes it ideal to illustrate the elusiveness of digital litigation to balancing parsing.⁹⁰

L'Oréal sued eBay for unlawful use of its trademark. eBay pays the likes of Google to have sponsored links appear alongside normal links as results of keyword searches. eBay's sponsored links advertise items sold on its auction platform, many of which branded. Therefore, the relative trademarks are among the words that eBay selects and for which it pays Google. When private parties sell counterfeit goods through eBay, eBay cannot be liable directly (to avoid the practice it should set up a preventive filtering system, something it can refuse to do under the safe harbour of Art. 15 of the

⁸⁹ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063.

⁹⁰ Contrast with Case C-323/09 *Interflora v Mark & Spencer* [2011] ECR I-8625, which also concerned the use of a trademark by a competitor. However, the dispute was essentially between two competitors and did not involve the interests of a wider audience. Hence, the case is only accidentally, not essentially, internet-related.

e-Commerce Directive). However, L'Oréal argued that eBay, by actively buying advertising services for the search-word 'l'oréal', used its brand and exploited or at least abetted the sale of counterfeit products – an indirect breach of trademarks rights.

The Type 2 question, in short, was whether the use of the brand L'Oréal by eBay qualified as 'use' under the relevant EU norms on trademark.⁹¹ If so, it could be objected by the trademark-holder, if unlawful. Whether in 1989 the EU legislator could possibly conceive the purchase of search-embedded advertising through keywords that can correspond to brands is beyond the point. The rationale of the EU regime concerned the IP-holder's power to prevent third parties from unauthorised use, hence the regulatory connection of pre-internet rules could occur without much conceptual trouble.⁹²

The Type 1 component of the dispute, instead, was less straightforward and did not emerge in the judgment. It did, however, in the Opinion of the Advocate General, who reminded at the outset that eBay listings are covered by the freedom of expression and information, under Article 11 of the Charter.⁹³ Jääskinen conceded that freedom of expression cannot normally justify a breach of property rights, including trademarks. However,

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.⁹⁴

Accordingly, it would be unfairly severe to set up a system of shorthand remedies for the benefit of IP-holders, if sellers of genuine goods were adversely affected unnecessarily. This remark reveals the endemic problem of regulation of all internet-related conduct: any standard potentially applies to millions of users. It is impossible to tell *a priori* innocent bystanders from fraudulent users, and fine-

⁹¹ Specifically, Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94.

⁹² As it seemingly did in *Google France* n 34, holding that Google's use of certain brands to populate sponsored ads qualified as 'use' under EU trademark law, and benefitted in principle from the safe harbour of Article 14 of the e-commerce Directive.

⁹³ *L'Oréal* n 22, Opinion of AG Jääskinen, para 49.

⁹⁴ *Ibid*, para 158. Emphasis added.

tune regulation to exclude false positive. Likewise, *ex post facto* prosecution is unviable. The slippery slope is around the corner every time regulation of internet behaviour purports to repose on a seemingly neutral balancing of values, because the sheer scale of massive behaviour online makes it impossible to strike a balance that is acceptable to all people whose fundamental rights are affected.

In short, any regulation of the activity 'using internet' is inevitably over-inclusive with respect to the regulatory goal pursued. It is as if all people 'breathing' were required to avoid drinking, just because all drivers are certainly 'breathers'. Unfortunately, there seems to be no better way to circumscribe internet regulation *ratione personae* or *ratione materiae*. As a result, proportionate balancing is normally and demonstrably impossible to achieve; all solutions are disproportionate. This is so since internet-regulating measures have such a massive inefficiency-creating externality (i.e., they create useless restrictions for users whose action is irrelevant to the regulatory purpose pursued) that it is impossible to prove their proportionality. Hence, it is often impossible to demonstrate that internet regulations – let alone court decisions – arbitrating between competing rights secure an overall positive balance of right-enjoyment compared to the *status quo*. As a consequence, it is the task of the regulator to deliberately assess the various trade-offs, none of which is proportionate in the sense implicated by the proportionality test, and choose the preferable norms as a matter of conscious policy-making.

To its credit, the findings of the Court are rarely the strained result of an impracticable review of proportionality. More commonly, they reflect indeed a policy choice,⁹⁵ often dictated by the concern of avoiding false positives and minimise the number of stakeholders whose interest is sacrificed in the trade-off. The Court in *Lindqvist* spared billions of web-users from the regime applicable to those who transfer personal information to third countries. In *Google Spain*, the Court operated similarly: when the individual's concern is plausible, Google's duty to act upon it is the more convenient option, as

⁹⁵ Endicott n 6, (referring to judges using proportionality): 'They assess the value of pursuing public purposes in the way that the legislature or the government has done or proposes to do'.

opposed to sacrificing her fundamental right, or asking the news outlet to retract a lawful exercise of the freedom to impart information. This idea of (utilitarian) convenience is candidly spelled out in the preamble of Directive 2001/29⁹⁶ on copyright protection in the information society:

In the digital environment ... 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.⁹⁷

There is a clear utilitarian foundation to the rightholders' right to seek court injunctions ordering intermediaries to remove the breach. The corresponding intermediaries' duty does not stem from their legal responsibility or the optimal balance between their rights and duties, but from their being 'best placed' to counter illegality. The intermediaries have quasi-public responsibilities reflecting their quasi-public authority: it is easy to draw a parallel with the *Google Spain* decision, as constructed in the previous section.

In *L'Oréal v eBay* the rights of the legion of eBay sellers could not be curtailed by preventive restrictions. eBay is held liable for infringement of IP rights only if is aware of it, for instance when it cooperates with the user on the preparation of the listings. A comparison with the case *Coty*⁹⁸ helps to elucidate the special features of *L'Oréal*, a case that is essentially internet-related and thus, arguably, unfit for proportionality. In *Coty*, the main proceedings emerged from a similar factual background: an eBay user purchased counterfeit merchandise and sought reparation from the seller.

⁹⁶ 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 L 167, 22.6.2001, 10-19.

⁹⁷ Recital 59 (emphasis added).

⁹⁸ Case C-580/13 *Coty Germany* (judgment of 16 July 2015)

eBay revealed the identity of the seller, who denied involvement in the specific transaction. The purchaser then required the bank with which the seller held an account (registered with eBay) to disclose the holder's identity. The bank refused, invoking banking secrecy. The Court was asked to determine whether EU law allows banking secrecy to be upheld at the expense of IP protection,⁹⁹ and set out to 'reconcile the requirements of the protection of different fundamental rights, namely the right to an effective remedy and the right to intellectual property, on the one hand, and the right to protection of personal data.'¹⁰⁰ The Court held that a domestic law authorising banks to invoke banking secrecy unconditionally can frustrate disproportionately the rights to intellectual property – by making it impossible to pursue an effective remedy in case of breach.¹⁰¹

The outcome resulted from a plain application of the proportionality test. The domestic law was considered capable of obliterating even the essence of the rights to property and to an effective remedy, in breach of Article 52(1) of the Charter. This decision differs from *L'Oréal* because the incidence of internet on the dispute was accidental. The dispute was between the bank and the purchaser, and the interests involved were just two: 'First, the right to information and, second, the right to protection of personal data must be complied with.'¹⁰² This case, in short, did not display some of the common features of those disputes in which internet activities are central, and which for this reason escape moderation through proportionality.

The mythology of proportionality pervades also the cases concerning infringements of IP rights through peer-to-peer online activities. In the main proceedings, the IP-owners (directly or through dedicated associations) required, alternatively, that internet providers disclose their customers' identity (*Promusicae; Bonnier*) or monitor their activity so as to prevent infringements (*SABAM; Scarlet*). The Court, in all cases, resorted diffusely to a constitutional reasoning, claiming to consider

⁹⁹ Namely, under Article 8(1) and Article 8(3) of Directive 2004/48

¹⁰⁰ *Coty* n 98, para 33.

¹⁰¹ *Ibid*, paras 41-43.

¹⁰² *Ibid*, para 28.

all fundamental rights involved. Generally, several rights of several subjects were at stake: the property rights of IP-holders and their right to seek judicial protection thereof, the right to conduct business of the internet service providers, the right to privacy and to exchange information of the internet users (the latter arising only in the monitoring-related cases).

According to the arguments presented so far, the essential matrix of these cases is sufficient to redoubt of their compatibility with the orthodox three-step proportionality routine. A short account confirms the doubts as meritorious.

In *Promusicae*, the Court recalled that it is the Member States' duty to implement a Directive choosing measures which strike 'a fair balance' between the various fundamental rights and respect proportionality.¹⁰³ The Court confirmed this guideline in *Bonnier*, adding that an order for disclosure of personal data is not precluded if, among other things, 'the reasons for the measure outweigh the nuisance or other harm which the measure may entail for the person affected by it or for some other conflicting interest'.¹⁰⁴ These guidelines are very vague and pass the buck to the national authorities, which are better positioned to assess the fairness of the balance in specific cases. This implicitly challenges the idea that there is only one balanced option, to be identified through proportionality testing.

In *SABAM* and *Scarlet*, the Court mixed subsumption and proportionality. It plainly stated that the sought-after filtering systems would require the internet service providers to carry out general monitoring, in breach of the e-commerce Directive.¹⁰⁵ It then stressed certain characters of the filtering system (costly, permanent, complicated) that automatically made it unnecessarily burdensome¹⁰⁶ and patently unable to strike a fair balance between the rights of IP-holders and internet providers.¹⁰⁷ The rights of the users were mentioned only *ad abundantiam*. This finding is

¹⁰³ *Ibid*, para 70.

¹⁰⁴ *Ibid*, para 58.

¹⁰⁵ *Scarlet*, n 23, para 40; *Sabam* n 24, para 38.

¹⁰⁶ *Scarlet* n 23, para 48; *Sabam* n 24, para 46.

¹⁰⁷ *Scarlet* n 23, paras 49-53; *Sabam* n 24, paras 47-51.

impossible to square with an orthodox proportionality test. The Court simply noticed that an obligation to monitor would impose a significant burden on internet providers, without elaborating on the degree of benefit that it would bring to property rights. Nor did the decisions account for the FR-balance of the preferable scenario (ample freedom of conducting business coupled by widespread disrespect of IP rights). There is not even a hint of comparison on which to hang a proper finding of proportionality. Likewise, the Court produced a cringeworthy *non sequitur* when it stated that requiring providers to set up ‘a complicated, costly, permanent computer system ... would also be contrary to [the requirement] that measures ... should not be *unnecessarily* complicated or costly’.¹⁰⁸ Nothing in the Court’s reasoning supported the conclusion that the measure was *stricto sensu* disproportionate, let alone unnecessary (that is, wasteful) in light of its purpose.

In sum, these peer-to-peer cases show that the Court either delegated proportionality to domestic courts or recited its elements as if it were a half-forgotten due diligence checklist. It is not preposterous to suggest that the findings were not truly reached through proportionality, and that it was just cited to inject legitimacy *ex post deciso*.

In another case (*UPC*¹⁰⁹), the intermediary was not *eBay*, and the alleged IP infringement was not camouflaged among millions of innocent ads. The intermediary, an internet provider, was ordered by a national court to block the users’ access to a website streaming pirated movies. In this dispute, the possibility of a blanket shutdown did not trouble the Court: the website was clearly up to no good, hence there was no risk of false positives being unfairly affected by the injunction. The balancing with the hypothetical countervailing rights was briefly accounted as follows:

... 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

¹⁰⁸ *Scarlet* n 23, para 48; *Sabam* n 24, para 50 (emphasis added).

¹⁰⁹ Case C-314/12 *UPC Telekabel* (judgment of 27 March 2014).

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.¹¹⁰

Even in a case like *Schecke*, where the outcome is based on a proper proportionality analysis (to the point that the Court assessed the necessity of the measure challenged, and suggested a less restrictive alternative),¹¹¹ the underlying problem was more mundane. Because any information on internet receives a disproportionate exposure, anything uploaded beyond the strict necessary breaches somebody's rights significantly, even when the additional disclosure is not particularly harmful in and of itself.

The fragmentation of practical responsibility for the downstream consequence of online conduct is difficult to decipher with certainty. Resultantly, the vast disproportion that can occur (in size, timespan, reach, effects, harmfulness) between conduct and events makes it impossible to apportion legal responsibility according to a principled scheme, like that resulting from the proportionality test. The northern star of the Court seems the minimisation of costs, something very different from the maximisation of rights that proportionality promises. Responsibility is regularly attributed to those who suffer the least from bearing it. Slippery slopes are regularly shunned, a pragmatic result that betrays the Court's preference for sustainability over principles. There seems to be a twist, however, which confirms the impossibility to refer to a unique method of balancing: millions of internet users are allowed to sell goods (*L'Oréal*) and exchange files (*SABAM*) freely, even if this relatively unregulated practice occasionally encroaches the rights of private individuals. When at stake is a public interest, instead, the focus shifts, and the priority becomes defusing internet's multiplying effect of disorderly conduct. The Court held in *Carmen Media Group*:

a prohibition measure covering any offer of games of chance via the internet may, in principle, be regarded as suitable for pursuing the legitimate objectives of preventing incitement to squander

¹¹⁰ Ibid, para 57.

¹¹¹ Ibid, paras 79-82.

money on gambling, combating addiction to the latter and protecting young persons, even though the offer of such games remains authorised through more traditional channels.¹¹²

An apparent exception to this very pragmatic approach is the case *Digital Rights v. Ireland*,¹¹³ in which the Court annulled the Data Retention directive, in a flamboyant exercise of proportionality testing. However, the Court maybe tried a bit too hard to sell this decision as an fearless application of proportionality. Consider the following statement, relating to the minimum period for which telecommunications operators must retain the data:

that period is set at between a minimum of 6 months and a maximum of 24 months, but it is not stated that the determination of the period of retention must be based on objective criteria in order to ensure that it is limited to what is strictly necessary.¹¹⁴

This remark purports to prove too much: why should an EU Directive specify that its application must comply with the principle of proportionality or respect for fundamental rights? Proportionality is a general principle of EU law that applies, by default and not upon request, to the interpretation, implementation and application of EU measures. Respect for fundamental rights is already a binding principle on State acts.¹¹⁵ If the Directive leaves a huge margin to State implementation, Article 51(1) of the Charter suffices to prevent the risk that implementing measures breach fundamental rights.

Certainly the potential breach entailed by defective implementation must be attributed to the Member States, not the Directive. FR-based review should hit the implementing measures, not the implemented act, unless the latter mandates a breach of human rights, *quod non* in the specific case.

¹¹² Case C-46/08 *Carmen Media Group* [2010] ECR I-8149, para 105.

¹¹³ Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and others* (judgment of 8 April 2014).

¹¹⁴ *Ibid*, para 64.

¹¹⁵ *Coty* n 98, para 34: 'EU law requires that, when transposing directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the EU legal order'; *Promusicae* n 21, para 68.

In truth, it is plausible to concede that the Directive was probably badly drafted, and that a tighter wording with respect to the FR-implications could help Member States to implement it appropriately, achieving more coherence across the Union. Ultimately, the inefficient (i.e., disproportionate) measures were the national implementing acts but the Court, perhaps knowing that the Directive would necessarily need an overhaul in any event, applied the proportionality directly to it, in a display of righteousness that conveyed the notion that the EU is under a rule of FR-law and the Court is ready to enforce it unceremoniously.

As for the proportionality test itself, this case was relatively simple, with essentially two interests in tension: the privacy of the data subjects and the public security.¹¹⁶ The duty of telecommunication providers to retain personal information was in fact a mere exception to the former for the benefit of the latter, not an autonomous element for the balancing. In essence, the dispute hinged on the regulatory limits of the exception. Using the privacy-restrictive scenario allowed (if not required) by the Directive as the *status quo* baseline, the Court performed an approximate proportionality analysis.

The Court employed several degree-qualifying terms, which seemed to set the scene for an intensity-assessment. Protection of personal data plays an ‘*important*’ role’ and the Directive causes a ‘*serious*’ interference, hence the Court’s judicial review thereon ‘should be *strict*’¹¹⁷; moreover, the fight against organised crime and terrorism is ‘of the *utmost importance*’.¹¹⁸ The suitability of data retention – in general – for the purposes of fighting crime went uncontested,¹¹⁹ but the necessity of its limitation under the Directive – in particular – was very much contestable. The Court even noted that ‘derogations and limitations in relation to the protection of personal data must apply only in so

¹¹⁶ That the Directive’s goal was certified as being the protection of public order and security is another point of possible contention. The Directive, indeed, was adopted under the first pillar as a measure providing for the harmonisation of national rules, aimed at the removal of obstacles to the realisation of a common market of services. This economic goal, the only official one, was somewhat side-lined in the Court’s analysis favour of the second-level purpose (the ‘material objective’) of facilitating the fight against crime, see *Digital Rights Ireland* n 113, para 41.

¹¹⁷ *Ibid*, para 48, emphases added.

¹¹⁸ *Ibid*, para 51, emphasis added.

¹¹⁹ *Ibid*, para 49.

far as is strictly necessary'.¹²⁰ This statement is presumably a reminder of how important the necessity step is, otherwise it would indicate that limitations of certain rights other than data protection can be justified without being strictly necessary.

The Court then introduced a spurious element at the outset of the necessity test: the obligation for the EU legislator to provide in its acts minimum safeguards against the risk of abuse of fundamental rights.¹²¹ This unprecedented legislative duty is borrowed 'by analogy' from the case-law of the ECtHR regarding vague domestic statutes, which unduly empower executive authorities to decide the scope of FR-limitation.¹²² However, this parallel oddly overlooks the nature of Directives as acts which, by definition, are not directly applicable in the Member States. The positive duty that the ECtHR bestows on national legislators cannot be attributed inattentively by analogy to the EU legislator drafting Directives. Directives require national implementation, so there is no analogy. Reasonably, the required safeguards must be included precisely in the national statutes implementing the Directives, at the hand of national authorities.

The call for clauses of minimum protection is also problematic because it injects an inherent vice in the proportionality reasoning. Alexy criticises similar instructions:

A guarantee of a minimum, if not determined by balancing, would, indeed, not be the same as optimization. It would, however, not only be different from optimization but also different from proportionality. It would not be an alternative interpretation of proportionality. Rather, it would be an alternative incompatible with proportionality. One who recommends the substitution of a guarantee of a minimum for the principle of proportionality in the narrower sense is recommending the abolishment of this principle.¹²³

¹²⁰ Ibid, para 52, quoting Case C-473/12 *IPI* (judgment of 7 November 2013) para 39

¹²¹ *Digital Rights Ireland* n 113, para 54.

¹²² For instance *Rotaru v. Romania*, app. No. 28341/95, Judgment (Merits and Just Satisfaction), Grand Chamber, 4 May 2000, paras 57-59.

¹²³ Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus* 51, 59.

Even allowing that this requirement be compatible with proportionality, the notion that the Directive should have included minimum safeguards (something it certainly did not) skewed irremediably the necessity analysis towards a finding of breach. The Court limited itself to note that the Directive applied to a wide and largely undifferentiated range of communications, means of communications and users.¹²⁴ Moreover, the Directive did not set a specific requirement that persons whose data ought to be retained be suspected of a crime,¹²⁵ any objective criteria to calibrate the State's access to the data retained,¹²⁶ or any guidelines on how to restrict domestically the period of retention, down from the over-inclusive range provided in the Directive.¹²⁷

The Court hence concluded peremptorily that the Directive caused an interference with FRs, and the interference was not 'precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary'.¹²⁸ Failure to meet the necessity requirement entailed a failure to respect the proportionality principle and, ultimately, led to the annulment of the act.

In this case, it is difficult to take the proportionality reasoning seriously, for the reasons stated above. This judgment features, in all likelihood, in the Court's trend of using proportionality-based arguments for policy-based decisions. Technically, the enhanced necessity analysis, including the duty to provide normative safeguards, made for an atypical proportionality test that cannot be traced back to the classic model. There is an easy way to appreciate how the Court used the proportionality narrative unorthodoxly. Even if the measure failed the necessity test, the Court did not even try to identify alternative measures which were reasonably available and equally effective to fight crime. In sum, the Court condemned the *status quo* without proving with any precision that another possible counterfactual scenario could secure a better overall balance of FR-protection.

¹²⁴ *Digital Rights Ireland* n 113, para 56.

¹²⁵ *Ibid*, paras 56-59.

¹²⁶ *Ibid*, paras 60-62.

¹²⁷ *Ibid*, paras 63-64.

¹²⁸ *Ibid*, para 65.

The Court held as much implicitly, noting the Directive's over-inclusiveness. However, it is fair to suppose that narrowing down the scope of the retention to an optimal level was a difficult task, hence it could not be assumed that simply because the Directive balance appeared unfortunate a better solution was readily available: perhaps it was not. Possibly, requiring that retention only occur when the conduct of the persons involved is suspicious might delimit the investigation and undermine its effectiveness. Likewise, the indication that the time-range for the period of retention is excessive should have come with a cost-benefit analysis of alternative ranges, or additional criteria to narrow the range down domestically. In short, there is no hint of real comparison in the Court's reasoning, which reveals that the Court itself (never mind this author) did not take proportionality seriously either.¹²⁹

In the landmark decision *MGM v Grolkster*, the US Supreme Court was called to address the liability of internet service providers managing a peer-to-peer platform.¹³⁰ The Supreme Court frankly evaluated the interests at stake and the wider policies (how to prevent technology from fostering disdain for intellectual property; how to set a liability regime that does not hinder technology advancements). It then based its finding on an openly pragmatic remark: when infringement occurs on such scale that individual enforcement is impossible, 'the only practical alternative'¹³¹ is to establish the vicarious or secondary liability of the intermediaries which induce the wrongdoing. It remarked that the inducement rule was 'a sensible one for copyright'¹³² and did not 'compromise legitimate commerce or discourage innovation having a lawful promise'.¹³³ Responsible reasoning tapping on common sense, practicality and established legal doctrines produced a well-reasoned and principled decision. Nothing suggests that this judgment would have been more legitimate (let alone correct) if

¹²⁹ The AG tried harder to apply proportionality. For instance, he argued that time measured 'in years' is inherently disproportionate because it pertains to the 'memory' of the 'historical time' of the users, rather than their 'present life' (better measured in months). *Ibid*, Opinion of AG Cruz Villalón para 146. He conceded that the distinction might be unhelpful in certain cases (when criminal plans 'are prepared well in advance', para 149), but tried to identify a counterfactual measure yielding a better FR-outcome than the *status quo*.

¹³⁰ *Metro-Goldwyn-Mayer Studios v Grolkster*, (04-480) 545 U.S. 913 (2005) 380 F.3d 1154.

¹³¹ *Ibid*, para 12.

¹³² *Ibid*, para 19.

¹³³ *Ibid*, para 20.

it had contained an artificial calculation of the weight of the interests involved and an impressionistic comparison of the aggregate weight corresponding to the different rules of liability discussed. Proportionality is the result of a good decision, not the other way round.

5. Conclusions

The Court is couching its decisions in the familiar jargon used in the balancing of fundamental rights. This is understandable, but the recurrent use of proportionality does not evince a *fil rouge* of the case-law, nor does it ensure better or more predictable decisions. Sometimes, proportionality is hardly recognisable when its use is announced, emptied as it is of any substance. Proportionality balancing as such would make sense only if one hoped to find a point of equilibrium, the end of a zero-sum game, where any other alternative would be wrong (because comparatively unbalanced). This aspiration is futile in the field of internet activities, where various recurring features advise against using proportionality balancing as a heuristic tool.

Namely, balancing often occurs between three or more groups of stakeholders and three or more different rights;¹³⁴ lawful conduct can result in harmful effects that are difficult to gauge factually and that, by virtue of the online-multiplier, are hypothetically immense; sweeping judicial precedents are likely to affect adversely innocent subjects; very rarely can all rights be preserved through Pareto-optimising balancing.

The challenge for the Court, in these conditions, is to let go of the comfortable terminology/mythology on proportionality and allocate liability with policy-oriented pragmatism, as it

¹³⁴ *UPC* n 109, para 47: '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.' See Rebecca Wong and Joseph Savirimuthu, 'All or Nothing: This is the Question-The Application of Article 3(2) Data Protection Directive 95/46/EC to the Internet' (2007) 25 *J. Marshall J. Computer & Info. L.* 241, 260: 'Identity management and privacy considerations now compete with market expectations of choice, availability, and efficiency.'

does regularly but covertly. Ultimately, however, the refinement of legal categories cannot be entrusted to the Court alone: the incoming regulatory reform of the field is bound to provide more guidance (and more precise rules) to judges and EU citizens alike. Regulatory connection with FR-externalities should not be routinely entrusted courts. Regulators should translate the preferences of society regarding technology and take responsibility for choosing a regime that will ineluctably entail an indecipherable FR-balance sheet. Governments are allowed and required to make decisions in circumstances of radical uncertainties, where beneficial and detrimental effects of a policy cannot be proved.¹³⁵ Difficult choices must be made, possibly outside courtrooms:

...to rely on courts to rescue legislation can sometimes undermine the integrity of legal reasoning. In the interests of regulatory legitimacy and democracy, where a technology has out-run its regulatory framework, it might be important to take time out to debate the developments that have taken place and to determine how the regulatory framework should be adjusted. Sometimes, the social licence for a particular technology needs to be reviewed and revised.¹³⁶

Granted, abandoning the FR-metrical discourse in favour of policy-oriented adjudication would have its own risks. La Torre rightly noted that if 'fundamental rights are seen as policies, they will ... lose their point, which is controlling and limiting State action.'¹³⁷

However, limiting the exercise of public authority is hardly the most pressing problem of the regulation of internet-related conduct, for the simple reason that public authority is already comparatively weaker in this field. What needs urgent management are the interplay between private rights and private interests, and the public policy inputs necessary to arbitrate or moderate between them. The *Google Spain* and *L'Oréal* cases are, in this sense, illustrative of how the difficulty does not

¹³⁵ Endicott n 6.

¹³⁶ Brownsword n 15, 266. The Author also notes (ibid., 258) that different regulators might opt for different solutions, depending on the priorities they set (for instance, utilitarianism versus human dignity).

¹³⁷ Massimo La Torre, 'Nine Critiques to Alexy's Theory of Fundamental Rights' in Agustín J Menéndez and Erik O Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006) 53, 61.

lie in the nature of public interference into private conduct, but in the sustainability of a reciprocal arrangement between human activities with numerous externalities.

Ultimately, it is proposed here to discard the 'mathematical' proportionality championed by Alexy, which has provided the Court for too long with a comfort-zone where anything goes, in terms of legal argumentation. If the motivation of the Court's decisions is after all policy-oriented, there is no plausible benefit in their disguise as proportionality *calculi*. *Google Spain* is a pragmatical apportionment of duties, so is *L'Oréal v eBay* and to a large extent the other IP-related cases perused above. The outlier cases are not symptomatic: *UPC* spurs from the matter-of-fact consideration that the website's conduct was *prima facie* illegal; *Digital Rights Ireland* was really a revise-and-resubmit note to the EU legislator with a perfunctory proportionality recitation.

Certainly, more cases in the future will decide digital cases through lip-serving references to proportionality. This knee-jerk trend is a disservice to the rule of law and obfuscates the legal reasoning of the Court, because internet disputes are bound to fit uncomfortably in the proportionality straitjacket. Better, the proportionality test is bound to fit too loose or too tight on internet-based realities. *Ad hoc* adjustments are routinely necessary, to the point that it is not clear anymore why courts should stick to a test that systematically needs *à la carte* stretching.

Habermas criticised proportionality balancing for undermining the claim to correctness of adjudication of principles. Proportionality-based reasoning, in short, would not reflect the legal categories of right and wrong, but the policy categories of adequateness and opportunity, thus depriving FRs of their status of legal principles.¹³⁸ Alexy's rebuttal is convincing, in general: proportionality is better than nothing. The three-step test, in fact, envisages 'abundant criteria to label a proposition as correct or incorrect'¹³⁹: it provides an articulate template for judicial reasoning (a

¹³⁸ Jürgen Habermas, *Between Facts and Norms* (HUP 1996) 256-259.

¹³⁹ Matthias Klatt and Moritz Meister, *The constitutional structure of proportionality* (OUP 2012) 69.

‘structured form of inquiry¹⁴⁰) in cases where free-style reasoning could be conceived as unprincipled.¹⁴¹ In his words,

[proportionality is] an argument form of rational legal discourse. As such, it is indispensable in order to introduce ‘order into legal thought’. It makes clear which points are decisive and how these points are related to one another.¹⁴²

This is undisputable. What makes this remark less compelling in the cases studied here is the set of idiosyncrasies of human affairs in the digital arena. Because optimisation is not a realistic task, proportionality cannot operate its ‘ordering’ effect and becomes a hollow formula, recited to infuse legitimacy by way of a recurrent mythology, rather through authoritative reasoning. If the assessments of necessity and strict proportionality are based on fuzzy and truncated reasoning (intensity of infringements is not measured; alternative measures are not explored and compared with the *status quo*; the interests of various groups are contrasted ‘impressionistically’ and not analytically; the reasoning shifts uncontrollably and inadvertently from the interest of the dispute parties the interest of society at large, etc); proportionality is not better than nothing, it is worse.

Habermas’s warning applies to these cases. Whereas the Court’s engagement in policy-based balancing is not to blame (what else is available?), less agreeable is its masquerading as neutral-looking proportionality.¹⁴³ If free-style judicial reasoning is the best option (if the regulator stalls, that probably is), then indeed free judicial reasoning is preferable to reasoning constrained by formulaic incrustations.

¹⁴⁰ Paul Craig, *Administrative Law* (OUP 2008) 637.

¹⁴¹ Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 L&Eth. HR 141, 144.

¹⁴² Alexy n 123, 64. Footnotes omitted.

¹⁴³ Tsakyrakis n 6, 493.