

COPYRIGHT AND RELATED RIGHTS INJUNCTIONS

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Abstract

The national general copyright legislative framework, in particular, the national laws transposing the EU acquis related to online copyright infringement and enforcement procedures (IPRED, InfoSoc Directive, Conditional Access Directive, E-Commerce Directive, Rental Rights Directive, etc.), is providing, in case of copyright and related rights infringements, the possibility for the Courts to take measures against the infringers, especially injunctions. We can distinguish between interlocutory injunctions like provisional and precautionary measures and injunctions following a decision on case merits like blocking and take-down injunctions, including forward-looking, live and dynamic injunctions which are being increasingly applied to certain types of online rights infringements. The article will underline the national legal framework in the field and Romanian, European and international case-law.

Keywords: *online copyright infringements, enforcement procedures, injunctions, interlocutory injunctions, injunctions following a decision on case merits, European Directives in the field, case-law.*

1. Introduction

The Romanian legal framework on copyright and related rights enforcement is set up by the Law no. 8/1996 on copyright and related rights. The law was subsequently amended, revised and modified, including for transposing into the national legislation the EU Directives in the field (for example, the Directive 2001/29/CE on the harmonization of certain issues of copyright and related rights in the information society¹ was transposed starting from 2004 by Law no. 285 for modifying and supplementing Law no. 8/1996 and the Directive 2004/48/CE on the enforcement of intellectual property rights was transposed starting from 2005 by the Government Ordinance no. 123 for modifying and supplementing Law no. 8/1996). The Law no. 8/1996 was republished in 2018 and its last amendment took place in 2020 by Law no. 8. In this article I will refer to Law no. 8/1996 on copyright and related rights, republished, with modifications and completions as Law no. 8/1996 on copyright and related rights or Law no. 8/1996.

The special enforcement dispositions regulated in Law no. 8/1996 on copyright and related rights, especially the procedural provisions, are completed with the general ones (common law) provided by the Civil and Procedure Code and Criminal and Procedure Code.

The Law no. 8/1996 on copyright and related rights dedicates a whole section to the enforcement of copyright: Section II ‘Procedures and sanctions’ in Chapter III ‘Measures of protection, proceedings and

sanctions’ of Title III ‘Management and Protection of Copyright and Related Rights’. 14 articles are regulating the enforcement of copyright and related rights: article 187 to article 200.

Mainly, the regulatory texts are the following and they will be detailed further: provisional and precautionary measures (art. 188 par. 3-6); measures for preserving evidence (art. 188 par. 7-9); claims and measures (art. 188 par. 10-15); contraventions (art. 190 letters f) and g), art. 191-192); and criminal offences (art. 193 - art. 200).

According to the Law no. 8/1996 on copyright and related rights the copyright infringements can involve: civil, contravention or criminal liability, as the case may be. By consequence, the protection of copyright and related rights is made by administrative, civil and criminal law measures.

The rightholders may request to the Courts or other competent bodies, as the case may be, the acknowledgment of their rights and the establishment of the infringing thereof, and may claim damages for the redressing of the prejudice caused. The same requests can be lodged on behalf and for the rightholders by the collective management organizations, by the associations fighting against piracy or by the persons authorized to use the rights protected by the Law no. 8/1996 on copyright and related rights, according to the mandate given for this purpose. When the rightholder has started an action, the persons authorized to use the rights protected by the Law no. 8/1996 on copyright and related rights can intervene in the lawsuit, claiming the remedy of the prejudice caused to them.

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¹ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>.

2. Content

As regards the provisional and precautionary measures, if the rightholder or the collective management organizations, the associations fighting against piracy or the persons authorized to use the protected rights, according to the mandate given for this purpose, credibly proves that the copyright is subject-matter of an illicit action, present or imminent and that this action risks to create a prejudice difficult to repair, it may request the Court to take provisional measures. The Court may decide in special:

- a) forbidding the infringement or its provisional cease;
- b) ordering the measures to be taken for conserving the probes;
- c) ordering the measures to be taken for ensuring the remedy of the damage; for this purpose, the Court can order the ensuring measures to be taken on the movable and immovable assets of the person presumed to have infringed the protected rights, including the blocking of his/her bank accounts and other assets. For this purpose, the competent authorities can order the communication of the banking, financial or commercial documents or adequate access to the pertinent information;
- d) ordering the taking or handing over to the competent authorities of the goods in connection with which suspicions exist on the violation of a protected right in order to prevent their introduction in the commercial circuit.

In this case, the applicable procedural disposals are provided for in the Civil Procedure Code related to IPR provisional measures.

The same measures can be requested, under the same conditions, against an intermediary whose services are used by a third party for the infringement of a protected right.

The above-mentioned measures can include the detailed description with or without the sampling of the specimen, or the real seizure of the goods under dispute

and, as the case may be, of the materials and instruments used to produce and/or distribute such goods, as well as the documents thereof. Such measures shall be taken into account in the enforcement of Criminal Procedure Code provisions (art. 169-171).

In respect the measures for preserving evidence, article 6² of the IPRED Directive³, namely 'Evidence' was transposed in Law no. 8/1996 on copyright and related rights in art. 188 par. 7 as it follows: 'The Court may authorize the taking of objects and documents that constitute evidences of the infringing of copyright or related rights, in original or in copy, even when they are in the possession of the opposite party. In case of infringements committed on commercial scale, the competent authorities can also order the communication of banking, financial or commercial documents or adequate access to the pertinent information'.

For the adoption of the above-mentioned measures, subject to the insurance of confidential information protection, the Courts shall request for the plaintiff to provide any element of evidence, reasonably accessible, in order to prove, with sufficient certainty, that his right was infringed, or that such an infringement is imminent. It is considered as a reasonable evidence the number of copies of a work or of any other protected object, at the Court appreciation. In this case, the Courts can request for the plaintiff to deposit a sufficient bail to ensure the compensation of any prejudice that might be suffered by the defendant (art. 188 par. 8).

The insurance measures for evidences or to ascertain a fact-finding disposed by the Court are applied through a bailiff. The rightholders of the rights supposed to be infringed or to which there is the danger to be infringed, as well as their representatives, have the right to take part at the application of the measures for evidence conservation or for ascertain a fact-finding.

Article 13⁴ of the IPRED Directive, namely 'Damages' was transposed in Law no. 8/1996 on copyright and related rights as it follows:

² Article 6 Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0048R\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0048R(01)&from=EN).

⁴ Article 13 Damages

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

'In establishing the damages, the Court takes into account (art. 188 par. 2):

a) either criteria such as the negative economic consequences, particularly the non-earned benefit, the benefits earned unlawfully by the offender and, as the case may be, other elements besides the economic factors, such as the moral damages caused to the rightholder;

b) either granting of damages representing the triple of the amounts that would have been lawfully owed for the type of utilization that made the object of the illicit deed, in the case when the criteria provided under letter a) cannot be applied'.

The Court may authorize measures for preserving evidence, provisional and precautionary measures and establish the damages taking into account, on one hand, the economic factors: the rightholder's non-earned benefit and the benefits earned unlawfully by the offender and, on the other hand, the moral damages caused to the rightholder.

Under the Romanian legislation, the conditions for civil offence liability are: the existence of an illicit deed, the existence of a prejudice, the existence of connection between the illicit deed and the prejudice and the existence of guilt.

For claims and measures, the owners of the infringed rights may claim to the Court for ordering the enforcement of any of the following measures:

a) remittance, in order to cover the prejudices suffered, of the income resulted from the unlawful deed;

b) destruction of the equipment's and means belonging to the offender that were solely or mainly intended for the perpetration of the unlawful deed;

c) removal from commercial circuit by seizure and destruction, of the illegally made copies;

d) dissemination of information referring to the Court's decision, including the posting of the decision as well as the integral or partial publication of it in the mass media at the expense of the offender; under the same conditions the Courts may order additional publicity measures adapted to the particular circumstances of the case, including an extensive publicity.

The Court orders the enforcement of the above measures at the expense of the offender, except the case when well-grounded reasons exist for, and the offender will not bear the expenses. The measures provided for under letters b) and c) may be ordered also by the

prosecutor with the occasion of classifying or renouncing to prosecuting.

In ordering the above-mentioned measures the Court shall respect the principle of proportionality with the seriousness of the protected rights infringement and it shall take into account the interests of third parties susceptible for being affected by such measures.

Legal authorities shall communicate to the parties the solutions adopted in the cases of copyright and related rights infringement.

Government of Romania, through the Romanian Copyright Office supports the preparing, by the professional associations and organizations, of the ethics codes at the Community standard, intended to contribute to the ensuring of the copyright and related rights observance, particularly with respect to the utilization of the codes that allow the identification of the manufacturer, affixed on optical disks. Also, the Government of Romania supports the delivery to the European Commission of the ethics codes drafts at the national or Community level and of the appraisals referring to the enforcement thereof.

The following infringements are considered contraventions/offences:

- fixation, without the authorization or consent of the rightholder of the performances or of the radio or television broadcasts (art. 190 letter f);

- communication to public, without the consent of the rightholder of works or related rights products (art. 190 letter g);

- the deed of the legal or authorized natural persons for permitting the access in the spaces, to the equipment, means of transport, goods or own services, with a view to committing, by another person of a contravention provided for by the Law no. 8/1996 on copyright and related rights (art. 191 par. 1).

The above-mentioned contraventions are established and applied by the persons empowered by the Romanian Copyright Office Director General or by the police officers or agents within local police or the Ministry of Interior Affaires with competences in the field.

The sanctions for the above-mentioned contraventions are applying also to the legal persons. If the contravener, legal person, is carrying out activities that involve, according to its object of activity, communication to the public of works or related rights products, the limits of the contravention fines are twice increased.

a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question

2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity

The contravener may pay, within 48 hours from the date of the reception of the document establishing the contravention, half from the minimum fine provided.

The provisions of Government Ordinance no. 2/2001 regarding the legal regime of contraventions, approved with modifications and completions by Law no. 180/2002, with subsequent amendments and completions are applying to the contraventions provided in Law no. 8/1996.

According to the Law no. 8/1996 on copyright and related rights the following infringements are considered criminal offences:

- making of pirate goods, for the purpose of the distribution (art. 193 par. 1 letter a); placing of the pirate goods under a final import or export customs regime, under a suspensive customs regime or in free zones (art. 193 par. 1 letter b); any other modality of introducing the pirate goods on the domestic market (art. 193 par. 1 letter c); offering, distribution, possession, or storage and transportation of pirate goods, for the purpose of distribution (art. 193 par. 2); the promotion of the pirate goods through any means and in any modality, including the utilization of public announcements or electronic means of communication, or through the exhibiting or presentation to the public of the lists or catalogues of products or through any similar means (art. 193 par. 5);

In these cases, shall not be punished the person who, before starting the criminal proceedings, denounces to the competent authorities its participation in an association or agreement with a view to committing one of the above-mentioned criminal offences, thus allowing for the identification and criminal accountability of the other participants.

Also, the person that has committed one of the above-mentioned criminal offenses and who, during the criminal proceedings, denounces and facilitates for the identification and criminal accountability of other persons who have committed offences connected to pirated goods or to pirated access control devices, benefit from the reduction by half of the punishment limits.

- making available to the public, including through the Internet or other computer networks, without the right, of works or related rights products or products involving *sui generis* rights of the databases makers or copies thereof, regardless of their support, so that the public may access them from any place and at any time individually chosen by them (art. 194);

- unauthorized reproduction on computer systems of computer programs in any of the following modalities: installation, storing, running or execution, display or transmission in the domestic network (art. 195);

- the following deeds committed without the authorization or consent of the rightholders: reproduction of works or related rights products (art. 196 par. 1 letter a); distribution, rental or import, on domestic market, of works or related rights products, other than the pirate goods (art. 196 par. 1 letter b); broadcasting of works or related rights products (art. 196 par. 1 letter c); cable retransmission of the works or related rights products (art. 196 par. 1 letter d); making of derivative works (art. 196 par. 1 letter e); fixation for commercial purpose of performances or radio or television broadcasts (art. 196 par. 1 letter f);

- the deed of a person to assume, without right, totally or in part, the work of another author and to present it as his own intellectual creation (art. 197 par. 1);

- production, import, distribution, possession, installing, maintaining or replacing in any way, access control devices, either original or pirate ones, used for conditional access programs services (art. 198 par. 1); the deed of a person who unlawfully connects to or unlawfully connects another person to conditioned access programs (art. 198 par. 2); using public announcements or of electronic communication means for the purpose of promoting the pirate access control devices to the conditioned access programs services, as well as the exhibiting or presentation to the public in any mode, unlawfully, of the information needed for making devices of any sort, capable to ensure the unauthorized access to the said conditioned access programs services, or intended for the unauthorized access in any mode to such services (art. 198 par. 3); sale or rental of the pirate access control devices (art. 198 par. 4);

- the deed of a person that, unlawfully, produces, imports, distributes or rents, offers, in any way, for sale or rent, or possesses for selling purposes, devices or components that allow the neutralization of the technological protection measures or performs services which lead to the neutralization of the technological protection measures, including in the digital environment (art. 199 par. 1);

- the deed of a person who, without right, removes, for commercial purposes, from the works or other protected products or modifies on them, any information under electronic form, on the applicable copyright or related rights regime (art. 199 par. 2).

In case the persons that have committed the above-mentioned criminal offences repaired, until the end of the first Court inquiry, the prejudice done to the rightholder, the special limits of the punishments are half reduced.

As regards the online infringements, some considerations regarding the criminal offence regulated in art. 194 of Law no. 8/1996 on copyright and related rights need to be made on making available to the

public right, including through the Internet or other computer networks, without the right, of works or related rights products or products involving *sui generis* rights of the databases makers or copies thereof, regardless of their support, so that the public may access them from any place and at any time individually chosen by them

The making available right is a part of communication to the public right regulated in art. 20 of the law as any communication of a work, directly or by any technical means, made in a place opened for public or in any other place where a number of persons exceeding the normal circle of a family members and of its acquaintances assemble, including stage performance, recitation or any other public form of performance or direct presentation of the work, public display of plastic art works, of applied art, of photographic art and of architecture, public projection of cinematographic and of other audiovisual works, including of digital art works, presentation in a public place, by means of sound or audiovisual recordings, as well as presentation in a public place, by any means, of a broadcast work. Any communication of a work by wire or wireless means, including by making the works available to the public, via Internet or other computer networks, so that any member of the public to have access to it, from anywhere or at any moment individually chosen, shall also be considered as communication to the public.

The right to authorize or prohibit communication to the public or making available to the public of the works is not subject to exhaustion by any act of communication to the public or of making available to the public.

The making available right is regulated as an exclusive right – to authorise or to prohibit – of the copyright and related rights holders: art. 13 lit. f) for authors; art. 96 par. 1 letter i) for performers; art. 106 par. 1 letter g) for phonograms producers; art. 110 par. 1 letter g) for audiovisual recordings producers; and art. 129 letter i) for broadcasters.

The deed of making available to the public is made without right which includes the cases done without the authorisation of the rightholder and also the ones made by third parties.

The material element of the criminal offence is making available to the public, including through the Internet or other computer networks, without the right,

of works or related rights products. Even that the provisions are stipulating the nouns' plural, the offence' material object is emphasizing also only one work or related rights product or (a) fragment(s) or (a) part(s) of a work or a related right product⁵.

The criminal offences are not differentiated depending on acting for profit. The infringement is considered as a criminal offence no matter if the deed is made with or without the purpose of obtaining profit. The deeds regulated as infringements are in fact, in the majority of the cases, made with the scope of obtaining profit. Still, acting for profit can be considered by the Courts in establishing the punishment.

The subjective part of the criminal offences is the intent. When the criminal offence is made with the purpose of obtaining profit, the intent is qualified by its scope.

In this case, the Law no. 8/1996 on copyright and related rights is defining the notion of 'commercial purpose' as aiming to obtain, directly or indirectly, of an economic or material benefit (art. 193 par. 7). The only criminal offence for which the law is express stipulating the 'commercial purpose' is the one provided in art. 199 par. 2 (the deed of a person who, without right, removes, for commercial purposes, from the works or other protected products or modifies on them, any information under electronic form, on the applicable copyright or related rights regime).

All the criminal offences regulated in the Law no. 8/1996 on copyright and related rights are sanctioned with imprisonment or fines. So, the law is providing an alternative way for sanctioning the criminal offences. The fines' quantum is not regulated in the Law no. 8/1996 on copyright and related rights and there are two major categories of imprisonment: 6 months to 3 years and 3 months to 2 years. For only two infringements the level of imprisonment is higher: 2 to 7 years if the deeds provided in art. 193 par. 1 and par. 2 are made for commercial purpose and 1 year to 5 years for the sale or rental of the pirate devices for access control (art. 198 par. 4), and for only one infringement a lower level, respectively 1 month to 1 year for using public announcements or of electronic communication means for the purpose of promoting the pirate access control devices of the conditioned access programs services, as well as the exhibiting or presentation to the public in any mode, unlawfully, of the information needed for making devices of any sort, capable to ensure the

⁵ C. Duvac, *Analiza infracțiunii prevăzută de art. 139 ind. 8 din Legea nr. 8/1996*, în *Revista Română de Dreptul Proprietății Intelectuale* nr. 4/2007, p. 51, nota 66 (*The analysis of the criminal offence provided by art. 139 ind. 8 of Law no. 8/1996*, in *Romanian Journal of Intellectual Property Law* no. 4/2007, page 51, note 66); V. Lazăr, *Infracțiuni contra drepturilor de proprietate intelectuală, (Intellectual Property Rights Criminal Offences*, Lumina Lex Publishing House, Bucharest, 2002, page 48); B. Florea, *Unele considerații privind modificările aduse asupra infracțiunii prevăzute de art. 139 ind. 8 din Legea nr. 8/1996 prin legea nr. 187/2012 pentru punerea în aplicare a Legii nr. 286/2009 privind Codul Penal*, în *Revista Română de Dreptul Proprietății Intelectuale* nr. 1/2015, p. 48 (*Some considerations regarding the changes brought on the criminal offence provided by art. 139 ind. 8 of Law no. 8/1996 by law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code*, in *Romanian Journal of Intellectual Property Law* no. 1/2015, page 48).

unauthorized access to the said conditioned access programs services, or intended for the unauthorized access in any mode to such services (art. 198 par. 3).

As mentioned before, in case the persons that have committed the criminal offences regulated in the Law no. 8/1996 on copyright and related rights repair, until the end of the first Court inquiry, the prejudice done to the rightholder, the special limits of the punishments are half reduced.

The criminal proceedings are applying for all the criminal offences regulated in the Law no. 8/1996 on copyright and related rights.

All the criminal offences are committed with direct or indirect intent. Committing the offences from indirect intent/negligence is not regulated in our national law. Also, the active subject of these criminal offences isn't circumstantiated, thus they can be committed by any natural or legal person without the need to prove any special quality. All the criminal offences infringe intellectual property rights, with their specificity, generally being exclusively patrimonial economic rights. The passive subject of the criminal offences is the rightholder, being essential to proof the existence and validity of the alleged infringement. Most criminal offences have alternative forms (sanctioned as a contravention, if is not a criminal crime and sanctioned with imprisonment or fine) and aggravated forms in relation to their purpose (commercial purpose).

The competence to judge cases having as object offenses under the IPR regime belongs to the courts, according to the provisions of the Criminal Procedure Code, and the police is carrying out the criminal investigation for any crime that is not given, by law, in the competence of the special criminal investigation bodies or to the prosecutor according also to the provisions of the Criminal Procedure Code. The notice methods are also provided by the Criminal Procedure Code: complaint, denunciation, ex officio notification and acts concluded by other finding bodies provided by law.

Carrying out the criminal investigation involves the administration of evidence that serves to establish the existence or non-existence of the criminal offence, to identify the person who committed it and to know the circumstances necessary for the just solution of the case and which contributes to finding out the truth in the criminal proceedings.

The criminal activity that takes place through a site can be prove by any means of proof provided in the Criminal Procedure Code, for example, screenshots, minutes, documents etc., whether they are filed with the complaint by the injured party or whether they are administered by the judicial officer. Given that the offenses which are provided by law as infringements of intellectual property rights are committed without the consent of the right holder, in all cases the judicial officer should check the rightholder lack of consent. Also, the judicial officer should take measures for conserving the site content and data information traffic. These measures are applying in relation with the internet service provider.

The prejudice is not an element of IPR criminal offences, thus the existence and dimension of the prejudice it is a proof that has to be pointed by the civil part, that is claiming the civil action within the criminal one.

There were identified more steps for investigating an IPR crime like⁶: identifying the rightholder/s, checking the existence and functioning of the site, site domain location (national or foreign), identifying the site administrator or the person that registered the domain (natural or legal persons), identifying profiles on the social networks, identifying methods for paying on the site (if there are), IP location, etc.

In order to transpose Article 5⁷ of the Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (Conditional Access Directive)⁸, Law no. 8/1996 on copyright and related rights regulates the following infringements as criminal offences:

- production, import, distribution, possession, installing, maintaining or replacing in any way, the devices for the control of the access, either original or pirate ones, used for the conditioned access programs services (art. 198 par. 1) – the sanctions are imprisonment from 6 months to 3 years or fine;
- the deed of a person who unlawfully connects to or unlawfully connects another person to conditioned access programs (art. 198 par. 2) - the sanctions are imprisonment from 3 months to 2 years or fine;
- using public announcements or of electronic communication means for the purpose of promoting the pirate access control devices of conditioned access programs services, as well as the exhibiting or

⁶ http://www.inm-lex.ro/fisiere/d_1443/Ghid%20de%20investigare%20a%20infractiunilor%20de%20proprietate%20intelectuala%20savarsite%20in%20mediul%20digital.pdf - site accessed on 20 March 2021.

⁷ Article 5 Sanctions and remedies:

1. The sanctions shall be effective, dissuasive and proportionate to the potential impact of the infringing activity.
2. Member States shall take the necessary measures to ensure that providers of protected services whose interests are affected by an infringing activity as specified in Article 4, carried out on their territory, have access to appropriate remedies, including bringing an action for damages and obtaining an injunction or other preventive measure, and where appropriate, applying for disposal outside commercial channels of illicit devices.

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998L0084>

presentation to the public in any mode, unlawfully, of the information needed for making any sort of devices, capable to ensure the unauthorized access to the said conditioned access programs services, or intended for the unauthorized access in any mode to such services (art. 198 par. 3) - the sanctions are imprisonment from 1 month to 1 year or fine; and

- sale or rental of the pirate access control devices (art. 198 par. 4) - the sanctions are imprisonment from 1 year to 3 years or fine.

The Law defines the pirate access control devices as any device of whose making has not been authorized by the rightholder in relation to a certain service of conditioned access television programs, made to facilitate the access to that service (art. 198 par. 5).

Within an action referring to the infringement of the rights protected under the Romanian Law on copyright and related rights and as a response to a justified application, the Court is entitled to demand supplementary information about the origin and distribution networks of the goods or services prejudicing a right provided for in the law either from the offender and/or from any other person that, among other, was using for commercial purposes, services through which the protected rights were infringed (art. 187 par. 2 letter b); was submitting, for commercial purposes, goods or services used in activities through which the protected rights were infringed (art. 187 par. 2 letter c); and was indicated, by any of the persons mentioned before, as being involved in the production, execution, manufacturing, distribution or rental of the pirate goods or of the pirate access control devices or in the supplying of the products or services through which the protected rights were infringed (art. 187 par. 2 letter d).

According to art. 187 par. 3, the above-mentioned information includes, as the case may be:

a) name and address of the producers, manufacturers, distributors, suppliers and of the other previous holders of the goods, devices or of the services, transporters included, as well as the consignee wholesalers and of the retail sellers;

b) information regarding the quantities produced, manufactured, delivered or transported, received or ordered, as well as the price obtained for the respective goods, devices and services.

The provisions mentioned before shall apply without prejudicing other legal provisions, which:

a) grant to the owner the right to receive more extensive information;

b) provide for the use, in the civil or criminal cases, of the information communicated according to this disposition;

c) provide for the abuse of liability information right;

d) give the possibility to reject the supplying of information that could constrain the person for which is applying the civil, administrative or criminal liability to admit its own participation or the one of its close relatives in an activity through which the protected rights are infringed;

e) provide for the confidentiality protection of informing sources or for processing of the personal character data.

The Law no. 8/1996 on copyright and related rights transposes Articles 6 and 8 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 (InfoSoc Directive). Art. 6 of the Directive is referring to obligations as to technological measures, and art. 8 to sanctions and remedies.

The technological measures are defined as the use of any technology, of a device or component that, in the course of its normal operation, is destined to prevent or restrict the acts, that are not authorized by the rightholders (art. 185 par. 2). The technological measures can be put in place by the author of a work, performer, phonograms or audiovisual recordings producer, radio or television broadcasting organizations or the database maker (art. 185 par. 1). Even that the regulatory text is enumerating the persons that can institute technological measures, there is no interdiction that other persons, meaning other rightholders, to put in place such measures⁹.

The technological measures are considered effective where the use of a protected work or other subject-matter of protection is controlled by the rightholder through application of an access control or protection process, such as encryption, coding, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, if the measures fulfil the assuring protection objective (art. 185 par. 3).

The rightholders that have instituted technical protection measures have the obligation to make available to the beneficiaries of the exceptions provided for in art. 35 par. (1) letters a), c) and e), art. 35 par. (2) letters d) and e) and art. 39 of Law no. 8/1996 the necessary means for the legal access to the work or any other protection object (art. 185 par. 4). They have also the right to limit the number of copies made under the

⁹ B. Florea, *Contribuții la analiza infracțiunilor prevăzute în art. 143 din Legea nr. 8/1996 privind dreptul de autor și drepturile conexe, astfel cum a fost modificat prin Legea nr. 187/2012*, în *Revista Română de Dreptul Proprietății Intellectuale* nr. 3/2015, p. 30 (*Contributions to the analysis of the offenses provided in art. 143 of Law no. 8/1996 on copyright and related rights, as amended by Law no. 187/2012*, in *Romanian Journal of Intellectual Property Law* no. 3/2015, page 30).

aforementioned conditions (art. 185 par. 5). These provisions are not applied to the protected works made available to the public, according to the contractual clauses agreed between the parties, so that the members of the public to have access to them in any place and at any time chosen, individually (art. 185 par. 6).

The exceptions mentioned before are referring to the following:

Uses of a work already disclosed to the public shall be permitted without the author's consent and without payment of a remuneration, provided that such uses conform to proper practice, are not contrary with the normal exploitation of the work and are not prejudicial to the author or to the exploitation rights owners:

- art. 35 par. (1) letter a) - the reproduction of a work in connection with judicial, parliamentary or administrative procedures or public security purposes;

- art. 35 par. (1) letter c) - the use of isolated articles or brief excerpts from works in publications, television or radio broadcasts or sound or audiovisual recordings exclusively intended for teaching purposes and also the reproduction for teaching purposes, within the framework of public education or social welfare institutions, of isolated articles or brief extracts from works, to the extent justified by the intended purpose;

- art. 35 par. (1) letter e) - specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not made for direct or indirect economic or commercial advantage.

In the conditions provided above, the reproduction, distribution, broadcasting or communication to the public, with no direct or indirect commercial or economic advantage, are allowed:

- art. 35 par. (2) letter d) - of works, for the sole purpose of illustration for teaching or scientific research;

- art. 35 par. (2) letter e) - of works, for the benefit of people with disabilities, which are directly related to that disability and to the extent required by the specific disability.

Art. 39 is regulating the broadcasting right assignment of a work to a radio or television broadcasting organization that shall entitle it to record the work for its own broadcasts needs with a view to a single authorized broadcast to the public. A new authorization from the authors shall be required in case of any new broadcast of the work so recorded, against a remuneration that cannot be waived. If no such authorization is requested within 6 months as from the broadcast, the recording must be destroyed. In the case of ephemeral recording of particular works made by the radio or television broadcasting organizations and by their own means for their own broadcasts, the preservation of these recordings in official archives is

permitted if the recording has a special documentary value.

Also, for transposing the articles 6 and 8 of InfoSoc Directive, the Romanian copyright law regulates that the rightholders may provide, in electronic format, associated to a work or any subject-matter of protection, or in the context of their communication to the public, rights-management information (art. 185 par. 1).

The rights-management information is defined as any information provided by the rightholders which identifies the work or other subject-matter of protection, of the author or of other rightholder, as well as the conditions and terms for using the work or any other subject-matter of protection, as well as any number or code representing such information (art. 185 par. 2).

The infringements of the above-mentioned provisions are sanctioned as criminal offences as it follows:

- the deed of a person that, unlawfully, produces, imports, distributes or rents, offers, in any way, for sale or rent, or possesses for selling purposes, devices or components that allow the neutralization of the technological protection measures or performs services which lead to the neutralization of the technological protection measures, including in the digital environment (art. 199 par. 1);

- the deed of a person who, without right, removes, for commercial purposes, from the works or other protected products or modifies on them, any information under electronic form, on the applicable copyright or related rights regime (art. 199 par. 2).

As mentioned before, the rightholders and the other persons entitled may request to the Courts or other competent bodies, as the case may be, the acknowledgment of their rights and the establishment of the infringing thereof, and may claim damages for redressing the caused prejudice. The Courts may take provisional and precautionary measures and, also, measures for preserving the evidence. Respecting the principle of proportionality, at the request of the infringed rights holder, the Courts may apply the following enforcement measures: the remittance, in order to cover the prejudices suffered, of the income resulted from the unlawful deed, destruction of the equipment's and means belonging to the offender that were solely or mainly intended for the perpetration of the unlawful deed, removal from commercial circuit by seizure and destruction, of the illegally made copies and dissemination of information referring to the Court's decision, including the posting of the decision as well as the integral or partial publication of it in the mass media at the expense of the offender.

A special emphasise has to made regarding Articles 12 to 15 (liability of intermediary service

providers) and Articles 16 to 20 (implementation) of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive)¹⁰, which are transposed into Romanian legislation by the Law no. 365/2002 on the e-commerce and the Methodological Norms from 20 November 2002 for applying the Law no. 365/2002 on the e-commerce approved by the Government Decision no. 1308/2002.

Art. 11 of Law no. 365/2002 on the e-commerce is regulating the general principles regarding the service providers liability. The title of Directive 'Liability of intermediary service providers' was incorrect translated, because Law no. 365/2002 is mentioning the 'Liability of service providers. This incorrect translation can create juridical incertitude since the services providers are defined as any natural or legal person who provides/makes available to a fixed or indefinite number of persons with society services information (art. 1 point 3).

The general principles are referring to the fact that civil, criminal and contravention liability is applying to the service providers; service providers shall be responsible for information provided by themselves or on their behalf; and the service providers are not responsible for the information transmitted, stored or to which they facilitate access, under the conditions provided in art. 12-15. So, the general liability principle of service providers is that they are responsible only for the information provided by themselves or on their

behalf (their liability can be put in place in any field, including copyright and related rights), and the liability exceptions are limited provided by the law in articles 12-15.

Art. 12 of Law no. 365/2002 on the e-commerce, regulating the 'Mere conduit'¹¹, is reproducing merely identically the dispositions of art. 12 par. (1)-(2) of the E-Commerce Directive. The same mention is done also for art. 13 of Law no. 365/2002 on the e-commerce which is regulating the temporary storage of information, caching-storage¹².

Art. 14 of Law no. 365/2002 on the e-commerce is regulating the permanent storage of information, hosting-storage¹³. Comparing the text of the Romanian Law with the one of the Directive, results that art. 14 par. (1) of the law is reproducing merely identically the dispositions of art. 14 par. (1) letter a) first thesis of the E-Commerce Directive, but the second thesis of the same article is translated differently.

As for the Romanian law the liability exemption takes place only in the cases in which the service provider doesn't have effective knowledge that the activity or information stored is illegal or facts and circumstances which show that the activity or information in question could harm the rights of a third party. The exemption is not applying in cases in which the service provider had the possibility to find out the character of these facts.

The distinction between 'having knowledge' and 'have the opportunity to have knowledge' wasn't applied nor for art. 14 par. (1) letter b) of the E-

¹⁰ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>.

¹¹ (1) If an information society service consists in transmitting in a communications network the information provided by a recipient of that service or in ensuring access to a communications network, the provider of that service shall not be liable for the information transmitted if the following conditions are cumulatively fulfilled: a) the transmission was not initiated by the service provider; b) the choice of the person receiving the transmitted information did not belong to the service provider; c) the content of the transmitted information has not been influenced in any way by the service provider, in the sense that neither the selection nor any possible modification of this information can be attributed to it.

(2) The transmission of information and ensuring access, mentioned in par. (1), shall also include the automatic, intermediate and temporary storage of the information transmitted, in so far as this operation takes place solely for the purpose of transiting the communications network and provided that the information is not stored for a period exceeding unjustifiably the time required for its transmission.

¹² If an information society service consists in the transmission in a communications network of information provided by a recipient of that service, the provider of that service shall not be liable for the automatic, intermediate and temporary storage of the transmitted information, in so far as this operation takes place exclusively in order to make the transmission of information to other recipients more efficient, at their request, if the following conditions are cumulatively met: a) the service provider does not make changes to the information transmitted; b) the service provider meets the legal conditions regarding the access to the respective information; c) the service provider complies with the rules or customs regarding the updating of information, as they are widely recognized and applied in the industry; d) the service provider does not prevent the legal use by any person of technologies widely recognized and applied in the industry, in order to obtain data on the nature or use of information; e) the service provider acts swiftly in order to delete the information it has stored or to block access to it, from the moment it has actually known that the information originally transmitted has been removed from the communications network or that access to it has been blocked or the fact that the removal or blocking of access took place as a result of a public authority decision.

¹³ (1) If an information society service consists in storing the information provided by a recipient of that service, the provider of that service shall not be liable for the information stored at the request of a recipient, if any of the following conditions are met:

a) the service provider is not aware that the activity or information stored is illegal and, as regards actions for damages, is not aware of facts or circumstances which show that the activity or information in question could harm the rights of a third party;

b) having knowledge of the fact that the activity or information is illegal or of facts or circumstances which show that the activity or information in question could harm the rights of a third party, the service provider acts quickly to eliminate or block access to it.

(2) The provisions of par. (1) do not apply if the recipient acts under the authority or control of the service provider.

(3) The provisions of this article shall not affect the possibility for the judicial or administrative authority to require the service provider to cease or prevent data breach and shall also not affect the possibility of establishing government procedures to limit or interrupt access to information.

Commerce Directive. This implementation particularity has probative consequences, in the sense that, in order to apply the provider's liability, based on Romanian law, it must be proved that the provider was actually aware of the illegal facts.

Regarding these dispositions of the Law no. 365/2002 and Law no. 8/1996, it was identified the following case – law.

In 2009, the Bucharest Tribunal was notified of the lawsuit filed by the Romanian Music Industry Association (named AIMR)¹⁴ against the website www.trilulilu.ro and the hosting provider Hostway requesting their obligation to pay damages, stopping use of phonograms and videograms from the AIMR repertoire and the establishment of technical protection measures by digital fingerprinting. The dispute was resolved through a transaction through which Trilulilu assumed the responsibility to implement the technical measures required by the action and to conclude license agreements with all AIMR members for the use of phonograms and videograms from their repertoire on the website www.trilulilu.ro.

In 2013, the same association AIMR notified Clax Telecom, a hosting service provider, to remove pirated content or suspend hosting services for sites with pirated content: www.muzicalove.ro, www.mp3alese.info, www.muzica.onlinefree.ro, www.netxplor.ro, www.vitanclub.net, www.allmuzica.com, www.muzicazu.net, www.muzicmp3.ws. These sites promoted national and international music repertoire, without paying the rights due to the production companies. Following the company's refusal to comply with the law, AIMR sued Clax Telecom, requesting the payment of the damage caused by the refusal to eliminate the pirated hosted content. The Bucharest Court of Appeal ordered Clax Telecom to pay damages and Court costs for its refusal to remove pirated content at the request of AIMR. The liability of the hosting service provider was analysed in relation to the provisions of Law no. 365/2002 on e-commerce and Law no. 8/1996 on copyright and related rights. The Court decided that according to art. 14 of Law no. 365/2002 a hosting service provider, following the notifications from the rights holders, is obliged to eliminate the hosted pirated content or to suspend the hosting service of the respective site¹⁵.

The case-law regarding Peer-to-peer and BitTorrent indexing websites is referring to The Pirate Bay - ThePirateBay.org – and is emphasising blocking and dynamic injunctions (main site and proxy sites) established by the Court. In the Bucharest Tribunal case no. 28072/3/2017 – judgement no. 2229 on 05.11.2018

– the international film production companies: TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP, UNIVERSAL CABLE PRODUCTIONS LLC, WARNER BROS. ENTERTAINMENT INC., PARAMOUNT PICTURES CORPORATION, DISNEY ENTERPRISES, INC., COLUMBIA PICTURES INDUSTRIES and SONY PICTURES TELEVISION INC. have obtained in Court the access blocking of internet service providers: RCS & RDS S.A., TELEKOM ROMANIA COMMUNICATIONS S.A., UPC ROMANIA SA, DIGITAL CABLE SYSTEMS S.A., AKTA TELECOM S.A. and NEXTGEN COMMUNICATION S.R.L. users to pirated movie sites:

- www.filmehd.net, that can be accessed to the following on-line location: www.filmehd.net;

- www.filmeonline2013.biz, that can be accessed to the following on-line location: www.filmeonline2013.biz;

- www.thepiratebay.org, that can be accessed to the following main on-line location: www.thepiratebay.org ; and the following on-line proxy locations: <http://bay.maik.rocks>, <http://bayproxy.net> , <http://piratebay.click>, <http://piratebay.red>, <http://piratebayblocked.com>, <http://pirateproxy.click> and <http://ukpirate.click> .

In April 2020, the largest Romanian torrent site, hosting dozens, perhaps hundreds of terabytes, of movies, games, music, software and pirated books, was closed by High Court of Cassation and Justice prosecutors. When accessing the old address, www.filelist.ro , a message signed by the Ministry of Justice appears: ‘This domain name is seized in accordance with the provisions of art. 249 from the Criminal Procedure Code. This domain name is the subject of a criminal offence proceeding’¹⁶. Just a few days after the site was shut down, it is back online, but on the .io domain, dedicated to the British Indian Ocean Territory¹⁷. The anonymous representatives of the torrent site published a message as a result of what happened, showing that they know nothing more than that the .ro domain was seized without further notice and that the site protection systems prevent the user's identification.

Art. 15 of Law no. 365/2002 on the e-commerce is regulating information search tools/search engines

¹⁴ <https://www.aimr.ro/>- site accessed on 20 March 2021.

¹⁵ <https://www.aimr.ro/furnizorii-de-servicii-de-hosting-sunt-raspunzatori-de-continutul-pirat-gazduit/> - site accessed on 20 March 2021.

¹⁶ <http://www.filelist.ro/> - site accessed on 20 March 2021.

¹⁷ <https://filelist.io/login.php?returnto=%2F> - site accessed on 20 March 2021.

and links to other web pages/hyperlinks¹⁸. This exception is not regulated in the Directive, it is a particularity of the Romanian legislation and to other EU Member States (e.g., Spain).

Comparing art. 15 of the Law no. 365/2002 on the e-commerce with art. 14 of the same law, results that the liability of services providers under art. 15 is the same as for hosting (art. 14), still in the Romanian practice/jurisprudence there are no cases for applying or/and interpret art. 15 of Law no. 365/2002 on the e-commerce.

The Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive)¹⁹ has not been transposed yet into the Romanian legislation, thus we cannot indicate the measure in which the injunctions procedures regarding copyright and related rights will be transformed.

At the present, there is an ongoing process for amending the Law no. 8/1996 on copyright and related rights on two subjects. The first subject is referring to the transposition of the DSM Directive and the Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC into the Law, and the second to the revision of the current dispositions of the Law. On December 15, 2020 a working group for revising the Law no. 8/1996 on copyright and related rights, was created by Ministry of Culture decision²⁰. The decision raised now a-days a lot of controversies in Romania, in fact the structure of the working group, because the structure is not containing the representatives of all the collective management organisations in Romania nor the representatives (e.g., associations) of all the rightholders (e.g., broadcasters, cable retransmission operators, etc.).

Taking into account the above-mentioned legal provisions, we can conclude that Law no. 8/1996 on

copyright and related rights is regulating the injunction procedures as transposing the dispositions of the IPRED Directive.

The injunctions are divided in two main forms:

The first form is the interlocutory injunctions provided for in art. 188 par. 3 and referring to:

a) forbidding the infringement or its provisory cease;

b) ordering the measures to be taken for conserving the probes;

c) ordering the measures to be taken for ensuring the damage remedy; for this purpose, the Court can order the ensuring measures to be taken on the movable and immovable assets of the person presumed to have infringed the rights acknowledge by the law, including the blocking of his/her bank accounts and other assets. For this purpose, the competent authorities can order the communication of the banking, financial or commercial documents or adequate access to the pertinent information;

d) ordering the taking or handing over to the competent authorities of the goods in connection with which suspicions exist on the violation of a right provided for by the law to prevent their introduction in the commercial circuit.

The interlocutory injunctions against intermediaries are available under the same conditions (art. 188 par. 5), thus any third party that uses in an unauthorized way in the commercial activity the IP right (including the transporters, Internet Service Providers, online shopping sites) may be subject to a preliminary proceeding initiated by the injured party.

Also, the Courts may order the precautionary seizure of the movable and immovable property of the alleged infringer in respect of infringements (art. 188 par. 6).

The measures for assuring the evidences or to ascertain a fact-finding disposed by the Court are applied through a bailiff. The rightholders of the rights supposed to be infringed or to which there is the danger to be infringed, as well as their representatives, have the right to take part at the application of the evidence conservation measures or for ascertain a fact-finding (art. 188 par. 9).

¹⁸ (1) The provider of an information society service that facilitates access to information provided by other service providers or by recipients of services provided by other providers, by providing its service recipients with information retrieval tools or links to other web site pages, is not responsible for the information in question, if any of the following conditions are met:

a) the provider is not aware that the activity or information to which it facilitates access is illegal and, as regards actions for damages, is not aware of facts or circumstances which show that the activity or information in question could harm the rights of a third party;

b) being aware of the fact that the activity or information in question is illegal or of facts or circumstances which show that the activity or information in question could harm the rights of a third party, the provider acts quickly to eliminate the possibility of access or block its use.

(2) The service provider shall be liable for the information in question where its illegality has been established by a decision of a public authority.

(3) The provisions of par. (1) shall not apply if the recipient acts on the order or under the command of the service provider.

¹⁹ <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

²⁰ <http://www.cultura.ro/infiintarea-grupului-de-lucru-pentru-modificarea-legii-81996-privind-dreptul-de-autor-si-drepturile> - site accessed on 20 March 2021.

The second main form is related to the injunctions following a decision on case merits. In this case, the Court may issue, by the final decision on case merits establishing an IPR infringement, an injunction aimed at prohibiting the infringement from continuing against the infringer and/or the intermediaries whose services are used by a third party to infringe the IPR, if the case may be. Also, the Court may dispose the following measures:

a) remittance, in order to cover the prejudices suffered, of the proceeds obtained from the unlawful deed;

b) destruction of the equipment's and means belonging to the offender that were solely or mainly intended for the perpetration of the unlawful deed;

c) removal from commercial circuit by seizure and destruction, of the illegally made copies;

d) dissemination of information referring to the court's decision, including the posting of the decision as well as the integral or partial publication of it in the mass media at the expense of the offender; under the same conditions the courts may order additional publicity measures adapted to the particular circumstances of the case, including an extensive publicity.

All these injunctions were exemplified in the case law presented before.

The blocking injunctions can be used and issued in the conditions and according to the above-mentioned procedure. Even that the law provides the measures ensuring that ISPs block access to copyright-infringing websites, in Romania blocking injunctions are used in an insignificant proportion, thus on-line and broadcast piracy remains a challenging copyright enforcement issue. The lack of the effective enforcement could be redressed by prioritising investigations and prosecution of significant IP cases, with a special focus on cases involving online piracy; providing to specialized police and local law enforcement with adequate resources, including necessary training, and instruct relevant enforcement authorities to prioritize IP cases; and awareness campaigns on the risks and damages done by online piracy.

Dynamic and de-indexing injunctions could be used as Romania implemented E-Commerce Directive

and IPRED Directive. In fact, none of these injunctions' types were used in practice for online piracy. From the case-law presented before, results that the blocking and dynamic injunctions are the most used in practice regarding illegal online content.

Dynamic injunctions could be a powerful tool to fight against on-line piracy, especially for live sports events, since they allow rightsholders to require ISPs to block both primary domain name and IP address of piracy websites, but also any subsequent domains they shift to (proxy sites). In these cases, it can be distinguished between blocking dynamic injunctions and live injunctions. Specially for sports the dynamic and live injunctions should be extended for the period in which the competition/event takes place (e.g., the Olympic games, UEFA's EURO).

For these types of injunctions, it should be mentioned the recent developments which were described as innovative, adapting the legal tools to keep up with ever adapting digital pirates²¹. Thus, fighting the latest evolution of piracy involves two new tools: live blocking and dynamic injunctions. Live blocking entails requiring Internet service providers (ISPs) to block users' access to servers hosting infringing streams of live events (used in Ireland and the United Kingdom). Dynamic injunctions allow rightsholders to require ISPs to block both primary domain name and IP address of piracy websites, but also any subsequent domains they shift to (used in Australia²², India²³, Singapore²⁴, and the United Kingdom²⁵). As note by the EU Commission in its 2017 Guidance on certain aspects of Directive 2004/48/EC, dynamic blocking injunctions are: 'injunctions which can be issued for instance in cases in which materially the same website becomes available immediately after issuing the injunction with a different IP address or URL and which is drafted in a way that allows to also cover the new IP address or URL without the need for a new judicial procedure to obtain a new injunction'.

In August 2019, the Federal Court in Sydney²⁶ enacted Australia's first dynamic injunction, targeting a list of 35 torrent, streaming, and related proxy sites. It was also the first time that a rightsholder had directly targeted proxy sites due to a 2018 change in Australia's copyright law²⁷ that allowed both dynamic injunctions

²¹ <https://itif.org/publications/2020/10/22/adaptive-antipiracy-tools-update-dynamic-and-live-blocking-injunctions> - site accessed on 20 March 2021.

²² <https://torrentfreak.com/australian-parliament-passes-tough-new-anti-piracy-law-181128/> - site accessed on 20 March 2021.

²³ <https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital> - site accessed on 20 March 2021.

²⁴ <https://www.todayonline.com/singapore/court-order-makes-it-easier-copyright-owners-curb-access-piracy-websites> - site accessed on 20 March 2021.

²⁵ <https://itif.org/publications/2018/12/03/using-dynamic-legal-injunctions-and-ai-fight-piracy-real-time-united-kingdom> - site accessed on 20 March 2021.

²⁶ <https://www2.computerworld.com.au/article/665704/foxtel-obtains-rolling-injunction-block-pirate-sites/> - site accessed on 20 March 2021.

²⁷ Copyright Amendment (Online Infringement) Bill 2018 –

and the targeting of sites that have a ‘primary effect’ of facilitating access to infringing content (along with more-explicit and central piracy sites). Dynamic orders are only possible when ISPs don’t file an objection.

Denmark is a pioneer in terms of website blocking for copyright enforcement. In 2006²⁸, Denmark was the first country in the world to allow website blocking for copyright enforcement. During 2019, the Danish Rights Alliance²⁹ had 141 ‘pirate’ sites blocked by local ISPs³⁰, which contributed to visits to pirate sites dropping by 40 percent in 2019 as compared to 2018³¹.

In the latest development, in April 2019, the Court of Frederiksberg issued Denmark’s first dynamic blocking injunction in allowing LaLiga (the Spanish football league) to get local ISPs to block access to 10 sites that infringe its copyrights by showing live matches³². Nine of the ten piracy sites listed in the complaint were ultimately deemed to be infringing the rights of the owners and generating revenue via advertising, and the tenth, Spain-based RojaDirecta (also targeted in Mexico), requested more time to respond to LaLiga’s complaint, so the site will be dealt with at a later date. The Danish Rights Alliance would follow procedures set by the court in identifying and advising what new sites to add to the injunction.

On September 29, 2020, Ireland’s High Court granted a dynamic blocking injunction to UEFA’s EURO 2020³³ (taking place in 2021 due to the COVID-19 pandemic)³⁴ and other matches taking place during the 2020/2021 football season. It’s the first injunction UEFA has sought and received in Ireland, but it follows a similar 2019 injunction for the English Premier League³⁵ (which was extended in June 2020³⁶). These

follow similar injunctions UEFA received in courts in England and Wales³⁷. As stated in UEFA’s case in Ireland, dynamic injunctions for sporting events are critical as ‘the real time nature of live sport means that the primary value of UEFA live match broadcasts is at the point in time when it is being broadcast’³⁸. Furthermore, that ‘by the end of the match, the streams will have served their purpose, so removal post-match would carry no or, at best, very limited benefit’³⁹.

The judgment in Ireland reiterates central facts about the use of website blocking for copyright enforcement: the ISP services are being used to infringe copyright, but the ISPs themselves are simply conduits, not infringers; dynamic orders prevent infringement in that they at least make it more difficult or discourage it; they do not impose unreasonable costs on ISPs; and they don’t unnecessarily deprive Internet users of lawful access to content online. The judge noted that his decision is consistent with the case law of the Court of Justice of the European Union (CJEU) and, in particular, with the judgment of that court in *Spiegel Online v. Beck* (2019)⁴⁰, in that it strikes a fair balance between the respective rights and interests of rightsholders and of Internet users.

Beyond football, in 2018, Matchroom⁴¹ - one of the world’s leading boxing promoters - received a similar dynamic injunction in the United Kingdom⁴². Matchroom wanted to protect upcoming major boxing matches involving British professional boxer Anthony Joshua, which were broadcast by Sky on a standard subscription or pay-per-view basis. Matchroom provided evidence that it lost a significant amount of revenue as a high number of illegal streams were made

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/r6> - site accessed on 20 March 2021.

²⁸ <https://arstechnica.com/information-technology/2006/10/8080/> - the Danish Courts ruled that an ISP must block access to the Russian music site AllofMP3.com. International Federation of the Phonographic Industry (IFPI) Denmark sued Tele2 (ISP) in Copenhagen City Court, asking the judge to force the ISP to cut off access to AllofMP3.com - site accessed on 20 March 2021.

²⁹ <https://rettighedsalliancen.com/> - site accessed on 20 March 2021.

³⁰ <https://torrentfreak.com/denmark-blocked-141-pirate-sites-in-2019-but-pirates-are-bypassing-the-system-200503/> - site accessed on 20 March 2021.

³¹ *Idem*.

³² <https://itif.org/publications/2020/10/22/adaptive-antipiracy-tools-update-dynamic-and-live-blocking-injunctions> - site accessed on 20 March 2021.

³³ https://www.bailii.org/ie/cases/IEHC/2020/2020IEHC488.html#_ftn6 - site accessed on 20 March 2021.

³⁴ <https://www.uefa.com/uefaeuro-2020/event-guide/> - site accessed on 20 March 2021.

³⁵ <https://www.bailii.org/ie/cases/IEHC/2019/H615.html> - site accessed on 20 March 2021; *The Football Association Premier League Ltd. v Eircom Ltd. t/a Eir & ors*.

³⁶ <https://www.bailii.org/ie/cases/IEHC/2020/2020IEHC332.html> - site accessed on 20 March 2021; *Football Association Premier League Limited – Plaintiff and Eircom Limited Trading as EIR, Sky Ireland Limited, Sky Subscribers Services Limited, Virgin Media Ireland Limited, Vodafone Ireland Limited – Defendants*.

³⁷ <https://www.bailii.org/ew/cases/EWHC/Ch/2017/3414.html> - site accessed on 20 March 2021; *Between: Union des Associations Européennes de Football – Claimant - and British Telecommunications PLC, EE Limited, Plusnet PLC, Sky UK Limited, Talktalk Telecom Limited, Virgin Media Limited – Defendants*.

³⁸ https://www.bailii.org/ie/cases/IEHC/2020/2020IEHC488.html#_ftn6 - site accessed on 20 March 2021.

³⁹ *Idem*.

⁴⁰ <https://curia.europa.eu/juris/liste.jsf?num=C-516/17> - *Spiegel Online* - site accessed on 20 March 2021.

⁴¹ <https://matchroom.com/> - site accessed on 20 March 2021.

⁴² <https://www.bailii.org/ew/cases/EWHC/Ch/2018/2443.html> - site accessed on 20 March 2021; *Matchroom Boxing Limited and Matchroom Sport Limited – Claimants and British Telecommunications PLC, EE Limited, Plusnet PLC, Sky UK Limited, Talktalk Telecom Limited, Virgin Media Limited – Defendants*.

available for his prior fights. Matchroom's dynamic injunction differs⁴³ from those given to UEFA. Given that boxing matches are irregular, the judge allowed blocking orders to be used in the seven days prior to a match and for a period/schedule of two years, thus the rightsholder needs to notify the ISPs at least four weeks in advance of a scheduled match.

Ever since its first dynamic injunction in April 2019⁴⁴, the Delhi High Court has become the focal point for rightsholders in India trying to better protect copyright online in India. In 2016 the Bombay High Court⁴⁵ took a more cautious approach in only allowing rightsholders to seek blocking injunctions against specific URLs and not entire websites unless they can demonstrate that the entire website contains infringing works. However, the Delhi High Court's detailed, well-reasoned, and comprehensive approach accounts for these and many other concerns in creating a legal and administrative framework for dynamic injunctions. As part of this, the court expressly endorsed the proportionality principle enunciated by courts in the EU and the UK.

On July 27, 2020, the Delhi High Court granted Disney a dynamic injunction against 118 piracy sites⁴⁶. Also, in July 2020, the court granted a dynamic injunction for Snapdeal⁴⁷ in fighting trademark infringement, which is in itself an evolution in India in using dynamic injunctions for IP enforcement beyond copyright. As with prior cases, the court allowed the rightsholders to update the list of blocked websites by adding the names of mirror/redirect/alphanumeric websites which piracy operator's setup after they realized their primary sites are blocked. This is the most important part of the judgement as it substantially

reduces the resources required for blocking every mirror infringing website. Similar to courts in Ireland, England, Wales, and the EU, the court consciously accounted for the rights of copyright holders in this way.

While India and the Delhi High Court have not yet allowed live blocking orders, they do allow the use of website blocking for sporting events, including pre-emptive "John Doe"⁴⁸ cases targeting known infringers. This is important as online viewing of sports content, especially cricket, has grown rapidly in India⁴⁹ due to increasing smartphone penetration and the falling cost of cell phone plans. The Indian Premier League (IPL)⁵⁰ - the massively popular cricket series - in 2017 saw a 62 percent growth rate of digital viewers. While a substantial number⁵¹ of these viewers watched the IPL on legitimate online services such as Star India's Hotstar mobile streaming app and Time Internet's platform. Crickbuzz, many people resorted to unauthorized online streaming of live matches. For instance, at the end of the 2017 IPL season, it was discovered that more than 1,700 unique URLs were illegally broadcasting the IPL via 211 unique servers, 122 pirate streams, 51 hosting sites, and 23 infrastructure providers⁵².

On September 23, 2020 the Delhi High Court granted Star India⁵³ - the broadcasters of the IPL - a blocking injunction against the operators of a known piracy service. The services are based outside of India and only became active during cricket matches. This follows rulings in 2014 and 2016 whereby the court ordered the complete blocking of websites involved in illegal streams of cricket matches and football tournaments (such as the World Cup)⁵⁴.

⁴³ <https://www.fieldfisher.com/en/services/intellectual-property/intellectual-property-blog/its-a-knock-out-matchroom-scores-a-blocking-injunction-for-boxing-matches> - site accessed on 20 March 2021.

⁴⁴ <https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital> - site accessed on 20 March 2021.

⁴⁵ <https://www.azbpartners.com/bank/diverging-john-doe-orders-in-relation-to-blocking-urls/> - site accessed on 20 March 2021.

⁴⁶ <https://sme news.org/2020/07/29/disney-obtains-new-dynamic-court-order-to-block-118-pirate-domains/> - site accessed on 20 March 2021. The action, filed by Disney Enterprises "and others", was heard via video-conferencing due to the coronavirus pandemic. Defendants include dozens of pirate sites, Internet service providers, the Department of Communications (DoT) and the Ministry of Electronics and Information Technology (MEITY). The list includes 37 'pirate' site defendants, none of whom were present to mount any kind of opposition. The sites were specialized in anime and cartoons, including the massively popular Nyaa.si, Horriblesubs, Kisscartoon/Kimcartoon, Wcostream/watchcartoononline, kissanime, gogoanime, and 9anime. Also, the plaintiffs were demanding that 11 domains/sub-domains to be blocked by ISPs (TorrentDownload and YourBitTorrent2), and finally, the application demanded that named proxy sites are also blocked by ISPs, including Unblockit.red and Proxyof.com.

⁴⁷ <https://www.latestlaws.com/intellectual-property-news/delhi-high-court-orders-blocking-of-50-websites-owing-to-dynamic-injunction-in-snapdeal-pvt-ltd-v-snapdealluckydraws-org-in-ors/> - site accessed on 20 March 2021.

⁴⁸ <https://www.lexology.com/library/detail.aspx?g=795b374a-88d6-4399-bdbd-e5e1f593ccf7> - site accessed on 20 March 2021.

⁴⁹ <https://www.coursehero.com/file/32840785/ey-sports-newsreel/pdf/> - site accessed on 20 March 2021. The sports sector in India has witnessed a number of recent developments, which have contributed to its significant growth. Although cricket continues to be the leading sport in the country, other sports have also gathered sizeable interest over the past few years.

⁵⁰ <https://www.iplt20.com/> - site accessed on 20 March 2021.

⁵¹ <https://assets.kpmg/content/dam/kpmg/in/pdf/2016/09/the-business-of-sports.pdf> - site accessed on 20 March 2021.

⁵² <https://www.indiantelevision.com/television/tv-channels/sports/ipl-2017-the-piracy-conundrum-170420> - site accessed on 20 March 2021.

⁵³ <https://www.livelaw.in/news-updates/the-delhi-hc-grants-ad-interim-injunction-to-star-india-pvt-ltd-in-broadcasting-of-dream-11-ipl-2020-163420> - site accessed on 20 March 2021.

⁵⁴ <https://economictimes.indiatimes.com/internet/delhi-hc-orders-blocking-of-73-rogue-websites-with-pirated-videos/articleshow/>

In February 2019, the Mexican Institute of Industrial Property implemented the country's first dynamic preliminary injunction to the rightsholders of the Spanish football league "La Liga" to block the pirate website *Rojadirecta*⁵⁵. The order was only for the duration of the season and only on the days when matches were broadcast.

In February 2020, the Madrid Commercial Court granted Spanish broadcaster Telefónica Audiovisual Digital⁵⁶ (which holds the rights to the national "La Liga" football competition) a dynamic blocking⁵⁷ injunction to block a list of 44 known piracy sites, which can be updated to add new entries. The injunction is valid until May 25, 2022, so will cover a total of three seasons.

In July 2020, Singaporean courts granted⁵⁸ a dynamic injunction to cover 15 flagrantly infringing online locations that included copyright protected content from the English Premier League, Discovery, BBC, La Liga, and TVB.

International jurisprudence has influenced Singapore in different ways. In the initial case, the Singapore High Court largely relied on the approach of English courts (in *Twentieth Century Fox v. British Telecommunication and Cartier International v. British Sky Broadcasting*). However, the Court expressly rejected the approach of the Federal Court of Australia (in *Roadshow Films v. Telstra Corporation*)⁵⁹ where it refused to allow dynamic blocking with judicial scrutiny. Also, contrary to the 'right balancing analysis' adopted by the Delhi High Court, the Singapore High Court in *Disney Enterprises* adopted a 'means/ends analysis'.

In December 2019, Sweden's Patent and Market Court issued the first ever dynamic injunction⁶⁰ in Sweden. ISPs are required to 'take reasonable steps to block customers' access to identified illegal file-sharing services, not only on the listed domain names and web addresses (subject to a separate traditional blocking injunction with immediate effect) but, for a period of three years, on domain names and websites 'whose sole purpose is to provide access to said illegal file-sharing services'. On June 29, 2020, the court confirmed and elaborated upon this precedent-setting

case in establishing the use of dynamic injunctions for copyright enforcement in Sweden⁶¹.

This follows a long-running appeals process that concerns a 2018 case where rightsholders (Disney, Universal Studios, Warner Bros, and several others) asked for an injunction to block infamous piracy sites such as *The Pirate Bay*, *Dreamfilm*, *Nyafilmer*, *Fmovies*, and several other related proxies and mirror sites. Similar to the High Court of England and Wales, the court made rightsholders responsible for informing the ISP about which domain names and URLs to block (the prerequisite being that these have the main purpose of providing unlawful access to any of the services in question). The court gave the ISPs three weeks to enact new blocking lists. ISPs bear the cost for enacting the blocking orders. However, the fact that it took 16 years for Sweden to block *The Pirate Bay* - which was founded in Sweden in 2003 - is indicative of how much more work is needed to reduce global digital piracy and how long it has taken website blocking to become accepted antipiracy tool⁶².

3. Conclusions

The copyright and related rights injunctions are equitable remedies in a form of a Court order/decision that requires a party to do or refrain from doing specific acts that are infringing copyright and related rights. In the case that the party fails to comply to an injunction faces criminal, administrative or civil sanctions as presented for the Romanian copyright and related rights law.

The main reason of injunctions is to establish the *ante status quo*, which refers essentially to fairness and equity.

In the view of EU regulatory texts, in order to protect copyright and related rights the Courts could take provisional and precautionary measures, measures for preserving evidence, measures for claims, blocking and dynamic injunctions.

As presented in the mentioned case-law and international developments, blocking injunctions are an example of policy best practice in supporting creativity, copyright and related rights in the digital content⁶³.

53519547.cms - site accessed on 20 March 2021.

⁵⁵ <https://www.worldipreview.com/contributed-article/dynamic-injunctions-in-the-digital-environment> - site accessed on 20 March 2021.

⁵⁶ <https://www.technadu.com/spanish-isps-block-pirate-sites-dynamically-updated-blocklist/93321/> - site accessed on 20 March 2021.

⁵⁷ https://cincodias.elpais.com/cincodias/2020/02/17/companias/1581968788_082002.html - site accessed on 20 March 2021.

⁵⁸ <https://advanced-television.com/2020/07/06/singapore-anti-piracy-court-orders/> - site accessed on 20 March 2021.

⁵⁹ https://www.copyright.org.au/ACC_Prod/ACC/News_items/2019/Roadshow_Films_Pty_Limited_v_Telstra_Corporation_Limited_2019_FCA_1328_.aspx - site accessed on 20 March 2021.

⁶⁰ <http://copyrightblog.kluweriplaw.com/2020/07/20/dynamic-blocking-injunction-confirmed-by-swedish-patent-and-market-court-of-appeal/> - site accessed on 20 March 2021.

⁶¹ <https://ipkitten.blogspot.com/2020/07/swedish-patent-and-market-court-upholds.html> - site accessed on 20 March 2021.

⁶² <https://itif.org/publications/2020/04/07/pirate-bay-lives-symbol-work-still-needed-reduce-digital-piracy> - site accessed on 20 March 2021.

⁶³ <https://itif.org/publications/2020/10/22/adaptive-antipiracy-tools-update-dynamic-and-live-blocking-injunctions> - site accessed on 20 March 2021.

Also, more countries are recognising that websites blocking can be well suited to protect live events⁶⁴.

Blocking injunctions are imposing as normal forms in order to fight against online piracy, since the websites and the proxies are blocked.

The injunctions forms are evolving for properly adapt to the changing forms of online piracy and modern digital piracy.

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