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**Proportionality -  
A New European Standard for  
Calibrating “Third Party Injunctions”**

# Introduction:

## Copyright Law as a Constitutional Issue

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Copyright law embraces a tension between:

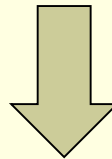
Interests of authors  **property right**

Public's interest  **freedom of expression**

# Introduction: A Constitutional Reconciliation

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A **legal mechanism** for reconciling the  
constitutional conflict

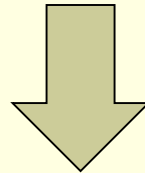


**Proportionality**

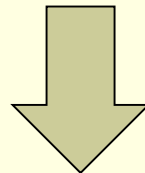
# Proportionality - Constitutional Balancing Tool in Copyright Law *via* Remedies

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**Internal** balancing tools (such as exceptions and limitations) are limited.



A move to **external** constitutional balancing tools.



The frame work for applying the constitutional balancing tool: **remedies** (“third party injunctions”).

# What Does "Proportionality" Mean?

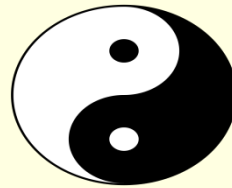
- A **"counter-formalistic"** approach.
- Balancing constitutional rights **on a case-by-case basis.**
- A **concrete multi-factor test:**  
proper purpose/necessary means/a proper relation between the benefit and the harm
- Proportionality reflects: **"logicality", "rationality" or "reasonability."**



# Why Remedies?

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- Rights and **remedies** are functionally interrelated.



- Remedies are a complimentary means of implementing **policy considerations**.
- The remedies framework in international copyright law is **flexible**.

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Remedies can serve as a means of promoting the balance of interests in copyright law.

# Proportionality in the Directives



- Article 8(1) Directive 2001/29/EC - (EU Directive on harmonization of certain aspects of copyright and related rights in the information society (2001)):

***measures, sanctions and remedies against infringements of intellectual property rights should not only be effective but also “proportionate”.***

# Proportionality in the Directives



- Article 3(2), Directive 2004/48/EC (Directive on the enforcement of intellectual property rights):

**"Those measures, procedures and remedies shall also be effective, **proportionate** and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse".**



# The Need for a Constitutional Criterion in Civil-Copyright Law



**“Proportionality” is highly appealing to the civil-copyright realm:**

- Current copyright discourse focuses also on the necessity to limit the scope of copyright;
- The basic structure of copyright as rights and limitations is akin to the "balancing" discourse;
- Copyright law crisis: constitutional conflicts in the contemporary digital environment.

# Proportionality as a Mega Standard

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**The proportionality test is gradually turning into a mega standard in copyright law!**

# "Proportionality" in Court Decisions: CJEU

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- **The CJEU Move - A New Mega Standard:**

**2006:** Productores de Música de España (Promusicae) v. Telefónica de España SAU (“**Promusicae**”)



# "Proportionality" in Court Decisions: CJEU

## ■ The CJEU Move - A New Mega Standard:

**2011:** Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et éditeurs SCRL (SABAM) 2011 (Scarlet Extended case); Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v. Netlog NV ("**SABAM**"):

*"...national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures. Accordingly, in circumstances such as those in the main proceedings, national authorities and courts must, in particular, strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs ...."*



# "Proportionality" in Court Decisions: CJEU

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- The CJEU Move - A New Mega Standard:

**2014:** UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH  
(**"Telekabel"** )



# "Proportionality" in Court Decisions: CJEU

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**The CJEU rulings reinforces the need to concretize the balancing metaphor.**

# English Court Decisions



## ■ Arnold J. Decisions:

- **2011:** Twentieth Century Fox Film Corporation and others v. British Telecommunications plc ("**Fox v. BT**“):

The need to strike a balance between property right and freedom of information.

- **2012:** Golden Eye (International) Ltd v. Telefonica UK Ltd ("**Golden Eye**“):

The proportionality of the blocking order is inspected in terms of "**necessity**" and "**efficiency**".

# English Court Decisions



## ■ Arnold J. Decisions:

- **2013:** EMI Records v. British Sky Broadcasting (“**EMI Records**”):

The proportionality of a blocking order should be considered only on a case-by-case basis.

**2014; 2015...2017**



# Conceptualizing the Use of the Proportionality Test in Copyright Law

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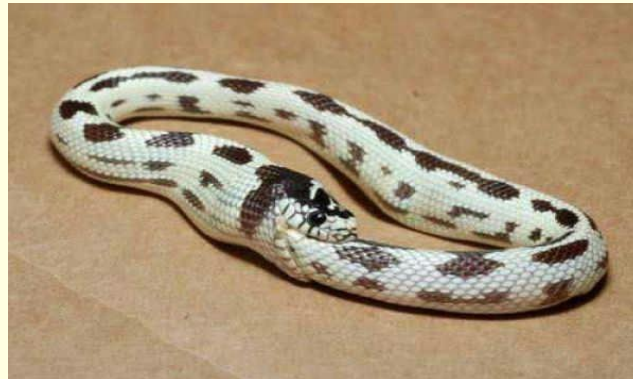
- Is it a substantive test for balancing copyright against other fundamental rights or is it a test for calibrating remedies/injunctions? **Both.**
- Is there a necessary link between the two possible functions of the proportionality test? **Yes.**

**It is a constitutional-remedy analysis, made within the copyright realm**

# Conclusion

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**Proportionality = Copyright Law New  
Constitutional Phase**



**Thank you!**