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**PROTECTION OF INTERNET PROTOCOL ADDRESSES
IN THE LIGHT OF ENFORCEMENT OF
INTELLECTUAL PROPERTY RIGHTS DIRECTIVE AND
THE PROTECTION OF FUNDAMENTAL RIGHTS**

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ABSTRACT

This study aims to propose an alternative solution to a case C-264/19 *Constantin Film Verleih* and determine the correct balance of fundamental rights in the light of the enforcement of the EU Intellectual Property Rights Directive (Directive 2004/48/EC). The key research question that this study investigates is whether dynamic internet protocol (IP) addresses can fall into the category of personal data, and specifically into the scope of Article 8 (2)(a) of the Directive 2004/48/EC. The objective is to find the balance between rights to information and intellectual property and the protection of personal data and respect for private and family life. The question of whether IP addresses are considered personal data was legally contested, in case C-264/19.

Based on the analysis of the EU primary and secondary laws, academic literature and case laws relating to Directive 2004/48/EC, the General Data Protection Regulation (GDPR) and the EU Charter of Fundamental Rights, this thesis proposes an alternative balancing of fundamental rights and argues that dynamic IP addresses fall within the scope of Article 8 (2)(a). Dynamic IP addresses with additional information are included in the concept of personal data and are “indirectly identifiable” according to Article 4 of the GDPR. The terms “name” and “address” should be interpreted broadly when circumstances allow for fundamental rights to be properly balanced.

This thesis employs a qualitative research method and the analysis and analysis of EU law.

Keywords: Definition of personal data, balance between fundamental rights, protection of internet protocol addresses, effectiveness of intellectual property rights

LIST OF ABBREVIATIONS

AG	Advocate General
ECJ	The European Court of Justice
EU Charter	Charter of Fundamental Rights of the European Union
GDPR	The General Data Protection Regulation
IP	Internet Protocol
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union

INTRODUCTION

Physical postal addresses are personal data and are protected under the European Union primary law.¹ Article 7 (“Respect for private and family life”), Article 8 (“Protection of personal data”) and Article 17 (“Right to property”) of the Charter of Fundamental Rights of the European Union are examined in this study in the light of internet protocol address protection.² To what extent does the protection of personal data provided by European Union law protect internet protocol (IP) addresses?³ How is the balance between fundamental rights ensured? These questions were only partly answered by the Court of Justice, before the case C-264/19 *Constantin Film Verleih*.⁴ The central focus of this analysis is the balance between the rights to information and right to intellectual property and protection of personal data and respect for private and family life. This thesis examines intellectual property rights from the view of Article 8 of Directive 2004/48/EC and aims to prove why dynamic IP addresses falls within the scope of Article 8 (2)(a), “Right to information”, due to the meaning of the term “names and addresses”. According to the jurisprudence of the European Court of Justice, these introduced fundamental rights are not absolute and can be limited under certain conditions.⁵ Therefore, it is critical to investigate the justification for restrictions of fundamental rights.

¹ Article 4, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 4.5.2016 p. 1-88

² European Parliament., & Office for Official Publications of the European Communities. (2000). *Charter of Fundamental Rights of the European Union*. Luxembourg: Office for Official Publications of the European Communities. OJ C 326, 26.10.2012, p. 391-407.

³ Internet protocol (IP) address is a unique number used to identify individual connections to the internet. Roberts, P. A., & Challinor, S. (2000). IP address management. *BT Technology Journal* p. 127

⁴ Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 29 March 2019 – *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* (Case C-264/19). In this case intellectual property rights holder has requested platforms (YouTube and Google) to provide the IP address of a person who uploaded content infringing on the rights of the holder. Opinion of Advocate General Saumandsgaard ØE delivered on 2 April 2020, Case C-264/19, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.*

⁵ European Union Agency for Fundamental Rights (2018). *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*, p. 70-71

The judgement of the of the Court for case C-264/19 *Constantin Film Verleih* issued on 9 July 2020 states that the IP addresses used by service users to upload infringing files does not belong to the scope of, “addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services as well as the intended wholesalers and retailers, mentioned in Article 8 (2)(a) of Directive 2004/48/EC.”⁶ This indicates that the Article 8 (2)(a) of Directive 2004/48 must be interpreted narrowly, meaning that the term “address” should refer only to regular postal addresses in the meaning of everyday language.⁷ According to the Court, it does not include the IP address.⁸ The European Court of Justice (ECJ) favoured users’ rights to protection of personal data. The ECJ justified its judgement with the arguments of minimum harmonisation of intellectual property rights, the Advocate General’s opinion on the case and a literal interpretation.⁹

This research proposes an alternative solution that balances fundamental rights in favour of intellectual property rights protection and supports a teleological interpretation. The European Union’s goal is to achieve a high level of protection of intellectual property rights; Article 17 of the Charter, Directive 2004/48/EC and the Directive 2001/29/EC attempt to create a flexible framework in order to respond to the development of the information society in the EU.¹⁰ The Advocate General’s opinion in case *Vereniging Openbare Bibliotheken* supports this view. His opinion states that a changing market will create new obligations to interpret EU law.¹¹ Market forces create new challenges for interpreting EU legislation. In the case *Constantin Film Verleih*, the broad interpretation would support the goal to achieve a high level of protection and ensure that technological developments are taken into account. The ECJ has followed the broad interpretation before in a partly similar case to achieve a high level of protection of authors. In *Joined Cases C-403/08 Football Association Premier League Ltd and Others and C-429/08 Karen Murphy*, the ECJ decided to apply the broad interpretation of “communication to the public” from

⁶ Judgement of the Court 9 July 2020, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* C-264/19 ECLI:EU:C:2020:542, par 6

⁷ *Ibid.*, par 31

⁸ *Ibid.*, par 40

⁹ *Ibid.*, par 36

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004

¹¹ Opinion of Advocate General Szpunar delivered on 16 June 2016, Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, ECLI:EU:C:2016:459, par 40

Directive 2001/29/EC Article 3.¹² Contrary to the broad interpretation, the narrow meaning of “address” applied to future cases would oppose the goals established in Directive 2001/29/EC and Directive 2004/48/EC.

IP addresses are unique numbers assigned to the network interface of a device that connects to the internet. IP addresses are divided into two parts; the first part identifies a particular network, and the second part identifies a particular machine on that network.¹³ There are two different types of IP addresses: dynamic and static. A dynamic IP address changes and formulates again with every new connection to the internet, whereas a static IP address does not change. Static IP addresses are assigned to a device and stays the same.¹⁴ Static IP addresses are also called fixed IP addresses.¹⁵ Under what conditions can dynamic IP addresses could be covered by “names and addresses” mentioned in Section 2(a) of Article 8 (“Right to information”) of Directive 2004/48/EC? ¹⁶ How can IP addresses be counted equal to the traditional meaning of address and to be considered personal data? ECJ judgement states that the term “address” should be interpreted according to its meaning in everyday language, as the Advocate General argued.¹⁷ The Advocate General maintained that the term “address” only refers to postal address, and that this definition can be verified in the Dictionnaire de l’Academic francaise which states that “address” is “the designation of the place where you can reach someone”.¹⁸ This decided meaning of the term does not narrow the scope of address to a physical address only; a designated place can refer to online locations as well. The judgement of the Court did not include any arguments relating to the rapid development of the information society or the constant evolution of technology. The Court ruled out teleological or dynamic interpretation altogether without further comments.¹⁹

¹² Judgement of the Court 4 October 2011, In Joined Cases C-403/08 and C/429/08 Football Association Premier League Ltd, NetMed Hellas SA, Multichoice hellas Sa v QC Leisure, Daivid Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen and Karen Murphy v Media Protection Services Ltd. ECLI:EU:C:2011:631, par 186

¹³ Roberts, P. A., & Challinor, S. (2000), *supra nota* 6, p. 127

¹⁴ Judgement of the Court 19 October 2016, *Patrick Breyer v Bundesrepublik Deutschland*, C-582/14 ECLI:EU:C:2016:779, par 16

¹⁵ Borgesius, F. Z. (2017). The Breyer Case of the Court of Justice of the European Union: IP Addresses and the Personal Data Definition. *Eur. Data Prot. L. Rev.*, 3, p. 130

¹⁶ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.4.2004.

¹⁷ Judgement of the Court 9 July 2020, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* C-264/19 ECLI:EU:C:2020:542, par 29

¹⁸ Opinion of Advocate General Saumandsgaard ØE delivered on 2 April 2020, Case C-264/19, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* Par 30

¹⁹ Judgement of the Court 9 July 2020, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* C-264/19 ECLI:EU:C:2020:542

Personal data is defined in Article 4 of the Regulation (EU) 2016/679 (General Data Protection Regulation).²⁰ The protection of personal data is a fundamental right and is ensured throughout the Union.²¹ Based on the analyses of the EU law and ECJ jurisprudence this thesis argues that in a digitalising world intellectual property will become more valuable and must be protected. An intellectual property system ensures and encourages new innovations, which is why it is important to share the knowledge globally.²²

In order to answer the key research, question the analysis proceeds in four main steps. First, Chapter 1 analyses the EU legal framework applicable to IP addresses. It introduces IP addresses and then primary and secondary legislations. Specifically, the discussion concerns data protection, intellectual property law enforcement and the protection of third parties' rights. The main objective of this analysis is to clarify how these rights are linked.

Second, Chapter 2 focuses on data protection, addressing the following questions: Why is personal data protected? How is personal data defined in the General Data Protection Regulation (GDPR), and what is the purpose of data protection? Data protection is analysed through fundamental rights and the GDPR, specifically through the definition of personal data provided in Article 4 of the GDPR.

Third, the concept of intellectual property rights is explored in Chapter 3. This chapter investigates why intellectual property rights are protected and why it is important to guarantee the enforcement of these rights. The analysis focuses on the core of intellectual property rights and explains how losing the trust in them be consequential to the system. This chapter develops arguments as to why dynamic IP addresses should fall within the scope of Article 8 (2)(a) of the Directive 2004/48.

²⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, Article 4 states, “‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”

²¹ European Parliament., & Office for Official Publications of the European Communities. (2000). *Charter of fundamental rights of the European Union*. Luxembourg: Office for Official Publications of the European Communities. OJ C 326, 26.10.2012, p. 391-407.

²² Prabu, S. L., Suriyprakash, T. N. K., & Thirumurugan, R. (2017). Introductory Chapter: Intellectual Property Rights. In *Intellectual Property Rights*. IntechOpen, p. 3

Finally, Chapter 4 examines the balancing of these rights through the case C-264/19. First the question referred to the preliminary ruling and then the judgement combined with the Advocate General's opinion.

1. GENERAL LEGAL FRAMEWORK

This chapter analyses dynamic IP addresses and the applicable legal framework in the European Union. To determine whether a dynamic IP address is personal data, Chapter 1.1 first analyses the technical nature and the functioning of a dynamic IP address. Second, the applicable EU primary law is discussed (Chapter 1.2), followed by an analysis of the applicable EU secondary law (Chapter 1.3). If dynamic IP addresses cannot be seen as equal to physical addresses and if the term “names and addresses” is only understood according to its traditional meaning in everyday language, how may this affect to the protection of intellectual property? It is clear that a dynamic IP address alone cannot identify a specific person due the dynamic element of the IP address.²³ Chapter 1 provides a comprehensive overview of the legal basis and the legal aspects that must be considered in order to balance fundamental rights correctly.

1.1. Internet protocol address

An IP address is a unique number and with it, it is possible to identify individual connections to the internet.²⁴ Network traffic mostly consists of the uses of IP addresses, which represent sources and destinations.²⁵ Although IP addresses can be dynamic or static, this thesis centres dynamic IP addresses, which are temporary and constantly changing. They are not addressed to a particular person and due the dynamic element, it is not possible to identify a natural person directly from them; it is only possible to identify a specific device. A dynamic IP address is assigned to the

²³ Hargreaves, S., & Tsui, L. (2017). IP addresses as personal data under Hong Kong’s privacy law: An introduction to the access my info HK project. *JL Inf. & Schi.*, 25, 68

²⁴ Roberts, P. A., & Challinor, S. (2000), *supra nota 6*, p. 127

²⁵ Marin, G. A. (2005). Network security basics. *IEEE security & privacy*, p. 68-72

network connection of a device that interacts with the internet.²⁶ Dynamic IP addresses are commonly used by internet service providers (ISP).²⁷

IP addresses are required in order to use a computer to communicate online; it works with similarly to a regular address. In the same way that homes have a street address, devices have an internet address.²⁸ In his opinion on case C-264/19, delivered on 2 April 2020, Advocate General Saumandsgaard ØE argued against the broad interpretation of the terms “name” and “addresses”.²⁹ The AG’s opinion states that, “the meaning and scope of the term should be determined by considering their usual meanings in everyday language”.³⁰ According to the Advocate General a traditional interpretation of the term should be applied, and the term must be understood through a literal and historical interpretation of Article 8 (2)(a), meaning that the article would not include IP address.³¹ The judgement by the Court of Justice relied on the AG’s opinion, and because the Directive 2004/48 has not defined the meaning of “names and addresses” widely, the term is not interpreted to include IP addresses.³² However, the Advocate General has verified the term “address” from the French dictionary, and according to the dictionary definition, it can be interpreted more widely and apply to more than only physical addresses.³³ The French dictionary states that “address” is “the designation of the place where you can reach someone”.³⁴ According to the Cambridge Dictionary an address is “a series of letters and symbols that tell you where to find something on the internet or show where an email is sent to” or “the place where a piece of information is stored in a computer’s memory”.³⁵ Both of these definitions support the broad interpretation of the term “address”. The Advocate General’s opinion could have discussed the definition according to the French dictionary, but neither the opinion nor the judgement commented on this definition in any way. According to suomisanakirja.fi, the Finnish translation of the term “address” states that an address is “someone’s location of residence, location of

²⁶ Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 29 March 2019 – *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* (Case C-264/19) p.4

²⁷ Hargreaves, S., & Tsui, L. (2017), *supra nota 10*, 68

²⁸ WhatIsMyIPAddress.com: Without IP Addresses, the Internet Would Disappear. Accessible: <https://whatismyipaddress.com/ip-address> 30 March 2020

²⁹ Opinion of Advocate General Saumandsgaard ØE delivered on 2 April 2020, Case C-264/19, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* par 43-48

³⁰ *Ibid.*, par 29

³¹ *Ibid.*, par. 27-31

³² Judgement of the Court 9 July 2020, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* C-264/19 ECLI:EU:C:2020:542, par 30

³³ Opinion of Advocate General Saumandsgaard ØE delivered on 2 April 2020, Case C-264/19, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* Par 30

³⁴ *Ibid.*, Par 30

³⁵ Cambridge Dictionary English to English, meaning of address in English (3.4.21)

whereabouts, location of establishment or location information”, which is also a broad interpretation of the term.³⁶

A dynamic IP address has very similar functions to a regular street address, and the scope of the term “names and addresses” is debated. Based on the findings from the investigation of the definitions of “address”, this thesis argues that the term “address”, should be interpreted widely. This claim is supported by specific legislation in the following chapters. The general function of an electronic address is compared to a regular address should be considered when interpreting the term. The GDPR defines the meaning of personal data and what is required for the processing of personal data to be lawful.³⁷ As an IP address contains information about a person, it is necessary to analyse to what the GDPR covers and to what extent.

1.2. EU primary law applicable to an internet protocol addresses

This section provides an overview of the applicable EU legislation that applies to the personal data. Aside from Article 8, “Protection of personal data”, other articles from the Charter relevant to the topic are Article 7, “Respect for private and family life” and Article 17, “Right to property”. With the development of technology, third-generation fundamental rights such as data protection have also been secured by the Charter.³⁸ Primary legislation always takes precedence over secondary legislation, and it shall be secured. Additionally, the principle of the primacy of EU law requires that European law prevail over national law of the EU Member States.³⁹ The Charter of Fundamental Rights of the European Union is primary law in the EU and has a triple function. Firstly, it provides guidance for interpretation; national law and European Union secondary law must always be interpreted in light of the Charter. Secondly, the Charter provides the basis for judicial review. An EU legal provision infringing an article of the Charter shall be annulled, and

³⁶ Suomi sanakirja, Suomi to Suomi, meaning of address in Finnish (3.4.21)

³⁷ Article 4, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
Accessible: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=FI>

³⁸ An official EU website, European Commission, EU Charter of Fundamental Rights (2020). Accessible: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_fi, 7 February 2020.

³⁹ Kwiecien, R. (2005). The primacy of European Union law over national law under the Constitutional Treaty. *German Law Journal*, Vol. 06 No.11 p. 1479

national law which is in the scope of EU law and contravenes the Charter is void. Thirdly, the general principles of EU law can be found in the Charter, the Charter provides a platform for discovering the general principles of the EU law.⁴⁰

1.3. EU secondary law applicable to an internet protocol addresses

European Union legislative acts are legally binding, generally applicable in all Member States and legislated according to the procedure established in the Treaty on the Functioning of the European Union (TFEU). Secondary law sources are regulations, directives and decisions which are regulated in Article 288 of the TFEU.⁴¹ Besides Directive 2004/48/EC, Directive 2001/29/EC also aims to create a flexible legal framework for intellectual property protection.⁴² According to the Proposal for the Directive 2004/48/EC, the focus of the directive is the need for harmonisation of national legislation in the field of intellectual property law.⁴³ The main objective is to prevent the growing risks of piracy and counterfeiting infringements within the EU area.⁴⁴

The GDPR presents the framework for data protection. The GDPR was implemented in 2018, and it is now the main legal framework for data protection in the EU.⁴⁵ The GDPR is directly applicable to all Member States of the EU, and it creates new obligations for Member States and their companies.⁴⁶ The protection of personal data is a fundamental right, and it must be ensured throughout the Union. Article 8 of Directive 2004/48/EC and Article 4 of the GDPR outline somewhat contradictory obligations for Member States. The GDPR intends to secure individuals'

⁴⁰ Lenaerts, K. (2012). Exploring the limits of the EU Charter of Fundamental Rights. *European Constitutional Law Review*, 375-403 p. 376

⁴¹ Duttler, T., Holzinger, Malang, Schäubli, Schimmelfennin, & Winzen. (2017). Opting out from European Union legislation: The differentiation of secondary law. *Journal of European Public Policy*, 24(3)

⁴² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004

⁴³ Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights /*COM/2003/0046 final – COD 2003/0024 */

⁴⁴ *Ibid.*

⁴⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

⁴⁶ European Union Agency for Network Information Security. (2017) *Handbook on security of personal data processing*. Heaklion: ENISA. p. 6

right to protection of personal data, and Article 8 of Directive 2004/48/EC states that in order to resolve cases of infringements of intellectual property rights, there is a right to information of the data subject matters of the origin and distribution networks, such as “names and addresses”.⁴⁷

Secondary and primary legislation in the European Union provide legislative frameworks from different perspectives. On the one hand, personal data is strictly protected, but on the other hand, the right to intellectual property is secured in the Charter and in the Enforcement of the Intellectual Property Rights Directive. Before discussing in detail how to balance these rights, Chapter 2 analyses applicable rules and case laws of the ECJ relating to personal data protection, and Chapter 3 focuses on the intellectual property rights.

⁴⁷ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004, p. 6

2. INTERNET PROTOCOL ADDRESSES AND PERSONAL DATA PROTECTION

Personal data is defined in the GDPR. Under what circumstances does a dynamic IP address constitute personal data, and how can the balance of fundamental rights be ensured? How can Article 8 and Article 7 of the Charter be applied to an IP address? The central element to analyse is the scope of personal data. Why is personal data protected, and what are the goals to be achieved by this protection? How does the definition provided in the GDPR apply to IP addresses? These questions are analysed in this chapter in the light of the case C-264/19.

2.1. General Data Protection Regulation

The first directive regarding data protection was the Directive 95/46/EC.⁴⁸ This directive was repealed by the GDPR 679/2016 in April 2016.⁴⁹ The European Commission saw the the GDPR as an essential step towards strengthening citizen's rights in the digital age.⁵⁰ The GDPR is directly applicable across all Member States in EU. According to the European Commission, there are two key goals to be achieved with the GDPR, and one unified law is the most effective way to meet these goals. The first goal is to protect the freedom, privacy and rights of natural persons in the European Union, and second goal is to remove barriers to business by simplifying the free movement of data inside the EU.⁵¹ The purpose of data protection is to secure the privacy, freedoms and rights of natural persons, which means to ensuring the fair application of the

⁴⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995

⁴⁹ EuroCloud Europe, A Brief History of Data Protection: How did it all start? Accessible: <https://cloudprivacycheck.eu/latest-news/article/a-brief-history-of-data-protection-how-did-it-all-start/> 11 March 2020

⁵⁰ Ustaran, E. (Ed.). (2018). *European Data Protection: Law and Practice*. An IAPP Publication, International Association of Privacy Professionals, p. 48

⁵¹ Itgp Privacy Team, I. (2017). *EU General Data Protection Regulation (GDPR): An Implementation and Compliance Guide*. (2nd ed.).

fundamental rights established in Article 8 of the European Convention of Human Rights and in Articles 7 and 8 (1) of the EU Charter.

The GDPR created new obligations for companies' privacy protection, and with the enforcement of this regulation, data protection and internet user's privacy protection improved significantly.⁵² The GDPR is derived from Article 8 (1) of the Charter and from the Article 16 (1) of the TFEU, which states that "Everyone has the right to the protection of personal data concerning them".⁵³ Recital 4 of the GDPR states that:

The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.⁵⁴

Purpose of personal data protection is to ensure fundamental rights and freedoms related to the data. The GDPR is derived from EU primary legislation and it must be balanced against other fundamental rights when limitations are in question. It is important to note the lawful basis of processing an individual's personal data.

2.2. Definition of personal data

How is personal data is defined, and can a dynamic IP address fall within the scope of that definition? Article 8 (1) of the Charter states, "(1) Everyone has the right to the protection of personal data concerning him or her."⁵⁵ Personal data is defined specifically in Article 4 of the GDPR:

⁵² Tikkinen-Piri, C., Rohunen, A., & Markkula, J. (2018). EU General Data Protection Regulation: Changes and implications for personal data collecting companies. *Computer Law & Security Review*, 34(1), 134-153

⁵³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) p. 1

⁵⁴ *Ibid.*, p. 2

⁵⁵ European Parliament., & Office for Official Publications of the European Communities. (2000) *Charter of Fundamental Rights of the European Union*. Luxembourg: Office for Official Publications of the European Communities. (2012/C 326/02), OJ C 326, 2610.2012p. 10

“personal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.⁵⁶

The key element of the definition of “personal data” is that someone can be identified by it. One of the issues with personal data is, that the line between personal and non-personal data is vague, and it is highly possible that data which is now seen as non-personal data may become personal data in the future.⁵⁷ De-identified or pseudonymised data which is possible to use to re-identify a person, is included into the scope of the GDPR.⁵⁸ Data may again become personal data after de-anonymization, or when combined with other data.⁵⁹ Definition of personal data also includes the possibility of indirect identification; the main function of personal data is to identify someone. How can dynamic IP addresses can be included into or not included into the scope of personal data?

2.2.1. Online identifiers

To expand the definition detailed in Article 4, Recital (30) of the GDPR adds that, “Natural persons may be associated with online identifiers...such as internet protocol addresses...This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of natural persons and identify them.”⁶⁰ According to the Recital 30, IP addresses are included in the group of online identifiers. Online identifiers are

⁵⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) p.33

⁵⁷ Janecek, V. (2018). Ownership of personal data in the Internet of Things. *Computer Law & Security Review: The International Journal of Technology Law and Practice*

⁵⁸ European Commission; Directorate-General for Justice Consumers. (2018). *The GDPR: New opportunities, new obligations: What every business needs to know about the EU's General Data Protection Regulation*. Luxembourg: Publications Office. p. 5

⁵⁹ Van Loenen, B., Kulk, S., & Ploeger, H. (2016). Data protection legislation: A very hungry caterpillar: The case of mapping data in the European Union. *Government Information Quarterly*, 33(2), 338-345

⁶⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), recital 30

regulated according to Article 4 including into the scope of, meaning that IP addresses are personal data in the form of online identifiers.⁶¹

In conclusion, IP addresses can be considered as personal data. However, questions remain about how the difference between dynamic and static IP addresses affects this categorisation and how fundamental rights can be balanced correctly if IP addresses in general are viewed as personal data?

2.2.2. Internet protocol addresses constitutes personal data

Case C-582/14 *Breyer* also supports the view that IP addresses should be seen as personal data under certain circumstances.⁶² This case concerned the protection of personal data. Mr. Patrick Breyer sued the Bundesrepublik Deutschland regarding the registration and storage of the IP address used by the Bundesrepublik Deutschland. Mr Breyer's data had been retained after he used many sites owned by German Federal institutions, which provide online media services.⁶³ The Court held that Article 2 (a) of Directive 95/46/EC must be interpreted in such way that a dynamic IP address can constitute personal data, when an online media service provider has reported it for the purpose of making a website accessible to an individual and when the IP address can be used to lawfully identify the data subject with additional information, which the ISP has about that person.⁶⁴

According to Directive 95/46/EC Article 2 (a) personal data is information by which an identified or identifiable natural person can be identified directly or indirectly. The wording of this article is similar to that of Article 4 of the GDPR. The word “indirectly” is the key; “indirectly” is seen equal to, with additional information provided by the third party. Indirect identification of a user is a matter which is not in dispute. Indirect identification is possible when a dynamic IP address is combined with other data.⁶⁵ Additionally, in case C-70/10 *Scarlett Extended*, the Court of Justice found that IP addresses can allow their users to be identified.⁶⁶

⁶¹ *Ibid.*, Recital 30

⁶² Judgement of the Court 19 October 2016, Patrick Breyer v Bundesrepublik Deutschland, C-582/14 ECLI:EU:C:2016:779, par 44

⁶³ *Ibid.*, par 2

⁶⁴ *Ibid.*, par 49

⁶⁵ Opinion of Advocate General Campos Sánchez-Bordona, delivered on 12 May 2016, Patrick Breyer v Bundesrepublik Deutschland, C-582/14, par 59

⁶⁶ Hargreaves, S., & Tsui, L. (2017), *supra nota 10*, 68

In the *Breyer* case, a dynamic IP address was reported by an online media services provider, and additional information was provided by an ISP. This gave the online media service provider the ability to identify the user with the combined information of the IP address and the additional data. According to the EU legislation presented in the case, “the word ‘indirectly’ is used in order to treat information as personal data, it is not necessary that the information alone allows the data subject to be identified.”⁶⁷ In the *Breyer* case the additional data provided by the existing third party enabled the dynamic IP address to be classified as personal data.⁶⁸ In a conclusion under the circumstances described in *Breyer* case, dynamic IP addresses are seen as personal data.

This judgement identifies a possibility for dynamic IP address to be seen as personal data in other situations as well, when additional data is available. According to Recital (26) of the GDPR “To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, either by the controller or by another person to identify the natural person directly or indirectly.”⁶⁹ All objective factors should be taken into account when deciding “whether means are reasonably likely to be used in order to identify the natural person”.⁷⁰ In regards to the case C-264/19 and the question of whether the dynamic IP address could have been seen as personal data, dynamic IP addresses can constitute as personal data when there is additional data available and when they can be used to identify a natural person directly or indirectly. In case C-264/19, additional data was available from the infringer’s Google account, which is an online media service provider, or from the ISP’s record.⁷¹ Therefore, the criterion of additional data is fulfilled, and the owner of the dynamic IP address can be indirectly identified.

⁶⁷ Judgement of the Court 19 October 2016, Patrick Breyer v Bundesrepublik Deutschland, C-582/14 ELCI:EU:C:2016:779, par 38-41

⁶⁸Opinion of Advocate General Campos Sánchez-Bordona, delivered on 12 May 2016, Patrick Breyer v Bundesrepublik Deutschland, C-582/14, par 74

⁶⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) p. 4

⁷⁰ *Ibid.*, p. 4

⁷¹ Computer Business Research: Online service provider (April 2020) Accessible: <http://www.computerbusinessresearch.com/Home/ebusiness/online-service-provider>

2.3. Fundamental rights – Article 7

The GDPR was created in order to secure fundamental rights regarding data protection and to harmonise data privacy laws in all EU Member States.⁷² Problems arising from Article 7 of the Charter, “Respect for private and family life”, raise concerns when the revealing of a dynamic IP address is in question. This article corresponds to Article 8 of the European Convention on Human Rights, as these articles have the same scope and similar wording.⁷³ As stated in previous chapters, it is impossible for a specific person to be identified directly from a dynamic IP address. Identification requires additional data and poses the threat of infringing upon third persons’ right to privacy. There are two ways to provide additional information, needed to identify the data subject indirectly according to Article 4 of the GDPR.⁷⁴

Firstly, in case C-264/19 additional data was available through the user’s Google account which can be used to identify the infringer indirectly. The processing of personal data requires the consent of the user in order for it to be legitimate. The consent must be a freely given, specific, informed and unambiguous indication of wishes. The responsibility of obtaining the consent correctly, lies with the data controller.⁷⁵ When creating a Google account, the user must accept the terms of service and the privacy policy. In this stage the user must give their consent to storage of server logs and that data being used by participating companies.⁷⁶ Access to the additional data through an infringer’s Google account is lawful when consent is collected according to GDPR, and when the indirect identification of the data subject can be obtained. Secondly, an ISP keeps a record of the temporary dynamic IP addresses and knows to whom it has been assigned.⁷⁷ That way, it is

⁷² Marelli, L., & Testa, G. (2018). Scrutinizing the EU general data protection regulation. *Science*, 360(6388), 496-498

⁷³ Lemmens, P. (2001). The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights-Substantive Aspects. *Maastricht Journal on European and Comparative Law* p. 57

⁷⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

⁷⁵ Ustaran, E. (Ed.). (2018), *supra nota 15*, p. 114

⁷⁶ Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 29 March 2019 – Constantin Film Verleih GmbH v YouTube LLC, Google Inc. (Case C-264/19)

⁷⁷ Lemson, D. E., & Brown, K. M. (2009). U.S. Patent No. 7, 600,042. Washington, DC: U.S. Patent and Trademark Office

possible to access additional information to identify the person to whom the dynamic IP address has been assigned and find the right person without infringing on anyone's right to private life.⁷⁸

Fundamental rights must be secured in all situations. Concerns regarding Article 7 of the Charter of Fundamental Rights and the right to private life can be mitigated with the information provided in an infringer's Google account and through an ISP's record, which can provide additional information about the owner of the dynamic IP address. Therefore, access to the additional data exists, and possible infringement of another's right to private life can be avoided. Additionally, third party rights are guaranteed, and the fundamental right to privacy is secured.

2.4. Relationship between fundamental rights and internet protocol addresses

European Union Member States are required to ensure the balance between fundamental rights. One measure that aims to do this is Article 8 of the EU Charter, "Protection of personal data". Personal data can be processed when the purposes are specified, and the consent of the person is legitimately obtained or when there is some other legitimate basis laid down by law. Personal data must be processed fairly in situations.⁷⁹ In cases of copyright infringements, the purpose of obtaining and processing personal data is specified. Illegal acts regarding intellectual property rights are handled in civil proceedings, and the question whether it is legal to reveal IP addresses arises. Copyright infringement on the internet is defined by the European Union Intellectual Property Office. According to this agency, "Copyright infringement arises whenever a protected work is used without the authorisation for the copyright holder, and when this activity cannot be regarded as permitted use under one of the applicable exceptions or limitations to copyright".⁸⁰ In case C-264/19 it is clear that there was a copyright infringement: the applicant's exclusive film exploitation rights for a film were infringed.

⁷⁸ European Parliament., & Office for Official Publications of the European Communities. (2000) *Charter of Fundamental Rights of the European Union*. Luxembourg: Office for Official Publications of the European Communities. (2012/C 326/02), OJ C 326, 2610.2012.

⁷⁹ Article 8, European Parliament., & Office for Official Publications of the European Communities. (2000) *Charter of Fundamental Rights of the European Union*. Luxembourg: Office for Official Publications of the European Communities. (2012/C 326/02), OJ C 326, 2610.2012

⁸⁰ EUIPO, European Union Intellectual Property Office: Online Copyright Infringement in the European Union: Music, Films and TV (2017-2018), Trends and Drivers (November 2019) Accessible:

https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/quantification-of-ipr-infringement/online-copyright-infringement-in-eu/online_copyright_infringement_in_eu_en.pdf

Data protection regulations aim to secure individuals' freedoms, and rights to privacy and fair processing of their personal data. The right secured in Article 8 of the Charter is not an absolute right and it needs to be balanced against other fundamental rights, according to the proportionality principle. Personal data is defined in the GDPR, but the line between personal and non-personal data is still vague and constantly changing. How can dynamic IP address can be included into or excluded from the scope of the definition of personal data? Recital 30 of the GDPR includes IP addresses into the category of online identifiers, which are considered to be personal data. This supports the argument that IP addresses can be considered personal data.⁸¹ The *Breyer* case also stated that dynamic IP addresses can constitute as personal data, when additional information of a user can be provided.⁸² Dynamic IP addresses with additional data, allow for the indirect identification of a data subject and can therefore be viewed as personal data.

⁸¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

⁸² Judgement of the Court 19 October 2016, Patrick Breyer v Bundesrepublik Deutschland, C-582/14 ECLI:EU:C:2016:779, par 38-41

3. HOW TO SECURE INTELLECTUAL PROPERTY RIGHTS

The purpose of Directive 2004/48 according to Recital 3, “is intended to contribute to the effective enforcement of intellectual property rights”.⁸³ That cannot be guaranteed if the terms “names and addresses” are understood in the traditional, ‘narrow’ meaning, precluding electronic addresses. Case C-264/19 addressed an intellectual property right infringement. Why does intellectual property need to be protected, and how is it secured in the European Union? Why should a dynamic IP address need to fall into the scope of Article 8 of the Directive 2004/48/EC? Revilng of the dynamic IP addresses in civil proceedings in case of copyright infringement would be an appropriate way to identify the infringer and would contribute to the effective enforcement of intellectual property rights for the intentions of Directive 2004/48. Copyright law is known to be very complex and because it is closely related to many economic, social and legal issues, problems arise easily.⁸⁴

This chapter briefly introduces the intellectual property rights system and how intellectual property rights are protected in the European Union. This chapter then analyses the appropriate measures needed in the light of the ECJ ruling in *Bastei Lübbe* and finally concludes how the effective enforcement of intellectual property rights needs to be secured.

⁸³ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004. Accessible: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29>

⁸⁴ Tian, Y. (2008). *Re-thinking intellectual property: The political economy of copyright protection in the digital era*. Routledge, p.5

3.1. Brief introduction to intellectual property rights

The right to intellectual property is secured in the EU Charter Article 17 (2) “Right to property”, which states that, “Intellectual property shall be protected”.⁸⁵ Intellectual property rights include copyright, designs, patents and trademarks. It refers to any products of human intellect, such as inventions; literary works; and symbols, names and images used in commerce.⁸⁶ It derives from human intellectual activity. The protection of intellectual property is important, and it has become a major concern across the global markets.⁸⁷ The intellectual property system ensures and encourages new innovations, which is why it is important to share the knowledge about intellectual property law system globally.⁸⁸ Ensuring the protection of intellectual property rights promotes innovations and creativity, improves competitiveness and develops employment opportunities. The importance lies in the ability to profit from innovative activities.⁸⁹

The system of intellectual property in the European Union is fragmented and needs harmonisation. Harmonisation with many different national legislations which use different titles and include different standards is not easy.⁹⁰ Case C-264/19 offered the possibility for the ECJ to unify intellectual property law systems within the EU. This decision could have defined dynamic IP addresses as part of personal data and could have given a new, wider definition to the meaning of the term “names and addresses”.

3.2. Article 8 of the Directive 2004/48/EC

Article 8 of Directive 2004/48/EC defines the right to information concerning intellectual property rights infringements. According to this definition, Member States have an obligation to ensure that the infringer or any person found to provide these infringing services on a commercial scale

⁸⁵ European Parliament., & Office for Official Publications of the European Communities. (2000) *Charter of Fundamental Rights of the European Union*. Luxembourg: Office for Official Publications of the European Communities. (2012/C 326/02), OJ C 326, 2610.2012.

⁸⁶ Prabu, S. L., Suriyprakash, T. N. K., & Thirumurugan, R. (2017), *supra nota* 9, p. 3

⁸⁷ Cao, Q. (2014). Insight into weak enforcement of intellectual property rights in China. *Technology Society*, 38, p. 40-47

⁸⁸ Prabu, S. L., Suriyprakash, T. N. K., & Thirumurugan, R. (2017), *supra nota* 9, p. 3

⁸⁹ An official EU website, European Commission: Intellectual property (2020). Accessible: https://ec.europa.eu/growth/industry/policy/intellectual-property_en

⁹⁰ Herz, B., & Mejer, M. (2019). Effects of the European Union trademark: Lessons for the harmonization of intellectual property systems. *Research Policy*, 48(7), 1841-1854

provides the appropriate information on the origin and distribution networks of the goods or services which infringe an intellectual property right.⁹¹ Article 8 (2)(a) defines the scope of information, “(2) The information referred to in paragraph 1 shall, as appropriate, comprise: (a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers...”⁹² In other words, the names and addresses of the infringed party should be revealed in order to identify the infringer in civil proceedings, such as those concerning intellectual property rights infringements.

The wording in Article 8(2)(a) refers only to the disclosure of names and addresses and does not clarify the scope of these terms. These terms are not defined in the Directive 2004/48/EC, and it is clear that the concept of the terms need an autonomous and uniform interpretation for the future cases. According to the Recital (10) of the Directive 2004/48/EC, “the objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market”.⁹³ Protection of the internal market and intellectual property rights cannot be secured if the term “names and addresses” is understood in the literal and historical sense of a physical address; the concept needs to be updated to be relevant in the current time. Technology has developed quickly in the last decades; the digital era began in the early 2000’s and with it, the “knowledge economy”.⁹⁴ Considering the increasing development of technology and the wording in Article 8 (2)(a) of the Directive 2004/48/EC, “names and addresses” should be interpreted broadly.

The judgement of the case *Constantin Film Verleih* did not apply any arguments regarding the development of the information society and constantly developing technology.⁹⁵ Both the judgment and the Advocate General’s opinion applied the traditional interpretation of the term.⁹⁶ The literal interpretation neither suits nor supports the rapid evolution of technology. A dynamic interpretation is necessary in the fields where the technological development is fast and constantly evolving. This was stated in the Advocate General’s opinion in case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrech*. According to this opinion the technological progress

⁹¹ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Tian, Y. (2008), *supra nota* 22, p. 4

⁹⁵ Judgement of the Court 9 July 2020, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* C-264/19 ECLI:EU:C:2020:542

⁹⁶ Opinion of Advocate General Saumandsgaard ØE delivered on 2 April 2020, Case C-264/19, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* par. 27-31

today is so fast that it without difficulty exceeds the legislative process.⁹⁷ When the European Union adopted the laws in the field of intellectual property law and copyright Directive 2006/115 stated that copyright law must adapt to new economic developments.⁹⁸

Article 8 of Directive 2004/48 provides the legal basis for supplying information to resolve intellectual property rights infringements. The directive's purpose is to ensure a high level of protection in the internal market, and the right to information is a crucial part of achieving this goal.⁹⁹ The broad interpretation supports the arguments presented in this thesis, if dynamic IP addresses can be seen as personal data, it is reasonable to assume that dynamic IP addresses could be included into the scope of Article 8 (2)(a) along with other forms of personal data.

3.3. Appropriate measures to secure effective protection of intellectual protection rights

A broad interpretation of the term “names and addresses” would ensure the effective enforcement of intellectual property rights. The judgement in case C-149/17 *Bastei Lübbe*, supports the broad interpretation as well.¹⁰⁰ The preliminary matter consisted of two questions relating to the legal problem of the “nature of penalties and measures to be taken in copyright infringement cases”. This case concerned a copyright infringement in which Bastei Lübbe's exclusive copyright was infringed by Mr. Stortzer's internet connection. Mr. Stortzer used an internet connection and an IP address for the purpose of sharing and downloading Lübbe's audio book.¹⁰¹

According to Article 3 of the Directive 2004/48 Member States are obliged to take measures which are necessary in order to ensure the enforcement of intellectual property rights. These measures must be effective, proportionate and dissuasive and Member States must avoid creating barriers to legitimate trade and must provide necessary safety measures against the abuse of these

⁹⁷ Opinion of Advocate General Szpunar delivered on 16 June 2016, Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, ECLI:EU:C:2016:459

⁹⁸ Opinion of Advocate General Szpunar delivered on 16 June 2016, Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, ECLI:EU:C:2016:459

⁹⁹ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004

¹⁰⁰ Judgement of the Court, 18 October 2019, *Bastei Lübbe GmbH & Co. KG v Michael Stortzer (Bastei Lübbe)*, C-149/17, ECLI:EU:C:2018:841

¹⁰¹ *Ibid.*, par. 12-13

measures.¹⁰² The *Bastei Lübbe* case argues that the main purpose of Directive 2004/48 is to secure the effective enforcement of intellectual property according to the Article 17 (2) of the Charter.¹⁰³ Effective enforcement cannot be guaranteed if IP addresses are protected too strictly and if the protection of these IP addresses is valued more than the protection of intellectual property rights. The judgement in the *Bastei Lübbe* case supports the broad interpretation of the scope of Article 8 of the Intellectual Property Rights Enforcement Directive.

To ensure the effective enforcement of intellectual property rights, in the light of discussion in this chapter the Article 8 (2)(a) should be interpreted broadly meaning that the term “names and addresses” is interpreted taking technological developments into account. The key impetus for the Directive 2004/48 was the need for harmonisation of national legislation. The directive aims to promote the development of innovatory and creative activity within the European Union.¹⁰⁴ This aim is fulfilled when a broad, autonomous interpretation is given to the term “address” in Article 8 of Directive 2004/48 and when evolving technology is taken into account.

¹⁰² Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004

¹⁰³ Judgement of the Court, 18 October 2019, *Bastei Lübbe GmbH & Co. KG v Michael Strotzer (Bastei Lübbe)*, C-149/17, ECLI:EU:C:2018:841, par 43

¹⁰⁴ Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights /*COM/2003/0046 final – COD 2003/0024 */

4. BALANCE OF FUNDAMENTAL RIGHTS

On 9 July 2020, the judgement of the Court for the *Constantin Film Verleih* case was published. Chapter 4 focuses more deeply on the analysis of the judgement of the case and AG's opinion. In the judgement the ECJ concluded that dynamic IP address is not included to the term "names and addresses", stating that the term must be interpreted according to its meaning in "everyday language". Chapter 4 proposes an alternative solution to the case based on the analysis in Chapters 1 through 3. This thesis argues that dynamic IP addresses can be seen as personal data and that the interpretation of Article 8 (2)(a) should be broad and include the dynamic IP addresses. This chapter balances these arguments against the judgement and the AG's opinion.

First, this chapter will analyse the preliminary question referred to the ECJ. It then evaluates the judgement of the case and the Advocate General's opinion. Lastly, it discusses the balance of fundamental rights.

4.1. Case C-264/19 *Constantin Film Verleih*

The ECJ has the ability to affect the EU's relationship with its Member States by using its powers and jurisdiction to implement decisions with political impact regarding the European Union. With the case *Constantin Film Verleih*, an opportunity was presented to derive a new principle and create a definition for the term "names and addresses" stated in Article 8 of Directive 2004/48. With the judgement, the ECJ established guidelines for future cases as well. Several of the EU's fundamental principles have derived from the ECJ's preliminary rulings, such as the principle of direct effect and the principle of supremacy of EU law.¹⁰⁵ In case C-264/19 a request for a preliminary ruling to the ECJ was lodged by the Bundesgerichtshof on the grounds of Article 267

¹⁰⁵Cini, M., & Borragán, N. P. S. (Eds.). (2013). *European Union politics*. Oxford University Press

of the TFEU.¹⁰⁶ With this case, the ECJ had an opportunity to specify the scope of personal data and eliminate the vagueness of the intellectual property rights enforcement process.

Constantin Film Verleih GmbH lodged a suit against YouTube LLC and its parent undertaking Google Inc. in order to gain information about the IP addresses of users who uploaded movies illegally onto YouTube. This case is about the German company which holds the exclusive rights to exploit the movies “Parker” and “Scary Movie 5”. These movies were uploaded illegally to internet, specifically onto the platform YouTube, multiple times via different usernames. First, *Parker* was uploaded on 29 June 2013 under the username “N1”. Then, *Scary Movie 5* was posted on 13 September 2013 under the username “N2”. Finally *Scary Movie 5* was uploaded again a year later on 10 September 2014 under the username “N3”. All the movies were blocked by YouTube within a few months after each upload, but they gained a great number of views during the times they were illegally available on YouTube.¹⁰⁷ The following question was referred to the Court in the preliminary ruling:

Do the addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers, mentioned in Article 8(2)(a) of Directive 2004/48/EC, also include (a) the email addresses of service users and/or (b) the telephone numbers of service users and/or (c) the IP addresses used by service users to upload infringing files, together with the precise point in time at which such uploading took place?¹⁰⁸

In answering the questions referred by the Bundesgerichtshof for a preliminary ruling, the Court interpreted Article 8 (2)(a) of Directive 2004/48. In its interpretation of the article, the Court did not include the IP address used to download those files or the IP address used when the user’s account was last accessed into the scope of the term “names and addresses.”¹⁰⁹ The AG’s opinion states that Member States do not have an obligation to order that kind of information in cases

¹⁰⁶ Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 29 March 2019 – Constantin Film Verleih GmbH v YouTube LLC, Google Inc. (Case C-264/19)

¹⁰⁷ Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 29 March 2019 – Constantin Film Verleih GmbH v YouTube LLC, Google Inc. (Case C-264/19)

¹⁰⁸ *Ibid.*

¹⁰⁹ Judgement of the Court 9 July 2020, Constantin Film Verleih GmbH v YouTube LLC, Google Inc. C-264/19 ECLI:EU:C:2020:542, par 40

concerning an infringement of intellectual property rights.¹¹⁰ In this case the Court decided to protect individual rights instead of intellectual property rights. The following chapters conclude this thesis' analysis in support of the protection of intellectual property rights.

4.2. The judgement of the Court and the Advocate General's opinion

AG Saumandsgaard Øe gave his opinion on 2 April 2020. His interpretation of the concept of "names and addresses" in Article 8 (2)(a) of Directive 2004/48/EC does not include users who upload infringing files.¹¹¹ This section analyses what are the grounds of his opinion and how it affected to the final court decision.

Firstly, the AG stated that the Article 8 (2)(a) of Directive 2004/48/EC does not contain a reference to the law of Member States; therefore, the concept of "names and addresses" must be given an autonomous and uniform interpretation.¹¹² Directive 2004/48/EC has not defined the terms, so the meaning and scope provided by EU law must be determined by considering their usage in everyday language. According to the AG, the "usual meaning in everyday language" should be a starting point for the interpretation of the term.¹¹³ The Advocate General confirmed that the historical interpretation was agreed upon by the European Commission when the Directive 2004/48 was adopted.¹¹⁴ The historical interpretation should be applied, and the term "address" should be interpreted by referring only to the traditional meaning of the term.¹¹⁵ AG Saumandsgaard Øe relied strictly on the historical and traditional interpretation in 2020, and the background information was provided from proposals written in 2003-almost 20 years' before the present case. This traditional interpretation does not support the rapid evolution of technology. As stated in case *Vereniging Openbare Bibliotheken v Stichting Leenrech*, it is necessary to interpret dynamically in the fields where technological development is fast and constantly evolving, such as the field of intellectual property rights in *Constantin Film Verleih*.¹¹⁶

¹¹⁰ Opinion of Advocate General Saumandsgaard ØE delivered on 2 April 2020, Case C-264/19, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* par. 66

¹¹¹ Opinion of Advocate General Saumandsgaard ØE delivered on 2 April 2020, Case C-264/19, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* par. 66

¹¹² *Ibid.*, par 29

¹¹³ *Ibid.*, par 30

¹¹⁴ *Ibid.*, par 30

¹¹⁵ *Ibid.*, par 38-39

¹¹⁶ Opinion of Advocate General Szpunar delivered on 16 June 2016, Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, ECLI:EU:C:2016:459

The final decision grounds the judgement on the argument of minimal harmonisation. The judgement mentions that Article 8 of the Directive 2004/48 aims to fulfil the fundamental right to an effective remedy which is guaranteed in Article 47 of the Charter of Fundamental Rights.¹¹⁷ The fact that protection of intellectual property is also included in the Article 17 of the Charter means that “the holder of an intellectual property right has the right to identify the person who is infringing that right and it is allowed to take the necessary steps in order to protect it”.¹¹⁸ The judgement also relied on the fact that when the Directive 2004/48 was adopted, the European Union decided to choose the minimum harmonisation regarding the enforcement of intellectual property rights.¹¹⁹ This implies that the directive purposely left space for development and new interpretations; this would be beneficial in a world of increasing digitalisation.¹²⁰ The vagueness of the scope of the terms stated in Article 8 of the Directive 2004/48 should be seen as a possibility for the law to be modified to the present day, not to narrowed down. The judgement indicated that even though Article 8 of the Directive 2004/48 does not create an obligation for the Member States to provide a wider range of information, it gives Member States the possibility to do so. According to the Article 8 (3)(a), Member States can give holders of intellectual property rights, the right to obtain more information as long as fundamental rights are balanced and the general principles of EU are ensured.¹²¹

4.3. Balancing fundamental rights

The balance between protection of personal data and the right to intellectual property may not be fully secured. Protection of personal data, respect for private and family life and the right to property are not absolute rights. This means that in the case of an issue regarding a non-absolute right, there may be a question regarding limitations of that right.¹²² In cases of absolute rights, limitations are not permitted. As an example, a case in 2014 dealt with issues arising from balancing rights. The ECJ ruled in case C-131/12 *Google Spain and Google* that the interference with a person’s right to protection of personal data could not be justified. The right to be forgotten

¹¹⁷ Judgement of the Court 9 July 2020, *Constantin Film Verleih GmbH v YouTube LLC, Google Inc.* C-264/19 ECLI:EU:C:2020:542, par 35

¹¹⁸ *Ibid.*, par 35

¹¹⁹ *Ibid.*, par 36

¹²⁰ *Ibid.*, par 36

¹²¹ *Ibid.*, par 39

¹²² European Union Agency for Fundamental Rights (2018), *supra nota* 6 p. 70-71

is not established as an absolute right-it can and must be balanced against other fundamental rights.¹²³ The “right to be forgotten” is a new right created in the GDPR, and it allows EU citizens to demand removal of any unwanted content from a website’s server.¹²⁴ Some rights may require limitations in order to secure another. The ECJ has also held in numerous occasions that “there is nothing whatsoever in the wording of Article 17 (2) of the Charter or in the Court’s case-law to suggest that the right to intellectual property enshrined in that article is inviolable and must for that reason be absolutely protected”.¹²⁵

Case law of the ECJ supports a wide interpretation of Directive 2004/48 and upholds protections to intellectual property rights. Case C-275/06 *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* explains that because Directive 2004/48 is a general directive, the power to define “the transposition measures which may be adapted to the various situations possible” is intended to be left to the Member States.¹²⁶ Member States are required to make sure that they do not interpret the directive contrary to fundamental rights or general principles of Community law.¹²⁷ The judgement of *Promusicae* states that the Directive 2004/48 needs to be interpreted to apply to different situations and to follow the principle of proportionality.¹²⁸ Based on this judgement, Directive 2004/48 should be interpreted to apply to the case *Constantin Film Verleih* in the light of evolving technology and due to the importance of revealing addresses in intellectual property rights infringement cases. The judgement for the case C-461/10 *Bonnier Audio AB, Earbooks AB, Nordstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB* presents similar arguments. The judgement states that Member States must interpret the transposing directives to prevent the conflict of fundamental rights and other principles of EU law, such as the principle of proportionality.¹²⁹

It is clear that effective enforcement of intellectual property rights must be achieved in order to be able to ensure the rights set forth in Article 17 (2) of the Charter. Recital 2 of the Directive 2004/48 states that intellectual property rights protection should create a possibility for the inventor or

¹²³ Judgement of the Court, 13 May 2014, *Google Spain and Google*, C-131/12, ECLI:EU:C:2014:317, par 85

¹²⁴ Shoor, E. A (2014). Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation. Book. J. Int’l L., p. 487

¹²⁵ Opinion of Advocate General Szpunar delivered on 16 June 2016, Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, ECLI:EU:C:2016:459

¹²⁶ Judgement of the Court 29 January 2008, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU C-275/06* ECLI:EU:C:2008:54, par 67

¹²⁷ *Ibid.*, par 70

¹²⁸ *Ibid.*, par 70

¹²⁹ Judgement of the Court 19 April 2012, *Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB C-461/10*, ECLI:EU:2012:219

creator to derive a legitimate profit from their innovations.¹³⁰ According to the Recital (2) “It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet”.¹³¹ The Proposal for Directive 2004/48 states that the key aim of Article 8 is to provide evidence in order to ensure protection of intellectual property rights.¹³²

The problems regarding third’s persons’ rights are secured because the additional data provided by an ISP or by online media service providers. It is necessary to balance fundamental rights, when Article 8 (2)(a) of Directive 2004/48 establishes the right to information in cases of copyrights infringements. Article 52 of the Charter provides guidelines for limitations; it regulates the scope of guaranteed rights and enumerates the instances in which there can be limitations to them. Article 52 (1) states that “limitations of the rights and freedoms recognised by the Charter must be provided for by law...Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or need to protect the rights and freedoms of others.”¹³³ The principle of proportionality is recognised in Article 5 of the Treaty on the European Union (TEU) and it requires that the European Union to limit its actions to what is requisite to obtain the objectives of the Treaties.¹³⁴ Limitations to fundamental rights are possible in cases where they are necessary to protect the general interest or other rights and freedoms.

¹³⁰ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004

¹³¹ *Ibid.*

¹³² Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights /*COM/2003/0046 final – COD 2003/0024 */

¹³³ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157, 30.04.2004

¹³⁴ Craig, P., & De Burca, G. (2008). *EU law: text, cases and materials*. Oxford University Press, p. 95

CONCLUSION

This thesis aimed to determine the conditions under which a dynamic IP address can be considered personal data, and whether a dynamic IP address falls within the scope of “names and addresses” regulated in Article 8 (2)(a) of Directive 2004/48/EC. This thesis also investigated how the balance between fundamental rights and the enforcement of intellectual property rights can be secured. These research questions were answered with regard to the case *Constantin Film Verleih*, which concerned an intellectual property law infringement. Based on the research of this thesis, dynamic IP addresses can be seen as personal data, and Article 8 (2)(a) should be interpreted broadly in the light of developing technology to be able to secure intellectual property rights

This thesis argued that dynamic IP addresses can be seen as personal data, when circumstances allow for the correct balancing of fundamental rights. Since dynamic IP addresses are not assigned to a specific person and it is not possible to identify a specific natural person directly from them due the dynamic element, additional data is needed in order to identify a natural person. According to the definition provided in Article 4 of the GDPR, personal data is information from which an identified or identifiable natural person can be identified directly or indirectly. The word “indirectly” is seen as equal to with additional information, which is not in disputed in the *Constantin Film Verleih* case. Indirect identification is possible when a dynamic IP address can be combined with other additional data. The data subject does not have to be directly identifiable from the data as long as there is additional data available which can support the identification of the data subject. In *Constantin Film Verleih*, additional data was able to be provided through the infringer’s Google account. This concludes that with additional data, a dynamic IP address constitutes as personal data. Additionally, Article 4 of the GDPR also provides that the identification of a data subject can be done with an online identifier, which, according to the Recital 30, includes IP addresses.

Since dynamic IP addresses can be considered personal data according to case law and Article 4 of the GDPR, this should be taken into account when investigating whether dynamic IP addresses

can be included in the scope of Article 8 (2)(a) of Directive 2004/48. When legislation was adopted in the field of intellectual property law, it was understood that these directives should adapt to economic developments. In his opinion in the case *Vereniging Openbare Bibliotheken v Stichting Leenrech*, Advocate General Szpunar stated that the technological progress today is so fast that it without difficulty exceeds the legislative process. This means that the term “names and addresses” must be interpreted in the light of developing technology and in consideration of future cases potentially arising from this issue. The effective implementation of intellectual property rights cannot be guaranteed, if the term “names and addresses” is interpreted in its traditional meaning. The wording of Article 8 (2)(a) must be interpreted broadly and include electronic IP addresses. The broad interpretation supports the arguments presented in this thesis: if dynamic IP addresses can be seen as personal data, it is reasonable to include dynamic IP addresses into the scope of Article 8 (2)(a) along with other forms of personal data. As stated in the case *Vereniging Openbare Bibliotheken v Stichting Leenrech*, it is necessary to interpret language dynamically in the fields where technological development is fast and constantly evolving, such as the field of intellectual property rights, which is discussed in *Constantin Film Verleih*.

Article 7, Article 8 and Article 17 (2) of the Charter are closely related to the case *Constantin Film Verleih*. None of the fundamental rights ensured in these articles are absolute, meaning that in case of an issue regarding these non-absolute rights, they may be limited if necessary. Article 52 of the Charter regulates the scope of guaranteed rights and specifies the instances in which there can be limitations to fundamental rights. Limitations need to follow the principle of proportionality, and they must be necessary to protect the general interest or others’ rights and freedoms. In case C-264/19 the infringer had given his consent for the processing of his personal data. He had also consented to his server logs being stored and that data being used by participating undertakings. The consent of the data subject fulfils the criteria described in Article 6 of the GDPR. The right to respect for his or her private and family life protected in Article 7 of the Charter can be secured through an ISP. An ISP keeps a record of all dynamic IP addresses and knows to whom they have been assigned. That way, it is possible to access more information about the person to whom the dynamic IP address has been assigned and to find the right person without infringing anyone’s right provided in the Charter.

In conclusion, to protect intellectual property rights the goal is to ensure the effective protection and enforcement of fundamental rights, and with a broad interpretation of “names and addresses”,

the aim could be fulfilled. With additional data, dynamic IP addresses constitutes as personal data and are included into the scope of Article 8 (2)(a).

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