JUDGING BY WORDS - COMPARATIVE JUDICIAL DISCOURSE ANALYSIS IN POLITICALLY CHARGED CASES

*Harri Kalimo, Trisha Meyer and Tuomas Mylly**

Abstract

Courts around the world are increasingly acting as decision-makers in politically charged cases, such as climate change lawsuits. At the same time, however, their legitimacy is claimed to be eroding. No longer able to rely on their formal authority, courts must more frequently convince their respective audiences through the argumentative contents of their judgments. In this article, we develop a socio-legal method – comparative judicial discourse analysis (CJDA) – that enables the evaluation of the discursive quality and judicial legitimacy of such judgments from multiple jurisdictions. We test the method in action by applying it to a limited sample of court cases across five jurisdictions on the societally controversial and long-standing subject of copyright liability for online peer-to-peer platforms. Based on this experiment, we argue that CJDA permits drawing critical conclusions on the discursive, value-laden qualities of judgments to complement doctrinal legal reasoning. Our analysis teases out differences, and indeed possible deficiencies in courts' argumentation, likely significant for the courts' 'throughput legitimacy'. Although the differences in discursive patterns are also affected by diverse legal cultures, case set-up, and institutional factors limiting a court's deliberative freedom, we argue that the method contributes to the critical study of judicial argumentation, comparative analysis, and ultimately to research pertaining to the legitimacy of courts.

Key words: Discourse analysis, jurisprudence, legitimacy, comparative law, methodology, copyright.

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* Harri Kalimo is a professor at the Brussels School of Governance (Vrije Universiteit Brussel, Belgium) and at the University of Eastern Finland Law School. Trisha Meyer is a professor at the Brussels School of Governance (Vrije Universiteit Brussel, Belgium). Tuomas Mylly is a professor at the University of Turku (Finland), Faculty of Law. The drafting of the article was supported by Prof. Kalimo's Jean Monnet Chair ECOvalence (Grant no. 101085564).

I. INTRODUCTION

Over the past decade, hundreds of lawsuits have been filed in national, regional, and international courts around the world as a reaction to climate change and other environmental crises. The explosion of ecological litigation has been driven by frustration on two fronts. First, citizens sue governments for their failure to enact and implement policies that respect the planetary boundaries, as seen in recent landmark cases against the Dutch[1] and Swiss[2] states. Second, corporations are sued for failing to exercise due diligence regarding climate change or other environmental aspects.[3] Courts are thereby becoming a central institution in which the right to a clean and healthy environment is pursued and balanced against other fundamental rights, such as economic development, private and family life, and property. Much is at stake. Various other global objectives beyond carbon neutrality, such as decent working conditions, gender equality, and the rights of indigenous communities, are also increasingly pursued through litigation. At the same time, populist and authoritarian pressures on the rule of law and liberal democratic systems are growing. The legitimacy of courts as societal decision-makers has taken center stage.

The surge in international judicial decision-making, accompanied by a decline in legitimacy, poses a challenge to comparative legal scholarship. How to understand the developments and to benefit from experiences in different court systems when addressing similar, often transnational challenges, such as environmental sustainability, illegal migration, or the protection of indigenous communities? How do various national and international courts achieve legitimacy in decisions that weigh societal values? The challenges call for innovative legal research methods. In this article, we develop and test such a novel method: comparative judicial discourse analysis (CJDA). CJDA, as a method, focuses on how the discursive qualities of courts' decisions can persuade audiences, complementing the courts' traditional legal

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[1] *State of the Netherlands v. Urgenda Found.*, ECLI:NL:HR:2019:2006, Case No. 19/00135, (SUP. CT. NETH. Dec. 20, 2019), https://uitspraken.rechtspraak.nl/details?id=ECLI: NL: HR: 2019: 2006.
[2] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App No 53600/20 [2024] ECHR 304, Eur. Ct. H.R. (Apr. 9, 2024), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-233206%22]}
[3] *See, e.g.*, *Milieudefensie et al. v. Shell*, ECLI:NL: RBDHA:2021:5337 (Hague Dist. Ct., May 26, 2021).

reasoning. In particular, CJDA draws attention to the value-laden content of decisions, an aspect that may be overlooked in doctrinal legal reasoning.

The task is delicate. On the one hand, critically analyzing the discursive contents of judgments, especially those from one's own legal culture, can prove challenging. It requires overcoming the same internalized biases, naturalized framings, and interpretative premises that may erode the legitimacy of traditional legal analyses. Discourse analyses focusing on cases coming from the analyzer's own home jurisdiction have not always been able to produce novel insights or critiques. On the other hand, insights or critiques emanating from such exercises have not necessarily convinced the members of the legal profession. Discourse analysis-based propositions may have lacked an understanding of legal, cultural, and institutional factors that limit the respective court's deliberative freedom. This paper proposes and develops a comparative judicial discourse analysis, critically testing it against these challenges.

After explaining the CJDA as a method, we apply it through a case law sample. Given the fast evolving and fragmented state of global climate litigation, we test CJDA through a case study on a legal issue that is narrower, at a mature state of judicial development, yet also societally important, politically charged with multiple stakeholders, and that courts in many legal systems have wrestled with over the past two decades: the copyright liability of peer-to-peer (P2P) platforms. This issue is colloquially referred to – also in the discourses of some courts – as access to "pirated" content online. Most courts around the world have ruled against P2P platforms. This raises the issue of legitimacy, because the courts have often done so without discussing the possible collateral damage of the judgments on freedom of expression, innovation, and other competing societal values and interests.

CJDA, as a method to analyze legitimacy, borrows from political science, which distinguishes between input, throughput, and output legitimacy.[4] By courts' output legitimacy, we mean the judgment's legal soundness, and by input legitimacy, the acceptability of a court's institutional and procedural setup. The assumption underlying CJDA is that it is not just the *output* legitimacy of a judgment's legal soundness which is important, nor only the *input* legitimacy of a court's institutional setup which is of concern. Additionally, the *throughput* legitimacy is essential. How does the court consider and discuss different values and interests in its case law? How

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[4] *See* Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) (discussing input and output legitimacy). Input refers to the democratic participation by the people and output the effectiveness of the decisions for the people. Throughput legitimacy, in turn, refers to what goes on in the 'black box' of governance between input and output. *See* Jens Steffek, *The Limits of Proceduralism: Critical Remarks on the Rise of 'Throughput Legitimacy,'* 97 PUB. ADM. 784 (2018); Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output* and *Throughput,'* 61 POL. ST. 2, 22 (2013) (about throughput legitimacy).

does it frame the decision in terms of tone and language? How does it engage a multiplicity of voices and, from them, create discourses in its judgment?

With *frames* (framing), we refer to the dominant ideas through which a phenomenon is conceptualized and treated, as well as the neutral or moralistic language used, which is indicative of the tone of the text. For example, a P2P platform could be associated with 'piracy', copyright infringement, innovation, or other frames. The combination of substantively similar frames forms a *discourse*. By examining *voices*, we can more granularly capture the explicit, implicit, or absent references to a potentially relevant party, law, case, or issue in the court's judgment. The amplification of particular voices reinforces frames and, in turn, discourses. Our method for assessing the courts' case law is thus somewhat unconventional: we posit that by subjecting the judgments to a discourse analysis, rather than a classic legal doctrinal analysis, it becomes possible to identify new features in the discursive quality of the judgments, which are typically ignored in legal doctrinal analysis.

Furthermore, we develop the 'socio-legal'[5] method of discourse analysis by conducting a *comparative* judicial discourse analysis, which involves case law from courts in different jurisdictions. The reason for this is that limiting the discourse analysis to judgments from one's home jurisdiction does not necessarily produce insights into *alternative* framings or *absent* voices. The courts and the analysts of the same jurisdiction might share the same internalized biases and normalized frames. In contrast, conducting a discourse analysis in parallel on similar cases from multiple jurisdictions could provide explicit alternative frames, absent voices, and discourses. They can thus provide the analyst with new (at least elsewhere) judicially relevant ideas for the critical evaluation of the discourses in home jurisdiction judgments. The comparisons have great promise as regards, for example, transnational climate and other environmental litigation, as they are maturing.

The final critical evaluation should however also accommodate knowledge about the legal cultural differences and the institutional limitations on a court's discursive freedom. This *combination* of comparative judicial discourse analytical insights and knowledge on legal culture and institutional factors affecting the court's deliberative freedom constitutes a critical methodology that is meaningful for the members of the legal profession.

The article proceeds in five steps. In Section 2, we discuss the developments

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[5] *See* Naomi Creutzfeldt, Agnieszka Kubal and & Fernanda Pirie, *'Introduction: Exploring the Comparative in Sociolegal Studies,'* (2016) 12 INT'L J.L. CONTEXT 377, 389 (2016). *See also,* e.g., Gunther Frankenberg, *'Stranger than Paradise: Identity and Politics in Comparative Law,'* (1997) UTAH L. REV. 259, 274 (critiquing the role of the comparatist in hegemonic projects). Jaakko Husa, *'Methodology of Comparative Law Today: From Paradoxes to Flexibility?'* (2006) 58 RIDC REVUE INTERNATIONALE DE DROIT COMPARÉ 1095, 1117 (2006) (arguing for a flexible and multidisciplinary understanding of comparative).

placing increasing demands on the discursive quality of judgments. In Section 3, we develop our method of comparative judicial discourse analysis in detail. In Section 4, we operationalize the proposed method by conducting a comparative analysis of the judicial discourses of five courts across the world – national and supranational – to tease out potential differences in argumentative practices, focusing on cases regarding the copyright liability of P2P platforms. Section 5 compares the discourses and discusses the findings from the perspective of legal cultural and institutional knowledge. Section 6 concludes.

II. CONTRADICTION - COURT OF INCREASING AUTHORITY YET DECREASING LEGITIMACY

A shift of power from legislatures towards judiciaries has been observed in developed countries since 1950s.[6] The empowering of courts means that, more often than before, courts function as decision-makers in politically charged cases with systemic effect.[7] An empowered court does not merely apply the law, it can actively create it. Typically, the courts do so in the absence of timely responses to societal problems from the legislature.[8]

The empowering of courts does not as such need to marginalize the legislature. When courts weigh interests and values, they also pave the way for legislative measures, especially in new transnational environments. Judicial decisions construct authority for legal acts, in particular where the legislature lacks systemic experience and authority or is politically too gridlocked to legislate. Copyright liability on the Internet is a telling example. In the absence of clear secondary legislation in most jurisdictions, the judiciary stepped in and subjected private Internet actors, for

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[6] According to Ran Hirschl, this shift of power results from combined strategic interests of political, economic and judicial elites. See in more detail RAN HIRSCHL, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 43–48 (Harvard Univ. Press 2004). On the decreasing authority of the EU legislator, *see, e.g.,* MARTIJN VAN DEN BRINK, *Justice, Legitimacy and the Authority of Legislation within the European Union*, 82 MOD. L. REV. 293 (2019).

[7] In the EU context, *see,* e.g., Case C-2/13, Opinion 2/13, Accession of the European Untion to the ECHR, ECLI:EU:C:2014:2454 (Dec. 18, 2014); Case C-1/09, Opinion 1/09 (Community Patents Court), ECLI:EU:C:2011:123 (Mar. 8, 2011); (C-311/18, *Data Prot. Comm'r v. Facebook Ir. Ltd. & Schrems*, ECLI:EU:C:2020:559 (July 16, 2020) (*Schrems II).*

[8] *See* TUOMAS MYLLY, *Proportionality in the CJEU's Internet Copyright Case Law: Invasive or Resilient?, in* GENERAL PRINCIPLES OF EU LAW AND THE EU DIGITAL ORDER 267–96 (Ulf Bernitz, Xavier Groussot, Jaan Paju, & Sybe de Vries eds., 2020); Tuomas Mylly, *The New Constitutional Architecture of Intellectual Property*, *in* GLOBAL INTELLECTUAL PROPERTY PROTECTION AND NEW CONSTITUTIONALISM 50-79 (Jonathan Griffiths & Tuomas Mylly eds., 2021); Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford Univ. Press 2019).

example diverse platforms, copyright owners and users, to constitutional norms.[9] The legislature was then able to build on the courts' case law, using the courts' decisions as guidelines instructing legislation. Thus, the EU's Digital Single Market (DSM) Copyright Directive's[10] Article 17 built on the European Court of Justice's (ECJ) proportionality analyses on the liability of 'online content-sharing service providers.[11] Article 17 of the DSM Copyright Directive, in turn, affected the EU's Digital Services Act (DSA),[12] which developed the ideas of Article 17 on platform liability and algorithmic enforcement into a more generic solution for the regulation of the Internet. How courts frame their decisions, how they identify, discuss and weigh diverse values and interest, and how they make certain voices explicit or hide them, could thus affect legal trajectories, sometimes even providing legislative models on a global level.[13] The proliferation of climate litigation is another example of the courts filling a gap in regulatory action, likely affecting subsequent legislative efforts in Europe and beyond.[14]

While the role of courts as societal decision-makers seems to have increased, their legitimacy – i.e. the acceptance of the authority of the court's decisions – may however have decreased, at least in some jurisdictions and on international and regional levels.[15] As the formal authority of courts evaporates, they must increasingly

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[9] CHRIS THORNHILL, *A Sociology of Transnational Constitutions - Social Foundations of the Post-National Legal Structure* 402–04 (Cambridge Univ. Press 2016).

[10] 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, O.J. (L 130) 92 (DSM Copyright Directive).

[11] ELEONORA ROSATI, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive* 2019/790 (Oxford Univ. Press 2021).

[12] *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, COM (2020) 825 final (Dec. 15, 2020); Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1; FOLKERT WILMAN, *Between Preservation and Clarification: The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law*, VERFASSUNGSBLOG (Nov. 2, 2022) (on the effects of ECJ case law on DSA), https://verfassungsblog.de/dsa-preservation-clarification/.

[13] *See* ANU BRADFORD, *The Brussels Effect: How the European Union Rules the World* (Oxford Univ. Press 2020) and *Digital Empires: The Global Battle to Regulate Technology* (Oxford Univ. Press 2023).

[14] *See, e.g.,* PAU DE VILCHEZ & ANNALISA SAVARESI, *The Right to a Healthy Environment and Climate Litigation: A Game-Changer?* 4 Y.B. INT'L ENVTL. L. 3 (2023) 3 (on the climate change litigation); *supra* note 2.

[15] *See* MARK A. POLLACK, *The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence*, in *Legitimacy and International Courts* 143 (Nienke Grossman et al. eds., 2018); JACQUELINE GLEESON, *Advancing judicial legitimacy: The stakes and the means*, 15 JUD. COMM'N N.S.W. J. 1 (2023). On challenges to the legitimacy of international courts, *see, e.g.*, HARLAN GRANT COHEN ET AL., *Legitimacy and International Courts - A Framework*, in Legitimacy and International Courts 23–31 (Nienke Grossman et al. eds., 2018); CHRISTINA VOIGT, 'Introduction' in *International*

convince their audiences of the merits of their decisions, while politically charged judgments are often openly contested in the media and politics, with trickle-down effects on the perceptions of the general public. Politically very charged judgments, such as the U.S. Supreme Court's decision in *Dobbs*[16] that overturned the seminal *Roe v. Wade*[17] precedent on abortion rights, test the judiciaries' legitimacy and the legal systems more generally.

The global nature of many societal spheres, such as the digital environment, draws international and regional courts (herein referred to as international courts) increasingly into the limelight as well. Contentious issues regarding the Internet, such as illegal and harmful online content, engage supra-national judiciaries as decision-makers. International courts, however, cannot rule in "the name of the people", like courts of nation-states can.[18] International courts adjudicate in a polycentric environment, where many regimes (including but not limited to nation-states) claim authority over the same issues. They lack the important legitimizing factor of a clear constituency.[19] This makes them particularly easy targets for national courts and politicians to question their authority. They, too, may be subject to populist attacks, especially by those challenging the international rules-based system. The discourses of the international courts' decisions are therefore essential to analyze.

Many parallel developments thus suggest that courts must increasingly convince their respective audiences through the discursive contents of their decisions. CJDA provides a novel method to draw insights from comparative case law, enabling critical insights on the discursive contents of judgments especially from one's home jurisdiction.

Judicial Practice on the Environment: Questions of Legitimacy 1 (Christina Voigt ed., 2019); on common law jurisdictions, *see, e.g.,* JOHN BELL, MARK ELLIOTT, JASON NE VARUHAS AND PHILIP MURRAY (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (2016); ORNA RABINOVICH-EINY, 'Legitimacy Crisis' (2015) 17 CARD. J. OF CONFL. RES. 23, 23; LOGAN STROTHER AND COLIN GLENNON, *An Experimental Investigation of the Effect of Supreme Court Justices' Public Rhetoric on Perceptions of Judicial Legitimacy*, 42 LAW & SOCIAL INQUIRY 2, 435–454 (2021); On the role of public opinion and judicial legitimacy across countries, *see, e.g.*, ALEX BADAS *The Applied Legitimacy Index: A new Approach to Measuring Judicial Legitimacy* 100 SOC. SCI. Q. 1848 (2019); OR BASSOK, *The Changing Understanding of Judicial Legitimacy in Judges as Guardians of Constitutionalism and Human Rights* (Martin Scheinin, Helle Krunke & Marina Aksenova eds., 2016).

[16] *Dobbs v. Jackson Women's Health Organization, 597 (2022).*

[17] *Roe v. Wade, 410 U.S. 113 (1973).*

[18]*See* ARMIN VON BOGDANDY AND INGO VENZKE, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 41 (2012).

[19] JEFFREY L. DUNOFF AND MARK A. POLLACK, *The Road Not Taken: Comparative International Judicial Dissent*, 116 AM. J. INT'L L. 340, 396 (2022).

III. COMPARATIVE JUDICIAL DISCOURSE ANALYSIS AS A METHOD

A. DISCOURSE ANALYSIS

Various studies have previously examined the relationship between argumentative deliberations in legal systems and the legitimacy of such judicial systems.[20] In the social constructivist methodology of discourse analysis,[21] judicial texts are understood as 'coherent expression[s] or a meaning structure[s] which construct reality in a certain way.'[22] Because the discourse defines what is permissible behavior and determines acceptable solutions, it is a source of power.[23] Actors who are focal to this article, such as the copyright holders, service providers, and users, compete for the institutionalization of *their* views and values in the language of legal and judicial acts. This gives courts a powerful position in constructing reality.[24] As Mertz puts it, '[n]owhere is an act of linguistic translation

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[20] STANISLAW GOŹDŹ-ROSZKOWSKI & GIANLUCA PONTRANDOLFO (eds.), *Law, Language and the Courtroom—Legal Linguistics and the Discourse of Judges* (Routledge 2022); MARTIN SCHEININ, HELLE KRUNKE & MARINA AKSENOVA, *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing 2016); MITCHEL LASSER, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford Univ. Press 2004); JAMES L. GIBSON, GREGORY A. CALDEIRA & VANESSA A. BAIRD, *On the Legitimacy of High Courts,* 92 AM. POL. SCI. REV. 343, 358 (1998); Strother & Glennon, *supra* note 15.
[21] VIVIEN BURR, *Social Constructionism* 3 (2d ed. 2003).
[22] JOHANNA NIEMI-KIESILÄINEN, JOHDANTO: DISKURSSIANALYYSIÄ JURISTEILLE [INTRODUCTION: DISCOURSE ANALYSIS FOR LAWYERS] (Fin.) in OIKEUDEN TEKSTIT DISKURSSINA [LEGAL TEXTS AS A DISCOURSE] 14 (Johanna Niemi-Kiesiläinen et. al. eds., 2006) (Fin.). In this way, juridical discourse analysis complement linguistic studies of the courts' decisions, see, e.g., NINA BRIES SILVA & ESTEBAN DÍAZ MONTENEGRO, *In Other Words: The Strategic Use of Nasa Indigenous Language in Legal Settings*, 12 CAMBRIDGE INT'L L.J. 288 (2023); RACHEL KILLEAN & ROSEMARY GREY, *Interpretation and translation in atrocity trials: Insights from Khmer Rouge Tribunal,* 12 CAMBRIDGE INT'L L.J. 211 (2023); VIRGINIA MATTIOLI & KAREN MCAULIFFE, *A corpus-based study on opinions of advocates general of the Court of Justice of the European Union: changes in language and style*, 6 INT'L J. LANGUAGE & L. DISCOURSE 87 (2021); STANISŁAW GOŹDŹ-ROSZKOW *Between corpus-based and corpus-driven approaches to textual recurrence: Exploring semantic sequences in judicial discourse in Applications of Pattern-driven Methods in Corpus Linguistics* 131 (Joanna Kopaczyk & Jukkka Tyrkkö eds., 2018).
[23] JULIA BLACK, *Regulatory Discourses* 29, J.L. & SOC'Y. 163 (2002).
[24] MIRJAMI PASO, *Viimeisellä tuomiolla: Suomen korkeimman oikeuden ja Euroopan yhteisöjen tuomioistuimen ennakkotapausten retoriikka* (At the Last Judgment: The Rhetoric in the Precedents of the Supreme Court of Finland and the European Court of Justice) (2009) (Fin.).

more obviously laden with socially powerful consequences than in judicial opinions.'[25] It therefore becomes important to understand the reality, created in the courts' discourse on copyright liability of online peer-to-peer platforms. Sometimes it is framed as a question of 'pirated content', sometimes as 'fair balance' between fundamental rights such as the right to property and freedom of expression, sometimes as finding a proper balance between copyright protection and innovation. The seemingly neutral rhetoric of a court may in practice replicate the party or view with whom the court sides, as can be observed in our subsequent analysis.

Inspired by Niemi-Kiesiläinen's discourse analysis of judicial decisions, and building on our earlier work[26], we (as external observers) seek to identify frames and voices in the decisions. This allows us to establish which discourses the court engages in, regardless of whether the argumentation in the judgment is portrayed as 'linguistic', systemic, teleological or something else.[27] We do not claim that the courts' discourse is isolated from the substantive, procedural or institutional law at stake: quite the contrary. As we explain later in more detail, we use legal analysis, for example, to reveal that beneath formal syllogistic language, the court can, in reality, break new ground and make critical socio-legal choices, for instance, by its initial framing of the case. The institutional structures of a court, such as the number of deciding judges or the ability to issue dissenting opinions, as well as the type of process and case setup in lower (or domestic) courts of cases later appealed, may also influence aspects of the discourse. We do posit, however, that the substantive, procedural, and institutional rules on the input often leave the courts considerable leeway in terms of the throughput of the frames and voices they introduce and the discourses that they wish to conduct – or renounce – in their decisions. It is the courts' use of that discursive leeway in the original framing of the case, as well as the presentation of voices and discourses that we are interested in. Ultimately, legal

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[25] ELIZABETH MERTZ, *Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law*, 26 LAW & SOC'Y REV. 413, 423 (1992).

[26] JOHANNA NIEMI-KIESILÄINEN, *Diskurssianalyysia Käytännössä: Oikeuden Tekstit Diskurssina [Discourse Analysis in Practice: Legal Texts as a Discourse]* 203 (Johanna Niemi-Kiesiläinen et al. eds., Suomalainen Lakimiesyhdistys 2006) (Fin.); JOHANNA NIEMI-KIESILÄINEN, PÄIVI HONKATUKIA & M. RUUSKANEN, *Legal Texts as Discourses*, in *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* 69 (Åsa Gunnarsson, Eva-Maria Svensson & Margaret Davies eds., Ashgate 2007); Niemi-Kiesiläinen, *supra note* 22, at 14; HARRI KALIMO, TRISHA MEYER & TUOMAS MYLLY, *Of values and legitimacy – Discourse analytical insights on European Court of Justice Copyright case law,* 82 THE MODERN L. REV. 1, 283 (2018).

[27] GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU (Hart 2013). On a close intertwining of discourse analytic and legal dogmatic approaches, see e.g. MONICA BURMAN, *Straffrätt och mäns våld mot kvinnor. Om straffrättens förmåga att producera jämstelldhet [Criminal Law and Men's Violence Against Women: The Ability of Criminal Law to Produce Gender Equality]* (Iustus Förlag 2007) (Swed.).

cultural knowledge and institutional factors affecting a court's discursive freedom assume relevance when we evaluate the ways in which alternative frames, voices, and values drawn from comparative discourse analysis could be considered in judgments emanating from one's home jurisdiction, in particular.

B. COMPARATIVE JUDICIAL DISCOURSE ANALYSIS

The method developed for this study is *comparative* discourse analysis of case law. With our method, we identify the used frames, active and absent voices, and the dominant and suppressed discourses in multiple judicial settings and then analyze them in a comparative fashion. This way, in particular, the absent voices, alternative framings, and suppressed discourses in one court's discourse become better identifiable, as the discourses in other jurisdictions may use a different framing or introduce other active voices. Conversely, the comparative method also allows us to reflect on the relevance of courts' different institutional characteristics, such as the publication of dissenting views or limitation of a court's sources of law to specific laws or instruments (such as human rights treaties), on the discourses. Such institutional factors and legal cultural knowledge assume specific relevance when alternative frames, voices, and values derived from the comparative analysis are considered in the context of one's home jurisdiction and courts.

Our discourse analysis proceeds in six steps[28]:

1. Selection of texts and awareness of preconceptions;
2. First impressions of the text;
3. Identification of explicit voices, implicit voices not immediately present in the facts, and absent voices;
4. Identification of neutral, moralistic or colorful language (framing), and of dominant and suppressed discourses;
5. Evaluation of how structured and (un)biased the consideration of the diverse values and interests in the discourse is – for example whether the discourses in the judgments consider all identified values and interests equally, and articulate them in terms of a specific stakeholder group, or as written legal norms, previous case law, or formulated as if at the discretion of the court in question;
6. Evaluation of whether the judgments indicate open issues or uncertainty – for example by showing openness to more than one possible solution, alternative legal norms or case law, or alternative framings.

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[28] *See* Niemi-Kiesiläinen, *supra* note 22; Niemi-Kiesiläinen, Honkatukia & Ruuskanen, *supra* note 22, at 69–88; Kalimo, Meyer & Mylly, *supra* note 26, at 290–292.

In Section 5, our main findings across these aspects are briefly summarized for each of the five cases (Table 2). The core of the discourse analysis was to reveal and juxtapose the dominant, contradictory, and absent (silent) discourses. The comparative method then further sharpens the discourse analysis by assessing the similarities and contrasts in the four central steps of the process – in the identification of explicit and implicit voices; in determining dominant and suppressed discourses; in the presence of value balancing; and in identifying open issues and uncertainties. A certain cautiousness is in place with critiques of foreign courts with which the evaluator is not sufficiently familiar. An international research group having sufficient understanding of more than one jurisdiction could naturally overcome the described problem and risk.

The evaluator's understanding of the home jurisdiction and the legal background of the case can explain features of the judgment and subject ideas emanating from comparative discourse analysis to a reality check. Understanding the law behind a judgment can also reveal that, beneath syllogistic or technocratic language, the court in question may have made a landmark ruling that addresses important societal background questions. Such legal analytical evaluation – intended to make the critiques relevant for the legal profession (including courts) – should form the last stage of the analysis, as otherwise it could unnecessarily interfere with the flow of the discourse analysis. A further potential limitation in identifying alternative frames, voices, and discourses in a comparative setting is that similar judicial responses from multiple jurisdictions may reflect judicial borrowing or the adoption of globalized frames. A certain frame could be normalized widely through powerful lobbying or a perceived need for convergence. Such phenomena can further lead to global harmonization through international treaties, legal transplants, or legislative first-mover dynamics, leading other jurisdictions to adapt to the laws first created to tackle a global emerging phenomenon, such as protection of personal data in the digital realm or regulation of artificial intelligence.[29] It is essential to comprehend the implications and potential consequences of such horizontal *de facto* harmonization in judicial discourse. Also, this type of analysis is best conducted after the discourse analysis and integrated into the discussion as explanations for the findings of the discourse analysis.

C. A LEGAL-INSTITUTIONAL CONTEXTUALIZATION OF THE COMPARATIVE ANALYSIS

For our comparative analysis, we followed 'the most similar case' approach,

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[29] *See, e.g.*, MICHELE GRAZIADEI, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES IN LAW 723, 743 (2009) (emphasizing that judicial and legal borrowing is so prevalent that the term legal transplant is even misleading—or at least often wrongly understood).

focusing on a narrow substantive topic that has been adjudicated upon in multiple international courts within a relatively short timeframe: the copyright liability of the peer-to-peer platform "The Pirate Bay" (TPB). We identified seminal P2P cases from the following five courts: the ECtHR, the European Court of Justice (ECJ), the High Court of the United Kingdom, the United States Supreme Court, and the Federal Court of Australia. The selected judicial systems are in many respects similar (being industrialized Western jurisdictions with a high level of copyright protection) and they are all directly or indirectly a part of the extensive international treaty frameworks on copyright.[30]

Still, various aspects of the courts merit caution from the viewpoint of comparative judicial discourse analysis: patterns in discourses will likely reflect the underlying legal system, with a civil law court using minimal formalistic arguments, unlike the more argumentative and self-reflective discourses of common law courts. The detected patterns and deficits in the judicial discourses will also reflect the institutional setup and limitations of the courts in question. This is particularly so for the European-level courts. The power of the ECtHR is limited only to interpreting and applying the ECHR. In contrast, the ECJ predominantly does not act as the court of last resort but instead guides national courts in the preliminary ruling procedure on how EU norms should be interpreted. Such institutional limitations can form epistemological bottlenecks that limit the types of arguments and interests a court could consider. While relevant, they do not preclude the use of comparative judicial discourse analysis for critically scrutinizing the patterns and shortcomings in the decisions. Indeed, the institutional setup or practices of the courts may facilitate discourses, but, as we will argue below, they are not typically decisive in themselves. Courts selectively include/exclude voices, discourses, and values within their institutional and epistemological structures.

IV. TESTING THE METHOD: DISCOURSE ANALYSIS OF SELECTED P2P JUDGMENTS

[30] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris July 24, 1971, and amended Sept. 28, 1979, 828 U.N.T.S. 221; WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 203; Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; among others.

D. ONLINE COPYRIGHT - A LEGITIMATE DISCOURSE ON FUNDAMENTAL VALUES

TPB is an online platform that indexes digital content, including music, films, games, and software. With the help of the peer-to-peer protocol BitTorrent, users belonging to the service can share, search, and download the indexed content of other users in the "swarm". However, as TPB's popularity rose, international controversy abounded, with allegations that TPB facilitated illegal activities – online piracy – worldwide.[31] Similar claims were made to corresponding platforms, such as Grokster in the US.[32]

TPB was a controversial actor on multiple accounts. *Economically*, the operation of TPB was claimed to cause, on the one hand, considerable financial harm to rightsholders, whose online content could be accessed without their consent or compensation. Rightsholders argued that TPB benefited financially from free content at the expense of content holders, through donations, merchandise sales, and ads on its search results. Additionally, Internet service providers (ISPs) also benefited indirectly, because transferring files requires users to subscribe to an ISP.[33]

Besides the economic values at stake, TPB cases implicated various *societal* values and rights, especially technological innovation, freedom of expression, and copyright. Indeed, TPB and similar P2P platforms advanced technological innovation: in the absence of a need for a central computer, high bandwidth capacity, and server storage space, requirements could be decreased, and file requests and retrievals could be conducted faster and with a lower risk of data loss or transfer errors. Cultural innovation and the exercise of freedom of expression could also be promoted through easy accessibility of content, much of which occurs without the authorization of copyright holders, thereby ignoring the protection of intellectual property rights.

E. CASE SELECTION - FIVE COPYRIGHT CASES ON P2P FILE-SHARING PLATFORMS

With a comparative analysis as a premise, we selected from each of the five

[31] i.e., cases from the U.K., Australia, and the E.C.J.
[32] *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).
[33] See e.g. MIAORAN LI, *The Pirate Party and the Pirate Bay: How the Pirate Bay Influences Sweden and International Copyright Relations*, 21 Pace Int'l L. Rev. 281 (2009); ROSATI, ELEONORA, *The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms,* 39 Eur. Intell. Prop. Rev.12, 737 (2017).

jurisdictions, a case that engaged specifically in a discussion on the direct or indirect responsibility of an indexing website (a P2P sharing platform) for copyright infringements committed by its users, as well as the conditions under which an 'innocent' Internet access provider may be obliged to block access to such a site. We favored cases that had reached at least the appellate court stage and, therefore, had been subject to particularly close judicial scrutiny. The cases cover the limited timespan during which the P2P file-sharing platforms emerged and thus faced most litigation: approximately 2005-2015.

We thus opted for the cases highlighted in Table 1. The length of the case descriptions and analyses varies for the natural reason that the judgments are of different lengths, caused not only by the diverse legal traditions, but also by the fact that for some judgments, a concurring opinion (US Supreme Court) or an Advocate General opinion (ECJ) form a part of the judgment.

Our results of discourse analysis in each of the five cases are structured into three parts: case description, court discourse, and discussion. The latter two parts reflect the four focal aspects of the discourse analysis (see points 1-4, Section III.B). In particular, the sections on court discourse engage with the identification of explicit and implicit voices and the dominant and suppressed discourses (including neutral, moralistic, and colorful language). The discussion sections analyze value balancing and openness to counterarguments, as well as uncertainty in each case. The comparative part of our discourse analysis is presented in Section 5 (see points 5-6, Section III.B), where we make observations about how the cases are similar or different in ways that bear relevance from a discourse analytical perspective.

Table 1: Factual summary of cases.[34]

Court	European Court of Justice	European Court of Human Rights	UK High Court	US Supreme Court	Federal Court of Australia
Case no	ECJ Case C-610/15	ECtHR Application 40397/12	UK High Court [2012] EWHC 268 (Ch) and [2012] EWHC 1152 (Ch)	US Supreme Court, 545 U.S. 913 (2005)	FCA 1503
Claimant	Stichting Brein	Neij and Sunde Kolmisoppi	Dramatico Entertainment et al.	Metro-Goldwyn-Mayer Studios	Roadshow Films
Defendant	Ziggo & XS4ALL	Sweden	British Sky Broadcasting et al. I & II	Grokster	Telstra Corporation
Case description	Dutch Supreme Court request for preliminary ruling on Art 3(1) of EU Directive 2001/19 on TPB (direct) copyright infringement	TPB founder complaint to ECTHR for violation of Art 10 Freedom of Expression of European Convention on Human Rights	Copyright holder request for injunctive relief on basis of Sect 97A of Copyright, Designs and Patent Act 1988	Copyright holder case on Grokster and StreamCast indirect copyright infringement	Copyright holder request for injunctive relief based on Sect 115A of Copyright Act 1968, as amended in 2015
Court decision	TPB communication to public (TPB guilty of direct copyright infringement)	Application declared inadmissible (no infringement of ECHR)	Both TPB users and operators infringe copyright of claimants in UK (Dramatico I) and Internet intermediaries need to block or impede access to TPB (Dramatico II)	Grokster and StreamCast are guilty of contributory (indirect) and vicarious copyright infringement	Internet intermediaries need to block access to online locations associated with SolarMovie, TPB, Torrentz, TorrentHound, IsoHunt
Court Context	Collegial decision (here: 5-judge Chamber); preceded by a separate Advocate General opinion	Unanimous decision (here: 7-judge Chamber); dissent possible	Single judge	9 justices; Dissent shown in decision	Single judge

F. STICHTING BRIEN V. ZIGGO & XS4ALL INTERNET – ECJ CASE C-610/15

Case Description

In this case, a copyright holder's organization, Stichting Brein, sought an injunction from a Dutch court for two Internet access providers, Ziggo and XS4All Internet, to block the domain names and IP addresses related to TPB in the Netherlands. The Court of First Instance in the Netherlands initially ruled in favor of Stichting Brein, but the decision was subsequently overturned on appeal. The Supreme Court of the Netherlands then requested a preliminary ruling from the ECJ to clarify *(1)* whether Article 3(1) of the Copyright in the Information Society Directive (2001/29) considers the activities of a platform, such as TPB, that indexes and categorizes metadata so that its users can trace, upload and download protected works, even though there are no protected works available on the website, as a communication to the public. If not, the second question would be *(2)* whether Article 8(3) of the Copyright in the Information Society Directive (2001/29) and Article 11 of the IPR Enforcement Directive (2004/48) allow for a blocking injunction against such a P2P file sharing platform. On 14 June 2017, the ECJ ruled that the platform's

[34] The cases in the order of Table 1: *Stichting Brein v. Ziggo BV (The Pirate Bay)*, Case C-610/15, ECLI:EU:C:2017:456 (June 14, 2017).; *Kolmisoppi v. Finland*, App. No. 40397/12 (Eur. Ct. H.R. Feb. 19, 2013); *Dramatico Entertainment Ltd. v. British Sky Broadcasting Ltd.*, [2012] EWHC (Ch) 268, [2012] EWHC (Ch) 1152 (Feb. 20, 2012); *Grokster*, *supra* note 33; *Roadshow Films Pty Ltd. v. Telstra Corp. Ltd.*, (2016) 248 F.C.R. 178 (Austl.) (Dec. 15, 2016).

activities constituted a communication to the public, thereby finding TPB directly liable for copyright infringement. The ECJ did not answer the second question.

Court's Discourse

Two questions were referred to the ECJ for a preliminary ruling in the *Stichting Brein* case. As is common practice, the ECJ uses its own voice in interpreting the questions.[35] The ECJ then moves, through the voice of the EU legislator (i.e., the Copyright in the Information Society Directive (ISD)), to a discourse on the exclusive right of copyright holders to authorize and prohibit the communication to the public of their works. The right includes measures to intervene in users' actions in a preventive manner, where a communication to the public is contemplated.[36] The Court continues with the voice of the ISD, yet from the parties mentioned in recitals 9 and 10 of the ISD, the ECJ only refers to authors, as discussed in more detail below.[37] Notably, reasoning on technological innovation[38] is plainly absent in the ECJ's interpretation.[39] Stakeholder groups, such as Internet service providers, are not part of the Court's copyright discourse but appear only in discussions on liability for copyright infringements.

In the case, the ECJ argues in its own authoritative voice and occasionally with the voices of preceding EU cases[40], the AG[41], the Dutch Supreme Court[42], EU copyright law, and *"observations submitted to the Court"*[43]. The court explains that providing access to copyright-protected works, with full knowledge of the consequences of such conduct, constitutes an act of communication to the public. The voice of the implicated parties, ISPs Ziggo and XS4ALL, is absent.[44] The only paragraph with any trace of a balancing discourse is the laconic statement that

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[35] "[T]he referring court asks, in essence, whether the concept of communication to the public, within the meaning of Article 3(1) of Directive 2001/29, should be interpreted as covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network."
[36] Brein, *supra* note 34, at 19–20.
[37] *Id.* at 22.
[38] The technological innovation discourse is prevalent in the U.S. Supreme Court *Grokster* case and also explicitly mentioned in the ECtHR, see *Kolmisoppi, supra* note 32.
[39] Indeed, such considerations only emerged subsequently in AG's Opinion in the *Google* case.
[40] *Id.* at 20–29; 31–33; 40–42; 44–45.
[41] *Id.* at 35, 36.
[42] *Id.* at 36, 42, 45.
[43] *Id.* at 38.
[44] This is likely since the ECJ did not answer the second question (blocking injunction) because its answer to the first question (direct liability) was positive. The first question did not involve the ISPs at all, but only the question whether TPB is directly liable under EU copyright law for the indexing website.

"operators of online sharing platform TPB cannot be considered to be making a 'mere provision' of physical facilities for enabling the making of a communication […] (recital 27 ISD)", in other words establishing that TPB cannot be exempted from liability on these grounds. The ECJ is declaratory and affirmative in explaining, with strong language, such as "*must be considered*[45]*", "it is apparent*[46]*", "there can be no dispute,"*[47] and *"it must be held"* how the actions and knowledge of TPB determine the outcome of the case. The discourses in the *Stichting Brein* case thus take place exclusively with voices in support of and focused on the decision's outcome, in particular earlier ECJ cases and the AG.

Advocate General (AG) Opinion

In the *Stichting Brein* case, the tone in the voice of AG Szpunar is quite distinct from the very beginning:

> *"'[T]he file being shared in the swarm is the treasure, the BitTorrent client is the ship, the .torrent file is the treasure map, The Pirate Bay provides treasure maps free of charge, and the tracker is the wise old man that needs to be consulted to understand the treasure map'.*
> *It is by this analogy, worthy of copyright protection, that the Australian judge, Justice Cowdroy, explained how file-sharing in breach of copyright by means of the BitTorrent protocol works."*[48]

The Pirate Bay is framed in a discourse of piracy, using the cross-jurisdictional voice of the Federal Court of Australia. Without further explanation, the AG contends that most of the works shared on TPB breach copyright.[49]

The AG elaborates in detail on the right to communicate with the public. He primarily[50] excludes from consideration, as did the ECJ later on, the issue of values other than copyright protection, or parties other than rightsholders. In other words, the balancing discourse is not entertained in that part of the opinion. Considerations relating to interests other than the high level of copyright protection are limited to thoughts on the knowledge requirement.[51]

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[45] *Id.* at 39.
[46] *Id.* at 42, 45.
[47] *Id.* at 46.
[48] Opinion of Advocate General Szpunar, Brein, at 1–2; Judgment of the Fed. Ct. of Austl. of Feb. 4, 2010, Roadshow Films Pty Ltd. v. iiNet Ltd. (No. 3), [2010] F.C.A. 24, 70 (also cited by Mr. van Peursem, Advocate General at the Hoge Raad der Nederlanden (Neth. Sup. Ct.) in the main proceedings).
[49] *Id.* at 2.
[50] Only indirect references to e.g. the service providers' knowledge of the consequences are made in the description (*id.* at 37).
[51] *Id.* at 52. Importantly, the Advocate General distinguishes the peer-to-peer platform from

In this context, the AG appears to take up, on his own initiative, the discourse on the compatibility between blocking access to a website and fundamental rights. The voice taken up for this balancing discourse is that of the ECJ in the *UPC Telekabel Wien v. Constantin Film Verleih and Wega Filmproduktionsgesellschaft* case (C-314/12).[52] Three conditions were provided in that case to ensure a proportionate balance: *(1)* the ability of the service provider to choose the technical means to comply with the injunction, *(2)* the continued possibility for users to lawfully access information, and *(3)* the effectiveness of the technical means to prevent unlawful viewing of protected content. The AG contends, in his own voice, that this entails a case-by-case analysis between the deprived access and the significance of the copyright infringements.[53] He refers to information provided by the copyright holders but cautions that this will need to be verified for accuracy. He accepts that operators of TPB have expressly refused to remove infringing content from their site, and that the amount of such content exceeds 90 percent. He concludes, on these terms, and again with his own voice, that blocking would seem proportionate.

When considering the prevention of unauthorized viewing, or at least the deterrence of internet users from viewing protected content, the AG introduces the voice of ISPs. Their voice, which argues that any blocking measures would be inefficient, is, however, suppressed affirmatively and without much explanation. The AG still adds the voice of the court to finalize the balancing discourse, specifying that blocking all Internet traffic would be too draconian against the rights of users and hence disproportionate.[54] The counterpart to the derogations is the absence of complicity on the part of the ISPs and their cooperation in preventing infringements. Overall, the AG thus engages in a rather nuanced balancing discourse while analyzing the liability of intermediary service providers, speaking mostly in his own voice and that of the court, as well as when considering the rights of users.

Discussion

Because the ECJ did not address the second question of the referring Dutch court regarding blocking in its judgment, its proportionality analysis was more limited compared to the AG's discourse. The latter introduced the ISPs' voice

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hyperlinking to infringing content for profit, as found in *GS Media BV v. Sanoma Media Netherlands BV*, Case C-160/15, ECLI:EU:C:2016:644 (Sept. 8, 2016). The Advocate General reasons that there could not be a presumption of knowledge, as in *GS Media*, even if The Pirate Bay is a for-profit peer-to-peer operator. The site's operator must have actual knowledge of illegality to be liable. The Advocate General justifies this reasoning with reference to the prohibition on general monitoring; there was no explicit weighing of any background values or interests.

[52] *Id.* at 71.

[53] *Id.* at 74.

[54] *Id.* at 78-84.

sparingly.

The Court uses mostly neutral framing in its description of TPB and its activities. It characterizes BitTorrent technology in technological terms (paras 9-11). Noting laconically that the torrent files "*offered on the online sharing platform TPB relate mainly to copyright-protected works, without the rightholders having given their consent…*" There is no moralistic or colorful language in the ruling. On the contrary, as the above quote from the AG opinion indicates, the AG opinion is more moralistic. For example, the AG refers to the "*fight"* against copyright infringements.[55]

The Court's treatment of TPB's activities as communication to the public leaves very little room for a subsequent weighing of diverse interests. Weighing of interests is, rather, implicit already in the decision to frame the activities under the right to communicate to the public. The ECJ reads the right to communicate to the public in light of the objectives of the InfoSoc Directive, which, according to the Court, "*is to establish a high level of protection* for authors*, allowing them to obtain an appropriate reward for the use of their works*".[56] The ECJ thus interpreted the high level of protection in recital 9 of the Directive from the perspective of original authors only, to the exclusion of other interests meaningfully protected by copyright, such as derivative creation (e.g., parodies and other derivative works) or substantial investments in innovation, network infrastructure, and information technology, mentioned in recital 4 of the Directive.

The absence of including further interests and values relates to the fact that the judgment appears very sure about the questions it treats. It does not discuss alternative approaches or solutions, or pro- and con arguments. This is in contrast with the fact that the ECJ judgment is, to our understanding, the first major judgment globally to find an indexing site like TPB *directly* liable for infringements committed by others (users). At the same time, it introduces criteria typical for *indirect* copyright infringement for direct liability, such as the knowledge requirement. It considerably extends the reach of its already controversial hyperlinking case law, referred to in the judgment, to cover indexing sites. The outcome, although quite plausible, does thus by no means seem an inevitable result of logical syllogisms, despite the Court's language to that effect. By framing the issue in terms of the public's right to communication (as invited by the referring court's first question), the Court avoided answering the second question concerning blocking a website, which only *facilitates* infringements of others. This suppressed an opportunity for the ISPs' voices to come forth. As TPB was found to be directly liable, the platform itself was deemed to be infringing, and the possibility of requiring ISPs

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[55] *Id.* at 83.
[56] *Id.* at 22.

to block it became evident. Although the preliminary ruling questions referred to by the ECJ limit its discursive freedom by setting the baseline of the case, it is not uncommon for the ECJ to reformulate the questions and reframe the case as a corollary. Framing the case through fundamental rights (as seen in the AG and ECtHR) or innovation (as in the US Supreme Court's *Grokster decision*) demonstrates that alternative framings might have been available to the ECJ.

G. NEIJ AND SUNDE KOLMISOPPI V. SWEDEN – ECTHR APPLICATION 40397/12

Case Description

In 2009 and 2010, the Swedish District Court and the Court of Appeal found the operators of TPB guilty of complicity to commit crimes in violation of copyright law and liable for damages. After receiving a refusal to appeal from the Swedish Supreme Court, Mr. Fredrik Neij and Mr. Peter Sunde Kolmisoppi filed a complaint against Sweden to the European Court of Human Rights[57] in 2012 under Article 10 of the European Convention on Human Rights. Neij and Kolmisoppi contended that their right to receive and impart information had been violated when they were convicted for the use of TPB by others. In 2013, the ECtHR declared their application inadmissible. In this case, the Court engages in an assessment of whether there was an interference with the freedom of expression of Neij and Kolmisoppi, and whether the interference was justified in the sense that it was prescribed by law, had a legitimate aim, and was necessary in a democratic society.

Court's Discourse

The ECtHR opines that there was an interference with the freedom of expression, as the applicants *had put in place the means for others to impart and receive information* within the meaning of Article 10 of the European Convention on Human Rights (ECHR). This means that the actions of the applicants are afforded protection under paragraph 1 of Article 10 and that the applicants' convictions interfere with their right to freedom of expression. However, this was only the beginning of the analysis, as such interference breaches Article 10 only if it is not 'prescribed by law', does not pursue one or more of the legitimate aims referred to in paragraph 2 of Article 10, or is not 'necessary in a democratic society' to attain such aims. Paragraph 2 of Article 10 of the ECHR thus contains *balancing language*.

The plaintiffs are TPB operators, whose freedom of expression defense constitutes a substantive part of the ECtHR's balancing discourse.[58] Interestingly, in

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[57] See a summary on the ECtHRs from an institutional perspective in Supplement 1.
[58] Kolmisoppi, *supra* note 34, at 9-10.

the actual balancing exercise, the voice of TPB is absent, despite the Court weighing their interests against those of copyright holders.[59] Instead, in the ECtHR's discourse, the right to impart and receive information is linked to the Internet as the technology enabling the implementation of freedom of expression in modern democracies.[60] However, reference to this latter aspect also highlights the explicit requirements in Article 10 of the ECHR, whereby any limitations to freedom of expression must relate to its necessity in a democratic society.[61] The ECtHR thus reminds us that interferences with fundamental rights cannot be applied in absolute terms, but rather vary depending on the values at stake. The competing interest is foremost related to the protection of property (copyright) under Article 1 of Protocol No. 1 to the Convention. After identifying the two *competing interests,* both of which are protected by the ECHR and must be balanced by the state organs, the ECtHR concluded that in such cases, the state benefits from a wide margin of appreciation. This affected the detail of ECtHR's own weighing of the applicable values. The nature of the distributed material further strengthened state's margin of appreciation: safeguards afforded to the distributed information in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate. These grounds made the margin of appreciation 'particularly wide'.

In the decision, the ECtHR explicitly speaks in *its own voice, as well as referencing its earlier case law and the voices of the Swedish courts and the Committee of Ministers*. For instance, the ECtHR *"stresses"* that intellectual property benefits from the protection of Article 1 of Protocol 1 to the Convention, and *"reiterates"* that copyright may require positive measures of protection, not a mere non-interference by the states.[62] The Court concludes that the Swedish Government had *"weighty reasons for the restriction of the applicants' freedom of expression,"* and "*advanced relevant and sufficient reasons to consider […] the applicants' activities […] criminal."*[63] *"[T]he prison sentence and award of damages cannot be regarded as disproportionate as the applicants had not […] remove[d] the torrent files in question despite having been urged to do so"*. Instead, they had according to the Court '*been indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB*'. These reasons, taken together, led the Court to conclude that there were compelling grounds for the interference with the applicants' rights,

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[59] *Id.* at 11 ("In the present case, the Court is called upon to weight, on the one hand, the interest of the applicants to facilitate the sharing of the information in question and, on the other hand, interest in protecting the rights of the copyright-holders.").
[60] *Id.* at 9.
[61] *Id.* at 10.
[62] *Id.* at 11.
[63] *Id.* at

"necessary in a democratic society."[64]

Discussion

What is most striking about this case is that, in discussing the values, the Court gives no voice to TPB, nor do any considerations supporting that side of the values appear in the ECtHR's discourse. This was partly enabled by the Court's emphasis on the 'particularly wide' margin of appreciation of the state. The Court's proportionality analysis could thus avoid a complete analysis and weighing of all potentially relevant interests and values. As a corollary, the Court could also adopt a neutral tone and avoid biased language. The Court's references to the applicants not removing the torrent files despite having been urged to do so and the applicants' indifference to the file-sharing of copyright-protected works via TPB were declaratory and seemingly neutral, however, without any discussion of potential motives or justifications for the applicants' inaction. One should note, however, that although the ideological roots of a political movement underlie TPB's activities, the plaintiffs did not introduce the political rhetoric as a part of their claims. The rationale might have been a legal strategy: during court proceedings at a national level, TPB would have had difficulty arguing that its acts leading to infringement were not intentional, should it have simultaneously promoted its anti-copyright political agenda. However, one may wonder whether the Court's choice to exclude political expression is deliberate, as if underlining the contradiction. That would seem to reflect the discourse that the ECtHR engages with in the balancing section.

As the ECtHR can only base its decisions on the ECHR, it is institutionally inhibited from raising issues such as the interest in future innovation, which are difficult to express in rights language. The same applies to many other policy interests: the ECtHR can only evaluate such policy interests where the defendant state attempts to justify a limitation of rights on the grounds of these policies. This functions as an epistemological bottleneck in its decision-making: the underlying values and interests become channeled—and sometimes also excluded—through a limited list of human rights only. This might also partially explain why the Court did not elaborate on the possible interests and values underlying the TPB platform, such as innovation. Yet, from another perspective, the same epistemological limitations suggest that the ECtHR is compelled to generate and elaborate on human rights perspectives where other courts might refrain from doing so. For example, the other studied courts have not discussed the possibility that the TPB platform constitutes the means for others to impart and receive information and that any limitations on that freedom must be justified. This makes ECtHR case law potentially enriching in

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[64] *Id.* at 12.

a comparative exercise like the current one, as explicit human rights perspectives are lacking from the other judgments studied.

H. DRAMATICO ENTERTAINMENT ET AL V. BRITISH SKY BROADCASTING ET AL. I & II – UK HIGH COURT [2012] EWHC 268 (CH) AND [2012] EWHC (CH)

Case Description

Based on Section 97A of the Copyright, Designs and Patent Act 1988, Twentieth Century Fox sought injunctive relief against Newzbin in 2010 in the UK High Court[65]. Judge Kitchin ordered Newzbin to refrain from copyright infringement (*20C Fox v. Newzbin*, also referred to as *Newzbin1*). In 2011, Twentieth Century Fox successfully applied for blocking injunctions again, this time from British Telecommunications, for an identical website to Newzbin that had commenced operation at the same location (*20C Fox v. BT*, also referred to as *Newzbin2*). The present case is a subsequent major application of Section 97A, a dispute in which nine copyright holders request that six Internet access providers block or impede access to TPB (*Dramatico Entertainment et al. v. British Sky Broadcasting et al., I & II).* On 20 February and 2 May 2012, Judge Arnold, who had also presided over the *20C Fox v. BT* case, ruled that both users and the operators of TPB infringe the copyright of the claimants in the UK *(Dramatico I)* and ordered that the Internet access providers in question block or impede access to TPB *(Dramatico II).*

Court's Discourse

In the *Dramatico I* case*,* Justice Arnold introduces the voices of the Information Society Directive[66], the ECJ[67], international copyright law[68], UK case law[69], the counsel of the copyright holders[70], and even Australian copyright jurisprudence[71], to first conclude that UK users of TPB have committed copyright infringement. Then, in determining whether TPB is also liable for infringement, either by having *"authorized"* the TPB users' infringements or by being jointly liable for the infringement, *"authorization"* is approached with the voices of precedents of other UK Justices[72], in particular Justice Kitchin (*20C Fox v. Newzbin)*, and the British Phonographic Industry's (i.e. copyright holders') Head of Investigation Hodge.

[65] See a summary on the UK High Court from an institutional perspective in Supplement 1.
[66] Dramatico, *supra* note 34, at 61.
[67] *Id.* at 62, 69–70.
[68] *Id.* at 62.
[69] *Id.* at 66.
[70] *Id.* at 67–68.
[71] *Id.* at 71.
[72] *Id.* at 73.

Hodge's page-long list of nine points to prove authorization is quoted directly, followed by the affirmative language of Justice Arnold: the TPB *"goes to great lengths"* to support, and its website is "*plainly*" designed for comprehensive infringements.[73] The torrent files are *"so conveniently"* indexed, constituting *"precisely the means"* to infringe[74]. The objective and intention to infringe are *"clear"*[75].

The Justice does not engage in a balancing discourse, save for a very brief statement at the end of the judgment. Indeed, Justice Arnold construes the voice of the (absent party) TPB in a "negative" manner: The Pirate Bay's name, its logo and announcements, such as a quote copied from TPB's about page that *"[a]ny complaints from the copyright and/or lobby organisations will be ridiculed and published at the site. 0 torrents have been removed, and 0 torrents will ever be removed*"[76] serve to self-indict TPB. So does a quote from an earlier Swedish case, where one of the founders had been recorded stating the *"purpose of the site [to be] pirate copying"*[77]. The claim of TPB to remove any material inappropriate for TPB's purposes (such as malware or child pornography) from the site is used to indicate that TPB can control copyright infringements, if it so wishes[78]. TPB's voice is further expressly brought forth in showing how TPB's move from .torrent files to Magnet links indicates TPB's determination to *"do whatever it can – to enable the users to continue to infringe*"[79]. The only trace of a balancing rhetoric – TPB's principled and open denouncement of copyright – is brushed aside as being *"no defence"*[80] in the end of Justice Arnold's very strong condemning language on the authorization of copyright infringements. The potential political (as opposed to commercial) voice of TPB is thereby expressly suppressed.

Following the common law tradition (also present in US and Australian cases), the UK Justice Arnold uses the first person "I" in adjudication. This gives the case a strong personal voice. The Justice does not shy away from disagreeing with earlier case law either: the technique is rather that of expressly introducing the voices of the (in his view erring) Justices to reinforce his own view[81]. This creates interesting dialogue between cases dealing with similar substantive issues. For instance, when moving from the assessment of TPB's authorization of infringements to its joint liability, Justice Arnold refers back to the above-noted voices and adds to them those

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[73] *Id.* at 76.
[74] *Id.* at 77.
[75] *Id.* at 78.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 79.
[79] *Id.* at 80.
[80] *Id.* at 81.
[81] *See, e.g.*, *Id.* at 65-66.

of Justice Kitchin (*20C Fox v. Newzbin*)[82], Arnold himself in an earlier case[83] quoted by Kitchin), and Lord Templeman (but disagrees with him). The Justice's voice is clear in concluding that TPB is jointly liable for the infringements of its users[84].

In the *Dramatico II* case, the same Justice granted copyright holders an injunction against the defendant ISPs, ordering the ISPs to block or at least impede access to TPB users. Although voices contradicting the blocking order on human rights grounds[85] are present in the *Dramatico II* case, they are very weak. Justice Arnold briefly comments on the ECJ *Scarlet Extended v. SABAM* case, where the Court deemed the measures imposed on Scarlet Extended to take down copyright-infringing content too broad. However, Justice Arnold considers that they do "*not make any difference" or "call into question"* his rationale[86]. The proportionality of the injunctions forms a part of an equally one-sided discourse. Justice Arnold acknowledges the ECJ's voice that calls for a proportionate balance between the protection of intellectual property rights[87] and (other) *"fundamental rights of individuals"* mentioned in the European Charter of Fundamental Rights (ECFR).[88] However, he does not engage in open, express discussion on the potential trade-offs, closing the issue in an authoritative, declaratory tone with a further reference to the *20C Fox v. BT* case, and to the contractual proportionality between the professional parties involved (ISPs and right holders)[89].

Discussion

Overall, the case demonstrates how UK common law jurisprudence provides ample scope for an elaborate discourse. There seem to be limited constraints in engaging voices beyond the British jurisdiction, rendering them more general appeal, and thus more weight. The explicit voices of the justices themselves, referred to by name and discussed in the first person, also facilitate the introduction of third-party voices. Yet this does not seem to ensure an equitable representation of the voices. A conspicuous feature of the *Dramatico I & II* cases is the contrast between the multitude of voices and the lengthy and expressive quotes from them that the Justice engages in motivating his view, and the hollow absence of any contradicting voices. Nor is there any balancing discourse to illustrate the nuance and complexity of the

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[82] *Id.* at 82.
[83] Case C-324/09, *L'Oréal SA v. eBay Int'l AG*, ECLI:EU:C:2011:474 (July 12, 2011).
[84] *Dramatico*, *supra* note 34, at 83.
[85] Eur. Ct. H.R., *supra* note 32, art. 10; Charter of Fundamental Rights of the European Union, art. 11.
[86] *Id.* at 8.
[87] Charter of Fundamental Rights of the European Union, *supra* note 85, art. 17(2).
[88] *Id.* at 10.
[89] *Id.* at 11–13.

situations, or to reflect on the potential disadvantages of the chosen approach.

I. METRO-GOLDWYN-MAYER STUDIOS V. GROKSTER - US S.CT, 545 U.S. 913 (2005)

Case Description

Copyright holders brought a case against the distributors of P2P file-sharing software, Grokster and StreamCast, for copyright infringement. The US District Court for the Central District of California and the US Court of Appeals for the Ninth Circuit did *not* find Grokster and StreamCast guilty on issues of contributory and vicarious infringement. On 27 June 2005, the US Supreme Court [90] overturned the previous decisions and ruled that distributors of P2P file sharing software are indirectly liable for the resulting acts of infringements of their users. Justice Souter authored the decision, while two groups of three Justices delivered concurring opinions. The concurring opinions by Justices Ginsburg and Breyer disagree with each other on the rationale, but agree on the outcome, of the decision.

Court's Discourse

In a marked contrast to the other cases, the voices of the defending Grokster and StreamCast are explicitly present throughout the US Supreme Court case[91]. However, the Supreme Court reaches the conclusion that the defendants' objective is to encourage copyright infringements. It uses these defendants' voices mostly as incriminating evidence. [92] The court's voice is unambiguous: *"[t]he record is replete with evidence"*[93] to prove that StreamCast's services leverage the user base left from the notorious filesharing service Napster since the decision of the 9th Circuit had shut down its activities in 2001[94]. The evidence on Grokster is *"sparser but revealing"*[95].

The *Grokster* decision is framed, in a striking contrast to the emblematic image of a pirate used by the AG in opening his opinion on *Stichting Brein*, as a discourse in value reconciliation. There is a *"sound balance between the respective values of supporting the creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement"*.[96] Favoring artistic protection and encouraging innovation are presented as a tradeoff, with the tension between these values serving

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[90] See Supplement 1 for a summary of the U.S. Supreme Court from an institutional perspective.
[91] *See*, e.g. *id.* at 922–23.
[92] *Grokster*, *supra* note 34, at 923–27; 937–38.
[93] *Id.* at 923–24.
[94] 239 F.3d 1004 (9th Cir. 2001).
[95] *Grokster*, *supra* note 34, at 925–26.
[96] *Id.* at 928.

as the underlying discourse of the case.[97] A reconciliatory tone is introduced through multiple voices, including the dissent of Justice Stevens in *Eldred*[98], as well as legal scholarship,[99] and *amici curiae*[100]. *"The mutual exclusivity of these values should not be overstated"*, the Court explains.[101]

The balancing discourse is advanced with voices from both sides—Grokster, StreamCast, and various amici for innovation; Metro-Goldwyn-Mayer Studios (MGM) for the right holders, complemented by ample precedent, in particular the seminal *Sony* case[102]. The balance in *Sony* is struck such that, where a product is capable of commercially significant non-infringing uses, it cannot be held liable for infringing uses. The Supreme Court uses the voice of MGM in proclaiming that the Ninth Circuit's summary judgment in *Grokster* gave too much weight to the value of innovative technology, and too little to the infringed intellectual property rights.[103] In its decision, the Supreme Court finds that the Ninth Circuit misinterpreted *Sony* by not inferring liability in a situation where one could find a *"patently illegal objective from statements and actions"*. The Supreme Court does not develop the balancing discourse to its full *"quantified description"*[104]. It suppresses the balancing discourse upon reaching its legal conclusion and switches to the tangential discourse on contributory and vicarious liability instead.[105]

Concurring Opinion of Justice Ginsburg

The concurring opinion of Justice Ginsburg also engages in a balancing discourse. The voice is first that of the *Sony* Court: *"the staple article of commerce doctrine […] must strike a balance between a copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others to engage in substantially unrelated areas of commerce."*[106] A finding that the device is capable of substantial non-infringing uses removes it from liability for infringing uses.[107] Justice Ginsburg, however, introduces the voice of the *Sony* case to challenge the reasoning developed therein, a reasoning that was decided by a tight 5-4 vote. She thus challenges the rationale in the *Grokster* Opinion. Shifting from a

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[97] *Id.*
[98] *Eldred v. Ashcroft,* 537 U.S. 186, 223–226 (2003) (Stevens, J., dissenting).
[99] TIMOTHY WU, *When Code Isn't Law*, 89 VA. L. REV. 679, 750 (2003); MOLLY S. VAN HOUWELING, *Distributive Values in Copyright*, 83 TEXAS L. REV. 1535, 1539–40, 1562–64 (2005).
[100] Brief for Sovereign Artists et al. as *Amici Curiae.*
[101] *Grokster*, *supra* note 34, at 929.
[102] *Sony Corp. v. Universal City Studios*, 464 U.S. 417.
[103] *Grokster*, *supra* note 34, at 933.
[104] *Id.* at 934.
[105] *Id.* at.
[106] Ginsburg, concurring, *Id.* at 943, citing *Sony*, 464 U.S. at 442.
[107] *Id.* at 943.

discourse on balancing to one on liability, Ginsburg argues that the *Sony* case established no clear rule on contributory liability, and indeed that it would be insufficient for escaping liability that a product is only *capable* of substantial non-infringing uses, rather than having substantial non-infringing uses.[108] Justice Ginsburg indirectly engages the voices of the *"motley collection"* briefs submitted for Grokster and StreamCast during the case, to challenge the relevance of *"assertions (some of them hearsay)"* and *"anecdotal evidence, sometimes obtained secondhand"*.[109] In other words, she uses the allegedly dissonant and dubious voices of the Grokster defense to enter into dialogue with the other group of concurring Justices (Breyer, Stevens, and O'Connor) regarding the *Sony* precedent on the required scope of non-infringing uses. Ginsburg's liability discourse is thus related to the balancing discourse, but discussion on the *outcome* of a balance is, however, suppressed.

Concurring Opinion of Justice Breyer

Justice Breyer is the voice of the second concurring opinion in *Grokster*, with which Justices Stevens and O'Connor join. Like the *Grokster* decision and Ginsburg's concurring opinion, this opinion takes the balancing discourse as its premise: the need for a court to fix secondary copyright liability, in order to strike a balance between copyright holders and those engaging in other areas of activity. Breyer's balancing discourse becomes intertwined with, but does not replace, the central legal question on "*substantial"* non-infringing uses. He, like Ginsburg, refers to a wide range of briefs from the parties and *amici*. Unlike Ginsburg, however, he finds these cases of non-infringing uses, such as authorized copies of music, free electronic works, public domain, authorized software, and licensed music and movies, rather persuasive.[110] Moreover, the voices speak to the balancing: there is a "*significant future market for non-infringing uses of Grokster-type peer-to-peer software, such as research information, historical recordings, digital photos, licensed music and movie files, news broadcasts and works created by Creative Commons."*[111] Numerous voices are thus introduced, weaving them into a discourse on innovation: *"course of events will […] continue to flow naturally as a consequence of the character of the software taken together with the foreseeable development of the Internet and of information technology."*[112] Valuable new technologies will be brought to the market[113], referring to the *Grokster* court's opinion on the general benefits of peer-to-peer technology. The

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[108] *Id.* at 944–45.
[109] *Id.* at 945–46.
[110] *Id.* at 953–54.
[111] *Id.* at 954–55.
[112] *Id.* at 955.
[113] *Id.* at 957.

Sony standard is defended with explicit balancing language, as *"clear", "strongly technology protecting", "forward looking",* and yet also adequately careful in not trying to second-guess the future.[114] The *Sony* standard seeks to protect, not the Groksters of this world, but the development of technology more generally.[115] To emphasize the point on maintaining the value balance struck in *Sony*, Breyer refers to it as the *"real question"* – in contrast to Grokster's liability, which he agrees with.[116]

Breyer's balancing discourse does not pause in advocating strong protection of technology and innovation either. Of all the decisions and opinions analyzed for this article, it offers by far the most substantive discourse on the counterclaims to the proposed balance. Breyer brings forth the voice of Ginsburg to introduce the issue of the implications of a higher evidentiary burden on proving the required *"substantial"* non-infringing uses on a case-by-case basis.[117]

Yet how do these values balance, *stricto sensu*, against the positive impact of intellectual property rights? Breyer adds his own voice to those on the different sides of the value balance. He stresses the importance of protecting the *"creative genius"* of artists and condemning deliberate, unlawful copying as theft, citing references to the US Constitution, precedents, and positive law[118]. A multitude of voices, many of them experts from the field, are introduced to testify that the need for overturning the balance established in *Sony* is not substantiated. The voice of the precedents also reminds us that the private motivation for obtaining rewards from creative work must also ultimately serve the cause of promoting public availability of the arts.[119] Other means than changing the *Sony* standard are available, including the inducement theory applied to *Grokster* in the present case. Individual lawsuits, technological protection measures, and easier lawful copying are also brought to the balancing discourse through a multitude of expert voices.[120] Breyer concludes his extensive balancing analysis with an institutional point. While courts have a role as the ultimate balancers of competing values, the legislature is often better positioned for such a politically charged task.[121]

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[114] *Id.* at 957–58.
[115] *Id.* at 955.
[116] *Id.* at 955–56.
[117] *Id.* at 959-60.
[118] U.S. CONST. art. I, § 8, cl. 8 enshrines the principle that "reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); 18 U.S.C. § 2319 (2000 & Supp. II 2002) (criminal copyright infringement).
[119] *Grokster*, *supra* note 34, at 961; *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975).
[120] *Grokster*, *supra* note 34, 963–64.
[121] *Id.* at 965.

Discussion

Overall, we found the discourses on balancing between societal values and intermediary liability to be very intertwined in all three parts of the *Grokster* decision.

The *Grokster* case is quite unique in that the decision consists of the views of only three of the nine Supreme Court Justices, accompanied by two concurring opinions of three Justices. The 3-3-3 split underlines the discursive structure of American case law: the voices of the concurring (or, in other cases, dissenting) justices are explicit and engage in a rich dialogue with one another. The court's institutional and legal cultural setup makes its train of thought visible and allows for a comparison of how alternative argumentative logics of the justices differ. The spectrum of voices and discourses that are a part of the reconciliation of values is thereby also more transparent and elaborate: the Central District Court of California and the Ninth Circuit Court, whose decisions are on appeal, earlier US case law at District, Appellate, and Supreme Court levels[122], parties, various *amici curiae*[123], and legal scholarship[124]. Indeed, the presence of diverging opinions also brings forth the indeterminacy and hesitations that may be detected in the Justices' voices. They reflect the intricacy and messiness of reality as opposed to relying on dogmatic and decidedly authoritative voices.

Especially the preceding seminal *Sony* case takes center stage. The personal nature of the voices makes the Supreme Court's ability to engage in an "inter-case" discourse on technological innovation, which spans years and, in this case, even decades, clearly visible. This is an essential aspect of the discourse in value-laden judgment: values in society may evolve, so the manner and extent of reconciling them will also change. Making these evolutions transparent to the public seems fundamental to the functioning of democracies.

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[122] For instance, the *Grokster* case at district and appellate level: *MGM Studios, Inc. v. Grokster, Ltd.*, No. CV 01-08541 SVW (PJWx), 2003 WL [pin cite], at App. 1213 (C.D. Cal. June 18, 2003); *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

[123] *See, e.g., Brief for Innovation Scholars & Economists as Amici Curiae at 20–22; Brief for Emerging Tech. Companies as Amici Curiae at 20–22; Brief for Intel Corp. as Amicus Curiae at 20–22; Brief for Sovereign Artists et al. as Amici Curiae at 20–22.*

[124] E.g., JANE C. GINSBURG, *Copyright and Control Over New Technologies of Dissemination*, 101 101 Colum. L. Rev. 1613, 1647 (2001); DOUGLAS LICHTMAN & WILLIAM LANDES, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J. L. & TECH. 395, 410 (2003).

J. ROADSHOW FILMS V. TELSTRA CORP. - FEDERAL COURT OF AUSTRALIA [2016] FCA 1503

Case Description

Roadshow Films v Telstra Corporation is the first Australian case granting injunctive relief against online copyright infringement. It applies Section 115A of the Copyright Act 1968*,* as amended in 2015. On 15 December 2016, at the request of two copyright holder groups (Roadshow Films, Village Roadshow Films, and Foxtel Management), Judge Nicholas of the Federal Court of Australia ordered 4 Internet access provider groups (Telstra, TPG, Optus, and M2) to block access to online locations associated with SolarMovie, The Pirate Bay, Torrentz, TorrentHound and IsoHunt.

Court's Discourse

Section 115A of the Australian Copyright Act 1968 provides detailed specifications for injunctions against carriage service providers that provide access to online locations outside Australia. Judge Nicholas cites the relevant statutory provisions extensively to establish the basis for the blocking injunction.

Overall, the language on balancing is very limited throughout the court decision; however, some evidence can be found in paragraphs 42 through 49, where Judge Nicholas expands on the factors to be taken into account in interpreting Section 115A (1)(a-c).

On the one hand, he points to the intentionality of the platform operators.[125] On the other hand, he also indicates that the *'primary purpose of the online location'* as mentioned in Section 115A (1)(c) *'provides an important check on the operation of s 115A'*.[126] He explicitly refers to the revised explanatory memorandum of the statutory provision, which is given considerable weight throughout the case. In this context, the memorandum indicates that the primary purpose test *'is an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse',* specifically mentioning that certain platforms such as *'www.youtube.com or www.blogger.com'* and *'Virtual Private Networks (VPNs)'* are not meant to be captured under this provision. A technology innovation discourse emerges: *'[t]echnology and technological change is not to be chilled or targeted by this amendment.'*[127]

When reflecting on the inclusion of the voice of P2P operators, it is notable that the legislator in section 115A (3) explicitly mentions that operators of online locations

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[125] *Roadshow Films*, *supra* note 34, at 46.
[126] *Id.* at 48.
[127] *Id.* at 38–40 of the Revised explanatory memorandum as quoted *Id*. at 48.

can be party to the proceedings, but only if they make an application to join.[128] In this case, none of the operators applied to join as a party.[129] Similar to our UK case *Dramatico,* the operators' voice is only used to (self-)indict them. Finally, Section 115A (5) also lists matters to be considered when determining whether to grant an injunction. Contrary to Section 115A (1), Judge Nicholas does not go into detail on the factors set out in Section 115A (5), although this might have been expected considering that they provide the basis for building evidence in the case. We are particularly interested in (e) on proportionality and (g) on public interest in disabling access to the online locations.

In applying Section 115A to the *Roadshow* proceeding, the *about* page of The Pirate Bay (similar to the UK case) offers the voice that "*the TPB site allows users to upload torrent files which may then be accessed by other users"*[130].

The expert witnesses of copyright holders, such as Mr. Herps (Global Content Protection for the voice of MPAA) and Mr. Carson (no details of background), are extensively used in the Court's argumentation. They are given much authority throughout the judgment. So, for instance, when considering the primary purpose of The Pirate Bay, Judge Nicholas states: *"Mr Carson is also of the opinion that the primary purpose of each of the TPB sites is to provide users with free access"*[131]. This statement comes in the middle of a section where the language otherwise seems quite technical and neutral.

The technical description of the case, which relies heavily on the expert witnesses' accounts, gives some voice to users by listing the disadvantages of (certain types of) blocking. Unlike most cases researched in this article, positive words are used to describe BitTorrent: *"BitTorrent is a protocol designed for the efficient and decentralised sharing of electronically stored information across the Internet"*[132], providing an entry for a technology innovation discourse. The technical description thus resembles the US Supreme Court *Grokster* case in its two-sided and comprehensive nature. At the same time, relevant balancing aspects (e.g., how deep packet inspection relates to privacy and freedom of expression) are not addressed. What stands out most about the conclusions from the Roadshow and Foxtel proceedings is the absence of voices referencing the specific criteria listed under Section 115A (5).

Internet access providers remain silent in the Court's deliberations but become vocal in the discussion on the details of the blocking orders. Their voices raise

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[128] *Id.* at 26.
[129] *Id.* at 3.
[130] *Id.* at 88.
[131] *Id.* at 87.
[132] *Id.* at 17.

arguments on cost sharing and seek to frame themselves as "innocent" parties.

Discussion

The disagreement between the parties in *Roadshow Film v. Telstra Corporation* pertains solely to the terms of relief.[133] The legal scope of the case, therefore, limits the discussion on balancing, as there is no contestation on whether to block access to the P2P platforms. Throughout the case, the judge only mentions technology innovation as a reason for limiting injunctions.

The list of matters that the Court could consider in determining whether to grant an injunction, as mentioned in Section 115A(5) of the Australian Copyright Act, is detailed and comprehensive, and includes provisions that explicitly aim to balance between values and interests. However, the Court did not introduce the diversity of voices and discourses that Section 115A (5) is pointing towards. Instead, it seems to cherry-pick which provisions – and thereby which voices – to include in its deliberations. While the language of Section 115(A) is not mandatory, as the Court *"may"* rather than *"shall"* take the list into account, from a value-balancing perspective, the case does seem like a missed opportunity.

As a final note, the Australian legislator has taken an interestingly transnational justice approach; it has included blocking orders from other jurisdictions in the list of matters to be considered. The approach can enrich the voices and discourses in Australian courts' copyright deliberations, while extending the reach of judgments made in other judicial systems in online copyright cases.

V. COMPARATIVE ANALYSIS OF DISCOURSES IN THE P2P COURT DECISIONS

Based on the discourse analysis of the individual cases, we proceed to the comparative phase of the research. The comparison reflects first on the voices, including both dominant and suppressed discourses (encompassing neutral, moralistic, and colorful framing language), and value balancing (proportionality), and second on the courts' institutional and epistemological dimensions and their impact on the courts' openness to diverse voices and counterarguments.

[133] *Id.* at 4.

Table 2: Summary of central discourse analytical aspects of the cases.

Court	European Court of Justice	European Court of Human Rights	UK High Court	US Supreme Court	Federal Court of Australia
Claimant	Stichting Brein	Neij and Sunde Kolmisoppi	Dramatico Entertainment et al.	Metro-Goldwyn-Mayer Studios	Roadshow Films
Defendant	Ziggo & XS4ALL	Sweden	British Sky Broadcasting et al. I & II	Grokster	Telstra Corporation
Explicit voices	ECJ own voice, AG, earlier case law, Dutch Supreme Court, EU law, observations submitted to court	ECtHR own voice, earlier case law, Swedish courts, Committee of Ministers, international human rights law	Justice's own voice, international and EU law, ECJ, Australian jurisprudence, other UK justices, © holders, incl. BPI head of investigation	Justices' own voices, earlier case law, appellate courts, parties incl. Grokster, StreamCast and MGM, amici curiae, legal scholarship	Australian law, other jurisprudence, expert witnesses of © holders, Internet access providers when discussing details of blocking orders
Implicit and absent voices	No voice for intermediaries and TPB; Ziggo & XS4All are present in AG opinion	TPB voice absent in balancing exercise	Negative use of TPB voice	Mostly incriminating voice of Grokster and StreamCast	Indirect use of voice of users (through expert witnesses); negative use of TPB voice
Dominant discourses	High level of copyright protection; (direct) liability for copyright infringement *AG:* high level of protection of copyright; balancing between copyright protection and freedom to conduct business	High level of copyright protection; balancing between freedom of expression and its limitations	High level of copyright protection; authorization of copyright infringements	High level of copyright protection; contributory (indirect) and vicarious copyright infringement; Technology innovation	High level of copyright protection; Technology innovation
Reference to Foreign Caselaw	Explicit reference to Australian Justice Cowdroy in AG opinion		Reference to Australian case law		Mention of blocking orders in other jurisdictions
Presence of Balancing Exercise	No or limited balancing by ECJ; present in AG opinion, but highly moralistic language	Limited balancing exercise on interference expression	Hollow balancing (many voices to justify)	Extensive balancing, tension as frame for case	Section 115A (5) of Australian Copyright Act (balancing provision) not applied consistently
Openness to Opposing Arguments	Exclusive use of voices in support	Arguments and reflections on ideological underpinning are absent	'Dialogue' with other UK Justices	Open dialogue amongst justices	Some but incomplete openness

A. VOICES, FRAMING, DISCOURSES AND VALUES

The cases analyzed in this article were from jurisdictions that vary from the more syllogistic, civil law-oriented traditions of the ECJ and ECtHR to the argumentative, common-law courts of Australia, the UK, and the US. As predicted, the variance in the voices and discourses in the cases increased accordingly, with the widest range of explicit voices and parallel discourses in the *Grokster* case of the US Supreme Court. One should, however, take the Opinion of the AG into account when analyzing the discourse in the ECJ case. The Opinion is much more open-ended than the decision and moves the ECJ considerably towards the more discursive end of the spectrum.

Our discourse analytical comparisons revealed that courts build authority into their argumentation through many voices. The voices to justify the court's decision included the institution itself (the court, the adjudicating judge (in person), and preceding case law), the parties as claimants and defendants (i.e., the copyright holders, TPB, and governments), and others (legislation, experts). Still, all courts mostly spoke with the Court's own, decidedly authoritative voice. This is hardly surprising, and so the courts engaged the explicit voices of other parties to support the courts' own hegemonic discourses. Moreover, except for the second concurring opinion in *Grokster*, the courts focused heavily on the *explicit* voices of the copyright holders, the party that prevailed in all the cases. They thus either suppressed the voices of the defendants or even engaged with them in an explicit, incriminating fashion against the defendants themselves.

In the discourses, the strong protection of copyright against infringements dominated. The discourses of reconciling between copyright protection and freedom of expression or copyright and technological innovation were only partially present in the US and Australian cases. The ECtHR and the AG engaged in a discourse on balancing between different fundamental rights, while none of the other courts did so. Considering the importance of the juxtaposition between the right to property, freedom of expression, and the freedom to conduct a business in these cases, the lack of balancing discourses is surprising. The ECJ judgment, for example, does not seem to consider any background values or interests that are not present in the immediate circumstances of the case. Although freedom of expression was negligible in the case of TPB, as most content was found to be clearly and intentionally infringing, the ECJ could have reflected what kind of precedent its judgment does (not) set for future cases with less controversial platforms. This could have limited the potential reach of the judgment. The case now sets a precedent for YouTube and file-hosting and sharing platforms, as the same expanded elements of communication to the public apply to them. In this judgment, the ECJ developed new criteria for evaluation, including the failure to implement the appropriate technological measures that can be expected of a platform to counter infringements, where the platform knows or ought to know, in a general sense, of its users' infringing activities.[134] Neither did the ECJ consider in its *Stichting Brein* judgment issues related to innovation or investments in information technology, as the US Supreme Court did in *Grokster*.

Furthermore, our discourse analysis assessed whether the courts' framing language demonstrated a bias, for instance, as moralistic voices towards a particular position. We found a moralistic voice in the Opinion of the AG of the ECJ, when referring to an earlier Australian case, and in the decision of Judge Arnold of the UK High Court. Their language was often colorful, with a clearly detectable *ethos* of condemning TPB.

The voices of other courts were interestingly visible in multiple cases. There is a conspicuous number of cross-references, and they are not limited to precedents of the same institution or legal system but extend quite liberally across jurisdictional and geographic boundaries. For instance, in the UK *Dramatico I* case, Justice Arnold speaks at length, drawing on the voices of the ECJ[135] and the European Court of

[134] Joined Cases C-682/18 & C-683/18, *Frank Peterson v. Google LLC & YouTube LLC*, and *Elsevier Inc. v. Cyando AG*, ECLI:EU:C:2021:503 (June 22, 2021).
[135] *Dramatico*, *supra* note 34, 45–46.

Human Rights. As the United Kingdom was still, at the time of the case, a part of the EU and remains a member of the Council of Europe, these voices appear natural, as do the voices of the applicable international Treaties (Berne Convention[136], WIPO Copyright Treaty[137], WIPO Performance and Phonograms Treaty,[138] and Rome Convention[139]). Still, Justice Arnold also uses, in an indirect manner, the voices of courts to whose decisions it is not bound on substance, to the Federal Court of Australia,[140] and on procedural aspects, to the Belgian, Danish, and Dutch[141] courts. Even more striking is the way Australian law[142] uses third country jurisprudence, not just as a point of reference, but as an authoritative voice that sets the standard of evaluation in determining injunctions. Indeed, the interlinkages between the cases illustrate the discursive aspects of the phenomenon of legal transnational transplants[143]. The cross-references to the voices of Courts in other jurisdictions also reflect the fact that if the issue is global, such as the Internet and the digital economy, the voices and discourses may also be transnational. This phenomenon increases the potential of *comparative* judicial discourse analysis as a novel research method.

B. INSTITUTIONAL AND EPISTEMOLOGICAL DIMENSIONS AND OPENNESS TO COUNTERARGUMENTS

The fact that the Court's own voice is central in all the cases, even hegemonic, deserves further reflections keeping in mind the diversity of the analyzed five courts. Multiple observations about the institutional and epistemological dimensions of the discourses can be made. First of all, the voices present in the analyzed cases may differ because of the varying nature of the parties who can be involved in the court in question. In ECtHR cases, the defendant is the state party that has allegedly committed a human rights violation. The plaintiff usually is the defendant in the case at the origin of the dispute, as was the case in *Neij and Kolmisoppi*.

Second, the *Kolmisoppi* case is also different as a criminal law case. The other four cases were civil law cases with internet service or software providers as the defendants. Although all five cases raise similar issues of diverging rights, values and

[136] *Id.* at 30, 62–63.
[137] *Id.* at 31–32.
[138] *Id.* at 33.
[139] *Id.* at 62.
[140] Justice Arnold (*id.* at 71). The Commonwealth tradition could, however, partly explain the reference to Australian case law.
[141] *Dramatico*, *supra* note 34, 11.
[142] Copyright Amendment (Online Infringement) Act 2015 (Cth) s 115A(5)(d).
[143] GUNTHER TEUBNER, *Good Faith in British Law or How Unifying Law Ends Up in New Divergencies* 61 MOD. L. REV. 11, 32 (1998).

interests, the scope of the narrative is in the criminal *Kolmisoppi* case epistemologically different and more limited. Another epistemological difference between the cases is that the objective of a preliminary ruling in an EU law case such as *Brein* is not to decide on the substantive legal issue, but to provide a national court authoritative guidance on the interpretation of EU law. These differences may be quite relevant for applying and further developing comparative judicial discourse analysis as a method. They should be considered as reality checks when considering alternative frames, voices and types of arguments in the context of a judgment from one's home jurisdiction.

Alongside the variance in the underlying judicial systems, differences in the institutional setup of the court may also have considerable influence on the discourse it engages in. The analyzed Commonwealth court cases (Australia and the UK) had only a single judge, while the ECJ *Brein* case was delivered by a 5-judge Chamber, the *Kolmisoppi* case by the ECtHR's 7-judge Chamber, while the US Supreme Court case included as usual all its nine justices. As expected, the single judge decisions contain a more explicit personal voice of the Court than the discourses in the multi-judge courts. From a discourse analytical perspective, the voice of the individual judge in a judgment might be even distinguishable from the institutional voice of the court.

The number of judges is also relevant for whether explicit, diverging voices from within the court can be identified. If there are more than a single judge, a dissenting or a concurring voice can exist, depending on whether the decision is collegial or not. A multi-judge court that decides collegially, without revealing the views of individual judges, will not include a separate explicit voice for the dissent. Diverging views between the judges could however still affect the discourse(s) present in a collegial judgment. A consensus-oriented collegial court could attune the substantive legal outcome, and thus probably also the narrative, in a deliberative process to accommodate the diverging views of the judges. This internal accommodation of views could in theory entail a broader inclusion of the different explicit voices of the stakeholders in the court's judgment on the case. On the contrary, a multi-judge court that simply speaks with the view of the majority might be less accommodating to the views of the minority and hence could also engage in a slightly different narrative. It is not possible to tell from the mere language of the *Brein* preliminary ruling of the ECJ what the positions of the individual judges of the 5-judge Chamber were. The effect that the collegial nature of the decision has on the discourse deserves further analysis.

The US Supreme Court, a multi-judge court with dissenting and concurring opinions visible, represents the other end of the spectrum in this respect. The positions, stated in the explicit voices of the judges, are visible. But do the positions that form around the different opinions on points of law, also integrate different explicit voices of the parties to the case? And do they integrate a wider selection of such voices? They do introduce a new voice to the court as an institution, and usually a new discourse as well. The discourse in the concurring opinion of Justice Breyer in *Grokster* was more diverse; it included different and more voices than the majority view. Is this observation generalizable to dissenting or concurring opinions? Dissenting opinions typically need to engage with the voice of the majority when disagreeing with it. The majority can also engage with the dissent, but it has also the option of remaining more constrained, or even silent. Further, the mere *possibility* of an express dissent may add or remove voices and discourses in the decision: the majority needs to consider the dissent's arguments and may thus alter its substantive position pre-emptively, accommodating or further sharpening its position. Overall, the effect of a dissent on the court's discourse(s) is a multifaceted question. The presence of a parallel dissent seems likelier to increase than to decrease the voices and discourses in a decision. This would make (the pattern) of the decision more legitimate.[144] However, giving an institutional role to a dissent does not in itself determine whether the respective narratives are *told* with the same voices, or with fewer or more external voices.

A further aspect that the comparative judicial discourse analysis brought forth was the explicit voice of the earlier decisions of the same institution in the court's discourse, i.e. the voice of the precedent. In simple terms, common law courts are more strongly tied by precedent than civil law courts. Common law courts are thus likelier to engage the voice of the precedent in the narratives of their decisions. The voice of precedent is likely stronger, when the precedent supports the decision that the court is taking. Precedent has however also become an increasingly loud voice in the ECJ and ECtHR jurisprudence. Precedents are in all the studied cases engaged as explicit voices to strengthen and distinguish the decision taken. In courts where the judge rules on his/her own personal name, such as the UK case *Dramatico* with Judge Arnold and the Australian case *Roadshow Films* with Judge Nicholas, the link is even clearer. In the U.S. case *Grokster,* the connections are also apparent. The second concurring opinion is authored by Justice Breyer and joined by Justices O'Connor and Stevens. It includes extensively the voice of the earlier majority in the landmark *Sony* case, which – not coincidentally – also included O'Connor and Stevens. But also the reverse happened in *Grokster*. Justices Ginsburg, Kennedy and Chief Justice Rehnquist used *Grokster* to reintroduce the earlier dissenting voices in *Sony*, which Rehnquist had been a part of.[145] Such positive references to precedents

[144] *See* Jeffrey L. Dunoff & Mark A. Pollack, *supra* note 19 (discussing how dissents do not, by themselves, reduce an international court's legitimacy, while the pattern of the dissent is relevant for legitimacy).
[145] *Sony*, *supra* note 102.

of the same judge(s) are as if speaking in the judge's own, personal voice, but in an "institutionally reinforced" manner. Precedents thus allow the judges to engage in discourses with voices that connect cases and cross time.

VI. CONCLUSIONS - ASSESSING COURTS' LEGITIMACY THROUGH COMPARATIVE JUDICIAL DISCOURSE ANALYSIS

Courts are increasingly used to resolve societal value conflicts underpinning the law. In different legal cultures and jurisdictions, courts approach their discursive tasks in a variety of ways depending, for example, on epistemological and institutional limitations on their discursive freedom.

A. THE METHOD OF COMPARATIVE JUDICIAL DISCOURSE ANALYSIS IN CRITICAL LEGAL RESEARCH

We argued that drawing from comparative judicial decisions by using discourse analytical method could facilitate a critical distance from one's own legal culture and its normalized discursive practices. The method we develop could in theory also be used to critique any foreign courts' discursive practices, but this could easily overlook legal cultural and institutional limitations the evaluator may not be familiar with. What is deemed persuasive will vary depending on the legal culture in question. Moreover, institutional factors – such as the specificities of the preliminary ruling procedure in the European Union (EU), the limitations of the European Convention of Human Rights (ECHR) as the primary authoritative legal source in ECtHR cases, the type of legal proceedings (civil, administrative, criminal, constitutional), the arguments presented by the parties before courts, and simply the contents of the applicable laws – often limit the argumentative freedom of the court and thus the discursive contents of the judgments. Such legal cultural and institutional factors can be taken into account especially when the critical gaze is directed at one's home jurisdiction and courts. In this situation, foreign judgments can suggest alternative voices, framings, values and interests, filtered through the reality check of the familiar legal culture and familiar institutional context.

B. A COMPARATIVE JUDICIAL DISCOURSE ANALYSIS OF THE PIRATE BAY (TPB) CASE LAW

To develop and test the method of comparative judicial discourse analysis, we chose cases that were as similar as possible in terms of the legal issues at dispute:

P2P "The Pirate Bay" cases in different jurisdictions across the world. These TPB cases have all dealt with the protection of copyright holder's proprietary rights and the liability of online intermediaries in P2P online content sharing systems. Copyright protection is in these cases pitched against the P2P file sharing platform's right to innovate and offer services, the content users' freedom of expression and information, and the Internet service provider's right to conduct business. Rather than subjecting the content of these decisions to a legal dogmatic analysis, we used the jurisprudence as a framework and material to engage in an analysis of the courts' voices, discourses, and frames. "The Pirate Bay" cases thus allowed us to explore in a comparative fashion how various courts frame and argue their decisions and thereby affect the throughput legitimacy of their judgments and, ultimately, of the courts themselves as institutions.

Our analysis of the five courts' judicial discourses in the TPB decisions revealed that the courts built authority into their argumentation by introducing multiple voices. The courts' own hegemonic voices were complemented by those of the parties to the case (copyright holders, governments and, albeit rarely, the TPB) and others (legislation, experts) to justify the courts' decisions. The voice of precedents was pronounced, unsurprisingly, in common law courts and in cases where the precedent directly supported the decision taken. Precedents were also a means to 'institutionally reinforce' the judge(s)' own voice, as some of the precedents referred back to a decision by the same judge, even by name. The strong protection of copyright against infringements dominated the discourses, while balancing, freedom of expression and innovation were only partially present. Importantly, the courts only rarely engaged the voice of the defendants (P2P file sharing platforms), and almost exclusively to the defendants' disadvantage. Voices representing alternative values as counterarguments were rarely present in the courts' decisions. This is striking, because the fundamental rights and values on both sides were usually at stake. The findings are problematic because they show patterns that could undermine the courts' throughput legitimacy. We also found that in the analyzed cases the courts engaged in explicit balancing (proportionality) analysis only when no other method of decision-making was available. The exception was the *Kolmisoppi* judgment of the European Court of Human Rights, which included a balancing test on interference with freedom of expression. Yet even this case was limited by the broad discretion of the Council's member states, as the case did not concern political expression, which would have merited more stringent protection.

In other cases, the courts preferred a discussion based on specific legal provisions (e.g. what constitutes communication to the public) and technical thresholds (e.g. when is a product capable of commercially significant non-infringing uses) rather than the voice of the underlying fundamental rights and values. In *Brein*, for example, the ECJ avoided an open proportionality analysis and decided the case through the initial selection of a narrow technical copyright concept – without discussing any alternatives or problems inherent in the selected frame. Perhaps the ECJ tried to maintain its legitimacy by portraying itself as a non-political actor; it was not willing to create a doctrine of secondary infringement without legislative support nor to recognize any freedom of expression rights or innovation-related protectable interests on the side of 'pirates' and weigh these with the countervailing interests of copyright owners.

However, we argue that such an approach may not be conducive to promoting the court's legitimacy. The *Brein*-judgment of the ECJ is not consistent with the Court's recent trend to increasingly use fundamental rights proportionality in its copyright case law.[146] It is also in tension with the ECtHR's *Kolmisoppi* judgment, which recognized the meaning of TPB platform for freedom of expression. The ECJ's original framing decision hid this aspect of the case under a superficially neutral syllogistic analysis of the specific copyright concept of communication to the public. This is one insight that a comparative judicial discourse analysis can provide for a critique of the ECJ's *Brein* judgment. Since the ECHR is part of the same system and since the AG considered fundamental rights, we consider it possible that the ECJ could have approached and discussed it from this perspective. The occasional practice of the ECJ to reformulate the questions in the preliminary rulings demonstrates that it could have reframed the case at hand.

The US Supreme Court case *Grokster* with its concurring opinions were an example of rich insights on diverse societal values not limited to fundamental rights, in particular on interests related to innovation. The realization that there was no similar framing in the ECJ's *Brein* decision is another contribution of our discourse analysis. As recital 4 of the Copyright Directive[147] refers to the need to interpret copyright so as to secure investments in innovation, network infrastructure and information technology, an argument similar to that in *Grokster* was available for the ECJ. However, the ECJ chose to exclude such innovation framing at the expense of "high level of protection" of copyright.

Compared to the ECJ judgment in *Brein*, the US Supreme Court also brought forth the voices that were contrary to its own position, which improved the neutrality, transparency and comprehensiveness of the judgment as elements of legitimacy. A discourse analytical approach helps reveal and understand these patterns that are

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[146] *Cf., e.g.*, The *Foreningen af danske Videogramdistributører v Laserdisken* [1998] ECR I-5171 with Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España* SAU Case C-275/06, 2008 E.C.R. I-271.

[147] Directive (2001/19) 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.

seminal to the court's legitimacy.[148]

C. THE INSTITUTIONAL AND CULTURAL BOUNDARIES OF THE COURTS' DISCOURSES

The institutional structure or practices of the Court (such as collegiality and dissent) may influence the discourses.[149] The number of judges sitting in the court, as well as the court's collegiality (*i.e.*, the (in)visibility of the concurring and dissenting opinions), affect the diversity of discourses in the decision. However, the relationship between the institutional setup and the narrative is less straightforward than one might expect.

For example, a short syllogistic decision may seem more legitimate for some legal cultures, contexts and individuals because it is clear and unambiguous.[150] With the evaporation of courts' formal authority and demands for argumentative authority, we would however think that this is decreasingly the case. Judgments that introduce multiple discourses may offer some of the advantages of judgments with dissents, notably transparency, comprehensiveness, depth and a sense of equality in the inclusion of all viewpoints.[151] This is noteworthy in cases where dissenting opinions are institutionally or politically not available, such as in the ECJ.

Our findings are aligned with the recent calls for "more explanation – more reasoning in the judgments" of the ECJ.[152] The jurisprudence of ECJ stood out in our research as the least communicative[153], while the lack of legitimacy is a major issue in the EU today: "the law is not being internalized well in the Member States"[154]. More detailed and reasoned legal definitions would help in this respect[155], but we also believe that decisions should better reflect on how law is approached. To that end, it would be useful to analyze how different courts' discourses vary beyond the small, exploratory sample of cases scrutinized here. How do judgments as parts of different legal systems convey the reconciliation of values that they engage in and that leads

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[148] *See* Dunoff & Pollack, *supra* note 19.
[149] *Id.* at 340.
[150] *Id.* at 377–78.
[151] *Id.* at 380–81.
[152] *See, e.g.*, GARETH T. DAVIES, *Between Market Access & Discrimination: Free Movement as a Right to Fair Conditions of Competition* in *Research Handbook on the Law of the EU's Internal Market* 13, 27 (PANAGIOTIS DELIMATSIS & NILS WAHL EDS., 2017).
[153] For a similar conclusion, see, e.g., ALEKSANDAR TRKLJA & KAREN MCAULIFFE, *Formulaic Metadiscursive Signalling Devices in Judgments of The Court of Justice of The European Union*, 26 INT'L J. SPEECH LANGUAGE & L.21, 49 (2019).
[154] *Id.* at 28.
[155] *Id.* at.

to a specific outcome? The question is only emphasized by the study of Favale et al[156], which reveals how different EU Member State governments may attempt to strategically steer the ECJ's case law on copyright.

Further, could courts better learn from each other's discursive practices while remaining within the boundaries of their own legal rules and traditions? The judges in the researched cases were comfortable using the voices of courts from other jurisdictions. Faced with the global challenge of copyright online, legitimacy was sought through a strong copyright protection discourse that also crossed borders.

D. JUDICIAL DISCURSIVENESS IN A CONTEXT OF GLOBAL CONTESTATIONS

An international dialogue with counterarguments and alternative value considerations can clearly have a positive impact on the throughput legitimacy of decisions. The legitimacy of the judiciary and of the judicial system as a whole would be improved, as the authority of the courts' decisions would increase. This would in turn provide an important bulwark in an era of populism. A very promising area of application is the hundreds of climate litigation cases that are unfolding around the world. Courts have become the institution for assessing the values of the human right to a clean and healthy environment, private and family life, economic development and national sovereignty in the absence of adequate regulation. Even the right to a fair trial is invoked, stressing the courts' legitimacy and the prospects of comparative judicial discourse analysis.[157]

The need for a discursive approach is also underlined by the increasing polycentricity of the international regimes such as the Internet: there are multiple sources of values and rules, and multiple viewpoints from which to apply them. Taking all relevant voices into account in a transparent and comprehensive manner would enhance equity, which is a goal in most, if not all, legal systems. Many of the courts we analyzed cross-referenced each other's positions rather liberally. Advocate General's Øe's references to UK and US case law in the subsequent *Google* case[158] in the ECJ illustrate this phenomenon well. Similar cross-references have been made on this topic by judges in the UK and Australia, for example.[159] Comparative judicial

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[156] MARCELLA FAVALE, MARTIN KRETSCHMER & PAUL L. C. TORREMANS, *Who Is Steering the Jurisprudence of the European Court of Justice? The Influence of Member State Submissions on Copyright Law*, 83 MOD. L. REV. 831 (2020).

[157] *See Verein Klimaseniorinnen Schweiz*, supra note 2.

[158] Joined cases C-682/18 and C-683/18, *Frank Peterson v. Google LLC & Others*, ECLI:EU:C:2021:586, 119 (June 22, 2021).

[159] For example, precedents from other Commonwealth jurisdictions, especially Australia or New Zealand, could be used to support a point before U.K. courts, and vice versa. See Zenon Bankowski, D. Neil MacCormick & Geoffrey Marshall, *Precedent in the United Kingdom*, in *INTERPRETING*

discourse analysis, which we tested here in an exploratory way on a narrowly defined topic, thus has real-life counterparts in case law. Many societal challenges are global in nature, which renders the courts' positions more influential transnationally. This exacerbates however also the impact of any possible biases in the judicial decisions. Dialogue between the relevant voices in the cases would make cross-references more transparent, and the background values, interests and uncertainties more apparent, thus making them more legitimate as sources of transnational law.

PRECEDENTS: A COMPARATIVE STUDY 315, 327 (Neil D. MacCormick & Robert S. Summers eds., 2016).