

Title: Has the CJEU been successful in balancing and consistently applying the economic right of "communication to the public"?

ABSTRACT:

While the term selected to describe the legal field, copyright, reveal what has been the most important avenue for economic exploitation of copyrightable works, new technological developments may indicate a shift. Modern communication technologies enable us to create and disseminate works at a speed and a cost unheard of a few centuries ago. These technological methods of dissemination have started to play an indispensable role in our society, democratic process, and for businesses and innovation alike. However, rightsholders may naturally feel under siege through the ease with which we may share their creations. The CJEU responded by applying the concept of "communication" broadly, continuously expanding its scope. While acknowledging the need for balance, the CJEU has introduced additional assessments to mitigate the consequences of the initially broad scope. These additions have resulted in that finding a "communication" directed at a "public" is not necessarily a "communication to the public". It must be assessed whether the communication is to a "new public", and if so, the knowledge of the communicator. Furthermore, it might be necessary to compare the different technical methods used to disseminate the copyrightable work. Not only are these additional assessments highly multifaceted, but they do not strike the appropriate balance between the various rights, interests and objectives involved, with uncertainty being the only consistent theme in their application.

The CJEU has not succeeded in balancing and consistently applying the economic right of "communication to the public". A narrower approach to "communication", accompanied by the removal of the additional assessments, is preferable to strike an appropriate balance between the various rights, interests and objectives. The rightsholders would be sufficiently protected through the application of the narrower but more comprehensible economic right, which could be combined with alternative avenues of redress, like unfair competition and secondary liability, albeit unharmonised.

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1. Introduction

1.1 Introducing the topic

This dissertation will argue that the Court of Justice of the European Union (CJEU) has been unsuccessful in balancing and consistently applying the economic right of "communication to the public".

It will be concluded that a less ambitious approach to the term "communication" has to be adopted, accompanied by the removal of the complex assessments introduced by the CJEU which has caused much of the current uncertainty and imbalance. Furthermore, that reliance on other concepts, like unfair competition and secondary liability, is equipped to contribute in creating the needed clarity, while at the same time striking a more appropriate balance between the conflicting rights, interests and objectives involved.

To understand the uncertainty which the CJEU has created it is first necessary to examine the technological development which has enabled the dissemination of copyrightable works regardless of both the recipient's physical location and the tangible manifestation of the work, and what approach the CJEU adopted as a response.

While technical developments like terrestrial broadcast and cable¹ allowed private individuals to *receive* information across vast distances, later developments allowed them also to *share*. Especially central in that shift was the advancement of the "network of networks" eventually called the internet.² The internet and development of hardware that is available to the masses at a relatively low cost, like the personal computer, has allowed almost everyone to partake in both the creation and the dissemination of copyrightable works, no longer reserving the process to those who have made a substantial investment into obtaining the necessary infrastructure.³ Moreover, the creation of intermediaries like YouTube, Twitch, Twitter and Facebook facilitate the efficient sharing and re-sharing at a speed and at a cost which was unheard of a few centuries ago. The World Wide Web (WWW), which uses URL's to identify the web resources and documents in the system, allow us to share links and websites through

¹ Makeen Fouad Makeen, "Copyright in a Global Information Society. The scope of copyright protection under international, US UK and French law" (Kluwer law international, 2000) 29

² Ibid 281-282

³ Investment was the rationale behind some related rights; WIPO, "Understanding Copyright and Related Rights" (second edition, WIPO, 2016) page 28. Accessible: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf

electronic communication systems efficiently.⁴ The open and free exchange of ideas and information was expressed as a central goal for the pioneers of the internet, which was to create a "*free and unfettered cyber world*".⁵ With the low threshold established within the European Union (EU) before a creation receives copyright protection, these technologies may quickly be used to transmit copyrightable work.⁶

The CJEU has responded to these developments by taking an extremely broad approach to the concept of "communication", interpreting the term in light of only one side of the equation, which is to establish a high level of protection for rightsholders.⁷

However, disallowing all acts which fall within the ambit of the broad construction of "communication" to the "public" would be detrimental to the much of the discourse occurring daily through these channels of communication.⁸ Hence, simultaneously as adopting an all-encompassing definition of "communication", the CJEU introduced other mechanisms to try to create balance, but these have achieved the polar opposite. The current legal situation is that a highly complex multifaceted legal assessment will have to be undertaken, even by a private individual doing something as mundane as linking to a copyrightable work through his/her social media account.

To understand how the CJEU has been unsuccessful in clarifying and balancing the rights, objectives and values which the economic right must be applied in accordance with⁹ these must be identified.

1.2 Rights and values which must be appropriately balanced

A fair balance has to be achieved between conflicting fundamental rights.¹⁰ This balance must be made at all stages of the legislative and judicial process, ensuring proportionality.¹¹

⁴ Richard Horvath, "Differences Between The Internet and World Wide Web", (The Digital, 2006). Accessible: <https://www.theedigital.com/blog/differences-between-the-internet-and-world-wide-web>

⁵ Frederick Mostert "The internet: regulators struggle to balance freedom with risk" (Financial Times, 2019). Accessible: <https://www.ft.com/content/e49c39e6-967d-11e9-8cfb-30c211dcd229>

⁶ C-5/08, infopaq international, EU:C:2009:465 (infopaq)

⁷ Directive 2001/29/EC, OJ L167/10, Recital 4 and 9 (InfoSoc)

⁸ Miquel Peguera "hyperlinking under the lens of the revamped right of communication to the public". (Computer law & Security Review 2018) page 1099. Accessible: <https://www.sciencedirect.com/science/article/pii/S0267364918302231>

⁹ C-306/06, SGAE, EU:C:2006:764, para 34

¹⁰ C-275/06, Promusciae, EU:C:2008:54 paras 68-70

¹¹ Remy Chavannes "Communication to the public in Europe" (Fair balance, 2018) Accessible: <https://blog.chavannes.net/2018/10/communication-to-the-public-in-europe/#post-967-footnote-ref-27>

As identified by the CJEU, a prominent conflict when regulating "communication to the public" is between intellectual property and freedom of expression.¹² These communication technologies have, as expressed in the recitals of the Conditional Access Directive, a central role *"to the full effectiveness of freedom of expression a fundamental right"*.¹³ Both perspectives are recognised as fundamental rights within the EU Charter of Fundamental Rights (CFR)¹⁴ and the European Convention on Human Rights (ECHR).¹⁵

However, the balance is more complicated and delicate. Adequate intellectual property protection incentivises behaviour, which is fundamental to freedom of expression and access to information, like journalism.¹⁶ Therefore, the two rights do not always conflict with each other. Another fundamental right which may be affected is the right to conduct business, recognised in CFR article 16, which the CJEU has used to set boundaries as to what obligations may be placed on businesses, and more specifically on intermediaries.¹⁷

Furthermore, the balance is made additionally complicated through the existence of other relevant principles and objectives. One of these is the objective to ensure the development of information society services¹⁸ and furthermore to stimulate European industry and innovation.¹⁹ Additionally, the interests of the users of copyrightable works must also be taken into account²⁰ as well as ensuring adherence to the EU's international obligations.²¹

A fundamental component of the harmonisation effort of "communication to the public" was to create a legal regime which eliminated uncertainties.²² Legal certainty has a close relationship with the efficient application of other rights and interest, for those cannot be exercised adequately when there is a lack of confidence as to the rule of law. For how can information society services and European industry develop efficiently when there is uncertainty as to the very legal framework in which they are operating in? The whole premise of an internal market rests on consistency to ensure certainty.²³ Legal certainty has naturally

¹² C-160/15, GSmedia, EU:C:2016:644, para 31

¹³ Directive 98/84/EC, OJ L320/54, recital 2 (Conditional Access Directive)

¹⁴ Charter of Fundamental Rights of European Union (2000/C 364/01) OJ C326/391, article 17(2) and 11

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 10 and Protocol No. 1 article 1

¹⁶ Directive 2019/790, OJ L130/92, recital 54 (DSM)

¹⁷ C-360/10, SABAM, EU:C:2012:85, paras 46-47

¹⁸ InfoSoc (n 7) Recital 2 and 4

¹⁹ Ibid recital 2, 4 and 5

²⁰ Ibid recital 31

²¹ Ibid recital 15

²² Ibid recital 4 and 25

²³ Council Directive 93/83/EEC, OJ L248/15, recital 7 and 8 (SatCab). InfoSoc (n 7) recital 7

been recognised as a central principle within EU law,²⁴ while in legal philosophy it is viewed as a fundamental pillar.²⁵ Uncertainty as to the legality of acts which are so essential for both the sharing and access to information²⁶ may cause a notable chilling effect.²⁷

The more precise involvement of these rights, interests and objectives will be explored further throughout the dissertation.

2. Background to communication to the public

2.1 Harmonisation by the EU

The harmonisation efforts by the EU on "communication to the public" has occurred in different stages.

In 1992 through the Rental and Lending Rights Directive (RRD), a part of the communication to the public right, for related rights, was harmonised, with the Directive being amended in 2006.²⁸

In 1993 the Satellite and Cable Directive (SatCab) harmonised the exclusive right to authorise satellite broadcasting.²⁹ A new Directive from 2019 on television and radio programmes (TRD)³⁰ partially amends and supplements the more procedural aspects of SatCab. Inter alia, it extends the country of origin principle to include certain ancillary online services by the broadcasters³¹ and makes the current procedural rules for cable retransmission more generally applicable.³² These more procedural aspects of the right will not be of focus in the dissertation.

²⁴ C-314/12, UPC Telekabel Wien, EU:C:2014:192 para 54

²⁵ Heather Leawood, "Gustav Radbruch: An Extraordinary Legal Philosopher". (Volum 2, Washington University Journal of Law & Policy 2000) page 493. Accessible: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1516&context=law_journal_law_policy

²⁶ Directive 98/84/EC (n 13) recital 2

²⁷ Judith Townend, "freedom of expression and the chilling effect" (The Routledge Companion to Media and Human Rights 2017) page 3 of chapter 7. Accessible: https://www.academia.edu/34350408/Freedom_of_Expression_and_the_Chilling_Effect

²⁸ Directive 2006/115/EC OJ L376/28, article 8 (RRD)

²⁹ SatCab (n 23) article 2

³⁰ Directive (EU) 2019/789 OJ L130/82

³¹ Ibid article 3

³² Ibid article 4 and 7

In 1996 the Database Directive (DD) was adopted, which grants a subject matter specific exclusive economic right of communication to the public for both authorial works³³ and a right of "re-utilization" for sui generis databases.³⁴

In 2001 a general communication to the public right for authorial works, the Information Society Directive (InfoSoc), was introduced.³⁵ As well as further harmonisation for related rights.³⁶

In 2019 the Directive on Copyright in the Digital Single Market (DSM)³⁷ was adopted, which influences the right of communication to the public in two ways that will be addressed. First, a related right for publishers of press publications is added to the InfoSoc article 3.2, although with specific carve-outs.³⁸ Second, the introduction of new obligations on certain intermediaries.³⁹

A sentiment which has been explicitly expressed by the CJEU is that to ensure a coherent approach to the concept of "communication to the public" it should be given the same understand across the various directives.⁴⁰ The uniform approach was early adopted between SatCab and InfoSoc.⁴¹

While on the other hand, the relationship between the RRD and InfoSoc has been more troublesome. In SCF, the CJEU stated that the concept must be interpreted independently, seeing as the objectives and context are different.⁴² However, SCF was reversed by a Grand Chamber decision, stating that "*there is no evidence that the EU legislature wished to confer on the concept of 'communication to the public' a different meaning (..)*".⁴³ Subsequent case law has confirmed the approach of the Grand Chamber.⁴⁴

Therefore, although there will be differences,⁴⁵ the concept of "communication to the public" itself with the various additional assessments introduced by the CJEU, which will be

³³ Directive 96/9/EC, OJ L77/20, Article 5.d (DD)

³⁴ Ibid article 7.2.b

³⁵ InfoSoc (n 7) article 3

³⁶ Ibid article 3.2.

³⁷ DSM (n 16)

³⁸ Ibid article 15.1 and recital 55 and 57

³⁹ Ibid, article 17

⁴⁰ C-403/08, Football Association Premier League and Others, EU:C:2011:631, (FAPL), para 188

⁴¹ C-431/09, Airfield and Canal Digitaal, EU:C:2011:648, para 44

⁴² C-135/10, SCF, EU:C:2012:140, paras 74-76

⁴³ C-117/15, Reha training, EU:C:2016:379, para 31

⁴⁴ C-641/15 Verwertungsgesellschaft Rundfunk EU:C:2017:131 para 19

⁴⁵ Point 2.2

identified and criticised, is applicable and relevant to all Directives, with one exception. This exception, as will be made clear in point 5.2, is DSM article 17.

Nonetheless, the harmonisation efforts are without prejudice to the existence of moral rights. Furthermore, the exceptions and limitations which may be applied to the right are not fully harmonised,⁴⁶ which ensures that the demarcation between those rights which are harmonised and those which are not is crucial to make.⁴⁷

2.2 The two dimensions of communication to the public

The right of communication to the public within the EU can be separated into two dimensions.

The first dimension is the simultaneous dissemination of a copyrightable work to a public which is not present where the communication originates.⁴⁸

The second dimension is the dissemination to a public which is not present where the communication originates *and* which may access the communication at different times,⁴⁹ so-called on-demand transmission.⁵⁰ Hence, a work is made available.⁵¹

For related rights, the first dimension is regulated in the RRD,⁵² while the second dimension, on-demand, is located in InfoSoc.⁵³ Although the EU protects both dimensions, with the rightsholder being protected regardless of whether it is a simultaneous or on-demand communication, separation is necessary:

First, different prerequisites have to be met before the dimensions are applicable for certain related rights. RRD article 8.3, providing a right of simultaneous transmission, is only applicable when there has been charged a "*payment of an entrance fee*". However, in InfoSoc article 3.2.d the same beneficiaries, the broadcasts organisations, are granted the right of making available regardless of whether a payment has been sought at the entrance.

⁴⁶ Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson "intellectual property law" (fifth edition, Oxford University Press, 2018) (Bently) 226-227

⁴⁷ Point 3.1

⁴⁸ InfoSoc (n 7) recital 23

⁴⁹ Ibid recitals 25-26

⁵⁰ Ibid recital 25

⁵¹ Ibid recital 24. Tanya Aplin and Jennifer Davis, "Intellectual Property Law", (Third edition, Oxford University Press, 2017), page 189.

⁵² (n 28), article 8

⁵³ (n 7), article 3.2

Second, while RRD article 8.2 provides a right of equitable remuneration, InfoSoc gives the same beneficiaries an exclusive economic right of making available. The separation correlates⁵⁴ with the approach taken by the Rome Convention⁵⁵ and the WIPO Performers and Phonograms Treaty (WPPT).⁵⁶ Although the EU is not a member of the Rome Convention, it has an indirect effect through article 1.1 of the WPPT, as stated by CJEU,⁵⁷ as opposed to being directly binding by the Treaty on the Functioning of the European Union (TFEU) article 216.2.⁵⁸

Third, the new related right for press publishers is added to article 3.2 but not RRD article 8.⁵⁹ Hence, only receiving the making available dimension of the right.

Unfortunately, the CJEU has not been consistent in their terminology.⁶⁰ For example, both ITV⁶¹ and SGAE⁶² concerned the simultaneous retransmission of terrestrial broadcast, but the CJEU mistakenly referred to it as making available.⁶³ Although the separation did not influence the result in those cases, it made a member state court seemingly confused in a situation where the separation did matter. The Corte d'appello di Torino asked how article 3.2.b should be understood in light of the factual circumstances. The case was, however, about simultaneous broadcasting, not on-demand/making available. The correct approach would, therefore, be RRD article 8.2. The CJEU identified the mistake and reformulated the question, applying article 8.2 instead of InfoSoc 3.2.⁶⁴

The confusion may be attributed to the unclear manner in which the CJEU expresses themselves, creating uncertainty for all parties involved.

Another potential element of confusion is its relationship with public performance.

⁵⁴ Bently (n 46) 176

⁵⁵ Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations (1961) article 12

⁵⁶ WIPO Performances and Phonograms Treaty (1996) (WPPT) article 10

⁵⁷ SCF (n 42) paras 47-50

⁵⁸ Treaty on the Functioning of the European Union, OJ C326/47, 2007 (TFEU)

⁵⁹ DSM (n 16) article 15.1

⁶⁰ Justin Ko "The Right of Communication to the Public in EU Copyright Law" (Heart Publishing, 2019) 84

⁶¹ C-607/11, ITV Broadcasting and Others, EU:C:2013:147, paras 25-26

⁶² SGAE (n 9) para 32

⁶³ Ibid para 39. ITV (n 61) para 25

⁶⁴ SCF (n 42) paras 60-64

3 Communication to the public

3.1 The scope of communication to the public and public performance

There are generally two economic rights concerned with the dissemination of copyrightable work in a non-material form, the communication to the public and public performance.

Although with one exception,⁶⁵ public performance is unharmonised in EU.⁶⁶

A contested area of separation is the reception in public situation of authorial works,⁶⁷ which is when a transmission is received and subsequently exhibited/transmitted to the public at the point of reception. The central question within the EU becomes whether the public is "*where the communication originates*".⁶⁸

It seems natural to categorise reception in public as a public performance. The "communication" which might make the defendant liable is the act reception, the recipient of the said communication, the "public", are all gathered. Hence, the public is gathered where the relevant communication originates. The Advocate-General advocated this approach in FAPL,⁶⁹ and the UK has legislated accordingly.⁷⁰

However, the CJEU concluded differently. In FAPL the CJEU notes that the communication in this situation originates at "*the place of the (..) performance which is broadcast*",⁷¹ as opposed to where it is received. Subsequent judgements follow the same approach.⁷²

The CJEU reach this conclusion by interpreting⁷³ article 11bis.1.iii in the Berne Convention.⁷⁴ However, the CJEU misinterpreted its background, as pointed out in the literature.⁷⁵ The misinterpretation becomes especially evident when analysing the WIPO Copyright Treaty (WCT).⁷⁶ The WCT supplemented the Berne convention in numerous ways, including the introduction of the making available dimension.⁷⁷ Therefore, the treaty chose to mention all the articles on communication to the public already in existence in

⁶⁵ DD (n 33) article 5.d

⁶⁶ C-283/10, *Circul Globus Bucuresti*, EU:C:2011:772, para 35

⁶⁷ *Makeen* (n 1) 75-77

⁶⁸ *InfoSoc* (n 7) recital 23

⁶⁹ FAPL (n 40) Opinion of AG Kokott, para 147

⁷⁰ Copyright, Design and Patents Act 1988 (CDPA) s 19.3

⁷¹ FAPL (n 40) para 203

⁷² For example, *Reha Training* (n 43)

⁷³ FAPL (n 40) para 192

⁷⁴ Berne Convention for the Protection of Literary and Artistic Works (September 28, 1979)

⁷⁵ *Aplin and Davis* (n 51) 194. *Makeen* (n 1) 75-77

⁷⁶ WIPO Copyright Treaty (1996)

⁷⁷ *Aplin and Davis* (n 51) 189

Berne. When listing these, article 11bis.1.iii on reception in public was not referenced, apparently not treating it as a question of communication to the public.⁷⁸ Although, the scope is easily misunderstood seeing as WIPO themselves, albeit before WCT, seemed to have assessed reception in public as communication to the public in one guide,⁷⁹ while in another guide WIPO categorises it as a public performance.⁸⁰

That the expansive approach⁸¹ has consistently been applied, even though its origins were based on a misinterpretation, could be attributed to the fact that classifying a particular situation as public performance results in the matter being outside EU law, and divergences are possible, both regarding how the concept is defined and what exceptions and limitations apply.⁸² As will be demonstrated, this is not the only time the CJEU adopts a broad approach to the harmonised concepts to address questions which would otherwise fall outside their competence.⁸³

3.2 Understanding “communication”

3.2.1 No definition in the Directives

The communication to the public right has been harmonised across various directives, but none of them has attempted to define more precisely when a particular act constitutes a “communication” nor when the recipients in question form a “public”. Therefore, the CJEU had to clarify its content, and as will be demonstrated, the clarification has been less than optimal. The CJEU has made it clear that there are numerous criteria involved, of an interdependent nature, and their relationship may vary in different situations.⁸⁴

The first central prerequisite which will be addressed is how to assess whether the act committed is a “communication”.

⁷⁸ Tanya Aplin, "Reproduction and Communication to the Public Rights in EU Copyright Law: FAPL v QC Leisure", (King's Law Journal, 22(1) 2011) page 11. Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2436975 (2014)

⁷⁹ WIPO, "WIPO glossary of terms of the law of copyright and neighbouring rights" (WIPO, 1983) page 42 and 44. Accessible: ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_828efp.pdf

⁸⁰ WIPO, "Guide to the Berne, Paris act 1971" (WIPO 1978) page 69. Accessible: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_615.pdf. Makeen (n 1) 77

⁸¹ Bently (n 46) 158

⁸² InfoSoc (n 7) article 5.3

⁸³ Point 5.

⁸⁴ C-610/15, Stichting Brein, EU:C:2017:456 (Ziggo) para 25

3.2.2 Transmission or intervention to give access?

The CJEU has been inconsistent in their language when defining what acts may constitute a "communication". Cases like FAPL,⁸⁵ Circul Globus Bucuresti,⁸⁶ Reha,⁸⁷ and even the recent judgement VCAST,⁸⁸ indicate that there needs to be a transmission, which has been described in the literature as a *"technical act of emission (...) giving rise to the potential reception to the work by the public"*.⁸⁹ Requiring a transmission seems to be the envisaged scope of the term, as expressed by InfoSoc recital 23. The UK has also legislated on the premise that "communication" is synonymous with "electronic transmission", both for simultaneous and on-demand communications.⁹⁰

Requiring a transmission would exclude pages like ThePirateBay, which merely facilitate and organise the connection between "seeders and "leechers" in a peer-to-peer distribution model, without transmitting the work themselves.⁹¹ Similarly, it would exclude hyperlinking⁹² or adding unauthorised streams on a multimedia device.⁹³ However, all of these examples were found to constitute a "communication". With the development in case law, commentators have generally concluded that there is no longer a requirement of transmission.⁹⁴

The term has instead been interpreted to require an intervention to give access to the work.⁹⁵

3.2.3 Intervention

3.2.3.1 Making access less difficult

In SGAE the CJEU expressed the requirement as: *"in the absence of that intervention, its customers (...) would not (...) be able to enjoy the (...) work"*.⁹⁶ Furthermore, it must go beyond the *"mere provision of physical facilities"*.⁹⁷

⁸⁵ FAPL (n 40) para 190

⁸⁶ (n 66), para 40

⁸⁷ Reha Training (n 43) para 38

⁸⁸ C-256/16, VCAST, EU:C:2017:913, para 40

⁸⁹ European Copyright Society, "Opinion on the Reference to the CJEU in Case C-466/12 Svensson", para 10 Accessible: <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-C-46612-svensson/>

⁹⁰ CDPA (n 79) s 20.2

⁹¹ Ziggo (n 84)

⁹² Gaetano Dimita, "The WIPO right of making available" in Torremans (ed), Research Handbook on Copyright law (Second edition, Edward Elgar Publishing Limited, 2017) page 150

⁹³ C-527/15, Stichting Brein v Jack Frederik Wullems EU:C2017:300 (Filmspeler)

⁹⁴ Torremans (ed) (n 92) 92. Bently (n 46) 162. Eleonora Rosati, "The CJEU Pirate Bay judgment and its impact on the liability of online platforms" (European Intellectual Property Review 2017) page 3-4 Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591

⁹⁵ Bently (n 46) 162

However, later the CJEU altered their formulation to instead requiring the intervention to make access to the work less difficult,⁹⁸ and that without the intervention access would be "*more complex*".⁹⁹ Moreover, Advocate-general Szpuner mentioned the analogy from Justice Cowdroy which is that ThePirateBay is a treasure map,¹⁰⁰ given the conclusion of AG Szpunar, he seemingly found the act of being the treasure map sufficient in order to constitute a "communication".¹⁰¹

There has been push-back and attempts to reverse the extensive scope established in the jurisprudence. In GSmedia,¹⁰² the Advocate-General Wathelet argued that CJEU should revert to requiring the intervention to be indispensable.¹⁰³ The Commission also argued for a more restrictive approach to hyperlink in their submission, as they had previously,¹⁰⁴ but did not persuade the CJEU.¹⁰⁵

Concerning the requirement that the act must go beyond the mere provision of physical facilities, the threshold seems to be quite low. With CD players and CDs being available in hotel rooms was seemingly sufficient.¹⁰⁶

Additionally, it is no requirement that the intervention is successful. Only that it makes it *possible* to get access.¹⁰⁷ The WCT appears to follow a similar approach in article 8 when using the term "may access".¹⁰⁸ The Berne convention also follows this approach, with emission being the central question not whether the signals are received.¹⁰⁹

Summarised, there is no requirement that the intervention is indispensable nor a transmission, leading the CJEU to conclude that many acts, both in the digital¹¹⁰ and analogue context,¹¹¹ constitutes a "communication". The basis for this increasingly expansive approach is a purposive interpretation, an interpretation which only takes into account one side of the

⁹⁶ SGAE (n 9) para 42

⁹⁷ InfoSoc (n 7) recital 27

⁹⁸ Ziggo (n 84) para 26

⁹⁹ Ibid 36.

¹⁰⁰ Ibid, Opinion of AG Szpunar para 1

¹⁰¹ Ibid para 54

¹⁰² (n 12)

¹⁰³ Ibid, opinion of AG Wathelet paras 59-61

¹⁰⁴ Ibid, opinion of AG Wathelet para 25

¹⁰⁵ GSmedia (n 12) para 55

¹⁰⁶ C-162/10 Phonographic Performance (Ireland), EU:C:2012:141 (PPL) paras 67-69

¹⁰⁷ Peguera (n 8) 1102. SGAE (n 9) para 43

¹⁰⁸ (n 76) article 8

¹⁰⁹ WIPO Guide to the Berne Convention (n 80) 66.

¹¹⁰ C-466/12, Svensson and Others, EU:C:2014:76 (svensson)

¹¹¹ PPL (n 106)

equation, which is the need to ensure a high level of protection for rightsholders. To mention some of the cases where the CJEU has explicitly drawn on this objective when defining the term; SGAE,¹¹² FAPL,¹¹³ ITV,¹¹⁴ OSA,¹¹⁵ GSmedia,¹¹⁶ Filmspeler¹¹⁷ and Ziggo.¹¹⁸

3.2.3.2 A requirement of knowledge?

The CJEU has used various formulations which indicate that knowledge of the intervention is required. One formulation is that the “*deliberate (..) intervention*”¹¹⁹, another is “*in full knowledge of the consequences of its action*”,¹²⁰ while in FAPL the CJEU notes that the intervention must be “*intentionally*”¹²¹ granting access to the broadcast in question.

Peguera argues that the knowledge element under "communication" is whether the intervention is purposeful, hence, that “*the user consciously performed the act of communication*”.¹²² Which he bases on an interpretation of the language in some of the cases, which use formulations like "deliberate" and "intentionally". Others have cited Peguera in agreement.¹²³

However, it's difficult to reconcile his interpretation with the wording used in some instances, where the CJEU seems to require knowledge about the *consequences* of the intervention.¹²⁴

Nevertheless, it is possible to reach the same conclusion as Peguera but through different reasoning. Concluding likewise but through an interpretation of the later development in the jurisprudence of a *second* knowledge element and their relationship. Therefore, further explanation will be provided after the assessment of the second knowledge component, in point 4.2.

It is concluded that all that is required is the intention of doing the intervention that grants access to the public.

¹¹² (n 9) para 36

¹¹³ (n 40) para 186

¹¹⁴ (n 61) para 20

¹¹⁵ C-351/12, OSA, EU:C:2014:110 Para 23

¹¹⁶ (n 12) paras 30 and 53

¹¹⁷ (n 93) para 27

¹¹⁸ (n 84) para 22.

¹¹⁹ Ziggo (n 84) para 26. SCF (n 42) para 94

¹²⁰ SGAE (n 9) para 42

¹²¹ FAPL (n 40) paras 195-196

¹²² Peguera (n 8) 1107

¹²³ Ko (n 60) 107

¹²⁴ SGAE (n 9) para 42

3.2.3.3 A requirement of profit?

Whether the intervention is commercially motivated has been deemed relevant when assessing "communication to the public". The commercial nature has also been taken into account when establishing a presumption of knowledge, as will be addressed later in point 3.4.2.5.

The CJEU has taken a varying view when assessing the significance of the act being committed for commercial purposes. In SCF the for-profit appears to be presented in a way which makes it seem to be a prerequisite to finding a "communication to the public".¹²⁵

However, in previous cases before SCF, it was merely treated as "not irrelevant".¹²⁶ Subsequent cases after SCF have reverted to treating it as a relevant factor, but not a prerequisite.¹²⁷ Peguera has pointed to how the CJEU has not been clear on whether it is a necessary condition.¹²⁸

A potential answer is found in the fact that, as previously mentioned,¹²⁹ the SCF had as a premise that RRD had to be interpreted differently than the InfoSoc. The CJEU states that the profit element must be all the more relevant in the case "*(..) equitable remuneration provided for in Article 8(2) (..) given its essentially financial*".¹³⁰ Hence, it was the particular commercial context of RRD that motivated the CJEU to emphasis the for-profit assessment.

As noted above,¹³¹ this premise is no longer applicable, seeing as the subsequent development has made it clear that the concept of "communication to the public" shall be interpreted identically across the relevant directives. Consequently, given the fact that the premise does no longer exists, the SCF should be ignored on this point.

Consequently, for-profit is relevant, but not a requirement, regardless of Directive.

But even if it's not a prerequisite, but merely a factor, how should one assess whether an act is for profit? As observed by others, what the term refers to is quite uncertain.¹³²

Commentators have questioned how the CJEU concluded that reception in public at a dentist

¹²⁵ (n 42) para 99

¹²⁶ FAPL (n 40) para 204

¹²⁷ For example, ITV (n 61) para 42 and Reha Training (n 43) para 49

¹²⁸ Peguera (n 8) 1102

¹²⁹ Point 2.1

¹³⁰ SCF (n 42) para 89

¹³¹ Point 2.1

¹³² Aplin and Davis (n 51) 198

was not for profit, but the same act at a rehabilitation clinic was.¹³³ More on general issues with the for-profit assessments in point 3.4.2.5.

3.3. Understanding “public”

None of the Directives defines the term "public". Therefore, jurisprudence will be the central source of interpretation. The Austrian government argued that "public" should be subject to a domestic interpretation. The CJEU rejected such a proposition, stating that a uniform understanding is essential.¹³⁴

The court has identified two cumulative requirements, one qualitative and one quantitative.

First, "public" refers to an *"indeterminate number of potential listeners"*,¹³⁵ meaning that they are *"persons in general"*.¹³⁶ Private groups are, therefore, excluded.¹³⁷

Second, the recipients must constitute a *"fairly large number of persons"*, described as a *"de minimis threshold", which excludes from the concept groups of persons which are too small, or insignificant"*.¹³⁸

When making the assessment above, three points are essential:

First, the recipients can be *potential* recipients.¹³⁹

Second, the evaluation is taken from a cumulative perspective.¹⁴⁰

Third, it is *"irrelevant whether the potential recipients access the communicated works through a one-to-one connection"*.¹⁴¹ In the extension of this, the private nature of the location of the recipients' physical location is also irrelevant.¹⁴²

While the CJEU did create uncertainty, both regarding the cumulative and qualitative assessment in SCF,¹⁴³ the case has been restricted to its facts on that point.¹⁴⁴

¹³³ Ibid

¹³⁴ SGAE (n 9) para 31

¹³⁵ SCF (n 42) para 84

¹³⁶ PPL (n 106) para 41

¹³⁷ SCF (n 42) para 85

¹³⁸ Reha training (n 43) para 43

¹³⁹ SCF (n 42) para 84

¹⁴⁰ SGAE (n 9) para 39

¹⁴¹ ITV, (n 61) para 34

¹⁴² SGAE (n 9) para 50

¹⁴³ SCF (n 42) paras 95-96

The term "public" was assessed in the context of transmission between professional parties in SBS Belgium.¹⁴⁵ The CJEU concluded that direct injection of programme-carrying signals from the broadcaster (A) to their distributors (B), is not to the "public".¹⁴⁶ The only communication to the public was the subsequent transmission to B's subscribers. Only if B had a purely technical role would their subscribers be part of A's public.¹⁴⁷ Therefore, contrary to the business practice,¹⁴⁸ B seemed to be the responsible party, not A. However, while article 8 of the new Directive on television and radio confirms that only a "*single act of communication to the public*"¹⁴⁹ occurs in this situation, it appears to indicate that both A and B are responsible for obtaining authorisation.¹⁵⁰ The literature interpreting SBS Belgium to "*(..) to absolve A of needing to obtain permission (..)*",¹⁵¹ written before the Directive, does no longer appear to be correct. Therefore, it could seem like the drafters was not fully satisfied with the approach adopted by the CJEU.

After having addressed "communication" and "public", it would seem like a logical proposition that finding both of them fulfilled would result in a "communication to the public", nonetheless, this is not necessarily the case.

3.4 Additional assessments

3.4.1 "Communication" to a "public" is not necessarily a "communication to the public"

One post on Instagram, Twitch, Twitter, YouTube or an article available on BBC.co.uk may be shared and re-shared millions of times efficiently and seamlessly through methods like hyperlinking as well as through intermediary platforms specifically developed to facilitate such sharing. But, with the broad scope of "communication" described above many acts which are fundamental to the public discourse may fall within its scope and given the nature of modern communication technologies these acts are often to a "public".

Therefore, additional assessments have been introduced, which has to be assessed in addition to "communication" and "public". The literature has described these assessments as a counter mechanism.¹⁵² These have resulted in the somewhat illogical proposition that a

¹⁴⁴ Reha training (n 43), Opinion of AG Bot para 55,

¹⁴⁵ C-325/14, SBS Belgium, EU:C:2015:764

¹⁴⁶ Ibid para 23

¹⁴⁷ Ibid paras 32-33

¹⁴⁸ Bently (n 46) 174

¹⁴⁹ TRD (n 30) article 8.1

¹⁵⁰ Ibid; "they"

¹⁵¹ Bently (n 46) 174

¹⁵² Peguera (n 8) 1103

"communication" directed at a "public" is not necessarily an act of "communication to the public".

These counter mechanisms have ensured that a highly complex, and often inconsistently applied, assessment is necessary to ascertain whether even something as mundane as linking to an article through social media is a "communication to the public". These assessments are significant sources of uncertainty, being contributing factors to the jurisprudence being described by commentators as both confusing¹⁵³ and inconsistent.¹⁵⁴

It will be necessary to compare different public targeted, assess knowledge of the communicator, and even the various technical methods used for dissemination.

3.4.2 New public

3.4.2.1 *What public was contemplated when authorising the initial communication*

The "new public" criterion was first mentioned in an Advocate-General opinion¹⁵⁵ but was first assessed by the CJEU years later.¹⁵⁶ In SGAE, the CJEU concluded that to find infringement, for a subsequent communication, a prerequisite is that the "communication" directed at a "public" is to a *new public*.¹⁵⁷ The CJEU defined the "new public" as a "*transmission (..) made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public*".¹⁵⁸ Ascertaining what public was initially contemplated is conceptually difficult, as will be evident by the court's inconsistent application.

In SGAE the simultaneous retransmission through cabling of a terrestrial broadcast was considered a communication which occurred to a public, and furthermore to a *new public* compared to the authorisation of the initial terrestrial broadcast. The CJEU stated that it is to a "new public" because "*(..) in the absence of that intervention, its customers, although physically within that area, would not (..) be able to enjoy the (..) work*",¹⁵⁹ The CJEU utilised the same language in the retransmission case Airfield.¹⁶⁰ However, this approach has been contradicted in AKM, with the CJEU stating that the public intended by the original

¹⁵³ Bently (n 46) 161

¹⁵⁴ Ko (n 60) 2

¹⁵⁵ C-293/98, Egeda, EU:C:2000:66 Opinion of AG Pergola, para 20

¹⁵⁶ SGAE (n 9)

¹⁵⁷ Ibid paras 40-42

¹⁵⁸ Ibid para 40

¹⁵⁹ Ibid para 42

¹⁶⁰ Airfield (n 41) para 79

broadcast was everyone within the catchment area.¹⁶¹ Bently, Sherman, Gangjee and Johnson points out the conflict between AKM and the other retransmission cases.¹⁶²

While in the reception in public cases a similar approach as in SGAE has been adopted, the Grand Chamber assessed in Reha whether the "(..) *absence of that intervention those 'new' viewers are unable to enjoy the broadcast works, although physically within the broadcast's catchment area (..)*".¹⁶³ Hence, if a public, as opposed to a private circle, is gathered at the place of reception they would constitute a "new public".¹⁶⁴ The CJEU has been seemingly consistent when assessing "new public" in the context of reception in public.¹⁶⁵

When it comes to making works available online, the CJEU has concluded that when a work is published freely available online with the consent of the rightsholders, the initial public would be the entirety of the internet that had access to the original communication.¹⁶⁶

While the CJEU has been inconsistent in the analogue context, the CJEU has generally seemed consistent in the digital context. However, the consistency appears to have ended with the recent Renckhoff decision.

3.4.2.2 Renckhoff, new public?

Renckhoff concerned a photograph that was made available on the website A.¹⁶⁷

Subsequently, the photograph was uploaded on a new website, page B. The question was whether page B was communicating the photo to a *new* public. Following the approach adopted by Svensson, the Advocate-General concluded that it was to the same public as the original one, seeing as the rightsholder had the entire internet in mind as the original public when authorising the initial upload.¹⁶⁸

The CJEU, however, concluded differently. The CJEU stated that "*the public taken into account by the copyright holder when he consented to the communication of his work on the website on which it was originally published is composed solely of users of that site and not*

¹⁶¹ C-138/16, AKM v Zurs.net, EU:C:2017:218 para 29

¹⁶² Bently, (n 46) 169

¹⁶³ Reha training, (n 43) para 46

¹⁶⁴ FAPL (n 40) para 198

¹⁶⁵ For example, OSA (n 115) paras 31-32

¹⁶⁶ Svensson (n 110) paras 25-27, paywalls etc is taken into account.

¹⁶⁷ C-161/17, Renckhoff, EU:C:2018:634

¹⁶⁸ Ibid, Opinion of AG Sanchez-Bordona paras 100-103

*of users of the website on which the work was subsequently published (..) or other internet users".*¹⁶⁹

Renckhoff seems to contradict established case law, like Svensson and Bestwater.¹⁷⁰ In Bestwater, following the Svensson approach, a video is posted on page A, while through an embedded link the same video can be enjoyed on page B.¹⁷¹ This was not an infringement since the public who could view the work on page B was the same public as those who could access page A.¹⁷²

The CJEU draws on numerous elements when concluding that it is to a "new public" in Renckhoff. The potential for exhaustion if the "new public" criterion is applied,¹⁷³ the need to protect rightsholders and their fundamental rights,¹⁷⁴ and how there shall be no formalities.¹⁷⁵ It does seem at first like the CJEU wants to alter the previous approach adopted in Svensson and Bestwater, seeing as the issues which they identify applies to the "new public" assessment more generally, as will be further addressed in point 3.6.

However, the CJEU separate the factual circumstances in question from those in Bestwater and Svensson.¹⁷⁶ Stating how important hyperlinking, which Bestwater and Svensson concerned, is to the efficient dissemination of information on the internet, while the act of re-uploading does not have the same vital role.¹⁷⁷ Furthermore, with hyperlinks, the control remains with the initial communicator, who may remove the initial communication at any time with the consequence of eliminating the communicative value of the hyperlink, as opposed to a new upload which would remain.¹⁷⁸

The judgement does raise some unanswered questions. Does Renckhoff mean that the CJEU will vary the scope of the "new public" assessment depending on how important and beneficial the method of re-communication is? From a logical perspective, it is hard to ascertain how the public the rightsholder had in mind when authorising the initial communication can fluctuate depending on how beneficial to society the method of recommunication is. While the CJEU has a point on the importance of linking and that there

¹⁶⁹ Renckhoff (n 167) para 35

¹⁷⁰ Chavannes (n 11) Ko (n 60) 100

¹⁷¹ C-348/13, BestWater International, EU:C:2014:2315

¹⁷² Ibid paras 15-18

¹⁷³ Renckhoff (n 167) paras 32-33

¹⁷⁴ Ibid para 30 and 41

¹⁷⁵ Ibid para 36

¹⁷⁶ Ibid paras 37-39

¹⁷⁷ Ibid para 40

¹⁷⁸ Ibid para 44

is a clear difference in control, the usage of the "new public" criterion to separate between them, to the detriment of coherency, does not seem preferable.

A better approach is to formulate the scope of "communication" to ensure that linking falls outside it while uploading falls within, without the need for any additional assessments as the "new public" criterion. More on this in point 6.

However, if the already identified issues were not sufficient, the case reveals another source of uncertainty, concerning *when* the assessment of "new public" should be made.

3.4.2.3 Renckhoff, should new public be assessed at all?

Association Littéraire et Artistique Internationale (ALAI) wrote an opinion on Renckhoff, before the court's judgement, criticising the Advocate-General.¹⁷⁹ The criticism had two components. First, the additional assessments introduced by CJEU does not adhere to the international framework, which will be addressed below. Second, the case concerned a primary communication, with the consequence that there is no original public to compare it to. Thus, ALAI argues that finding "communication" and "public" is sufficient.¹⁸⁰

Furthermore, scholars like Marie Eline Bulten,¹⁸¹ Caroline de Vries and Sam van Velze,¹⁸² and Justin Ko,¹⁸³ cite the ALAI opinion, although without much additional explanation, when concluding that Renckhoff concerned an initial communication and that "new public" should not have been assessed.

The ALAI's rationale seems to be that the "new public" may only be applied when the recommunication concerns the initial *communication*, not when it relates to a *copy* of that communication.¹⁸⁴

It would appear that the CJEU agrees with ALAI, stating in Renckhoff that: *(..) the posting on another website of a work gives rise to a new communication, independent of the communication initially authorised*".¹⁸⁵ The CJEU seems to use the rationale that the upload

¹⁷⁹ ALAI, "Opinion on case c-161/17 (Land Nordrhein-Westfalen v Dirk Renckhoff)" (2018). Accessible: <http://www.alai.org/en/assets/files/resolutions/180529-opinion-land-nordrhein-westfalen-en.pdf>

¹⁸⁰ Ibid 2

¹⁸¹ Marie Eline Bulten, "The Renckhoff judgement: A Step Backwards for Information and Education Rights?" (2019) page 7. Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407259

¹⁸² Caroline de Vries and Sam van Velze, "HvJEU in Renckhoff: Kopieren, plakken en uploaden mag niet", (bureau Brandies 2018), paras 14-19. Accessible: <https://www.bureaubrandeis.com/hvjeu-renckhoff-kopieren-plakken-en-uploaden/>

¹⁸³ Ko (n 60) 85

¹⁸⁴ ALAI (n 179) page 2

¹⁸⁵ Renckhoff (n 167) para 44

will "remain available (...) despite an action by which the rightholder decides no longer to communicate his work (...)".¹⁸⁶ A similar sentiment was advocated by the French Government, Mr Renckhoff and the Commission.¹⁸⁷ This lack of control would naturally occur when a distinct copy is being re-communicated, which implies that the CJEU approaches the distinction similarly as ALAI.

Despite these statements, the CJEU does apply the additional assessments in Renckhoff, both new public¹⁸⁸ and different technical means.¹⁸⁹ Likewise, these were also used previously in VCAST where a terrestrial broadcast was copied, and the copy was subsequently made available to subscribers online,¹⁹⁰ which should not have been assessed following what seems to be ALAI's logic.

Consequently, what has become evident is that not only is the new public assessment hard to ascertain the scope of, in addition, *when* it should be applied is subject to some controversy.

If the negative aspects as to its application were not sufficient, even its mere existence seems to be surrounded by much controversy, as further examination of its origin will reveal.

3.4.2.4 The international position

The CJEU has emphasised the importance that the concept of "communication to the public" follows international law.¹⁹¹ When the CJEU formulated the "new public" criterion, article 11bis(1)ii of the Berne Convention was used as its basis. The EU is officially signatories to the WCT¹⁹² and the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹⁹³ which both require the EU to adhere to the Berne Convention article 11bis.¹⁹⁴ Thus, the right must be understood in light of the Berne Convention.¹⁹⁵

Article 11bis.1.i in Berne regulates the right of the rightsholders to broadcast their works. While article 11bis.1.ii states that a rebroadcast or cabling of broadcast needs authorisation

¹⁸⁶ Ibid

¹⁸⁷ Ibid para 28

¹⁸⁸ Ibid para 35

¹⁸⁹ Ibid paras 24-25

¹⁹⁰ VCAST (n 88) paras 48-50

¹⁹¹ FAPL (n 40) para 189

¹⁹² 2000/278/EC: Council Decision, OJ L89/6

¹⁹³ 94/800/EC: Council Decision, OJ L336/1

¹⁹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) article 9. WCT (n 76) article 1

¹⁹⁵ FAPL (n 40) paragraph 189

when it *"is made by an organization other than the original one"*. In SGAE, the CJEU concludes that the exception is synonymous with the "new public" criterion.¹⁹⁶

If a literal interpretation was not sufficient to have one convinced that the CJEU is mistaken in applying these as interchangeable, it does become especially evident in light of the legislative history of the Berne Convention. In 1948 at the Brussel Revision Conference, "new public" was explicitly rejected as a way to regulate rebroadcasting.¹⁹⁷ One of the reasons why the criterion was rejected was that it was so difficult to ascertain when it would be fulfilled,¹⁹⁸ by the looks of the current CJEU inconsistent jurisprudence the drafters of Berne were correct.

Although article 11bis.1.ii directly relates to the right of authorising cabling of broadcast and rebroadcasting the CJEU has applied their misinterpretation beyond this scope, for example, also using it to govern the making available aspect,¹⁹⁹ which was first introduced in WCT.²⁰⁰ Thus, the criterion cannot be ignored, regardless of whether its initial adaption was based on a misunderstanding and seemingly in contradiction with the international framework.

3.4.2.5 Knowledge about new public

The new public criterion will ensure that if someone, for example, shares a link to a photograph to all his social media followers, as long as the photo was freely available with the consent of the rightsholder, this would not be an infringement. It will be a "communication" to a "public", but not to a "new public" because when the rightsholder authorised the original news article he/she had the entirety of the internet in mind, following CJEU's logic in Svensson. Thus, ensuring that the consequences of the broad scope to "communication" is somewhat mitigated.

However, what if the initial communication was without the authorisation of the relevant rightsholder? Then, per definition, linking to the public would prima facie be to a "new public" because there is no original public taken into account by the rightsholder.

In GSmedia the CJEU was directly faced with these factual circumstances. The CJEU responded by acknowledging the potential chilling effect on fundamental rights, like freedom

¹⁹⁶ SGAE, (n 9) para 40

¹⁹⁷ Sam Ricketson and Jane Ginsburg, *International copyright and neighbouring rights*, (volum 1, second edition, Oxford University Press, 2006), paras 12.26-12.27 page 725-726

¹⁹⁸ Ibid

¹⁹⁹ Svensson (n 110)

²⁰⁰ Aplin and Davis (n 51) 189

of speech, with always finding infringement when the communication has been directed at a "new public".²⁰¹

The solution to avoid the chilling effect was to go further than requiring "communication" which is to the "public" and "new public", but adding that the communicator must either know or ought to have known that the original communication was unauthorised.²⁰² The Advocate-General in *Ziggo* described the assessment introduced in *GSmedia* as knowledge of that it was made available "*in breach of copyright*".²⁰³ Hence, requiring actual or construed knowledge of the illegal nature of the initial communication and, therefore, the unlawfulness of the subsequent act of recommunicating. A second²⁰⁴ knowledge element was therefore introduced in *GSmedia*. As pointed out in the literature, the CJEU seems to have gone beyond its competence, adding a knowledge component not foreseen by its drafters.²⁰⁵

It is unclear precisely what knowledge is referring to, and how specific it has to be. The CJEU does seem to indicate in *Ziggo* that the knowledge does not have to be very specific; "*could not be unaware*".²⁰⁶ Furthermore, while it has been made clear that the *GSmedia* approach is applicable beyond traditional hyperlinking,²⁰⁷ it is uncertain how broadly it will be applied, for example, whether it will be used beyond the making available situation. In light of how the CJEU seems to adopt specific approaches to specific types of sharing methods,²⁰⁸ the uncertainty of its applicability is notable. Rosati goes as far as saying that the CJEU failed in giving proper guidance in *GS Media*.²⁰⁹

The CJEU made it clear in *GSmedia* that knowledge is presumed if the communication has been for profit.²¹⁰

There are uncertainties concerning how the for-profit element should be understood, just as when assessing the first profit element under "communication".²¹¹ *GSmedia* gives some

²⁰¹ *GSmedia* (n 12) paras 44-45

²⁰² *Ibid* para 49

²⁰³ (n 84) Opinion of AG Spzunar para 51

²⁰⁴ Point 3.2.3.2

²⁰⁵ *Peguera* (n 8) 1111.

²⁰⁶ *Ziggo* (n 84) para 45

²⁰⁷ Applied in *Ziggo* (n 84)

²⁰⁸ Renckhoff (n 167), special approach to hyperlinking

²⁰⁹ Elenora Rosati, "GS Media and Its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture" (2017) 54(4) Common Market Law Review. Available at SSRN: <https://ssrn.com/abstract=2943040> page 16

²¹⁰ (n 12) para 51

²¹¹ Point 3.2.3.3

guidance, stating it is for-profit when *"the posting of hyperlinks is carried out for profit"*,²¹² hence, that the emphasis is on the activity not on the entity. Focus on activity rather than entity correlates with how the EU has approached similar questions in the InfoSoc.²¹³

The first domestic court in a member state to apply the GSmedia knowledge assessment was the case of Rebecka Jonsson in Sweden. The presumption was established in merely one sentence, stating that the defendant had *"published the relevant link on a news site and it is, therefore, the court's opinion that it is obvious that it has occurred for-profit"*²¹⁴ (personal translation from Swedish). The case was applying what seems like a low threshold. Moreover, in Landgericht Hamburg, it was apparently sufficient that the page the link appeared on was for profit, without seemingly any requirement that the linking activity itself was commercial or for-profit.²¹⁵ The approach seems to contradict the statement made in GSmedia, which appeared to focus on the activity rather than the entity.

Also, the Supreme Court in Germany²¹⁶ concluded that the presumption does not apply for a search engine. They based this on that search results are generated automatically²¹⁷ and the importance these search engines have for the functioning of the web.²¹⁸ Although it is uncertain how the CJEU will approach this question, it is interesting that the German court seems to indicate that they do not think the GSmedia approach safeguards freedom of speech in a sufficient degree, at least if applied generally. Likewise, an Advocate-General, merely a year after GSmedia, tried to limit its application by stating that there was no presumption of knowledge and that what was required was *actual* knowledge, removing the possibility of *"ought to have known"*.²¹⁹ Nonetheless, the CJEU does not follow the AG and keep the option of *"ought to know"*. Although the CJEU does not explicitly refer to the presumption, creating some uncertain in the literature,²²⁰ its references to Filmspeler and GSmedia would

²¹² GSmedia (n 12) para 51

²¹³ (n 7) recital 42

²¹⁴ DOM-2016-11-21 Meddelad i Sollentuna. *Rebecka Jonsson v Les Éditions de L'Avenir SA* (2016) page 8. Accessible: <http://svemarknad.se/wp-content/uploads/2016/12/TATT-FT-6414-15.pdf>

²¹⁵ As cited in Elenora Rosati "GS Media finds its first application in Germany" (IPKitten 2016). Accessible: <http://ipkitten.blogspot.com/2016/12/gs-media-finds-its-first-application-in.html>

²¹⁶ BGH 21 september 2017 (I ZR 11/16 – Vorschäubilder III) as cited in Peguera (n 8) 1115. Eleonora Rosati "German Federal Court of Justice rules that GS Media presumption of knowledge does not apply to Google Images" (IPkitten, 2017) , Accessible: <http://ipkitten.blogspot.com/2017/09/german-federal-court-of-justice-rules.html>

²¹⁷ Ansgar Ohly, "The broad concept of "communication to the public" in recent CJEU judgements and the liability of intermediaires: primary, secondary or unitary liability?", *Journal of Intellectual Property Law & Practice*, 2018, Vol. 13, No. 8, page 669. Accessible: <https://academic.oup.com/jiplp/article/13/8/664/5045928>

²¹⁸ Peguera (n 8) 1115

²¹⁹ *Ziggo* (n 84) Opinion of AG Szpunar para 52

²²⁰ Peguera (n 8) 1112

indicate that the CJEU does not reverse what is now established case law, as concluded by Rosati.²²¹

Consequently, much uncertainty surrounds the application of the introduction made by GSmmedia. Uncertainty as to when a party "*knew or ought to have known*"²²² of the infringing nature, who will be subject to the presumption of knowledge, and if so, what duty of care is necessary in order to overcome the presumption for those acting for-profits.

So while the CJEU, for the first time, explicitly acknowledges the importance these technologies have for freedom of speech, in an attempt to strike a fair balance, the approach adopted creates more questions than answers.

Further analysis on how this assessment conflates primary with secondary liability, its relationship with the earlier discussed knowledge requirement under "communication", and how the presumption may be very problematic for fundamental rights will be made in point 4 and 5.

Moreover, the assessment of whether a "communication" to a "public" is a "communication to the public" is even more complicated, as point 3.5 will demonstrate.

3.5 Different technical means

In ITV a terrestrial broadcast was retransmitted by a third party online. Only those with lawful access to the original broadcast was allowed to access the simultaneous online retransmission. The CJEU avoided the "new public" criterion and instead introduced an alternative, stating that the communication in question "*uses a specific technical means different from (..) the original communication*",²²³ and because of this, it was not necessary to assess the "new public" criterion.

How should one assess whether the technologies are different? Furthermore, how dissimilar do the technological approaches have to be before they are sufficiently different that infringement is found regardless of the "new public" criterion? The CJEU gives no meaningful guidance.

An important question is whether the cases before ITV, which did not address the technical method of dissemination, indirectly concluded that the methods were similar.

²²¹ Rosati, *Pirate Bay* (n 94) 9-11

²²² Gsmmedia (n 12) para 49

²²³ ITV (n 61) para 26 and 39

If such an inference could be made then cable retransmission of a terrestrial broadcast is the same technical means, seeing as the CJEU did not address it in SGAE.²²⁴ However, in AKM the CJEU concludes that these are two different technologies.²²⁵ Nevertheless, Ko seems to apply a different approach. He concludes that satellite retransmission of a terrestrial broadcast uses the same technical means, citing Airfield from 2011.²²⁶ Although no further explanation is provided, it is possible to speculate whether his view is based on paragraph 39 in ITV, which might seem to indicate that previous case law used "new public" because the technical means were the same. However, the CJEU does not appear to read ITV in this manner when one compares SGAE with AKM, as mentioned.

Consequently, only a limited number of conclusions can be made. The CJEU views terrestrial broadcast and internet transmission as different technologies,²²⁷ and transmission through broadcasting and cabling are different.²²⁸ In SBS Belgium it is stated that: "*programme-carrying signals to several signal distributors by satellite, cable or xDSL line, and, therefore, by different technical means*".²²⁹ On the other hand, the CJEU has not separated between various methods of dissemination available online.²³⁰

Making matters more complicated; all that is needed is to change one side of the equation, and the already limited guidance is no longer applicable.

Even more troublesome, the CJEU has applied the assessment inconsistently. In AKM, the CJEU concluded that the technical means of dissemination were different.²³¹ Regardless, the CJEU found no infringement because there was no new public.²³² Such an approach is in direct contradiction with the previous case law, which treats "new public" and different technical means as two alternatives to finding infringement, not cumulative.²³³ Commentators have criticised the judgement,²³⁴ and subsequent case law has reverted to the approach

²²⁴ (n 9)

²²⁵ (n 161) para 26

²²⁶ Ko (n 60) 51

²²⁷ ITV (n 61) para 26, VCAST (n 88) para 48

²²⁸ AKM (n 161) para 26

²²⁹ SBS Belgium (n 145) para 18

²³⁰ Svensson, (n 110) para 24

²³¹ AKM, (n 161) para 26

²³² Ibid, para 27

²³³ Svensson (n 110) para 24

²³⁴ Bently (n 46) page 168-169

adopted in ITV,²³⁵ and an Advocate-General addressed the inconsistency and concluded that the CJEU could not have meant to reverse ITV.²³⁶

3.6 Problems with the additional assessments introduced by CJEU

Numerous problems may be directly attributed to these additional elements introduced by the CJEU, some of which has been mentioned above. Although the degree of these issues depend on what approach the CJEU adopts to them, as made evident above, the CJEU has been inconsistent.

First, the CJEU interpretation is in apparent conflict with international law.²³⁷ Furthermore, if restricting access to the work is needed to prevent further communication to the public this is somewhat similar to imposing a formality, as touched upon in Renckhoff,²³⁸ which also contradicts with the prohibition in the Berne Convention.²³⁹

Second, as made clear, these additional assessments may limit the incentive businesses have to conduct certain kinds of communications. "New public" might limit the incentive to initiate the first communication. Furthermore, the different technical means criterion encourages against the use of new technological methods for dissemination, which may influence the competitiveness of the European industry and the development of information society services, which were central goals of the harmonisation efforts. The impact may be especially prominent in light of the opposite approach being adopted elsewhere, with a more lenient approach to new methods of exploitation.²⁴⁰

Third, the knowledge component from GSmedia will reduce the incentive to allow content from sources which are more uncertain or less established. Sharing platforms have already been criticised for precisely this, limiting access and revenue to smaller channels.²⁴¹ The importance of pluralism in culture, media and information have been made clear by the

²³⁵ Ziggo (n 84) para 28

²³⁶ VCAST (n 88) Opinion of AG Spzunar para 53

²³⁷ Point 3.4.2.4

²³⁸ (n 167) para 31

²³⁹ Berne Convention (n 74) article 5.2

²⁴⁰ Fair use in the US, Authors Guild, Inc. v. Google Inc., No. 13-4829-cv (2d Cir. Oct. 16, 2015)

²⁴¹ Alex Sinke "YouTube's demonetization situation and the adpocalypse" (Diggit magazine, 2018). Accessible: <https://www.diggitmagazine.com/articles/youtubes-demonetization-situation-and-adpocalypse>

ECHR,²⁴² EU legislators,²⁴³ and the UN,²⁴⁴ which may be challenged if only established sources are allowed to access the revenue streams.

Fourth, exhaustion is also a potential issue with the "new public" assessment. As made clear in InfoSoc article 3(3) the right shall not be exhausted, which was also reiterated in Renckhoff.²⁴⁵ Although the degree of exhaustion depends on what approach the CJEU subsequently adopts to the new public, as demonstrated in point 3.4.2.1, the CJEU has been quite inconsistent.

Fifth, "new public" may motivate rightsholders to hide their content behind sign-up or similar access restrictions because the assessment of infringement is partially based on the accessibility of the original communication. Potentially to the detriment to the free and open internet.²⁴⁶

Sixth, the presumption introduced by GSmedia may conflict with fundamental rights, as will be examined further in point 5.3.

All of these concerns, for individuals, businesses and rightsholders alike, are made even more prominent in light of the uncertainty as to whether an approach adopted in one case will be applicable in another communication to the public situation. For example, uncertainty as to how widespread the CJEU will apply the GSmedia knowledge assessment or its presumption, with at least one court in a member state believing that the presumption should not be generally applicable.²⁴⁷

Furthermore, even just the question of *when* these assessments should be made is a controversial topic.²⁴⁸

How complex legal assessments these additional elements have led to while being highly relevant for all parties involved to understand, is illustrated in the flow-chart in appendix 1.

Consequently, addressing the complex conflict between various fundamental rights and values through the current approach has not led to a satisfactory result. Removing these

²⁴² Commissioner for human rights, "Media pluralism and human rights", commDH (2011)43 (2011) page 8. Accessible: <https://rm.coe.int/16806da515>

²⁴³ Conditional Access Directive (n 13) recital 6 *

²⁴⁴ Universal Declaration of Human Rights, UNA Res 217 A(III) (1948) (UDHR) article 19

²⁴⁵ Renckhoff (n 167) para 33

²⁴⁶ Ko (n 60) 99

²⁴⁷ Point 3.4.2.5

²⁴⁸ Point 3.4.2.3

additional assessments, seemingly introduced as a mitigating factor to limit the consequence of the initial broad scope of "communication", is paramount. More on this in point 6.

Furthermore, in addition to the problems identified above, additional concerns and complexities have been created by the current approach. One of which is the relationship between primary and secondary liability.

4 The relationship between primary and secondary liability

4.1 Expanding the concept of "communication"

The European Commission argued for a more limited approach to "communication to the public", and that reliance on other concepts like secondary liability was preferable in *Ziggo*.²⁴⁹ However, Advocate-General Szpunar found the suggestion unfavourable, because secondary liability is not harmonised within the EU and would therefore potentially undermine the goal of harmonisation,²⁵⁰ a familiar sentiment from the public performance debate.

A better view is that if something is not harmonised it should be treated accordingly. Anything else is harmonisation at the expense and to the detriment of coherency in the domestic legal system, which legislates with the expectation that those areas are left unharmonised.

Regardless, the communication to the public has through the broad approach to the term started to address acts which would normally be categorised under secondary liability, instead of primary liability.²⁵¹ That these situations did not use to be addressed through primary liability becomes evident when analysing earlier case-law from countries in EU/EEA:

In the UK case *Twentieth Century Fox v. Sky*,²⁵² it was noted that the website merely facilitated the downloading using the BitTorrent system, which led Birss J to conclude that Popcorn time was not communicating.²⁵³ In Sweden, *ThePirateBay* was found to infringe, but through secondary liability.²⁵⁴ Similarly, in Norway, the infamous Napster service was found

²⁴⁹ *Ziggo* (n 84) Opinion of AG Szpunar para 3

²⁵⁰ *Ibid*

²⁵¹ *Ko* (n 60) 55

²⁵² (2015) EWHC 1082 (Ch)

²⁵³ *Bently* (n 46) 171

²⁵⁴ Mal nr B 4041-09. Accessible: <http://domstol.se/Om-Sveriges-Domstolar/Sveriges-Domstolars-pressrum/Nyhetsarkiv/2010/Hovratten-har-idag-meddelat-dom-i-Pirate-Bay-malet-mal-nr-B-4041-09/>

to infringe through secondary liability,²⁵⁵ with services like ThePirateBay being the literal textbook example of this kind of liability in Norwegian tort law.²⁵⁶

Commentators have described the current broad approach as an indirect form of harmonisation of secondary liability.²⁵⁷

Furthermore, primary liability is usually strict liability,²⁵⁸ and therefore without a knowledge component,²⁵⁹ as opposed to the unharmonised secondary liability, which – although with varying domestic approaches – require some degree of knowledge.²⁶⁰

To fully understand the impact on the relationship between primary and secondary liability, there is first a need to clarify the relationship between the two knowledge elements previously presented.

4.2 Expanding the concept beyond strict liability

First, the Court seems to require some kind of knowledge when assessing "communicating".²⁶¹ Second, the CJEU introduces a second knowledge element when assessing "new public", relevant when there is a secondary communication.²⁶²

These are two separate and distinct assessments, found at various stages in the jurisprudence. The separation is illustrated in *Filmspeler* where the CJEU first assess the knowledge element as part of the "communication" requirement,²⁶³ and subsequently under "new public".²⁶⁴ Most evident of their separate nature is that knowledge under "new public" is presumed if for-profit, which has not been taken into account when assessing knowledge as part of "communication".²⁶⁵

Consequently, there are two independent assessments. This realisation should impact how they are understood.

²⁵⁵ HR-2005-133-A - Rt-2005-41

²⁵⁶ Trine-Lise Wilhelmsen "Om erstatningsrett" (Gyldendal, 2017) page 134

²⁵⁷ Peguera (n 8) 1109-1110

²⁵⁸ Ibid 1110. Christina Angelopoulos "CJEU decision on *Ziggo*: The Pirate Bay Communicates works to the public" (Kluwer Copyright Blog, 2017). Accessible: <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>

²⁵⁹ European Group on Tort Law, "Principles of European Tort Law Text and Commentary" (Springer Wien New York 2005) page 104

²⁶⁰ Bently (n 46) 1286

²⁶¹ Point 3.2.3.2

²⁶² Point 3.4.2.5

²⁶³ *Filmspeler* (n 93) para 41

²⁶⁴ Ibid paras 49 - 50

²⁶⁵ No mention of how the lack of profit impacted knowledge assessment in SCF, (n 42)

If the first knowledge element did not only concern the deliberate intervention, then it would naturally include knowledge about whether the first publication was without the appropriate authorisation. If there is no knowledge about this, then the defendant does not know the consequences of the act. Seeing as the first knowledge requirement does not consist of this, because why else would there be a need for a second knowledge element, the first knowledge requirement would seem to refer to the conscious choice to intervene. Consequently, reaching the same conclusion as Peguera, but with slightly different reasoning. The conclusion would explain why so little attention has been dedicated to the first knowledge assessment,²⁶⁶ seeing as it has been evident that the acts in the case law, so far, have been voluntarily committed.

Consequently, when assessing a primary act of communication, only the deliberate nature of the act must be assessed.

While on the other hand, knowledge of the unauthorised nature will be relevant when determining "new public", if there is a secondary communication, as made clear when discussing the GSmedia knowledge requirement under "new public".²⁶⁷

The condition introduced by GSMedia, to know or ought to know, is very reminiscent of the unharmonised secondary liability regime, requiring for example intention, gross negligence or duties of care, although the approach depends on the jurisdiction.²⁶⁸ Therefore, the knowledge component introduced in GSmedia partakes in the conflation between primary and secondary liability, which may cause issues for the coherency of the domestic legal regime which legislates with an expectation that what is unharmonised will be treated accordingly.

Furthermore, this conflation may especially impact intermediaries.

5. Intermediary liability

5.1 Intermediaries communicating to the public

The broad approach to "communication", and consequently who commits them, may result in that activities of intermediaries fall within its scope. Especially Ziggo made this clear, where ThePirateBay was infringing the communication to the public right. The broad approach to

²⁶⁶ Ko (n 60) 107

²⁶⁷ Point 3.4.2.5

²⁶⁸ Ohly (n 217) 665

the term communication has ensured that, as described in the literature; "(...) *multiple actors in a chain could all, separately and distinctly, be regarded as legally responsible*".²⁶⁹

Applying the approach in Ziggo/ThePirateBay to other intermediaries, it is possible to argue that some of their interventions are often even more comprehensive. Services like YouTube, in addition to indexing and categorising the content somewhat similar to ThePirateBay,²⁷⁰ make the content accessible through their centralised servers, not the decentralised peer-to-peer model where content is stored and accessible through third parties (seeders).²⁷¹

There is a pending reference to the CJEU from the Bundesgerichtshof asking whether the activities on YouTube is "communication to the public" in the context of InfoSoc article 3 when unauthorised content is uploaded on their platform.²⁷² ALAI believes that CJEU should conclude, based on Ziggo and the presumption established in GS media, that YouTube is committing an act of "communication to the public".²⁷³

The broad approach to primary liability also creates uncertainty as to the applicability of the E-Commerce Directive (ECD),²⁷⁴ the safe-harbours.²⁷⁵ With article 14 being of interest for hosting intermediaries. It has been questioned, by among others Rosati²⁷⁶ and ALAI,²⁷⁷ whether the defence can be applied if the entity is found, prima facie, primary liable. Rosati points to the lack of reference to the ECD in Ziggo as a potential indication that it does not apply.²⁷⁸

Counter-arguments exist, for example, how the ECD safe harbour is inspired by the US system²⁷⁹ which applies regardless of liability, as expressed in the House of Representatives Conference report.²⁸⁰ If so, questions will emerge as to the relationship between the knowledge component in ECD article 14 and the one in GSmedia.

²⁶⁹ Bently (n 46) 172

²⁷⁰ Jurriaan van Mil "German BHG – Does YouTube Perform Acts of Communication to the Public?" Kluwer Copyright Blog, point 3. Accessible: <http://copyrightblog.kluweriplaw.com/2019/01/27/german-bgh-does-youtube-perform-acts-of-communication-to-the-public/>

²⁷¹ Ziggo (n 84), Opinion of AG Opinion Szpunar paras 19-20 explains the difference

²⁷² C-682/18 request of preliminary ruling

²⁷³ ALAI, "opinion in respect of some of the questions from the Federal Court of Justice of Germany for preliminary ruling by the CJEU, Case C-682/18 (YouTube)" (2019) page 3-5. Accessible: <http://www.alai.org/en/assets/files/resolutions/190225-opinion-youtube-en.pdf>

²⁷⁴ Directive 2000/31/EC OJ L178/1 (ECD)

²⁷⁵ Bently (n 46) 1289

²⁷⁶ Rosati, Pirate Bay (n 94) 12

²⁷⁷ ALAI (2019) (n 273) 6

²⁷⁸ Rosati, Pirate Bay (n 94) 13

²⁷⁹ Bently (n 46) 1290

²⁸⁰ H.R. Rep. No. 105-796 73 (1998), as cited on Peguera (n 8) 1111

Regardless of whether the ECD may include primary liability, it seems unlikely that CJEU would conclude that an act is a "communication" while still maintain that the service is neutral, as required in CJEU jurisprudence to apply the safe harbours.²⁸¹ When assessing the neutrality requirement, the CJEU notes that it is only applicable when *"the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive (...)"*,²⁸² which seems very reminiscent of the threshold for "communication" as expressed in InfoSoc recital 27 and as discussed in point 3.2.

Hopefully, guidance will be provided by the CJEU in the pending reference from Bundesgerichtshof, both to the applicability of the ECD and its relationship with the assessment introduced in GSmedia.

Furthermore, if that was not enough, the recently adopted Directive²⁸³ makes matters even more complicated for these intermediaries.

5.2 Introducing article 17, the legislator makes matters more uncertain

DSM article 17 (previously article 13) introduces obligations for *"online content-sharing services"*, defined in article 2.6. The assessment is made on a case-by-case basis,²⁸⁴ while certain providers are exempt from its definition or have reduced obligations.²⁸⁵

Article 17.1 notes that these services are communicating to the public *"for the purpose of this directive"* when they are offering *"the public access to copyright-protected works or other protected subject matter uploaded by its users"*. The consequences are that these services will either have to obtain authorisation (17.1) or be liable unless they meet specific due diligence requirements (17.4). Article 17.3 notes that the safe harbour provision is not applicable to avoid liability from article 17.

Albeit new and structurally different, the approach adopted in article 17 sounds somewhat familiar with how the CJEU has approached the concept of "communication to the public" found in other Directives. Especially Ziggo building upon GSmedia illustrates the similarities.

²⁸¹ C-236/08, Google France, EU:C:2010:159 para 114

²⁸² Ibid

²⁸³ DSM (n 16)

²⁸⁴ Ibid recital 63

²⁸⁵ Ibid article 2.6, 17.6 and recital 62

First, Ziggo made it clear that even a platform, ThePirateBay, can be viewed as committing an act of "communication" in the context of InfoSoc article 3, although they are merely the treasure map, indexing and otherwise facilitating access to what others have uploaded.²⁸⁶

Second, although the content and applicability of the presumption introduced by GSmedia are unclear, it does seem that to avoid liability the communicator acting for-profit has to display some effort to overcome the presumption, a duty of care. See point 3.4.2.5

Rosati, although concerning the wording in a previous suggestion, described the then proposal as an "alignment" between the CJEU and the policymakers.²⁸⁷ Consequently, while article 17 is new and more specific, it does seem to strike a familiar chord with the approach adopted by the CJEU

The question becomes what the relationship is between the two concepts of communication to the public.

It is made clear in the recitals that "communication to the public" found elsewhere is unaltered, and that article 17 only clarifies the understanding applicable to this specific Directive.²⁸⁸ The same sentiment is expressed in DSM article 1.2. Hence, for those falling outside the scope of article 17 previous case law is entirely relevant.

However, if the preliminary reference from Bundesgerchithof²⁸⁹ is answered affirmative and services like YouTube is committing an act of "communication to the public" within the context of InfoSoc article 3, would this mean that they are subject to both distinct concepts of communication to the public in so far as article 17 applies to them as well? Or is article 17.1 *lex specialis*, consequently taking precedence? As made clear by the questions posed before the recent workshop held by the European Copyright Roundtable, this question does not have an obvious answer.²⁹⁰

At the workshop, Jan Bernd Nordemann concludes that article 17 is *lex specialis* and that it does not impose dual obligations,²⁹¹ noting that to the extent article 17 applies, article 3 will

²⁸⁶ Ziggo (n 84) para 36

²⁸⁷ Rosati, Pirate Bay (n 94) 16

²⁸⁸ DSM (n 16) recital 64

²⁸⁹ C-682/18

²⁹⁰ Martin Husovec and Martin Kretschmer, "European Copyright Roundtables: Implementing The Digital Single Market Directive" (Kluwer Copyright Blog, 2019). Accessible: <http://copyrightblog.kluweriplaw.com/2019/06/12/european-copyright-roundtables-implementing-the-digital-single-market-directive/>

²⁹¹ European Copyright Roundtables, time 24:21-24:51 out in the stream of the seminar. Accessible: <https://www.youtube.com/watch?v=xE5W03F6RKM>

not be applicable, with Dr Tobias Holzmüller joining in agreement.²⁹² Martin Husovec points to how vital identifying the scope of article 17 will be, seeing as this will also determine the applicability of the old regime.²⁹³ Quintais, in his paper, also reaches the conclusion that article 17.1 is *lex specialis*.²⁹⁴

An alternative view is that these are dual obligations. Potentially leading to a complicated situation for those services falling within the scope of both. Making it necessary to assess whether there is a discrepancy between overcoming the GSMedia presumption and the due diligence requirements in article 17.4. Making matters more complex, different exceptions and limitations could apply the two distinct regimes.²⁹⁵

Hopefully answers as to their relationship will be provided by the CJEU in the pending preliminary reference.

Regardless of the relationship, there has been raised questions as to whether the cost of the measures required in 17.4 will make the entrance-cost to the market for competitor considerably higher. Although concessions for smaller services are available,²⁹⁶ Shikhiashvili questions the negative impact it can have on the competition in the market.²⁹⁷

Additional uncertainty exists, seeing as both the presumption from GSmedia and the new article 17 might conflict with fundamental rights.

5.3 Relationship to fundamental rights

The CJEU²⁹⁸ has made it clear that general monitoring obligations are not only prohibited by article 15 of the ECD, but similar protection is provided through CFR article 16.²⁹⁹

Furthermore, it was made clear that such monitoring obligations could also infringe the users of those services, more specifically CFR article 8 and 11.³⁰⁰

²⁹² Ibid 38.40

²⁹³ Ibid 43:00-43:32

²⁹⁴ Joao Quintais, "The New Copyright in the Digital Single Market Directive: A critical Look" (European Intellectual Property Review 2019) page 18. Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424770 page 18

²⁹⁵ DSM (n 16) article 17.7 a and b, compared with InfoSoc (n 7) article 5

²⁹⁶ Lia Shikhiashvili, "the same problem, different outcome: online copyright infringement and intermediaries' liability under the US and the EU law" (2019) page 13. Accessible:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431704

²⁹⁷ Ibid 15.

²⁹⁸ SABAM (n 17) paras 47–48

²⁹⁹ Peguera (n 8) 1114

³⁰⁰ SABAM (n 17) para 48

The prohibition is not addressed in GSmedia, but commentators³⁰¹ and at least an Advocate-General³⁰² are concerned with whether overcoming the presumption may amount to a general monitor obligation. Furthermore, although the perspective has been addressed in the new Directive,³⁰³ a member state (Poland) has filed for an annulment per TFEU article 263,³⁰⁴ with others also questioning whether the new Directive will prejudice fundamental rights.³⁰⁵

Consequently, the relationship between the fundamental rights of intermediaries and users of their services and the new obligations introduced is uncertain.

The uncertainty for intermediaries is relevant for all parties. These intermediaries play an essential role in our ability to share our opinions and ideas, becoming the "*modern public square*".³⁰⁶ One possible consequence is that they become more restrictive of what content is made available, as a response to the uncertainties, which could be to the detriment of pluralism of content.

6. Re-striking the balance

6.1 Re-formulating the scope of "communication"

The CJEU has been unsuccessful in striking the correct balance between the various rights, interests and objectives concerned. Hence, there is a need to re-formulate the term "communication" to reverse the current unsatisfactory situation.

There have been different suggestions as to how to limit the term "communication".

Commentators³⁰⁷ and even the Commission³⁰⁸ have argued that "communication" should revert to only refer to transmissions of the work. Consequently, the broader test applied by the CJEU, "intervention", should be abandoned. While the Advocate-General in GSmedia focused on indispensability as its reason why the act of hyperlinking should not fall within the purview of the term, stating in agreement with the observations of the Portuguese

³⁰¹ Ohly (n 217) 669

³⁰² Ziggo (n 84) opinion of AG Szpunar para 52

³⁰³ DSM (n 16) article 17.10, 17.8 and 17.5

³⁰⁴ Tomasz Targosz "Poland's Challenge to the DSM Directive – and the Battle Rages On..." (Kluwer Copyright Blog, 2019). Accessible: <http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/>

³⁰⁵ Quintais (n 294) 19. Bently (n 46) 1294

³⁰⁶ Frederick Mostert, "Free speech and internet regulation" (Journal of Intellectual Property Law & Practice, Volume 14, Issue 8, 2019) page 607. Accessible: <https://academic.oup.com/jiplp/advance-article/doi/10.1093/jiplp/jpz074/5522765>

³⁰⁷ European Copyright Society (n 89) para 6. Ko (n 60) 77

³⁰⁸ GSmedia (n 12) opinion of AG Wathelet para 25

Republic that the one who uploads the work is making it available not the one who links to it.³⁰⁹

A preferable approach seems to be the narrowest one, which is to require both.

First, requiring a transmission. The transmission does not necessarily have to be accessed/occur, but that it may be accessed, ensuring that the scope includes on-demand communications, which some have expressed concerns about when advocating for a broader test.³¹⁰

Second, that the responsible party is the one who directly provides it, either simultaneous or makes it available. To borrow a metaphor,³¹¹ but with the opposite result, the role should be that of the treasure as opposed to the treasure map.

The suggested re-formulation is in part based on an analysis of when the CJEU has applied the additional criteria to conclude that a particular act is a "communication" to a "public" but not a "communication to the public". This analysis will aid in formulating the scope without the need for any of the additional assessments introduced by the CJEU.

In light of this, it is noteworthy that while the "new public" criterion was introduced by the CJEU in 2006,³¹² it was first eight years later that it was ever concluded that there was no "new public". The case was Svensson, which did not involve any indispensable transmission. See point 3.4.2.

In ITV, the different technical means assessment was introduced. In this case, when there is indispensable retransmission, apparently, the CJEU wants to ensure that infringement regardless of any new public. See point 3.5.

In GSmedia, which does not concern an indispensable transmission, the CJEU presents a new assessment, that although to a "new public" the lack of knowledge may ensure that there is no infringement, though it must be noted that infringement was found in the particular case.³¹³ See point 3.4.2.5.

³⁰⁹ Ibid, para 54

³¹⁰ Alexander Tsoutsanis, "Why Copyright and linking can tango", *Journal of Intellectual Property law & Practice*, 2014, Vol. 9, No. 6" (2014) page 505. Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333686

³¹¹ Ziggo, (n 84) Opinion of AG Szpunar para 1

³¹² SGAE (n 9)

³¹³ GSmedia (n 12)

In Renckhoff, if the CJEU had applied "new public" as in Svensson it would result in no infringement. However, through a more limited approach to "new public", infringement was found. The case concerned an indispensable transmission, which includes the "(..) *display on screen*",³¹⁴ by the uploader. See point 3.4.2.3.

Therefore, it seems like the CJEU's approach is especially focused upon ensuring that acts which are not indispensable transmissions do not infringe even though they are "communication" to the "public", while this is generally not the case when the act is an indispensable transmission. Although the AKM, see point 3.4.2.1, is an example of "new public" being used to ensure no infringement of an indispensable transmission, it has been highly criticised,³¹⁵ nor should exceptions prevent the conclusion that the more a narrow scope is preferable, especially in light of all the other benefits from adopting such an approach.

6.2 Benefits of re-formulating the scope of "communication"

The positive consequences of this narrow approach to "communication" and the subsequent removal of the additional assessments introduced in CJEU jurisprudence are numerous and would be a better approach to strike a balance between the competing rights, interests and objectives.

First, the additional assessments introduced in case law have ensured a complex legal assessment, which has been applied inconsistently by the CJEU. Therefore, removal would bring much legal certainty and clarity.³¹⁶ As mentioned, legal certainty is a central principle and closely connected with the stimulation of European services and industry, as pointed out by the EU.³¹⁷ The removal will make it easier for all parties involved, ensuring that the communication services may contribute to the "*full effectiveness of freedom of expression as a fundamental right*" without uncertainty.³¹⁸ While through the removal of "different technical means" the information society services and European industry would no longer be disincentivised to employ new methods of dissemination.³¹⁹ Removing these additional

³¹⁴ Commission, Proposal for a European parliament and council directive on the harmonization of certain aspects of copyright and related rights in the information society, (Brussels. 10.12. 1997) COM(97) 628, final, page 25. Accessible: <http://aei.pitt.edu/6216/1/6216.pdf>

³¹⁵ Bently (n 46) 169

³¹⁶ Bernt Hugenholtz and Sam van Velze, "Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a 'New Public'" (2016). Page 13-14. Accessible: <https://ssrn.com/abstract=2811777>

³¹⁷ SatCab (n 24) recital 7 and 8

³¹⁸ Directive 98/84/EC (n 13) recital 2

³¹⁹ Point 3.6

elements, especially "new public", would also ensure that the EU adheres to their international obligations.³²⁰ Moreover, it would reduce the incentive to hide content behind pay-walls.³²¹

Also, removing the additional assessments would ensure that finding a "communication" and "public" would be a "communication to the public", which is a much more logical proposition than the current situation.

Second, hyperlinking would fall outside its scope.³²² Which is better in line with the envisaged goal of the pioneers behind the internet, the potential for a chilling effect when regulating linking was noted by Tim Berners-Lee himself.³²³ Linking is a fundamental part of the architecture behind the WWW, as pointed out in the literature,³²⁴ the CJEU,³²⁵ and an Advocate-General.³²⁶ Hence, how linking is treated is closely connected with the internet realising its potential as a facilitator for freedom of speech and efficient access to information.³²⁷ Notable jurisdictions, like the US and China, have excluded hyperlinks from its scope.³²⁸ Furthermore, the new press publishers related right was given a more limited scope, to the exclusion of hyperlink, private and non-commercial uses,³²⁹ which provides insight into the nature of the criticism it initially received.

Third, intermediaries, the "treasure maps", will generally not be communicating through the more narrow approach, ensuring no uncertainty of the potential application of the safe harbour. Furthermore, if the additional requirements are removed from the assessment, this would include the knowledge element introduced in GSmedia, which would remove any difficulties as to the relationship with fundamental rights or ECD article 15. Although the new article 17 remains even if the concept found in the other Directives are limited, it would be the only applicable legal regime to those intermediaries falling within its scope, seeing as

³²⁰ Ibid

³²¹ Ibid

³²² Point 3.2.2

³²³ Tim Berners-Lee, "Links and Law: Myths" (World Wide Web Consortium, 1997). Accessible: <https://www.w3.org/DesignIssues/LinkMyths.html>

³²⁴ Tanya Aplin, "Copyright Law in the Digital Society", (Hart Publishing 2005), page 151

³²⁵ GSmedia (n 12) para 45

³²⁶ Ibid, opinion of AG Wathelet paras 78-79

³²⁷ European Copyright Society (n 89) para 3

³²⁸ US: Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007). China: Jingrong Long "Different Solutions for Similar Questions: Hyperlinks and the Right of Communication to the Public in China and the EU" (IIC, 2018) page 428. Accessible: <https://link.springer.com/content/pdf/10.1007%2Fs40319-018-0693-3.pdf>

³²⁹ DSM (n 16) article 15.1 and recital 55

the other Directives, like InfoSoc article 3, would no longer be applicable through the more narrow interpretation.

Fourth, a more limited approach to the term "communication" will make the overlap with other economic rights less prominent. For example, the situation of making CD players and CDs available would fall outside the scope of the term "communication". As pointed out by Bently, Sherman, Gangjee and Johnson when criticising the CJEU in PPL³³⁰ and subsequently their application of the "intervention" test as opposed to transmission; *"if communication really is that broad, then lending libraries, video rentals, bookshops (which permit browsing) (..) even art galleries may be involved in communicating to the public"*.³³¹ Although there will still be overlap with other exclusive economics rights even if the term "communication" is reduced, because of the inclusion of transient copies in the reproduction right,³³² and how electronic copies made available for lending is part of the lending right,³³³ it would at least reduce the overlap to a certain degree.

However, would not the consequences of the alternative approach be that the rightsholders are not appropriately protected? For example, neither the infamous site ThePirateBay nor the man who sold multimedia devices filled with unauthorised streams³³⁴ would be viewed as communicating to the public under the more narrower approach.

The response to this argument is that the rightsholders can be sufficiently protected through other avenues of redress.

6.3 Alternative avenues of redress

6.3.1 Unfair competition and secondary liability utilised to fill the gap

Central in assuring a fair balance is that limiting what acts constitute "communication" does not necessarily mean that the act is not infringing. Other areas of law, although some of which is not harmonised, can better deal with the legitimate concerns for rightsholders.

Concluding that the activities of ThePirateBay should not be construed as "communication" and therefore not a "communication to the public" does not mean that their actions are lawful. As made evident by the cited cases from member states in point 4.1, it is possible to find

³³⁰ (n 106)

³³¹ Bently (n 46) 163

³³² InfoSoc (n 7) recital 33

³³³ C-174/15, Vereniging Openbare Bibliotheken, EU:C:2016:856, para 54

³³⁴ Filmspelers (n 93)

infringement through secondary liability. In other jurisdictions,³³⁵ like the US,³³⁶ these situations have been addressed without using such a broad approach to primary liability. Moreover, Bently, Sherman, Gangjee and Johnson point out that linking could be sufficiently addressed through secondary liability.³³⁷ Also, when linking is used to circumvent paywalls or similar restrictions, it is possible to use the rules on anti-circumvention measures to find infringement instead of using "new public".³³⁸

When it comes to the making available of CD and CD players or similar by commercial entities, the rental right could be used.³³⁹ The more narrow scope would remove any overlap between the rental right and communication to the public, seeing as the CJEU has shown more restraints to the rental right, as opposed to lending,³⁴⁰ limiting its application to physical manifestations.³⁴¹

While unfair competition, in the sense of a general tort against misappropriation, introduces a level of flexibility to address the various circumstances in the digital context, for example, the flexibility to address the multiple forms linking occurs in.³⁴² Hence, the level of misappropriation may be notably different depending on the method used, which could be taken into account when applying unfair competition.³⁴³

An additional benefit to unfair competition is that its application would not predicate the acts of private individuals, reducing the potential for any chilling effect on freedom of speech for private individuals. The Commission themselves have been critical against infringement proceedings towards private individuals, stating in a working document that they prefer a "*follow the money approach*" instead,³⁴⁴ with the CJEU expressing a similar sentiment in GSmedia.³⁴⁵ Even the Berne Convention may be interpreted as advocating this view, through

³³⁵ Member states prior to harmonisation of the EU, see point 4.1

³³⁶ Jane Ginsburg, "The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on Brein v. Filmspelers [C-527/15](2017) and Brein v. Ziggo [C-610/15] (2017) 2016/5-6", *Auteurs et Médias* 401 (Belgium). Page 13. Accessible: <https://ssrn.com/abstract=3024302>

³³⁷ Bently (n 46) 171

³³⁸ European copyright society (n 89) para 7

³³⁹ Bently (n 46) 155

³⁴⁰ Vereniging (n 333) para 54

³⁴¹ Ibid para 34

³⁴² Aplin, Copyright law in The Digital Society (n 324) 149

³⁴³ Bently (n 46) 169, referring to embedded links as akin to misrepresentation

³⁴⁴ COMMISSION STAFF WORKING DOCUMENT A Digital Single Market Strategy for Europe - Analysis and Evidence (COM(2015) 192 final) SWD/2015/100 final. Part 4.4 page 51 Accessible: <https://www.eumonitor.nl/9353000/1/j9vvik7m1c3gyxp/vjtq7248i6y2>

³⁴⁵ GSmedia (n 12) para 47

the reference to "organization" in 11bis.1.ii, which implies the involvement of a commercial entity.

Likewise, while making every single individual into a potential infringer might at first seem to realise one of the objectives, to ensure the high level of protection for rightsholders, it could have the opposite effect in the long run. Since the EU legislative process is democratic, copyright protection is predicated on having a favourable public opinion. However, trends have emerged which indicate that the public has started to turn against the ever-expanding protection of copyright.³⁴⁶ The resistance could be attributed to the fact that copyright, to a more considerable extent than ever, concerns acts committed by private individuals.

The close relationship which exists between unfair competition and copyright in some countries is evident by how unfair competition is often brought as an alternative to copyright.³⁴⁷ While Hungenholtz and Velze point to unfair competition as a potential remedy if a more limited approach to "communication to the public" is adopted, although without expanding much on the suggestion.³⁴⁸

6.3.2 Harmonising unfair competition and secondary liability, and what about the UK?

Both secondary liability and unfair competition are unharmonised. Hence, it will depend on the individual member states whether these avenues of redress are utilised properly in order to achieve the benefits identified above.

While most preferable, harmonisation efforts within areas like unfair competition and secondary liability might prove difficult for the EU, given the fact that the national divergences are notable.

One issue is the lack of a general tort against misappropriation in the UK. While this should not prevent the conclusion that a general tort of misappropriation would be more appropriate to address some of these questions, it is even possible to question whether the time is ripe to introduce a general tort against misappropriation in the UK. The recent harmonisation of whether a copyrightable work meets the threshold of originality within the EU and

³⁴⁶ Jessica D. Litman, "Readers' Copyright", (Copyright Soc'y 58, no. 2 2011) page 353. Accessible: <https://repository.law.umich.edu/articles/633/>

³⁴⁷ Atleast in Netherlands; Rogier W. de Very, "Towards a European Unfair Competition Law: A Clash Between Legal Families", (Martinus nijhoff publishers leiden / boston 2005) page 79..

³⁴⁸ Hungenholtz and Velze (n 316) 14

furthermore whether there is an infringement³⁴⁹ has ensured that the old UK approach, which went quite far in protecting labour³⁵⁰ and misappropriation,³⁵¹ is presumably gone.

Consequently, certain acts which are misappropriating and would be protected under the former UK copyright regime no longer have protection.³⁵² Potentially, the UK could be more open to introducing unfair competition to fill this gap, and perhaps be persuaded to go quite a bit further when in the process.

Furthermore, although the divergences might be prominent, this should be an argument for harmonisation rather than against, seeing as these represent the biggest obstacles to an internal market.

7. The CJEU has not succeeded, but it is essential for all parties that they do

The CJEU has applied a broad approach to the term "communication" through a purposive interpretation which merely takes into account one side of the equation; the need to ensure a high level of protection for rightsholders. While simultaneously introducing additional assessments which have to be met before a "communication" directed at a "public" is a "communication to the public".

These additional assessments are not only highly multifaceted and complex, but they do not strike an appropriate balance between the various rights, interests and objectives involved, with the current application causing uncertainty for users, rightsholders and businesses alike as its only consistent theme.

The conclusion is that a more limited application of the economic right, requiring an indispensable transmission, accompanied by the removal of the additional assessment which has caused so much of the uncertainty and imbalance, is better capable of striking the correct balance between the rights, interests and objectives involved. Furthermore, that reliance on unfair competition and secondary liability are more appropriate avenues of redress instead of continuously expanding who and what acts falls within the ambit of primary liability, to the detriment of certainty, consistency and without acknowledging that some areas remain unharmonised, limiting the CJEU's competence accordingly.

³⁴⁹ Infopaq (n 6)

³⁵⁰ Bently (n 46) 103

³⁵¹ University of London Press v University of Tutorial Press (1916), 2 Ch 601, expresses the sentiment that "what is worth copying is worth protecting"

³⁵² Bently (n 46) 102

Regardless of whether the suggested approach is adopted, it is essential that CJEU applies its approach consistently. For how may a business looking to exploit the opportunities these communication technologies enable, how may rightsholders effectively and with certainty disseminate their work, how may pluralism of media be ensured, how may users partake in the public discourse without a chilling effect, when there is legal uncertainty as to the very basic elements of the legal framework in which they operate in?

The CJEU has not succeeded, but it is essential for *all* parties that they do.

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APPENDIX 1

