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**DOI**

[10.1111/jwip.12107](https://doi.org/10.1111/jwip.12107)

**Publication date**

2018

**Document Version**

Author accepted manuscript

**Published in**

Journal of World Intellectual Property

[Link to publication](#)

**Citation for published version (APA):**

Quintais, J. P. (2018). Untangling the hyperlinking web: In search of the online right of communication to the public. *Journal of World Intellectual Property*, 21(5-6), 385-420. <https://doi.org/10.1111/jwip.12107>

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# UNTANGLING THE HYPERLINKING WEB: IN SEARCH OF THE ONLINE RIGHT OF COMMUNICATION TO THE PUBLIC

João Pedro Quintais

Amsterdam Law School Legal Studies Research Paper No. 2018-16

Institute for Information Law Research Paper No. 2018-02

# Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public

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## PRE-PRINT

Please cite as follows: Quintais JP. Untangling the hyperlinking web: In search of the online right of communication to the public. *J World Intellect Prop.* 2018;1–36 (forthcoming)

## ABSTRACT

This article examines the online right of communication to the public under EU law and its interpretation by the Court of Justice of the EU. The focus of the analysis is on the controversial application of the right to hyperlinking, and its implications for the online activities of users and intermediaries. After outlining the international and EU legal framework on the right of communication to the public, the article advances a conceptual framework for the interpretation of the exclusive right in the online environment, which is both based on, and attempts to bring coherence to, the Court's complex case law. On this basis, the article then explores and critically assesses the main areas of legal uncertainty for the online application of the right and the normative considerations at stake—especially fundamental rights and the promotion of technological development—offering interpretative and legislative solutions for their resolution. The article argues for abandoning the legislative proposals for a new right for press publishers and the so-called value gap, as both are fundamentally flawed. Instead, reform should focus on redefining the right of communication to the public and preserving safe harbors, especially for hosting providers.

**KEYWORDS:** copyright, EU law, hyperlinking, intermediary liability, right of communication to the public

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\* I am grateful to Bernt Hugenholtz, Matthias Leistner, Patrícia Akester, Tito Rendas, the participants at the Online Platforms and Intermediaries in Copyright Law Conference 2017 (LMU, Munich), and at the Católica Graduate Legal Research Conference 2017 (Lisbon). Parts of this paper have been developed or drawn from the author's previous work on the topic, namely J.P. Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law*, Kluwer Information Law Series, 2017. An earlier version of this paper was awarded the 1<sup>st</sup> Prize in the 2017 ATRIP Essay Competition.

## 1. INTRODUCTION

Although many internet users are unaware of it, copyright law regulates a significant part of their everyday online practices. Activities like streaming music and films, downloading an e-book or news article, or even posting a hyperlink may, and often do, have copyright significance. In European Union (EU) copyright law, two exclusive rights apply to most online use. Copying of protected content – a song, film, TV series, book, video game, photo, drawing, etc. – is subject to the right of reproduction. Online dissemination of that content to the general internet public is subject to the right of communication to the public. Both rights apply whether the user is an individual or service provider delivering or giving access to content over the Internet, like Spotify or Netflix (Quintais, 2017).

This paper is concerned with the dissemination dimension, regulated by the online right of right of communication to the public. The right is harmonised in Article 3 of Directive 2001/29/EC (InfoSoc Directive) and its interpretation is perhaps the most controversial aspect of EU copyright law. To date, the provision has been subject to over twenty judgements by the Court of Justice of the European Union (CJEU or Court), based on preliminary references by national courts (Annex 1). Questions on communication to the public, it appears, spring eternal. Despite the flurry of judicial rulings, the law remains unclear. The application of the criteria developed by the Court is complex and sometimes inscrutable, especially in the digital environment (Husovec, 2016).

The current state of affairs provides a strong case for reform. In September 2016, the EU Commission proposed a comprehensive legislative package to modernize EU copyright law, comprising two regulations and two directives. The centrepiece of the package is the proposed directive “on copyright in the Digital Single Market” (Proposed DSM Directive, COM(2016)593). However, the legislative package only indirectly tackles the right of communication to the public in two controversial provisions, in Articles 11 and 13 of the proposed directive.<sup>1</sup>

The first refers to a new exclusive right for press publishers covering the reproduction and making available to the public for digital use of their “press publications” (Article 11). The new right would apply *inter alia* to online aggregators of news that provide links to the publishers’ contents or that use snippets of said content. The provision, sometimes labelled as a “link tax” or “Google tax”, has been criticized *inter alia* for lacking economic justification, distorting competition, being detrimental to media pluralism, and for its otiose nature (Bently, Kretschmer, Dudenbostel, Calatrava Moreno, & Radauer, 2017; European Copyright Society, 2017; Hilty & Moscon, 2017; Peukert, 2016).

The second and perhaps more contentious proposal is on the use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users. In simple terms, this so-called “value gap” or “transfer of value” proposal aims at regulating large-scale user upload websites, i.e. platforms like YouTube and Vimeo. These types of platforms traditionally benefit from the conditional liability exemption or “safe harbour” for hosting service providers (against claims for damages) in Article 14 of Directive 2000/31/EC (E-Commerce Directive or ECD). They also benefit from the prohibition on the imposition of general monitoring obligations on intermediaries in Article 15 of the same instrument. Against this legal framework and its interpretation by the CJEU, the new provision uses rather opaque language to impose obligations on these providers of “measures”, such as “the use of effective content recognition technologies”, to ensure the functioning of agreements with rights holders and the prevention of infringing content in their websites. Furthermore, the proposed directive’s recital 38 appears to recast and even reshape the Court’s case law, by stating that the activities of the platforms at stake are not those of intermediaries but rather copyright relevant communications to the public. Other recitals (37 and 39) provide further guidance on the measures to be imposed on the platforms targeted by the value gap provision. It is not clear how these obligations –labelled by critics as requiring “mandatory upload filtering” by platforms – are consistent with the aforementioned hosting safe harbour and prohibition on general monitoring, as well with fundamental rights. Indeed, many scholars and other stakeholders argue they are not, as do at least two

Committees in the European Parliament reviewing the legislation (Angelopoulos, 2017b; Hilty & Moscon, 2017; Senftleben et al., 2017).<sup>2</sup> Furthermore, as this article shows, the contention that these platforms directly communicate works to the public is dubious as a matter of law and undesirable as a matter of policy.

Against this background, the present paper develops a conceptual framework for the interpretation of the EU online right of communication to the public on the basis of the vast body of existing CJEU judgments. The focus of the analysis is on the controversial application of the right to hyperlinking, and its implications for the online activities of users and intermediaries. Following this introduction, section 2 briefly outlines the international and EU legal framework on the right of communication to the public, with a focus on Article 3 InfoSoc Directive. Section 3 then advances a conceptual framework for the interpretation of the exclusive right in the online environment, which is both based on, and attempts to bring coherence to, the CJEU's complex case law. On this basis, section 4 explores and critically assesses the main areas of legal uncertainty for the online application of the right and the normative considerations at stake. This section offers interpretative proposals to overcome the problems identified with the current law, advances arguments for the rejection of the current legislative proposals for an ancillary right for press publishers and additional liability for online platforms, and provides a blueprint for reshaping the exclusive right that is normatively preferable. Section 5 concludes.

## 2. A BRIEF OUTLINE OF THE LEGAL RULES

International and EU law define broad exclusive rights that extend to online use. The Berne Convention for the Protection of Literary and Artistic Works (**BC**) sets forth minimum standards for different exclusive rights, including reproduction and several types of communication to the public, such as public performance, broadcasting and public recitation. These rights are incorporated in and adapted to the digital environment by the WIPO Copyright Treaty 1996 (WCT) and the WIPO Performances and Phonograms Treaty 1996 (WPPT). The WCT includes a general exclusive right of communication to the public in Article 8. Both the WCT and WPPT include (respectively, under the general right and as a stand-alone provision) an exclusive right of “making available”. The latter covers the placing of protected content online in such a way that members of the public may access them from a place and at a time individually chosen by them, i.e. predominantly to interactive and on-demand (as opposed to linear) communications.<sup>3</sup>

The WCT and WPPT were implemented in the EU by the InfoSoc Directive, which harmonised several economic rights and adapted them to the online environment, including the right of communication to the public in Article 3. Paragraph (1) of the provision grants authors a general right that covers online and offline acts including the making available prong of the entitlement. According to recital 23, the right comprises the “transmission or retransmission of a work to the public by wire or wireless means, including broadcasting”, but ‘should not cover any other acts’. Article 3(2) gives related rights holders (performers, phonogram and film producers, and broadcasters) a narrower right of ‘making available’. In doing so, it leaves intact other types of rights of communication to the public regulated elsewhere in the *acquis*, such as for satellite broadcasting and cable retransmission.

As a whole, Article 3 covers communication to a public at a distance, excluding direct public presentation or performance of works or other subject-matter (Recital 23 InfoSoc Directive and Common Position (EC) No 48/2000). The ‘making available’ prong refers to interactive and on-demand services. It does not require simultaneous reception of the work by the public and is independent of whether, where, and how often the work is accessed. Hence, the right applies to access by users to a website, even if at a different time and place from the original communication (Recital 23 InfoSoc Directive. CJEU, *SCF*, 59; *C More Entertainment*, 26). As clarified by Article 3(3), neither the right of communication nor that of making available is subject to exhaustion.

### 3. DEVELOPING A CONCEPTUAL FRAMEWORK

There is a vast and complex body of CJEU judgments on the right of communication to the public in the InfoSoc Directive, Directive 93/83/EEC (Satellite and Cable Directive) and Directive 2006/115/EC (Rental and Lending Directive) (Annex 1). Some basic concepts emerge from this case law that form the backbone of the conceptual framework advanced in this paper.

An initial point is that ‘communication to the public’ is an autonomous concept of EU law (*SGAE*, 31). This means that the concept should be given the same meaning and interpreted according to the same criteria whether it is used in the context of the exclusive right in the InfoSoc Directive or the remuneration right in the Rental and Lending Directive (*Reha Training*, 27–34).

Furthermore, the concept of communication to the public involves a wide array of activities. In the offline world, these include the transmission of broadcasts in hotel rooms (*EGEDA I*, *SGAE*, *Organismos Sillogikis*, *PPI*, *SPA*), spas and rehabilitation centres (*OSA*, *Reha Training*), circuses (*Circul Globus*), pubs (*Murphy*), and dental practices (*SCF*), as well as different aspects of communication to the public by satellite (*Lagardère: Airfield*; *SBS*). In the online world, a growing body of judgments has attempted to elucidate the scope of the right regarding different activities: from the live streaming by a third party over the Internet of signals from commercial television broadcasters (*ITV Broadcasting*), to different hyperlinking scenarios to authorized and unauthorized content (*Svensson*, *BestWater*, *GS Media*), to the sale of kodi boxes (*Filmspeler*), and the provision of an online peer-to-peer file sharing platform (*Ziggo*).

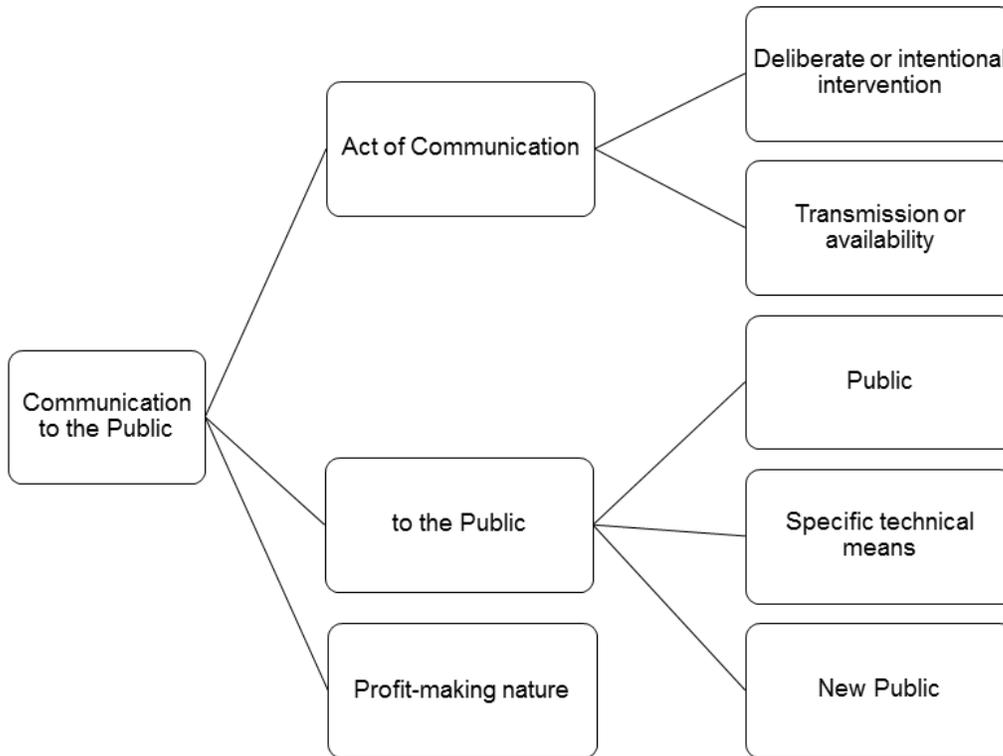
Taken together, these judgments allow the identification of the main conditions and sub-conditions used to assess the concept of communication to the public in EU law. The first two main conditions are essential and cumulative (e.g. *Svensson*, 16; *ITV Broadcasting*, 21, 31; *SBS*, 15; *C More Entertainment*, 25; *Reha Training*, 37; *GS Media*, 32).

The first cumulative condition is the existence of an “act of communication”, which requires the establishment of two elements. First, the existence of an “intervention” by the user, also referred to as “the indispensable role of the user and the deliberate nature of its intervention” (*GS Media*, 35 and case law cited). Confusingly, as we shall see, the notion of intervention also sometimes surfaces at other stages of the analysis. Second, the “sufficiency of transmission or availability” or works.

The second cumulative condition is that the communication is made to the “public”. This includes assessing three elements. In particular, it must be established that the act of communication is made to a “public”, which can alternatively be (1) a new public or (2) a public reached through a separate or specific technical means.

In parallel to these cumulative conditions, the CJEU sometimes refers to the profit-making nature or purpose of the communication, either as a stand-alone third condition or as an integral part of the “new public” analysis. However, neither this third criterion nor the factors mentioned under each condition are per se determinative of the qualification of the right. Instead, they are classified as “complementary” and “interdependent” (*SCF*, 79; *Reha Training*, 35; *GS Media*, 33–34; *Ziggo*, 25). That is to say, “those criteria may, in different situations, be present to widely varying degrees, [and] they must be applied both individually and in their interaction with one another” (*GS Media*, 34 and case law cited). In this sense, the Court talks about the need for an “individual assessment” of the concept of communication to the public (*PPI*, 29; *Reha Training*, 33; *GS Media*, 33; *Filmspeler*, 28; *Ziggo*, 23).

In other words, they appear to be factors developed by the Court to conduct a case-by-case multi-factor analysis of the right of communication to the public, as represented in Figure 1.



**Figure 1. Conceptual Map Right of Communication to the Public**

The remainder of this section explores how the Court’s case law can be mapped on to this conceptual blueprint for a consistent interpretation of the right. It explains each criterion and their influence in shaping the scope of the right in the online environment. The focus is on the InfoSoc Directive and the authors’ right of communication to the public.

### **3.1. An “Act of Communication”**

Although the InfoSoc Directive does not define the notion of ‘communication’, its judicial interpretation provides some guidance. The case law of the CJEU relies on a broad interpretation of the exclusive right in light of the objective of a “high level of protection”. The result is a likewise broad interpretation of what constitutes a “communication” (Recitals 9, 10, and 23 InfoSoc Directive. CJEU: *SGAE*, 36; *Murphy*, 186; *Circul Globus*, 33; *ITV Broadcasting*, 20; *Svensson*, 17; *OSA*, 23; *SBS*, 14).

A communication occurs when a work is transmitted or made available in such a way that members of the public may access it. This implies two elements. The first is the occurrence of an intentional or deliberate intervention by the user to make the communication, which intervention is either “indispensable” or at least “essential” for the communication to occur. The second is that the acts must be sufficient to transmit or make the work available to the public. This means that it is not necessary for the work to actually be received or accessed.

### 3.1.1. *Intervention*

The notion of “intervention” is used in a flexible and far-reaching manner by the Court, applying it to a multitude of different activities of users. Examples are the transmission of football matches in a pub on a television screen (*Murphy*), and the broadcasting of films or music in hotel rooms (*SGAE, PPI*), in a circus (*Circul Globus*), or in the waiting room of a dental practice (*SCF*).

This intervention must be “intentional” or “deliberate”. That is to say, the user – the person or entity using a means of communication – carries out an act of communication when they knowingly intervene to provide their customers access to a work, for example through a broadcast. This point is emphasised in multiple judgments discussing the “essential role played by the user”, where it is stated that the user intervenes “in full knowledge of the consequences of his action, to give his customers access to a protected work” (*Reha Training*, 46; *GS Media*, 35, *Filmspeler*, 31, *Ziggo*, 26).

One implication of this approach is that intention or knowledge of the user play a role in establishing whether an intervention takes place and, therefore, whether a communication to the public occurs. An intervention is therefore volitional, not accidental.

The intervention must also be “indispensable” or “essential”. This creates some problems. In its “offline” judgments, the Court emphasized the indispensable role of the user’s intervention for the act of communication to occur. It said, for instance, that without that intervention, the customers, although physically within the area covered by a broadcast, would not otherwise be able to enjoy the broadcast work (*SGAE*, 42; *Organismos*, 38, *Murphy*, 195; *SCF*, 82; *PPI*, 31).

Related to this, the Court noted that the intervention can only qualify as a “communication” if it is more than a mere technical means that ensures or improves the communication (*SGAE*, 42, *Murphy*, 194). On the basis of this language, for example, the Court was able to qualify an internet retransmission as a “communication” in *ITV Broadcasting*, by arguing inter alia that TV Catch-up’s intervention goes beyond the provision of a mere technical means to ensure or improve reception of the original transmission in its catchment area (*ITV Broadcasting*, 28–30).

However, when it comes to its judgments on hyperlinks, the “indispensable” nature of the intervention fades. To be sure, the Court does mention it explicitly (*GS Media*, 34; *Filmspeler*, 31, *Ziggo*, 26). However, both *Filmspeler* and *Ziggo* clearly soften the requirement. In these cases, the intervention does not need to be indispensable. It suffices that it is very important. In the words of the Court: “in the absence of that intervention, those customers would not be able to enjoy the broadcast work, *or would be able to do so only with difficulty*” (*Ziggo*, 26, *Filmspeler*, 41).

The softening of this requirement had significant implications in online cases. In *Filmspeler*, it was the basis for considering that the sale of a multimedia player (a Kodi box) containing links to unauthorized sources constitutes an act of communication. The CJEU did not consider such sale to be a “mere provision of physical facilities for enabling a communication”, which would be outside the scope of the right pursuant to recital 27 InfoSoc Directive. Rather, it relied on its “hotel room” jurisprudence (*SGAE* and its progeny) and the AG Opinion to qualify the intervention of the seller as intentional – “with full knowledge of the consequences of his conduct” – and instrumental (but *not indispensable*) for users to have “direct access” to works (*Filmspeler*, 38–42).

In *Ziggo*, the Court drew from its previous case law the principle that “any act by which a user, with full knowledge of the relevant facts, provides his clients with access to protected works is liable to constitute an ‘act of communication’ for the purposes of Article 3(1)” (*Ziggo*, 34). This reasoning led to the position that the online sharing platform The Pirate Bay (TPB) made an intervention without which “works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex” (Ibid. 36). On this basis, it was concluded that the operators of TPB played an “essential role in making the works in question available”, committing a restricted act of communication (Ibid. 37). The argument that TPB was engaging in the “mere provision” of facilities was also rejected. In

no small part, this was because the platform offers not only a search engine but also a detailed index for access to works, which is furthermore curated by the operators of the platform (Ibid. 37–38).

Whatever one thinks about the wisdom of this approach, it surely allows a broader range of acts to qualify as an intervention, thereby broadening the range of activities that may fall within the scope of the exclusive right and give rise to primary liability.

### **3.1.2. Sufficiency of transmission or making available**

The second constitutive element to assess whether there is an act of communication is the sufficiency of transmitting or making a work available to members of the public. In other words, a communication occurs independently of the work being received or accessed by the public. An offline illustration is provided in *SGAE*, where a communication occurred even if customers did not switch on the television and had not actually accessed the works (*SGAE*, 43). An online example is *Svensson*, where it was considered that the provision of direct access to the work via a link from one website to another constitutes a restricted act of “making available” to the public (*Svensson*, 19-20).

This view is not uncontroversial. For example, the Advocate General in *GS Media* departed from *Svensson* by arguing that if a link points to a freely accessible work it is merely facilitating the access to the work: the “actual ‘making available’ was the action by the person who effected the initial communication” (*GS Media Opinion*, 54). To make this point, he relied on the notion of intervention, considering that an act of communication occurs only if the intervention of the linker is “vital or indispensable in order to benefit from or enjoy works” (Ibid. 55-57). Because the work is already freely accessible, the link does not constitute an *indispensable* intervention and is therefore not an act of communication to the public. As noted below (4.1), this position is shared by relevant scholarship and would have prevented the qualification of standard hyperlinks within the right of communication to the public.

Be that as it may, the current line of the Court is that an “act of communication must be assessed taking into account the specific nature of that method of communication” (*Ziggo Opinion*, 38). In other words, if the method of communication is linear, an act of transmission is required; if that act is interactive (on-demand), only the making available of the work is necessary.

Thus, in its judgments involving linear types of communication – whether or not over the Internet –, the CJEU appears to require a ‘transmission’ of the protected works, irrespective of the technical means or process used (*Murphy*, 193; *ITV Broadcasting*, 28–30; *OSA*, 25; *SBS*, 16; *Reha Training*, 37–39). However, when the acts in question are of making available online (most notably uploading or hyperlinking) no transmission is required (*Filmspeler*, 36; *Ziggo*, 31).

## **3.2. Communication “to the public”**

If an act of communication is established, the second cumulative condition that must be met is that such act is made to the “public”, a concept to be construed similarly across the InfoSoc, SatCab and Rental and Lending Directives (*Murphy*, 187–188). The public is defined as an “indeterminate” and “fairly large number” of recipients as potential beneficiaries of the communication (*Mediakabel*, 30, *Lagårdere*, 31 *SGAE*, 38, *SCF*, 84; *ITV Broadcasting*, 32; *OSA*, 27; *SBS*, 22; *Reha Training*, 41; *GS Media*, 36). It contains a *de minimis* threshold that rules out groups of persons that are too small or insignificant (*SCF*, 84; *Reha Training*, 43). To determine the threshold it is necessary to consider the “cumulative effects of making works available to potential audiences”, taking into consideration the number of persons having access to the same work at the same time and in succession (*SGAE*, 39; *PPI*, 35, *ITV Broadcasting*, 33; *OSA*, 28; *Reha Training*, 44). This threshold filters out communications that are “private”, i.e. within a

delimited circle of family or friends (*SCF*, 86; *Reha Training*, 42). It is unclear whether the concept of private encompasses all non-public acts.

As noted, the right covers only communications to a public at a distance, meaning not present at the place of origin of the communication (*Murphy*, 200, 203; *Circul Globus*, 36-37, 40). In some cases, the Court requires that the public is “targeted by the user and receptive, in one way or another, to that communication, and not merely ‘caught’ by chance” (*SCF*, 91; *PPI*, 37).

Finally, the Court has on occasion derogated from its unified view of the concept of public in the *acquis*, by drawing a distinction between copyright and related rights. In *SCF*, it excluded patients in a waiting room of a dental practice from the concept (*SCF*, 84–85, 95–96). One justification for this is that such patients do not meet the *de minimis* threshold of “public”. Another possibility is to understand the Court’s reasoning in light of the “profit-making nature” criterion (discussed below) and the type of right at stake in *SCF* – a non-exclusive right of equitable remuneration. This latter view is confirmed in *OSA*, where the different treatment of related rights is justified on the *nature* of the right (*OSA*, 34–35; *SCF*, 74). To be sure, such distinction has the benefit of limiting the reach of the questionable interpretation in *SCF*. However, it also leads to unequal treatment of related rights holders (Leistner, 2015, pp. 633–637).

Having defined “public”, the CJEU advances two alternative sub-criteria to determine whether a communication to the public takes place (*GS Media*, 37, and case law cited). Such a communication occurs, first, if it is made through separate or different technical means as compared to the original communication (*ITV Broadcasting*, 39, *VCAST*, 48). Alternatively, it occurs if a work is communicated to a “new public” (*SGAE*, 37–38, 40, 42).

Both sub-criteria are crucial for the assessment of the exclusive right in the online environment. They are also the cause for much of the legal uncertainty and complexity arising in this area, especially the “new public”. It is furthermore remarkable that neither criterion has a clear basis in international or EU copyright law. Rather, they are creations of the Court (ALAI, 2014; Hugenholtz & Velze, 2016).

### **3.2.1. Specific Technical Means and Internet Retransmission**

According to the CJEU, an act of communication to the public is restricted if made through a “specific technical means”. In essence, this safeguards communications of works made by different technologies, regardless of whether a new public is reached. An example is where a primary communication made by satellite broadcasting is followed by secondary communication over the internet. The targeted public may be the same but the technical means is distinct. The situation is different for primary communications online, where “all potential and different forms of communication appear to constitute the same technical means in the opinion of the CJEU” (Leistner, 2015, p. 634).

In *ITV Broadcasting*, the Court looked at the near real-time distribution of television broadcasts over the Internet. TV Catchup offered users a service that allows them to receive online live streams of free-to-air broadcasts, including those transmitted by ITV. The service was restricted to users legally entitled to watch the content under a UK television licence.

The Court first established the internet retransmission in question qualified as an act of communication, to a public. It then stated that the acts were separate from the original transmission and required an independent authorisation, due to its specific technical conditions, means and intended public. This qualification made it unnecessary to examine whether the communication reached a new public. It was likewise not necessary to assess other complementary but ultimately “non-essential” factors, such as the profit-making nature of the activity or the level of competition between the third party and the original broadcaster (*ITV Broadcasting*, 39, 43–49).

This reasoning was later confirmed in *SBS*, where it is stated that “every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of

the work in question” (*SBS*, 17; *VCAST*, 48–49). It has been argued that the Court’s development of this criteria and interpretative approach is meant to safeguard new technological avenues of exploitation with economic significance for rights holders (Leistner, 2014, pp. 569–572).

### 3.2.2. *New Public and the Hyperlinking Judgments*

If an act of communication reaches a public but does not use a specific technical means it can still be restricted by copyright, provided the communication is made to a “new public”: a public not taken into account by the copyright holder when they authorised the initial communication. This new public criterion is central to the definition of the online right of communication to the public in EU law.

The criterion was first used in *SGAE*. It then made its way to the Court’s analytical framework and is now a staple of most judgments on the interpretation of the exclusive right (*SGAE*, 37–38, 40, 42; *Murphy*, 197; *Organismos*, 38; *Airfield*, 76; *Svensson*, 21, 24; *OSA*, 32; *Reha Training*, 45, *GS Media*, 37). In *SGAE*, the Court traced the criterion back to Article 11*bis*(1)(**ii**) BC and the 1987 Guide to the Berne Convention (*SGAE*, 41). Curiously, the Guide referred to that criterion instead in relation to Article 11*bis*(1)(**iii**) BC, which raises doubts as to the validity of the analysis. This is because subparagraph (ii) of the BC provision relies instead on the criterion of an “organisation other than the original one”, i.e. a *new communicator* rather than a *new public*. It therefore appears that the Court’s reliance of this criterion is based on a misconception (Hugenholtz & Velze, 2016).

Regardless, from the application in the offline world to acts of communication in pubs (*Murphy*), hotels rooms (*SGAE*), spa establishments (*OSA*), rehabilitation centres (*Reha Training*), and in the context of satellite broadcasting (*Airfield*), the new public criterion has gained extraordinary relevance for the interpretation of Article 3(1) InfoSoc Directive in the online environment. This relevance is due especially to its use in hyperlinking judgments. These can be divided in two stages of increasing complexity. The first stage is characterized by the CJEU taking a position on the legal qualification of hyperlinking as a restricted type of communication to the public, and includes the early judgments from *Svensson* to *C More*. The second stage deals with aftermath of accepting the copyright relevance of hyperlinks and the Court’s struggle to deal with the loose ends of earlier decisions. After opening that particular Pandora’s Box, the Court has been forced to develop a web of factors and conditions to circumscribe its reach. This stage includes the judgments from *GS Media* to *Ziggo*.

#### i) **First Stage: placing hyperlinking under copyright**

*Svensson* involved a Swedish company (Retriever) operating a website that provided clients with links to articles published on third-party websites. The applicants in the main proceedings (all journalists) claimed compensation from Retriever for harm resulting from provision of hyperlinks redirecting users to their freely accessible and copyright protected press articles. The question at stake was whether such placing of links qualified as a restricted act of communication to the public in EU law.

The CJEU first considered that the provision of direct access to the works via a link from one website to another is an act of making available and, therefore, of communication. Second, because the link is aimed at all potential users of the website it reaches a public. However, to trigger Article 3(1) InfoSoc Directive, the acts “must also be directed at a new public” (*Svensson*, 19-25).

In this case, there was no communication to a new public. The initial communication targeted all potential visitors to the website in question, consisting of “all internet users”, and access to the works was not subject to “restrictive measures”. Accordingly, Retriever’s website users were part of the public taken into account by the applicants when they first authorised the making available of works. Therefore, no new authorisation is required (Ibid 27-28).

The Court further noted that the conclusion remains valid even if the link causes the work to appear “in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site” (Ibid 29). In other words, the legal qualification turns on whether the linked-to work is “freely accessible” online rather than on the type of hyperlink (i.e. deep-link, framing, embedded, etc.).

This technology-neutral approach was confirmed in *BestWater*, where it was considered that hyperlinking through “framing” of a YouTube video did not constitute a communication to a new public because the link pointed to a work freely available online (*BestWater*, 16–19; *Svensson*, 29–30). Crucially, the Court in *BestWater* did not rule on whether it is relevant for the assessment of the right that the video is question was uploaded *with or without the consent* of the copyright holders (Mezei, 2016, p. 783).

The outcome is different if a link allows users to circumvent restrictions put in place by a website to limit access to its subscribers. The circumventing link “constitutes an intervention without which those users would not be able to access the works transmitted”, meaning that those users would constitute a new public (not targeted by the initial communication) and such link would be restricted under copyright (*Svensson*, 31). In this instance, the circumventing link can be said to constitute separate act of communication, characterized by an intervention of the linker that is essential to reach a new public. To be sure, there is some conceptual overlap here as to the two main criteria used by the Court, leading to a difficult distinction between intervention and new public.

Finally, the CJEU added a conceptual wrinkle to its case law in the *Soulier* case by raising the possibility that a link to a freely accessible work is not outside copyright (for failing to meet the new public requirement, but rather subject to implied consent. This point is developed further *infra* at 4.3.

## ii) Second stage: blurring the liability lines

In the second stage of hyperlinking cases, the Court has had to deal with the floodgate it opened. As expected, the ambiguous criteria of new public as developed by *Svensson* and its progeny generated significant legal uncertainty. This in turn led to further preliminary references by national courts seeking guidance on the many grey areas created by the CJEU. Unfortunately, the judgments that followed have probably created more problems than they solved. Especially concerning is the expansion of the exclusive right’s scope and the ensuing blurring of the lines between primary and secondary (or intermediary) liability in EU copyright law.

### *GS Media and hyperlinking to unauthorised sources*

In the aftermath of the first stage cases, the most controversial issue to arise was the legal status of hyperlinking to unauthorised sources. This was addressed in *GS Media*, a case concerning the posting of hyperlinks on the popular Dutch website *GeenStijl.nl*, operated by GS Media. The hyperlinks directed users to third-party websites hosting photos of Dutch starlet Britt Dekker, taken by the photographer C. Hermès. The photos were destined for publication in the Dutch *Playboy* magazine, owned by the publisher Sanoma.

Without the authorization of Sanoma, the *GeenStijl* website posted links to files containing the photos on the third-party website *Filefactory.com*. The photos were eventually removed from that website following notice by Sanoma. However, neither the links nor the articles referring to the photos were removed from the *GeenStijl* website, despite Sanoma’s requests. Instead, *GeenStijl* published additional articles with links to other third-party websites hosting the photos at issue. All of these articles and links were published online between October and November 2011, prior to the scheduled publication of the photos in the *Playboy* issue of December 2011.

Interpreting the CJEU case law post-*Svensson*, the Dutch Supreme Court was uncertain whether Article 3(1) InfoSoc Directive was triggered “if a work has been previously published, but without the consent of the copyright holder”. In particular, it was unclear whether a new public is reached if the work was already available online before a link to it is created, even if that link greatly facilitates access to the work. Furthermore, it would be extremely difficult for the operator of a website to check, prior to posting a link, whether the rights holder had consented to the prior availability of that work (*GS Media*, 21–22).

The judgment was preceded by an Opinion by AG Wathelet, who departed from previous case law. In his view, a link that is freely accessible is not an indispensable intervention to make the work available online, even if it points to an unauthorised source. The availability originates from the initial communication, which is the infringing act. As such, there is no act of communication in this case (*GS Media Opinion*, 48-64). Even if this was not the case, he continued, there would be no communication to a new public, either because the criterion only applies if the original communication is authorised or because the linker’s intervention was not indispensable to reach that public. In this case, the link merely “facilitates or simplifies” access to the work (*Ibid.* 67-70).

Building on this analysis, the AG concluded that Article 3 InfoSoc Directive does not cover the posting of hyperlinks to works freely accessible online, a result that could only be achieved through legislative action (*Ibid.* 75-79). This conclusion was motivated by the normative concern that a different interpretation would “significantly impair the functioning of the Internet”, undermine the directive’s objectives of “the development of the information society in Europe” and fair balance, and have a chilling effect on individuals’ freedom to use the internet (*Ibid.* 77-78).

This echoes a fundamental rights argument in support of delimiting the scope of the exclusive right made prior to *Svensson* by a group of leading scholars in this area. In their view, hyperlinks are essential to the operation of the Internet, including access and exchange of a vast trove of information available in the network. Therefore, they are crucial for exercising the fundamental freedom of expression and information online (European Copyright Society, 2013). This freedom is protected by Article 11 Charter and must be balanced with copyright protection, as recognised in recital 3 InfoSoc Directive.

The CJEU did not follow the AG. The judgment begins by noting the need to determine the scope of the exclusive right in light of the objectives of the directive. On the one hand, establishing a high level of protection for authors, allowing them to receive an appropriate reward for the use of their works. On the other hand, striking a fair balance between the rights of copyright holders in Article 17(2) Charter), and the fundamental rights of users, namely freedom of expression and information in Article 11 Charter (*GS Media*, 28–31).

In an argumentative sleight of hand, the Court then reframed its earlier case law. Although this was not clear before, the Court now states that posting hyperlinks to works on another website is not covered by copyright *only* if those works are freely accessible with the consent of the rights holder. *A contrario*, if the hyperlink points to works accessible online *without consent* it *may* be a communication to the public (*Ibid.* 40-43).

To assess whether that is the case, the Court makes two preliminary remarks, which are essential to understand the murky reasoning that follows. First, it recognizes the importance of the internet in general for freedom of expression and information, and of hyperlinks in particular for “its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information”. Second, it considers the extreme difficulty of individuals posting hyperlinks to ascertain the legal status of the linked-to works at the time of posting or subsequently (*Ibid.* 45-46).

On this basis, the Court states that if the linker “knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet” (e.g. if “he was notified thereof by the copyright holders”), the provision of the link is a restricted communication to the public. Why? Because

the linker *intervened* in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted online. This “deliberate intervention” is akin to posting a link circumventing access restrictions (Ibid. 48-50).

Conversely, if the linker did not know or ought to have known of that fact, then the link is not restricted. In other words, the end-user may benefit from a sort of innocent infringement defence. In this analysis, *knowledge* becomes crucial element to establish the legal status of linking. This is noteworthy because it moves copyright away from its natural habitat as a strict liability tort, blurring the lines between primary and secondary liability (see *infra* 4.5).

To determine knowledge, a distinction is drawn between whether a person posting the link pursues profit or not. If she does, there is a rebuttable presumption that the linker had full knowledge of the legal status of the work, as she would carry “out the necessary checks” for that purpose. If the presumption is not rebutted, the link is assumed to communicate the work to a new public (Ibid. 47–52). Differently, if the linker does not pursue profit, knowledge is presumed. This scenario seems to cover individuals using the internet for non-commercial purposes, for whom it would be too cumbersome to check the legal status of the linked-to works. Thus, in contrast with previous judgments, the Court assesses the profit making nature of the communication in the new public analysis, as a means to establish a knowledge presumption. However, it does not elucidate the meaning of “posting of hyperlinks carried out for profit”.

To justify the creation of this presumption and attached for-profit condition the Court resorts to the familiar terrain of the need to secure a high level of protection. Copyright holders, it is said, should be entitled to “act not only against the initial publication of their work on a website”, but also against “any person posting for profit a hyperlink to the work illegally published on that website”, as well as any persons posting hyperlinks that circumvent access restrictions. They are also entitled to act against any linker that does not pursue financial gain but has knowledge of the “illegal nature of the publication” and fails to remove the link. These persons, furthermore, “may not rely upon one of the exceptions listed in Article 5(3)”, which could otherwise provide a legal permission to post the hyperlink (Ibid. 53).<sup>4</sup>

Applying this analysis to the particular case, the Court noted that: GS Media operated the *GeenStijl* website, which provided the hyperlinks to the photos for profit; Sanoma did not authorise the publication of photos on the Internet; GS Media was aware of Sanoma’s lack of consent for publication, and thus cannot rebut the presumption of knowledge. Consequently, the posting of the hyperlinks in question is a restricted communication to the public (Ibid. 54–55).

Following *GS Media*, to determine a “new public” it is crucial to establish the public taken into account by the rights holder at the time of the initial communication. If the rights holder consented (implicitly or explicitly) to the unrestricted making available of a work, the user is free to link to it. But if the work was made available without the consent of the rights holder, “no public was taken into account by the latter, and any new making available therefore targets a new public and must consequently be considered a communication to the public” (*Ziggo Opinion*, 41).

### *Filmspeler and Kodi boxes*

The influence of *GS Media* was immediately felt in *Filmspeler*, a case involving the provision of a multimedia player (also known as a “kodi box”) with software and add-ons containing hyperlinks allowing access to protected audio-visual works.

The kodi boxes in question were sold online under the name “filmspeler” and included pre-installed software that integrated third-party add-ons, which linked to different websites, including some containing works made available without the content of rights holders. Together with a user-friendly interface and a remote control, the device allowed users to easily access such works and stream them for viewing on a television screen. Importantly, advertising for the device singled out its ability to allow

viewing of unauthorised content. The question before the CJEU was whether the right of communication to the public covers the *sale* of kodi boxes of this type (*Filmspeler*, 15–23).

After establishing that the sale of kodi boxes amounts to an act of communication and is directed at the public, the Court turned to the *GS Media* precedent for guidance. In doing so, it noted the importance of prior consent of the rights holder for every act of communication and restated the prior judgment’s knowledge test for assessing the legality of a link to unauthorized content (Ibid. 47–49).

Here, the kodi box was sold “in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on that player gave access to works published illegally on the internet”, as attested by the advertisement to that effect. Furthermore, the device was sold for profit at a price that accounted for its ability to allow streaming of audio-visual works without the consent of the rights holders. In this light, the knowledge presumption of *GS Media* applies and the sale of such devices constitutes a communication to a new public (Ibid. 50–53).

*Filmspeler* further erodes the absolute character of the exclusive right by shifting the analysis of the notion of communication to the public towards knowledge and intention. Arguably, this lends flexibility to the right, with the benefit of allowing the interpreter to better distinguish users along categories such as good/bad faith or professional/non-professional, modulating the scope of the right accordingly (Tatiana Sinodinou, 2017). From a less optimistic perspective, this further shift away from strict liability is worrisome. It broadens the scope of primary liability so that it now includes acts previously dealt with through intermediary liability, while simultaneously drawing from concepts more familiar to tort law. In blurring the primary/secondary liability lines, this approach also risks creating further legal uncertainty.

#### *Ziggo and peer-to-peer platforms*

*Ziggo* concerns inter alia the liability of operators of indexing sites of peer-to-peer networks for copyright infringements committed in the context of the same. The site in question here (TPB) provides an indexing site for magnet links or torrents and a search engine, allowing file sharing of works by end-users without the authorisation of rights holders. The main question of the case for our purposes is whether TPB is directly liable for those unauthorised uses or, as had been the predominant view before, it is merely subject to intermediary liability.

The judgment was preceded by an opinion by AG Szpunar. He distinguished this case from its predecessors: whereas *Svensson* and *GS Media* concerned secondary communication of works via hyperlinking, *Ziggo* was about the original communication of works via a peer-to-peer network based on the BitTorrent protocol. This, in his view, implied that the reasoning of previous cases should not apply directly (*Ziggo Opinion*, 4).

The main issue at stake is whether the operators of platform are directly liable for copyright infringement, together with the uploading users. TPB provides a “system which enables users to access works that are made available by other users”, making its role “necessary” in accessing the works (Ibid. 25-27, 49-50). However, the platform only indexes metadata. It does not host copies of works or influence what content is shared. Thus, the AG argues, the site’s operator is “only an intermediary” enabling peer-to-peer sharing. He does not have a “decisive role in the communication to the public” unless he has “actual knowledge” that the work has been made available illegally *and* fails to “take action to render access to the work in question impossible” (Ibid. 51) Actual knowledge results, for instance, from direct notification to the operator by the rights holder regarding “the illegal nature of the information appearing on the site” (Ibid. 52).

On this basis, the AG concludes that the *GS Media* knowledge presumption should not apply automatically to TPB or similar sites. Doing so would violate Article 15 of the ECD as it would impose “on operators of indexing sites of peer-to-peer networks, which normally operate for profit, a general

obligation to monitor the indexed content” (Ibid. 52). In contrast, if such operators gain actual knowledge of the illegality and do not “make access to such works impossible” their *intervention* qualifies as “necessary and deliberate”, making them “simultaneously and jointly” liable for the original unauthorised making available to the public of works in the network (Ibid. 53-54).

As with *GS Media*, the Court did not follow the AG. After establishing the existence of an act of communication by TPB to a “public” that covers “at the very least, all of the platform’s users” (*Ziggo*, 40–43), the Court then engaged in a remarkably leaner analysis of the new public than usual.

First, it stated that the operators of the site were informed of the existence of unauthorized works in the platform. Second, it observed that it resulted from the observations to the Court and statements of those operators (in blogs and forums), that they knew or “could not be unaware that this platform provides access to works published without the consent of rightholders”. This was particularly clear due to the high number of torrent files on TPB relating to unauthorized works. That alone was sufficient to establish a communication to a new public (Ibid. 44–45).

However, so as to leave no doubt as to TPB’s knowledge of the unauthorized source, the Court further observed that the “making available and management of an online platform” like the TPB is an activity carried out with the purpose of obtaining profit. This was clear from the fact that such “platform generates considerable advertising revenues”. Therefore, the Court concluded, a platform such as TPB is directly liable for communicating works to the public under (Ibid. 46–48).

*Ziggo* marks “the first time that the liability proper (i.e. for damages, as opposed to mere injunctions) of an internet intermediary for copyright infringement has been considered at the European level” (Angelopoulos, 2017a). To be sure, this is not a case of strict liability. Instead, following from previous decisions, the CJEU makes liability for what would normally be qualified as an intermediary dependent on knowledge of an unauthorised act by a third party (here: the uploading user of the platform). The obvious danger of this approach is the applicability of this interpretation to other (good faith) online intermediaries whose services are used by third parties to infringe copyright (Angelopoulos, 2017a).

### iii) A flowchart of the new public

To better understand and summarize the complex legal status of hyperlinking and the application of the new public criterion acts in EU copyright law, Figure 2 contains a representation of the above analysis.

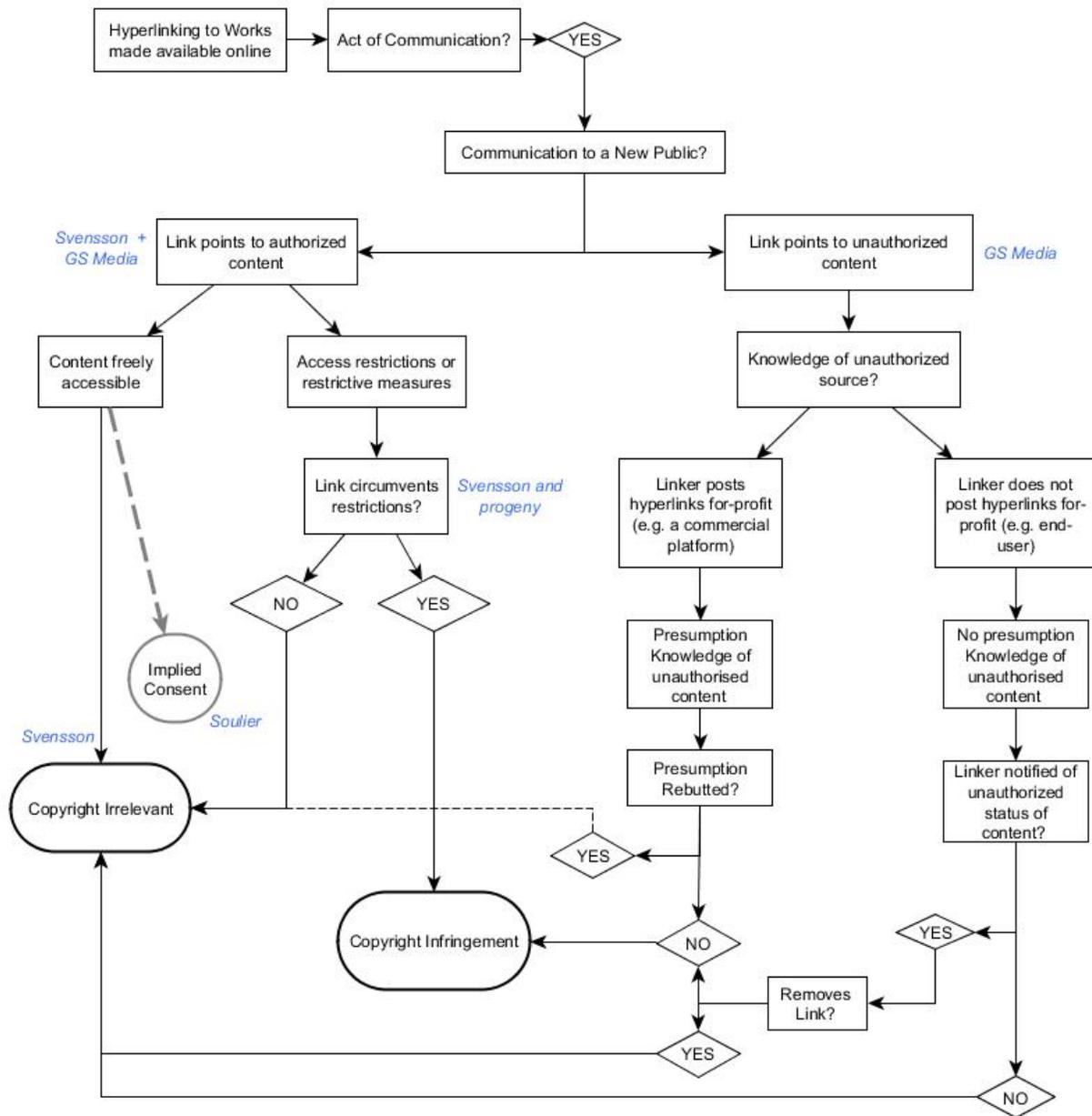


Figure 2. Hyperlinking and new public flowchart

### 3.3. The Profit Making Nature of the Communication

Finally, the CJEU sometimes resorts to a third separate criterion to determine if there is a copyright relevant communication to the public: whether the communication is of “a profit-making nature” (*SGAE*, 44; *Murphy*, 204, *ITV Broadcasting*, 42–43; *SCF*, 79, 88, 97; *Reha Training*, 49; *GS Media*, 38; *Filmspeler*, 34). This criterion, as noted, also surfaces as a condition to establish knowledge in assessing the new public in hyperlinking cases.

As a standalone criterion, the CJEU appears to draw a distinction between copyright and related rights cases (Nérison, 2015, p. 390). For communications to the public of *works*, the profit-making condition is relevant but not “necessary” or “essential” to establish “the existence of a communication to the public”

(*SGAE*, 44; *Murphy*, 204, *ITV Broadcasting*, 42–43; *Reha Training*, 49, *Filmspeler*, 34, *Ziggo*, 28). Hence, it is not determinative of the exclusive right in Article 3(1) InfoSoc Directive (*OSA*, 35).

A different conclusion applies to the communication to the public of subject matter protected by related rights. This is visible in *SCF* and *PPI*, which deal with the *remuneration right* in Article 8(2) Rental and Lending Directive. The position of the CJEU is that the provision “requires an individual interpretation of the concept of communication to the public” as the right in question “is essentially financial in nature”, which assessment entails an examination the profit-making nature of a communication (*SCF*, 76-79, 88-89; *PPI*, 36). In these cases, the criterion is used to qualify the intervention that communicates the work to the public and, in particular, whether it aims at attracting additional customers and revenue (*SCF*, 90; *Reha Training*, 48–51).

The judgment above suggest the profit-making criterion plays a crucial role in assessing the existence of a communication to the public for the remuneration right in Article 8(2) Rental and Lending Directive (Leistner, 2015, p. 633). As a standalone criterion, it is much less important in assessing Article 3(1) InfoSoc Directive. That notwithstanding, after *GS Media*, it is arguable that it plays a decisive role to establish a presumption of knowledge, which is in turn a key element in the analysis of the new public in scenarios of hyperlinking to works available online without the content of the rights holder.

## 4. CRITIQUE AND PROPOSALS

The previous section sets out a conceptual framework to understand the complex case law of the CJEU on communication to the public. That framework teases out several deficiencies in the Court’s approach to a central concept of EU copyright law. This section develops a critique of that case law and advances interpretative proposals to overcome its main shortcomings.

### 4.1. Hyperlinking as an act of communication

The CJEU’s case law has been criticized for bringing acts of hyperlinking into the scope of the concept of communication to the public. One main objection to existing case law is that most types of hyperlinking are not acts of communication of works and should therefore not be covered by the exclusive right. This objection can be divided in two separate arguments: the *transmission* and *indispensable intervention* arguments.

In order to understand the arguments, it is useful to distinguish between hyperlinking and uploading. When a user posts a hyperlink she makes available a reference or pointer to a file containing a copy of a work. Her action does not involve previous storage of the file with the purpose of making it available to the internet public. Hyperlinking is merely “the provision of a set of technical information about how such content may be reached”, which “always presupposes that the linked content already be made available on the net by someone else”; the uploader is “the actual infringer if the first act of uploading took place without the rightholder's consent” (Arezzo, 2014, p. 551).

According to the *transmission* argument, an act of communication requires a transmission of a work from the communicator to (members of) the public. That is to say, the exclusive right applies only to communication to the public “of the work”, and whatever a hyperlink provides, it is not “of a work” (European Copyright Society, 2013).

This position has undeniable pedigree. It finds support in the Basic Proposal of the WIPO Internet Treaties, which allows the parent provisions of Article 3 InfoSoc Directive as a “transmission” right. In addition, recital 23 of the directive identifies only “transmission and retransmission” of works as falling

within the scope of the right. Finally, the directive's *travaux préparatoires* point in the same direction (European Copyright Society, 2013; WIPO, 1999, p. 206).

Taking the argument to its logical conclusion, if a hyperlink is only a reference to a location where a work is hosted, then it is not a transmission thereof. As such, to qualify it under an exclusive right would expand the scope of the right beyond the requirements of international law and, arguably, the letter of the InfoSoc Directive.

As explained, the CJEU's case law on linear communications (including online retransmissions) does appear to require an act of transmission. If transmission were also a requirement for interactive acts of communication, then the scope of the right would probably exclude hyperlinking. Some scholars find this to be a desirable outcome, as it would avoid expansive interpretation of the right of communication to the public as an overbroad "right of access" (European Copyright Society, 2013).

Still, the existence of separate right of "making available" appears to undermine this objection by allowing that the mere availability of access to a work is sufficient to qualify it as an act of communication (Leistner, 2015, pp. 632–633; Mezei, 2016, p. 788).<sup>5</sup> Furthermore, it has been stated that such position is consistent with a broad interpretation of the right, aimed at providing a high level of protection to rights holders and ensuring that the concept of "act of communication" retains sufficient flexibility to survive technological obsolescence (*GS Media Opinion*, 48-52). Therefore, although the transmission argument has its merits, it does not appear to be decisive.

A separate argument states that because a hyperlink is not an *indispensable* intervention, it does not qualify as an act of communication. This reading was developed by the AG in *GS Media*, who argued that the actual making available results from the initial communication (the upload), which is the infringing act (Ibid. 48–64). If the hyperlink is not an act of communication, then it does not fall within the scope of exclusive right. This causes other factors to become irrelevant, like the linker's motivation, knowledge, or awareness of the unauthorised source (Ibid. 63).

Some scholars have taken up this interpretation as a means to prevent that the right of making available becomes a general right to provide access to works online. By requiring an "indispensable" intervention it is possible to exempt from the scope of copyright simple hyperlinks, while retaining protection against those links that circumvent access restrictions. Contentious issues like content aggregation, these scholars argue, should be dealt by the law of unfair competition. This would refocus copyright on acts of economic exploitation, leave copyright holders sufficient means of redress, and foster technological development (Hugenholtz & Velze, 2016, pp. 811–815).

This is probably the simplest solution to solve the many challenges posed by the CJEU's hyperlinking judgments. However, after the *GS Media/Filmspeler/Ziggo* trilogy, there is arguably not a requirement that the intervention is "indispensable". Instead, as noted above (3.1.1), it is sufficient that without that intervention users would not be able to access the works or would only be able to do so only with difficulty.

#### **4.2. Access restrictions or restrictive measures**

A user does not require authorization from the rights holder if she posts a link to a work freely accessible online with the consent of the rights holder.<sup>6</sup> A work is freely accessible online if it is not subject to "access restrictions" or "restrictive measures" (*Svensson*, 18, 26, 31; *GS Media*, 42). These terms are not clearly defined and give rise to significant uncertainty in the determination of the right's scope. In theory, the restrictions or measures in question can be contractual, technological, or both.

For some authors, the terms at stake include contractual restrictions (ALAI, 2014, p. 27; Headdon, 2014, p. 665; Moir, Montagnon, & Newton, 2014, p. 400). That is to say, they allow copyright holders to

prohibit hyperlinks to freely accessible works if accompanied by restrictive terms and conditions. An example is a notice on the webpage prohibiting embedded links to the work.

The rationale here is that the notice would provide the linker with knowledge of the prohibition. Individual users could benefit from an innocent infringement defence, as they would not be subject to the *GS Media* presumption of knowledge. For other users, liability can only be avoided if the presumption is rebutted.

As noted by other scholars, this interpretation is difficult to support (Arezzo, 2014, pp. 541–542; Savola, 2014, pp. 282–283). First, taking into account the case law, it is a reach to consider that contractual conditions encompass access restrictions or restrictive measures. The fact pattern in *Svensson*, where the terminology was first used, and the decision itself focus solely on restrictions/measures of a technological nature. In fact, the Court mentions that a link is infringing if it “circumvents” restrictive measures (*Svensson*, 31; *GS Media*, 50). In the *acquis*, circumvention is a term used in connection with technological measures, for example in Article 6 InfoSoc Directive.

Second, the Court in *Soulier* expressly interprets *Svensson* as

*a situation in which an author had given prior, explicit and unreserved authorisation to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public (Soulier, 36).*

In other words, a literal and systematic interpretation leads to the conclusion that the restrictions/measures at stake are *technological* (Benabou, 2016, p. 366). Therefore, a hyperlink infringes the exclusive right if it provides access to works in circumvention of technological measures meant to restrict that access to a limited number of people. Examples of such measures are subscription pay-walls, session IDs, or current geo-blocking measures used by broadcasters and service providers in the audio-visual sector (Headdon, 2014, p. 655; Moir et al., 2014, p. 400; Tsoutsanis, 2014, p. 507). A circumventing hyperlink of this type amounts to an act that makes the work reach a new public.

The question remains whether the measures in question are any and all technological measures or only the technological protection measures (TPMs) mentioned in Article 6 InfoSoc Directive, the circumvention of which is by itself a prohibited act. Proponents of the broader view point to the likewise broad use of the terms by the Court. Mezei, for instance, argues that existing case law should be read as referring not only to effective TPMs “but also paywalls, registration pages or ‘robot.txt.’files” (Mezei, 2016, p. 782). However, this position is not shared by all, including members of the Court itself. In that sense, the AG in *GS Media* points in the opposite direction, apparently reading *Svensson* as referring to TPMs (*GS Media Opinion*, 73 and n. 43). The issue remains unclear and has implications for the scope of the right, as the latter view would require first an assessment of whether the circumvented measures qualifies as TPM, which might not be the case for a number of currently used restrictions on access to works online.

### 4.3. Implicit consent

*Svensson* states that a hyperlink pointing to a work freely accessible online without access restrictions does not reach a new public. In this scenario, there is no communication to a new public. Failing to meet a cumulative condition, the act would not trigger the exclusive right. In other words, this type of hyperlinking would be copyright-free.

However, and rather confusingly, the later judgment of *Soulier* challenges this interpretation by suggesting that these types of hyperlinks are instead subject to “implicit consent”. The relevant paragraphs state the following (*Soulier*, 35-37).

35. Nevertheless, Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly.

36. Thus, in a case in which it was questioned about the concept of a “new public”, the Court held that, in a situation in which an author had given prior, explicit and unreserved authorisation to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public (see, to that effect...Svensson..., paragraphs 25 to 28 and 31).

37. However, the objective of increased protection of authors to which recital 9 of Directive 2001/29 refers implies that the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author’s prior consent.

To be sure, Svensson already contained language raising the spectre of implicit consent (Benabou, 2016, pp. 363–366; Karapapa, 2017; Savola, 2017). However, *Soulier* appears to accept that hyperlinking to a freely accessible work can be admissible under a doctrine of implicit consent, the conditions for the application of which must be strictly defined. If that is true, these types of hyperlinks fall within the scope of the right of communication to the public. To some extent, *Filmspeler* could be seen as endorsing this view when it mentions that the work is not communicated to a new public “as soon **and as long** as that work is freely available on the website to which the hyperlink allows access (*Filmspeler*, 48).

Some authors welcome the implicit consent approach. Ficsor, for example, considers that it prevents the free and unrestricted making available of works from exhausting the right of communication to the public for acts of hyperlinking. The combination of implicit consent with an innocent infringement defence (in *GS Media*) would allow users the freedom to hyperlink, while avoiding the “collateral damage” of exhaustion (Mihály J. Ficsor, 2017a, pp. 11–12, 2017b).

He further suggests authors can prevent the application of the implicit consent doctrine by making “it clear on their websites... through contractual terms or an unmistakable notice” that they do not give permission to subsequent making available of their works. If they do so, hyperlinking to those works would lose the benefit of the implied license and become unauthorised. This would then trigger the application of the *GS Media* doctrine. As a result, the persons or platforms posting hyperlinks would only escape liability if they “do not have direct or constructive knowledge about the infringing nature thereof (that is, they are innocent infringers)”, or if they benefit from an exception or limitation (Mihály J. Ficsor, 2017b).

One obstacle to this interpretation is that it leads to the “contractual restrictions” scenario rejected above (4.2). In fact, the implicit consent approach would mean accepting that the terms “access restrictions” / “restrictive measures” allow copyright holders to terminate the freely accessible status of a work through a declaration on their website. *Soulier* would thereby contradict its own interpretation of those terms as referring solely to technological measures that restrict access.

A preferable interpretation is that the implicit consent or license granted with the initial availability of the work can only be terminated by the copyright holder if she imposes “access restrictions” through technological measures (Savola, 2017). The measures would automatically break the existing hyperlinks to that work. If an existing or subsequent link circumvents the measures, it will be infringing. Also, if the work is hosted in a third party website without permission and an individual user posts a hyperlink thereto, she will benefit from the *GS Media* innocent infringement defence.

To argue otherwise and accept the “termination by notice” approach would be to impose an unreasonable burden on individuals and platforms. For individuals, it would expand the scope of the right in detriment of the freedom to hyperlink endogenous to the internet. For commercial platforms, it could mean automatic liability for hyperlinks already posted from the moment rights holders prohibit such links

“through contractual terms or an unmistakable notice”. The only recourse of platforms would then be to *a posteriori* rebut the *GS Media* knowledge presumption. This scenario could lead to a duty to monitor links on commercial websites (see *infra* 4.4.3).

A different interpretation would also risk further legal uncertainty. Implicit consent is not harmonised in EU law. The conditions for contractual termination of the implicit license would therefore be determined by different national doctrines. Given the cross-border nature of the use, this would probably lead to (further) divergent interpretations as to the legal status of hyperlinking to a work.<sup>7</sup>

For the above reasons, if the implicit consent approach is accepted, the possibility for its termination should only be accepted if made through the imposition of technological measures. Nevertheless, it bears pointing out that the validity of the implicit consent doctrine in this context is questionable. The new public amounts to a cumulative criterion without which there is no copyright relevant communication to the public, a point made repeatedly by the Court. It therefore defies logic to accept that implied consent can cure the failure to meet a constitutive requirement for the exclusive right to apply to a certain activity.

#### 4.4. The knowledge test

Perhaps the most controversial aspect of the CJEU’s hyperlinking case law is the introduction of a knowledge test to assess the application of the exclusive right. This section discusses the different components of that test, its challenges, and implications.

##### 4.4.1. Knowledge and presumption

The introduction of a knowledge test in *GS Media* was, to put it mildly, a legal innovation. As with any such innovation, its immediate implications are uncertain. In basic terms, the judgment states that if a link provides access to a work published online without the consent of the copyright holder and the person “knew or ought to have known” about that lack of consent, then the hyperlink itself infringes the right of communication to the public (*GS Media*, 49). In other words, the CJEU “introduced a subjective knowledge test in the infringement analysis” of the exclusive right (Senftleben, 2016, p. 132), making its application in some scenarios dependent upon a requirement of intent or negligence.

*GS Media* and its progeny define and develop two standards of knowledge. The first is *actual* knowledge, which refers to the state of knowing the material facts at issue, e.g. as a result of notification of the illegality from the copyright holders (*Ziggo*, 45). The second standard is *constructive* or *construed* knowledge. This would result from facts or circumstances from which the illegal character of the publication of the linked-to work is apparent (the “ought to have known”), as illustrated in *Ziggo* by the presence of a “very large number of torrent files” in TPB (*Ziggo*, 38).

In a further innovative step, the CJEU created a rebuttable (*juris tantum*) legal presumption to determine knowledge, which presumption depends on whether the posting of hyperlinks is carried out for profit. It is worth reproducing the Court’s language (*GS Media* 51; see also *Filmspeler*, 49).

...when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.

This presumption has not clear legal or dogmatic basis (Leistner, 2017b, p. 138). In fact, copyright is traditionally a strict liability tort where the deliberate or negligent qualification of the user’s intervention is relevant only to assess remedies (Targosz, 2016). The *GS Media* Court “rejected strict liability in

respect of hyperlinks to illegal content” (Senftleben, 2016, p. 132). In other words, these hyperlinks do not automatically infringe the exclusive right of communication to the public. A finding of infringement will depend on whether the linker had the required knowledge of unauthorised nature of the publication of the linked-to work.

The obvious parallels with this construction are found in the realm of EU intermediary liability law (most notably in Art. 14 ECD) and general unfair competition law, with the *GS Media* test resembling “the assessment of negligence and duty of care in the context of unfair competition claims”. From this perspective, the erosion of copyright in the hyperlinking context is hardly a victory for copyright holders (Senftleben, 2016, p. 132).

#### 4.4.2. *The for-profit condition*

The presumption of knowledge relies on a “for-profit” condition, the workings of which have been described above (*supra* 3.2.2 - ii)). This condition is poorly defined in *GS Media*, which simply makes references to the posting of hyperlinks being “carried out for profit”, or by persons “pursuing” or “in pursuit of” “financial gain” (*GS Media*, 51, 53, 55).

In theory, considering the for-profit or commercial nature of a copyright use in order to determine its legal status is not per se wrong or inconsistent with EU copyright law. From a functional perspective, it is sensible to ascribe stronger protection to uses of a commercial nature, as they affect the economic core of copyright and its potential for exploitation. An example of this approach is found in the second or third conditions of the three-step test.<sup>8</sup> Another example is the recognition in EU copyright law of the concept of “non-commercial” for certain limitations and in the context of collective rights management.<sup>9</sup> Also, as noted (*supra* 3.3), the profit-making nature of the communication can be a relevant stand-alone criterion to assess the concept of communication to the public.

The novelty introduced by *GS Media* and its progeny was to move the assessment of that criterion to the new public test. This shift is an attempt to actualise the presumption of knowledge and ultimately strike a balance between the need for a high level of protection of copyright owners and the freedom of expression and information of internet users (see *infra* 4.4.5).

But what exactly means that the “posting of hyperlinks is carried out for profit”? In theory, three interpretations are possible. The first and strictest view is that the specific link is posted with the intention to make profit. The second is that the website where the link is posted is a commercial website, generally posting links for profit. The third is that the person or party posting the link is a commercial entity (Geert Lokhorst, 2017).

Support for the first (strict) interpretation can be found in *GS Media*. The Court refers to profit making and pursuing financial gain always in connection to the specific links to unauthorized content, not to other links posted on the same website. This direct connection between the infringing link and the profit it generates (e.g. through additional web traffic and advertisement revenues) is also consistent with the Court’s interpretation of the “profit-making” criterion, which focuses on the commercial nature or advantage of the specific unauthorised use.

However, the *GS Media* wording is sufficiently open to accommodate broader views. In the aftermath of the judgment, some commentators observed that its language “refers to the overall operations of the website owner and not a specific link” (Targosz, 2016), while others took the even broader view that it should cover all persons posting links “who pursue ‘direct or *indirect*’ economic or commercial advantage” (Mihály J. Ficsor, 2017b, p. 3).

A broad interpretation of the for-profit condition is arguably endorsed in post-*GS Media* cases. In *Filmspeler*, the fact that the price for the kodi box was “paid in particular to obtain direct access to protected works available on streaming websites without the consent of the copyright holders” sufficed to

conclude that the “multimedia player is supplied with a view to making a profit” (*Filmspeler*, 51). *Ziggo* takes an even broader stance, by stating that the making available and management of an online sharing platform like TPB “is carried out with the purpose of obtaining profit therefrom”, as attested by the fact that the “platform generates considerable advertising revenues” (*Ziggo*, 46). In other words, the Court appears to favour an interpretation whereby the overall operations of a website or platform owner where the communication occurs are key to determine the for-profit condition.

For the most part, this has been the position of national courts in the aftermath of *GS Media* in Sweden, Germany, Czech Republic, and the UK (Brüß, 2017a, p. 165; Malovic & Haddad, 2017; Nordemann & Kraetzig, 2017; Vivoda, 2017).<sup>10</sup> In essence, national court decisions have predominantly converged on the broad interpretation of the for-profit condition. The condition is taken to refer to the overall operations of the website owner and will be met in most cases where such operations as commercial or generate revenue, including through advertisement and other means.

Particularly worrisome is the application of the for-profit condition to grey area cases. Although many individual users will avoid *automatic* direct liability if their activities are not qualified as being for-profit, some situations remain unclear. In particular, it is uncertain whether an individual posting links in her blog or personal website to third party websites hosting unauthorized works is liable for copyright infringement when the user’s blog/website generates small amounts of revenue, for example through services like Google AdSense.<sup>11</sup>

In the end, beyond the issue of legal uncertainty, the main criticism to the broad interpretation taken by most national is that it turns the for-profit condition into a de facto presumption (Malovic & Haddad, 2017, p. 91). That is to say, if the website posting the link is a commercial website, then it is presumed to have posted the link for profit. This in turn triggers the application of the presumption of knowledge, which leads to the application of the exclusive right. This quasi-double presumption means that a link posted to unauthorized content in a commercial website or platform will automatically be covered by the right of communication to the public.

It is noteworthy, however, that some national decisions in Greece and Germany have advanced stricter readings of the for-profit condition and knowledge presumption, based on policy concerns with fundamental rights and the sound functioning of the internet. For instance, the Athens Court of Appeal considered that the operator of a website linking to movies hosted on third-party websites to not act with a profit-making intention because he had neither a commercial relationship with those websites nor did he receive revenues from retransmission of films in said websites. That is to say, the court did not apply the knowledge presumption in cases where the links are provided by a commercial entity, but only if a connection is established between the linker and the unauthorized for-profit exploitation of the work (Chíou, 2017).<sup>12</sup>

In Germany, a first decision from District Court of Hamburg held that the operator of for-profit website with framing links generated automatically by a search engine to a third party platform where the work is displayed without permission of the copyright holder cannot be presumed to have knowledge of the unlawfulness of the offer. The automated nature of the linking process and good faith standing of the third party platform (Amazon.de) set aside the presumption. Moreover, the sheer amount of links generated made the possibility to individually check them unreasonable. To apply the presumption in this cases would be contrary the fundamental freedom to conduct business in Article 16 of the EU Charter.<sup>13</sup> A second decision from that court goes in the same direction, emphasizing that were links are generated through an algorithmic process that points to a prima facie good faith third party platform there should be no presumption of knowledge or awareness of the unlawfulness of the offer on the part of the linker. Also here the court considered “unreasonable” and “economically unjustifiable” for the linker to check the legality of every such link, an obligation that would conflict with his fundamental freedom to conduct business (Rosati, 2017).<sup>14</sup>

With greater authority, the German Federal Court of Justice (BGH), although subscribing to a broad definition of the for-profit condition, ruled that the *GS Media* knowledge presumption does not apply to links generated by search engines, such as thumbnails automatically indexed on Google Images linking to freely accessible but unauthorized photographs on third party websites. Much like the lower instance courts, the BGH considered that imposing a general obligation to check the status of links generated by search engines from content available on freely accessible websites would be unreasonable, encroach upon their business model, and hinder the development of the internet. (Brüß, 2017b; Nordemann, 2018b).<sup>15</sup>

#### 4.4.3. *A duty to (continuously) monitor links*

Another problematic implication of the judicially created knowledge test is that it risks imposing a duty to monitor links. This issue is closely linked with those the definition of access restrictions / restrictive measures and implicit consent discussed before (Benabou, 2016, pp. 363–366). The risk first arises in *Svensson* but is made more concrete by *GS Media*'s knowledge test. The scenario is the following: a user post a link to a work that is at that time freely accessible online. After the link is posted, the copyright holder restricts access to the work through technological measures. In *Svensson*, the Court broadly states that after the restrictions are imposed a link to that same work (whether hosted on the original website or a different one) constitutes a communication to a new public (*Svensson*, 31).

This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation.

Some commentators read here a “duty to monitor” the freely accessible nature of the work by linkers (Arezzo, 2014, pp. 545–546; Headdon, 2014, p. 665). To understand why, imagine the following situation. A sound recording is made freely accessible online by the copyright holder. A third party copies that recording and posts it on his own website. I am a fan of the artist so I post two links in my blog to each of the websites. Two months later the copyright holder changes his mind and places the recording behind a pay-wall. My link to her website is automatically broken; the link to the third party website remains operational. I am now linking to an unauthorised source, even if I'm not aware of it.

After *GS Media*, a potential duty to monitor this link – or a *duty of care* (Senftleben, 2016, p. 132) – will depend on whether the knowledge presumption applies, which in turn depends on the interpretation of the for-profit condition. For the reasons explained above, this will not always be clear.

As a general rule, unless we follow a strict interpretation of “for profit”, a person or company operating a commercial website and posting links therein will have a *duty to monitor* the status nature of the linked-to work, namely the possible (lack of) consent to publication by the copyright holder (Hanuz, 2016, p. 881).

This duty encompasses all “the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead” (*GS Media*, 51; *Filmspeler*, 49). But what are these necessary checks? Following the Court's logic, the application of the knowledge presumption to commercial websites online entails that operators of the sites be required to check each link posted at the time of posting *and continuously monitor* their legality. To comply with this duty, a website would probably have to set up a broad monitoring system, which would be problematic.

First, it is not clear whether it is possible for most (if not all) websites to adopt a system that effectively monitors the authorised status of the works linked-to, in particular if that status is susceptible of changing in time (Hanuz, 2016, p. 881). Second, assuming *arguendo* it is possible to set up such a system, it would probably entail broad monitoring obligations. As a result, the system may conflict with the prohibition against a general obligation to monitor by information society providers in Article 15 ECD.

At this juncture, we are faced with a conceptual dilemma. On the one hand, it is arguable that the general monitoring prohibition does not apply here because a hyperlink to unauthorised content gives rise to direct (i.e. primary) liability for infringement, and Article 15 ECD applies only to *intermediaries* (Mihály J. Ficsor, 2017a, p. 7). On the other hand, due to the particular nature of the knowledge test and mechanics of its presumption, it is the case that the duty to monitor applies to the activities of commercial websites *before* there is a finding of direct liability, in a context where they are essentially acting as intermediaries. This appears to be the argument of AG Szpunar in *Ziggo* and the main reason for him to require that direct liability of TPB should only be based on actual knowledge. (see *supra* 3.2.2–ii).

The following sub-sections advance different interpretative proposals that would strike a balance between the interests of rights holders in enforcing their copyrights and those of users and platforms (and the public) in avoiding a general obligation to monitor links (prohibited by Article 15 ECD), as well as with their fundamental freedom to conduct a business (protected by Article 16 Charter). In essence, it is argued that it is possible to consider the compliance with the hosting safe-harbour conditions in Article 14 ECD as sufficient to rebut the presumption of knowledge and to prevent broad applications of the constructive knowledge standard.

#### **4.4.4. *Rebuttable presumption and duty of care***

When applying the CJEU’s knowledge test it is important to distinguish two situations. The first is whether the linker has actual or constructive knowledge of the illegality of the link. As noted, knowledge may result *inter alia* from notification of the illegality by the copyright owner. If knowledge is established, the linker is directly liable for infringement of the right of communication to the public unless the link is removed or a copyright limitation applies. In this scenario, the presumption of knowledge does not apply.

The second situation occurs when actual or constructive knowledge of the illegality of hyperlink is not established. It is in this case that the *GS Media* rebuttable presumption of knowledge applies, in the terms described above. To rebut the presumption, the linker needs to establish absence of knowledge or awareness of the unauthorised publication of the linked-to work.

The CJEU provides scant guidance on how to rebut the presumption. It appears that the linker must do more than show that the copyright holder failed to notify her of the infringement (*GS Media*, 53). Rather, a linker that is sued for infringement probably needs to provide evidence that she did not know or could not reasonably have known of the lack of consent of the copyright holder (Rendas, 2017b).

*GS Media* and *Filmspeler* mention that the linker to whom the presumption applies must carry out “necessary checks to ensure that the work concerned is not illegally published” on the linked-to website. The implication is that some action is required of the linker, an aspect on which some national court decisions seem to agree on (Brüß, 2017a, p. 165; Nordemann & Kraetzig, 2017). As explained, the “necessary checks” language could translate into a duty of care or obligation to monitor the links imposed on linker (4.4.3). The logic conclusion of this design is that if a linker carries out those checks she will meet the duty imposed on her and thereby rebut the knowledge presumption.

To this effect, Leistner proposes to apply here a reasonable duty of care. According to this, the “presumption can be rebutted if it is shown that the legal status of the posted material could not have been identified even when reasonable, duly diligent controls would have been carried out by the person, posting the link for profit” (Leistner, 2017b, p. 138 (n.23)). The proposal is sensible. However, due to the Court’s vagueness, the contours of the duty remain unspecified, placing individual users and platforms in a precarious position.

In the current state of the art, it is not possible to define with certainty what type of “checks” or monitoring system would suffice to rebut the knowledge presumption. Assuming that a general

monitoring system is in conflict with Article 15 ECD, it is possible to envision two main scenarios where a linker can rebut the presumption: the hyperlink points to content hosted but not taken down; the hyperlink is covered by an exception or limitation.<sup>16</sup>

**i) Hyperlink to content hosted and not taken down scenario**

This scenario is derived from Articles 14 and 15 ECD. It refers to hyperlinks to works uploaded without consent of copyright owners. It further assumes that the hosting provider (e.g. YouTube, Vimeo) does not itself play an active role regarding the content uploaded by its users/subscribers.

In this scenario, the hosting provider benefits from the safe-harbour in Article 14 ECD. The safe-harbour has its own specific regime to determine knowledge of copyright infringing content. In particular, it allows the adoption of a notice-and-take-down system pursuant to which copyright holders may request the removal of unauthorised content. The notice gives rise to an obligation on the provider to remove content.

Until the notice is served, the provider cannot be said to have knowledge (actual or constructive) of the infringement, especially as the safe-harbour applies in parallel to the general obligation not to monitor in Article 15. Therefore, the hosting platform cannot not be subject to a presumption of knowledge of the illegal nature of the content uploaded until it is notified thereof.

If this is accepted, a follow-up argument can be made. If a commercial website posts a hyperlink to unauthorised content uploaded on a hosting platform (e.g. an embedded link to a video on YouTube), she should be able to rebut the *GS Media* presumption of knowledge on the basis that the content was freely available on the hosting platform.

From a systematic perspective, it would be illogical to accept that, on the one hand, the hosting platform is not presumed to have knowledge of the illegal nature of uploaded content, while on the other hand accept that a website posting hyperlinks to that content is presumed to have knowledge of the illegality. In this scenario, unless and until the rights holder notifies the linker, the knowledge presumption should be considered rebutted. It should moreover be required that the copyright holder simultaneously notifies the hosting provider to take-down the content, as this would otherwise amount to acting in bad faith.

Another option to achieve the same result would be to apply the doctrine of implicit consent in this scenario. That is to say, if a link is posted to unauthorised content uploaded on a platform benefiting from the hosting safe-harbour, then that link would be deemed to benefit from an implied license by the copyright owner, which could only be terminated pursuant to an effective take-down request with the hosting platform. The implicit consent would thus be an argument to rebut the presumption of knowledge (Senftleben, 2016, p. 133).

**ii) Exception or limitation scenario**

Another possibility to rebut the presumption is if the hyperlink is covered by an exception or limitation to the right of communication to the public. The limitations for quotations, parody, and reporting by the press are the most obvious candidates (Senftleben, 2016). In particular, the limitations for quotation and parody in Article 5(3) (d) and (k) InfoSoc Directive have been interpreted by the CJEU in *Painer* and *Deckmyn* as based on freedom of expression. One important consequence thereof is that the scope of such limitations may be reinforced and even prevail over the exclusive right, subject to the use in question meeting the remaining conditions of the provisions (Quintais, 2017).

Such reinforced status could allow these limitations to privilege certain types of hyperlinks to works freely accessible available without the authorization of rights holders. In that case, not only would the limitation serve as a defence against infringement but it should also be considered to rebut the *GS Media* presumption of knowledge. After all, it is not logical to presume knowledge of infringement when a limitation precludes a finding of infringement.

In light of the limitations in question, the main beneficiaries of this interpretation would probably be online news platforms and journalists that post links to copyright-protected content published on third-party websites without the permission of the copyright holders.

#### **4.4.5. Notice-and-take-down system for individuals**

The presumption of knowledge does not apply to individuals and websites that do not post links “for profit” or whose online activities are outside the commercial sphere. For those users, especially for individuals, *GS Media* creates what amounts to an ad-hoc notice-and-take-down system (Leistner, 2017b, p. 138).

This system is the Court’s way of striking a fair balance between the rights of copyright holders with the freedom of expression and information of users, recognized in Article 11 Charter and in the InfoSoc Directive (*GS Media*, 28–31). The Court expressly states the importance of the internet to this fundamental freedom and the particular relevance of hyperlinks to its “sound operation”, “as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information” (Ibid. 45).

In addition, the Court observes that it is near impossible for individuals to verify *ex ante* the legality of the linked-to works in different websites (Ibid. 46). As the AG had already noted, “[i]f users were at risk of proceedings for infringement of copyright under Article 3(1)... whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society” (*GS Media Opinion*, 78).

To accommodate these normative concerns with chilling effects, the Court attached the for-profit condition to the presumption of knowledge, thereby avoiding its application by default to individuals. As a result, hyperlinks by individuals appear to be outside the scope of the exclusive right.

Under the Court-devised notice-and-take-down system, copyright holders can seek remedies for direct liability when a linker is notified of the illegality of the link, refuses to remove the link, and does not benefit from one of the exceptions and limitations in Article 5(3) InfoSoc Directive. These three elements appear to be cumulative (Hanuz, 2016, p. 881).

However, there is a problematic wrinkle to the Court’s system, based on the language in *GS Media*. In that judgment, the Court implies that after a notice is served the linker can only benefit from a limitation *if (and after) she removes the link* (*GS Media*, 53). This section of judgment is difficult to understand or reconcile with the letter and interpretation of the directive. There is no discernible legal argument to justify that the application of the limitations in Article 5(3) as a defence for copyright infringement are conditional upon first removing a link pointing to unauthorised content. As such, it would be advisable to disregard this opaque passage of the judgment.

## **4.5. Blurred lines: primary vs secondary liability and the liability of platforms**

### **4.5.1. The erosion of the lines between primary and intermediary liability**

One of the main normative consequences of CJEU case law in this field is that it broadens the scope of the exclusive right and therefore of primary liability, *maxime* via-à-vis commercial websites acting as intermediaries. This expansion is made at the expense of the area of intermediary, accessory or secondary liability. For Angelopoulos, “this amounts to a judge-made harmonisation of indirect copyright liability

through the application of the rules of primary liability, adjusted for the purpose by appeal to freedom of expression, the Charter of Fundamental Rights and the need for balance” (Angelopoulos, 2017a).

Intermediary liability is not harmonised in EU law. Even the definition of online intermediary is fluid and covers a wide range of players, including internet service providers (ISP), hosting providers, search engines and portals, internet payment systems, social networking sites, online marketplaces, auction websites, P2P platforms, online advertisers, blogs, and wikis (OECD, 2010).

In regulating this field, the ECD prescribes a system of safe-harbours or liability exemptions for damages for three types of “information society providers”: mere conduit or access, caching, and hosting. The directive further prohibits the imposition of general monitoring obligations on intermediaries, which prohibition applies also to injunction claims.<sup>17</sup> This regime does not prevent that intermediaries are required to take measures against the infringement of copyright, either through injunctions or duties of care.

Regarding the first, Article 8(3) of the InfoSoc Directive obligates member states to ensure that rights holders can apply for injunctions against intermediaries whose services are used by a third party to infringe copyright, even if the intermediary is not itself directly liable for infringement (and, thus, for damages under the previous paragraphs in the same article). This provision has played a significant role in the development of intermediary liability, in articulation with the aforementioned safe harbors. In particular, the discretion of national law to determine the scope and procedures to seek injunctions is limited *inter alia* by the operation of fundamental rights. This implies that an injunction must strike a fair balance between conflicting fundamental rights: to copyright as property in Article 17(2) of the Charter, on the one hand; and to the protection of personal data and privacy of Internet users, their freedom to receive information, and ISPs’ freedom to conduct a business, in Articles 7, 8, 11 and 16 Charter.<sup>18</sup>

Concerning the second, recital 48 ECD allows member states to impose duties of care on hosting providers “in order to detect and prevent certain types of illegal activities”, provided those duties “can reasonably be expected from them and... are specified by national law”. Some national laws, most notably in Germany, specify rather detailed duties in this respect. Still, the imposition of such duties of care may be problematic, especially if these constitute *ex ante* measures to prevent infringement. An *ex post* obligation to remove or disable access to content after obtaining knowledge of the same typically occurs in notice-and-takedown systems and would be *per se* unproblematic. Conversely, *ex ante* measures, like proactive filtering, may conflict with the general prohibition on monitoring obligations in Article 15 ECD (Angelopoulos, 2017b, pp. 13–14).

In interpreting this constellation of provisions, the CJEU has noted that for safe harbours to apply the conduct of intermediaries must be predominantly “neutral”, i.e. of a mostly “technical, automatic and passive nature”.<sup>19</sup> Together with technological and business development of online platforms, this has led to a legal grey area in the application of the hosting safe harbour, namely in what concerns the qualification of certain web 2.0 platforms as “neutral intermediaries” or “active content providers”. Between those two categories are a significant number of good and bad faith platforms. Depending on the specific configuration of their services and the shifting interpretation of the law on communication to the public and intermediary liability, these platforms may or may not benefit from the safe harbour. In connection to this, it remains unclear what type of “specific” (as opposed to “general”) monitoring duties may be lawfully imposed on providers to prevent infringement, which duties can in turn affect the liability of platforms.

This is the legal issue at the heart of current “value gap” discussion in the EU copyright reform proposal. At stake is the legal qualification of hybrid platforms or “online content sharing service providers”, as they are labelled in a recent discussion paper from the Presidency of the Council of the EU. The document defines them as “information society providers whose main or one of the main purposes is to store and give public access to a significant amount of copyright works or other protected subject matter uploaded by its users which the service organises with the aim of obtaining profit from their use”<sup>20</sup> In

other words, these platforms or aggregators operate as “structured content providers” relying on large amounts of content uploaded by their users, basing their business models “on massive, comprehensively automated compilation and placement of copyright protected content” (Leistner, 2017b, pp. 139, 141–142). The preeminent example is YouTube.

Under the current law, it is unclear whether hybrid platforms are subject to direct or indirect liability, i.e. whether their activities are better qualified as those of copyright *users* or *intermediaries*. As users, they would be primarily liable for acts of making available works under Article 3 InfoSoc Directive. After *GS Media* and *Ziggo*, primary liability would result automatically from the application of the knowledge presumption (and its for-profit condition), or from establishing actual or constructive knowledge by the platform of the unauthorised act by the third-party user. If knowledge is established, the platform cannot benefit from the hosting safe harbour. If knowledge is not established, hybrid platforms likely qualify as mere intermediaries benefiting from the hosting safe harbour, while remaining subject to injunctions and duties of care.

There is some complementary to the CJEU’s approach. The knowledge requirement developed in *GS Media* and *Ziggo* could be used to establish whether an online intermediary has a predominantly neutral role, a necessary condition to benefit from safe harbours. To curtail the potential negative effects from the proposed value gap provision, we could consider that hybrid platforms only communicate works to the public if they have knowledge of the infringement carried out through their services. Without that knowledge, the “active role” of the intermediary is irrelevant to establish direct liability. This pushes the assessment of the platform’s activities to the realm of national intermediary liability law. Even then, however, gaps remain due to the lack of EU level harmonization of intermediary liability and the conceptual muddiness of the Court’s case law, which gaps may upset the “traditional balance between the rules of direct and indirect copyright liability in those national systems that distinguish between the two” (Angelopoulos, 2017a).

The current trend of the CJEU and national courts is to consider hybrid platforms to be hosting providers, subject to duties of care (Angelopoulos, 2017b). German courts, for instance, have developed an increasing list of detailed “verification and prevention obligations” that must be met by these intermediaries for them to benefit from safe harbours and, possibly, to nudge them towards licensing solutions (Hilty & Moscon, 2017, p. 104; Leistner, 2017b, pp. 139–140). We can see the above mentioned recent thumbnails judgement by BGH as one of the latest developments of the “flexible model of duties of care for linkers” (Nordemann, 2018b).

It is possible that the CJEU hyperlinking case law changes this, at least for intermediaries of the same type as those addressed by the Court so far. However, the effect of these judgments on hybrid platforms traditionally subject to intermediary liability remains to be seen, especially since the Court’s case law opens the door to consider that some of their services amount to direct use of works. Still, as shown in this article, current law is unclear on this point and tends towards considering that good faith hybrid platforms are not communicating works to the public. To address the lingering grey area surrounding the liability of online platforms in this context it is possible to envisage two types of solutions: interpretative and legislative. These are explored below.

#### **4.5.2. *Balanced interpretative solutions: knowledge presumption and constructive knowledge***

*De lege lata*, it is possible to use the conceptual framework developed in this article to advance interpretative options that target bad faith platforms primarily geared towards enabling or facilitating copyright infringement, while preserving breathing space for good faith hybrid platforms under the hosting safe harbour. The crux of the problem with current law is the potential overreach of the exclusive right through the knowledge presumption and the constructive knowledge standard, the “ought to have known”.

The status quo creates barriers for online innovation, as the “uncertainty surrounding the use of hyperlinks places a heavy burden on innovators who will hardly be capable of creating new online platforms and services without hyperlinking technology” (Senftleben, 2016, p. 133). The knowledge presumption applies to hybrid platforms, aggregators and likely search engines. Small and medium-sized platforms will struggle to meet the requisite duties to monitor or duties of care, or to withstand the financial burden of ensuing copyright infringement litigation. The increased exposure to legal risk will also create additional obstacles for investment in new online platforms, resulting in chilling effects (Leistner, 2017b, p. 138).

These problems can be mitigated by a flexible interpretation of the conditions for rebuttal of the presumption of knowledge, which avoids automatic findings of direct liability for platforms. One possibility is to consider the presumption rebutted when a platform already meets the conditions of the hosting safe harbour and accompanying duties of care. Satisfying those conditions would be equivalent to meeting the “necessary checks” requirement. The same reasoning ought to apply by extension to any platform posting a hyperlink to a third party website that complies with safe harbour conditions.<sup>21</sup>

In my view, these considerations should also play a role when assessing constructive knowledge. If a platform hosts large amounts of copyright-protect content and complies with the safe harbour conditions and attendant duties of care, then it ought to benefit from a presumption that the majority of content it hosts is non-infringing. Such a platform is a “diligent economic operator” with a reputation as a good-faith intermediary. If we accept the above proposal for rebutting the presumption of knowledge, a good faith platform should likewise be subject to a narrow interpretation of the constructive knowledge standard. A narrow standard would not prevent the effectiveness of the exclusive right, as it would still capture bad faith platforms like TPB, against which there will be evidence of advertisement for access to infringing content, statements to that effect by the website operators in blogs or online forums, simple disregard for take-down notices, or evident prevalence of infringing content accessed or exchanged through their services.<sup>22</sup>

This proposal for the interpretation of the knowledge presumption and constructive knowledge standard has a further significant advantage: it ensures compliance with Article 15 ECD. Indeed, it could prevent judicial interpretations of the knowledge test that impose on intermediaries a duty to monitor links in conflict with the general prohibition to actively to seek facts or circumstances indicating illegal activity. This outcome is normatively desirable, as it decreases the risk of violating the fundamental rights of intermediaries and individual users, often recognized by the case law of the Court on “fair balance”. On the first, broad monitoring duties would impose a disproportionate burden on intermediaries contrary to their freedom to conduct a business in Article 16 Charter. Concerning the second, it is difficult to imagine that such broad monitoring of content would not harm internet users’ freedom of expression and information online, as recognized in Article 11 Charter.

Of course, this proposal does not solve all issues. For instance, its application to platforms and aggregators that collect and generate links by automatic processes through algorithmic agents (Savola, 2017) is unclear, especially as these aggregators “have no reasonable possibility to clear the legal status of the posted material” (Leistner, 2017b, p. 139). To address these platforms, two alternative approaches could be followed.

The first and less radical is to extend to good faith aggregators the proposal set forth above for hybrid platforms. This approach has the appeal of mirroring the way in which the hosting safe harbour has been interpreted across the EU to include these types of service providers. In fact, the CJEU itself qualifies these aggregators as intermediaries benefiting from safe harbour protection.<sup>23</sup> In this scenario, then, the compliance by aggregators with reasonable duties of care should suffice to rebut the knowledge presumption, provided they have in place an effective notice and takedown procedure (Leistner, 2017b, p. 139).

A second and more far-reaching interpretation would be to not apply the presumption of knowledge to these aggregators. The reason is that the links at stake are generated automatically without (direct) human intervention or intention from the website operator as regards any specific link. In other words, because of the process by which the links are created and posted, knowledge should not be presumed. In those cases, liability would require actual or constructive knowledge.

Provided reasonable and proportionate duties of care are in place to determine the good faith character of the platform, either approach can strike a fair balance between the competing fundamental rights at stake. To some extent, German courts are already adopting a variant of this interpretation, following the lead of the BGH (see *supra* 4.4.2).

The interpretative proposals advanced above should help retain the core of the hosting safe harbour intact and respect the general prohibition against monitoring. They would allow good faith platforms to continue benefiting from this important breathing space, essential for the promotion of technological development and innovation online. At the same time, they would assist in clarifying the liability of bad faith platforms, as well as so-called “false hosting providers” and “non-sufficiently collaborative hosting providers”, to borrow the terminology of (Nordemann, 2018a).

#### **4.5.3. Towards good law: from the value gap to a better definition of the right**

The general contours of the controversial provisions in the Proposed DSM Directive were explained in the introduction. These refer to a new ancillary right for press publishers (Article 11) and a rule on large scale user upload platforms (the value gap provision in Article 13). For our purposes, both provisions are problematic insofar as they unjustifiably extend the notion of communication to the public to activities of online platforms previously outside the scope of the right and/or benefiting from safe harbour protection.

##### **i) Press publishers’ right**

The proposed right for press publishers covers inter alia the making available to the public for digital use of “press publications”. It extends to “activities carried out by online intermediaries ... not covered by copyright law (i.e. indexing and displaying news and articles)” (Hilty & Moscon, 2017, p. 86). For the most part, the content indexed and displayed is freely available online with the consent of the copyright owner. As such, following *Svensson* and its progeny, linking to that content is not a communication to a new public and, thus, a copyright-relevant act. Even if we consider that such links are subject to implied licensing, as hinted at in *Soulier*, the argument outlined above at 4.2 and 4.3 suggests that the copyright owner may impose technological restrictions on the availability of the work to negate such consent. Measures of this kind would prevent the indexing and displaying of news and articles by search engines. Therefore, irrespective of our preferred interpretation, the proposed right would probably extend the notion of communication to the public to activities currently outside the scope of copyright (Hilty & Moscon, 2017, p. 86).

This issue has proven problematic in the legislative process, with different committees in the European Parliament proposing amendments to the provision so as to safeguard the non-application of the right to hyperlinking (Bently et al., 2017, pp. 40–42). As noted, there is significant criticism to the ancillary right for press publishers. Scholarly opinion is almost unanimous in considering the proposal to be flawed and lacking in robust economic or legal justifications (Bently et al., 2017; Gompel, 2017; Peukert, 2016). In addition, legislation of this type has failed in Germany and Spain (Hilty & Moscon, 2017, pp. 83–86).

In an effort to overcome the deficiencies of the proposal, the recent Discussion Paper of the Presidency of the Council of the EU proposes to clarify the scope of the provision in a recital stating that the right does “not extend to acts of hyperlinking when they do not constitute communication to the public”.<sup>24</sup> This approach has the obvious problem of leaving the legal status of the hyperlinks at stake to the

interpretative winds of (extremely complex) CJEU case law, opening the door for the application of the right to this type of hyperlinks. For the reasons advanced in this article, that outcome is normatively undesirable.

In this light, and considering the many weaknesses of the new right, the best option is to abandon it altogether, thus avoiding unwarranted extensions of the notion of communication to the public in the online environment. For publishers that struggle with the enforcement of their rights over the Internet, the best solution is to recognize instead a legal presumption entitling them “to copyright/use rights in the contents of their publications”, as suggested by the JURI Committee (Bently et al., 2017).

## ii) Value Gap

Article 13 and accompanying recitals (37 to 39) of the Proposed DSM Directive contain the so-called “value gap” provision. This provision is based on a perceived disconnect between the amount of creative content available on the internet and the rights revenue that access to such content generates for rights holders (Angelopoulos, 2017b). The provision targets hybrid platforms, labelled in the most recent version of the proposal as “online content sharing services”, i.e. large-scale commercial user-upload platforms like YouTube and Vimeo. This is made clearer by the amended version of recital 37 advanced in the Presidency Discussion Paper, which excludes from the definition internet access providers, cloud service providers, online services storing and hosting content uploaded by copyright owners (including “scientific or education repositories”), and services that benefit from an exception or limitation to copyright.

The objective of the provision is to improve the position of rights holders in relation to the platforms in question by imposing on them a set of obligations worded in an unclear way and with “trivially vague language” (Rendas, 2017a). The joint reading of the original versions of Article 13 and recital 38 is based on the assumption that such platforms are, by virtue of their services, “performing an act of communication to the public”, as they play “an active role, including by optimizing the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor”.<sup>25</sup> The recital further suggests that the mere “use of automatic optimization techniques” would suffice to remove the protection of the hosting safe harbour (Rosati, 2017). Some authors argue that this provision, or a slightly amended version thereof, is but a clarification of CJEU case law (von Lewinski, 2017). For the reasons set out above, this cannot be accepted. Instead, it is more accurate to state that the wording of Article 13 and accompanying recitals fail to reflect the current state of the case law on communication to the public and intermediary liability (especially *L’Oréal*), but also conflate the scope of the hosting safe harbour and the conditions for the application of the exclusive right of communication to the public (Senftleben et al., 2017).

The 2018 Discussion Paper attempts to address some of the issues by stating that an online content sharing service performs an act of communication or making to the public “when in plays an indispensable role and intervenes in full knowledge of the consequences of its action to give the public access” to protected content uploaded by its users.<sup>26</sup> The wording resembles that of the CJEU (in *GS Media* and progeny) and seeks to clarify the notion of communication to the public as it applies to hybrid platforms.

The provision remains problematic insofar as the Court’s case law is in flux and lacks clarity in relation to key concepts like “intervention” and “knowledge” in the field of primary liability. In particular, as shown above, a broad interpretation of the for-profit condition may – and in many cases will – lead to an automatic application of the presumption of knowledge and a finding of liability for commercial platforms. This would be the case for many “online content sharing platforms”, as they are by definition commercial. Without further assessment, these platforms could be considered to communicate the works they host to the public and lose the benefit of the safe harbour.<sup>27</sup> The double negative effect of this legal

construct would be to, first, further stretch a notion of communication to the public that is already strained by the CJEU's hyperlinking case law and, second, to remarkably erode the liability privilege stemming from the hosting safe harbour (Frosio, 2017; Senftleben et al., 2017).

In addition to requalifying the activities of hybrid platforms, the value gap provision imposes on them obligations to take “measures” to ensure (1) the functioning of agreements with rights holders for the use of their copyright-protected content or (2) the prevention of infringing content identified by rights holders in their websites. An example of such measures is that of “effective content recognition technologies”. This regime is accompanied by a series of reporting and information obligations on platforms vis-à-vis rights holders regarding the measures in question. For individual users of the platforms, both the original proposal and its later iterations provide for the existence of a complaint a redress mechanism.<sup>28</sup>

The main issue with these measures is the real risk that they translate into general obligations to filter content uploaded by users, i.e. to proactively monitor their data on a continuous basis. This would both be inconsistent with Article 15 ECD and with the Court's case law of fair balance between fundamental rights and freedoms recognized in the Charter, namely the protection of personal data, and the freedom to conduct a business. First, filtering systems of the type contemplated herein would in all likelihood implicate a systematic processing of personal data irrespective of whether the uploaded content is copyright infringing. Second, ex ante automated filtering systems lack the degree of sophistication or nuance required to accommodate the current and evolving interpretation of copyright exceptions justified by freedom of expression, such as quotation and parody.<sup>29</sup> Given the mass adoption of hybrid platforms as a means for users to engage with each other in the online public sphere, systems of this type will deprive individuals of a significant space to exercise this fundamental freedom. Finally, as pointed out above, the filtering systems contemplated here will be disproportionately burdensome for online platforms, especially those that lack the significant economic capacity necessary to implement such measures, i.e. small and medium-sized service providers (Hilty & Moscon, 2017, pp. 104–105; Senftleben et al., 2017).<sup>30</sup> Paradoxically, a provision designed to reign in large scale user upload platforms might create a regulatory environment that favours these platforms by imposing costs that prevent new entrants to the market. Such outcome is obviously undesirable and contrary to guiding principles in the ECD and InfoSoc Directive, namely the protection of competition and promotion of technological development.

### iii) Redefining communication to the public and preserving safe harbours

*De lege ferenda*, from the perspective of the notion of communication to the public, neither a new press publishers' right nor a “value gap”-style provision are desirable. As it stands, this notion has already been conceptually stretched to the point where the exclusive right applies outside the paradigm of strict liability. Further expanding the right to cover new types of use and players without solid normative or economic justifications would be perilous. This is particularly so when it poses a risk to fundamental rights, legal certainty, the promotion of technological development and competition.

The proposals on the table, especially that on increased liability for online platforms, also risk upsetting the balance between the InfoSoc Directive and the ECD, namely the interface between the exclusive right in the first, and the hosting safe harbour and general prohibition on monitoring in the second. In a recent study on the ECD for the European Parliament, it was concluded that the safe harbour regime could remain unchanged, as it was “sufficiently flexible to adopt to new business models”, a feature that made it “in general, future-proof” (Nordemann, 2018a). However, the validity of this conclusion depends on a sensible definition of the right of communication to the public that prevents it from voiding the hosting safe harbour from any meaningful scope of application.

In this light, EU copyright reform should focus on a conceptually sound definition of the exclusive right. The notion of communication to the public should be less technical and more functional, focus on acts of commercial exploitation, and refer to the use of works. A functional approach would require that we

examine the conduct of the user and its role in the dissemination of content and make an assessment on that basis, rather on whether he performs “act of communication” that reaches “a new public” or is carried out through “specific technical means”. In this respect, the “indispensable role of the user” in making the content available would be a relevant factor. In addition, the proposed assessment should take into account whether the activity of the potential user amounts to commercial exploitation *of the work*. The right should target uses that are in competition with those of the copyright owner, while leaving untouched non-competing use by third parties, whether for-profit or not.<sup>31</sup> Finally, the right should focus on uses of the *work as a work* (Ohly, 2018; Strowel, 2018), meaning that the mere provision of references to the work (e.g. standard links) without appropriating the content as “own information” (e.g. deceptive embedding) should be outside its scope.

As a matter of legal design, a particularly promising approach to redefining the exclusive right would be through a combination of an open-ended clause with non-exhaustive lists of statutory examples (Leistner, 2017c, p. 31; Ohly, 2018). The open-ended clause would contain the elements of functionality, commercial focus, and use as a work outlined in the previous paragraph. The lists could contain positive and negative examples of types of actors or activities that are considered or not to constitute or carry out communication to the public. The lists are exemplary so as to allow a flexible a future-proof application of the right, while providing an appropriate degree of legal certainty. The examples should also be crafted so as to allow breathing space and effective application of safe-harbours, especially for hosting, and respect for the general prohibition against actively seeking facts or circumstances indicating illegal activity.

## 5. CONCLUSIONS AND OUTLOOK

In EU law, the interpretation of the right of communication to the public to online environment is extremely complex. Attempts by the CJEU to clarify the scope of the right, especially in its hyperlinking judgments from *Svensson* to *Ziggo*, have resulted in a minor legal revolution. At its centre is the development of a new public criterion, based on a knowledge test, which blurs the lines between primary and secondary or intermediary liability.

To be sure, this development has afforded the concept of communication to the public right with flexibility, allowing it to cover a wide range of bad faith users or piratical websites involved in making works available to the public with the consent of copyright holders. The downsides are legal uncertainty and conceptual opaqueness, which open the door for the exclusive right to extend to a universe of good faith individual users and online platforms. This extension, combined with legislative proposals for an ancillary right for news publishers and the liability of online platforms (the “value gap” provision), threatens to reshape and further broaden the notion of communication to the public, while eroding the hosting safe harbour and potentially conflicting with fundamental rights.

After placing the Court’s case law within a coherent conceptual framework, this article subjects that case law to a critical assessment, advancing interpretative proposals to solve some of the challenges identified. First, the cumulative condition of act of communication should be subject to a strict requirement of truly indispensable intervention. Second, the concepts of “access restrictions” or “restrictive measures” should be defined as referring solely to mere technological (rather than contractual) measures, leaving open the question of whether such measures ought to in addition refer only to TPMs under Article 6 InfoSoc Directive. Third, it is advisable to either reject the possibility of implicit consent to hyperlinks for a freely accessible work, or (as a second-best solution) to accept that such consent can only be terminated through the application of technological measures.

It is likewise advisable to reject interpretations of the case law that result in the imposition of a duty to monitor links on persons or platforms posting hyperlinks. Such a duty would conflict with fundamental

freedoms (of expression and information, and to conduct a business) in the Charter, as well as with the prohibition of a general obligation to monitor in the ECD. To achieve this outcome, we could rely on the operation of the hosting safe harbour to rebut the *GS Media* presumption of knowledge whenever a link is made by a service provider in compliance with the conditions thereof, or a link is posted to content hosted and not taken-down by such provider (assuming the linker does not have actual or constructive knowledge of the illegal status of the content). Moreover, in line with recent German case law, there are solid normative arguments to outright exclude the application of the knowledge presumption to search engines and other good faith hybrid platforms that generate links automatically through the use of algorithms on a large scale. For these platforms, it appears disproportionate to presume knowledge based on their commercial nature and unreasonably burdensome to impose an obligation to check the legal status of each link.

*De lege ferenda*, this article argues for abandoning the legislative proposals for a new right for press publishers and the so-called value gap provision, as both are fundamentally flawed. Instead, reform should focus on redefining the right of communication to the public and preserving safe harbours. In particular, it is suggested that a future-proof right should combine an open-ended clause with non-exhaustive lists of statutory examples. The open-ended clause would advance a notion of communication to the public that follows a functional (rather than technical) approach, focuses on commercial exploitation, and the use of works in a copyright sense. The accompanying exemplary lists would provide guidance on types of actors or activities within and outside the scope of the right, allowing a flexible but predictable application of the general clause, as well as its compatibility with the hosting safe harbour. This design should enable a fair balance between competing fundamental rights, while ensuring breathing space for good faith online platforms.

## Annex 1. CJEU Case Law on the Right of Communication to the Public

Case No.	Case Name	AG Opinion	Judgement Date	ECLI (judgement)	Description
C-293/98	<i>Egeda</i>	La Pergola (09.09.1999)	03.02.2000	ECLI:EU:C:2000:66	Copyright; Satellite and Cable Directive; Satellite broadcasting and cable retransmission
C-192/04	<i>Lagårdere</i>	AG Tizzano (21.04.2005)	14.07.2005	ECLI:EU:C:2005:475	Rental and Lending Directive; Satellite and Cable Directive; Communication to the public by satellite; Broadcasting of phonograms; Equitable remuneration
C-306/05	<i>SGAE</i>	AG Sharpston (13.07.2006)	7.12.2006	ECLI:EU:C:2006:764	Article 3 InfoSoc Directive; Concept of communication to the public; Works communicated by means of television sets installed in hotel rooms
C-136/09 (Order)	<i>Organismos</i>	N/A	18.03.2010	ECLI:EU:C:2010:151	Article 3 InfoSoc Directive; Concept of 'communication to the public'; Works communicated by means of television sets installed in hotel rooms
C-403 and 429/08	<i>Murphy</i>	AG Kokott (3.02.2011)	4.10.2011	ECLI:EU:C:2011:631	Satellite broadcasting; Broadcasting of football matches; Reception of the broadcast by means of satellite decoder cards; Satellite decoder cards lawfully placed on the market in one Member State and used in another Member State; Prohibition on marketing and use in a Member State; Visualisation of broadcasts in disregard of the exclusive rights granted; Copyright; Television broadcasting right; Exclusive licences to broadcast in a single Member State; Freedom to provide services; Article 56 TFEU; InfoSoc Directive; Reproduction of works within the memory of a satellite decoder and on a television screen; Exception to the reproduction right; Communication of works to the public in public houses; Satellite and Cable Directive
C-431-432/09	<i>Airfield</i>	AG Jääskinen (17.03.2011)	13.10.2011	ECLI:EU:C:2011:648	Satellite broadcasting; Satellite and Cable Directive; Articles 1(2)(a) and 2; Communication to the public by satellite; Satellite package provider; Single communication to the public by satellite; Persons to whom that communication may be attributed; Authorisation from copyright holders for the communication.
C-283/10	<i>Circul Globus</i>	N/A	24.11.2011	ECLI:EU:C:2011:772	Article 3 InfoSoc Directive; Concept of 'communication of a work to a public present at the place where the communication originates'; Dissemination of musical works in the presence of an audience without paying the collective management organisation the appropriate copyright fee; Entry into contracts, with the authors of the works, for copyright waiver; Scope of InfoSoc Directive
C-135/10	<i>SCF</i>	AG Trstenjak (29.06.2011)	15.03.2012	ECLI:EU:C:2012:140	Copyright and related rights in the information society; Direct applicability of the Rome Convention, the TRIPS Agreement and the WPPT in the European Union legal order; Article 8(2) Rental and Lending Directive; InfoSoc Directive; Concept of 'communication to the public'; Communication to the public of phonograms broadcast by radio in a dental practice
C-162/10	<i>PPI</i>	AG Trstenjak (29.06.2011)	15.03.2012	ECLI:EU:C:2012:141	Copyright and related rights; Articles 8 and 10 Rental and Lending Directive; Concepts of 'user' and 'communication to the public'; Installation in hotel bedrooms of televisions and/or radios to which the hotelier distributes a broadcast signal.
C-607/11	<i>ITV Broadcasting</i>	N/A	7.03.2013	ECLI:EU:C:2013:147	Article 3(1) InfoSoc Directive; Broadcasting by a third party over the internet of signals of commercial television broadcasters; 'Live streaming'; Communication to the public
C-466/12	<i>Svensson</i>	N/A	13.02.2014	ECLI:EU:C:2014:76	Article 3(1) InfoSoc Directive; Communication to the public; Meaning; Internet links ('clickable links') giving access to protected works
C-351/12	<i>OSA</i>	AG Sharpston (14.11.2013)	27.02.2014	ECLI:EU:C:2013:147	InfoSoc Directive; Copyright and related rights in the information society; Definition of 'communication to the public'; Transmission of works in a spa establishment; Direct effect of the provisions of the directive; Articles 56 TFEU and 102 TFEU; Rental and Lending Directive; Freedom to provide services; Competition; Exclusive right of collective management of copyright
C-348/13 (Order)	<i>BestWater</i>	N/A	21.10.2017	ECLI:EU:C:2014:2315	Article 3(1) InfoSoc Directive; Communication to the public; Definition; Internet links giving access to protected works; Use of the 'framing' technique
C-279/13	<i>C More</i>	N/A	26.03.2015	ECLI:EU:C:2015:199	Article 3(2) InfoSoc Directive; Direct broadcast of a sporting fixture on an internet site
C-151/15 (Order)	<i>SPA</i>	N/A	14.07.2015	ECLI:EU:C:2015:468	Article 3(1) InfoSoc Directive; Concept of 'communication to the public'; Broadcasting of works in a café-restaurant by means of a radio apparatus connected to loudspeakers
C-325/14	<i>SBS</i>	N/A	19.11.2015	ECLI:EU:C:2015:764	Article 3(1) InfoSoc Directive; Communication to the public; Definition of 'communication' and 'public'; Distribution of television programmes; Process known as 'direct injection'
C-117/15	<i>Reha Training</i>	AG Bot (23.02.2016)	31.05.2016	ECLI:EU:C:2016:379	Article 3(1) InfoSoc Directive; Article 8(2) Rental and Lending Directive; Concept of 'communication to the public'; Installation of television sets by the operator of a rehabilitation centre making it possible for patients to watch television programmes
C-160/15	<i>GS Media</i>	AG Wathelet (7.04.2016)	8.09.2016	ECLI:EU:C:2016:644	Article 3(1) InfoSoc Directive; Communication to the public; Definition; Internet; Hyperlinks giving access to protected works, made accessible on another website without the rightholder's consent; Works not yet published by the rightholder; Posting of such links for a profit
C-301/15	<i>Soulier</i>	AG Wathelet (7.07.2016)	16.11.2016	ECLI:EU:C:2016:878	Articles 2 and 3 InfoSoc Directive; Rights of reproduction and communication to the public; Scope; 'Out-of-print' books which are not or no longer published; National legislation giving a collecting society rights to exploit out-of-print books for commercial purposes; Legal presumption of the authors' consent; Lack of a mechanism ensuring authors are actually and individually informed
C-138/16	<i>AKM</i>	N/A	16.03.2017	ECLI:EU:C:2017:218	Articles 3(1) and Article 5(3)(o) InfoSoc Directive; Broadcast of television programmes through a local cable network; National law laying down exceptions for installations allowing access to a maximum of 500 subscribers and for the retransmission of broadcasts of the public broadcaster in national territory
C-527/15	<i>Filmspeler</i>	AG Campos Sánchez-Bordona (08.12.2016)	26.04.2017	ECLI:EU:C:2017:300	Article 3(1) InfoSoc Directive; Communication to the public; Definition; Sale of a multimedia player; Add-ons; Publication of works without the consent of the right holder; Access to streaming websites; Article 5(1) and (5) InfoSoc Directive; Right of reproduction; exceptions and limitations; Lawful use
C-610/15	<i>Ziggo</i>	AG Szpunar (8.02.2016)	14.06.2017	ECLI:EU:C:2017:456	Article 3(1) InfoSoc Directive; Communication to the public; Definition; Online sharing platform; Sharing of protected files, without the consent of the rightholder
C-265/16	<i>VCAST</i>	AG Szpunar (07.09.2017)	29.11.2017	ECLI:EU:C:2017:913	Article 5(2)(b) InfoSoc Directive; Private copying exception; Article 3(1) InfoSoc Directive; Communication to the public; Specific technical means; Provision of a cloud computing service for the remote video recording of copies of works protected by copyright, without the consent of the author concerned; Active involvement of the service provider in the recording
C-161/17 [PR]	<i>Renckhoff</i>	N/A	N/A	N/A	(Preliminary Reference) Does the inclusion of a work — which is freely accessible to all internet users on a third-party website with the consent of the copyright holder — on a person's own publicly accessible website constitute a making available of that work to the public within the meaning of Article 3(1) InfoSoc Directive if the work is first copied onto a server and is uploaded from there to that person's own website?

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<sup>1</sup> As of writing, the current state of the proposal and discussion on both articles is consolidated in a “Discussion paper on Article 11 and Article 13” (6 February 2018), issued by the Bulgarian Presidency of the Council, available at <http://data.consilium.europa.eu/doc/document/ST-5902-2018-INIT/en/pdf> (hereinafter “Discussion Paper 2018”).

<sup>2</sup> See also: European Parliament, Committee on the Internal Market and Consumer Protection, *Opinion on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market* (Rapporteur: Catherine Stihler), 14.6.2017, pp. 4-5, 42–43; European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Opinion...* (Rapporteur: Michał Boni), 22.11.2017 .

<sup>3</sup> Arts 8 WCT, 10 and 14 WPPT.

<sup>4</sup> The only limitation mentioned by the Court (at para. 5) in its “legal context” section is Art. 5(3) InfoSoc Directive on reporting of current events.

<sup>5</sup> *But see* (Computer & Communications Industry Association, 2016; European Copyright Society, 2013), arguing on the basis of the *travaux préparatoires* of the InfoSoc Directive for the necessity of an act of ‘transmission’ for the copyright qualification of the use.

<sup>6</sup> After *Soulier*, it is also possible that the consent of the rights holders is implied. See *Soulier*, 35–36. This possibility is discussed *infra* at 4.3 and 4.4.3.

<sup>7</sup> In Germany, for instance, the Federal Court of Justice has used the doctrine of implicit consent to allow the use of freely accessible thumbnails by search engines (BGH, 29.04.2010, I ZR 69/08 (“Vorschaubilder”)) and of images made available without authorisation of the rights holder by search engines (BGH, 19.10.2011, I ZR 140/10 (“Vorschaubilder II”)). See also (Geiger & Schönherr, 2014, pp. 458–459; Peukert, 2015, pp. 380–381). On implied license and linking, see (Pihlajarinne, 2012).

<sup>8</sup> These prohibit, respectively, the introduction of exceptions or limitations to exclusive rights if they conflict with the normal exploitation of works or cause an unreasonable prejudice to the legitimate interests of rights holders. In the InfoSoc Directive, see Art. 5(5).

<sup>9</sup> Arts 5(2)(b) and (e), and 5(3)(a) and (b) InfoSoc Directive; Art. 6(5) Directive 2012/28/EU; and Art. 5(3) Directive 2014/26/EU.

<sup>10</sup> Germany: District Court of Hamburg, 18.11.2016, Case No. 310 O 402/16. Sweden: Rebecka Johnsson v Les ‘Editions de l’Avenir SA, Attunda District Court, FT 11952-15, 13.10.2016. Netherlands: Rechtbank Noord-Holland, 31.10.2016, ECLI:NL:RBNHO:2016:8077. Czech Republic: District Court for Prague 4 (Obvodni soud pro Prahu 4); UK: *FAPL v BT* [2017] EWHC 480 Ch.

<sup>11</sup> For a description of this service, see (Google, 2017).

<sup>12</sup> Athens Court of Appeal, Decision No 1909/2017 (18th section)

<sup>13</sup> District Court of Hamburg, 1 June 2017, Case No. 308 O 151/17.

<sup>14</sup> District Court of Hamburg, 13 June 2017, Case No. O 117/17.

<sup>15</sup> BGH, 21 September 2017, I ZR 11/16 - Vorschaubilder III.

<sup>16</sup> These scenarios are inspired by (Senftleben, 2016). The author mentions another scenario not discussed here: “it may even be rebuttable in cases where a copyright holder does not contribute to the identification of illegal content by providing content ID information in the standard format of ‘content recognition technologies’ mentioned in the copyright reform proposals”. See, in this respect, Proposed DSM Directive, Article 13.

<sup>17</sup> Arts 2, and 12–15 E-Commerce Directive.

<sup>18</sup> See Cases C-70/10 – *Scarlet Extended*, C-360/10 – *Netlog*, C-314/12 – *UPC Telekabel Wien*, and C-461/10 – *Bonnier Audio*.

<sup>19</sup> This approach stems from CJEU trademark judgments in cases like *Google France* (C-236-238/08) and *L’Oréal* (C-324/09).

<sup>20</sup> Discussion Paper 2018, p. 11.

<sup>21</sup> See *supra* 4.4.

<sup>22</sup> A very similar point is made (Angelopoulos, 2017a). *N.B.* Angelopoulos prefers to consider that the rebuttable presumption may not apply in *Ziggo*, and therefore deals with the situation under the for-profit standard.

<sup>23</sup> See, e.g. *Google France*, *L’Oréal*, and C-360/10 – *Netlog*.

<sup>24</sup> Discussion Paper 2018, p. 5 (proposed new draft of recital 34).

<sup>25</sup> Recital 38 Proposed DSM Directive.

<sup>26</sup> Discussion Paper 2018, p. 12 (proposed draft Art. 13(1)).

<sup>27</sup> During the discussions some national delegations considered the possibility of including a targeted limitation of liability for unauthorised acts of communication and making to the public. As proposed, this targeted safe harbour would be conditional upon the take down and stay down of content identified by rights holders, as well as other “effective measures”. Discussion Paper 2018, pp. 12 and 13.

<sup>28</sup> Art. 13(2) Proposed DSM Directive and Discussion Paper 2018, p. 13. The Discussion Paper further includes a proposal to the effect that, if licenses are concluded between rights holders and the platform, these should cover the end-users. *Ibid.* *N.B.* that counter notice procedures are often considered ineffective (Urban, Karaganis, & Schofield, 2017).

<sup>29</sup> Recognized in Art. 5 (3)(d) and(k) InfoSoc Directive.

<sup>30</sup> Some of these concerns were expressed in the Opinions of the IMCO and LIBE Committees (*supra* note 2).

<sup>31</sup> See (Leistner, 2017a) for a specific legislative proposal of Article 3 InfoSoc Directive.