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Hyperlinking under the lens of the revamped right of communication to the public

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ABSTRACT

For more than a decade now, the right of communication to the public has been developed and interpreted by the CJEU, leading to a complex set of criteria that must be analysed on a case-by-case basis. When confronted with the copyright status of hyperlinking, the Court built upon that background in a string of cases that ended up reshaping the traditional contours of the exclusive right. The practice of linking, an essential element of the Internet and a crucial tool for any online activity carried out by entities and individuals, is now affected by the new scope of the communication to the public right, with direct consequences on the liability hyperlinkers may incur. This article will examine the status of the Court's case law to provide insights that may facilitate its interpretation and application. It will consider in particular how hyperlinkers are exposed to liability and which duties of care result from the Court's approach. It will also examine how the new understanding of hyperlinks from a copyright perspective may be relevant in the context of the proposed Directive on Copyright in the Digital Single Market.

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Keywords: Hyperlinks; Communication to the public; Intermediary liability; Digital Single Market; Copyright

1. Introduction

Hyperlinks are ubiquitous on the Internet. Millions of Internet users routinely post links to social networks or other platforms. Search engines return long lists of hyperlinks as search results after user queries. Websites show links to useful resources online for the users to click on. Websites also use less perceptible forms of links, such as inline links, which are automatically executed by the browser to integrate parts of the page that come from different sources. Webpages may also include embedded links—for instance, to insert a YouTube video which will be displayed within the context the webpage—, or resort to some other forms of framed links. Image and video search engines may also use embedded links to show the images or videos on their search platform. Other business models rely heavily on links as well,

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including news aggregators, platforms offering curated internet radio streams, or websites providing download links to copyrighted content hosted somewhere else. Hyperlinks are crucial for accessing valuable content on the Internet and, as such, they are key to exercising the right to freedom of expression and information, recognised in Art. 11 of the Charter of Fundamental Rights of the EU. They are also used to facilitate massive access to copyright infringing content.

In October 2012, by means of a reference for a preliminary ruling made by a Swedish court of appeal in the *Svensson* case,¹ the Court of Justice of the European Union (CJEU) was asked to clarify whether the provision of a link to a copyrighted work might constitute a 'communication to the public' within the meaning of the InfoSoc Directive.² Implicit in this question was another crucial one. Namely, whether a hyperlink may meet the needed threshold condition of being an 'act of communication' in the first place – irrespective of whether it may ultimately amount to a communication 'to the public' in the sense of that Directive.

On the one hand, an answer in the negative would situate any instance of linking outside the scope of the exclusive right of communication to the public. Thus, a provider of a hyperlink to unauthorized copyrighted content could not be deemed to infringe that right and could only be held liable under the different national law doctrines on indirect liability. On the other hand, an answer in the affirmative could potentially have serious overreaching effects. If any link were to be deemed as involving an 'act of communication,' there would be a risk of converting daily routine acts by millions of users into direct copyright infringements, which would negatively affect freedom of expression and would arguably not respect the balance the InfoSoc Directive seeks to achieve between the rights and interests at stake.

In the *Svensson* judgment, handed down in 2014, the CJEU answered that fundamental underlying question with a resounding yes, holding that, in the circumstances of the case, "*the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication'.*"³ This answer was bound to bring about remarkable consequences in the way the CJEU conceives the right of communication to the public.

To be sure, in the same judgment the CJEU limited the potential impact of that conclusion by holding that, despite being an 'act of communication', "*the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public'.*"⁴ on the grounds that such communication does not reach a 'new public'.⁵ Nonetheless, *Svensson* opened the door to a reconceptualization of that right, something that would be apparent in CJEU's subsequent rulings in this field. Already in *Svensson*, the Court broadened the scope of this act of exploitation to include situations that could be better characterized as indirect copyright infringement. This was eventually followed by the inevitable consequence of importing into the equation the subjective condition of knowledge about the

¹ Reference for a preliminary ruling from the Svea hovrätt (Sweden) lodged on 18 October 2012, Nils Svensson et al v Retriever Sverige AB (Case C-466/12).

² Directive 2001/29 of the European Parliament and of the Council, on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 OJ (L 167) 10 (EC).

³ CJEU, Case C-466/12, Nils Svensson et al v Retriever Sverige AB, Judgment of 13 February 2014, ECLI:EU:C:2014:76 (*Svensson*), para 20.

⁴ *Svensson*, C-466/12, para 32.

⁵ *Svensson*, C-466/12, para 30. See Julia Hörnle, 'Is linking communicating?' [2014] 30 CLSR 439.

illegality of the linked content,⁶ which is at odds with the longstanding notion of primary copyright infringement as an objective act of exploitation. In this way, the CJEU has come to reshape the contours of the right of communication to the public, effectively conflating the notions of direct and indirect copyright infringement, in a string of cases that show an effort to provide broad protection to right owners while somehow trying to protect providers of hyperlinks from a disproportionate risk of liability.

This case law affects businesses and individuals regarding their ability to place links online, as well as rightsholders' enforcement capabilities. It is also influencing how national courts are addressing the issue of copyright liability for hyperlinking. However, it also goes beyond the provision of links. As it ultimately reinterprets the very notion of communication to the public, other instances not involving hyperlinks may be also impacted by the new approach.⁷ In the legislative front, the proposal for a Directive on copyright in the Digital Single Market⁸ tackles the business model of news aggregators, where hyperlinks play a key role, proposing a new related right for press publishers. In addition, the proposal relies on the notion of communication to the public for establishing new obligations on content sharing platforms, where hyperlinks are not involved, but where the new notion of communication to public may nonetheless play a role.

This article's purpose is twofold. First, it aims at providing specific insights into the Court's reasoning and conclusions, which may help both to dispel some misunderstandings and to facilitate an appropriate interpretation of the CJEU's criteria by the interested parties and by national courts. To that end, the article will engage in an in-depth analysis of the legal reasoning followed by the Court when addressing the copyright status of hyperlinks, in the broader context of the Court's case law on the right of communication to the public. Second, the article will consider the consequences of this case law on hyperlinkers' liability. In this regard, it will first explore the interplay of the revamped right of communication to the public with the liability exemptions set out in the E-Commerce Directive. Next, the article will consider some duties of care hyperlinkers' should observe to avoid liability under the fault-based system that results from the Court's approach. Finally, the article will examine the implications of the Court's interpretation of the communication to the public right with regard to the Proposed Directive on Copyright in the Digital Single Market.

2. The evolving CJEU's case law on hyperlinks and copyright

⁶ See CJEU, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV*, Judgment of 8 September 2016, ECLI:EU:C:2016:644 (*GS Media*), para 55.

⁷ See Advocate General Campos Opinion, Case C-161/17, *Renckhoff*, 25 April 2018, ECLI:EU:C:2018:279.

⁸ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market. COM/2016/0593 final, Brussels, 14.9.2016.

The CJEU's case law on hyperlinks includes so far the cases of *Svensson*,⁹ *BestWater*,¹⁰ *GS Media*,¹¹ *Filmspeler*,¹² and *Ziggo*.¹³ The CJEU's reasoning in this line of cases builds upon an already complex, nuanced and somewhat confusing jurisprudence on the right of communication to the public, which started with *SGAE* in 2006.¹⁴ The Court relies on a number of legal arguments, or *topoi*, to support its evolving conceptualization of this right, including linguistic, contextual and teleological arguments to interpret EU law.¹⁵ In particular, it refers to the criterion of considering the legislation's objectives. For instance, the InfoSoc Directive's objective to provide a high level of protection of intellectual property, and thus the need to interpret broadly the concept of 'communication to the public'. It also resorts to the Charter of Fundamental Rights of the EU, to underscore both intellectual property rights and users' right to freedom of expression and information. In addition, the Court uses its own case law as a source for interpretation criteria. Indeed, even though the hyperlinking case law has certainly included unexpected twists, the CJEU has wrestled to justify them as consistent with, and even required by, its previous jurisprudence. Of course, such efforts may not be entirely persuasive, but it is remarkable how the Court feels the need to stick formally to its former holdings—and to refuse Advocate Generals' suggestions to overrule some of them. To provide the necessary background for the analysis, the relevant criteria regarding the right of communication to the public held by the CJEU before the hyperlinking cases are briefly recalled below.

2.1. Relevant criteria established by the CJEU before the hyperlinking cases

Despite the unforeseen developments, the whole saga of hyperlinking cases builds upon interpretative criteria the CJEU had previously established in relation to the communication to the public right. In fact, the *Svensson* reference came at a time where the Court had already dealt repeatedly with this right, from *SGAE* in 2006,¹⁶ to *TV2 Danmark* in 2012.¹⁷ Before deciding *Svensson* in 2014, the Court handed down yet another ruling on this right, *ITV Broadcasting*, in 2013.¹⁸ That case law already contained the building blocks for the interpretation of the notion of 'communication to the public' under the InfoSoc Directive. Some of those elements may be summarized as follows.

⁹ *Svensson*, C-466/12.

¹⁰ CJEU, Case C-348/13, *BestWater International GmbH v Michael Mebes, Stefan Potsch*, Order of 21 October 2014, ECLI:EU:C:2014:2315 (*BestWater*).

¹¹ *GS Media*, C-160/15.

¹² CJEU, Case C-527/15, *Stichting Brein v Jack Frederik Wullems* Judgment of 26 April 2017, ECLI:EU:C:2017:300 (*Filmspeler*).

¹³ CJEU, Case C-610/15, *Stichting Brein v Ziggo BV, XS4ALL Internet BV*, Judgment of 14 June 2017, ECLI:EU:C:2017:456 (*Ziggo*).

¹⁴ CJEU, Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, Judgment of 7 December 2006, ECLI:EU:C:2006:764 (*SGAE*).

¹⁵ For an empirical analysis of the *topoi* used in the CJEU's case law on copyright up to *Svensson*, see Marcella Favale, Martin Kretschmer and Paul C. Torremans, 'Is there an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' [2016] 79(1) *Modern Law Review* 31.

¹⁶ *SGAE*, C-306/05.

¹⁷ CJEU, Case C-510/10, *DR and TV2 Danmark A/S v NCB — Nordisk Copyright Bureau*, Judgment of 26 April 2012, ECLI:EU:C:2012:244 (*TV2 Danmark*).

¹⁸ CJEU, Case C-607/11, *ITV Broadcasting Ltd et al v TVCatchup Ltd*, Judgment of 7 March 2013, ECLI:EU:C:2013:147 (*ITV Broadcasting 2013*).

First, the CJEU acknowledged from the outset that InfoSoc Directive does not define ‘communication to the public’,¹⁹ and held that this notion and its different components must be given an autonomous and uniform interpretation in the EU, as the provisions of that Directive do not expressly refer to national law to determine their meaning and scope.²⁰ In addition, this term must be given the same meaning in the body of directives in the area of intellectual property where it is used, such as Directive 92/100,²¹ unless the EU legislature has expressed a different intention.²² Moreover, the communication to the public right set forth in the InfoSoc Directive must be interpreted in a way consistent with international law.²³

Second, ‘communication to the public’ must be interpreted broadly,²⁴ as this follows from the 23rd recital of the InfoSoc Directive and a broad interpretation is essential to achieve Directive’s principal objective, underscored in 9th and 10th recitals. Namely, “*to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public.*”²⁵

Third, for there to be a communication to the public, there must be (i) an act of communication, and (ii) this communication must be made to ‘a public’.²⁶ The term public “*refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons*”,²⁷ and must take into account not only those who access the work simultaneously but also those who access it in succession.²⁸

Fourth, considering Art. 3(1) of the InfoSoc Directive together with Art. 8 of the WIPO Copyright Treaty, the CJEU had already held that “*for there to be communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it,*”²⁹ and thus there is no need that such persons actually access the works.

Fifth, when the act of communication consists of retransmitting, or allowing access to, a prior communication, for such act to be a ‘communication to the public’ it must reach a *new* public, meaning “*a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public*”.³⁰ In this connection, the CJEU noted that there is such communication to a new public where a hotel owner “*intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its*

¹⁹ *SGAE*, C-306/05, para 33.

²⁰ *SGAE*, C-306/05, para 31.

²¹ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which was later replaced by the codified Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

²² CJEU, Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd et al v QC Leisure et al* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), Judgment of 4 October 2011, ECLI:EU:C:2011:631 (*FAPL*), para 187.

²³ *FAPL*, C-403/08, para 189; CJEU, Case C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, Judgment of 15 March 2012, ECLI:EU:C:2012:140 (*SCF*), para 54.

²⁴ *SGAE*, C-306/05, para 36.

²⁵ *SGAE*, C-306/05, para 36.

²⁶ *ITV Broadcasting 2013*, C-607/11, para 31.

²⁷ *SCF*, C-135/10, para 84.

²⁸ *SGAE*, C-306/05, para 38-39; *SCF*, C-135/10, para 87.

²⁹ *SGAE*, C-306/05, para 43.

³⁰ *FAPL*, C-403/08, para 197.

customers,”³¹ noting that “[i]n the absence of that intervention, its customers, although physically within [the catchment] area, would not, in principle, be able to enjoy the broadcast work.”³² In addition, the Court had already held that when the communication is made using technical means different from those used in the initial communication, there is no need to examine whether a new public is targeted.³³

Sixth, the CJEU had also considered whether the act of communication is of a profit-making nature, though not being conclusive on whether it is a necessary condition for the existence of a communication to the public.³⁴

Finally, and more generally, in view of these and other elements, the CJEU had already declared that a case-by-case analysis is needed to assess whether an act of communication to the public is being carried out, and had noted that “[f]or the purposes of such an assessment, account must be taken of several complementary criteria, which are not autonomous and are interdependent[,]” and which “must be applied individually and in the light of their interaction with one another, given that in different specific situations, they may be met to varying degrees.”³⁵

The reach and meaning of these criteria have evolved over time, and sometimes unexpected conclusions have been derived from them. In any event, all those elements were already present in the communication to the public case law when the Court faced the hyperlinking questions for the first time.

2.2. Broadening the notion of ‘communication’

With the hyperlinking cases, the CJEU’s expanded the understanding of what may constitute an ‘act of communication’—the first element of a ‘communication to the public’. Admittedly, the Court had always favoured a broad interpretation of this element. In *SGAE*, for instance, after holding that the mere installation of television sets in hotel rooms may make public access to broadcast works technically possible, the Court concluded that “if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then

³¹ *SGAE*, C-306/05, para 42 (emphasis added).

³² *SGAE*, C-306/05, para 42.

³³ *ITV Broadcasting 2013*, C-607/11, para 39.

³⁴ *SGAE*, C-306/05, para 44; *FAPL*, C-403/08, para 204.

³⁵ *SCF*, C-135/10, para 79. This approach was put forward by the Court in *SCF*, regarding the remuneration right of communication to the public granted to phonogram producers in Art. 8(2) of Directive 92/100. The CJEU noted that the individual assessment was required by the nature of this right (*SCF*, C-135/10, paras 75-76), which differs from the preventive nature of the exclusive right provided for by the InfoSoc Directive. See also CJEU, Case C-351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, Judgment of 27 February 2014, ECLI:EU:C:2014:110 (*OSA*), para 35. However, in *Reha Training*, some years after *Svensson*, the CJEU determined that, notwithstanding the somewhat different contexts and different nature of the rights, the concept of ‘communication to the public’, which is after all the trigger of the respective rights, must have the same meaning in both Directives (See CJEU, Case C-117/15, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*, Judgment of 31 May 2016, ECLI:EU:C:2016:379 (*Reha Training*), paras 29-33). Consequently, that concept must be assessed in accordance to the same criteria (*Reha Training*, paras 34-35), and thus following the individualised approach already noted in *SCF*. This would be relevant in *GS Media* to further develop the nuances of the linking cases, particularly by introducing subjective requirements.

communication to the public takes place, irrespective of the technique used to transmit the signal."³⁶ In addition, the CJEU held that it is not necessary that customers switch on the television, as for there to be an act of communication it is sufficient that the public has the possibility of accessing the work.³⁷

The latter holding may be read as a recognition that a transmission is not needed to find an act of communication—a question which has been relevant in the hyperlinking debate,³⁸ and thus requires some consideration. On the one hand, Recital 23 of InfoSoc Directive states that the author's right of communication to the public "*should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting,*" adding that "*[t]his right should not cover any other acts.*"³⁹ On the other hand, Art. 3(1) refers to the right of authorizing any communication to the public "*by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*"⁴⁰ While such 'making available' envisages a transmission—indeed, as noted in Recital 25, it consists of "*interactive on-demand transmissions*"—, it has been understood that a *potential* transmission suffices. In other words, if the user is given the real possibility to access the work on demand, a communication subject to the rights holders' authorization exists even if there is no *actual* transmission because no member of the public requests the work. This seems clearly accepted by the Court and has its analogy in the *SGAE* factual setting with the installation of television sets that members of the public may or may not switch on. Since the mere 'making available' is recognized as a form of communication in Art. 3(1), the language of Recital 23 should not be an obstacle to the conclusion that an offer of transmission as described here is enough.⁴¹ However, the *offering* of an actual transmission is still required. In other words: a person who makes a work available is someone who will actually transmit the work—either via streaming or by sending a digital copy—to the members of the public who request it on demand. The provider of a hyperlink, nonetheless, will not transmit the work when a user clicks on the link. Rather, the operator of the website where the work is located, that is, where the work is *made available*, will transmit the work.

When the Court faced the *Svensson* case—its first hyperlinking case—, it noted (i) that the notion of 'act of communication' must be construed broadly;⁴² (ii) that the provision of

³⁶ *SGAE*, C-306/05, para 46.

³⁷ *SGAE*, C-306/05, para 43.

³⁸ See European Copyright Society, *Opinion on The Reference to the CJEU in Case C-466/12 Svensson*, 15 February 2013, available at <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-Svensson/> (supporting the view that a transmission is a *sine qua non* condition for a communication to the public and pointing, to that effect, to CJEU's case law as well as to InfoSoc Directive, the WTC, and to the *travaux préparatoires* for both).

³⁹ Recital 23, InfoSoc Directive.

⁴⁰ Art. 3(1), InfoSoc Directive.

⁴¹ In a number of cases the Court has recalled Recital 23 of InfoSoc Directive to stress that an act of communication must involve a transmission. However, from the context of those cases it seems clear that with such statement the Court does not intend to exclude the acts of making available which are not followed by an actual transmission simply because no member of the public requests it. See e.g. CJEU, Case C-283/10, *Circul Globus București v Uniunea Compozitorilor și Muzicologilor din România*, Judgment of 24 November 2011, ECLI:EU:C:2011:772 (*Circul Globus București*), paras 39-40 (where what the Court wanted to exclude were live presentations or performances of a work, where the public is present at the place where the communication originates).

⁴² *Svensson*, C-466/12, para 17.

clickable links to protected works freely accessible on another site—which apparently was the case in *Svensson*—affords users direct access to those works;⁴³ and (iii)—referring to *SGAE* by analogy—that “it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity”.⁴⁴ It concluded that in the factual circumstances of the case, “the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’” under the InfoSoc Directive.⁴⁵ In its observations in *Svensson*, however, the EU Commission had submitted that in the case of a hyperlink there is no ‘act of communication’ since there is no transmission or retransmission, and insisted again on this view in the *GS Media* case.⁴⁶ Similarly, Advocate General Wathelet, in his Opinion in *GS Media*, advised the CJEU to depart from its holding in *Svensson*, arguing that “hyperlinks which lead, even directly, to protected works do not ‘make available’ those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works”, and that “the act which constitutes the actual ‘making available’ was the action by the person who effected the initial communication.”⁴⁷

By concluding that the provision of a hyperlink amounts to making the work available, the CJEU expanded the notion of ‘act of communication’ to encompass third-party actions different from either actually transmitting the work or offering the on-demand transmission of the work. The provision of links certainly facilitates, even to a great extent, the access to the work by directing users to the place where someone else is making the work available. Nonetheless, this third-party intervention may arguably be deemed a contribution to the communication rather than a communication in its own right. *Svensson*’s characterization of links as acts of communication was a remarkable step that went beyond what had been held in the CJEU’s jurisprudence, despite the *Svensson*’s references to previous case law.⁴⁸

That path was subsequently followed in *Filmspeler*, where it was held that the sale of a multimedia player with pre-installed add-ons containing links to protected works published without authorization on streaming websites is also an act of communication, because the multimedia player enables access to the links, which, when activated, offer users direct access to protected works.⁴⁹ A further step was taken by the CJEU in *Ziggo*, where the fact of providing

⁴³ *Svensson*, C-466/12, para 18.

⁴⁴ *Svensson*, C-466/12, para 19.

⁴⁵ *Svensson*, C-466/12, para 20.

⁴⁶ See Advocate General Wathelet Opinion, Case C-160/15, *GS Media*, 7 April 2016, ECLI:EU:C:2016:221, para 25.

⁴⁷ AG Wathelet Opinion in *GS Media*, para 54. However, the crux of AG Wathelet’s argument is not that much that the hyperlinker did not effect a transmission or a retransmission; rather, it is that, since the works were already freely accessible, the hyperlinker’s intervention was not *indispensable* to make the works available to users. See *id.*, para 60. On the AG Wathelet Opinion, see Raquel Xalabarder, ‘The Role of the CJEU in Harmonizing EU Copyright Law’ [2016] 47 IIC 635.

⁴⁸ *Svensson*’s holding that the existence of an ‘act of communication’ must be construed broadly (para 17) explicitly refers to *FAPL* 139, which nonetheless doesn’t appear to cover acts which do not involve an actual or potential transmission carried out by the one who performs the act of communication. Similarly, pointing to the *SGAE*’s holding that there would be a communication even if members of the public do not avail themselves of the opportunity to access the work is not enough to justify categorizing hyperlinks as acts of communication.

⁴⁹ *Filmspeler*, C-527/15, paras 41–42, 53. When assessing whether it is a communication to ‘a public’, the Court noted not only that the multimedia player had been purchased by a large number of people, but also

and managing an online platform hosting links to protected works was regarded as an act of communication in itself.⁵⁰

In all these cases, the CJEU stressed that the concerned activities grant access to the linked works. The fact that the persons providing the links—, selling the device, or managing the sharing website—do not engage themselves in the transmission of the works seems no longer relevant for the Court.⁵¹ The expanded notion of ‘act of communication’, however, is countered by a mechanism to avoid some overreaching effects. The Court found that mechanism in the old idea of the ‘new public’.

2.3. Limiting the unintended effects by resorting to the ‘new public’ criterion

As noted, while *Svensson* held that the provision of a hyperlink to a protected work amounts to an act of communication, the judgment limited the practical reach of such a holding by resorting to the controversial ‘new public’ criterion.⁵²

It was in *SGAE* where the ‘new public’ criterion was mentioned by the CJEU for the first time—though it had already been suggested by Advocate General La Pergola in his Opinion in the *Egeda* case.⁵³ The notion was taken from a 1978 WIPO non-binding guide to the Berne Convention (BC).⁵⁴ The Guide referred to this notion when explaining the scope of Art. 11bis(1)(iii) BC, as a criterion to distinguish between the mere reception of a broadcast and the further communication of the received broadcast by means of loudspeakers or analogous instruments.⁵⁵ According to that Guide, when authorizing a communication, right holders only

that “the communication at issue in the main proceedings covers all persons who could potentially acquire that media player and have an internet connection.” (*Filmsepler*, C-527/15, para 45).

⁵⁰ See *GS Media*, C-160/15, para 48.

⁵¹ To be sure, as we will see, the CJEU does consider additional criteria such as whether those activities go beyond the mere provision of physical facilities for enabling or making a communication, whether those providers play an indispensable role to grant access to the works, and whether they intervene in full knowledge of the consequences of their actions.

⁵² See ALAI Executive Committee, ‘Opinion on the criterion “New Public”, developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public’ (17 September 2014), available at <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>; P. Bernt Hugenholtz and Sam C. van Velze ‘Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”’ [2016] 47(7) IIC 797 (Hugenholtz and van Velze); Stavroula Karapapa, ‘The requirement for a “new public” in EU copyright law’ [2017] 1 ELR 63.

⁵³ AG La Pergola Opinion in Case C-293/98, *Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) v Hostelería Asturiana SA (HOASA)*, 9 September 1999, ECLI:EU:C:1999:403, para 20.

⁵⁴ M. Claude Masouyé, *Guide de la Convention de Berne pour la protection des oeuvres littéraires et artistiques (Acte de Paris, 1971)* (WIPO, 1978), at 80.

⁵⁵ While the Guide refers to Art. 11bis(1)(iii) BC, it does make a parallelism with Art. 11bis(1)(ii), which according to the Court is the one relevant for the factual situations both in *SGAE* and *Svensson*. Indeed, the Guide notes that “*in the same way than in the case where the reception of a broadcast is followed by a public communication targeting a new circle of listeners (or viewers), either by means of rebroadcasting or by means of a wired transmission [Art. 11bis(1)(ii)], the public communication by loudspeaker (or analogue instrument) is considered as reaching a new public, different from the one that the author had in mind when authorizing the broadcasting of his work.*” *Ibid.* (my own translation and emphasis). Nonetheless, as Hugenholtz and van Velze note, the legislative history shows that Art. 11bis(1)(ii)

take into account the users who are able to receive the work with their own reception equipment within their own private or family circle.⁵⁶ Thus, if a recipient communicates the broadcast to other people, for instance by means of loudspeakers or television sets, he or she is making a new act of communication, which must be authorized. Since the people getting access to the work through that subsequent transmission had not been taken into account by the right holders when authorizing the original communication, they can be considered a ‘new public’, that is, in the words of *SGAE*, “*a public different from the public at which the original act of communication of the work is directed.*”⁵⁷

The ‘new public’ criterion is assessed by the CJEU where an *ulterior* act of communication occurs, thus where there is an initial communication, duly authorized, directed to an ‘original public’. According to the Court, a communication to a public not included in the initial authorization—thus to a ‘new public’—needs to be specifically consented by right holders. Ultimately, though, the criterion is somewhat tautological: a communication to a ‘new public’ must be authorized precisely because a ‘new public’ means a public not yet covered by an authorization. In other words, a communication to a public must be authorized unless such communication is already authorized. Indeed—as the CJEU has done on occasion—the public of an initial communication may also be regarded as ‘new public’ in the sense that such communication needs to be authorized.⁵⁸

Ultimately, the relevant question is how to ascertain whether the subsequent communication may be deemed already authorized with the initial authorization. Before the hyperlinking saga started, the CJEU had already provided a functional criterion for this. It had determined in *ITV Broadcasting 2013* that “*each 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.*”⁵⁹ Applying that rule to the case before it, which concerned the transmission of works via terrestrial broadcast and the making available of those works over the internet, the Court explicitly connected the ‘different technology’ test with the new public criterion by holding that “*each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public.*”⁶⁰ The Court added

criterion that the communication “is made by an organization other than the original one” was precisely meant to be used instead of a new public condition. *See also* Jane C. Ginsburg and Luke Ali Budiardjo, ‘Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives’ [2018] 41 *Colum. J.L. & Arts* 153, 170 (noting that neither the Berne Convention nor the WIPO Treaties supply a basis for the new public criterion).

⁵⁶ The reference to the public taken into account by the right holders when authorizing the initial communication was no longer included in the new *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (WIPO 2004), available at <http://www.wipo.int/publications/en/details.jsp?id=361&plang=EN>. *See* Mihály J. Ficsor, ‘Svensson: Honest attempt at establishing due balance concerning the use of hyperlinks - spoiled by the erroneous “new public” theory’, *Copyright See-Saw* (5 May 2014), available at http://www.copyrightseesaw.net/archive/?sw_10_item=63.

⁵⁷ *SGAE*, C-306/05, para 40.

⁵⁸ *See* to that effect, CJEU, Joined Cases C-431/09 and C-432/09, *Airfield NV, Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09), and *Airfield NV v Agicoa Belgium BVBA* (C-432/09), Judgment of 13 October 2011, ECLI:EU:C:2011:648 (*Airfield*), para 75.

⁵⁹ *ITV Broadcasting 2013*, C-607/11, para 24.

⁶⁰ *ITV Broadcasting 2013*, C-607/11, para 39 (emphasis added).

that “[i]n those circumstances, it is no longer necessary to examine below the requirement that there must be a new public.”⁶¹

This statement has frequently been referred to as holding that where an ulterior communication uses a different technology, the condition of reaching a new public simply does not apply.⁶² Considering its rationale, though, it could probably be said that the Court understands that the public targeted by the second communication carried out using a different technology will always be a new public, because it assumes that right owners, when authorizing the initial communication only take into account the public who would receive the work through the technical means used in that initial communication.⁶³ This may explain why in some cases where clearly different technologies were used, the Court nonetheless noted that the new public condition was fulfilled.⁶⁴ In addition, the Court has not always been consistent in following the criterion that the use of a different technology makes it unnecessary to assess whether there is new public. Indeed, in *AKM* the Court held that the use of different technology simply meant that there was an act of communication, but that it was still necessary to examine whether there was a new public—and it found there was not.⁶⁵

It must also be noted that individuals forming part of the ‘new public’ (because they are able to access the work thanks to the second communication) may also form part of the initial one (because they are physically within the catchment area of the initial communication, and thus able to access it if they have their own reception equipment ad hand).⁶⁶ It thus appears that the question is not necessarily that members of the new public are different individuals, but that they are ‘a public’ and are granted access to the work in a way not contemplated by right owners when authorizing the initial communication.

When assessing the fulfillment of the new public condition in *Svensson*, the Court first held—in an unsophisticated way—that both the initial communication and that carried out through hyperlinks were made using the same technical means because both were made on the Internet.⁶⁷ Next, it assumed that, since the works had been made available on a website without any restriction, the public taken into account by right holders when authorizing that initial

⁶¹ *Ibid.* (emphasis added).

⁶² Indeed, the Court itself somehow endorsed this view in latter cases. See, for instance, *BestWater*, C-348/13, para 14; *GS Media*, C-160/15, para 37; *Filmspeler*, C-527/15, para 33; *Ziggo*, C-610/15, para 28.

⁶³ See, for instance, *FAPL*, C-403/08, para 198.

⁶⁴ *SGAE* was such a case, to begin with, since the hotel distributes the signal to the television sets by cable, whereas the initial communication is carried out via terrestrial broadcast. But also after *ITV Broadcasting 2013*, where this criterion was established, similar examples are found. See *OSA*, C-351/12, para 32 (the owner of a spa establishment distributes the signal by means of television or radio sets in the bedrooms of the establishment's patients, who constitute a ‘new public’); CJEU, Case C-151/15, *Sociedade Portuguesa de Autores CRL v Ministério Público et al*, Order of 14 July 2015, ECLI:EU:C:2015:468 (*Sociedade Portuguesa*), paras 21-24; *SCF*, C-135/10, paras 60-61.

⁶⁵ See CJEU, Case C-138/16, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH*, Judgment of 16 March 2017, ECLI:EU:C:2017:218 (*AKM*), para 29.

⁶⁶ See *SGAE*, C-306/05, para 42; CJEU, Case C-136/09, *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia*, Order of 18 May 2010, ECLI:EU:C:2010:151 (*Divani Akropolis*), para 38; *FAPL*, C-403/08, para 195. This appears to be so even though on some occasions the Court expresses the idea that addressing a new public expands the circle of persons having access to the initial communication. See to that effect *Airfield*, C-431/09, para 76.

⁶⁷ See *Svensson*, C-466/12, para 24.

communication was composed of all Internet users.⁶⁸ Therefore, it concluded that the provider of the hyperlink did not communicate the works to a 'new public'. Therefore, the Court held that the hyperlinker had not engaged in a communication to the public that needed to be authorized by the right holders.⁶⁹

The CJEU'S holding in *Svensson* was a remarkable novelty, not because of the 'new public' criterion, as this had already been used by the CJEU in its previous case law. It was because, for the first time, the CJEU held that the public considered was *not* new, i.e., that the public addressed by the ulterior communication had already been contemplated by the right holders when granting the initial one, and thus that no further authorization was needed.⁷⁰

The practical effect of *Svensson* approach to the new public criterion was to allow users to link to copyrighted works made freely available on the Internet with the consent of right owners.⁷¹ Other possible factual situations were not covered by the *Svensson* judgment, particularly the situations where a link circumvents restrictions, and where a link points to a work that had been made available on the linked-to website without the authorization of the right holders. Nonetheless, the ruling did refer briefly to those situations. *First*, it held that where the link points to a work which is not freely accessible and gives access to it by circumventing the restrictions in place, the users who are able to access the work because of that link, and who could not access it otherwise, constitute a 'new public'.⁷² *Second*, it strongly implied that if a link points to an unauthorized source, users of the link should also be considered new public.⁷³

Hyperlinks to unauthorized content were about to be the centre of another case—*GS Media*—and the occasion for the CJEU to introduce yet another twist to the convoluted case law on the communication to the public right.

2.4. Limiting the reach of the extended notion of communication by requiring knowledge about the illegal nature of the source.

A new challenge for the Court came with the *GS Media* reference, concerning a case where the contested hyperlinks pointed to files uploaded to a website without the right owners' authorization. Under the *Svensson* lens, it was difficult to foresee how this situation could possibly escape being categorised a communication to a *new public*. Although the operative part

⁶⁸ *Svensson*, C-466/12, paras 26-27. See also *GS Media*, C-160/15, para 42.

⁶⁹ This was also the case for framed links, i.e., links that show the content linked-to as if it was part of the website where the link is placed. See *Svensson*, C-466/12, para 29-30. The same conclusion was held in *BestWater* for embedded or inline links. See *BestWater*, C-348/13, para 17-19. Arguing against expanding that doctrine to include those kinds of links, see Matthias Leistner, 'Closing de Book on the Hyperlinks: A Brief Outline of the CJEU's Case Law and Proposal for European Legislative Reform' [2017] 39(6) EIPR 327. See also Roosa Tarkiainen, 'Tipping the scale in *GS Media*: a proposal to restore the balance between rightholders and internet users' [2017] 12(6) JIPLP 502.

⁷⁰ It is generally understood that the doctrinal ground for considering that no new authorization is needed is that rights holders have granted an implicit license, which depend on whether or not they place restrictions for accessing the work. See Pekka Savola, 'EU Copyright Liability for Internet Linking' [2017] 8(2) JIPITEC 139, 149, suggesting the name of "regulated implied consent" to refer to this particular kind of implicit consent.

⁷¹ See Mira Burri, 'Permission to Link. Making Available via Hyperlinks in the European Union after *Svensson*' [2014] 5(3) JIPITEC 245.

⁷² *Svensson*, C-466/12, para 31.

⁷³ *Ibid.*

of the ruling in *Svensson* used a broad language, holding that “*the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’, as referred to in [Article 3(1) of the InfoSoc Directive]*”,⁷⁴ the Court in *GS Media* could not be reasonably expected to ignore the rationale behind that conclusion. This was that, in the factual circumstances of *Svensson*, the communication was not made to a ‘new public’ because the source was not only freely accessible but also authorized. As expected, *GS Media* explicitly noted that limited scope of the operative part of the *Svensson*’s ruling.⁷⁵

Unlike in *Svensson*, the public addressed by the hyperlinks in *GS Media* could not, by any means, be deemed a public already taken into account by right holders when authorizing the initial communication, as there was simply no authorization in the first place. Indeed, the Court clearly conveyed that the communication in *GS Media* was not directed to a public already taken into account by right holders, and that, for that reason, it was not covered by the *Svensson* lack-of-new-public safe harbour and thus it *might* still be categorised as a communication to the public.⁷⁶

However, holding that any link to an unauthorized source requires authorization would again be troublesome for the widespread practice of linking, and thus for the functioning of the Internet as a means for exercising freedom of expression and information. The Court stressed that concern, stating that “*it should be noted that the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute 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.*”⁷⁷ The *Svensson* lack-of-new-public safe harbour would be of little relief for hyperlinkers if it were conditioned to the legality of the source, as this circumstance may in practice be difficult to ascertain by them.⁷⁸ To solve the problem, the Court decided to import a key element from the indirect infringement doctrine—the condition of having actual or constructive knowledge about the related primary infringement.⁷⁹

Essentially, the Court held that posting a link to a work published without the right holders’ consent on another website constitutes a communication to the public *only* if the person setting the link ‘knew or ought to have known’ that the hyperlink provides access to a work illegally published on the Internet.⁸⁰ The Court held that this might be the case where the rightholders put the link setter on notice.⁸¹ Moreover, it established the rebuttable presumption that such a

⁷⁴ See *Svensson*, C-466/12, operative part of the judgment.

⁷⁵ *GS Media*, C-160/15, para 41–43.

⁷⁶ *Ibid.*

⁷⁷ *GS Media*, C-160/15, para 45.

⁷⁸ *GS Media*, C-160/15, para 46.

⁷⁹ See Birgit Clark; Julia Dickenson, ‘Theseus and the Labyrinth? An Overview of the “Communication to the Public” under EU Copyright Law: After *Reha Training* and *GS Media* Where are we Now and Where do we Go from Here?’ [2017] 39(5) EIPR 265, 268 (considering that this addition of a *mens rea* element is *contra legem*, as it is not foreseen in the InfoSoc Directive).

⁸⁰ *GS Media*, C-160/15, para 49.

⁸¹ *Ibid.* See Lyubomira Midelieva, ‘Rethinking Hyperlinking: Addressing Hyperlinks to Unauthorised Content in Copyright Law and Policy’ [2017] 39(8) EIPR 479, 482 (criticizing that the Court appears to treat the presence of knowledge as an element that allows disapplying the requirement of ‘indispensability’).

knowledge condition is fulfilled where the links are placed for profit,⁸² because in those situations “*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.*”⁸³

The Court mentioned different legal arguments to justify this new approach. *First*, it pointed to Article 11 of the EU Charter for Fundamental Rights, which recognizes the rights to freedom of expression and information—recalling, as already noted, the importance of the Internet and hyperlinks for exercising those rights. *Second*, the Court held that that approach provides the high level of protection for authors sought by the InfoSoc Directive. Under such an approach, the Court underscored, copyright holders may act against those who post hyperlinks for profit to works illegally published on a website and, subject to the condition of knowledge, against those posting the links without pursuing a financial aim. Specifically, it stressed that “*rightholders, in all cases, have the possibility of informing such persons of the illegal nature of the publication of their work on the internet and of taking action against them if they refuse to remove that link, and those persons may not rely upon one of the exceptions listed in Article 5(3).*”⁸⁴

Interestingly, the Court tried also to justify the introduction of the knowledge requirement by referring to its own previous case law, as if it was its natural consequence. On the one hand, it took advantage of the *SCF* criterion that the existence of a communication to the public requires an individualised assessment. In addition, and more specifically, it held that a person who does not know and cannot reasonably know that the work to which the link points had been published without authorization, “*does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet.*”⁸⁵

This language comes from *SGAE*. In that case, to show that the customers of a hotel constitute a ‘new public’, the Court noted that the hotel’s role was *indispensable* because, without that intervention, its customers would not have been able to access the works. In that context, the Court stressed that the hotel was not merely providing a technical means to ensure or improve the reception of the original broadcast in the catchment area, but that, “[*o*]n the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.”⁸⁶ The practical meaning of the parenthetical sentence ‘in full knowledge of the consequences of its action’ is not clear. Was it just a way of describing that the hotel’s action was a purposeful intervention? Or rather, was it meant to be an actual condition of

⁸² *GS Media*, C-160/15, para 51. However, the Court did not provide any guidance to ascertain when hyperlinking may be considered to be carried out for profit. See Eleonora Rosati, ‘*GS Media* and its implications for the construction of the right of communication to the public within EU copyright architecture’ [2017] 54(4) CMLR 1221, 1238.

⁸³ *GS Media*, C-160/15, para 51. In paragraph 46, the Court noted that “*the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it.*” Arguably, thus, the duty of care the Court imposes on for-profit providers would entail constantly monitoring the status of the material after the link has been established.

⁸⁴ *GS Media*, C-160/15, para 53.

⁸⁵ *GS Media*, C-160/15, para 48 (emphasis added).

⁸⁶ *SGAE*, C-306/05, para 42 (emphasis added).

knowledge? In addition, if so, what was exactly that knowledge about? Then, would the lack of such a knowledge have changed the fact that the intervention was indispensable for the customers to get access to the work, which was the point the Court ultimately wanted to make with that argument?⁸⁷

In one way or another, many other judgments before *GS Media* had echoed that sentence taken from *SGAE*. Those cases appear to confirm that the Court simply meant that the user's intervention was purposeful or volitional, *i.e.*, that the user consciously performed the act of communication. Indeed, most of those cases use the words 'deliberately' or 'intentionally', as a synonym of 'in full knowledge of the consequences'.⁸⁸ In *FAPL*, for instance, after citing *SGAE*, the Court chose to use the word 'intentionally', instead of 'in full knowledge', and held that "*the proprietor of a public house effects a communication when he intentionally transmits broadcast works, via a television screen and speakers, to the customers present in that establishment.*"⁸⁹ Sometimes, the idea of 'intentional' or 'deliberate' is again conflated with that of 'indispensable'. For example, in *SCF*, also after citing *SGAE*, the Court held: "*although the patients of a dentist are in the area covered by the signal conveying the phonograms, they are able to listen to those phonograms only as a result of the deliberate intervention of that dentist. Therefore such a dentist must be considered to be intervening deliberately in the broadcasting of those phonograms.*"⁹⁰ In addition, sometimes the intentional element is considered when examining whether there was an act of communication,⁹¹ while in other cases it is referred to when assessing whether the act of communication reached a new public.⁹² Moreover, sometimes it is considered both in relation to the act of communication *and* to the new public criterion.⁹³

All in all, this case law suggests that by introducing a condition of actual or constructive knowledge about the legality of the initial communication, *GS Media* departed from the Court's previous jurisprudence—which was essentially considering the deliberate character of the intervention—despite pretending to be in line with it.

⁸⁷ See, eg., *Filmspeler*, C-527/15, para 31, referring again to the 'full knowledge of the consequences' when examining whether the user's intervention was indispensable.

⁸⁸ See *Divani Akropolis*, C-136/09, paras 38-39 ('deliberately'); *FAPL*, C-403/08, paras 194-196 and 198 ('intentionally'); *SCF*, C-135/10, para 94 ('deliberately'); CJEU, Case C-162/10, Phonographic Performance (Ireland) Limited v Ireland, Judgment of 15 March 2012, ECLI:EU:C:2012:141 (*PPL*), para 40 ('deliberate'); *ITV Broadcasting 2013*, C-607/11, para 38 ('deliberate'); *OSA*, C-351/12, para 26, 33 ('deliberately' and 'intentionally'); *Sociedade Portuguesa*, C-151/15, paras 14, 22 ('deliberately'); *Reha Training*, C-117/15, paras 47, 54, 55 ('intentionally').

⁸⁹ *FAPL*, C-403/08, para 195.

⁹⁰ *SCF*, C-135/10, para 94 (emphasis added). Nonetheless, *Ziggo* seems to consider as two separate elements "the indispensable role played by the user and the deliberate nature of his intervention." (See *Ziggo*, C-610/15, para 26).

⁹¹ For instance, *PPL*, C-162/10, paras 31, 40.

⁹² For instance, *Reha Training*, C-117/15, paras 46-47; *ITV Broadcasting 2013*, C-607/11, para 38.

⁹³ For instance, *FAPL*, C-403/08, paras 194-196 (act of communication) and para 198 (new public); *OSA*, C-351/12, para 26 (act of communication) and para 32 (new public); *Sociedade Portuguesa*, C-151/15, para 14 (act of communication) and para 22 (new public). This may explain why both *Filmspeler* and *Ziggo* consider the intentional element ("full knowledge of the consequences") when examining whether there is an act of communication (*Filmspeler*, para 41; *Ziggo* para 36) and the knowledge about the illegality of the source in connection with the new public criterion (*Filmspeler*, para 50; *Ziggo* para 45). On the consequences that may result from assessing the knowledge element at one or another stage of the analysis, see Ginsburg and Budiardjo, *op cit.*, 163 ff.

In turn, as noted above, *GS Media* limited the practical effects of establishing the knowledge requirement by suggesting that a notice from right holders might suffice to deem that the user has obtained the required knowledge, and, more importantly, by establishing a presumption of knowledge where the links are posted for profit. It must be stressed that the CJEU has not gone as far as establishing that the aim of profit is a *condition* for there to be a communication to the public. Likewise, the for-profit nature of the activity is not an alternative to the knowledge requirement. Rather, it is just a presumption—a rebuttable one—of knowledge.⁹⁴

The Court reminded in *GS Media* that the relevance of profit had already been declared in the previous case law.⁹⁵ While this is true, it must be noted that the previous references to profit are manifestly vague in this respect. In *SGAE*, the Court declined to state whether the pursuit of profit is a necessary condition for the existence of a communication to the public while noting that in any event, in the case before it, the hotel's activity was of a profit-making nature.⁹⁶ From that statement, *FAPL* extracted the ambiguous conclusion that profit “*is not irrelevant*,”⁹⁷ which has been repeated in numerous cases.⁹⁸ Interestingly, this case law tends to consider the for-profit nature as an element to assess whether the recipients of the communication constitute ‘a public’.⁹⁹

GS Media approach regarding knowledge about the illegality of the source was confirmed by the CJEU in the subsequent hyperlinking cases decided so far: *Filmspeler* and *Ziggo*. Both cases also involved links to illegal sources, but the factual circumstances were different from *GS Media*. *Filmspeler* concerned the sale of a multimedia player with add-ons containing links to streaming websites where copyrighted works are made available without the right holders' authorization. The Court noted that the multimedia player was obviously supplied with a view to making a profit.¹⁰⁰ Nonetheless, the Court did not need to rely on a presumption of knowledge based on the profit-making nature of the sale, as it had already found in the first place that “*the sale of the ‘filmspeler’ multimedia player was made 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.*”¹⁰¹ In particular, the Court underscored that “*the advertising of that multimedia player specifically stated that it made it possible, in particular, to watch on a television screen, freely and easily, audiovisual material available on the internet without the consent of the copyright holders.*”¹⁰²

⁹⁴ Interestingly, while the Court is arguably conflating the notions of direct and indirect infringement, it appears to have imported only the kind of indirect infringement which is based on knowledge, and not the situations that in some jurisdictions give rise to vicarious liability based on financial gain even in the absence of knowledge. That said, due to the explicit presumption based on profit that difference may be blurred in practice.

⁹⁵ *GS Media*, C-160/15, para 38.

⁹⁶ *SGAE*, C-306/05, para 44. See also *ITV Broadcasting 2013*, C-607/11, para 42.

⁹⁷ *FAPL*, C-403/08, para 204.

⁹⁸ See *SCF*, C-135/10, para 88; *ITV Broadcasting 2013*, C-607/11, para 42; *Sociedade Portuguesa*, C-151/15, para 26; *Reha Training*, C-117/15, para 49; *Filmspeler*, C-527/15, para 34.

⁹⁹ See *SCF*, C-135/10, paras 90, 99.

¹⁰⁰ *Filmspeler*, C-527/15, para 51.

¹⁰¹ *Filmspeler*, C-527/15, para 50.

¹⁰² *Filmspeler*, C-527/15, paras 50 and 18. On a different note, *Filmspeler* relaxed a bit the criterion of the indispensable role played by the user, deeming it sufficient an intervention without which users “would find it difficult to benefit from those protected works” (See *Filmspeler*, C-527/15, para 31 and 41). *Ziggo* would also follow this approach (See *Ziggo*, C-610/15, para 26, 37).

Ziggo concerned the provision and operation of a peer-to-peer sharing platform, The Pirate Bay (TPB). This platform indexes and categorises metadata—provided by users—of media files that users have made available on P2P networks without the right holders' authorization. The metadata allow users of the platform to locate the works and to download and share them using a BitTorrent client. Following the opinion of the AG, the Court noted that the operators of the platform “*intervene, with full knowledge of the consequences of their conduct, to provide access to protected works.*”¹⁰³ The Court found as well that their intervention does not consist of a mere provision of physical facilities for enabling or making a communication, and thus it held that “*the making available and management of an online sharing platform, such as that at issue in the main proceedings, must be considered to be an act of communication.*”¹⁰⁴ It also held that the communication is made to ‘a public’. Then the Court moved on to consider the criteria of ‘new public’, the knowledge about the illegal nature of the content, and the for-profit element. The Court appears to hold that the communication was in fact to a new public *because* the operators were informed that the sharing platform provided access to works published without authorization and because in any event they “*could not be unaware that this platform provides access to works published without the consent of the rightholders.*”¹⁰⁵

It may be surprising that *Ziggo* assessed the new public condition, given the fact that the making available of the linked-to works had not been authorized in the first place. Indeed—very much like in the cases where different technical means are used—, it is frequently understood that where the initial communication was not authorized, the new public condition simply does not apply, *i.e.*, it is no longer required. However, the Court's rationale in *GS Media* may be best described by saying that in those cases the new public condition is already necessarily fulfilled and that for this reason—and not because it does not apply—there is no need to assess it.¹⁰⁶ In fact, this is how the AG Szpunar understood *GS Media*, noting that “*if the work has been made available, but without the consent of the rightholder, no public was taken into account by the latter, and any new making available therefore targets a new public*”¹⁰⁷, adding that “[i]f the author of the work has not consented to it being shared on a peer-to-peer network, the users of that network constitute by definition a new public.”¹⁰⁸ This may explain why the Court in *Ziggo* allowed itself to deal with the new public condition, although it was not strictly needed, as the public was necessarily new, *i.e.*, not previously authorized.¹⁰⁹

What is more surprising is that *Ziggo* appears to hold that the public was new *because* the platform operators knew they were providing access to illegal files. An argument more in line with *GS Media* would have been to consider the knowledge of the illegal nature of the works made available as an additional requirement to find a communication to the public. In any event, the Court clearly stated that the platform operators had the relevant knowledge. Like in

¹⁰³ *Ziggo*, C-610/15, para 36.

¹⁰⁴ *Ziggo*, C-610/15, para 38-39.

¹⁰⁵ *Ziggo*, C-610/15, para 45.

¹⁰⁶ See *GS Media*, C-160/15, para 41-43.

¹⁰⁷ Advocate General Szpunar Opinion, Case C-610/15, *Ziggo*, 8 February 2017, ECLI:EU:C:2017:99, para 43.

¹⁰⁸ *Ibid*, para 47.

¹⁰⁹ *Ziggo*, C-610/15, para 44-45. Even in *Filmpeleer*, the Court reminded that, failing the initial authorization, it cannot be deduced from the Court's case law that the hyperlinks do not communicate to a new public, even though it finally didn't make an explicit assessment of the new public condition regarding the facts of that case—arguably because it was clear that the public was not already authorized. See *Filmpeleer*, C-527/15, para 48 and AG Campos Opinion, paras 55-59.

Filmspeler, the Court did not need to resort to the for-profit presumption of knowledge; although it did point out that the operation was of a profit-making nature.¹¹⁰

3. Hyperlinkers' liability under the new right of communication to the public

In the hyperlinking cases, analysed above, the CJEU's does not deal with liability as such but with framing the provision of hyperlinks, in some circumstances, as an act of communication to the public—and thus a primary infringement if it is performed without authorisation and not covered by an exception. Liability for copyright infringement, on the other hand, is ultimately imposed according to national laws, which typically apply a strict liability standard when it comes to primary or direct infringement.¹¹¹

Primary liability enjoys a certain degree of harmonisation at the EU level. *First*, EU law establishes some fully harmonised exclusive rights, particularly those of reproduction and communication to the public. These rights, as interpreted by the CJEU, must have the same scope in all Member States. *Second*, both the InfoSoc Directive and the Enforcement Directive oblige Member States to provide for monetary relief in case of primary infringement—at least where the act has been carried out knowingly, or with reasonable grounds to know—,¹¹² and offer some rules on how such relief may be established.¹¹³ Nonetheless, the criteria for ascertain if the relevant act has been authorized, as well as for assessing subjective elements, ultimately depend on national law.¹¹⁴

Secondary or indirect liability is that imposed on someone who does not perform an act covered by the rightholder's exclusive right but prejudices in some way the rights of the copyright holder, normally by contributing to, or profiting from, someone else's infringement. There is very little harmonisation regarding indirect liability,¹¹⁵ as EU law deals exclusively with the acts of exploitation reserved to rightholders, and thus, there is no common understanding about which conducts may constitute an indirect infringement in the first place.¹¹⁶ In addition, there

¹¹⁰ *Ziggo*, C-610/15, para 46.

¹¹¹ See Savola, *op. cit.*, p. 143.

¹¹² See art. 8 InfoSoc Directive and art. 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (which distinguishes between the situation where the primary infringement has been carried out knowingly, or with or with reasonable grounds to know, and the cases where those subjective elements were not present).

¹¹³ See CJEU, Case C-367/15, *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich*, Judgement of 25 January 2017, ECLI:EU:C:2017:36.

¹¹⁴ See Antoni Rubí-Puig and Pablo Ramírez Silva, 'El nuevo derecho de acceso. Evolución de la jurisprudencia del TJUE en materia de comunicación al público en relación con las actividades que facilitan el acceso a obras protegidas' [2018] *pe.i*, *Revista de propiedad intelectual (forthcoming)*.

¹¹⁵ See AG Campos' Opinion in *Ziggo*, para 65 (noting that "liability for that type of infringement is not harmonised at the level of EU law").

¹¹⁶ On the current landscape of accessory liability for copyright infringement in Member States and harmonisation perspectives, see Christina Angelopoulos, *European Intermediary Liability in Copyright. A Tort-Based Analysis* (Kluwer Law International 2016). See also Maurice Schellekens, 'Reframing Hyperlinks in Copyright' [2016] 38(7) *EIPR* 401, 407 (noting that doctrines of indirect infringement, even without harmonisation, might be better equipped to deal with hyperlinking than the right to communication to the public). See also Evangelia Papadaki, 'Hyperlinking, making available and copyright infringement: lessons from European national courts' [2017] 8(1) *European Journal of Law and*

are no common criteria for imposing such liability. National laws provide for different remedies against secondary infringements, which depend on their own legal law tradition.¹¹⁷

Nonetheless, there are some harmonised elements in EU law that affect this liability.¹¹⁸ Those include the exemptions from liability set forth in the E-Commerce Directive (ECD).¹¹⁹ In addition, there are other provisions that deal with the admissible scope of injunctive relief. Those are to be found in Art. 15 ECD, which prohibits imposing general monitoring obligations on some providers,¹²⁰ and in the rules laid down in arts. 8(2) of the InfoSoc Directive and in Arts. 3 and 11 of the Enforcement Directive, regarding the availability of injunctive measures. In addition, some limits to injunctive measures stem from the need to protect fundamental rights such as privacy and data protection. The norms governing injunctions are relevant in the field of indirect liability in two different ways. *First*, because they affect the reach of the injunctive measures that may be imposed on those who do not directly engage in a primary infringement. *Second*, because by restricting the scope of the admissible injunctions they also limit the possibility of finding negligence arising from the failure to comply with them—negligence which in turn could be the basis for establishing fault-based indirect liability.

By holding that, in some circumstances, the provision of hyperlinks—as well as the sale of multimedia players, or the provision of an online sharing platform—must be deemed a ‘communication to the public’, and thus an act exclusively reserved to rightholders, the CJEU provides in practice for some indirect harmonisation in the field of secondary liability.¹²¹ Indeed, cases that would have arguably been considered—at the most—secondary infringements are now converted into instances of primary infringement.

There are signs in the CJEU’s case law arguably showing that considering the provision of some hyperlinks to be acts of communication to the public is only possible if this notion is expanded to cover *indirect* acts of exploitation. *First*, just like there is no indirect infringement without a primary infringement, the Court found a way to hold that, except in cases of circumventing

Technology (noting that “direct liability does not suit the treatment of hyperlinks, as it introduces indirect liability notions through the back door.”)

¹¹⁷ A description of the different Member States’ approaches to indirect liability would exceed the limits of this article. The reader will find a thorough analysis in Angelopoulos, *European Intermediary Liability... op. cit.*, pp. 145-387. Angelopoulos identifies three main approaches, represented by the traditions of the UK, France and Germany. The UK offers an intra-copyright solution with the doctrine of authorisation, and resorts as well to the principles of joint tortfeasance to hold liable those who participate in someone else’s wrongdoing. French courts have tended to consider that the provision of means by the secondary infringer constitutes also a primary infringement. In addition, the French system follows an approach of concurrent liability between the primary and the secondary infringer. Germany has a particular system, that of *Störerhaftung*, which allows the imposition of injunctions against those who contribute to someone else’s infringement by failing to observe a duty of care.

¹¹⁸ See Angelopoulos, *European Intermediary Liability... op. cit.*, p. 67.

¹¹⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), arts. 12 through 14.

¹²⁰ See art 15, Directive 2000/31/EC.

¹²¹ See Ginsburg and Budiardjo, *op. cit.*, 167. See also Angelopoulos, *European Intermediary Liability... op. cit.*, p. 66 (“in the absence of harmonised rules for accessory liability, the EU Court is arguably attempting to substitute primary liability for accessory liability”, resulting in “a sort of accessory liability by stealth”).

restrictions,¹²² the hyperlinker does *not* perform an unauthorized communication where the primary communication was authorized. *Second*, just like there is normally no contributory infringement without a subjective element of knowledge, the Court introduced the unexpected condition that the hyperlinker knows or has reason to know about the illegal character of the source he or she is linking to for there to be an act of communication to the public. *Third*, the Court's approach regarding the applicability of exceptions points as well to an understanding of hyperlinking as a contribution to someone else's infringement. When *GS Media* justified the balance achieved because of introducing the knowledge requirement and the presumption of knowledge for commercial actors, it noted that enforcement against no lucrative linkers would still be always possible. To this effect, the Court reminded that rightholders might inform linkers about the illegal nature of the source and bring an action against them if they fail to remove the link. Moreover, it held that "*those persons may not rely upon one of the exceptions listed in Article 5(3).*"¹²³ In general terms, once an act is categorized as an act of exploitation—in this case a communication to the public—the user may still invoke the applicability of one of the exceptions laid down in the Directive and transposed into national law, and there should be no reason to deny an otherwise applicable injunction merely because the communication is made through a hyperlink. In the situation considered by the Court, the linker provides a hyperlink to a work whose publication on the linked website was illicit, i.e., both unauthorized and not covered by any exception. The reason why the Court absolutely rejects the possibility for the linker to rely on an exception, which the Court does not discuss in more detail,¹²⁴ is arguably the fact that the CJEU's is considering the act of the linker a participation on the illicit initial communication. If the first act was not covered by an exception—the argument seems to go—the hyperlinker's act will not be covered either.

While those are arguably indirect acts of exploitation, once they have been categorized as direct infringements, Member States will need to treat them as such,¹²⁵ which has obvious harmonisation effects. To be sure, even if liability continues to be imposed under the strict liability standard generally used for primary liability, an assessment of subjective elements will be needed as, in some situations, they are now a condition to find a primary infringement in the first place.¹²⁶ However, a harmonisation result emerges anyway. Indeed, in the absence of that categorization as direct infringements, national law might have considered that those actions, or some of them, do not even amount to an indirect copyright infringement. Moreover, in any event, the criteria for holding them as indirect infringements would have been those established

¹²² Admittedly, not all situations of hyperlinking that the Court admits as an act of communication to the public may be understood as an act that depends on the infringement of a third party. Indeed, according to the Court, when a hyperlink circumvents restrictions to give access content, which is not freely accessible in the Internet, the link setter might be performing an (unauthorized) act of communication to the public. See *Svensson*, C-466/12, para 31.

¹²³ *GS Media*, C-160/15, para 53.

¹²⁴ See Savola, *op. cit.*, p. (noting that the ruling mentioned without further discussion the exception on reporting on current events by the press (Art. 5(3)(c)), but that "*the lawfulness of the source is not required by that specific exception or EU copyright law in general unless derived from Article 5(5), and in consequence the basis and impact of this statement is left vague.*")

¹²⁵ See Martin Husovec, *Injunctions Against Intermediaries in the European Union. Accountable But Not Liable?* (Cambridge University Press 2017) at 67 (criticizing the *Svensson*'s approach of incorporating solutions for secondary liability directly into the scope of the rights).

¹²⁶ See Savola, *op. cit.*, p. 143, noting that "[e]ven though, from the domestic perspective, liability may still be strict, fewer acts would be considered infringing in the first place, leading essentially to a similar result as with intention-based liability regimes."

domestically. Now, however, Member States will need to assume the subjective criteria laid down by the Court.

Although it is not formally presented as such, the practical effect of the Court's approach is thus very close to that of engaging in a harmonisation of indirect liability, something that would fall outside the CJEU's mandate.¹²⁷ Admittedly, the Court has the power to interpret the meaning of the concepts used by the Directive, such as 'communication' and 'communication to the public'. Since those notions determine the scope of primary infringements, the Court has some power to change the line between primary and secondary liability. On the one hand, there may be different views on whether the Court has taken the notion of 'act of communication' beyond the meaning it has in the Directive.¹²⁸ On the other hand, it is more doubtful that the Court has the competence for introducing subjective conditions into the notion of 'communication to the public.' In this regard, Art. 13.2 of the Enforcement Directive, which refers to the situations where "*the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity*",¹²⁹ strongly suggests that while knowledge may be taken into account in imposing liability and determining the level of damages, it is not a required element of the act of exploitation reserved to the rightholder.

From the rightholders perspective, the Court's approach, which conflates direct and indirect infringement with the result of harmonising secondary liability, has some benefits, as it facilitates uniform enforcement when it comes to links to illicit sources. Nonetheless, in this effort, the Court has come to authorize all instances of linking to freely available legal sources, which arguably prejudices the possibility of taking action against linking practices under national theories of indirect liability. On the other hand, the categorization of linking as an 'act of communication' and the doctrinal inconsistency of introducing a knowledge requirement, along with a severe presumption of knowledge, increases the uncertainty for those who want to place hyperlinks. While the Court's approach may be understandable in terms of finding a balance allowing both an easier enforcement and free space for linking to legal sources, the uncertainties it creates and the arguably indirect way of achieving a result which goes beyond its competences—that of harmonising indirect liability—may be raised as objections to the analysed case law.

In any event, the effects of this indirect harmonisation of secondary liability may find some limits stemming from the elements of EU law noted above. In particular, it must be considered how the CJEU's approach comports with, or is affected by, (i) the E-Commerce Directive Safe

¹²⁷ See Christina Angelopoulos, 'AG Szpunar in *Stichting Brein v Ziggo: An Indirect Harmonisation of Indirect Liability*' [2017] Kluwer Copyright Blog, available at <<http://copyrightblog.kluweriplaw.com/2017/03/23/ag-szpunar-stichting-brein-v-ziggo-indirect-harmonisation-indirect-liability/>>

¹²⁸ A broad notion of communication to the public is put forward by the *Assotiation Littéraire and Artistique Internationale* (ALAI), noting that what in principle matters is "that (i) *the act* of an individual person, *directly or indirectly*, (ii) has the distinct *effect* of addressing the public, irrespective of the tool, instrument or device that the individual has used to bring about that effect, and (iii) that elements protected by copyright or material protected by related rights thus become available to the public in a way that is encompassed by the discrete rights granted under copyright." (Emphasis added in "directly or indirectly"). See ALAI, *Report and Opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet* (16 September 2013), available at <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf>

¹²⁹ See art. 13.2, Enforcement Directive.

Harbours and (ii) the EU law norms that may restrict the possibility of imposing duties of care on hyperlink providers. These questions will be separately considered below.

3.1. Hyperlinking liability and the E-Commerce Directive Safe Harbours

As noted, the question arises as to whether the hyperlinker's liability in this new scenario may be somehow affected by the liability exemptions laid down in the ECD in relation to the provision of some intermediary services.

A first quick answer could be in the negative, deeming that the ECD liability exemptions only concern secondary liability, and that, therefore, once an act is defined as direct act of exploitation—and thus a direct infringement if it lacks authorization—, the exemptions do not apply. However, such an approach would be ill founded.

Firstly, it must be noted that some of the acts of hyperlinking now considered by the CJEU as primary infringements—if performed without authorization—may be considered secondary infringements in nature. This is so because, as noted, they are only deemed infringing when the content linked-to is infringing in the first place—and thus there must be an act of direct infringement carried out by someone else—, and moreover because actual or constructive knowledge about that direct infringement is needed. This is all the more the case where, like in *Ziggo*, the act of exploitation does not even consist in establishing hyperlinks but in hosting hyperlinks uploaded by users.

Secondly, the idea that any act that may be labeled as a direct infringement falls necessarily outside the scope of the ECD safe harbours is inaccurate. The ECD safe harbours exempt intermediaries from the hypothetical liability they might incur because of providing their intermediary services in relation to illegal third-party content. The exemptions provided are of a preventive nature, that is, irrespective of whether the intermediary could have been held liable in the absence of the exemption. Their aim is to ensure that Member States will not hold those intermediaries liable, regardless of the legal theory a Member State could resort to for imposing liability—something which ultimately depends on Member States' national law establishing liability in the relevant field, be it copyright law or any other field of the law. The fact that a Member State's law happens to categorize a particular intermediary activity as an act that carries with it direct liability may not derogate the effects of the safe harbour, provided that all the conditions required by the ECD are met. It must be noted that the ECD has a horizontal approach, covering all kind of illicit third-party content, and does not depend on how the material law on one particular field, such as copyright—either at national or at EU level—, may define the acts of the intermediary.¹³⁰ The relevant aspects are rather whether the intermediary

¹³⁰ In this vein, it is interesting to note that the US Digital Millennium Copyright Act, which served as inspiration for the establishing of the ECD safe harbours, follows the same approach. As the *House of Representatives Conference Report* expressly states, the DMCA safe harbours “protect qualifying service providers from liability for all monetary relief for *direct, vicarious and contributory infringement*.” See H.R. Rep. No. 105-796, at 73 [1998] (emphasis added). Likewise, the DMCA safe harbours are “not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.” (*ibid*). In addition, see Christina Angelopoulos, *European Intermediary Liability in Copyright. A Tort-Based Analysis* (Kluwer Law

service (i) concerns third-party material, (ii) is provided in a way that meets the neutrality threshold required by the CJEU,¹³¹ and (iii) satisfies the specific conditions established for the safe harbour.

In the case of an online platform hosting links uploaded by users, if the platform meets the CJEU's neutrality test, the ECD hosting safe harbour might be relevant. Under this provision, a hosting service provider cannot be held liable for the content uploaded by its users, provided that “(a) *the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*”¹³² In the context of the provision of a referencing service, the CJEU has already held that as long as the role played by the service provider is neutral, the hosting safe harbour applies to the storage and display of advertisements, which include the advertising hyperlink and the accompanying commercial message.¹³³

While a factual situation like the one considered in *Ziggo* would hardly comply with the neutrality test due to the active role played by the operators of The Pirate Bay platform, some other situations where a website hosts hyperlinks uploaded by users might meet that test and thus be eligible for the hosting safe harbour. In that case, knowledge about the infringing content becomes relevant. As noted above, according to the CJEU, any communication to the public must be an act carried out in full knowledge of its consequences. In the case of hyperlinks pointing to illegal content, the CJEU has understood that that criterion encompasses a condition of knowing or having reason to know about the illegal nature of the content to which the hyperlink directs. Similarly, the finding that the operator of a platform that hosts hyperlinks engages in a primary infringement of the communication to the public right—with the almost certain result of being held strictly liable under national law—already entails the finding that that operator had the relevant knowledge. In that scenario, holding the operator liable would not seem to go against the hosting safe harbour, which only protects those who lack knowledge or who promptly remove the content upon obtaining it.

International 2016), 68 (noting that the ECD exemptions cover both cases of primary and accessory liability).

¹³¹ The CJEU holds that in light of recital 42 of the ECD, the hosting safe harbour only applies where the service provider “has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.” See Joined Cases C-236, 237 & 238/08, *Google France SARL and others v. Louis Vuitton Malletier SA and others*, EU:C:2010:159 (*Google France*), para 120. See also paras 113-114. This is a controversial test, as in fact recital 42 does not cover hosting, but only mere conduit and caching. See Opinion of AG Jääskinen in Case C-324/09, *L'Oréal v. eBay*, 9 December 2010, ECLI:EU:C:2010:757, paras 138-142. See also Van Eecke, “Online service providers and liability: A plea for a balanced approach” (2011) 48 *CML Rev.*, 1455-1502, at 1481-1484; High Council For Literary and Artistic Property, *Mission to link Directives 2000/31 and 2001/29 – Report and proposals* (3 November 2015), available at www.culturecommunication.gouv.fr/; Sophie Stalla-Bourdillon, ‘Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well...’ in M. Taddeo and L. Floridi (Eds.) *The Responsibilities of Online Service Providers* [2017] 275, 286 ff (arguing for abandoning the distinction between passive and active actors).

¹³² Art. 14(1) ECD. In addition, the exemption will not apply “when the recipient of the service is acting under the authority or the control of the provider.” See Art. 14(2) ECD.

¹³³ See *Google France*, C-236-238/08, paras 111-120.

Nonetheless, the presumption of knowledge established in *GS Media*—based on a supposed duty of checking the legality of all linked content—does not comport with the safe harbour provisions. Expanding that presumption to platforms that host hyperlinks uploaded by users would certainly go against the approach taken by the ECD, which expressly prevents the imposition on hosting providers of a general obligation to monitor the information they store, or a general obligation actively to seek facts or circumstances indicating illegal activity.¹³⁴

It is not clear that the Court is willing to accept such an expansion, though. In fact, in *Ziggo* the Court did not explicitly rely on a presumption of knowledge based on the for-profit nature of the activity. It did observe that the operation was carried out for profit, but did not draw conclusions regarding knowledge from it.¹³⁵ Rather, it established knowledge on different grounds, finding that “*the operators of the online sharing platform TPB could not be unaware that this platform provides access to works published without the consent of the rightholders, given that, as expressly highlighted by the referring court, a very large number of torrent files on the online sharing platform TPB relate to works published without the consent of the rightholders.*”¹³⁶ To some extent, the Court might have silently followed the AG Campos’ advice, who warned the Court against applying such a presumption of knowledge, as it “*would amount to imposing on operators of indexing sites of peer-to-peer networks, which normally operate for profit, a general obligation to monitor the indexed content.*”¹³⁷ The AG proposed the Court to hold instead that an operator engages in a communication to the public only “*if that operator is aware of the fact that a work is made available on the network without the consent of the copyright holders and does not take action in order to make access to that work impossible.*”¹³⁸

A further reference to the ECD may be interesting yet from another perspective. The ECD does not grant a safe harbour for hyperlinks and information location tools. That is, a provision essentially establishing that those who provide hyperlinks or search tools shall not be held liable because of the illegal character of the material they point to, if they lack actual or constructive knowledge that the material is illegal, or act promptly to remove the link when they obtain such knowledge. Such a scenario is different from the hosting activity, where a provider hosts links uploaded by users. Rather, here the provider itself establishes a hyperlink, either directly or by the operation of a location tool like a search engine.

The lack of such a safe harbour in the ECD is one of the differences between the Directive and the US Digital Millennium Copyright Act of 1998 (DMCA),¹³⁹ a statute that, while diverging from the ECD in some key respects, was an obvious source of inspiration for the ECD safe

¹³⁴ See Art. 15(1) ECD. See, however, Eleonora Rosati, ‘The CJEU Pirate Bay judgment and its impact on the liability of online platforms’ [2017] 39(17) EIPR 737 (putting forward a possible solution of interpreting that presumption “as part of a broader obligation to conform to the behaviour of the ‘diligent economic operator’.”).

¹³⁵ *Ziggo*, C-610/15, para 46. There is even no reference in *Ziggo* to the criterion that the profit-making nature of the activity may trigger a *presumption of knowledge*. In fact, unlike *Filmspeler*, C-527/15, para 49, *Ziggo* simply mentioned the pre-*GS Media* criterion that the profit-making nature of the communication is not irrelevant (para 29). See Ginsburg and Budiardjo, *op. cit.*, 166 (noting that *Ziggo* did not apply the presumption of knowledge). For a different read, See Rosati, ‘The CJEU Pirate Bay...’ *op. cit.* (suggesting that *Ziggo* might be read as implicitly applying the presumption of knowledge).

¹³⁶ *Ziggo*, C-610/15, para 45.

¹³⁷ AG *Ziggo*, 52.

¹³⁸ AG *Ziggo*, 54. AG Campos’ Opinion seems to focus on actual knowledge about specific instances of infringing content (See AG *Ziggo*, paras 51-52).

¹³⁹ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

harbours scheme.¹⁴⁰ The DCMA—which, unlike the ECD's horizontal approach, deals only with liability for copyright infringement—grants a safe harbour for information location tools.¹⁴¹ While the ECD chose not to establish it,¹⁴² some Member States did include a safe harbour of that kind when implementing the ECD into national law.¹⁴³ Moreover, according to Art. 21 ECD, one of the aspects to be considered in future revisions of the Directive is the need for proposals concerning “*the liability of providers of hyperlinks and location tool services*”.¹⁴⁴ So far, though, the ECD has not been amended. In the absence of a hyperlinking safe harbour, some authors propose that linking should benefit from the hosting safe harbour by way of analogy.¹⁴⁵ The CJEU has not yet tackled this issue. It certainly has accepted that advertisements appearing in a referencing service, which include a hyperlink to the advertiser's website, are content provided by a third party and thus fall under the material scope of the *hosting* safe harbour.¹⁴⁶ However, the CJEU has not yet ruled on whether a provider directly providing links (as opposed to hosting links uploaded by users), or search services which offer links to natural results, might be covered as well.

In some sense, the *GS Media* knowledge condition might be understood as a sort of a judicially created hyperlinking safe harbour regarding liability for copyright infringement. It ensures that the provision of hyperlinks to infringing content freely available on the Internet will not be considered an act of communication to the public where the provider lacks knowledge or reason to know about the illegal nature of the linked-to content. Consequently, the hyperlinker would

¹⁴⁰ See Miquel Peguera, ‘The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems,’ [2009] 32 *Columbia Journal of Law & the Arts* 481.

¹⁴¹ See Digital Millennium Copyright Act, 17 U.S.C. § 512(d)(1). Of course, it only shields from liability related to copyright infringement, as the DMCA limits its scope to copyright. Some other particularities must be also taken into account. For instance, just like in the DMCA hosting safe harbour, the provision exempts from liability for monetary relief and limits injunctive relief, and the protection is conditioned to the fact that the service provider “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity”—a requirement that relates to vicarious liability, not present in the ECD hosting safe harbour.

¹⁴² The Brussels court of appeals reminded this in *Copiepresse SCRL v. Google Inc.*, Cour d'Appel de Bruxelles (9ème Ch.), 5 May 2011, para 53. There is no convincing explanation for this absence in the Directive. Crabit suggests the reason was that there was no disparate case law on linking liability at the time of drafting the Directive. See Emmanuel Crabit, ‘La directive sur le commerce électronique. Le projet “Méditerranée”’ [2000] 4 *Revue du Droit de l'Union Européenne* 749, 813.

¹⁴³ See the 2007 Study on the liability of internet intermediaries, commissioned by the EU Commission, available at http://ec.europa.eu/information_society/newsroom/image/document/2017-4/study_liability_final_report_2007_42089.zip

¹⁴⁴ See Art. 21(2) ECD. In the first report on the implementation of the ECD, the Commission noted that some Member States had established limitations on the liability of providers of hyperlinks and search engines, and stated that “[w]hilst it was not considered necessary to cover hyperlinks and search engines in the Directive, the Commission has encouraged Member States to further develop legal security for internet intermediaries.” It also indicated that, according to Art. 21 ECD, the Commission would keep monitoring the new developments and “examine any future need to adapt the present framework in the light of these developments, for instance the need of additional limitations on liability for other activities such as the provision of hyperlinks and search engines”. See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of Directive 2000/31/EC, Brussels, 21.11.2003, COM(2003) 702 final.

¹⁴⁵ See, for instance, Pirlot de Corbion, ‘Référément et droit des marques: quand les mots clés suscitent toutes les convoitises’, in Strowel and Triaille (dirs.) *Google et les nouveaux services en ligne* [2009], 127. See also Commission Staff Working Document: “Online services, including e-commerce, in the Single Market,” Brussels, 11.1.2012, SEC(2011) 1641 final.

¹⁴⁶ See *Google France*, C-236-238/08, paras 111-112.

not be liable for primary infringement. To be sure, however, the CJEU's approach is far from achieving the effects of the hyperlinking safe harbours established by some Member States or, for that matter, that of the DMCA. First, because even in the absence of knowledge, the hyperlink provider might face some form of indirect liability, for instance, vicarious liability. Second, because both the duties of care assumed by the CJEU where the service is provided for profit and the corresponding presumption of knowledge conflict with the ECD rule preventing general monitoring obligations.¹⁴⁷ Still, the relevance attributed to the lack of knowledge condition might be an indication that the Court feels the need for some kind of hyperlinking safe harbour and tries to achieve a somewhat similar result through the convoluted way of enshrining knowledge as a condition for there to be a communication to the public—ultimately intending to establish a limitation of liability.

3.2. Hyperlinkers' duties of care

By establishing the condition of having actual or constructive knowledge about the unlawful nature of the linked content, the CJEU echoes the negligence rule that governs most secondary liability systems—now integrated into the very notion of primary infringement. Under the CJEU's approach, linking to infringing material freely accessible online may only lead to liability for primary infringement where the link setter has acted negligently. The fault may consist either in placing the link despite knowing that the content was infringing or in disregarding a duty of care, whose observance would have provided such knowledge to the linker. Duties of care are normally established by domestic legislation and case law and are subject to limits that stem from both primary and secondary sources of EU law as interpreted by the CJEU.

As discussed above, the CJEU assumed in *GS Media* that those who post links for profit can be expected to carry out “*the necessary checks*” to make sure that any work they link to is not illegally published on the website to which the link directs.¹⁴⁸ The Court did not explicitly impose a positive obligation to conduct those checks; rather, it held that such care is something that “*can be expected*” from those persons. From this assumption, the Court concluded that it must be presumed that a link setter acting for profit knew, or could have reasonably known, the illegal nature of the publication of the work on the linked website.¹⁴⁹ It held moreover that unless such presumption is rebutted, the provision of the link constitutes a ‘communication to the public’.¹⁵⁰ Such a rebuttable presumption of knowledge arguably amounts to imposing a duty of care, whether or not explicitly stated as such. Indeed, the practical result is that a person posting links in view of a profit is apparently charged with the burden of ascertaining the legality of all the linked content or otherwise face the risk of being held liable for primary copyright infringement.

¹⁴⁷ See Art. 15 ECD. Likewise, it would arguably go against the equivalent rule established in the DMCA. See Digital Millennium Copyright Act, 17 U.S.C. § 512(m).

¹⁴⁸ *GS Media*, C-160/15, para 51.

¹⁴⁹ *GS Media*, C-160/15, para 55 and operative part of the ruling.

¹⁵⁰ *GS Media*, C-160/15, para 51.

Legitimate questions may be raised as to the actual scope of the presumption established by the Court. *Firstly*, one may wonder whether, despite the Court's broad language, which refers generally to the cases where the links are provided for profit, the CJEU was ultimately having in mind the specific kind of provider represented by GS Media, rendering the applicability of the presumption more doubtful when it comes to other types of hyperlink suppliers. Admittedly, in view of the facts of the case, the CJEU hardly needed to rely on a presumption based on an expected duty of care to conclude that the defendant knew or could have reasonably known the illegal nature of the publication of the works. Indeed, it was obvious that the defendant was fully aware—or had reason to be so—of the infringing nature of the photos, to which it was linking.¹⁵¹ This, along with the actual language used, might lead to the conclusion that the CJEU sought to establish the *presumed duty of care* as a rule for all for-profit providers of hyperlinks, rather than limited to the factual situation of the case brought before it.

The reason why the Court chose to establish such a dividing line between for-profit and not-for-profit scenarios was likely the need to strike a balance between the rights and interests at stake once the Court had decided that knowledge would be a condition to find a communication to the public.¹⁵² In the balance devised by the Court, rightholders would bear the burden of policing the infringements and notifying the linkers about them when it comes to individuals or other entities who do not pursue profit. Conversely, when it comes to links provided for profit, the burden would shift to hyperlinkers, who would face the cost of checking the legality of the content to which they link. The fact remains, however, that the Court was analysing a situation where in fact it was expectable from the link setter to check the kind of content it was linking to, and ultimately to know, or have reason to know, about its *prima facie* legal status.

Secondly, even if the court did not intend to limit its holding to the kind of activities carried out by entities like GS Media, it is dubious that the resulting duty of care may be applied to any situation where hyperlinks are supplied for profit. A simple dividing line between for-profit and not-for-profit is problematic, as it disregards relevant considerations, particularly whether the expected supervision is feasible, and how it may interfere with other fundamental rights. In many for-profit scenarios of linking, particularly in the case of search engines, checking the legality of each source would arguably result in an impossible task. It also may prove unfeasible for providers of platforms hosting links uploaded by users—including social networks hosting millions of messages that publicly share hyperlinks. Many aggregators could find this seemingly undoable.¹⁵³ These difficulties are exacerbated if we consider that the duty of care would not

¹⁵¹ The facts of the case clearly reveal that knowledge or reason to know. Right after the link was placed on the GeenStijl website, the rightholder, Sanoma, requested its removal—which GS Media failed to do. The rightholder did achieve that the infringing files were removed from Filefactory, the website where they had been illegally made available. Then GS Media set a link to another website, Imageshack, where some of the photos were also accessible without authorization. Again, at the request of Sanoma, the pictures were removed from that site. GS Media published then yet another link to the images, as always, encouraging users to click on it. Forum users of GeenStijl also posted links to other websites. *See GS Media*, C-160/15, paras. 7-15.

¹⁵² *See GS Media*, C-160/15, para 53.

¹⁵³ *See* Matthias Leistner: 'Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators' [2017] 12(2) *JIPLP* 136, 139 (noting that "for normal links, the presumption of knowledge with regard to commercial actors seems to go too far in many cases, such as with regard to search engines and many other aggregators which effectively collect links by way of automatic processes and have no reasonable possibility to clear the legal status of the posted material.").

only refer to the legal status of the linked content at the time of publishing the hyperlink but also to its legality over time.

We have already mentioned the limit stemming from art. 15 ECD, which prohibits the imposition of general monitoring obligations on hosting providers. It may be discussed whether such limitation applies only to providers neutral enough as to be eligible for the safe harbour protection. However, the underlying principle behind the prohibition goes beyond the strict scope of the safe harbours scheme. In *Sabam/Netlog*,¹⁵⁴ when the CJEU rejected the possibility of obliging a social network to check and prevent the public availability of all copyright infringing content uploaded by users, it did not reach that conclusion solely based on the E-Commerce Directive. Rather, it held that an injunction imposing the contested filtering system would result in a serious infringement of Netlog's freedom to conduct business, and would be contrary to the conditions required in Art. 3(1) of the Enforcement Directive. The filtering was meant to extend indiscriminately to all their users, for an unlimited period, at the exclusive expense of the provider, and imposed as a preventative measure.¹⁵⁵ As a result, the injunction would not respect the fair balance that must be struck between the protection of intellectual property and the freedom to conduct business.¹⁵⁶ The Court noted moreover that the injunction could also infringe users' right to personal data protection and their freedom to receive or impart information, both rights recognized in the Charter.¹⁵⁷

All these factors must be taken into account when assessing the actual reach of the duty to carry out the necessary checks referred to in *GS Media*. Indeed, just like the injunctions that may be imposed on intermediaries to prevent copyright infringements, duties of care such as the one that results from a literal reading of *GS Media* must respect the limits embodied in the overarching principles of proportionality and reasonableness.¹⁵⁸ *GS Media* must be read jointly with the rest of decisions that have assessed the proportionality of injunction measures. As a result, in many cases, it will not be possible to presume knowledge, as the duty of checking the legal status of the linked works, which constitutes the ground for the presumption, could not be imposed to, and thus *expected* from, the linker.

Summing up, in many cases the expected duty of checking out the legality of all the linked sources may be either unfeasible or incompatible with the adequate protection of other fundamental rights. This would generally be the case, in particular, when it comes to search engines and social networks hosting user-provided links. Thus, for those types of providers, the presumption of knowledge may be rebutted by showing that infeasibility or incompatibility. In other situations, the presumption might be rebutted by showing that the copyright infringing status of the linked-to material was not apparent, and that it would have been disproportionate to carry out an investigation on whether the publication had been authorized or might benefit from an exception or limitation. In our view, this should suffice to rebut the presumption, because the presumption is ultimately based on what can be reasonably expected from the linker. Nonetheless, it remains to be seen whether national courts will be willing to accept those

¹⁵⁴ CJEU, Case C-360/10, *SABAM v Netlog NV*, Judgment of 16 February 2012, ECLI:EU:C:2012:85 (*Sabam/Netlog*).

¹⁵⁵ See *Sabam/Netlog*, C-360/10, para 46.

¹⁵⁶ See *Sabam/Netlog*, C-360/10, para 47.

¹⁵⁷ See *Sabam/Netlog*, C-360/10, para 48.

¹⁵⁸ See Martin Husovec and Miquel Peguera, 'Much Ado About Little: Privately Litigated Internet Disconnection Injunctions' [2015] 46(1) IIC 10, 17.

arguments. The German Federal Court of Justice has already held that the duty of checking the legal status of the linked material does not apply to an image search engine, having account of the importance of search engines for the functioning of the Internet.¹⁵⁹ However, when it comes to other scenarios of hyperlinking, some lower courts have applied the presumption strictly.¹⁶⁰

Having said that, to determine the duties of care that hyperlinkers may be required to observe, it must also be noted that the relevant knowledge necessary to find a communication to the public under the CJEU's case law on hyperlinks may be both actual and constructive. While this does not entail in itself an obligation actively to check the legal status of the content, it does require that hyperlink providers—whether or not acting for profit—exercise some degree of diligence in carefully considering the facts and circumstances they may be aware of that reveal the illegal nature of the works. Such awareness may be obtained by any means, including through rightholders' notices. Even where it would be disproportionate—as discussed above—to charge the linker with the burden to carry out specific checks on the legality of the content, the duty to assess those facts and circumstances, once the linker is aware of them, would arguably apply. However, different levels of diligence may apply depending on the nature of the hyperlinker's activity. A criterion used by the CJEU when dealing with the lack of awareness required under the ECD hosting safe harbour may be in point when it comes to professional linkers. That criterion establishes that a provider meets the relevant awareness where it has been aware “*of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question*”.¹⁶¹

In addition, failure to remove or disabling the link after being aware of those elements would amount to engage in a communication to the public under the new notion of this right crafted by the CJEU. Thus, to avoid being considered an infringer, the linkers' diligence must extend to promptly removing or disabling the link once they obtain knowledge that it leads to infringing content.

Besides the knowledge related to specific instances of links pointing to infringing content, the question arises as to whether a general awareness that some or most of the links lead to infringing content may also be enough to find an infringement of the communication to the public right. Both in *Filmspeler* and *Ziggo* the Court found that the providers were aware in general terms of the illegal nature of the sources to which they were linking. In *Filmspeler*, this was inferred from the provider's own statements in advertising the device.¹⁶² In *Ziggo*, the Court first noted that the operators had been informed that the platform provided access to works published without authorization—which may point to specific knowledge—and that they encouraged users to download the works. Nonetheless, it also held that the operators “*could not be unaware*” that they were providing access to infringing content because “*a very large number of torrent files on the online sharing platform TPB relate to works published*

¹⁵⁹ BGH ruling of 21 September 2017 (I ZR 11/16 - Vorschaubilder III).

¹⁶⁰ In a Swedish ruling handed down on 13 October 2016 by the Attunda District Court, a Belgian media company was held liable for providing an embedded link to a video posted to YouTube without authorization. The court found that the website was publishing the link for-profit, and resorted to the *GS Media* presumption to infer knowledge, and thus copyright infringement. See E. Rosati, ‘Linking to unlicensed content: Swedish court applies *GS Media*’ [2016] IPKat, <http://ipkitten.blogspot.com.es/2016/10/linking-to-unlicensed-content-swedish.html>

¹⁶¹ *L'Oréal v. eBay*, C-324/09, para 120.

¹⁶² *Filmspeler*, C-527/15, paras 50 and 18.

without the consent of the rightholders."¹⁶³ While in these two cases the defendants probably had also knowledge about specific instances of linking to infringing content, the Court's statements about their general awareness suggest that such awareness might be in fact enough to meet the knowledge condition articulated in *GS Media*. At least it is likely to be so in clear-cut cases of business models obviously oriented to encourage access to infringing content. We may recall that the justification for the introduction of the knowledge condition in *GS Media* was that, absent that knowledge, the link setter "*does not, as a general rule, intervene in full knowledge of the consequences of his or her conduct.*"¹⁶⁴ It is thus likely that, if a specific reference for a preliminary ruling were to be lodged, the CJEU would admit that a general awareness shown by the defendant's own acts and statements promoting and encouraging access to works published without authorization is enough to deem that linker intervened in full knowledge of the consequences of his or her acts. Ultimately, this would need a case-by-case analysis. The relevance of general awareness, as opposed to knowledge of specific instances of links pointing to infringing material, results also in a duty of care, that of not turning a blind eye to obvious facts indicating that the platform is widely used to access unlicensed content.

In conclusion, duties of care are relevant, as the failure to observe them may result in a finding of primary infringement. On the one hand, the duty to check, preventatively and proactively, the legal status of the works may not always be required, as it may not respect proportionality and reasonableness. On the other hand, even in those situations, hyperlinkers must diligently react when noticing facts or circumstances that may reveal the infringing nature of the linked content. In addition, they must be prepared to remove links once they are directly or indirectly aware that they link to infringing content. Even in the absence of actual or constructive knowledge in relation to specific links, where the hyperlinkers' activity manifestly gives access to infringing content, it will not be possible for them to deny the knowledge needed to find a communication to the public.

4. Communication to the public in the Digital Single Market Copyright Reform

The CJEU's approach to hyperlinks and the uncertainties it generates might have warranted some legislative action on the scope of the right of communication to the public, or maybe a specific intervention to clarify the copyright status of hyperlinks.

In its 2015 Communication "*Towards a modern, more European copyright framework*",¹⁶⁵ the EU Commission noted a "*growing concern*" on whether the EU copyright framework is well equipped to ensure that the value generated by some new forms of online dissemination of content is fairly shared with right holders. It referred particularly to online platforms and aggregation services. In this regard, the Commission emphasized that "*[t]here are contentious grey areas and uncertainty about the way [the rights of communication to the public and of making available] are defined in EU law, in particular about which online acts are considered 'communication to the public' (and therefore require authorisation by right holders), and under*

¹⁶³ *Ziggo*, C-610/15, para 45.

¹⁶⁴ *GS Media*, C-160/15, para 48.

¹⁶⁵ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework*. Brussels, 9.12.2015. COM/2015/0626 final.

what conditions."¹⁶⁶ It stated it would examine whether action is needed on the definition of those rights and that it would "*consider whether any action specific to news aggregators is needed, including intervening on rights.*"¹⁶⁷

The 2016 Proposal for a Directive on Copyright in the Digital Single Market that ensued,¹⁶⁸ however, did not directly suggest any amendment or clarification to the definition of the right of communication to the public and the right of making available.¹⁶⁹ Nonetheless, the Proposal did tackle two situations where those rights are obviously relevant. Firstly, the digital uses of press publications, by introducing a new neighbouring right for press publishers.¹⁷⁰ Secondly, the activity of online platforms that store and give access to works and protected subject matter uploaded by users, by imposing new obligations on those platforms, particularly to prevent the availability of unauthorized content on their services.¹⁷¹

Hyperlinking is clearly involved in the case of the proposed press publishers' right, which intends to cover in particular news aggregators and other platforms providing hyperlinks to, along with small fragments of, pieces of news published elsewhere. The Proposal grants press publishers the reproduction right and the making available right for the digital use of their press publications. Those rights would also apply in respect of uses of parts of a press publication, such as headlines, snippets or images. Being related rights, they would arguably not be subject to the threshold of originality required in the case of copyrights.¹⁷²

Interestingly, the Commission refrained from suggesting a clarification of the definition of the making available right that would explicitly recognize that hyperlinking amounts to making the content available. Rather, the Proposal – which was put forward more than two years after the *Svensson* ruling was handed down – expressly states in a Recital that "[t]his protection does not extend to acts of hyperlinking which do not constitute communication to the public."¹⁷³ To be sure, this does not mean that the new right would not affect hyperlinks as it stands in the Proposal.¹⁷⁴ For one thing, hyperlinks that do constitute a communication to the public

¹⁶⁶ Id., p. 9.

¹⁶⁷ Id., p. 10.

¹⁶⁸ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market. Brussels, 14.9.2016, COM/2016/0593 final.

¹⁶⁹ Note however that the Council's agreed negotiating mandate of 25 May 2018 does establish that "an online content sharing service provider performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright protected works or other protected subject matter uploaded by its users." See Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Agreed negotiating mandate, Brussels 25 May 2018, 2016/0280 (COD).

¹⁷⁰ See art. 11, Proposal for a Directive on copyright in the Digital Single Market.

¹⁷¹ See art. 13, Proposal for a Directive on copyright in the Digital Single Market.

¹⁷² See Thomas Höppner, *The proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16). Strengthening the Press Through Copyright* (Brief, European Parliament PE 596.810-September 2017), 7. Nonetheless, the Council's Agreed negotiating mandate of 25 May 2018, (2016/0280 (COD)), takes a different approach, stating in the new draft of art. 11 that the new right "shall not apply in respect of uses of insubstantial parts of a press publication. Member States shall be free to determine the insubstantial nature of parts of press publications taking into account whether these parts are the expression of the intellectual creation of their authors, or whether these parts are individual words or very short excerpts, or both criteria."

¹⁷³ Recital 33, Proposal for a Directive on copyright in the Digital Single Market (Recital 34 in the Council's Agreed negotiating mandate of 25 May 2018).

¹⁷⁴ See Lionel Bently, Martin Kretschmer et al, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive* (Study for the JURI committee, European Parliament

according to the CJEU's case law would still be subject to the press publishers' right. For another thing, even publishing a hyperlink to authorized and freely available online publications – which, according to the CJEU would not constitute a communication to the public because there is no 'new public' – might be impossible in practice without affecting the press publishers' right. This is because any hyperlink needs an 'anchor' – the visible item where to click on –, which is normally the headline or some other component of the press publication to which the hyperlink points. Providing the pure URL, as a clickable anchor text would generally be useless,¹⁷⁵ except if it is surrounded by additional information, such as the headline, which again would trigger the press publishers' right, particularly if a threshold of originality is not required. Moreover, in many cases, the text of the URL itself includes the headline or part of it, and thus, the mere URL might trigger the right.¹⁷⁶

In the case of hosting platforms, the Proposal sets new obligations, which may require the use of recognition technologies to prevent the availability of infringing content on their platforms. Notably, those obligations would also depend on whether the activity carried out by the platform may be characterized as a communication to the public. It is remarkable that such a characterization was apparently taken for granted in Recital 38 of the original Proposal. The Recital referred to the case “[w]here information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public.”¹⁷⁷ In fact, however, taking into account the different criteria established by the CJEU's case law already discussed above, the mere fact of providing access is not enough to conclude that the platform is necessarily engaging in a communication to the public.¹⁷⁸ If the aim of the proposal was to establish such an equation, a mere recital in the Preamble was hardly the proper way to do it.¹⁷⁹ In addition, the use of content recognition technologies to monitor the contents uploaded by users, which the Proposal appears to require, would be incompatible with the prohibition set out in art. 15 of the ECD.¹⁸⁰

To be sure, the proposed article 13 specifically refers to the *storage* of works and other protected subject matter,¹⁸¹ which would arguably exclude the activity of merely providing hyperlinks, without hosting the protected work—even if users had uploaded the hyperlinks. However, the question arises as to whether the CJEU hyperlinking case law examined above

PE 596.810 - September 2017), 40. See also Thomas Höppner, Martin Kretschmer and Raquel Xalabarder, 'CREATe Public Lectures on the Proposed EU Right for Press Publishers' [2017] 39(10) EIPR 607, 618.

¹⁷⁵ See Marco Ricolfi, Raquel Xalabarder and Mireille van Eechoud, 'Statement from EU Academics on Proposed Press Publishers' Right' [2018], available at <https://www.ivir.nl/academics-against-press-publishers-right/>

¹⁷⁶ Of course, the result might be different if the new Directive finally adopts the position put forward in the Council's Agreed negotiating mandate of 25 May 2018, which excludes from the related right the use of “insubstantial parts of a press publication.”

¹⁷⁷ Recital 38, Proposal for a Directive on copyright in the Digital Single Market (emphasis added).

¹⁷⁸ See M.R.F. Senftleben et al., 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' [2018] 40(30) EIPR 149.

¹⁷⁹ As noted, however, now the Council's Agreed negotiating mandate of 25 May 2018 proposes a specific legal declaration that online sharing service providers perform an act of communication to the public when they store and give access to protected content uploaded by their users.

¹⁸⁰ In the original Proposal, the use of recognition technologies is required even if the provider is eligible for the ECD hosting safe harbour (see Recital 38).

¹⁸¹ See Art. 13, Proposal for a Directive on copyright in the Digital Single Market.

will influence the notion of communication to the public beyond the setting of hyperlinking. In particular, whether the 'new public' criterion and condition of knowledge may play a role in situations where a website—whether or not a hosting provider—actually stores and makes available a copy of a work already made available somewhere else on the internet.

The *Renckhoff* reference for a preliminary ruling, which at the time of writing is pending before the CJEU, tackles precisely this question.¹⁸² It considers the case of making available on a website, not for profit, a copy of a photograph that was freely accessible with the consent of the copyright holder on another website. The Advocate General Campos considers that the new public criterion and the subjective elements set forth in *GS Media* should also apply to this case, though adapted to the specific situation.¹⁸³ According to the AG, since the original publication was authorized, the question, in this case, is whether the persons making the copy available—a student and her teacher—were aware that they needed the photographer's consent to publish the image.¹⁸⁴ He concludes that this was not the case, mainly because the original photograph carried no mention of its author and was accessible without any restriction or warning. Thus, those persons could presume it had been made free for the public to use.¹⁸⁵ In addition, the AG sustains that there was no new public since the work had already been made available to the whole internet community on the original website. If the AG's views were to be followed by the Court, the reshaping of the right of communication to the public would definitely go beyond the particular setting of hyperlinking to encompass more generally the different ways of making available on the internet.

5. Conclusions

The CJEU has continued to develop a complex jurisprudence on the communication to the public right. The hyperlinking cases have expanded the notion of communication to the public—generally understood as the direct realization of an act of exploitation—to include acts, which arguably constitute indirect acts of exploitation. The Court's stated aim is to provide a high level of protection for right holders. In practice, it serves the purpose of facilitating a uniform enforcement of copyright against those indirect acts, which otherwise would depend on doctrines of indirect infringement and secondary liability, which are not harmonised and diverge in the different Member States. This is of course good news for rightholders. However, judicially conflating direct and indirect infringement gives rise to doctrinal inconsistencies such as requiring the assessment of subjective elements of knowledge for there to be an act of communication to the public.

The complexity of the CJEU's approach is also reflected on the fact that it requires a case-by-case analysis to find a communication to the public. That 'individualised assessment' allows weighing all the relevant factors and criteria in view of the facts of a particular case and comes close to create different types of communication to the public, each one with its own

¹⁸² See the request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 31 March 2017, *Land Nordrhein-Westfalen v Dirk Renckhoff (Renckhoff)* (Case C-161/17).

¹⁸³ See Advocate General Campos Opinion, Case C-161/17, *Renckhoff*, 25 April 2018, ECLI:EU:C:2018:279, paras. 72 and 96.

¹⁸⁴ See AG Campos' Opinion in *Renckhoff*, para 70.

¹⁸⁵ See AG Campos' Opinion in *Renckhoff*, para 75.

conditions.¹⁸⁶ Nonetheless, the Court wrestles to offer a formally consistent general approach to the communication of the public. When it comes to knowledge, for instance, what the Court formally holds is not exactly that knowledge of the illegality of the source is a condition only for some types of communication to the public. Rather, it asserts that in the specific setting of providing links, the lack of knowledge about the illegality of the source entails that the user “*does not, as a general rule, intervene in full knowledge of the consequences of his or her conduct.*”¹⁸⁷ In this way, the Court introduced a completely new condition in the notion of communication to the public. This way of reasoning leaves room for further evolution and flexibility—for instance, in some particular circumstances, the Court might find that a user who lacks knowledge of the illegality of the source is nonetheless intervening in full knowledge of the consequences of his or her acts.

The Court's approach has direct consequences on hyperlinkers' liability for copyright infringement. However, to appreciate the reach of those effects, additional elements must be taken into account. First, the limits stemming from the E-Commerce Directive provisions make the presumption of knowledge untenable in where it comes to the hosting of hyperlinks provided by users. Second, the requirements derived from the overarching principles of reasonableness and proportionality may limit the duty of carrying out extensive checks on the legality of the linked content. In any event, hyperlinkers will need to observe some duties of care. In particular, they will need to carefully consider the facts and circumstances they may be aware of that may reveal the illegal character of specific works they link to. In addition, they must remove the links when they are directly or indirectly aware that they point to non-authorized content. Moreover, they may not ignore obvious facts indicating that the platform is notoriously used to access infringing material.

The proposed directive on copyright in the Digital Single Market might have been an opportunity for the European legislator to provide clarity on the boundaries of the right of communication to the public. Unfortunately, though the proposal is still under discussion at the time of writing, this is not likely to occur. It nonetheless will affect the practice of linking. Indeed, the proposal provides for a new related right for press publishers that, if passed, will affect hyperlinks, even though the draft intended to leave them out of the scope of the new right. Moreover, the measures envisioned for hosting providers will probably be affected by the Court's approach to the right of communication to the public, which is likely to expand beyond the limits of hyperlinking.

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¹⁸⁶ See Clark and Dickenson, *op. cit.*, pp 276 ff, noting a potentially intentional divergence between the hyperlinking and retransmission groups of cases in the CJEU's case law.

¹⁸⁷ *GS Media*, C-160/15, para 48.

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