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Giancarlo Frosio

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# IT'S ALL LINKED: HOW COMMUNICATION TO THE PUBLIC AFFECTS INTERNET ARCHITECTURE

## Abstract

*The architecture of the Internet is changing. A novel expansive construction of communication and making available to the public has been shaking the Internet ecosystem. It reaches into basic online activities, such as linking. Departing from well-established international approaches, the Court of Justice of the European Union (CJEU) has recently decided a multitude of cases that redesigned the notion of communication to the public in the Internet, while discussing linking activities in particular. This jurisprudence stands against a fluid legal framework searching for the optimal allocation of intermediary liability of information service providers. Communication to the public is at the center stage of this legislative process as well. EU copyright legislative reform makes Online Content Sharing Service Providers (OCSSP)—the large majority of UGC platforms—communicating to the public. In doing so, the Copyright in the Digital Single Market Directive changes the fundamental rules under which online platforms operate and UGC content is created for a large portion of the connected world. This, in turn, is forcing online intermediaries to remodel the architecture of the Internet accordingly. Proactive filtering—rather than ex ante review of allegedly infringing content and links—is set to become the first commandment governing the Internet of tomorrow.*

## Keywords

*EU law; international law; CJEU; copyright; communication to the public; linking; Internet; platforms; intermediary liability; online enforcement; algorithmic enforcement; fundamental rights*

## INTRODUCTION

Fundamental changes are occurring to Internet content regulation. Invisibly, a new construction of copyright technicalities might lead to game-changing repercussions by incentivising Internet architects and gatekeepers to re-engineer the Network. Like a blob, the notion of communication to the public is expanding relentlessly. It has reached deep into the very essence of the Internet: linking. Meanwhile, twitching the notion of communication to the public changes the UGC ecosystem profoundly, making proactive filtering the default rule online.

This expansive construction of the notion of communication to the public has been set in motion by a recent discussion investigating the legal status of linking. In this context, different approaches have been increasingly emerging in different jurisdictions. US and Canadian case law seem to have long established that linkers do not directly infringe copyright, construing linking as no more than digital references. In contrast, European courts have been wrestling with this question until recently and have apparently reached opposite conclusions. This

evolution resulted from a number of landmark cases decided by the Court of Justice of the European Union (CJEU) in the last few years, starting from earlier cases discussing the question of the legal status of linking per se. The CJEU later tackled the thornier issue of linking to unauthorized materials, while expanding the notion of communication to the public as far as reaching some online platforms and other information society intermediaries. A critical question lies beneath these developments: to which extent this expansive notion of communication to the public changes the landscape of liabilities and obligations for online intermediaries, such as search engines, UGC platforms and other online intermediaries? Answering this question becomes then especially sensitive in the aftermath of the enactment of the Copyright in the Digital Single Market (DSM) Directive (C-DSM Directive).<sup>1</sup>

This article does provide some coordinates to construe communication and making available to the public in Europe and elsewhere. In doing so, I will investigate first how case law related to linking has initiated a process of expansion of the notion of communication to the public in the EU, departing from well-established precedents and a quite consistent international approach. My review will increasingly focus on dissecting this new approach to communication to the public and how it becomes relevant for platform liability, the EU DSM and Internet architecture at large. Once crystalized in Art. 17(1) of the C-DSM Directive, this expansive notion of communication to the public turns into a major tool for governing intermediary liability—that becomes primary rather than secondary. Enhanced liability, in turn, incentivizes intermediaries to make changes to the Internet architecture to better preserve their business models. In this regard, my discussion aims at contextualizing legal notions within the relevant policy debate and related market externalities that follow from legal interpretation and policy decisions. Therefore, in conclusion, this article also considers how inconsistencies in regulating communication to the public might affect global Internet activities and architecture, with special emphasis on negative externalities on users' rights.

## 1. INTERNATIONAL APPROACH TO LINKING: ONLINE CITATION, SECONDARY OR PRIMARY INFRINGEMENT?

There has been a long-standing debate on whether linking to third party content—and related activities<sup>2</sup>—may trigger liability for copyright infringement.<sup>3</sup> It is within this debate that

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<sup>1</sup> See Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

<sup>2</sup> At the outset, some taxonomical clarifications should be given. Linking is a hypertextual link to online content. Framing, instead, refers to linking to a content made available on a third-party website but displayed on the linking website. Again, surface linking, refers to linking to the home page of the website where the target content is hosted. Deep linking is the action of linking to the targeted content on a third-party webpage without accessing the home page. Finally, inlinking or hotlinking would be a form of linking to an object on a third-party web page, which is launched automatically regardless of whether the user clicks on the link or even has knowledge that a hyperlink has been opened. See also for a detailed discussion of technical aspects of linking, Alessandro Cogo, 'Linking e framing al vaglio della Corte di giustizia dell'Unione Europea', (2014) *Giur It* 2201-2202; Emanuela Arezzo, 'Hyperlinks and making available right in the European Union – what future for the Internet after Svensson?' (2015) 46(5) *IIC* 526-529; Ignacio Garrote, 'Linking and Framing: a Comparative Law Approach' (2002) *EIPR* 184; Alain Strowel and Nicolas Ide, 'Liability with Regard to Hyperlinks' (2001) 24 *Columbia-VLA J L & Arts* 103-108.

an expansive notion of communication to the public has been slowly emerging. In particular, this expansion of communication to the public has brought about primary liability for copyright infringement for the majority of professional online platforms and outlets. Of course, this has not been the case until recently in the EU and other jurisdictions still hold on an opposite approach.

In considering the legal status of linking—and potential interferences with copyrights—three possible scenarios might apply. First, linking has been often compared to a digital, or hypertextual, citation.<sup>4</sup> The European Court of Human Right has recently noted, for example,

[T]he *very purpose of hyperlinks is*, by directing to other pages and web resources, to *allow Internet-users to navigate* to and from material in a network characterised by the availability of an immense amount of information. Hyperlinks contribute to the smooth operation of the Internet by making information accessible through linking it to each other. [...] *Hyperlinks*, as a technique of reporting, are essentially different from traditional acts of publication in that, as a general rule, they *merely direct users to content available elsewhere on the Internet*.<sup>5</sup>

Developing upon this comparison, a citation to a copyrighted work could be envisioned including information where to retrieve the work. Could this reference ever infringe upon the cited work's copyright? Could an interest to prevent the citation be claimed? Would it be relevant from a copyright perspective whether the citation refers to an infringing work, which is hard to retrieve? Would it be relevant that the author of the work that has been plagiarized informed the party citing the infringing work of such infringement? In case of analog citations, the conclusion should be on the negative as one citing does not reproduce, make available or communicate the work. The party citing to an infringing work does merely provide a research tool. In addition, proper balancing of freedom of expression against intellectual property rights would weigh heavily against contrary conclusions.

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<sup>3</sup> Predominantly, the question of linking—and related activities—has been addressed through copyright analysis. However, at least choice-of-law analysis and tort analysis, also entangled with copyright issues in these cases. For example, some decisions localize infringement online for choice-of-law purposes by asking what national public, rather than the public worldwide, a site targets. Tort analysis also can be applied to address a number of issues that copyright analysis might not reach, such as subsequent links to an initially infringing post, obtaining sufficient notice in order to be subject to remedies, or misrepresentation of the work by framing it as the linker's. See De Beer and Mira Burri, 'Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada' (2014) EIPR 104, 104.

<sup>4</sup> See European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' (2013) University of Cambridge Faculty of Law Research Paper No. 6/2013, 1-2 <<https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson>>; Tim Berners-Lee, 'Axioms of Web Architecture. Links and Law: Myths' <<http://www.w3.org/DesignIssues/LinkMyths.html>> (noting that a link would be no more than an online citation or footnote and that the right to cite a document is fundamental freedom of expression right); Steven Waldman, 'The Information Needs of Communities: The Changing Media Landscape in the Broadband Age' (FCC 2011) 340; Jessica Litman, *Digital Copyright: Revising Copyright Law for the Information Age* (Prometheus Books, 2001) 183; Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP 2009) 151.

<sup>5</sup> *Magyar Jeti ZRT v Hungary* App no 11257/16 (ECtHR, 4 December 2018) para 73-74 (emphasis added).

There is a second scenario where an argument is made that the rightholder does not have an interest to prevent linking to her protected works. This depends on the fact that linking is the privileged tool of Internet search. Therefore, linking makes linked content visible, increases online traffic targeting that content and, correspondently, the advertisement revenues that online traffic triggers. In this scenario, the absence of an interest to prevent linking—and rather the advantages that linking would provide to the rightholder—would be construed as an implicit consent from the rightholder that would clear infringement’s claims.<sup>6</sup> This very principle has been applied by a Canadian Federal Appellate Court, establishing that linking to a picture made available online with the rightholder’s consent does not trigger copyright infringement.<sup>7</sup> According to the Court, even if the linking communicated the protected work to the public—an issue that the Court actually has not considered—such communication would occur in any event with the implicit consent of the rightholder as access to the work was always “within the applicant’s full control and if he did not wish it to be communicated by telecommunication, he could remove it from his websites as he eventually did.”<sup>8</sup> For example, this construction should easily apply to surface linking.<sup>9</sup> It would hardly sustainable the argument that a rightholder does not have an interest—and implicitly consent—that users are taken to her website. Online presence itself would confirm that the webmaster has an interest to be visited by users.

Third, there is a scenario—which actually takes up the center stage in this review—where rightholders have an interest to prevent linking to protected content, such as in the case of framing, deep linking or, more importantly, linking to unauthorized content. How should this linking activity be treated? This hotly debated question has received at least three set of possible answers: (1) linking does not trigger any infringement of third party rights; (2) linking triggers secondary liability for copyright infringement;<sup>10</sup> (3) linking triggers direct liability for copyright infringement, in particular of the right of communication to the public, as provided

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<sup>6</sup> See Cogo (n 2) 2202-2203; Taina Pihlajarinne, ‘Setting the limits for the implied license in copyright and linking discourse - the European perspective’ (2012) 43(6) IIC 700-710; Orit Fischman Afori, ‘Implied License: An Emerging New Standard in Copyright Law’ (2009) 25 Santa Clara High Tech L J 275; Strowel and Ide (n 2) 109-114; Nicos Tsilas, ‘Minimizing Potential Liability Associated with Linking and Framing on the World Wide Web’ (2000) 8 CommLaw Conspectus 85-86.

<sup>7</sup> See *Warman*, 2012 FC 803 (Federal Court of Appeal 2012). See also *De Beer e Burri* (n 3) 111.

<sup>8</sup> *Warman* (n 7) § 38. The German Bundesgerichtshof put forward a similar argument in the *Paperboy* case by noting that the rightholder publishing open access content takes the chance that infringing uses might occur, which can actually be avoided by taking the online publication down. Bundesgerichtshof (BGH) *Paperboy* [17 July 2003] I ZR 259/00. See also Cogo (n 2) 2202.

<sup>9</sup> *Ibid* 2205.

<sup>10</sup> Cf, for an explanation of the causal link leading to the secondary liability of one making available the link for the infringement of the user reproducing the work on screen without authorization, Cogo (n 2) 2202. See *contra* C-360/13, *Meltwater* (2014) ECLI:EU:C:2014:1195 (excluding copyright infringement for unauthorized on screen reproduction of protected content). See also Irini Stamatoudi, “Linking’, ‘Framing’ and ‘Browsing’. The EU Court of Justice’s recent case law’ in Tana Pistorius, *Intellectual Property Perspectives on the Regulation of New Technologies* (Edward Elgar Publishing 2016) (supporting CJEU’s stance).

for example by Art. 3 of Directive 2001/29/EC,<sup>11</sup> although infringement of other exclusive rights might be claimed in jurisdictions that do not specifically feature such right.

What the regulatory approach to linking—and the reach of the notion of communication to the public—should be has been, at least at the EU level, highly debated.<sup>12</sup> For example, pending the *Svensson* decision,<sup>13</sup> which addressed first the issue of the legal status of linking under EU law, ALAI and the European Copyright Society (ECS) endorsed dichotomic approaches. While ALAI supported the construction of linking as communication to the public,<sup>14</sup> ECS rejected that position and instead insisted that linking should be treated as a mere online citation.<sup>15</sup> Again, the same discussion emerged during the preparatory works of the European Parliament Resolution of 9 July 2014 on the implementation of Directive 2001/29/EC. The initial draft of the Resolution provided that the Parliament “stresses that the ability to freely link from one resource to another is one of the fundamental building blocks of the internet; calls on the EU legislator to make it clear that reference to works by means of a hyperlink is not subject to exclusive rights, as it does not consist in a communication to a new public.”<sup>16</sup> This statement was later expunged from the Resolution as finally approved.<sup>17</sup>

### 1.1. European Member States

Traditionally, European national courts have located linking within doctrines of secondary liability for copyright infringement, rather than direct infringement of the right of

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<sup>11</sup> See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, Art 3.

<sup>12</sup> Directive 2000/31/EC provides liability exemptions for Information Society Service Providers, including hosting providers. See Directive 2000/31/EC on certain legal aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (2000) OJ (L 178) 1, 13, art 14. However, Directive 2000/31 does not include a specific exemption for linking and so-called “information location tools” as U.S. Digital Millennium Copyright Act or some national implementation of the EU Directive do. See Digital Millennium Copyright Act of 28 October 1998, 17 US Code § 512(d). See also Joris van Hoboken, ‘Legal space for innovative ordering: on the need to update selection intermediary liability in the EU’ (2009) 13 Int’l J of Communications Law and Policy 49-69. In particular, the Spanish implementation of the Directive, does so by applying to linking a “knowledge and take-down” mechanism as for the hosting exemption. See Ley 11 July 2002, 34/2002, Art 17. See also Miquel Peguera, ‘Internet Service Providers’ Liability in Spain Recent Case Law and Future Perspectives’ (2010) JIPITEC 151.

<sup>13</sup> See C-466/12 *Nils Svensson et al v Retriever Sverige AB* (2014) ECLI:EU:C:2014:76 [hereafter *Svensson*].

<sup>14</sup> See Association Littéraire et Artistique Internationale (ALAI), ‘Report and Opinion on the Making Available and Communication to the Public in the Internet Environment: Focus on Linking Techniques on the Internet’ (2014) EIPR 149.

<sup>15</sup> See European Copyright Society (n 4) (noting that a construction of linking as a communication to the public does theoretically imply an obligation to obtain a licence for any hypertextual link, as such introducing a highly dysfunctional regulatory framework for online activities fundamentally based on linking).

<sup>16</sup> See Draft Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2015) 2014/2256(INI), 6, § 15.

<sup>17</sup> See European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2015) 2014/2256(INI).

communication to the public.<sup>18</sup> This construction was famously deployed, for example, in the German *Paperboy* case. In *Paperboy*, the Bundesgerichtshof—the German Supreme Court—

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<sup>18</sup> There is no harmonized regulation on secondary liability for copyright infringement at the EU level. However, the CJEU has extended the reach of the direct infringement of some exclusive rights to third parties contributing to the infringement. See C-5/11 *Donner* (2012) ECLI:EU:C:2012:370 (construing advertisement, shipping and payment services allowing users to receive infringing copies of protected works as “distribution to the public”. In addition, there are CJEU decisions providing on the applicability of Directive 2000/31/EC’s liability exemptions for intellectual property infringement for mere conduit and hosting providers. See C-324/09 *L’Oréal/eBay* (2011) ECLI:EU:C:2011:474, § 138-141; C-484/14 *McFadden* (2016) ECLI:EU:C:2016:689, § 87; C-494/15, *Tommy Hilfiger* (2016) ECLI:EU:C:2016:528, § 34. As a consequence, each Member State has deployed differing and miscellaneous standards. See, for a review of these solutions, Martin Husovec, *Injunctions Against Intermediaries in the European Union: Accountable but not Liable?* (CUP 2018); Christina Angelopoulos, *European Intermediary Liability in Copyright. A Tort-Based Analysis* (Kluwer Law Int’l 2016); Tatiana-Eleni Synodinou, ‘Intermediaries’ Liability for Online Copyright Infringement in the EU: Evolutions and Confusions’ (2015) 31 *Comp L & Sec Rev* 57, 57-67; Christina Angelopoulos, ‘Beyond the Safe Harbors: Harmonizing Substantive Intermediary Liability for Copyright Infringement in Europe’ (2013) 3 *IPQ* 254; Mari Männiko, ‘Intermediary Service Providers’ Liability Exemptions: Where Can We Draw the Line?’ in Tanel Kerikmäe (ed), *Regulating eTechnologies in the European Union: Normative Realities and Trends* (Springer Int’l 2014) (noting that comparative analysis show that the present legislation is too general and gives too much room for interpretation); Patrick Van Eecke, ‘Online Service Providers and Liability: A Plea for a Balanced Approach’ (2011) 48(5) *Common Market L Rev* 1455, 145-1461. In France, for example, general tort law principles have been relied upon to expand liability to additional actors than the material infringer. Extra-contractual liability obliges to repair damages caused with fault or negligence (*responsabilité délictuelle* and *quasi-délictuelle*). Traditionally, intermediaries were placed under a duty to take all necessary measures to prevent infringement of others’ rights in order to avoid liability. Later, the *Cour de Cassation* found this general duty—that derailed into a judicially made notice and stay-down system—uncompliant with the prohibition of general monitoring under EU law, therefore copyright holders must now monitor the content of websites themselves and notify intermediaries for each new infringement of protected content. Arrêt n° 831 *Google France v. Bach films*, (Cour de cassation 12 July 2012); Arrêt n° 828 *Google France v. Bac films* (Cour de cassation, 12 July 2012); André Lucas, Henri Jacques Lucas and Agnès Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (LexisNexis 4th ed 2012) 901; Angelopoulos, *supra*, at § 2. In UK law, intermediaries would be generally held liable for the infringements of their users, if they have either authorised those infringements, procured or induced them or acted pursuant to a common design with its users to achieve them. See CDPA 1988, §16 (stating that a copyright in a work is also infringed by “any person who, without the licence of the copyright owner, authorises another person to do any of the restricted acts”). Claimants bringing suits against secondary infringers have to prove an additional mental element, i.e. that the defendant knew or had reason to believe that he was dealing with infringing copies, providing the means for making infringing copies or that the performances for which he had permitted the use of premises or had provided necessary apparatus was infringing. See *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* (No. 1) [2012] EWHC 268 (Ch); Sophie Stalla-Bourdillon, ‘Liability Exemptions Wanted! Internet Intermediaries’ Liability under UK Law’ (2012) 7(4) *JICLT* 289, 293-299; Angelopoulos *supra*; Paul Davis, ‘Accessory Liability: Protecting Intellectual Property Rights’ (2011) 4 *IPQ* 390. In Germany, intermediary liability in copyright is almost invariably handled through the doctrine of *Störerhaftung*—as an alternative to joint tortfeasance for which intermediaries hardly qualify. This doctrine—embedded in BGB, §1004—grants a permanent injunctive relief to the proprietor against anybody who has caused an interference—*störer* means interferer—with the property, unless it would be unreasonable to burden the interferer with a duty to examine whether his behaviour could interfere with the (intellectual) property of a third person. See BGH 11 March 2004 *Rolex v Ebay/ Ricardo (Internet Auction I)* I ZR 304/01, 31; Broder Kleinschmidt, ‘An International Comparison of ISP’s Liabilities for Unlawful Third Party Content’ (2010) 18 *IJLIT* 332, 346–347; Angelopoulos *supra*. Again, a recent Spanish copyright reform expanded intermediary liability by introducing, *inter alia*, doctrines of secondary liability—inducement, contributory and vicarious liability—in the Spanish legal system. See Real Decreto Legislativo (RDL) 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, BOE-A-1996-8930, Art.

rejected the conclusion that linking—and deep linking in that specific case—was a communication to the public.<sup>19</sup> Similar decisions have been issued in Austria, France, UK, Spain and Italy.<sup>20</sup> In 2011, the Austrian Supreme Court noted that

only the person possessing the original or a copy can make that work available to the public with modalities that allow to control access. A person [...] making available a mere link allowing to display the work where was originally made available, in any event, only facilitates access to that file [...] without being that person to make the work available under the meaning of Art. 18 of copyright law. Under these circumstances, [the linker] does not control access to the work as the file can be removed without any intervention on his side.<sup>21</sup>

In *Paramount Home Entertainment*, the High Court of England and Wales concluded that “it is arguable that the mere provision of a hyperlink is not enough to constitute communication to the public.”<sup>22</sup> Italian case law has customarily construed linking, both for civil and criminal law purposes, as a “facilitating contribution” to copyright infringement, rejecting a construction of linking as a direct infringement of the right of communication to the public.<sup>23</sup> In addition, an

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138, as amended by Ley 21/2014, de 4 de noviembre, BOE-A-2014-11404 (Spain) (imposing liability—unless the intermediary is sheltered by the Directive 2001/29/EC’s exemptions—on anyone who either knowingly induces the infringement, or knowing or having reason to know about the infringement cooperates to it, or having a direct economic interest in the results of the infringement has the ability to control the infringer’s conduct).

<sup>19</sup> See *Paperboy* (n 8) (noting that deep linking could have possibly triggered liability for unfair competition, which was finally excluded in that specific case). See also Maurizio Borghi, ‘Collegamento ipertestuale a opere protette da diritto d’autore: la Corte europea riscrive il diritto di comunicazione al pubblico’ (2016) *Giur it* 2133; Cogo (n 2) 2202 and 2204-2205; Guido Westkamp, ‘Hyperlinks, Circumvention Technology and Contributory Infringement—a Precarious Tale from German Jurisprudence’ (2006) 1(5) *JiPLP* 309, 309-313 (discussing German case law stating the principle that a person who sets a link referring to a website offering software for circumventing technological anti-copy protection measures commits an act of contributory infringement according to the principles of disturbance liability); Alain Strowel and Vicky Hanley, ‘Secondary Liability for Copyright Infringement with Regard to Hyperlinks’ in Alain Strowel (ed), *Peer-to Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar 2009) 106-107 (discussing the application of the principles of *Störerhaftung*—disturbance liability—in cases of linking to anti-copy protection circumventing software and pornography); Stefan Freytag and Torsten Bettinger, ‘Civil law responsibility for links’ (1999) 30(8) *IIC* 883, 883-907.

<sup>20</sup> See, for a discussion of these cases, Borghi (n 19); Evangelia Papadaki, ‘Hyperlinking, making available and copyright infringement: lessons from European national courts’ 2017 8(1) *EJLT* 1-24. TGI Nancy 6 December 2010 *Le Bien Public, Les journaux de Saône et Loire / Dijonscope*.

<sup>21</sup> See eg OGH 20 September 2011 *Vorschaubilder* 4Ob105/11m. The EctHR makes the same point by noting

A further distinguishing feature of hyperlinks, compared to acts of dissemination of information, is that the person referring to information through a hyperlink does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link – a natural exception being if the hyperlink points to contents controlled by the same person. Additionally, the content behind the hyperlink has already been made available by the initial publisher on the website to which it leads, providing unrestricted access to the public.

See *Magyar Jeti ZRT* (n 5) 75.

<sup>22</sup> See *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2014] ECDR 7, 32.

<sup>23</sup> See Cass penale 10 October 2006 n 33945; Trib Milano *SKY v Tv Gratis e Telecom Italia* [20 March 2010] n 3639, 35-6.

Italian Regulation implementing Directive 2001/29/EC stated, in accordance with the mentioned case law, that links (and torrents) “do not entail nor a transmission of a work, nor a communication to the public, therefore they cannot be autonomously relevant as direct copyright infringement.”<sup>24</sup> In Spain, the Audiencia Provincial de Madrid acquitted Rojadirecta’s owners from criminal charges for copyright infringement in a case promoted by Audiovisual Sports. Rojadirecta is a website offering an exhaustive, well-maintained database of links to sporting events streamed over the Internet by other entities, mostly illegally. The Madrid appellate court saw Rojadirecta as a “mere intermediary” simply providing links to enable users to watch sport events, without any involvement with the actual infringement that was occurring elsewhere.<sup>25</sup>

## 1.2. United States

In a similar fashion, US case law has traditionally excluded that linking and framing triggered direct copyright infringement.<sup>26</sup> Initially, earlier jurisprudence rejected both any primary or secondary liability for copyright infringement that might have occurred through linking.<sup>27</sup> Later, secondary liability has been considered—but rejected—by the 9<sup>th</sup> Circuit in the *Perfect 10* case. The Court maintained that links available on the search engine “Google Image” linking to images owned by Perfect 10 and made available online without the consent of the rightholder were irrelevant for copyright infringement purposes.<sup>28</sup> In this regard, the Court rejected the hypothesis that linking might constitute a direct violation of any exclusive rights, in particular

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<sup>24</sup> See Delibera 12 December 2013 n. 680/13/CONS, Regolamento in materia di tutela del diritto d’autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, n. 70, § 76.

<sup>25</sup> See Auto 364/2010 AP Madrid of 27 April 2010, Cendoj: 28079370012010200371. However, recently, the Criminal Court of Appeal of Castellón rejected the earlier assumption by Spanish courts that operators of websites linking to infringing contents online cannot be held criminally liable because they do not engage in acts of communication to the public. The Court upheld a previous decision charging the webmaster of the website Bajatetodo.com with a eighteen-month prison term under Article 270 of the Spanish Criminal Code. The website used to provide links to a miscellaneous array of infringing materials available online. See ‘Spanish Court Criminalizes Linking to Copyright Infringing Materials and Reverses a Consolidated Case Law’ (*CIS Blog*, February 2015) <<http://cyberlaw.stanford.edu/page/spanish-court-criminalizes-linking-copyright-infringing-materials-and-reverses-consolidated>>.

<sup>26</sup> See eg, for a discussion of US law on liability for hyperlinking, Jane Ginsburg and Luke Budiardjo, ‘Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives’ (2018) 41 *Colum J L & Arts* 153, 177-205. See also, on the notion of communication to the public in the U.S., Rebecca Giblin and Jane Ginsburg, ‘We (Still) Need to Talk About Aereo: New Controversies and Unresolved Questions After the Supreme Court’s Decision’ (2015) 38 *Colum J L & Arts* 109; Rebecca Giblin and Jane Ginsburg, ‘We Need to Talk About Aereo: Copyright-Avoiding Business Models, Cloud Storage and a Principled Reading of the “Transmit” Clause’ (2014) *Columbia Law Sch Ctr. for Law & Econ Working Paper* 480/2014 <<http://perma.cc/TA7Y-T7CG>>; Jane Ginsburg, ‘Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms – Part I’ (2014) 241 *Revue Intl du Droit d’auteur*.

<sup>27</sup> See *Ticket Master Corp. v. Tickets.com, Inc.* 54 USPQ2d (BNA) 1344, 1346 (CD Cal 2000) (noting that “hyperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved. [...] This is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently”).

<sup>28</sup> See *Perfect 10 v Google Inc.*, 508 F.3d 1146 (9<sup>th</sup> Cir 2007). See also Meng Ding, ‘Perfect 10 v. Amazon.com: A Step Toward Copyrights Tort Law Roots’ (2008) 28 *Berkley Tech LJ* 373.

the right of public display.<sup>29</sup> This position has been known as the ‘server test’ or ‘server rule’, according to which ‘in-line’ or ‘framing’ hyperlinking do not infringe the exclusive right of public display or performance unless the linker also possesses a copy of the protected works residing on his servers.<sup>30</sup>

*Flava works v. Gunter* confirmed the same principle by reinstating that linking cannot directly infringe any exclusive copyright.<sup>31</sup> In *Flava works*, Justice Posner had to answer the question whether links made available on the platform “myVidster” were infringing copyright. MyVidster allows users to save and list links to embedded videos on a personal page. These links taking the form of “thumbnails” can take users to copyrighted materials made available without permission elsewhere in the Internet, although the video would be displayed in a frame on the myVidster page.<sup>32</sup> Actually, Flava work had also far reaching effect on a Rojadirecta case pending at that time in the United States. In 2011, entities owning the rights to broadcast sporting events prevailed on U.S. authorities to seize the rojadirecta.com and .org domain names as part of the “Operation in Our Sites” anti-piracy campaign.<sup>33</sup> Rojadirecta filed an appeal with the Second Circuit arguing that links to streaming video are not themselves infringing, therefore Rojadirecta was not directly or secondarily liable for criminal copyright infringement, and the domain name therefore should be returned.<sup>34</sup> Meanwhile, the influential Judge Posner issued his opinion in *Flava works*. The parallels with Rojadirecta were clear, and soon thereafter, the U.S. Department of Justice agreed to return the Rojadirecta domain names to the registrant.<sup>35</sup>

Recently, however, U.S. courts have been challenging previous approaches regarding the interplay between linking and copyright protection. A California District Court dismissed a

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<sup>29</sup> See *Perfect 10* (n 28) 1159-1161 (discussing infringement of the exclusive right of “display” provided by 17 U.S.C. § 106(5) and noting that “the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information», quindi «[Perfect 10] was unlikely to succeed in its claim that Google's in-line linking to full-size infringing images constituted a direct infringement”. Actually, the Court continues, “Google does not, however, display a copy of full-size infringing photographic images for purposes of the Copyright Act when Google frames in-line linked images that appear on a user's computer screen. Because Google's computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act. In other words, Google does not have any «material objects ... in which a work is fixed ... and from which the work can be perceived, reproduced, or otherwise communicated” and thus cannot communicate a copy”.)

<sup>30</sup> For a comprehensive review of the ‘server rule’ in the US, see Jane Ginsburg and Luke Budiardjo, ‘Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?’ (2019) 41 Colum J L & Arts 417, 419-474; Ginsburg and Budiardjo (n 26) 177-193.

<sup>31</sup> See *Flava Works v Gunter* 689 F3d 754 (7<sup>th</sup> Cir 2012).

<sup>32</sup> *ibid* 755-756.

<sup>33</sup> See Operation In Our Sites protects American online shoppers, cracks down on counterfeiters (ICE Newsletter, 27 November 2015) <<https://www.ice.gov/news/releases/operation-our-sites-protects-american-online-shoppers-cracks-down-counterfeiters>>.

<sup>34</sup> See *Puerto 80 Projects v USA* 11-3390-cv (2<sup>nd</sup> Cir. 2011) (Opening Brief) <<https://www.scribd.com/document/65234499/Puerto-80-Projects-v-USA-Opening-Brief>>.

<sup>35</sup> See Giancarlo Frosio, ‘Alalalai! ...Rojadirecta is up for Battle Again in Italy’ (*CIS Blog*, 6 September 2013) <<https://cyberlaw.stanford.edu/blog/2013/09/alalalai-rojadirecta-battle-again-italy>> .

complaint against Boing Boing from Playboy alleging copyright infringement for linking but noted that such liability “exists if the defendant engages in personal conduct that encourages or assists the infringement.”<sup>36</sup> A full reconsideration of previous jurisprudence instead occurred in *Goldman v. Breitbart* decided by a New York district Court.<sup>37</sup> In *Goldman*, a photographer sued several publishers for the unauthorized embedment in their publications of a tweet including an unlicensed image of American football quarterback Tom Brady that he had taken. The complaint alleged direct infringement of the public display right as provided by §106(5) of the Us Copyright Act. However, the defendants never copied or saved the image on their own servers.<sup>38</sup> The Court found for the plaintiff by noting that “when defendants caused the embedded Tweets to appear on their websites, their actions violated plaintiff’s exclusive display right; the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result.”<sup>39</sup> The Court openly disagreed with Perfect 10’s proposition that “inline linking can never cause a display of images or videos that would give rise to a claim of direct copyright infringement” and instead held that “a website’s servers need not actually store a copy of the work in order to ‘display’ it.”<sup>40</sup> In doing so, the Court appears to reject the so-called Perfect 10’s “server test” according to which the direct liability for copyright infringement depends on whether an image is hosted on the publisher's own server or is embedded or linked from a third-party server.<sup>41</sup> Similar conclusions have been reached also by the District Court for the Northern District of Texas rejecting the ‘server rule’ in *Leader’s Institute v Jackson*.<sup>42</sup> Although *Goldman*, *Leader’s Institute* and *Playboy* are merely district court decisions, which should be tested against the landmark appellate precedents they reject once and if they are appealed, this might sign nonetheless an alignment with the treatment of linking emerging in Europe.<sup>43</sup>

### 1.3. Canada

Canadian courts have weighed in on this debate by following into the footsteps of the predominant US jurisprudence and mirroring the position of the European Copyright Society. Actually, the Canadian Supreme Court has not been tackling directly linking to copyright infringing content but, instead, linking to defamatory statements made available online.<sup>44</sup> The

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<sup>36</sup> See *Playboy Inc v Happy Mutants LLC et al* CV 17-8140 FMO (PLAx) (CD Cal 2018) In 11-12 citing *Tarantino v. Gawker Media LLC* 2014 WL 2434647 (CD Cal 2014) 3 (concerning the linking to the script for Tarantino's *The Hateful Eight* by the website Gawker.com).

<sup>37</sup> See *Justin Goldman v Breitbart LLC et al* 17-cv-3144 (KBF) (SDNY 2018).

<sup>38</sup> *ibid* 4

<sup>39</sup> *ibid* 2.

<sup>40</sup> *ibid* 13.

<sup>41</sup> See Ginsburg and Budiardjo (n 30) 474-477 (supporting the new standard and the rejection of the ‘server rule’)

<sup>42</sup> See *Leader’s Institute, LLC v Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514 (ND Tex 2017).

<sup>43</sup> See also US Copyright Office, ‘The Making Available Right in the United States: A Report of the Register of Copyrights (February 2016) 50 <[https://www.copyright.gov/docs/making\\_available/making-available-right.pdf](https://www.copyright.gov/docs/making_available/making-available-right.pdf)> (challenging Perfect 10’s conclusions and noting that “it remains uncertain whether a court might deem certain forms of inline linking or framing distinguishable from the technology in Perfect 10 for purposes of the server test”).

<sup>44</sup> See *Crookes v. Newton* 2011 SCC 47, [2011] 3 S.C.R. 269.

Supreme Court of Canada held that merely providing a hyperlink—even straight to the page in question—is not a communication or publication for the purpose of defamation law. According to the Court:

Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral — it expresses no opinion, nor does it have any control over, the content to which it refers.<sup>45</sup>

Although stated in a defamation rather than copyright infringement case, commentators have been sustaining that the principle that “hyperlinks are, in essence, references [...] [b]oth communicate that something exists, but do not, by themselves, communicate its content,”<sup>46</sup> should be equally applicable to copyright infringement cases.<sup>47</sup>

## 2. COMMUNICATION TO THE PUBLIC IN THE EU: A BROAD NOTION

As to be discussed soon, CJEU jurisprudence has recently decided several cases focusing on online infringement and multiple online activities such as linking, live streaming and peer-to-peer file sharing, while redefining the notion of communicating and making available to the public online.<sup>48</sup> These decisions build upon—and update—an already very prolific CJEU jurisprudence dealing with the notion of communication to the public.<sup>49</sup> Before proceeding further, it is of essence to describe the legal contours of this notion and how it started to expand in EU law.<sup>50</sup>

Art. 3 of the Directive 2001/29/EC provides “authors with the exclusive right to authorise or prohibit any communication to the public of their works, (a) by wire or wireless means, (b) including the making available to the public of their works (c) in such a way that members of the public may access them from a place and at a time individually chosen by them.” According to Recital 23 in the Directive “this right should be understood in a broad sense covering all

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<sup>45</sup> Ibid 30.

<sup>46</sup> Ibid § 27-30.

<sup>47</sup> See De Beer and Burri (n **Error! Bookmark not defined.**) 112.

<sup>48</sup> The notion of “making available to the public” was introduced by the WIPO Treaties. See WIPO Copyright Treaty, 20 December 1996, Art 6 e 8; WIPO Treaty, 20 December 1996, Art. 10 e 14. See also Ginsburg and Budiardjo (n 26) 155-161; De Beer and Burri (n 3) 104; Arezzo (n 2) 529-531; Jane Ginsburg, ‘Hyperlinking and Making Available’ (2014) 36 EIPR 147; Jane Ginsburg, ‘The (New?) Right of Making Available to the Public’, in Vaver e Lionel Bently (eds), *Intellectual Property in The New Millennium, Essays in Honour of William R. Cornish* (CUP 2004) 234; Mihály Ficsor, *The Law of Copyright and the Internet: The WIPO Treaties and Their Implementation* (OUP 2002) 496-500.

<sup>49</sup> See eg, for a comprehensive book-length review of the notion, Justin Koo, *The Right of Communication to the Public in EU Copyright Law* (Bloomsbury Publishing 2019).

<sup>50</sup> See Miquel Peguera, ‘Hyperlinking Under the Lens of the Revamped Right of Communication to the Public’ (2018) 34(5) CLSR 1099, 1101-1103 (for a discussion of the CJEU criteria before the linking cases and the broadening of the notion of communication).

communication to the public not present at the place where the communication originates.”<sup>51</sup> CJEU case-law repeatedly stressed that the aim of the directive is to establish a high level of protection for authors and that the concept of ‘communication to the public’ must therefore be interpreted broadly.<sup>52</sup> Further in Recital 23, the Directive attempts also to provide a positive definition of the notion of communication to the public that should perhaps limit an expansive interpretation of the right by noting that “[t]his right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.”<sup>53</sup> Therefore, it covers both broadcasting for all members of the public simultaneously, including “linear” transmissions or “push services”, and “making available” for each member of the public at a time and place of their own choosing, including “on-demand” or “pull” services or “non-linear” transmissions.

So, besides these scanty textual references, when does communication to the public takes place according to EU law? Several relevant criteria can be extracted by the CJEU case law. The concept of ‘communication to the public’ combines two cumulative elements: (1) an ‘act of communication’ that is (2) directed to a ‘public’. According to the Directive, the first criterion is limited to the extent that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication.”<sup>54</sup> Therefore, communication includes any transmission of a copyright work, irrespective of the medium used or the technical means employed. Each transmission or retransmission of a work that uses a specific technical means should be in principle individually authorised by the relevant rightholder.<sup>55</sup> In *SGAE v. Rafael Hotels*, the ECJ confirms that while the mere provision of physical facilities does not suffice, the distribution of a TV signal does.<sup>56</sup> In *FAPL*, communication covers transmission of the broadcast works, via a television screen and speakers.<sup>57</sup> In *Airfield v. Sabam*,<sup>58</sup> communication encompasses satellite broadcasting and *ITV. v. TV Catch-up* extends the notion of communication to streaming or any transmission or retransmission of TV broadcast over the Internet.<sup>59</sup>

A debated issue is whether transmission is actually required.<sup>60</sup> While it is true that “in the case of making available, the actual transmission of the work takes place only potentially and

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<sup>51</sup> In this respect, the CJEU in *Circul Globus* stated that Dir. 2001/29 only refers to communication to a public which is not present at the place where the communication originates. Communication carried out in a place open to the public by public performance or direct presentation of the work is not harmonised. See C-283/10 *Circul Globus Bucuresti v UCMR - ADA* (2011) ECLI:EU:C:2011:772 § 39-40.

<sup>52</sup> See C-306/05 *SGAE v Rafael Hoteles* (2006) ECLI:EU:C:2006:764 para 36 [hereafter *Rafael Hotels*].

<sup>53</sup> Directive 2001/29/EC (n 11) Recital 23.

<sup>54</sup> *ibid* Recital 27.

<sup>55</sup> See C-431/09 and C-432/09 *Airfield v. SABAM* (2010) ECLI:EU:C:2011:648 para 72 [hereafter *Airfield*].

<sup>56</sup> See eg *Rafael Hoteles* (n 52) para 40-41 [hereafter *Rafael Hotels*].

<sup>57</sup> See C-403/08 and C-429/08 *Football Association Premier League v QC Leisure* (2011) ECLI:EU:C:2011:631 para 196-204 [hereafter *FAPL*].

<sup>58</sup> See *FAPL* (n 55).

<sup>59</sup> See C-607/11 *ITV v. TVCatchup* (2012) ECLI:EU:C:2013:147 para 40 [hereafter *TVCatchup*].

<sup>60</sup> There is plenty of doctrinal debate on this point with commentators holding the position that an effective transmission of the works would be necessary, rather than a mere making available to the public. See eg European

on the initiative of the recipient”, the question, as the AG Szpunar puts it, is whether, “the ability of the copyright holder to prevent the communication arises at the actual time of making available, irrespective of whether and when transmission actually takes place.”<sup>61</sup> Theoretically, reading Recital 23 above, “communication to the public” should cover only “transmission and retransmission” and exclude any other acts, therefore excluding any other acts that make the transmission possible. Otherwise, it becomes impossible to provide a meaningful interpretation of the specific exclusion of “any other acts” in Recital 23. However, the CJEU seems to have overlooked this textual reference and the logical fallacy that derives from a different interpretation. According to the CJEU, transmission in making available would already occur when a work is made available online (for example uploading content on an OA website) so that members of the public can access it, rather than when it is actually downloaded.<sup>62</sup>

The term 'public' refers to an indeterminate number of potential recipients, and also implies a fairly large number of people,<sup>63</sup> which includes, for example, hotel guests, customers present at a public house or a bar. Factual differences among cases can, however, lead to different, and apparently inconsistent outcomes. For example, *Reha Training* found that transmission to the public rooms to a rehabilitation center qualified as “public,”<sup>64</sup> while instead, transmission of a radio broadcast to the waiting room of a private dentist did not.<sup>65</sup> Uniformity of meaning of the concept of communication and distribution to the public remains still an open question, which is actually under review before the CJEU.<sup>66</sup>

Third, it is necessary to take into consideration that infringement of the right of communication to the public only occurs in case of a deliberate intervention by the user, in full knowledge of the consequences without which the public would not be able to access the work.<sup>67</sup> According to long-standing CJEU jurisprudence, there must be an *indispensable* role of the user without whom the public would not, in principle, have access to the copyright work in question.<sup>68</sup> This requirement, however, as to be seen soon, have been fundamentally relaxed by the most recent CJEU jurisprudence discussing linking and online infringement.

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Copyright Society (n 4). See, for a review of this doctrinal positions, 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) Common Market L Rev 1221-1242, ft 53.

<sup>61</sup> C-610/15 *Stichting Brein v Ziggo BV, XS4ALL Internet BV* [2017] ECLI:EU:C:2017:99, Opinion of AG Szpunar, para 38 (hereafter *Ziggo*, Opinion of AG Szpunar).

<sup>62</sup> C-466/12 (n 13) para 19 (“for there to be an ‘act of communication’, it is sufficient [...] 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”).

<sup>63</sup> See C-135/10 *Società Consortile Fonografici v Marco dal Corso* (2011) ECLI:EU:C:2012:140 para 84 [hereafter *Marco dal Corso*]; C-89/04 *Mediakabel* (2005) ECLI:EU:C:2005:348 § 30.

<sup>64</sup> See C-117/15 *Reha Training v GEMA* (2016) ECLI:EU:C:2016:379 § 35 [hereafter *Reha Training*].

<sup>65</sup> See *Marco dal Corso* (n 63) para 96.

<sup>66</sup> See Svea Hovrätt Patent- och marknadsöverdomstolen [Swedish Patents and Market Court of Appeal] (PMÖD) *JJ v MA* [20 August 2019] case no PMFT 12151-17.

<sup>67</sup> See *FAPL* (n 57) § 195; *Rafael Hotels* (n 52) para 42.

<sup>68</sup> See *Reha Training* (n 64) para 46; *Marco dal Corso* (n 63) § 82; *FAPL* (n 57) § 195; *Rafael Hotels* (n 52) para 42

Fourth, if the same technical means are used, then the copyrighted work has to be communicated to a 'new public'.<sup>69</sup> The "new public" criterion was introduced for the first time in the *Rafael Hoteles* decision, not being specifically mentioned in EU law.<sup>70</sup> Further CJEU jurisprudence has turned it into a fundamental condition for protection. In this scenario, to fall within the concept of 'communication to the public' a work must be directed to an audience that was not taken into account by the relevant rightholder when he authorised the initial communication of the work.<sup>71</sup> However, if the communication takes place through specific technical means different from those previously used by the copyright holder, a new public is not necessary for having communication to the public.<sup>72</sup> In *TVCatchup*, the CJEU found a communication to the public even though those subscribers of an online streaming service are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver.<sup>73</sup> Actually, different technical means, such as satellite or on line streaming rather than terrestrial broadcasting, would imply a "public which was not taken into account by the authors of the protected works within the framework of an authorization given to another person"<sup>74</sup> as the authorization was given for a certain technical means rather than the different one through which the communication now takes place.

Since its creation, the "new public" requirement and the "specific technical means" theory have been deemed in conflict with international norms and treaties, such as the Berne Convention, the WCT and the WPPT, and the EU Directives that implement them.<sup>75</sup> According

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<sup>69</sup> See *Rafael Hotels* (n 52) para 40-42. See also, for a discussion of the 'new public' requirement, Peguera (n 50) 1104-1105.

<sup>70</sup> See *Rafael Hoteles* (n 52) para 41 (referring to the commentary to Art 11bis of the 1978 Guide to the Berne Convention, a WIPO non-binding document). See contra Mihály Ficsor, 'The right of communication (and making available to the public) in the light of the case law of the Court of Justice of the EU' in Irini Stamatoudi (ed), *Copyright and the Digital Agenda for Europe: Current Regulations and Challenges for the Future* (Sakkoulas Publications 2015) 97-134 (arguing that, according to the Paragraphs 61-67 of the Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable available at [http://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo\\_pub\\_120\\_1984\\_04.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1984_04.pdf), the true meaning of the Art. 11bis of the Berne Convention is "new communication" to the public rather than communication to a "new public")

<sup>71</sup> See *Airfield* (n 55) para 72. On the question of what public the copyright holder takes into account when authorizing the initial communication, see also *Rafael Hotels* (n 52) para 41 (noting that when the holder of copyright in a musical work "authorizes the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme"); *FAPL* (n 57) para 198 (finding that, when authorizing the initial communication to the public, copyright holders would not consider those watching TV in hotels and pubs as the direct initial public but "only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts"); *Airfield* (n 55) para 72 (noting that, in the case of satellite broadcastings, when the initial communication to the public is not carried out by the copyright holder, the "new public" is the "public which was not taken into account by the authors of the protected works within the framework of an authorization given to another person").

<sup>72</sup> See eg *TVCatchup* (n 59) para 39

<sup>73</sup> *ibid* para 40.

<sup>74</sup> See *Airfield* (n 55) para 72.

<sup>75</sup> Ficsor (n 90) 114.

to settled case-law, EU law must be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement.<sup>76</sup> By limiting the rights of authorizing further communications to the public, critics of the “new public” criterion would construe it as an indirect application of the principle of exhaustion, which does not apply to the right of communication to the public.<sup>77</sup> Communication to the public, including the ‘making available to the public’, refers to services rather than goods and the principle of exhaustion does not apply to services, in particular online services.<sup>78</sup> As a result, a protected work needs to be authorized by the rightholder each time it is made available to the public.

In contrast, the criterion of new public has been justified under the implied consent theory.<sup>79</sup> The new public would be essentially a legal fiction that stands for implied consent. Although not defined in Directive 2001/29/EC, consent should be construed in a uniform manner in the EU in conjunction with consent in the Trademark Directive and “can either be expressed (in writing) or be inferred from the facts or circumstances of the case”.<sup>80</sup> As the author already communicated the work to the same public, it could be inferred the author’s implicit consent for any subsequent communication, by a linker for example.

Fifth, the profit-generating nature of the action has been introduced as an additional factor that might be relevant for finding infringement of the exclusive right of communication to the public. According to the CJEU, it is not irrelevant that a communication is of profit-making nature.<sup>81</sup> However, the CJEU also noted that a profit-making nature is not essential for the existence of a communication to the public and cannot be conclusive to determine whether a retransmission is a communication.<sup>82</sup> Recently, however, the CJEU has crafted a new enhanced role for “for profit” motives in its linking-related case law.

Finally, the CJEU has stressed the not autonomous character of the criteria and their interdependency for the complementary criteria or for all. In this respect, *Reha Training* concludes that

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<sup>76</sup> *Rafael Hoteles* (n 52) § 35; C 341/95 *Bettati* (1998) ECR I 4355, para 20.

<sup>77</sup> See Directive 2001/29/EC (n 11) Art 3(3) (“The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article”) and Recital 29. See also ALAI (n 14) 5; Jan Rosén, ‘How Much Communication to the Public is ‘Communication to the Public?’ in Irini Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law Int’l 2016) 331–350.

<sup>78</sup> See Irini Stamatoudi and Paul Torremans, ‘The information Society Directive’ in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law A Commentary* (Edward Elgar 2014) para 11.34 (noting that “The extent to which an act over the Internet is considered to be a service rather than an online distribution of goods is a matter of fact and should be judged on the basis of the particular characteristics of each case”).

<sup>79</sup> See C-301/15 *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* (2016) ECLI:EU:C:2016:878, para 35-37 (for the first time explicitly connecting the notion of new public with a classical and more familiar legal concept such as the author's implied consent).

<sup>80</sup> *Stamatoudi and Torremans* (n 78) para. 11.57

<sup>81</sup> See *FAPL* (n 57) para 204; *Rafael Hotels* (n 52) para 44.

<sup>82</sup> See *Rafael Hotels* (n 53) para 42-43 (noting also that a retransmission funded by advertising is of a profit-making nature).

in order to determine whether there has been a communication to the public, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another.<sup>83</sup>

### 3. THE CJEU LINKING SAGA AND THE EXPANSION OF COMMUNICATION TO THE PUBLIC

As anticipated, like a saga now in its sixth season, the CJEU defined the legal contours of linking in *Svensson*, *BestWater*, *C More Entertainment*, *GS Media*, *Filmspeler* and *Ziggo*. These decisions—building on the prolific jurisprudence that was just mentioned—contributed to the relentless expansion of the notion of communication to the public. This expansion has led to a growing involvement of online intermediaries, platforms and other service providers in Internet content regulation and sanitization.

#### 3.1. *Svensson*: Is Linking a Communication?

The linking saga starts with a quite surprising finding—as any exciting saga should do, I would say. Linking is a communication within the meaning of EU copyright law.<sup>84</sup> In saying so, the CJEU departed from consistent case law of European national courts and courts of other jurisdictions. As the Advocate General Wathelet noted in a later opinion, up to that point, the CJEU was asking for an indispensable intervention of the user in order to have a communication.<sup>85</sup> That appeared to be a *conditio sine qua non* for Article 3(1) to apply. Actually, with linking, that intervention seemed hardly possible as the protected content is made available by third-parties elsewhere, absent any control of the linker over that content. As to be seen soon, however, the CJEU will be later replacing the notion of “indispensable intervention” with that of “essential” intervention.

*Svensson* involved journalists claiming that the website Retriever Sverige had improperly linked to news articles they had authored, thereby making those articles available to the public without permission, in violation of copyright law.<sup>86</sup> As said, the CJEU announced a rule that links communicate works to the public. Nonetheless, the CJEU decided that links to authorized works freely available online do not infringe the exclusive right of communication to the public. This conclusion depended on the application of the notion of new public, which the CJEU had already developed in previous cases.

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<sup>83</sup> See *Reha Training* (n 64) para 35.

<sup>84</sup> See *Svensson* (n 13) § 20. See also Mira Burri, ‘Permission to Link: Making Available via Hyperlinks in the European Union after *Svensson*’ (2014) JIPITEC 245, 245-255; Gemma Minero, ‘Are hyperlinks covered by the right to communicate works to the public? The *Svensson* case’ (2014) 4(4) QMJIP 322–327; Toby Headdon, ‘An epilogue to *Svensson*: the same old new public and the worms that didn’t turn’ (2014) 9(8) JIPLP 662-668.

<sup>85</sup> See C-160/15 *GS Media v Sanoma*, Opinion of Advocate General Wathelet (2016) EU:C:2016:221 § 60. See also, supporting the position that linking should be only construed as an act that is accessory to the communication, ECS (n 4); Arezzo (n 2) 534-554; Schellekens, ‘Reframing hyperlinks in copyright’ 2016 38(7) EIPR 401-408; De Beer and Burri (n **Error! Bookmark not defined.**) 104.

<sup>86</sup> See *Svensson* (n 13) § 8.

### 3.2. Svensson: Is Linking a Communication to a New Public?

*Svensson* said that links are not infringing and do not need additional authorization from the copyright owner unless they make the work available to a new public or the communication occurs with new technical means, which is not the case of linking.<sup>87</sup> According to *Svensson*:

in order for there to be a communication to the public, that user must, in full knowledge of the consequences of its actions, give access to the [...] protected work to an additional public and that it appears thereby that, in the absence of that intervention those ‘new’ viewers are unable to enjoy the [...] works.<sup>88</sup>

A new public must include people other than those who can access the work thanks to the rightholders’ initial authorization. It is a public that must not have been taken into consideration by the rightholders when authorizing the communication.<sup>89</sup> In other words, if the rightholder publishes the work online, anyone can link to it without further permission. As the authorised communication was meant to reach the internet public in its entirety, as much as the communication through linking does, there is no new public. Therefore, no right of communication to the public would be infringed.<sup>90</sup>

This criterion has been further clarified with emphasis on a relative, individualized notion of new public to be taken into account. In *Renckhoff*, the CJEU decided a case focussing on reposting on a different website of a picture that was originally made available elsewhere without access or copy restrictions.<sup>91</sup> *Renckhoff* concerned posting of a picture, which entails reproduction of protected content and making available from a server under the control of the alleged infringer. In clarifying the notion of new public, the CJEU seems to depart from *Svensson*’s conclusions by noting that the posting of the picture on the new website ‘must be treated as making such a work available to a new public’ because ‘the public [initially] taken into account by the copyright holder [...] is composed solely of users of that site *and not* of users of the website on which the work was subsequently published without the consent of the

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<sup>87</sup> *ibid* § 24-28. This is the first CJEU decision considering copyright holders that authorized the initial communication of works on the Internet. See *Peguera* (n 50) 1105 (noting that, although the new public criterion was nothing new for the CJEU, this was actually the first time the CJEU found that there was no new public to which the work is communicated).

<sup>88</sup> *Svensson* (n 13) para 46.

<sup>89</sup> *ibid* para 27.

<sup>90</sup> See *Svensson* (n 13) para 25-27. See also Marco Ricolfi, ‘Comunicazione al pubblico e distribuzione’ (2002) AIDA 77 (anticipating the conclusions of the CJEU). See contra, ALAI (n 4); Mihaly Ficsor, ‘Svensson: Honest attempt at establishing due balance concerning the use of hyperlinks - spoiled by the erroneous ‘new public’ theory’ (5 May 2014) <[http://www.copyrightseesaw.net/archive/?sw\\_10\\_item=63](http://www.copyrightseesaw.net/archive/?sw_10_item=63)>; Jorg Reinbothe and Silke Von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (OUP 2015) 352-353. For a discussion of all these alternative positions and the application of the notion of new public in *Svensson*, see Christof Koolen, ‘The use of hyperlinks in an online environment: putting links in chains?’ (2016) 11(8) JIPLP 585, 586-597; Alexander Tsoutsanis, ‘Why copyright and linking can tango’ (2014) 9(6) JIPLP 495-509 (proposing “nine angles as part of the multi-factor test to determine whether linking is actionable under European copyright law: four policy arguments (harmonization, high level protection, technology neutral, authorization) and five factors (‘making available’, ‘to the public’, ‘new public’, ‘intervention’ and ‘profit’)”).

<sup>91</sup> C-161/17 *Land Nordrhein-Westfalen v Renckhoff* (2018) ECLI:EU:C:2018:634, para 6-12.

rightholder, or other internet users.<sup>92</sup> Therefore, in contrast to *Svensson*, the public taken into account is only the users of the first website rather than all internet users. The CJEU has reconciled this apparent dichotomy by distinguishing *Renckhoff's* posting from *Svensson's* linking and noting that this notion of new public would not apply to linking cases as linking must receive a different treatment to assure the functioning of the Internet.<sup>93</sup> According to the CJEU defining the new public lies on an individualized assessment. While in case of linking, the public seeing the content through linking must be inherently taken into account given the customary functioning of the Internet, in case of posting of content on a different website without authorization and in violation to the right of reproduction that public cannot have been taken into account by the rightholder. Obviously, a rightholder cannot be deemed to take into account a public that is reached in violation of his exclusive rights. Therefore, the standard for triggering violation of the right of communication to the public must be construed in terms of new public taken—or that ought to be taken—into account by a specific rightholder at the time of the initial authorization rather than an absolute notion of new public. This individualized standard for defining the public taken into account has been applied recently by the High Court of England and Wales in *Warner Music v TuneIn*.<sup>94</sup> TuneIn is an online platform enabling its users to access the online feeds of radio stations from around the world by providing hyperlinks to radio streams that are freely available on the Internet. In *TuneIn*, the Court found that the unlicensed provision to UK-based users of links to radio stations that are already licensed in the UK is not an act of communication to the public,<sup>95</sup> while the unlicensed provision to UK-based users of links to radio stations that are not licensed in the UK or are not licensed at all is an act of communication to the public.<sup>96</sup> The Court argued that, for the purpose of triggering infringement of communication to the public of musical recordings in the UK through linking, only UK-based users should constitute the public to be taken into account at the time of initial authorization as radio licencing schemes are territorial and rightholders would inherently take into account only national-based public when authorizing the first communication. In fact, *Renckhoff* and *TuneIn* do not depart from the fundamental rule set up by *Svensson* and earlier CJEU's case law defining the notion of 'new public' but clarify that that notion should be assessed in light of the public taken—or that ought to have been inherently taken—into account by the rightholders at the time of the first authorization. That public could be all Internet users as in *Svensson*, the public of a specific website as in *Renckhoff* or the UK-based users as in *TuneIn* according to an individualized assessment based on the specific circumstances of each case.

### 3.3. *Svensson*: Is Framing a Communication to the Public?

*Svensson* also considers whether framing or deep linking would deserve a special regulatory approach. Because only a link that communicates the work to a “new public” infringes

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<sup>92</sup> *ibid*, para 35 (emphasis added).

<sup>93</sup> *ibid*, para 37 and 40.

<sup>94</sup> *Warner Music UK Ltd & Ors v TuneIn Inc* [2019] EWHC 2923 (Ch).

<sup>95</sup> *ibid* [171].

<sup>96</sup> *ibid* [141], [144] and [160].

copyright, inserting a copyrighted work, freely available elsewhere, on a website through a link using the technique of "framing" cannot be described as "communication to the public" under EU law.<sup>97</sup> As the public does not change, framing—as well as linking—does not entail a new public. Although differences might be critical from an anti-competitive perspective, the CJEU's decision of providing linking and framing with the same treatment appears sound from a copyright perspective.<sup>98</sup> Technically, this is the same communication. A difference lies instead in the users' perception of that communication. However, a technically-savvy user could obviously perceive that content has been linked from an external website. Therefore, to construe that communication taking place while framing as infringing, a personal element should be introduced, which would be attached to the user's perception of the communication, depending on which infringement can be triggered. However, although the CJEU has been recently introducing complementary criteria based on personal elements of culpability to regulate linking to infringing materials,<sup>99</sup> infringement of the right of communication to the public—as well as any other exclusive rights provided for by copyright law—is traditionally construed as a strict liability tort. Therefore, infringement should occur regardless of personal elements of conduct.<sup>100</sup> Also, in this instance, the mentioned personal criteria would be hardly applicable as proof of the users' perception will be difficult to give and that perception will change from user to user. Instead, rather than an infringement of copyright law, deep linking or framing might be construed as anti-competitive practices. The CJEU, while limiting its analysis to copyright infringement, does not exclude the possibility that other remedies might be available, such unfair competition law.<sup>101</sup>

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<sup>97</sup> See *Svensson* (n 13) para 30. Apparently, copyright law would not offer any redress for the practice of framing. However, the ECJ does not exclude the possibility that courts may still sanction this practice under some circumstances as a form of unfair competition.

<sup>98</sup> Contra Alessandro Cogo, 'Note to CJEU, 21 October 2014, *BestWater*, C-466/12, EU:C:2014:76' (2015) AIDA 433, 339 (noting, in accordance with the interpretation of the BGH referring the case to the CJEU, that practical differences between linking and framing matter also from a copyright perspective because the framer would use protected content to "make a communication that is normally distinguishable from the original both in form and content" as the context where the publication occurs would be relevant to trigger this new communication.)

<sup>99</sup> See *infra*.

<sup>100</sup> See, eg, *Borghi* (n 19) 6-7; App Milano [Court of Appeal Milan] 25 February 1997 (1997) AIDA 480 (noting that "[l]a violazione dei diritti d'autore è un fatto oggettivo e non richiede la qualificazione particolare dell'elemento soggettivo" ["copyright infringement is an objective fact and does not require a special qualification of personal elements"]); Nicholas Caddick, Gillian Davies, Gwilym Harbottle, *Copinger and Skone James on Copyright 17th ed* (Sweet and Maxwell 2016) para 7-07 (stating that "[i]t is a characteristic of all [the] rights of the copyright owner that the right is infringed whether or not the defendant appreciated that what he was doing infringed copyright or whether he intended to infringe. Copyright is a proprietary right and is infringed by invasion of the right". See also, for a review of the common law and US position on point, Patrick Goold, 'Unbundling the 'Tort' of Copyright Infringement' (2016) *Virginia L R* 102, 1833; Patrick Goold, 'Is Copyright Infringement a Strict Liability Tort?' (2015) 30 *Berkeley Technology L J* 305 (criticising, actually, the construction of copyright as a strict liability tort and arguing that "copyright infringement in the United States is a fault-based tort, closely related to the tort of negligence"); Bob Sinclair, 'Liability for Copyright Infringement. Handling Innocence in a Strict-Liability Context' (1970) 58(4) *California L R* 940.

<sup>101</sup> See Cogo (n 2) 2207-2208.

### 3.4. C More Entertainment: Is Linking that Circumvents Paywall Protected Content a Communication to a New Public?

After *Svensson*, the ECJ endorsed the conclusion that linking is a communication to the public, if a new public is reached. This conclusion leaves open many complicated questions. For example, what if the copyright owner removes the linked-to material, or puts it behind a paywall? In practice, the links will probably not infringe, because they will be dead, or will direct the web user to the paywall. Another related question is whether publishing a link that allows users to circumvent a paywall or other restrictions put in place to limit public access to a work would be a copyright infringement. As a corollary to the principle enunciated above, *Svensson* obviously concluded that a link enabling users to circumvent a paywall would communicate the work to a new public and would be infringing:

[o]n the other hand, where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation.<sup>102</sup>

Of course, the circumvention makes the content available to a larger—and new—public that that taken originally into consideration by the rightholders.

Somehow, this question was later considered also in *C More Entertainment*, where the ECJ had to decide whether linking to live internet streams of sport events infringed on the exclusive related rights of broadcasting organizations. In this Swedish case, the online broadcaster C More Entertainment challenged the legality of Mr. Sandberg's website hosting links enabling users to circumvent a paywall to watch its live streams of hockey matches.<sup>103</sup> *Svensson* could not reach the question raised in *C More Entertainment* as live streamed sport events were not valid subject matter of protection both under Art. 3(1) and Art. 3(2) of Directive 2001/29/EC. *C More Entertainment* does not own a copyright in the underlying sport event, which does not reach the level of originality required for copyright protection.<sup>104</sup> Instead, C More Entertainment enjoys a related right in the broadcasting of the sport event.<sup>105</sup> However,

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<sup>102</sup> *Svensson* (n 13) para 31.

<sup>103</sup> See C-279/13 *C More Entertainment AB v Linus Sandberg* (2015) ECLI:EU:C:2015:199, para 10-13 [hereafter *C More Entertainment*].

<sup>104</sup> See, eg, *FAPL* (n 57) para 97-99; *National Basketball Assoc v Motorola, Inc.*, 105 F.3d 841, § 19-24 (2nd Cir. 1997).

<sup>105</sup> See Directive 2001/29/EC (n 11) art 3(2)(d) (stating that Member States must provide broadcasting organizations with “the exclusive right to authorize or prohibit the making available” of fixations of their broadcasts to the public, “in such a way that members of the public may access them from a place and at a time individually chosen by them.”)

according to the ECJ, *C More Entertainment*'s live streams of hockey matches would fall out of the scope of the neighbouring rights granted by EU law to broadcasting organizations, which only apply to 'interactive on-demand transmissions' characterized by the fact that members of the public may access them from a place and at a time individually chosen and "that is not the case of transmissions broadcast live on internet."<sup>106</sup> Therefore, the ECJ was asked whether EU law should be interpreted as precluding national legislation from extending the exclusive right of the broadcasting organizations to acts of communication to the public encompassing broadcasts of sporting fixtures made live on internet.<sup>107</sup> Actually, the referral from the Swedish Supreme Court to the CJEU centred on such a norm that had been enacted in Sweden.<sup>108</sup> The ECJ concluded that national legislation may extend the exclusive right of the broadcasting organizations to new acts of communication to the public, such as those encompassing broadcasts of sporting fixtures made live on internet.<sup>109</sup> In sum, *C More Entertainment* confirmed that it would be illegal to publish links allowing to circumvent content access protection measures and extended this finding to neighbouring right not covered by Art. 3(2) of Directive 2001/29/EC.

### 3.5. BestWater: Is Embedding Communication to the Public?

Next, what if the rightholder published the work on one website, but there's an infringing copy on another site? A user links to the infringing rather than authorized copy. Is the linker infringing? In *BestWater*, the Court issued a reasoned order ex Article 99 of the Rule of Procedure of the European Court of Justice,<sup>110</sup> which applied the findings of the *Svensson* decision to this scenario. The case concerned the lawfulness under EU law of the practice of inserting on websites clickable links that use the technique of "embedding"—a form of "framing"—and through which the user was directed to a film on which BestWater maintained the exclusive rights.<sup>111</sup> BestWater manufactures and markets water filter systems. For advertising needs, she produced a short film on the water pollution that was originally published on BestWater website.<sup>112</sup> The film was also available on the video platform YouTube apparently without BestWater's consent. Mebes and Potsch—-independent sales agents who act on behalf of a competitor of BestWater International—allowed the visitors to their websites to view BestWater's film through an embedded web link.<sup>113</sup> The ECJ confirmed that—regardless

<sup>106</sup> *C More Entertainment* (n 103) para 23-27.

<sup>107</sup> *ibid* para 22.

<sup>108</sup> *ibid* para 19.

<sup>109</sup> *ibid* para 37. See also Giancarlo Frosio, (C) More Entertainment for Broadcasters: The European Court of Justice on Linking to Live Streams of Sport Events (*CIS Blog*, 31 March 2015) <<https://cyberlaw.stanford.edu/blog/2015/03/c-more-entertainment-broadcasters-european-court-justice-linking-live-streams-sport>>.

<sup>110</sup> See C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch* (2014) ECLI:EU:C:2014:2315 para 4-5 [hereafter *BestWater*]. See also Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012, Art. 99 <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf)>.

<sup>111</sup> See *BestWater* (n 110) para 2.

<sup>112</sup> *ibid* para 4.

<sup>113</sup> *ibid* para 4-5.

whether the YouTube video to which the defendants linked was also a copyright violation—embedding content from another website does not constitute a communication to the public if the rightholder did not restrict access to the content and communicated it to the whole Internet community.<sup>114</sup>

In truth, *BestWater* presented marked differences when compared to *Svensson*.<sup>115</sup> Actually, the linking via embedding directs to a video uploaded without authorization on YouTube, after having been made available open access on a different website with rightholders' authorization.<sup>116</sup> *BestWater* serves as a good example of potential unfair-competition issues that may emerge with framing, embedding and deep linking. A protected work, which was created for advertising purposes, is communicated to the public to promote competitors' activities. However, although critical differences emerge from a competition perspective, it is harder to distinguish the two cases from a copyright perspective as far as the notion of communication to the public is concerned. Even if the content was uploaded on YouTube without authorization, that video was previously made available open access online by the rightholders, therefore can never be communicated to a *new* public.<sup>117</sup>

It could be argued again that framing or embedding would not change the nature of the communication but merely its perception by the public. Obviously, this line of reasoning can be sustained only equating linking to an unauthorized copy to linking to an authorized copy, as the CJEU seems to do. If an authorized copy is freely available, no new public can subsist. This conclusion might lead to unexpected scenarios, though. What if the copyright owner takes the authorized copy down or protects access to it through technological protection measures? At this point, *the work is no longer available on the site where it was initially communicated* or it is available on that site only to a restricted public, 'while being accessible on another Internet site without the copyright holders' authorization'.<sup>118</sup> According to the court's reasoning, the link that was once arguably legal might suddenly be infringing as it communicates to a new public. If this interpretation of the ECJ's decision is correct, websites could have to constantly monitor that materials they link to are still freely available on some authorized website.

However, seeking infringement of the right of communication to the public is unfit to protect competition in cases of framing. If a new public is necessary for triggering infringement of the

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<sup>114</sup> *ibid* para 20. See also Mezei, 'Enter the matrix: the effects of CJEU case law on linking and streaming technologies' (2016) 11(10) *JIPLP* 778. The principle has been immediately applied by national courts in Europe. See eg Tribunal of Rome 29 November 2016 n. xxx, *Kisstube.tv* (stating that embedding files from YouTube does not entail criminal infringement of copyright law and cannot support an order of seizure of a website).

<sup>115</sup> See *Cogo* (n 2) (noting how the CJEU used a reasoned order and equated framing to linking without properly considering the legal differences between the two techniques); *Borghesi* (n 19) (also criticising the hasty assimilation of linking to framing operated by the CJEU).

<sup>116</sup> See *BestWater* (n 110) para 4. It is, however, unclear how the video was uploaded on YouTube and why *BestWater* did not seek a take-down of the unauthorized copy.

<sup>117</sup> See *BestWater* (n 110) para 16.

<sup>118</sup> *Svensson* (n 13) para 31.

right of communication to the public,<sup>119</sup> there is no room to bend this right to the protection of anti-competitive behaviours that might arise with linking, framing or embedding. In these instances, the communication does not reach a new public, although the unsophisticated viewers might perceive it as originating from a different source than the rightful uploader. From a copyright perspective, this communication might nonetheless entail the violation of moral rights of attribution, which obviously cannot be enforced by the CJEU as EU law has not yet harmonized moral rights.<sup>120</sup> In framing videos on their website, the defendants in *BestWater* would have deceived the public into believing that they created the videos for promoting their clients' business activities.<sup>121</sup> Of course, as mentioned earlier, unfair competition remedies—which are unharmonised at the EU level—can be claimed before a national court.

### 3.6. *GS Media* and Beyond: When is linking to Unauthorized Content a Communication to the Public?

In the fourth episode of the linking saga, *GS Media*,<sup>122</sup> the CJEU must now decide the most critical question, which *Svensson* left unanswered; would a link to materials that the copyright holder *didn't* authorize be communication to the public? What about a link to images that were not properly licensed, or to a leaked document? To a certain extent, this was also the question that was before the 9<sup>th</sup> Circuit in the *Perfect 10* case in 2007. There, the U.S. court decided that links to full-size unauthorized copies of copyrighted pictures from thumbnails in Google Image search engine do not infringe copyright.<sup>123</sup> Following *Svensson's* reasoning, this linking should be infringing as it is directed to a new public or, again, as there cannot be any implied consent. In this scenario, the rightholder either has not authorised the communication to any online public or has authorized the communication to a specific public. In *GS Media*, the defendant is a popular Dutch blog—*GeenStijl* managed by *GS Media*—that posted links to photos meant for publication in the Dutch version of *Playboy* magazine, but which were leaked on an Australian server by an unknown uploader.<sup>124</sup>

<sup>119</sup> Contra this stance taken by the CJEU see ALAI (n 14); Ficsor (n 90); Bernt Hugenholtz and Sam van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a New Public' (2016) 47(7) IIC 797–816; Karapapa, 'The requirement for a 'new public' in EU copyright law' (2017) 42(1) European L Rev 63-81.

<sup>120</sup> See, eg, for a national decision considering moral rights, Attunda District Court *Rebecka Jonsson v. Les Editions de L'Avenir* [13 October 2016] (noting that in the case of a YouTube video was embedded on the website of *L'Avenir*, a Belgian media company, by failing to acknowledge the name of author, the defendant had also infringed the claimant's moral right of attribution).

<sup>121</sup> In a similar fashion, trademark law's 'reverse passing off' describes a situation when parties 'pass off' others' goods and services as their own. In US law, trademark law's 'reverse passing off' have been applied by analogy to provide protection to moral rights that do not otherwise find specific protection under US copyright law. See *Gilliam v. ABC*, 538 F.2d 14 (2nd Circuit 1976); contra *Dastar v. 20<sup>th</sup> Century Fox Film*, 539 U.S. 23 (2003).

<sup>122</sup> See C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* (2015) ECLI:EU:C:2016:644 [hereafter *GS Media*] with case note from Borghi (n 19). See also Rosati (n 60) 1221-1242; Martin Senftleben, 'Copyright Reform, *GS Media* and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?' 2016 (5) *Tijdschrift voor Auteurs-, Media- en Informatierecht* 130, 130-133;

<sup>123</sup> See *Perfect 10* (n 28) 1146.

<sup>124</sup> *GS Media* (n 122) para 9-13.

However, applying *Svensson*'s conclusions literally to unauthorised linking might lead to unwanted consequences. The CJEU seems aware of this possibility when acknowledging the importance of linking for the functioning of the Internet, and for the freedom of receiving and imparting information.<sup>125</sup> In order to protect these superior interests, the CJEU introduced an "individual assessment" featuring "several complementary criteria".<sup>126</sup> The CJEU borrows from consolidated jurisprudence that already spelled out the principle according to which in order to assess the existence of a communication to the public "several complementary criteria, which are not autonomous and are interdependent [...] must be applied both individually and in their interaction with one another".<sup>127</sup> *GS Media* would introduce these criteria to balance a "high level of protection of authors" and a broad interpretation of the right of communication to the public<sup>128</sup> with users' fundamental rights.<sup>129</sup>

In this context, knowledge of the unauthorised illegal nature of the linked content emerges as a primary criterion next to the presence of a new public.<sup>130</sup> Such knowledge—or the knowledge that the link allows to circumvent access restriction to the work where originally published with authorization—would trigger infringement of the right of communication to the public.<sup>131</sup> In *GS Media*, for example, Sonoma noticed GS Media of the infringing nature of the linked material—asking for removal of the link multiple times.<sup>132</sup> However, the CJEU manipulates the construction of the knowledge requirement by introducing the additional accessory criterion of the profit nature of the linking activity in order to facilitate Internet activities and the enjoyment of fundamental rights.<sup>133</sup>

On one side, the CJEU realizes that checking whether contents have been published without authorization or OA by the rightholders elsewhere in the Internet would be too burdensome for the average Internet users, especially given that contents in the linked site can be modified

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<sup>125</sup> *ibid* para 44-45.

<sup>126</sup> *ibid* para e 47.

<sup>127</sup> *Reha Training* (n 64) para 35; C-162/10, *Phonographic Performance (Ireland) v Ireland and Attorney General* [2012] ECLI:EU:C:2012:141, para 30; C-135/10 *Società Consortile Fonografici v Marco dal Corso* [2012] ECLI:EU:C:2012:140, para 79. See also, Justin Koo, 'Walking forward with backward facing feet: the CJEU decision in *Reha Training* and the development of the communication to the public right' (2016) 11(10) *JIPLP* 732.

<sup>128</sup> See *GS Media* (n 122) para 30.

<sup>129</sup> *ibid* para 31.

<sup>130</sup> See *Peguera* (n 50) 1106-1107 (considering how the CJEU tried to justify the introduction of the knowledge requirement as a natural consequence of its previous jurisprudence seeking 'full knowledge of the consequences' of the actions leading to a communication and a 'deliberate intervention' of the user for triggering an infringement of the right of communication to the public).

<sup>131</sup> *Ibid* para 49 and 50.

<sup>132</sup> *ibid* para 9-13.

<sup>133</sup> Cf *Borghi* (n 19) (noting correctly that if there is knowledge, then it becomes irrelevant whether linking is for profit or not). This conclusion is confirmed also by *GS Media* (n 7) para 53 ("copyright holders may act [...] also against any person posting for profit a hyperlink to the work illegally published on that website and, under the conditions set out in paragraphs 49 and 50 of the present judgment, against persons having posted such links *without pursuing financial gain*") (emphasis added).

after linking has occurred without knowledge from the linker.<sup>134</sup> According to the CJEU, therefore, the average internet user does not intervene with full knowledge of the consequences of his conduct when linking to illegal content—which would be a requisite for infringing the right of communication to the public.<sup>135</sup> By deploying this construction of the knowledge requisite, the CJEU, as a general rule, exonerate the majority of Internet users from liability for potential infringement of the right of communication to the public when linking to online content.

However, on the other side, the CJEU also seeks a manner to impose liability on online intermediaries profiting from linking to unauthorised content and having enough resources to cope with the transaction costs of monitoring links to infringing content online. Therefore, the CJEU introduces an additional complementary criterion to reach the goal of imposing liability for linking to infringing content depending on the nature of the linker: when the posting of linking is carried out for profit, there is a rebuttable presumption regarding the knowledge of the illegal nature of the linked content.<sup>136</sup> Professional websites linking to infringing content are under the obligation to carry out the necessary checks to expunge their networks from links to infringing content, otherwise they will be communicating that content to the public.<sup>137</sup>

Obviously, this criterion poses considerable challenges. First and foremost, it draws a blurred line between professional and unprofessional internet users generating profits though online advertisement. According *GSMedia*, a multitude of unprofessional websites—such as blogs, news and political sites, and plenty of pro-bono platforms dedicated to miscellaneous purposes—might be subject to *GSMedia*'s rebuttable presumption, if they collect revenues from advertisement as they customarily do. In this regard, a set of open questions remain apparently unanswered, in particular because the CJEU refers both to the notion of providing links “for profit” and for the “pursuit of financial gain”, which appear to be two distinct concepts. The spectrum of financial gain seems broader than “for profit”. Is every income (even “indirect”) sufficient or a commercial profit is needed? Is attracting more website viewers by including links to popular works considered a form of “financial gain”? Should the linking activity itself be for profit or financial gain or the online outlet where that linking activity occurs?

A literal interpretation of *GSMedia* would lead to believe that the broader spectrum of “financial gain”, rather than “for profit”, would apply as the CJEU makes specific reference to that broader concept and it does so in particular, and solely, in the ruling. Again, as the “pursuit

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<sup>134</sup> *ibid* para 47.

<sup>135</sup> *ibid* para 48.

<sup>136</sup> *ibid* para 51.

<sup>137</sup> *ibid*. However, national courts applying *GSMedia* are arguing that this presumption should apply only in cases in which for profit websites can be reasonably expected to carry on the necessary checks. In a case where the linking activities are performed algorithmically and link to well-known websites (e.g. Amazon.de), the *GSMedia*'s presumption would be economically unjustifiable. See Landgericht (LG) Hamburg, 13 June 2017, case no 310 O 4117/17. This conclusion seems to apply the German property law doctrine of *Störerhaftung* according to the BGH's finding that obligations against online intermediary cannot be imposed if they jeopardize their business model. See BGH *Rolex v Ebay/Ricardo* (a.k.a. Internetversteigerung I) [11 March 2004] I ZR 304/01, GRUR 2004, 860 (DE); BGH *Rolex v eBay* (a.k.a. Internetversteigerung II) [19 April 2007] I ZR 35/04, GRUR 2007, 708 (DE); BGH *Rolex v Ricardo* (a.k.a. Internetversteigerung III) [30 May 2008] I ZR 73/05, GRUR 2008, 702 (DE).

of financial gain” refers specifically to the provision of links, it might be argued that it is the linking activity itself that must produce a financial gain rather than the online business activity at large.

However, a teleological interpretation of the case building upon the CJEU’s reasoning—which is actually emphasizing the need of crafting complementary requirements to protect Internet users’ fundamental rights—might support a different conclusion where a distinction might be first drawn between no profit website collecting revenues from online advertising and for profit website, excluding the former from the applicability of the rebuttable presumption. Otherwise, any attempt to apply an individual assessment to protect users’ fundamental rights would be devoid of practical impact.

Actually, a number of European national courts have been busy at work applying *GSMedia’s* findings.<sup>138</sup> First, a fundamental question has obviously arisen: where does *GSMedia* leave search engines and other information location tools? Should they determine whether every image, video clip, or article on the websites to which they link has been authorized by the relevant copyright holders before providing you a search result? The German Supreme Court has authoritatively answered in the negative and plainly stated that *GSMedia’s* presumption:

does not apply to search engines and to hyperlinks leading to a search engine because of the particular importance of Internet search services for the functionality of the Internet. The provider of a search function cannot be expected to check whether the images found by the search engine in an automated process have been legally posted on the Internet in first place before listing them as thumbnails on its website.<sup>139</sup>

The BGH’s arguments in support of its conclusion seem to mirror those made by the CJEU when choosing an individual assessment that can properly balance intellectual property rights and internet users’ rights. This might confirm a wider applicability of the same conclusions if other national courts were asked to answer the same question.

Multiple national courts, then, have answered the thorniest issue relating to the scope of the notion of “for profit” and “financial gain”. Their conclusions, however, have been inconsistent, especially when deciding whether “financial gain” should specifically be proved in connection to the posting of the links or the website at large. For example, a German court in Hamburg concluded that it is not necessary that the link itself be provided “for financial gain”, e.g. through cost-per-click calculations.<sup>140</sup> It is instead sufficient that the link is provided on a website that is operated for financial gain, i.e. run with the intention to realising profits, irrespective of the commercial impact of the particular link.<sup>141</sup> Similarly, French and Czech

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<sup>138</sup> Multiple national courts have applied *GS Media’s* teachings, finding online platforms and social media liable for linking to infringing content when aware of the illegality of the linked content. See eg Trib Roma [Court of Rome] *Reti Televisive Italiane SpA v Facebook Inc* [15 February 2019] no 3512/2019; Premier League v BT [2017] EWHC 480 (Ch); Jonsson (n 120); Cour d’appel Paris [Paris Court of Appeal] *DM v APP, Microsoft, Sacem et autres* [7 June 2017].

<sup>139</sup> BGH *Vorschaubilder III* [21 September 2017] I ZR 11/16

<sup>140</sup> LG Hamburg, 18 November 2016, case no 310 O 402/16, para 47-48 (involving the linking to an unauthorized derivative work superimposing UFO to a picture of a public building uploaded on the Wikimedia Commons).

<sup>141</sup> *ibid*

jurisprudence concluded that revenue generated from general advertising on the website would qualify for applying to that website the *GS Media*'s rebuttable presumption.<sup>142</sup> In contrast, the Court of Appeal of Athens found for the defendant linking to infringing content by noting that he did not receive profits generated from the transmission of the works per se.<sup>143</sup> It's a thorny issue with which national courts might struggle for some time. In this context, Eleonora Rosati highlights that CJEU jurisprudence might suggest that that financial gain refers to the surrounding environment where the link is offered, rather than the link itself.<sup>144</sup> In *Rafael Hoteles* and *FAPL* has been irrelevant whether the content itself was made available for profit. Rather, the CJEU found that transmitting works from the own establishment of the defendant in order to attract customers makes the profit-making nature of the communication apparent.<sup>145</sup> Although not conclusive, the analogy with the case of linking in *GS Media* has some merit.

#### 4. ZIGGO AND WULLEMS: MAKING BAD PLATFORMS DIRECTLY LIABLE...WHAT NEXT?

This trend towards enhanced liability for professional online outlets stands out in the latest decisions of the CJEU dealing with linking and communication to the public: *Wullems* and *Ziggo*. *Wullems* considered the legal status of a multimedia player carrying preinstalled applications linking to infringing content,<sup>146</sup> while *Ziggo*, reviewed the lawfulness of "ThePirateBay" (TPB), a search engine listing file torrents that allow to download unauthorized content.<sup>147</sup> The CJEU concluded that the concept of "communication to the public" covers both the sale of a player like *Filmspeler* and the making available and management of platforms like *ThePirateBay*.<sup>148</sup> Again, *Ziggo* and *Wullems* align themselves to the recent post-*Svensson* jurisprudence of the CJEU but depart from well-established understanding of European national courts. Before the Dutch Supreme Court referral to the CJEU, the Court of Appeal in The Hague dismissed the case against *Ziggo* and *XS4ALL* under the assumption that it is the users of the services of the access providers, and not TPB, which directly infringe copyright.<sup>149</sup>

Apparently, the CJEU's case law would promote a criterion requiring a looser involvement of the user (i.e. the platform or the intermediary) for infringing the right of communication to the

<sup>142</sup> See *DM v APP* (n 138) [calculating damages as number of copyrighted works x (number of views of each copyrighted work/2) x 2 €]; *Obvodní soud pro Prahu* [District Court Prague] *Sledujserialy.cz* [16 January 2017] 33 T 54/2016.

<sup>143</sup> Εφετείο Αθηνών [Court of Appeal of Athens] (18th section) *Livemovies.gr* [26 April 2017] no 1909/2017.

<sup>144</sup> See Rosati (n 60) 1237-38.

<sup>145</sup> *Rafael Hoteles* (n 52) para 44; *FAPL* (n 57) para 205-206.

<sup>146</sup> See *C-527/15 Stichting Brein v Jack Frederik Wullems* [2017] ECLI:EU:C:2017:300, para 15 (hereafter *Wullems*).

<sup>147</sup> See *C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV* [2017] ECLI:EU:C:2017:456, para 9-11 (hereafter *Ziggo*) (referring specifically to "a system by means of which metadata on protected works which is present on the users' computers is indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof").

<sup>148</sup> See *Wullems* (n 146) para 53; *Ziggo* (n 147) para 48.

<sup>149</sup> See *Gerechthof Den Haag* [Court of Appeal The Hague] *Ziggo & XS4ALL v BREIN* [28 January 2014] ECLI:NL:GHDHA:2014:88.

public: an “essential”, rather than “indispensable”, role of the user would suffice.<sup>150</sup> *Wullems* and *Ziggo* qualified this notion of essential intervention by extending it to circumstances not only where, absent that intervention, customers would not be able to access the work but also where they “would be able to do so only with difficulty”.<sup>151</sup> In particular, *Ziggo* concludes that without the TPB’s operators making the platform available and managing it, the users could not share the works or, “at the very least, sharing them on the internet would prove to be more complex”.<sup>152</sup>

At first sight, these decisions seem to extend the notion of communication to the public dangerously within a domain that should be preserved by the notion of technological neutrality. However, important caveats are in place. According to the CJEU, there are special circumstances that distinguish FilmSpeler and TPB from other service providers and lead to cast upon them enhanced liabilities. First, both *Wullems* and *Ziggo* seems to assume that the defendants have willfully induced copyright infringement.<sup>153</sup> In this regard, the CJEU would repurpose the “inducement theory” that the US Supreme Court introduced in *Grokster*.<sup>154</sup> In that case as well the finding of liability was based on factual evidence, such as email exchanges among platform’s operators planning an aggressive advertising campaign that showed costumers opportunities for downloading unlawful content by using the platform.<sup>155</sup> In a similar fashion, *Ziggo* concludes that ThePirateBay’s “operators expressly display, on blogs and forums available on that platform, their purpose to make protected works available to the users, and encourage the latter to make copies of those works”.<sup>156</sup> Similarly *Wullems* finds that the defendant advertised the player FilmSpeler by claiming that it can be used to watch on a TV screen, easily and for free, protected content made available on the Internet without the authorization of the rightholders.<sup>157</sup>

Never pay for films, series, sport again, watch them directly without commercial breaks or waiting times (no subscription fees, plug&play). This means that Netflix is a thing of the past! [...] Watching films, series, sport free of charge? Yes please! [...] Never go to the movies again thanks

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<sup>150</sup> See *Wullems* (n 146) para 32; *Ziggo* (n 147) para 26 e 37. This distinction might not be clearly spelled out in all national translations, such as the Italian rendering both terms with “imprescindibile”.

<sup>151</sup> *Ziggo* (n 147) para 26.

<sup>152</sup> *ibid* para 36. The Advocate General Szpunar, actually, refers to the role played by websites such as TPB in P2P file-sharing as “crucial” and “unavoidable”. *Ziggo*, Opinion of AG Szpunar (n 61) para 26-27. Szpunar adds that the works made available by users “would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as TPB, which enable works to be found and accessed. The [...] role [of the operators of those sites] may therefore be regarded as necessary”. *ibid* para 50.

<sup>153</sup> See Jane Ginsburg, ‘The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on Brein v. FilmSpeler [C-527/15] (2017) and Brein v. Ziggo [C-610/15] (2017)’ (2017) Columbia Law and Economics Working Paper no 572 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3024302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024302)>.

<sup>154</sup> See *Metro-Goldwyn-Mayer Studios v. Grokster*, 545 U.S. 913 (2005).

<sup>155</sup> *ibid* 924-926 e 937-940 (mentioning how that two companies taken to court by the rightholders, Grokster and StreamCast, sought to harvest the Napster’s user base).

<sup>156</sup> *Ziggo* (n 147) para 45.

<sup>157</sup> See *Wullems* (n 146) para 18.

to our optimised XBMC software. Free HD films and series, including films fresh from the cinema, thanks to XBMC. [...] Are you looking for a Media player so you can watch your favourite films and series FREE OF CHARGE on any TV in HD Full HD or 3D? Then one of our Android Filmspelers (X5 X7 or X9) is right for you! [...] You just connect the Filmspeler to your TV/monitor. Plug and play, easy peasy.<sup>158</sup>

Second, the CJEU seems to assume also that both technologies, Filmspeler and TPB, do not have substantial non infringing uses.<sup>159</sup> According to the evidence collected by the CJEU, the overwhelming majority of the users would be using the TPB platform or the Filmspeler player for accessing protected content without authorisation and infringing copyright.<sup>160</sup>

Arguably, these further criteria—and those spelled out in *GS Media*<sup>161</sup>—qualify the recent CJEU's jurisprudence and delimitate potential liability of online platforms. Absent these factual conditions, it cannot be assumed that other online intermediaries would be liable for infringing the right of communication to the public, although the conduct—and the technology—under review in *Ziggo* closely resembles that of any search engines. Actually, if so narrowly construed, this latest CJEU case law aligns itself with national decisions discussing similar scenarios. At national level, intermediaries have been already held directly liable for their users' copyright infringement under similar circumstances when their involvement in the infringement is so substantial that they have been found to have communicated the works themselves, rather than being used by others to perform the communication.<sup>162</sup>

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<sup>158</sup> See Eleonora Rosati, 'New CJEU reference on linking and copyright: is streaming unlawful content an infringement?' (*IPKat*, 8 October 2015) <<http://ipkitten.blogspot.com/2015/10/new-cjeu-reference-on-linking-and.html>>.

<sup>159</sup> Cf *Sony Corp v Universal City Studios*, 464 U.S. 417 (1984) (affirming the principle that a technology does not infringe copyright law if it is "capable of substantial non-infringing uses". The same principle has been confirmed in Europe by *CBS Songs Ltd v Amstrad Consumer Electronics* [1988] UKHL 15; Hoge Raad [Dutch Supreme Court] 2003, *Kazaa BV*, AN7253 causa No C02/186HR (confirming the legality of the filesharing software Kazaa).

<sup>160</sup> See *Ziggo* (n 147) § 12; *Wullems* (n 146) § 51.

<sup>161</sup> In particular, the knowledge requirement would be the foundation of any liability, which can subsist only if, as the Advocate General clarified, the "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". *Ziggo*, Opinion of AG Szpunar (n 61) para 54. Once the operator of the site has actual knowledge—eg through notification—of the infringement, "its conduct may be regarded as being intended to allow, expressly, the continuation of the illegal making available of that work and, hence, as an intentional action" to the extent that they should be made "simultaneously and jointly" liable with the users for making unauthorized works available to the public. *ibid* para 51 and 53. Also, both *Wullems* and *Ziggo*, emphasise the for profit-making intentions of the defendants. See *Ziggo* (n 147) para 46; *Wullems* (n 146) para 51. However, as suggested by the AG Szpunar, a presumption of knowledge like the one adopted in *GS Media* could not be applied to operators of indexing sites (of P2P networks), which normally operate for profit, as it would amount to a general obligation to monitor the indexed content contrary to Article 15 of the Ecommerce Directive. *ibid* para 52.

<sup>162</sup> See eg *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch) (UK) (finding an indexing website—used for the illegal exchange of copyrighted movies—directly liable for having communicated works to the public because it had "intervened in a highly material way to make the claimants' films available to a new audience, that is to say its premium members," in particular "by providing a sophisticated technical and editorial system which allows its premium members to download all the component messages of the film of their choice upon pressing a button, and so avoid days of (potentially futile) effort in seeking to gather those messages together for themselves"); *Football Association Premier League Ltd v British Sky Broadcasting Ltd & Others* [2013]

The further sensitive question thus remains whether, according to the CJEU, also other platforms, such as UGC platform, would be communicating to the public. In fact, two cases already pending before the CJEU to clarify the matter. On 13 September 2018, the *Bundesgerichtshof* asked the CJEU whether an online video sharing platform, such as YouTube, performs an act of communication to the public when its users upload copyright infringing content to its platform.<sup>163</sup> The German Supreme Court made specific reference to internet video platforms (1) earning advertising revenues, (2) uploading content automatically without the operators review, (3) receiving worldwide, non-exclusive and royalty-free licence for the videos, (4) pointing out in the T&Cs that infringing content cannot be posted, (5) providing tools to rightholders to block infringing content, (6) ranking, categorizing search results and recommending them to users on the basis of previously viewed content, (7) and not being specifically aware of the infringing content or, after becoming aware, expeditiously removing it disabling access to it.<sup>164</sup> In a second case, Elsevier has taken to court Cyando, a shared hosting service, and again the *Bundesgerichtshof* asked the CJEU if Cyando communicates to the public given that, in addition to some of the points above: (1) the service is used for lawful applications but the operator knows that a considerable amount of infringing works is available; (2) there is no directory or search function on Cyando but the download links that the platform provides are posted by third parties elsewhere in the Internet in link collections including information regarding the source files; (3) a remuneration based on number of downloads creates an incentive to upload content protected by copyright; (4) Cyando allows anonymous uploads, increasing the probability of users not to be held accountable. The decision taken by the CJEU will clarify how broad the construction of the notion of communication to the public should be in CJEU's view and whether it should reach beyond Internet players whose business models is based on copyright infringement. Several criteria in the *Cyando's* referral relates to a scenario where the platform's involvement in the infringement is so substantial that both platform and user are jointly liable. Actually, setting up a remuneration scheme based on of downloads that incentivizes upload of infringing content and allowing anonymous uploads resembles closely standards for common design found by UK courts in similar cases.<sup>165</sup>

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EWHC 2058 (Ch) (UK) (finding that—in the case of a link aggregator of unlawfully streamed sport events—(i) the aggregation of a large number of streams (ii) the indexing of those streams for the convenience of the users (iii) the provision of a simple link to click in order to have access to the stream, and (iv) the fact that the stream is presented in FirstRow's frame or window makes the site directly liable for the communication); *FAPL v BT* [2017] EWHC 480 Ch [2017] EWHC 480 Ch [32]-[38] (finding that the operators of streaming servers which are being used to deliver infringing live streams of Premier League footage to UK consumers are communicating to the public; therefore ordering an injunction which required access providers to block access by their customers to these servers).

<sup>163</sup> See *C-682/18 LF v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH*, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018.

<sup>164</sup> *ibid.*

<sup>165</sup> See eg *Twentieth Century Fox* (n 162) (setting up a premium members schemes that made downloading infringing content easier).

## 5. THE DSM REFORM: MAKING ALL PLATFORMS COMMUNICATING TO THE PUBLIC?

However, the EU legislator has rushed forward making perhaps most of the questions just raised moot. In 2015, The EU Commission’s Digital Single Market Strategy (DSMS) announced steps to be taken “towards a connected digital single market” and plans to reform EU copyright and intermediary liability in the digital environment.<sup>166</sup> As part of the DSMS, the Commission presented its platform-sensitive update of the EU copyright policy in a proposal for a Directive on Copyright in the Digital Single Market,<sup>167</sup> which is part of a larger package aiming at modernizing EU copyright rules and achieving a fully functioning Digital Single Market.<sup>168</sup> The draft legislative provision has been subject to numerous amendments and—following its approval by the Parliament—was finally adopted by the Council in April 2019 (“DSM Directive”).<sup>169</sup>

The reform extends the scope of the notion of communication to the public by making Online Content Sharing Service Providers (OCSSPs)<sup>170</sup> directly liable for copyright infringement based on the assumption that they “perform an act of communication to the public or an act of making available to the public” and should “therefore obtain an authorisation from the rightholders”.<sup>171</sup> The reasons for this characterization are quite apparent. If platforms communicate to the public, they can be obliged to enter into licencing agreements.<sup>172</sup> The reform would apply to active user-generate-content (UGC) hosting providers. First, the Directive refers only to those who “store and give access to the public” to copyright protected content—restricting therefore its scope to hosting providers.<sup>173</sup> Second, the content must be “uploaded by its users.”<sup>174</sup> Third, the Directive assumes that hosting providers must play an active role, therefore excluding the application of the hosting liability exemption ex Article 14, eCommerce Directive. It redeploys the language in *L’Oréal v. eBay* by linking the active role to the optimization of the presentation of the uploaded works and the promotion of that content

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<sup>166</sup> See European Commission, ‘A Digital Single Market Strategy for Europe’ COM (2015) 192 final, s 3.3

<sup>167</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market’ COM (2016) 593 final, art 13.

<sup>168</sup> See European Commission, Digital Single Market, Modernization of the EU Copyright Rules, <<http://bit.ly/DSMCopyright16>>. See also European Commission, ‘Promoting a Fair, Efficient and Competitive European Copyright-based Economy in the Digital Single Market’ COM (2016) 592 final.

<sup>169</sup> See Directive 2019/790/EU (n 1).

<sup>170</sup> *ibid* Art 2(6) (defining an OCSSP as “a provider of an information society service of which the *main or one of the main purposes* is to *store and give the public access to a large amount of copyright-protected works or other protected subject-matter uploaded by its users, which it organises and promotes for profit-making purposes*”). (emphasis added).

<sup>171</sup> *ibid* Art 17(1). See also Martin Husovec and Joao Pedro Quintais, ‘How to license Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms’, (2019) SSRN Research Paper Series No. 3463011, 8 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3463011](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463011)> (construing this right as a new EU *sui generis* right that rightholders previously did not own).

<sup>172</sup> *ibid* Art 17(1)-(2)

<sup>173</sup> *ibid* Art 2(6).

<sup>174</sup> *ibid*.

for profit making purposes.<sup>175</sup> In this respect, the Directive further clarifies that the notion of optimising content—and promoting it for profit making purposes—would include amongst others “categorising it and using targeted promotion within it.”<sup>176</sup> In sum, platforms like YouTube, Facebook, DailyMotion would apparently fall within the scope of the provision.<sup>177</sup>

The imposition of direct liability for copyright infringement is combined with an elevated standard of care and due diligence that is exemplified through a three-tiered framework of direct liability.<sup>178</sup> Firstly, OCSSPs are required to make their ‘best efforts’ to obtain the authorization of the relevant copyright owners before communicating any copyright protected content to the public.<sup>179</sup> Secondly, they are required to make their ‘best efforts’ to ensure the unavailability of specific works concerning which rightholders have provided the relevant and necessary information.<sup>180</sup> Thirdly, upon receiving a sufficiently substantiated notice from the rightholders, OCSSPs are required to act expeditiously to disable access or to remove from their websites the particular work and furthermore, to make their ‘best efforts’ to prevent the future upload of that content (i.e. ‘stay-down’ of infringing content).<sup>181</sup> As noted above, the limitation of liability under Article 14 of the EC D is made expressly inapplicable to situations covered under Article 17.<sup>182</sup>

This arrangement represents a radical shift from the prevailing regulatory framework under the ECD that imputes secondary liability based on knowledge and take-down.<sup>183</sup> It also constitutes an extension of the notion of ‘communication to the public’ under EU law which traditionally stressed on the ‘indispensable’ or ‘essential’ role of the user in giving access to a copyright protected work to an additional public. As seen in the previous pages, characterizing hosting providers as “communicating to the public” has never been an obvious conclusion under EU law.<sup>184</sup> Absent all those cumulative circumstances that the CJEU singled out,

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<sup>175</sup> *ibid.* See also *L’Oréal* (n 18) para 116.

<sup>176</sup> See Directive 2019/790/EU (n 1) Recital 62.

<sup>177</sup> However, again, whether this is the case—and in particular whether these platform play an active role leading to a loss of the liability exemption—will be answered at some point in the near future by the CJEU. The *Oberster Gerichtshof* (OGH)—the Austrian Supreme Court—has been asking the CJEU whether Art 14 ECommerce Directive should be interpreted in the sense that an online video platform plays an “active role” when it suggests videos, facilitates search, provides help to users and shows targeted ads. See *C-500/19 Puls 4 TV GmbH & Co. KG v YouTube LLC and Google Austria GmbH*, Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 1 July 2019.

<sup>178</sup> Although a few limitations apply for services (i) available in the EU for less than 3 years, (ii) having an annual turnover below €10 millions and not exceeding 5 million unique visitors per month. See Directive 2019/790/EU (n 1) Art 17(6).

<sup>179</sup> *ibid* Art 17(4)(a).

<sup>180</sup> *ibid* Art 17(4)(b).

<sup>181</sup> *ibid* Art 17(4)(c).

<sup>182</sup> *ibid* Art 17(3).

<sup>183</sup> See Directive 2000/31/EC (n 12) Art 14.

<sup>184</sup> See eg Christina Angelopoulos, ‘On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (2017) 19-33 <[https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos\\_platforms\\_copyright\\_study.pdf](https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf)>; See also Eleonora Rosati, ‘Why a

traditionally, intermediaries have been held secondary liable, rather than primarily. In most EU jurisdiction, secondary liability requires highly demanding conditions that are derived from miscellaneous doctrines of tort law,<sup>185</sup> such as the doctrines of joint tortfeasance, authorization, inducement, common design, contributory liability, vicarious liability, or extra-contractual liability. In contrast, under Article 17, OCSSPs—and therefore the majority of hosting providers—would be automatically assumed to infringe copyright and be held directly liable for acts of copyright infringement that are materially committed by users who upload unauthorized content onto online services provided by them.

## 6. CHANGING INTERNET POLITICS, CHANGING INTERNET ARCHITECTURE

Regulation of communication to the public online—in connection to miscellaneous activities, such as linking, framing, embedding, streaming, filesharing, or user-generated content distribution—has profound repercussion on innovation politics. Recent case law and legislation will obviously affect the digital environment, both in terms of network design and business models. The next few pages will be mapping these dynamics and their effects over online intermediaries and users.

### 6.1. Intermediary Liability Expansion

Arguably, there are sensitive policy choices that affect regulation of communication to the public online, linking and broadly online content regulation. Internet governance and regulation of online intermediaries emerged as a strategic battlefield in the information digital society with huge economic and geopolitical implications. Therefore, recent legal developments can be situated within a trend towards the expansion of the liabilities—and responsibilities—of online intermediaries.<sup>186</sup> This emerging innovation policy choice reversed an earlier approach that provided online intermediaries with substantial liability exemptions to incentivize their capacity to develop Internet infrastructure and applications.<sup>187</sup> Today, due to changed market conditions,

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Reform of Hosting Providers' Safe harbour is Unnecessary under EU Copyright Law' (2016) CREATe Working Paper no 2016/11.

<sup>185</sup> See Kamiel Koelman and Bernt Hugenholtz, Online Service Provider Liability for Copyright Infringement (WIPO Doc. OSP/LIA/1 Rev.1, 22 November 1999) 5-8.

<sup>186</sup> See European Commission, 'Tackling Illegal Content Online. Towards an Enhanced Responsibility of Online Platforms' COM (2017) 555 final, para 3 (establishing the principle that online intermediaries and platforms should ensure a safe online environment for users, hostile to criminal and other illegal exploitation, which should be deterred and prevented by (1) allowing prompt removal of illegal content, (2) encouraging the use of automated monitoring and filtering technology and (3) adopting effective proactive measures to detect and remove illegal content online, rather than limiting themselves to reacting to notices. See also, for a discussion of these global phenomenon, Giancarlo Frosio, 'Why Keep a Dog and Bark Yourself? From Intermediary Liability to Responsibility' (2017) 25 Oxford JLIT 1, 1-33; Giancarlo Frosio, 'Internet Intermediary Liability: WILMap, Theory and Trends' (2017) 13 Indian J of Law and Tech 16.

<sup>187</sup> See James Boyle, Intellectual Property? Two Pasts and One Future, Information Influx International Conference, Amsterdam 2-4 luglio 2014, <[https://www.youtube.com/watch?v=gFDA-G\\_VqHo](https://www.youtube.com/watch?v=gFDA-G_VqHo)> (describing this evolution of Internet policies). See also Bruce Lehman, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (DIANE Publishing 1995) 114-124

policy makers might want to switch the enormous transaction costs of online content regulation to online intermediaries as they might be the least cost avoiders, in particular given their economies of scale.<sup>188</sup> This policy trend has been emerging markedly in Europe. Compared to the United States, Europe has a limited control over Internet resources, thus has less concerns in switching transaction costs of enforcement on online intermediaries, mostly U.S. conglomerates.

Imposing direct liability to online intermediaries and platforms as part of a novel construction of communication to the public and linking in the EU is just one of multiple symptoms of this policy trend. There are plenty other tools that characterize it. In particular, enhanced responsibilities for online intermediaries result from proactive monitoring obligations, automated monitoring and filtering,<sup>189</sup> voluntary measures,<sup>190</sup> administrative enforcement of copyright online,<sup>191</sup> widespread use of blocking orders ex Art. 8(3) of Directive 2001/29/EC and 11 Dir. 48/2004,<sup>192</sup> and extra-territorial application of court ordered obligations against intermediaries.<sup>193</sup> In addition, this trend—and the deployment of most of the measures just

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<<https://eric.ed.gov/?id=ED387135>> (noting that “the best policy is to hold the service provider liable [ . . . ] Service providers reap rewards for infringing activity. It is difficult to argue that they should not bear the responsibilities”).

<sup>188</sup> See eg Cour de cassation *SFR, Orange, Free, Bouygues télécom et al v Union des producteurs de cinéma et al* [6 July 2017] no 909 (FR) (imposing proactive monitoring obligations to several search engines and establishing that the related costs must be borne by the intermediaries). See also, for further case law imposing monitoring and filtering obligations to online intermediaries, Giancarlo Frosio, ‘The Death of ‘No Monitoring Obligations’: A Story of Untameable Monsters’ (2017) 8(3) JIPITEC 199-215.

<sup>189</sup> See Giancarlo Frosio, ‘To Filter or Not to Filter? That is the Question in EU Copyright Reform’ (2017) 36(2) *Cardozo Arts & Entertainment L J* 101-138; Frosio (n 188); Giancarlo Frosio, ‘Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy’ (2017) 112 *Northwestern U L Rev* 19, 36-38; Giancarlo Frosio, ‘From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe’ (2017) 12(7) *Oxford JIPLP* 565, 569-570.

<sup>190</sup> See Frosio, ‘Why Keep a Dog and Bark Yourself?’ (n 186) 25.

<sup>191</sup> See, for more context regarding administrative authorities enforcing intellectual property right online and other miscellaneous forms of online infringement against intermediaries, Frosio, ‘Internet Intermediary Liability’ (n 186) 33-35.

<sup>192</sup> See Husovec (n 18); Christophe Geiger and Elena Izyumenko, ‘The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking’ (2016) 32 *American Int’l L Rev* 43; Pekka Savola ‘Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers’ (2014) 5 *JIPITEC* 116; Pekka Savola, ‘Blocking Injunctions and Website Operators: Liability for Copyright Infringement for User-generated Links’ (2014) 36 *EIPR* 279, 279-288; Martin Husovec, ‘Injunctions Against Innocent Third Parties: Case of Website Blocking’ (2013) 4(2) *JIPITEC* 116, 116-129.

<sup>193</sup> See *X v Twitter* [2017] NSWSC 1300 (AU), (ordering Twitter to filter contents across all Internet domains); *Google Inc v Equustek Solutions Inc* 2017 SCC 34 (CA) (ordering Google to de-index across all Internet domains a website violating IP rights in British Columbia; Commission Nationale de l'Informatique et des Libertés deliberation of 10 March 2016, no. 2016-054 (FR) (ordering Google to de-index any content that infringes upon the right to be forgotten not only on national or .eu domains but on .com as well). See also Michael Geist, ‘The Equustek Effect: A Canadian Perspective on Global Takedown Orders in the Age of the Internet’ in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP, forthcoming 2019); Dan Svantesson, ‘Internet Jurisdiction and Intermediary Liability’ in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP, forthcoming 2019); Dan Svantesson, ‘A Jurisprudential Justification for Extraterritoriality in (Private) International Law’ (2015) 13(2) *Santa Clara J Int'l L* 517; Dan Svantesson, ‘Between a Rock and an Hard Place - An International Law Perspective of the Difficult Position of Globally Active Internet Intermediaries’ (2014) 30 *Comp L Sec Rev* 348;

mentioned—extends well beyond copyright or IP enforcement, reaching the sanitization of any potentially illegal content online.<sup>194</sup>

In this respect, the expansion of the making available and communication rights and the politics of linking strengthen a general trend, especially marked at the EU level, imposing enhanced obligations and responsibilities to online intermediaries and platforms, who are called to bear the costs of content regulation in the Internet. *GS Media's* emphasis on for profit professional online outlets can be construed as turning point exemplifying this policy approach. *GS Media* sets apart non-professional online users from professional Internet players for purposes of Internet content regulation. It concludes that professional online service providers must be held directly liable for the very reason that they have the technical and economic means for efficiently monitoring the Internet for links to allegedly infringing content, therefore being best placed for curbing online infringement as “least-cost avoiders”.<sup>195</sup> Obviously, the recent copyright reform in the DSM—and its overall goal of closing a value gap between online platforms and right holders—should be construed as an additional moment of this policy development. In truth, multiple instruments that have been implementing the DSM Strategies have endorsed a policy approach that seeks enhanced involvement of Internet intermediaries in content regulation online.<sup>196</sup>

## 6.2. The Road to Harmonisation or Hybridisation?

Traditionally, communication to the public depends on the degree of control over the work made available.<sup>197</sup> Therefore, only those exercising that power of control could infringe copyright directly. Otherwise, there was accessory—or secondary—infringement that triggered secondary liability. Linking activities, for example, have been long construed as providing only mere support to others making content available and thus triggering secondary liability. Actually, for a long time, the CJEU case law required an indispensable contribution of the user—i.e. the linking party or the platform operator—then recanting this construction to endorse the notion of an essential role of the user merely facilitating access to the infringing works. This relaxation of the concept of 'indispensable intervention' has broadened the notion of who makes an act of communication to the public, which expands third-party intermediary liability for online infringement.<sup>198</sup>

In taking its new stance, the CJEU jurisprudence contaminates direct liability for copyright infringement with criteria usually required in a secondary liability scenario. Traditionally, liability for copyright infringement is construed as strict liability that applies regardless of

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<sup>194</sup> See Frosio, ‘Why Keep a Dog and Bark Yourself?’ (n 186) 12-32.

<sup>195</sup> See Reinier Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy’ (1986) *J L Econ & Organization* 53, 53-104; Guido Calabresi, ‘Some Thoughts on Risk Distribution and the Law of Torts’ (1961) *70 Yale L J* 499; Ronald Coase, ‘The Problem of Social Cost’ (1960) *3 J L & Econ.* 1.

<sup>196</sup> See eg European Commission. ‘Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms’ COM (2017) 555final. See also Frosio, ‘Why Keep a Dog and Bark Yourself?’ (n 186) 13-15.

<sup>197</sup> See Borghi (n 19) 6-7; Arezzo (n 2) 554.

<sup>198</sup> See Rosati (n 60) 1221.

subjective elements.<sup>199</sup> In contrast, secondary liability depends on subjective elements—often related to the knowledge of the infringing activity or for-profit motives—and negligent or omissive conducts that might facilitate or aggravate the infringement.<sup>200</sup> Instead, the most recent CJEU case law seems to conclude that—in case of linkers, operators of certain platforms and sellers of certain digital devices that can be used to infringe copyrights—a number of subjective criteria, such as (1) the knowledge of the infringement, (2) a for-profit motive that makes such knowledge presumed, and (3) a wilful conduct to induce or facilitate copyright infringement, become relevant to operate the “individualized assessment” required by the court for finding whether an infringement of the right of communication to the public has occurred.

Therefore, the latest CJEU jurisprudence dealing with communication to the public and infringement in the digital environment witnesses the emergence of a hybrid regime at the intersection of primary and secondary liability.<sup>201</sup> Copyright primary liability’s objective criteria become entangled with subjective criteria of extra-contractual or tort liability. This expansion—and hybridization—of the right of communication to the public occurs for two main reasons. There is first a structural reason. Lack of EU harmonization of secondary liability for copyright infringement leads the court to seek a common solution to avoid that “liability, and ultimately the scope of the copyright holders’ rights, would depend on the very divergent solutions adopted under the different national legal systems”.<sup>202</sup> Ultimately, the CJEU believes that seeking a solution to online copyright infringement in unharmonized national secondary liability doctrines would undermine the objective of the EU legislature to harmonise the substantial scope of the rights enjoyed by authors and rightholders within the single market.<sup>203</sup> Therefore, the CJEU, in a way, pushes its own harmonized construction of the *acquis communautaire* to fill in loopholes left unaddressed by the legislators.<sup>204</sup>

The second reason is substantial. The CJEU is seeking a solution that can balance authorship rights with other competing fundamental rights. For this very reason, the notion of communication to the public includes any act facilitating access to protected works but its

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<sup>199</sup> See eg Borghi (n 19) 2137-38; App. Milano (n 100); Caddick, Davies, e Harbottle (n 100) s 7-07; Goold, ‘Unbundling the ‘Tort’ of Copyright Infringement’ (n 100).

<sup>200</sup> As mentioned, such criteria have not been harmonized at EU level but depends on fragmented national legislation and case law. See (n 18).

<sup>201</sup> See Pekka Savola, ‘EU Copyright Liability for Internet Linking’ (2017) 8(2) JIPITEC 139, 141-143 (mentioning a “de facto harmonization of secondary liability”).

<sup>202</sup> *Ziggo*, Opinion of AG Szpunar (n 61) para 3. See also Raquel Xalabarder, ‘The role of the CJEU in harmonizing EU copyright law’ (2016) 47(6) IIC 635-639.

<sup>203</sup> *Ziggo*, Opinion of AG Szpunar (n 61) para 3.

<sup>204</sup> See Ginsburg and Budiardjo (n 26) 163-170 (labelling this CJEU jurisprudence as ‘Harmonization of the Law of Communication to the Public as Applied to the Facilitation of Infringement by Hyperlinks and Other Means’). See also Borghi (n 19) 1337-38 (noting that, instead, the CJEU might have applied by analogy EU law that already addresses the issue of secondary liability as in the case of art. 7 of Directive 2009/24/EC regulating software programs, as it has been done with the notion of originality that, from vertical legislation dedicated to databases, software and photographs, was ported horizontally to all copyright subject matters by CJEU jurisprudence; otherwise, the CJEU might have recognised its own incompetence, leaving the matter to national law as the CJEU has done in *Circul Globus București* (n 51) and *C-30/14 Ryanair v PR Aviation* (2015) ECLI:EU:C:2015:10).

infringement is limited by subjective elements, such as actual or presumed knowledge, for-profit motives and wilful conduct inducing infringement. In doing so, however, the CJEU forces the EU legal framework to a point of structural tension by blurring established doctrinal conclusions and thus unleashing unpredictability.<sup>205</sup> In a similar context,<sup>206</sup> a dissenting opinion from the US Supreme Court spelled out its concerns in applying copyright direct liability in domains traditionally regulated by secondary liability doctrines by noting that “disregarding widely accepted rules for service-provider liability [...] will sow confusion for years to come”.<sup>207</sup>

### 6.3. Internet Regulation and Fundamental Rights

These policy choices have important consequences on competing fundamental rights.<sup>208</sup> Departing from traditional approaches construing linking that violates copyright as tort-based secondary infringement, the recent CJEU case law reads linking as a copyright-relevant communication, which triggers a direct infringement of the right of communication to the public if it is directed to a new public. Pragmatically, the CJEU develops, through abundant case law, a flexible regulation according to specific factual and subjective circumstances in order to assure the balancing of competing fundamental rights. This approach results in the construction of an hybrid model introducing several secondary liability subjective criteria next to the common primary liability objective criteria. This model allows linking from non-professional Internet users, while imposing additional liability and obligations on professional users, such as information society service providers. Such a pragmatic approach would like to preserve freedom of expression and information in the Internet by carving out a liability-free space of manoeuvre for generic Internet users. However, imposing more direct liability to online intermediaries and platforms for their users’ behaviour might also create negative externalities for society at large by causing “chilling effects” and thus limiting freedom of expression, especially if online enforcement occurs through algorithmic tools. In addition, it might create further negative externalities—especially for players with limited market power—by restricting freedom of business and relenting innovative processes as a result of the costs of monitoring and filtering.

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<sup>205</sup> Cf Peguera (n 47) 1117 (noting that ‘conflating direct and indirect infringement gives rise to doctrinal inconsistencies’).

<sup>206</sup> See *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 573 U.S. \_\_\_ (2016) (extending the infringement of the exclusive right to publicly perform to a service called Aereo, which allowed its users to receive on internet-connected devices copyright protected tv programs when users enter their credentials to access the service, select a channel and press “watch”).

<sup>207</sup> *ibid*, Scalia, J., dissenting, 1.

<sup>208</sup> Consideration should be given to the provisions included in the European Charter of Fundamental Rights, such as, on one side, Article 17 protecting property and intellectual property in particular and, on the other side, Articles 11, 13 and 16, which protect freedom of expression, freedom of the arts and sciences and freedom to conduct a business. See Charter of Fundamental Rights of the European Union (2012) OJ (C 326)391, Art 11, 13, 16-17.

### 6.3.1. Balancing Copyright Expansionism with Fundamental rights: A Ray of Hope...

Apparently, recent CJEU jurisprudence might stand for a maximalist copyright approach that surfaces from the constant reference to high levels of protection.<sup>209</sup> In this respect, this expansive construction of the notion of communication to the public follows in the footsteps of a recurrent attempt of rightholders to leverage their monopoly power over new uses made possible by technological innovation,<sup>210</sup> linking being just one recent example, among many others.<sup>211</sup>

Actually, there is more to it. Copyright expansionism offers only a partial view of the EU jurisprudential evolution. There is next to it a progressive perspective, which is rebalancing regulation of online content. *GS Media* emphasises the need to balance property rights with competing fundamental rights, such as freedom of expression and information and users' rights. Furthermore, *GS Media* concerns itself with safeguarding the functioning of the Internet as a fundamental tool to guarantee personal realization and exchange of information and opinions.<sup>212</sup> In this respect, *GS Media* signals a critical moment in the evolution of the EU jurisprudence. It embraces a progressive vision of copyright and cultural policies that focuses on public interest and user's access to content, rather than on a perspective purely individualistic and proprietarian.

This development has been steadily taking place since a "fair balance" approach was sought in the *Promusicae* case.<sup>213</sup> In *UPC Telekabel*, the CJEU stated that in order to strike that "fair balance" between competing fundamental rights, measures to be applied, such as blocking orders, most "not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and [...] have the effect unauthorized access [...] or , at least, of making it difficult to achieve".<sup>214</sup> *L'Oreal, Scarlet* and *Netlog*, the CJEU banned general monitoring obligations by highlighting their disproportional negative externalities over

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<sup>209</sup> See CJEU jurisprudence cited.

<sup>210</sup> See Hannibal Travis, 'Building Universal Digital Libraries: An Agenda for Copyright Reform' (2006) 33 Pepp L Rev 761, 786–92 (sketching a quick history of holdouts on cultural technological advancements).

<sup>211</sup> See eg *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908) (piano rolls); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (cable television); *Amstrad Consumer Electronics Plc v. British Phonographic Industry Ltd.* [1986] AC 159 (UK) (tape recorders); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (VHS recorder); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (radio); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (peer to peer software); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (peer to peer software); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349 (S.D.N.Y. 2000) (mp3 music format); *Perfect 10 (n 28) 1146* (search engines and digital thumbnails); *Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 29, 2010, Vorschaubilder, I ZR 69/08 (Ger.)* (ruling that Google Image Search does not infringe copyright); *Capitol Records, LLC v. ReDigi Inc.*, 934 F.Supp.2d 640 (S.D.N.Y. 2013) (holding that users do not have the right to resell digital music on ReDigi, even though it features an innovative cloud service technology that verifies the legitimacy of a digital music file before it can be uploaded for storage).

<sup>212</sup> See *GS Media* (n 122) para 31 and 45.

<sup>213</sup> *C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU* (2008) ECLI:EU:C:2008:54, para 70..

<sup>214</sup> *C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] EU:C:2014:192, para 62. See also Geiger and Izyumenko (n 192) 43.

fundamental rights, such as the right to receive and impart information, the right to privacy and freedom of business.<sup>215</sup>

Finally, a recent trifecta of CJEU decision has placed fundamental rights and exceptions and limitations—thus the public interest perspective of the copyright paradox—at the center stage, noting *inter alia* that, in striking a balance between exclusive rights of the author and the rights of the users, a court must “rely on an interpretation [...] which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union [“(“Charter”)”].<sup>216</sup> In addition, the level of protection of fundamental rights provided by the Charter—as well as the primacy, unity and effectiveness of EU law—can never be compromised by national implementations or national courts’ application of national standards.<sup>217</sup> For Geiger and Izyumenko, this recent jurisprudence is contributing to a “constitutionalization” of intellectual property with the influence of fundamental rights on the scope of exceptions and limitations never being so relevant.<sup>218</sup> However, the CJEU does not go as far as implementing an external freedom of expression defense, which would undermine EU law harmonization and certainty. The CJEU clearly spells out that “[f]reedom of information [is] not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author’s exclusive rights of reproduction and of communication to the public”.<sup>219</sup> In a way, recent CJEU jurisprudence on regulation of content in the Internet exposes—and addresses—a growing tension between fairness and personality theories, on one side, and welfare and cultural theories on the other side, with the latter being increasingly relevant in the EU law IP discourse.<sup>220</sup>

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<sup>215</sup> See *L’Oréal* (n 18) para 139; Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECLI:EU:C:2011:771; C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECLI:EU:C:2012:85.

<sup>216</sup> C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (2019) ECLI:EU:C:2019:623, para 76; C-516/17 *Spiegel Online GmbH v Volker Beck* (2019) ECLI:EU:C:2019:625, para 59. See also C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* (2019) ECLI:EU:C:2019:624.

<sup>217</sup> See eg *Funke Medien* (n 216) para 79-80.

<sup>218</sup> See Christophe Geiger and Elena Izyumenko, ‘The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, But Still Some Way to Go!’ (2019) IIC 1-25 (online first) <<https://link.springer.com/article/10.1007/s40319-019-00901-1>>. See also Christophe Geiger and Elena Izyumenko, ‘Towards a European ‘Fair Use’ Grounded in Freedom of Expression’ (2019) 35(1) *American U Int’l L Rev* 1, 1-74; Christophe Geiger, ‘“Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’ (2006) 37(4) IIC 371, 371-406.

<sup>219</sup> See *Funke Medien* (n 216) para 64; *Spiegel Online* (n 216) para 49.

<sup>220</sup> See Terry Fisher, ‘Theories of Intellectual Property’ in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) (distinguishing between (1) fairness theory or Lockean natural law property theory, (2) personality theories, characterizing the civil law tradition and rooted in German idealism, (3) welfare theory, based on Bentham and Mill’s utilitarianism and economic analysis of law and (4) cultural theory, aiming at promoting more distributive justice).

### 6.3.2. ...in the Darkness: Innovation, Competition and Globalization

Direct liability for linking and other making available online constricts freedom of business by imposing more responsibility on online intermediaries and, thus, more transaction costs. Given that knowledge of infringement is presumed for professional Internet users operating for profit, online intermediaries and platforms will be de facto under the obligation of monitoring their networks to take down links to allegedly infringing content. As the CJEU stated multiple times, unlimited and generalized monitoring might result in a serious limitation of freedom of business.<sup>221</sup>

The recent CJEU jurisprudence might result in a contraction of innovative business models based on linking activities, which represent a core process of the Internet. In this respect, the policy approach endorsed by the CJEU and recent EU copyright legislation might weaken the DSM, rather than promoting it, by limiting market innovation capacities and foreign investments. Globalization makes this policy approach even more troubling from a market innovation and investment perspective. Innovators and investors might decide to localize their activities in jurisdictions that do not burden linking-based innovation with obligations and specific liability.

In addition, from a specific EU market perspective, recent obligations might put the European high-tech industry and innovators at a competitive disadvantage as they lack proprietary software solutions to monitor their networks in order to limit or avoid liability. In contrast, this technology has been already developed and widely deployed by overseas high-tech conglomerates. European start-ups will be forced to face additional costs for software development or licence technological solutions from competitors already established on the market.<sup>222</sup>

### 6.3.3. Towards Algorithmic Enforcement

Algorithmic enforcement is a further consequence of recent CJEU jurisprudential trends and legislative reforms expanding notions of communication to the public, regulating linking activities and imposing enhanced liabilities and duties of care on online intermediaries and platforms.<sup>223</sup> Lessig and others have explained that the code is the law of cyberspace.<sup>224</sup> Therefore, enforcement can become implicit by modifying the architecture of the Internet.<sup>225</sup> Increasingly, policy making seeks to turn the internet into a space of control rather than access and openness. New legislative obligations and judicial trends would like to force online

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<sup>221</sup> See *Netlog* (n 215) para 46.

<sup>222</sup> See Martin Senftleben, 'EU Copyright Reform and Startups – Shedding Light on Potential Threats in the Political Black Box' (March 2017) 5-9 <<http://www.innovatorsact.eu/wp-content/uploads/2017/03/Issues-Paper-Copyright-Directive-2.pdf>>.

<sup>223</sup> See Frosio, 'Why Keep a Dog and Bark Yourself?' (n 186) 22-27.

<sup>224</sup> See Lawrence Lessig, *The Code and Other Laws of Cyberspace* (Basic Books 1999) 3-60; William Mitchell, *City of Bits: Space, Place, and the Infobahn* (MIT Press 1995) 111. See also Lawrence Lessig, *Code: Version 2.0* (Basic Books 2006).

<sup>225</sup> See Joel Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology' (1998) 76 Texas L. Rev 553.

intermediaries to implement architectural changes leading to sanitisation of allegedly infringing content—possibly legit freedom of expression—by design. Given the unsustainable transaction costs related to manual checking of infringing content and linking to infringing content, online intermediaries will be forced to deploy algorithmic tools to perform monitoring and filtering, and limit their liability.<sup>226</sup>

As the CJEU made clear in *Scarlet* and *Netlog*, automated filtering tools cannot properly balance intellectual property rights and other competing fundamental rights, such as freedom of expression, freedom of business and privacy.<sup>227</sup> In particular, present algorithmic filtering tools impinge upon freedom of expression as they might be unable to identify uses made by applying exceptions and limitations or might not discern the public domain status of works.<sup>228</sup> Again, algorithmic enforcement appears to be inherently unsuitable to apply “fair use” doctrines, which require an equity—thus inherently human—judgement.<sup>229</sup>

Automated and algorithmic copyright enforcement implies a number of policy choices, which are operated by platforms and rightholders and subject freedom of expression and online cultural participation to a new layer of “private ordering”.<sup>230</sup> In practice, automated filtering determine online behaviour far more “than whether that conduct is, or is not, substantively in compliance with copyright law”.<sup>231</sup> A legal system switching the liability equilibrium on online intermediaries—which can more than any other manipulate Internet architecture—can actually lead to fundamental architectural changes to limit that liability. This process might likely bring about pervasive over-enforcement, which becomes invisible and leads users to get accustomed to an online ecosystem with less links, less access, less freedom of expression and less innovation.

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<sup>226</sup> See, for a discussion of this very issue in connection to the enactment of Art. 17 of Directive 2019/790/EU, references in (n 189).

<sup>227</sup> See eg *Netlog* (n 215) para 51; *C-70/10 Scarlet Extended SA v SABAM* (2011) ECLI:EU:C:2011:771, para 53. See also Art. 52 (1) of the Charter: “any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

<sup>228</sup> *Netlog* (n 215) para 50.

<sup>229</sup> See Dan Burk and Julie Cohen, ‘Fair Use Infrastructure for Copyright Management Systems’ (2000) Georgetown Public Law Research Paper 239731/2000 <[ssrn.com/abstract=239731](https://ssrn.com/abstract=239731)>.

<sup>230</sup> See Matthew Sag, ‘Internet Safe Harbors and the Transformation of Copyright Law’ (2017) 93 *Notre Dame L Rev* 1.

<sup>231</sup> *ibid*