

# Pravo priopćavanja javnosti u autorskom pravu EU - pitanje odgovornosti

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COMMUNICATION TO THE PUBLIC RIGHT IN EU COPYRIGHT LAW –  
THE QUESTION OF LIABILITY

Master Thesis

Mentor: dr. sc. Antonija Ivančan

Zagreb, October 2023

## Izjava o izvornosti

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Vilim Ilić, v.r.

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## 1. Introduction

Copyright-protected works are more accessible than ever. Books, movies, TV shows, and music are consumed by a large number of people every day, largely because the Internet has made them very easy to get a hold of. Some of those works are being accessed legally, either through purchases or through subscriptions to streaming platforms, or even accessed for free on various websites. However, a non-negligible part of consuming these works comes from illegal sources. Copyright infringement has existed for as long as copyright has existed, but before the Internet and the information revolution battling it was much easier. On the one hand, there are legitimate rights of the copyright holders that are being violated, but on the other hand, protecting those rights means sometimes interfering with other rights, such as the right to freedom of information, and freedom of expression. The focus of this paper is one of the rights granted by copyright and that is the right of communication to the public, and how the Court of Justice of the European Union (hereinafter: the Court) defines and interprets different aspects of this right, as well as how the criterion of the profit-making nature is the determinant criterion.

The paper consists of two main parts, the first one concerns the right of communication to the public within the context of The Information Society Directive (hereinafter: the InfoSoc Directive).<sup>1</sup> Firstly, all of the conditions that are needed for an act to be considered an act of communication to the public will be defined, and nuances of different types of these conditions will be explained, as well as criteria which the Court uses to determine the existence of these conditions. As each of the conditions and criteria are introduced in subchapters, case law concerning them will be analysed, and advantages and drawbacks of each criterion will be discussed. After an analysis of the case law, the last subparagraph of the chapter will focus on the profit-making criterion, and examine the impact of using it as a decisive criterion for determining acts of communication to the public, as opposed to other criteria, most notably the definition of the concept of the public, and communication using specific technical means.

The second part of this paper concerns secondary liability of intermediaries in cases regarding the right of communication to the public. The focus of this chapter will be how the Court established intermediary liability and the criteria it used to determine it. Following this, the chapter will

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<sup>1</sup> European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Infosoc Directive).

examine the Digital Single Market Directive,<sup>2</sup> which regulated the conditions under which online content-sharing service providers which can become liable as intermediaries in cases of communication to the public. The chapter will start by defining online content-sharing service providers, as well as the conditions for establishing such a liability and the obligations the online content-sharing service providers have to meet in order to free themselves of liability. This will be followed by a comparison of relevant case law, firstly referencing cases which do not concern online content-sharing service providers, but which do concern intermediary liability, and then a case in which secondary liability of online content-sharing service providers is the main issue. The analysis will examine how the case would have been decided if the Court judged it using the Digital Single Market Directive compared to how it was judged using the Information Society Directive. The final subchapter of this part will explore how social and economic factors other than the legal aspect influence copyright infringement.

## **2. The Communication to the public**

One of the rights harmonised at the European Union level regarding copyright protection is the right of communication to the public. It is mentioned in Article 3(1) of the InfoSoc Directive in the following context: “Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”<sup>3</sup> It is apparent that the right of communication to the public is defined rather vaguely, so it is up to the Court to additionally clarify what the terms in this definition mean, and how are they going to be used in individual cases in practice. The Court first does this in *ITV Broadcasting*, a case involving an internet broadcasting television service, which enabled its users to watch live streams of television broadcast over the Internet. Users could access these live streams only if they already possessed a valid TV licence, meaning that they already had the permission to access the initial television broadcast in order to access the internet live stream. In this case, the Court states that the act of communication to the public consists of two parts that need to be examined separately; the “act of

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<sup>2</sup> European Parliament and Council Directive 2019/790 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 L130/92 (The Digital Single Market Directive).

<sup>3</sup> Article 3(1) The InfoSoc Directive.

communication” as the first part, and the “public” as the second.<sup>4</sup> This stance has later been cited in other cases, like *Svensson*, a case concerning a website that provides clickable links to articles which are published by other websites. Even though the two conditions need to be examined separately, the Court states that they need to be fulfilled cumulatively.<sup>5</sup> Plainly put, in order for an act of communication to the public to be committed, a transmission which is considered an act of communication has to be communicated to a group of people which are considered a public. The following subchapters offer more detailed explanations of different types of these conditions, and in which situations the Court considers them fulfilled.

## 2.1 The right to make available to the public

Another term important to distinguish is the right to make works available to the public (hereinafter: the making available right). The right is a part of a wider right of communication to the public. As defined in the article from the InfoSoc Directive above, the right of communication to the public includes “[...] the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”<sup>6</sup> In other words, this means that the public can access the works on demand. It is important to note that both the place and time need to be chosen by the user. So, if the user can choose a place, but not the time of access to the work, the act may be covered by the right of communication to the public, but it will remain outside of the making available online right. “This right is relevant for the person (or entity) that makes the work accessible to the public and not for the member of the public that accesses the work. The act of the latter will probably be covered by the right of reproduction unless it is exempted by an exception or limitation.”<sup>7</sup> The Court covered this right in the case *SCF*, where the question was whether broadcasting music by radio signal in a private dentist’s office was a case of making the works available to the public. The Court ruled that this was not the case, explaining that the act of making works available to the public “is intended to refer 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 by them.”<sup>8</sup> Plainly put, this means

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<sup>4</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14, paras 21 and 31.

<sup>5</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76, para 16.

<sup>6</sup> Art 3(1) The InfoSoc Directive.

<sup>7</sup> Irini Stamatoudi and Paul Torremans, *EU Copyright Law - A Commentary* (2nd edition, Edward Elgar Publishing 2021), para 11.25.

<sup>8</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140, para 59.

that the case was not covered by the making available right, as the patients which came to the dentist's office could not choose the time of the transmission by themselves. This issue is further expanded upon in the case *C More*, where it was ruled that live broadcasting a hockey game without permission of the copyright holder was also not a case of making works available to the public, because the users that watched the game could not choose the time when they will watch the game in question.<sup>9</sup> In these two cases, the Court made it clear that the most important element in differentiating the right to make available to the public from the right of communication to the public is the element of accessing the works at a time and place chosen by the viewer or listener. More specifically, in *SCF*,<sup>10</sup> the fact that listeners could not access music that they specifically wanted to listen to, but rather only listen to a live broadcast when they happened to be in the dentist's office was the decisive element for the Court's decision. By the same logic, in *C More*,<sup>11</sup> viewers that watched the hockey match via the link provided by the defendant could only do so at the time the hockey game was being broadcast, and not afterwards at a time of their choosing.

Another important case to understand the right to make works available to the public on demand is *Svensson*. This case sparked a lot of controversies when the Court decided that providing a hyperlink to a protected work should be considered as "making available online on demand", which means that the Court views it as an act of communication.<sup>12</sup> This decision is problematic because of the fact that providing hyperlinks should not be considered an act of communication per se. An act of communication happens when a work is published without the consent of the copyright holder. The hyperlink that leads a user to a web page that contains said works merely points to a location where a work is already posted, i.e. communicated. This leads to the conclusion that the work to which a particular hyperlink points was already made available because if the hyperlink in question did not exist, a member of the public could still access the work, as the InfoSoc Directive defines "[...] at a time and a place individually chosen by them".<sup>13</sup> Considering the common nature of providing hyperlinks, the conclusion of the Court could potentially interfere with other rights. "The legal regulation of hyperlinking thus carries with it enormous capacity to interfere with the operation of the Internet, and therefore with access to information, freedom of

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<sup>9</sup> Case C-279/13 *C More Entertainment* [2015] EU:C:2015:199, paras 25 and 26.

<sup>10</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140.

<sup>11</sup> Case C-279/13 *C More Entertainment* [2015] EU:C:2015:199

<sup>12</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76, para 20.

<sup>13</sup> Article 3(1) The InfoSoc Directive.



expression, freedom to conduct business, as well – of course – with business ventures that depend on these types of linkages.”<sup>14</sup> To mitigate this decision, the Court introduced the new public criterion in *Svensson*,<sup>15</sup> which will be explained in the following subchapters.

## **2.2 Acts of communication**

An act of communication is a very important factor in determining an act of communication to the public. It is the first condition that the Court has to examine in a case regarding the right of communication to the public, to determine which other criteria are going to be used. The court defines it in the case of *Football Association Premier League and Others*, where it explains that “[...] the concept of communication must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used.”<sup>16</sup> Generally, acts of communication can be divided into two subcategories, depending on whether the act of communication happened via the original (initial) transmission or via a retransmission of the work.

### **2.2.1 Original transmission**

An original transmission is a type of act of communication in which a work is communicated to a public by using a transmission which the relevant rightsholder had in mind, meaning that the works in question were not retransmitted by the other party. A first example of a case regarding original transmissions is *SGAE*, the case regarding the transmission of ambiental music in a hotel. The plaintiff, a body responsible for the management of intellectual property rights in Spain, held that the hotel was communicating to the public by virtue of installing television sets in room and in communal areas of the hotel, where the music in question was being played.<sup>17</sup> Other examples of this type of case are *Reha Training*, where a rehabilitation centre allowed its patients to watch television programming by broadcasting said programmes via television sets that were installed in waiting and training rooms,<sup>18</sup> and *SCF*, where a dentist was broadcasting copyright-protected works as background music in his office using a radio signal.<sup>19</sup>

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<sup>14</sup> European Copyright Society, *Opinion on The Reference to the CJEU in Case C-466/12 Svensson* (2013) <<http://ssrn.com/abstract=2220326>> accessed 14 September 2023, para 3.

<sup>15</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76, para 24.

<sup>16</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] EU:C:2011:631, para 193.

<sup>17</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764, paras 20 and 21.

<sup>18</sup> Case C-117/15 *OSA (Reha Training)* [2016] EU:C:2016:379, para 61.

<sup>19</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140.

The cases containing an original transmission as an act of communication are most notable because of the fact that the Court examined the criterion of the new public in them for the first time, which is an important criterion that will be expanded upon in the following subchapters. The main issue in these cases was whether the contribution of the party which was communicating (e.g. the installing of television sets in *SGAE*)<sup>20</sup> was enough to classify it as an act of communication to the public. Because of this, the Court did not choose to examine the nature of the act of communication, but rather to examine if such an act of communication reached a new audience which the rightsholder did not have in mind, i.e. a new public.

### **2.2.2 Retransmission**

The other way an act of communication can be committed is via a retransmission, which is an act of communication that is committed via a new transmission of the protected work. Examples of retransmission include *ITV Broadcasting*,<sup>21</sup> and *VCAST*.<sup>22</sup> In *ITV Broadcasting*, the element of retransmission is apparent in the fact that the original transmission was done via television signal, and the act of communication happened by retransmission on the Internet, where the users could watch the livestream of that television programme.<sup>23</sup> *VCAST* had similar facts, as in that case the original transmission was also a television broadcast, that users could watch on the Internet by virtue of a video recording system, either in real time as the programme was being broadcast, or later at a different time.<sup>24</sup> The conclusion from these two examples is that an act of communication via retransmission can be committed both in cases regarding acts of communication to the public, and in cases regarding the right to make works available online on-demand.

A retransmission can also be done via the same medium as the original transmission, like in *C More*,<sup>25</sup> where the original transmission of hockey games was done online, as was the retransmission, as the act of retransmission was the posting of a link which enabled the watching of the games in question with the circumvention of the paywall which was installed in the original transmission.

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<sup>20</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764.

<sup>21</sup> Case C-607/1 *ITV Broadcasting and Others* [2013] EU:C:2013:14

<sup>22</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913.

<sup>23</sup> Case C-607/1 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>24</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913.

<sup>25</sup> Case C-279/13 *C More Entertainment* [2015] EU:C:2015:199.

### 2.3 The criterion of technical means

This criterion is only used in cases of retransmission. In those cases, the Court examines whether the retransmission of protected works was done using the same or different technical means as the initial transmission. In other words, the Court examines if the act of communication in question was done using a different medium than the original transmission. Examples of a retransmission that used different technical means are the aforementioned *ITV Broadcasting*,<sup>26</sup> and *VCAST*.<sup>27</sup> In both of those cases the technical means which were used for the initial transmission was a television signal. The act of communication that the Court examined was a retransmission, which was done via the Internet, which is a different technical means than the original one. Examples of a retransmission using the same technical means are cases like *Svensson*<sup>28</sup> and *GS Media*.<sup>29</sup> *Svensson*, as previously discussed, concerned a service which provided hyperlinks to newspaper articles posted on newspaper websites.<sup>30</sup> *GS Media* was a case that concerned photographs that were going to be published in a magazine. The website owned by the other party in the proceedings received a link to a data storage website. That link contained the pictures in question. Following this, the link was posted to their website of the other party, and when users clicked on the link, they were redirected to the data storage website, where they could download the photographs.<sup>31</sup> These cases also concern a retransmission, but the technical means which were used were the same as the original transmission, as in both cases the content was already available online, and the retransmission was also done via hyperlinks on the Internet. The difference between the links used in the retransmission is that in *Svensson*,<sup>32</sup> the link provided by the defendant was used to link to freely available content (newspaper articles) which was posted by the rightsholder, while the link in *GS Media* allowed users access to photographs which were made available online without the consent of the rightsholder.<sup>33</sup>

The Court put a great deal of importance on this criterion, as cases using different technical means for a retransmission are ruled as cases of communication to the public, while cases with the same

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<sup>26</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>27</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913.

<sup>28</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>29</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644.

<sup>30</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>31</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644, paras 6-10.

<sup>32</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>33</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644.

technical means in their retransmissions subsequently use the new public criterion and possibly the criterion of the profit-making nature of the act.

#### **2.4. The public criterion**

The other condition that needs to be fulfilled after the Court decides that a transmission (original or otherwise) constitutes an act of communication is that the work has to be communicated to the public. In the case *Mediakabel*, the court defines the public as “an indeterminate number of potential television<sup>34</sup> viewers, to whom the same images are transmitted simultaneously.”<sup>35</sup> This stance of the Court has also been cited in other cases, such as *SGAE*<sup>36</sup> and *Lagardère Active Broadcast*.<sup>37</sup>

In *Mediakabel*, the case which concerned a service that enabled its users to watch certain selected films at the time at which the films in question were being broadcast on television. The Court concluded that such a service was for the television viewing public, and that such a public concerned an indeterminate number of potential television viewers, and that such a group of people should, therefore, be considered a public.<sup>38</sup> *Lagardère Active Broadcast* concerned a broadcast of a radio signal, intended to be received in France, but were also available in a limited area of Germany due to technical reasons, to the people which lived in that area. The Court ruled that such a limited number of potential listeners cannot be regarded as a public, as it is not an indeterminate number of potential listeners.<sup>39</sup> In *SGAE*, the case concerning the installation of television sets in a hotel, the Court explained that in the context of the case, when examining whether the act of communication reached a public, that it is necessary to take into account not only the guests in hotel rooms, but to also take into account guests in other areas of the hotel where the television sets were installed. The Court added that generally guests in hotels circulate and succeed one another relatively quickly. By these two statements the Court concluded that in this case, the guests of the hotel are a fairly large number of people and should therefore be considered a public.<sup>40</sup>

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<sup>34</sup> The term “television” is used here because the issue in the main proceedings was about television programming, but the definition of the “public” is not limited to television.

<sup>35</sup> Case C-89/04 *Mediakabel* EU:C:2005:348 [2005], para 30.

<sup>36</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764, para 37.

<sup>37</sup> Case C-192/04 *Lagardère Active Broadcast* [2005] EU:C:2005:475, para 31.

<sup>38</sup> Case C-89/04 *Mediakabel* EU:C:2005:348 [2005], para 36.

<sup>39</sup> Case C-192/04 *Lagardère Active Broadcast* [2005] EU:C:2005:475, para 31.

<sup>40</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764, para 38.

## 2.5. The new public criterion

The new public criterion was introduced by the Court in *SGAE*, where the Court ruled that the transmission in question was a case of communication to the public, but this time to a new public which the Court explained as follows: “Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.”<sup>41</sup> Furthermore, the Court explains that the guests of a hotel form a new public because the hotel actively intervenes to give access to its guests, which would otherwise not be able to enjoy the works, even though they were in the area of broadcast. The Court also responds to the defendant’s question of whether it is decisive if the guests turned on the television or not in a negative way, explaining that it is sufficient for the works to be made available to the (new) public, and not whether the guests actually accessed the protected works or not.<sup>42</sup> Another similar case was *Reha Training*, in which the Court ruled that a rehabilitation centre that allowed its patients to watch television programming constituted a case of communication to a new public.<sup>43</sup> In the same case, the Court emphasizes the role of the user, meaning the person who committed the act of communication: “It has held that, 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 television broadcast containing 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 broadcast works, although physically within the broadcast’s catchment area.”<sup>44</sup> The Court first intended to use this criterion only in cases where an act of communication was committed via the original transmission.

However, in later cases, the Court started using the new public in other cases, namely in cases in which a retransmission happened, and was done using the same technical means as the original transmission. Firstly, in *Svensson*, in which the works in question (in this case newspaper articles) were published on the Internet by the copyright holder, and hyperlinks of those freely accessible articles were then published on another website. The Court ruled that this was not the case of communication to the public, stating that the act of communication did happen, but since the articles were already available online the Court concluded that there was no new public reached.<sup>45</sup>

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<sup>41</sup> *ibid*, para 40.

<sup>42</sup> *ibid*, paras 42 and 43.

<sup>43</sup> Case C-117/15 *OSA (Reha Training)* [2016] EU:C:2016:379, para 61.

<sup>44</sup> *ibid*, para 46.

<sup>45</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76, para 32.

The Court was relatively consistent in using this test only in cases where a retransmission was done using the same technical means (and in cases using the original transmission), as it did not examine it in *ITV Broadcasting*,<sup>46</sup> nor in *VCAST*, where it stated that because there was a new technical means involved in the transmission (the original transmission was made via television signal while the retransmission was made via the internet), it was unnecessary to examine whether the communication was made to a new public.<sup>47</sup> But there is one exception to this rule, and that was the case *AKM*, which was another case with similar facts as the previous two cases, where the Court chose to examine whether a case was communicated to a new public. Even though different technical means were used for the retransmission (television signal in the original transmission and cables in the retransmission), the Court still held that “It remains, however, to be determined whether that communication is intended for a new public, different from that for which the broadcasts by ORF were intended.”<sup>48</sup> The Court explained that this decision was made due to the fact that the rightsholders in this particular case “[...] are aware that the broadcasts made by that national corporation may be received by all persons within the national territory.”<sup>49</sup> From that fact, it follows that even though there were different technical means of the transmission, the fact that the rightsholder did, in fact, have in mind the public that was reached with this retransmission, while in other cases the Court argues the opposite. This decision is supported by an Opinion of Advocate General (AG) Szpunar in the case *France Télévisions*, where it is argued that “[...] this finding seems to rest on the condition, the fulfilment of which the Court left the referring court to verify, that the copyright holders had indeed taken into account the retransmission at issue when authorizing the original broadcast.”<sup>50</sup>

In cases with a retransmission as the act of communication, most notably *ITV Broadcasting*, the Court did not examine the new public, because it interpreted the use of different technical means as a new act of communication, so the Court concluded that it did not have to examine the new public as a criterion, since the act of transmission was already new.<sup>51</sup> If the Court used the new public as a criterion, it would likely find that no new public was reached, because the

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<sup>46</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>47</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913, para 50.

<sup>48</sup> Case C-138/16 *AKM* [2018] EU:C:2017:218, para 27.

<sup>49</sup> *ibid*, para 28.

<sup>50</sup> Case C-298/17 *France Télévisions* [2018], Opinion of AG Szpunar EU:C:2018:535, para 47.

<sup>51</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14, para 30.

retransmission of the television programme was done on the Internet, but the only way a viewer could access the service as if they already possessed authorization to access the initial television broadcast. The new public was never meant to be used in cases with retransmissions in the first place. However, when the Court started using it in those cases as well, the decision to first use the technical means criterion resulted, as shown by the cases above, in very arbitrary and inconsistent decisions, where two cases that are very similar in terms of how many new people they have reached, get opposite judgments by the Court just because of the technical means criterion. It is possible to commit an act of communication to the public (or a new public just as well), both with the same and with different technical means used for the retransmission. The fact that the same or different technology was used should not have so much impact on the results of the judgment. *Svensson*<sup>52</sup> and *ITV Broadcasting*<sup>53</sup> are relatively similar cases in their core. Their different outcomes are problematic not only from the point of arbitrariness of criteria used but are also problematic for assuming which kind of protection the Court wants to provide. Plainly put, if the Court intended to prevent copyright-protected content from reaching people who otherwise would not have been able to access it, then both cases should not have been considered an act of communication to the public. Conversely, if the Court wanted to prevent the unauthorized sharing of protected works of any kind, then both cases should have been considered an act of communication to the public.

## **2.6. The profit-making nature criterion**

When the Court examines the profit-making nature, it is determining whether there is a financial benefit for the party which committed the act of communication. This criterion was first used in cases with no retransmission, starting with *SGAE*, where the Court states that “it is apparent from the documents submitted to the Court that the action by the hotel by which it gives access to the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. It cannot be seriously disputed that the provision of that service has an influence on the hotel’s standing and, therefore, on the price of rooms.”<sup>54</sup> The Court further solidified this stance in *Football Association Premier League and Others*, where the Court answered that a case of transmission of works in a public house via television constitutes an act of

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<sup>52</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>53</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>54</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764, para 44.

communication to the public because the owner of the public house financially benefits from transmitting the works: “the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results.”<sup>55</sup> A more detailed analysis of different ways of how an act of communication to the public can have effect on financial results will be provided later on. In *Phonographic Performance (Ireland)*, the Court also ruled that having radio devices in hotel rooms was a case of communication to the public, reiterating firstly that it is important that the communication is of a profit-making nature.<sup>56</sup> Conversely, in the case *SCF*, where a dentist was broadcasting copyright-protected works as background music in his office, the Court concluded that it was not a case of communication to the public, because a dentist could not reasonably expect a rise in the number of patients or could be reasonably expected to raise the price of his services because of the copyright-protected music playing in his office.<sup>57</sup>

In cases in which the act of communication was done via a retransmission, this criterion was firstly mentioned in the case *GS Media*, where the Court states that providing the hyperlinks to copyright-protected works, without the consent of the copyright holder, is to be considered communication to the public only if providing those hyperlinks was made for profit.<sup>58</sup> This case bares resemblance to cases discussed at the end of the previous subchapter, most notably to *Svensson*,<sup>59</sup> as both cases concern a retransmission using the same technical means. Here however, the Court decided to introduce the profit-making nature of an act of communication as a criterion. The Court also named several other criteria which need to be considered generally, namely the role played by the user regarding the deliberate nature of their intervention, the definition of the concept of the public, and communication using specific technical means.<sup>60</sup> The Court firstly defined that “[...] 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>61</sup> On the one hand, the Court acknowledges the complexity of these types of cases and the necessity to look at facts from

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<sup>55</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] EU:C:2011:631, para 205.

<sup>56</sup> Case C-162/10 *Phonographic Performance (Ireland)* [2012] EU:C:2012:141, para 36.

<sup>57</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140, para 97.

<sup>58</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644, paras 54 and 55.

<sup>59</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>60</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644, paras 35-37.

<sup>61</sup> *ibid*, para 34.



multiple angles, but on the other hand, the Court never explained how to use these criteria when multiple are present.

It is important to distinguish the different ways in which the Court can examine a profit-making nature of the act of communication, or in other words, different types in which an act of communication can have a profit-making nature. Firstly, there are cases in which the act of communication has an effect on financial results of the party which is communicating the works. Examples of these types of cases are cases discussed in the first paragraph of this subchapter, as in those cases the act of communication to the public that happened is not intended to directly make a profit to the defendants. For example, in *SGAE*, the Court does not examine whether the hotel is actively transmitting the music for profit, as that is clearly not the case.<sup>62</sup> In that case and the cases like it, the Court examines whether the act of communication (in this case the reproduction of music in the hotel), can be linked to an expected rise of the number of visitors, or can the hotel owner raise the price of rooms because the guests have access to the music in question. Conversely, the other way to examine a profit-making nature of an act of communication to the public is to examine if the communication itself was made for profit. The Court does this in cases like *GS Media*, where it examines whether the act of communication itself was done with the intention to make a profit, or in other words, if the defendant was paid (or expected to be paid), for their act of communication.<sup>63</sup> The Court differentiates between these two different types of the profit-making nature criterion but regards that in either of those two possibilities an act of communication to the public was committed. From this, it is apparent that the Court wishes to protect the rightsholders right to financially exploit their work rather broadly. The Court wants to prevent any kind of financial exploitation of protected works, regardless of if it was done directly for profit, or if it was done because the person which communicated the works expected a rise in their profit even though their core activity was not the communication of the works. On the other hand, the Court also protected the defendants when the act of communication was not done for an expected rise in profit, like in *SCF*.<sup>64</sup>

Also regarding the criterion of the profit-making nature of the communication, there are two cases with similar facts and different outcomes. In the case *Airfield and Canal Digitaal*, the Court ruled

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<sup>62</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764.

<sup>63</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644.

<sup>64</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140.

that the satellite television provider is communicating to a new public, as the provider in the case enables its subscribers to view a large number of television channels from multiple broadcasting organizations and in doing so it expands the number of persons who have access to those television programs, so those people form a new public.<sup>65</sup> Aside from the mentioned new public, the deciding factor seems to be the profit-making nature of the satellite television provider: “Moreover, the satellite package provider’s intervention amounts to the supply of an autonomous service performed with the aim of making a profit, the subscription fee being paid by those persons not to the broadcasting organisation but to the satellite package provider. It is undisputed that the fee in question is payable not for any technical services, but for access to the communication by satellite and therefore to the works or other protected subject-matter.”<sup>66</sup> In the other case *SBS Belgium*, where the broadcast organization in question did not offer television program packages to customers, but rather to distributors who then sold television program packages to their subscribers. The Court ruled that this act was not an act of communication to the public, as it held that the distributors, to which the broadcast organization transmitted the signal, cannot be considered a part of the public, and that subscribers paid the fee not to the broadcast organization, but to the distributors. Furthermore, the fee in question was paid to the distributors not for technical services, but for the communication.<sup>67</sup> In these cases, the Court clarified the condition that the communication needs to be made for profit, but the profit in question has to come directly from the act of communication, i.e. for the possibility of a public to access the copyright-protected works, which was the case in *Airfield and Canal Digitaal*,<sup>68</sup> where the subscribers paid directly to the satellite television provider which broadcasted the signal, but not in *SBS Belgium*, where the broadcaster did not make money from the subscribers that form the public. The Court did however leave a caveat in *SBS Belgium*, stating that the subscribers could be considered the public, and the transmission in turn a communication to the public, if the intervention of the distributors service was just technical in nature.<sup>69</sup>

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<sup>65</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal* [2011] EU:C:2011:648, paras 81 and 82.

<sup>66</sup> *ibid*, para 80.

<sup>67</sup> Case C-325/14 *SBS Belgium* [2015] EU:C:2015:764, paras 26-31.

<sup>68</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal* [2011] EU:C:2011:648.

<sup>69</sup> Case C-325/14 *SBS Belgium* [2015] EU:C:2015:764, paras 32-34.

## 2.7. The profit-making criterion as a substitute for other criteria

The main criticism regarding the profit-making nature criterion is uncertainty in the way that it is applied: “Should one consider whether the relevant link is provided with the intention to make a profit? Or should rather one consider the surrounding environment to the relevant link, e.g. whether it is provided on a website that is operated for profit? Although both alternatives appear plausible, consideration of the context in which the relevant link is provided appears to be more in line with earlier CJEU case law.”<sup>70</sup> But even with these criticisms in mind, if the criterion is applied consistently with the consideration of the context of the provided link (and the case law shows that the Court mostly interprets the criterion in such a manner), examining the profit-making nature in these cases produces the most uniform results, with coherent explanations for the decisions. Furthermore, the criterion is in line with the goals of the Directive as it balances the rights of the copyright-holder by limiting the financial exploitation of their work in cases of unauthorized acts of communication, and rights of the users such as freedom of expression and the right of access to information.

The logical and intuitive results are perhaps best seen in cases with the original transmission. It is intuitive to understand that for instance, a pub from *Football Association Premier League and Others*<sup>71</sup> could expect more guests and subsequently a larger profit, while on the other hand, a dentist’s office from *SCF*<sup>72</sup> is not likely to benefit from new customers because of music playing in their waiting rooms. Even though in both cases the transmission in question is not a core economic activity of the two establishments, it is reasonable to assume that people will frequent a pub more if it offers certain television broadcasts in which the customers are interested in. Conversely, it would not be reasonable to assume that a customer would choose their dentist based on the music which plays in their waiting room.

Consistent and logical results are also found in the other group of cases, regarding retransmissions. Most notably in *Airfield and Canal Digitaal*<sup>73</sup> and in *SBS Belgium*.<sup>74</sup> Even though these cases are similar, the Court applied the same criterion in both and explained how it uses the criterion in a

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<sup>70</sup> 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 Law Review 1221, 1237.

<sup>71</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] EU:C:2011:63.

<sup>72</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140.

<sup>73</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal* [2011] EU:C:2011:648.

<sup>74</sup> Case C-325/14 *SBS Belgium* [2015] EU:C:2015:764.

way that is understandable and logical, and it is clear why the outcome of these cases was different, namely that the profit in question has to come directly from the act of communication itself. In *GS Media*,<sup>75</sup> the use of this criterion was also justified, and far more reasonable than other criteria which were the deciding factor in similar cases, such as the new public criterion or the criterion of technical means.

If we examine these similar cases that do not use the profit-making criterion and try to apply it in them, the outcome of most (though not all) of those cases might not be different than in the status quo, but it would ensure a consistent outcome in the cases to come. In *ITV Broadcasting*, if the Court utilized the profit-making nature criterion, the case would probably still be considered as an act of communication to the public, as the service is funded by advertisements that appear on the users' screen.<sup>76</sup> The same logic is applied to *VCAST*.<sup>77</sup> And in *Svensson*,<sup>78</sup> since the works were already available for free, and were free even with the use of the service in question, the profit-making criterion would likely also lead to the conclusion that this was not a case of communication to the public. But if a case with the facts similar to those of *ITV Broadcasting*<sup>79</sup> and *VCAST*<sup>80</sup> came before the Court, but in that hypothetical case the service in question did not receive any financial gain for operating (which is likely to happen considering a large number of similar services), the case would be examined fairly and consistently, whereas in the status quo the case would surely be decided as being an act of communication to the public, simply because of the retransmission using different technical means. And conversely, if a service like the one in *Svensson*<sup>81</sup> received remuneration, either through advertisements or through a subscription-based model, the Court, if it applied the profit-making nature in this hypothetical case, would consider such a case an act of communication to the public, and the infringement would not be protected by the fact that no new public was effectively reached. Furthermore, not every case would have the same outcome as it did in the status quo. If applied in *AKM*,<sup>82</sup> the profit-making criterion would lead the Court to the conclusion that an act of communication to the public was committed, as the defendant in this case

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<sup>75</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644.

<sup>76</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14, para 11.

<sup>77</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913, para 15.

<sup>78</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>79</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>80</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913.

<sup>81</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>82</sup> Case C-138/16 *AKM* [2018] EU:C:2017:218.

receives financial gain from its subscribers. This case is analysed separately from the previous three cases because other criteria were applied differently. Namely, that the new public test was applied even though same technical means were used in the retransmission, and the case was ruled as not being a communication to the public because there was no new public reached.<sup>83</sup>

The analysis above clearly shows how the profit-making criterion compares to other criteria. Even though in most cases the outcome remained the same, if the facts of each of those cases were just slightly different, and it is fair to assume that such cases will appear before the Court in the future, the end result could likely be very different. Additionally, the analysis above shows that the other criteria are not always applied consistently, best illustrated by the case *AKM*.<sup>84</sup> Lastly, and most importantly, the criteria of technical means and the new public both suffer from far larger problems and criticisms than the profit-making criterion.

The problems of arbitrary results regarding the technical means criterion were already discussed sufficiently in previous subchapters. So, the other criterion which needs to be analysed and compared to the profit-making criterion is the new public. Firstly, in cases where there was no retransmission, such as *SGAE*,<sup>85</sup> *Reha Training*,<sup>86</sup> or *Football Association Premier League and Others*,<sup>87</sup> in which the new public criterion was introduced, the new public criterion is not completely problematic, as the Court uses it not only as a criterion but also as an explanation as to why a case where no new act of communication was done, the case can still be considered a case of communication to the public. On top of this, the Court added the profit-making nature criterion which mitigated the new public criterion, and it is apparent that even in these types of cases the most consistent results were produced when the profit-making criterion was also used.

In cases like *GS Media*<sup>88</sup> or *Svensson*<sup>89</sup> however, examining the new public criterion is redundant. Since both cases concerned the transmission and the subsequent retransmission on the Internet, the new public test will show (as it did in those cases) that there was no new public reached and will move on to examine the profit-making nature as a criterion. When the Court used the new public

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<sup>83</sup> *ibid*, para 29.

<sup>84</sup> Case C-138/16 *AKM* [2018] EU:C:2017:218.

<sup>85</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764.

<sup>86</sup> Case C-117/15 *OSA (Reha Training)* [2016] EU:C:2016:379.

<sup>87</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] EU:C:2011:631.

<sup>88</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644.

<sup>89</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

criterion in retransmission cases, most apparently in *Svensson*,<sup>90</sup> it also used it to reduce the impact of the decision that linking to licensed content constitutes an act of communication. This in turn created complications in cases to follow, as discussed in previous chapters. “Paradoxically, the ‘new public’ considered to contain and restrict the application of the right of communication to the public, in that case, would serve to establish potential liability in each and every situation not mirroring the factual scenario at hand in *Svensson*. To avoid this conclusion, the Court subsequently gave centrality to criteria that, prior to *GS Media*, were not regarded as decisive (the profit-making intention of the link provider) or were not part of the assessment under national law in primary/direct infringement situations vis-à-vis secondary/indirect infringement scenarios (the knowledge of the link provider).”<sup>91</sup> This analysis further proves the redundancy of the new public criterion, especially in cases with retransmissions. If the Court always examines the profit-making nature of the act, it is irrelevant whether the act of communication is done to a new public or not. All that matters is that there was an act of communication aimed at an indeterminate number of potential users. Whether those users could have accessed the works in question before the act of communication in question is not relevant to the facts of the case, the only thing that matters is examining if the person committing the act of communication is profiting from said act, either directly or indirectly. Furthermore, the Court applied the new public criterion unevenly, especially in combination with the technical means criterion. This resulted in the application of the criterion in some cases, like *Svensson*,<sup>92</sup> *AKM*,<sup>93</sup> and *GS Media*,<sup>94</sup> but not in others, like *ITV Broadcasting*,<sup>95</sup> or *VCAST*.<sup>96</sup> This leads to the conclusion that the profit-making nature would judge these types of cases more fairly and would be more in line with the goals of the Directive, and if the Court applied it in all similar cases, there would be no need for the new public criterion in them.

There are also arguments which defend the use of the new public. Some suggest that the new public is the answer to the high level of protection that the Directive and the Court generally give to rightsholders. “Seen in this light, the notion of ‘new public’ could be considered as a way for the

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<sup>90</sup> *ibid.*

<sup>91</sup> Eleonora Rosati, “When Does a Communication to the Public Under EU Copyright Law Need to Be to a ‘New Public’?” (2020) 45(6) *European Law Review* 802, 820.

<sup>92</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>93</sup> Case C-138/16 *AKM* [2018] EU:C:2017:218.

<sup>94</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644.

<sup>95</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>96</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913.

CJEU to strike a balance between the interest of stimulating the production of creative works and at the same time to foster their dissemination – within the realms set by the international treaties.”<sup>97</sup> However, a better balance is struck when using the profit-making nature criterion. The new public does not always have to be a new group of people different from the public which the rightsholder had in mind. This means that in cases like *SCF*<sup>98</sup> using only the new public criterion actually widens the number of potential acts of communication to the public, because if the Court did not also examine the profit-making nature of the act, the case would likely be ruled as an act of communication to the public as the transmission it did reach a new public. But if only the profit-making nature criterion is used, the balance is achieved, as the Court would reach the conclusion that an indeterminate number of people were reached by the transmission, but the transmission in question did not bring financial gain to the defendant. So in these types of cases, the nature of the public is irrelevant, and the profit-making nature criterion enables the rightsholders to be the only ones to monetise their works, while at the same time allowing certain transmissions to happen if they were not intended for purposes of financial gain. Others suggest that, in retransmission cases, the new public can be of use only in cases closely resembling *Svensson*.<sup>99</sup> “In practical terms, courts faced with linking scenarios, should consider the ‘new public’ only in *Svensson*-like scenarios (linking to freely accessible, licensed content), and avoid considering it as a requirement in cases concerning linking to unlicensed content because no public had been contemplated in the first place. In such instances, the GS Media criteria (knowledge and profit-making intention) are sufficient to determine whether liability could be established.”<sup>100</sup> This approach could work in practice and is in line with the intentions of the Court in regard to the level of protection it wants to provide. But it faces the same problems as the previous argument, namely that the Court never explicitly stated that the criterion should only be used when linking to already freely accessible content, which means that the Court will apply it to other cases as well, as it did in practice. Furthermore, even though the new public criterion does not lead to a problematic conclusion when applied in *Svensson*-like<sup>101</sup> cases, it does not affect the result of the case either. If the new public

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<sup>97</sup> Johan Axhamn, “Internet Linking and the Notion of ‘New Public’” (2014) 83(2) Nordiskt immateriellt rättsskydd 110, 126.

<sup>98</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140.

<sup>99</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>100</sup> Rosati, “When Does a Communication to the Public Under EU Copyright Law Need to Be to a ‘New Public?’” (n 91) 822.

<sup>101</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

test was never applied in *Svensson*,<sup>102</sup> and the Court used the profit-making criterion instead, the end result would have been the same, but without the possibility for a misinterpretation or a misuse of the criterion, as it happened in a large number of previously discussed cases.

The logical conclusion of the aforementioned analysis is that, compared to technical means and the new public criteria, the profit-making nature criterion overall proves as the better criterion to use, not only for practical reasons but also in terms of the type of protection the Court and the InfoSoc Directive aim to give. Plainly put, users consume protected works in a number of different ways, either by buying physical copies, watching or listening via television or radio signal, or via subscription-based streaming platforms. “While all these distinct services communicate to the same ‘public’, they are acts of ‘independent economic exploitation for financial profit’ – and should be treated accordingly under copyright law. Whether a ‘new’ public is actually reached by a service, should be irrelevant to a finding of copyright infringement. What should be decisive is whether the service exploits the work by extracting substantive economic value from the use of the work.”<sup>103</sup>

### **3. The secondary liability of intermediaries in cases of communication to the public**

This chapter will focus on the cases in which an intermediary can be found liable for an act of communication to the public committed by users of its service. Firstly, the term of online content-sharing service providers (which are potentially liable under the rules of Digital Single Market Directive),<sup>104</sup> will be explained, as well as its obligations and possible ways to escape the liability, and limitations and exceptions to the liability. Following this, a couple of cases that also concern intermediary liability which do not concern online content-sharing service providers will be introduced, as they will be used to compare the liability of online content-sharing service providers. Finally, a case regarding online content-sharing service providers will be analysed, both

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<sup>102</sup> *ibid.*

<sup>103</sup> P. Brent Hugenholtz, Sam C. van Velze, “Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a ‘New Public’” (2016) 47 IIC – International Review of Intellectual Property and Competition Law 797, 812.

<sup>104</sup> European Parliament and Council Directive 2019/790 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 L130/92.



in the context of whether it actually would be secondarily liable as an intermediary, and whether secondary liability as such is useful in enforcing copyright law.

### **3.1. The definition of online content-sharing service providers**

The Directive defines an online content-sharing service provider (hereinafter “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.”<sup>105</sup> Notable examples of OCSSPs are large online platforms and social networks, such as Facebook, X, or YouTube. The need for regulation of such platforms is justified, as they are continuously some of the most visited websites on the Internet over the past decade and longer, and a large amount of copyright-protected content is uploaded to OCSSPs and said content often is not posted with the consent of the relevant rightsholder.

### **3.2. The conditions for secondary liability of OCSSPs**

The Digital Single Market Directive states that: “Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.”<sup>106</sup>

### **3.3. Obligations of OCSSPs if the liability conditions are fulfilled**

If they do not obtain the required authorization from the previous subchapter, OCSSPs are liable for an unauthorized act of communication to the public, unless they can prove they did the following things: “(a) made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event (c) acted expeditiously,

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<sup>105</sup> Art. 2(6) European Parliament and Council Directive 2019/790 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 L130/92.

<sup>106</sup> *ibid*, art. 17(1).

upon receiving a sufficiently substantiated notice from the rightholders to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).”<sup>107</sup>

### **3.4. Limitations and exceptions to secondary liability**

In order to balance the rights of the copyright holders with other rights, most notably the freedom of expression and the right of access to information, the Directive also lists exceptions to liability: “The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation. Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche.”<sup>108</sup>

### **3.5. Case law regarding intermediary liability before the Digital Single Market Directive**

This subchapter will cover three cases, which concern intermediary liability, and will later be used to analyse liability under the Digital Single Market Directive.<sup>109</sup> The first case concerns the responsibilities that intermediaries had under the InfoSoc Directive,<sup>110</sup> and the other two cases are about websites that are not OCSSPs, but because the facts of the cases are similar to the case regarding OCSSPs, they are worth analysing.

Under the InfoSoc Directive, intermediaries were regulated in the following way: “Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right”.<sup>111</sup>

The first of these cases is *UPC Telekabel Wien*, which concerned an internet service provider (hereinafter: ISP), whose services were used to access websites, which allowed its users to access

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<sup>107</sup> *ibid*, art. 17(4).

<sup>108</sup> *ibid*, art. 17(7).

<sup>109</sup> European Parliament and Council Directive 2019/790 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 L130/92.

<sup>110</sup> European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10

<sup>111</sup> Art. 8(3) The InfoSoc Directive.

copyright protected works (in this case films), by virtue of download and streaming.<sup>112</sup> The Court further explains that ISPs are crucial in the infringement of copyright on the internet and that not considering them as intermediaries would greatly diminish the level of protection of copyrighted works. The Court also concludes that it is irrelevant whether there was a contractual link between the internet service provider and the party that infringed upon copyright-protected works.<sup>113</sup> As a result of this decision, the Court ruled that the injunction which obligates the Internet service provider to restrict access to the website in question is valid. The Court mitigated this decision by acknowledging that the injunction in question restricted the service provider's right to conduct business, but that it did not infringe the substance of said freedom.<sup>114</sup> Even though this case does not concern OCSSPs, it is important to analyse it to understand the circumstances under which a party can be considered an intermediary.

The decision that ISPs are considered intermediaries is problematic on two accounts. Firstly, the fact that Internet service providers play an integral role in communication to the public and therefore must take active measures to try and prevent infringements. Secondly, this decision can have very damaging consequences to the right to conduct business, and to the right to the freedom of information. The fact that ISPs are crucial for providing access to the users to the works in question is indisputable, which in theory makes the decision that they are intermediaries understandable. However, ISPs do not provide access only to copyright-protected works, but to the Internet as a whole. Just because a user can use a product or a service in an illegal way, does not mean that the provider of the product or the service in question can be expected to prevent its abuse. The responsibility for the illegal use of a product or service should lie mainly on the user and said user can also be a service provider, meaning the platform or website which is transmitting the content without authorization in the first place, not on the end-user which is accessing (e.g. watching or listening) the content in question. Especially when the service in question has a much broader function and is generally used for a number of other purposes, as ISPs clearly do.

The Court did try to mitigate the fact that ISPs have to abide by the injunctions and prevent access to the website, and balance the opposing rights by stating that the measures taken by the ISP “must have the effect of preventing unauthorised access to the protected subject-matter or, at least, of

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<sup>112</sup> Case C-314/12 *UPC Telekabel Wien* [2014] EU:C:2014:192.

<sup>113</sup> Case C-314/12 *UPC Telekabel Wien* [2014] EU:C:2014:192, paras 32-34.

<sup>114</sup> *ibid*, paras 48-51.

making it difficult to achieve”.<sup>115</sup> The Court also stipulated that the ISP can avoid penalties if it proves that the measures that they have implemented are reasonable to the extent that they have an effect on preventing or restricting access, while at the same time, the measures do not interfere with the rights of internet users.<sup>116</sup> By stipulating these conditions, the Court does acknowledge the harshness of the measures to an extent, however, these goals are still difficult, if not impossible to achieve. Because of the Internet’s ubiquity in the modern world, there can hardly be a measure that the ISP can undertake to effectively make it difficult for the user to access the works. The number of piracy websites that exist is very large. If access to one of those websites is blocked by an ISP, the user has a number of other websites which they can visit and still access the content illegally. Even if the ISP bans all of the most popular websites visited by their users, those websites can simply change the domain (as they often do, due to the nature of the websites), which means that the ISP would have to ban them all over again. Besides these alternatives, the user can also use a virtual private network (VPN), which masks the user’s location and allows them to access the website. So, even if the ISP will not be liable to pay penalties because it has taken reasonable measures, it is still very unlikely that it would significantly reduce access to copyright-protected content. In the UK, access to websites with copyright protected content posted without authorization which were blocked by ISPs experienced a significant decline in traffic of 71.2%. However, at the same time, the websites which were not blocked, and offered the same kind of content, experienced a significant increase in traffic, which was 146%. These results imply that users did not stop accessing protected works because of the injunction, they just started using a different website to access them.<sup>117</sup> These measures have the potential to restrict other freedoms, while at the same time not achieving their goal. This leads to the conclusion that the role of the ISP as an intermediary should not mean that they should be expected to prevent unauthorized access to the works. If there were measures that could accomplish a more significant level of protection of copyright, then it would be justifiable to consider balancing them with the freedoms that they restrict, but since the analysis above shows that not to be the case, these types of measures can ultimately cause more harm than benefits.

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<sup>115</sup> Case C-314/12 *UPC Telekabel Wien* [2014] EU:C:2014:192, para 62.

<sup>116</sup> *ibid*, para 64.

<sup>117</sup> Despoina Farmaki, “The effectiveness of blocking injunctions against ISPs in respect of online copyright infringement in Europe: a comparative analysis from the UK, Greece and the Nordic countries” (2021) 4 *Stockholm International Property Law Review* 6, 15.

The other two cases concern liability by parties, which even though they are not OCSSPs by definition, closely resemble these types of platforms and are useful for showing under which conditions an intermediary actually should be liable for acts of communication to the public.

The first of these cases is *Filmspeler*, a case regarding a multimedia player. The Court ruled that selling that multimedia player was a case of communication to the public because it came with the possibility of easily accessing copyright-protected content, by virtue of implementing add-ons, which made this possible.<sup>118</sup> It is important to note that the add-ons in question were made by third parties, though they did come preinstalled with the multimedia player. The other case is *Ziggo* and it concerned ISPs which were used to provide access to a website which is an online sharing platform called “The Pirate Bay” which indexed torrent files, which are protocols through which users can share files. Other users could then search these torrent files on the website and download them using a separate software. Most of the files shared on the website were copyright-protected works which were posted to the website without the consent of the copyright holder. The main question of the referring court was whether the activities of “The Pirate Bay” website could be considered an act of communication to the public, which would mean that the ISPs could be considered intermediaries and would therefore have to block the website in question. Firstly, the Court decided that the act of communication was committed by the website since it played an indispensable role in accessing the works. The Court explained that an indispensable role is played when a user intervenes to give access to protected works in full knowledge of their actions. This intervention is deemed indispensable if without it, the public would not be able to enjoy the works in question at all, or could enjoy the works only with difficulty.<sup>119</sup> Furthermore, the Court explained that the platform that catalogued and gave access to these works was committing an act of communication that was directed at a new public because the Court determined that “such a public is a public that was not taken into account by the copyright holders when they authorized the initial communication.”<sup>120</sup> Both of these cases are notable because, in them, the owners of the services in question (the multimedia player and the website) not only had the knowledge that copyright infringements were happening on their service but had the intention for their services to be used for posting unauthorized works. Even though in *Filmspeler*,<sup>121</sup> the service could be used

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<sup>118</sup> Case C-527/15 *Stichting Brein (Filmspeler)* [2017] EU:C:2017:300.

<sup>119</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456, paras 25 and 26.

<sup>120</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456, para 44.

<sup>121</sup> Case C-527/15 *Stichting Brein (Filmspeler)* [2017] EU:C:2017:300.

legally, simply as a multimedia player, the fact that when bought it came with the add-on which is used for access to protected works shows the clear intention of the player's owner for the player to be used for illegal purposes. The same logic applies in *Ziggo*,<sup>122</sup> as even though copyright-protected content was uploaded to the platform by users, and not by the owners of the platform, cataloguing such content into categories made it clear that the owners of the website intended it to be used in such a way as well. And even though in that case the end result is an injunction against the ISPs, and not directed at the website, the most notable conclusion of the Court is that the website "The Pirate Bay" can be considered as committing an act of communication to the public even though they were not the ones actually communicating, which is very similar to the way secondary liability is established with OCSSPs, as the Court used the same criteria as in this case.

### **3.6. Case law concerning intermediary liability of OCSSPs**

The most notable example of this type of case is the joined case *YouTube and Cyando*. Even though the Court explicitly states that the case does not concern the Digital Single Market Directive,<sup>123</sup> as it came into force after the case, the case is worth analysing.<sup>124</sup> Firstly, because these types of cases regarding OCSSPs are probably going to become more common as the number of users of these services continues to rise, and secondly because by analysing whether the judgment would have been different or remained the same if the Digital Single Market Directive<sup>125</sup> was used to make a ruling, important conclusions regarding the future of copyright protection can be drawn. Both cases concern OCSSPs and the question of whether they committed an unauthorized act of communication to the public because copyright-protected content was uploaded by users to their websites. In the case of YouTube, the works in question were music, and in the case of Uploaded, the website owned by Cyando, the works in question were e-books. The rightsholders claimed that their rights were infringed upon, and since both YouTube and Cyando played an indispensable role in the infringement, they were guilty of an act of communication to the public. Before the case was referred to the Court, the Appeal Court in Germany had certain important findings about the way YouTube handled attempts of unauthorized posting of content on their platform. Among other

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<sup>122</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456.

<sup>123</sup> European Parliament and Council Directive 2019/790 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 L130/92.

<sup>124</sup> Joined Cases C-682/18 and C-683/18 *Youtube and Cyando* [2021] EU:C:2021:503, para 59.

<sup>125</sup> European Parliament and Council Directive 2019/790 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 L130/92.

things, the Court noted that a very large amount of content, around 35 hours per minute, is uploaded to YouTube. Furthermore, in their terms of service, users agree that they hold all needed rights, agreements, consents, and licenses for all and any videos that they themselves upload. There are also measures, put in place by YouTube, for preventing infringements, ranging from notifying YouTube about a video that contains copyrighted content (anyone can notify YouTube of such a video, not just the copyright holder), to the implementation of the Content Verification Program which allows rightsholders to identify when a video which contains their protected work was uploaded, and lastly an identification software, which notifies a rightsholder when their work is being used and allows them either to block or allow the posting of a video in question.<sup>126</sup> Following this, the Court explained under what circumstances are OCSSPs considered to be communicating to the public: “[...] emphasised the indispensable role played by the platform operator and the deliberate nature of its intervention. That platform operator makes an ‘act of communication’ when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work.”<sup>127</sup> The Court referred to the case *Ziggo*<sup>128</sup> as an example of a platform operator with full knowledge of the fact that they are giving access to protected content. To that effect, the Court concluded that YouTube and Uploaded also had an indispensable role in the current case, however, this criterion is not the only one that has to be taken into account. The other criterion that the Court gives importance to is the deliberate nature of the OCSSPs in the case.<sup>129</sup> This indeed is a very important criterion, because it is clear that from the amount of content that is being uploaded to these platforms daily, it would be quite impossible for the platform operators to ensure that absolutely no content is posted without authorization, so it is imperative to investigate whether the platform knows and encourages its users to post content illegally. To explain what constitutes deliberate behaviour, the Court compared the present case with *Ziggo*:<sup>130</sup> “[...] online file-sharing platform The Pirate Bay – which, by indexing metadata relating to protected works and providing a search engine, allowed users of that platform to locate those works and to share them in the context of a peer-to-peer network – constituted a

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<sup>126</sup> Joined Cases C-682/18 and C-683/18 *Youtube and Cyando* [2021] EU:C:2021:503, para 30.

<sup>127</sup> *ibid*, para 68.

<sup>128</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456.

<sup>129</sup> Joined Cases C-682/18 and C-683/18 *Youtube and Cyando* [2021] EU:C:2021:503, paras 77 and 78.

<sup>130</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456.

communication to the public. In that regard, the Court stated, *inter alia*, that The Pirate Bay’s operators had intervened in full knowledge of the consequences of their conduct, to provide access to protected works, that they had made explicit, on blogs and forums available on that platform, their purpose of making protected works available to users, and that they had encouraged the latter to make copies of those works.”<sup>131</sup> It is apparent from the facts in the case that even though the platforms had knowledge of unauthorized content, neither of them had the element of deliberate behaviour. On the contrary, YouTube put in place a variety of measures listed above, which were aimed at preventing, or failing that, minimizing the number of unauthorized uses of protected works. Uploaded did not have such measures in place, but they also did not index such works or offer a search engine that would make it easier for users to access the content in question. The Court finally concluded that the present joined cases did not constitute a communication to the public, stating that “[...] the operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, does not make a ‘communication to the public’ of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright.”<sup>132</sup> When analysing this case, it is easy to conclude that the Court came to a reasonable conclusion. It is completely apparent that YouTube does not want unauthorized content on its platform. It would therefore be counterproductive to rule that a platform like YouTube makes an act of communication to the public.

It is evident from this case, as well as from previously discussed case law, that in order to establish intermediary liability, the Court gave importance to two criteria. After the Court determines that a platform is used for acts of communication to the public, which are done by users of the platform, not from the platform owners itself, the Court decides on whether a platform is considered an intermediary by examining them. The first criterion being an indispensable role of the intermediary in the act of communication to the public, and the second one is the deliberate nature of such behaviour. These criteria are a logical way to determine liability in the discussed cases. It makes sense to question whether the intermediary plays an indispensable role in the act of communication. If the answer to this question is negative, it means that without the existence of the intermediary (or just without its intervention), the public would still be able to access the works

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<sup>131</sup> Joined Cases C-682/18 and C-683/18 *Youtube and Cyando* [2021] EU:C:2021:503, para 82.

<sup>132</sup> *ibid*, para 102.



in question, so it would not be justifiable to hold the intermediaries liable. The criterion of deliberate behaviour is also crucial because of the nature of the platforms. Since the platform owners are not the ones directly communicating to the public, their liability is determined based on their behaviour towards the communication. If compared to other possible criteria, the deliberate behaviour is most in line with the goals of the InfoSoc Directive.<sup>133</sup> For example, the knowledge criterion would put these platforms in an unfairly disadvantaged position, since in practice all or almost all platforms are aware of the fact that unauthorized acts of communication are happening on their platforms. The fact that YouTube put in place systems to prevent and minimize such acts is proof of knowledge. Instead, the Court examines how platforms react in such cases, and are they trying to stop or encourage such further acts. The profit-making nature criterion would suffer from similar issues, as most of these platforms are operated for profit, and the works which are posted there certainly influence the number of visitors, and therefore, profits. But again, it is far more beneficial to examine if the platforms want to profit from these works on their platforms, or if they are discouraging the users from posting them.

It is difficult to predict how the case would have been decided if the Digital Single Market Directive<sup>134</sup> had been in force when this case was brought before the Court. However, using the logic from the existing judgment and the facts of the case, some projections can be made. Firstly, regarding the authorization that platforms should acquire, it is evident that it would be quite difficult for either of them to acquire in advance licensing agreements or similar authorizations for all the content uploaded to the platforms in the main proceedings, considering the size of the platforms, and the amount of content uploaded to them. An important thing to note is that both YouTube and Uploaded prohibit users from uploading copyright-protected content in their terms of service, to which all users must agree. Secondly, we need to look at the three measures that have to be put in place in order for an OCSSP to not be liable: trying to obtain authorization, trying to ensure that the works which are uploaded without authorization are removed, and acting quickly when warned of an infringement. From the facts of the case, YouTube fulfils these conditions quite well. They have systems in place to check for unauthorized content, and if a video contains protected content, the rightsholder is notified and they decide if the video can use their works, and

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<sup>133</sup> European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

<sup>134</sup> European Parliament and Council Directive 2019/790 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 L130/92.

when they are warned that a video with unauthorized works is uploaded, they act relatively quickly to examine the situation and remove the infringement. The wording of the Digital Single Market Directive in the part of “[...] high industry standards of professional diligence”<sup>135</sup> leaves room for interpretation and will probably be defined by case law in future similar cases, but it is reasonable to assume that the systems YouTube has in place would be considered as being up to the standard, as they are pretty efficient. Surely some unauthorized content might get around these measures, but overall, the system discourages infringements. On the other hand, Uploaded did not have such intricate systems in place. It can be argued that Uploaded asks for authorization as a part of its terms of service, to which all users must agree, the same as YouTube. As for the other three conditions, it would mainly depend on the Court’s understanding of what constitutes fulfilment of these conditions. They could argue that they act expeditiously upon receiving the notice from the relevant rightsholder and that the mere fact that they prohibit unauthorized uploads of protected content are “best efforts to obtain authorization”.<sup>136</sup> But it would be hard to argue that they are trying to prohibit future infringements because they do not have automated systems in place to prevent such infringements. The best argument for Uploaded is that they did not have the deliberate nature of profiting by uploads of protected works, since they do not have a search engine, and users have to obtain links to files uploaded to the platform either manually (from the uploader), or from a third-party website which can catalogue and index links on their sites. However, the Digital Single Market Directive<sup>137</sup> does not mention the deliberate nature as a condition for determining liability. So, it would be up to the Court to decide through case law whether they would value this criterion as strongly as they did in the original ruling. It can only be speculated whether the Court would value it as a deciding criterion, or if they would introduce a new criterion altogether, or perhaps only use criteria in the directive and interpret them broadly.

The opinion of Advocate General Saugmandsgaard Øe offers some additional points in regard to the judgment in the case *Youtube and Cyando*,<sup>138</sup> as well as arguments for future cases when the

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<sup>135</sup> Art. 17(4) European Parliament and Council Directive 2019/790 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 L130/92.

<sup>136</sup> Art. 17(4) European Parliament and Council Directive 2019/790 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 L130/92.

<sup>137</sup> European Parliament and Council Directive 2019/790 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 L130/92.

<sup>138</sup> Joined Cases C-682/18 and C-683/18 *Youtube and Cyando* [2021] EU:C:2021:503.

Digital Single Market Directive<sup>139</sup> is in power. The AG firstly emphasizes the importance of YouTube as a service provider, saying that it has around 1.9 billion users and that these users generate and consume a wide range of content “[...] including cultural and entertainment content, such as musical compositions published by emerging artists looking for a wide audience, informative content on topics as diverse as politics, sport and religion, as well as ‘tutorials’ the purpose of which is to allow anyone to learn to cook, play the guitar, repair a bicycle, etc.”<sup>140</sup> This is a very important point as it shows the importance and versatility of these platforms. So, it can be concluded that through these types of platforms, users also utilize their right of access to information. On the point of intermediary status, the AG compared the present case to a case regarding the unauthorized use of trademarks on the popular electronic commerce platform e-Bay. Those items with the trademarks in question were also put on sale by users, not by the platform. The platform recommended these items to buyers who searched for similar products, and the platform also charged a fee based on sales that were made through their platform. The Court concluded that this did not constitute a case of communication to the public by e-Bay, as the users themselves posted these products for sale.<sup>141</sup> It is apparent that in the case mentioned by the AG, e-Bay was certainly an essential factor, since without it the infringements would not happen, and the Court did not find them to be liable for using the sign. So, it is only reasonable that the same logic be applied in the present case, and YouTube and Uploaded should also not be viewed as intermediaries.

But the balancing of rights and the question of intermediaries are not even the main issue in these types of cases. The main issue is the question of liability of these platforms in the first place. As the AG points out in his opinion, users are the ones who should be held liable for communicating to the public and not the operators.<sup>142</sup> In the same opinion, it is later emphasized that “[...] Article 3(1) of Directive 2001/29 harmonises the material content of the right of ‘communication to the public’, it determines acts falling within that exclusive right and, to that extent, primary liability borne by those who commit such acts illegally. On the other hand, nothing in the wording of that

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<sup>139</sup> European Parliament and Council Directive 2019/790 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 L130/92.

<sup>140</sup> Joined Cases C-682/18 and C-683/18 *YouTube and Cyando* [2021], Opinion of AG Øe ECLI:EU:C:2020:586, para 43.

<sup>141</sup> *ibid*, paras 90 and 91.

<sup>142</sup> *ibid*, para 50.

provision or in the other provisions of that directive suggests that it was intended to govern matters of secondary liability.”<sup>143</sup> However, the Digital Single Market Directive establishes secondary liability under the aforementioned Article 17.<sup>144</sup> This could lead to problematic interpretations down the line, as cases in which OCSSPs do not fulfil the obligations required for not being held liable as clearly as YouTube does, could be held liable. The Court has shown a history of broad interpretations of copyright, so it would come as no surprise if they used similarly broad interpretations in this new directive. Further analysis of legal arguments the Court could use would be hypothetical, but the issue of establishing this type of liability is not. Practical goals of this type of liability should be aimed at reducing the number of potential new infringements. But by making platforms liable, this goal would not realistically be likely to be achieved. Firstly, by making the OCSSPs liable, the focus is removed from users who are posting the works. OCSSPs can put very complex systems in place to combat this (as they already do), and still not be able to catch every infringement. This means that the users are not getting discouraged from posting the works in the first place, because they have nothing to lose. It is far easier for any rightsholder to accuse a large company than an anonymous, individual user, who can easily make a new anonymous account and try to post the works again. Furthermore, large platforms like YouTube are likely to have these systems in place with or without legislation that mandates them to do so, because it is in their best interest. It is clear that their business model does not want to rely on publishing unauthorized content, but rather on creators who post their own work, or publishing companies that have been authorized to post said works. If they did not care about the legality of their content, they would be perceived as a platform like The Pirate Bay, and rightsholders would likely publish their work on another platform. But secondly, even the concept of secondary liability is problematic, and the argumentation is analogue to cases regarding ISPs, like *UPC Telekabel Wien*<sup>145</sup> from one of the previous subchapters. The main issue is not whether intermediaries can stop these infringements, it is whether they should be expected to. Just because they provide a service that is most of the time used legally, they are not responsible for cases in which individuals abuse the service for illegal activity. Placing this amount of responsibility on the industry arguably makes the problem

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<sup>143</sup> *ibid*, para 103.

<sup>144</sup> Art. 17 European Parliament and Council Directive 2019/790 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 L130/92.

<sup>145</sup> Case C-314/12 *UPC Telekabel Wien* [2014] EU:C:2014:192.

even worse, as it does not disincentivize primary liable users from unauthorized acts of communication.

Of course, a counterargument can be made, that in the case of deregulation platforms from cases like *Ziggo*<sup>146</sup> or *Filmspeler*<sup>147</sup> have even less incentive to stop existing and encouraging their users to commit acts of communication to the public. It is true, this looser regulation could be perceived as incentivizing websites that are made to post unauthorized content, but the regulation that exists currently does not disincentivize them. Even if the owners of the website are prosecuted, it is likely that a new website will come into their place, or they will simply change the domain. And again, while the owners of the website can be prosecuted, users who actually post the content enjoy better protection, by the same logic as with “legitimate” websites. Another very important fact is that rightsholders have ways to protect themselves aimed at the users who post the content, they can take legal action against users, and in doing so they have the right to obtain information about those users from platforms, including the name and addresses of those users.<sup>148</sup> So in the end, the liability of OCSSPs does not solve or significantly diminish the problem of piracy, and rightsholders have concrete ways to hold users who actually committed acts of communication to the public responsible. At the same time, secondary liability jeopardizes freedoms such as freedom of expression and information. AG Saugmandsgaard Øe emphasizes that platforms like YouTube are an essential way to exercise these freedoms.<sup>149</sup>

Since liability for platforms is established, the most reasonable way for the Court to distinguish between OCSSPs who are liable and those who are not is to maintain the criterion of the deliberate nature in new cases for which the Court will use the Digital Single Market Directive.<sup>150</sup> Determining if a platform had the intention to allow users to post unauthorized content mitigates the negative aspects of secondary liability from the previous paragraph. Conditions that free OCSSPs from liability listed in Article 17 of the Digital Single Market Directive<sup>151</sup> already imply

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<sup>146</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456.

<sup>147</sup> Case C-527/15 *Stichting Brein (Filmspeler)* [2017] EU:C:2017:300.

<sup>148</sup> <sup>148</sup> Joined Cases C-682/18 and C-683/18 *YouTube and Cyando* [2021], Opinion of AG Øe ECLI:EU:C:2020:586, para 235.

<sup>149</sup> *ibid*, para 241.

<sup>150</sup> European Parliament and Council Directive 2019/790 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 L130/92.

<sup>151</sup> Art. 17 European Parliament and Council Directive 2019/790 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 L130/92.

that the deliberate nature of the act is the deciding criterion, since any platform that fulfils these conditions likely does not wish for users to post unauthorized content, but ambiguous cases, like *Cyando*<sup>152</sup> will not necessarily fall under this category. The criterion of deliberate nature in these types of cases could in practice look as it did before. Determining facts like whether the website provides search options, or catalogues unauthorized works specifically (like the Court did in *Ziggo*),<sup>153</sup> among other factors, could decide the deliberate nature of a platform. By using this criterion unambiguous cases, like *YouTube*, would still have the same result, while other platforms would be able to prove that they are not liable, so the rightsholders would likely persecute users, who are the ones communicating to the public in the first place. This would not be the first time the Court implemented criteria that are not in the directive, as we have seen in the example of the new public criterion in the previous chapter.

### **3.7. Other factors which determine copyright infringement**

Regulation is not the only thing that determines the amount of copyright infringement happening online, nor is it the only thing this regulation influences. This final subchapter examines other factors which contribute to a higher or lower rate of copyright infringement, as compared to the case law and regulations.

As the AG Saugmandsgaard Øe notes, a lot has changed since the InfoSoc Directive came into power. “[...] Intermediary providers are no longer the same and this balance is perhaps no longer justified.”<sup>154</sup> The approach of harsh measures and broad interpretation of copyright may make it difficult to achieve other goals, while not doing much to solve the problem of unauthorized communications to the public. Firstly, it damages the potential for the growth of the digital economy. It is suggested that there is a “negative relationship between the level of regulatory restrictiveness and the size of ICT capital investment across certain regulatory categories.”<sup>155</sup> The explanation for this correlation is quite logical, as a heavily regulated market increases the risk for companies who want to conduct business in said market. “Indeed, the Internet has thrived because

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<sup>152</sup> Joined Cases C-682/18 and C-683/18 *Youtube and Cyando* [2021] EU:C:2021:503.

<sup>153</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456.

<sup>154</sup> Joined Cases C-682/18 and C-683/18 *YouTube and Cyando* [2021], Opinion of AG Øe ECLI:EU:C:2020:586, para 246.

<sup>155</sup> Mathias Bauer, “Right Direction, Wrong Territory: Why the EU’S Digital Single Market Raises Wrong Expectations” (2017) American Enterprise Institute <<http://www.jstor.com/stable/resrep03276>> accessed 28 September 2023 p. 8.

it has largely been unregulated, especially when it comes to commerce.”<sup>156</sup> This means that by putting additional obligations on companies that conduct business on the internet, like imposing secondary liability on OCSSPs can discourage such companies to conduct business in such markets. On top of that, the fact that judgments can have uncertain outcomes, as the Court sometimes applies criteria in an arbitrary way, can make a market even less desirable to potential investors and companies. Furthermore, there is evidence to show that putting an emphasis on protecting the rights of the rightsholders is not even necessary, as data from the latest report made by the EU Intellectual Property Office (hereinafter: EUIPO) shows that other factors have a higher influence on the amount of users who wish to access content illegally: “Between 2017 and 2020, overall access to pirated content in the EU halved. This decline was particularly pronounced in music, with piracy access reduced by 81%. Film piracy fell by 68% and TV piracy declined by 41% during the period.”<sup>157</sup> Even though there were some temporary increases due to external factors (e.g., the COVID pandemic in 2020), and piracy of different types of content decreased at different rates the overall trend of piracy is falling consistently, and significantly. The report also included a number of factors that influence the amount of illegally obtained content. Factors that were found to be the most relevant were income per capita and income inequality, followed by demographic factors. The conclusion was that the rate of piracy was higher in Member States with lower income and higher income inequality, as well as in Member States with a younger population. Following these factors, the report analysed the acceptance of digital piracy in situations where a copyright-protected work was not available legally as a factor. The report suggests that this hypothesis is only partly supported by data as it varies among different types of content. Finally, the study found that two more factors contribute to a higher level of piracy, namely the awareness of legal offers and the number of legal platforms which are available in a Member State.<sup>158</sup> From these findings, it is apparent that the problem of unauthorized content is not related solely to regulation, as the majority of the aforementioned factors are not influenced by the content of the directives or the Court’s interpretation of them. So, making intermediaries liable

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<sup>156</sup> Robert Atkinson, “EU Digital Single Market: Pursuing Contradictory Goals?” (2016) German Marshall Fund of the United States 5, 7.

<sup>157</sup> Online Copyright Infringement in the European Union, Music, Films, and TV (2017-2020), Trends and Drivers, <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/quantification-of-ipr-infringement/online-copyright-infringement-in-eu/online\\_copyright\\_infringement\\_in\\_eu\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/quantification-of-ipr-infringement/online-copyright-infringement-in-eu/online_copyright_infringement_in_eu_en.pdf)> accessed 14 September 2023, page 69.

<sup>158</sup> *ibid*, page 68, for a more detailed explanation of the study see Chapter 5 of the report starting at page 56.

is not only problematic from the point of legality, it is also inefficient, especially when there are better ways for the industry to influence the demand for pirated content. The decreased rates of piracy from the study are evidence that the decrease in pirated content is mainly influenced by the other factors, as opposed to regulation. For example, music, which is the type of content with the largest decrease in illegal consumption is widely available completely for free (on platforms like YouTube, where most music is uploaded by the rightsholders), or on streaming services that offer affordable subscription rates. When given the possibility to consume content legally, most users opt for this possibility. The rights of the rightsholders are important and must be balanced with other rights, but the way in which this is currently attempting to be accomplished is not helping to combat that problem. This means that the rightsholder's rights are not being balanced by these measures and interpretations, and at the same time other rights that were talked about, such as rights to privacy, freedom of expression and information, and the right to conduct business are at risk of being unjustifiably interfered with.

#### **4. Conclusion**

The first part of this paper concerned primarily the right of the communication to the public as defined in the InfoSoc Directive.<sup>159</sup> Acts of communication to the public were analysed mainly from the point of case law and discussed the Court's approach to interpreting different aspects of this right. After defining and analysing all the conditions for an act to be considered an act of communication to the public, and the criteria which the Court uses to determine the existence of these conditions, several problems were identified.

Firstly, the use of the technical means criteria, which led to uneven and uncertain case law. This is most noticeable in *Svensson*<sup>160</sup> and *ITV Broadcasting*,<sup>161</sup> as well as in *AKM*.<sup>162</sup> The technical means criterion, which is applied first in cases regarding retransmissions, determines whether a retransmission is to be considered an act of communication to the public, or if the new public criterion should be applied subsequently. The case *AKM* further shows that even this arbitrary divide is not always consistent, as the Court uses the new public criterion, even though the

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<sup>159</sup> European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

<sup>160</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

<sup>161</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>162</sup> Case C-138/16 *AKM* [2018] EU:C:2017:218.



retransmission was done using the same technical means as the initial transmission.<sup>163</sup> The problem with these interpretations of the technical means criterion is two-fold, firstly because it is inconsistent, and secondly, even if it were not, it is arbitrary, as the means by which a transmission is achieved are overall irrelevant in determining whether a rightsholder's rights have been infringed upon. If the technical means criterion was abandoned by the Court, and the profit-making nature criterion as this paper suggests, was used in its place, the case law would be more consistent and logical.

The second large problem was the use of the new public criterion in cases with retransmissions. The criterion was originally intended to be used in cases where there was no subsequent retransmission of the works in question, but rather the original transmission was communicated to a public not thought of by the rightsholder. In these types of cases, for example, *SGAE*<sup>164</sup> and *SCF*<sup>165</sup> the new public criterion made sense, and produced overall uniform results, especially when combined with the profit-making nature criterion. In these cases, the criterion is justified, but problems arise when it is used in different cases, where a retransmission of protected works happens. Cases like *GS Media*<sup>166</sup> and *Svensson*,<sup>167</sup> in which the criterion was also applied, did not benefit from the criterion. Since there already was a retransmission, and it was done using the same technical means, which was the internet, these cases had no new public, so the Court used the profit-making nature criterion to determine whether an act of communication to the public has been committed. So, in those cases, the new public criterion is redundant, and will likely continue to be, as more and more works are going to be communicated via the Internet, and if the works were already freely available then there will be no new public. In cases where an original transmission was not freely available, rather the works were available to paying subscribers, if there is a case of communication, the new public criterion is also redundant, as in those cases a communication to the public was made, so examining whether the public was actually "new" is completely irrelevant. So, the best course of action is to use the criterion the way it was originally intended, in cases with original transmissions, and in the other group of cases the best course of action is again to examine the profit-making nature of the act.

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<sup>163</sup> *ibid*, para 27.

<sup>164</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764.

<sup>165</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140.

<sup>166</sup> Case C-160/15 *GS Media* [2016] EU:C:2016:644.

<sup>167</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76.

The profit-making criterion, though not perfect, produces the most consistent results. Even though it can be argued that the use of this criteria could also be uneven and arbitrary, most cases that use it point to the contrary. *Airfield and Canal Digitaal*<sup>168</sup> and *SBS Belgium*<sup>169</sup> show that the financial gain has to come directly from the act of communication to the public, i.e., from the subscribers that form the public. In cases with the original transmission, like *SGAE*,<sup>170</sup> and *SCF*,<sup>171</sup> the use of the criterion is well explained and logical, basically defining that depending on the type of business that is communicating to a (new) public via the original transmission, the Court determines if the said business can expect financial gain as a direct result of the retransmission. Finally, and most notably, in cases with retransmissions if the criterion was applied, it would produce the most uniform results. Similar cases, like *Svensson*,<sup>172</sup> *ITV Broadcasting*,<sup>173</sup> *AKM*,<sup>174</sup> and *VCAST*,<sup>175</sup> would all be examined using the same criterion, and the decisions reached by the Court would be understandable and logical. This criterion is also most in line with the goals of the Directive, as it balances the rights of users to freedom of expression and access to information on the one side and protects the rights of rightsholders by limiting unauthorized financial exploitation of their works on the other.

The second part of the paper focused on OCSSPs and their status as intermediaries which can, under certain conditions, be found liable for cases of unauthorized posting of protected works on their websites. Cases regarding OCSSPs are different from the previous cases because the platforms themselves are not posting the content, but rather their users. Since there still are not any cases where the Court applied the Digital Single Market Directive, it is uncertain how the Court will interpret the article of the Digital Single Market Directive about OCSSP liability.<sup>176</sup> However, the mere fact that such a liability exists is problematic for a number of reasons. Firstly, from an efficacy standpoint, establishing liability for intermediaries is not likely to reduce the amount of unauthorized content. This is mainly due to the fact that users are not going to be discouraged from

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<sup>168</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal* [2011] EU:C:2011:648.

<sup>169</sup> Case C-325/14 *SBS Belgium* [2015] EU:C:2015:764.

<sup>170</sup> Case C-306/05 *SGAE* [2006] EU:C:2006:764.

<sup>171</sup> Case C-135/10 *SCF* [2012] EU:C:2012:140.

<sup>172</sup> Case C-466/12 *Svensson* [2014] EU:C:2014:76

<sup>173</sup> Case C-607/11 *ITV Broadcasting and Others* [2013] EU:C:2013:14.

<sup>174</sup> Case C-138/16 *AKM* [2018] EU:C:2017:218.

<sup>175</sup> Case C-265/16 *VCAST* [2017] EU:C:2017:913.

<sup>176</sup> European Parliament and Council Directive 2019/790 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 L130/92.

communicating the works if they are not the ones who are going to be found liable. The second reason is that most large OCSSPs, like YouTube from the case, are likely to have these systems in place anyway, or if not, then at least they are likely to discourage piracy on their platform. Aside from practical reasons, there is also a principal reason, as platforms should not be the ones that have to stop piracy, and therefore should not be held liable for not preventing it. Just because someone is using their product in an illegal way does not mean that they are liable for it. Also, the rightsholders have the possibility of targeting the users directly, so their rights do not remain unprotected if they cannot get remuneration from OCSSPs. So, when the Court establishes case law regarding this issue, the most beneficial criterion it can use is the deliberate nature criterion. In other words, to simply examine whether a platform not only knew about the posting of unauthorized content but encouraged such posting and based its existence on the users who post such content. These are cases like *Ziggo*,<sup>177</sup> where it is completely obvious that the operators of the platform wanted unauthorized content to be posted on their platform. By using this criterion, cases, where OCSSPs or ISPs are intermediaries, would be safe from liability, as it would be easy to prove that providing users with unauthorized content is not the way they want to make money. At the same time, in cases where pirated content is for example catalogued, advertised, or otherwise encouraged would not be exempt from liability. This still clearly would not solve the problem of piracy, but at least in an individual situation with a platform, the decision would be intuitive and logical, with a better balance of rights.

All of these previous factors from both parts of the paper lead to a conclusion that the Court gives a very high level of protection to the rightsholders, which often results in confusing and contradictory decisions, with criteria that are being used unevenly and inefficiently. The balance that needs to be struck between copyright on one side, and other rights on the other is not being achieved. Aside from the imbalance, strong regulation has another negative effect, as markets that are heavily regulated usually receive less investment. This in turn results in fewer innovations being made, and fewer new technologies being developed, which hinders the EU's aspirations of positioning itself as a competitive force in digital markets worldwide. Surely this is not the only factor in achieving such a complicated goal, but it is significant. Finally, the results of research mentioned in the previous chapter show that the level of regulation ultimately does not affect the

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<sup>177</sup> Case C-610/15 *Stichting Brein (Ziggo)* [2017] EU:C:2017:456.

level of piracy in a noteworthy way and that other factors mostly financial and demographic in nature, as well as the existence of legal alternatives, are the crucial factors which impact piracy. Of course, interpreting regulation in a different way and using different criteria proposed in this paper will not resolve the problem completely. However, it will strike a more nuanced balance with other rights which were previously discussed, and possibly aid other goals the EU digital market has, while at the same time not increasing the amount of copyright infringement. Balancing any sort of opposed rights certainly is not an easy task, and a small imbalance will always exist, whether it is factual or perceived, but with a few small corrections mentioned throughout this paper the said imbalance can at least be improved upon and can allow the EU digital market to be a more competitive and fairer one.

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