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# Linking to illicit content – lawful or unlawful conduct?

- An assessment of the relationship between art. 3(1) of the Information Society Directive and the use of hyperlinks on the internet.

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# Summary

This essay specifically concerns itself with how the EU regulates the activity of using hyperlinks on the internet in connection with copyright protected material. Although there has been prior case-law dealing with this relationship, it is still unclear whether the publishing of a hyperlink which directs the internet user towards unlawfully uploaded copyright protected works, which are freely accessible, constitutes an infringement of the author's rights. This is the main question in a proceeding currently lodged at the Court of Justice of the European Union (CJEU). If deemed unlawful, it would mean that the use of a hyperlink in said manner would constitute an *act of communication to the public* in accordance with art. 3(1) of Directive 2001/29/EC of the European Parliament and of the Council *on the harmonization of certain aspects of copyright and related rights in the information society* (ISD). In addition, the essay discusses how this ruling, deeming this activity either lawful or unlawful, will affect both the right holder and the general users of the internet.

After the introduction, the essay in chapter 2 begins with a brief discussion on how the EU legal body is constructed. This is then followed by a somewhat lengthier discussion of the role of the CJEU as it is with this Court that the answer the stated question ultimately lies. Chapter 3 of the essay discusses what the internet is as well as the different types of links that can be used within it. Chapter 4 gives a general overview of how copyright legislation has developed on the EU-level, and what has influenced it. Chapter 5 discusses the most prominent features of the ISD with a focus on the right holder's right of communication to the public. The essay then in chapter 6 specifically discusses how this right has developed in an internet context by analyzing CJEU case-law that has dealt with some of the provisions of the ISD. This continues in chapter 7, but this chapter instead focuses on the case currently pending before the CJEU that will ultimately resolve the first of the stated questions of which there recently has been an opinion of the Advocate General published. Chapter 8 discusses all of the findings above and these are then brought together in a final conclusion.

It is concluded that the answer to the principal question of the essay, whether one lawfully can link to illicitly uploaded content that is freely accessible on the internet, is not definitively ascertained.

# Sammanfattning

Denna uppsats handlar om hur EU-lagstiftningen reglerar användningen av hyperlänkar på internet mot bakgrund av det skydd som finns för upphovsrättsligt skyddat material. Även om detta förhållande har behandlats i tidigare EU-rättslig praxis kvarstår oklarheter. Uppsatsen vill närmare bestämt svara på frågan huruvida publiceringen av en hyperlänk som styr internetanvändare mot olovligt uppladdade men fritt tillgängliga verk, skyddade av upphovsrätt, utgör en överträdelse av upphovsmannens rättigheter. Detta är huvudfrågan i ett ärende som för närvarande väntar på domslut från Europeiska unionens domstol (EU-domstolen). Om det anses olagligt, skulle det innebära att användningen av en hyperlänk, skulle innebära en överföring till allmänheten i enlighet med art. 3 (1) Europaparlamentets och rådets direktiv 2001/29/EG *om harmonisering av vissa aspekter av upphovsrätt och närstående rättigheter i informationssamhället*. Dessutom diskuterar uppsatsen hur ett domslut som innebär att denna aktivitet är antingen laglig eller olaglig kommer att påverka både rättighetsinnehavare och internetanvändare.

Efter uppsatsens inledning börjar kapitel 2 med en kort diskussion om hur EU:s lagstiftning är utformad. Detta följs sedan av en något längre diskussion om EU-domstolens roll och arbetssätt eftersom det är denna domstol som kommer att ge svaret på uppsatsens huvudfråga. Kapitel 3 diskuterar vad internet är och de olika typer av länkar som finns. Kapitel 4 ger en allmän översikt över hur lagstiftningen om upphovsrätt har utvecklats på EU-nivå, och vad som har påverkat den. Kapitel 5 diskuterar några av de viktigaste bestämmelserna i ovan nämnda direktiv med fokus på rättighetsinnehavarna rätt att överföra sina verk till allmänheten. Uppsatsen diskuterar sedan, mera specifikt, i kapitel 6 hur denna rättighet har utvecklats i relation till internet genom att analysera EU-domstolens rättspraxis som har behandlat detta förhållande tidigare. Detta fortsätter även i kapitel 7 men här med fokus på det domstolsförfarande hos EU-domstolen som kommer att svara på uppsatsens huvudfråga. Vad gäller detta ärende har nyligen ett yttrande avgivits från Generaladvokaten. Kapitel 8 diskuterar därefter resultatet av undersökningen och slutligen görs en sammanfattande konklusion.

Svaret på huvudfrågan i uppsatsen, d.v.s. frågan om man lagligen kan länka till olagligt uppladdade verk som är fritt tillgängliga på internet, är att den ännu inte har fått ett definitivt svar.

# Preface

Although I refrained from writing a preface text for my bachelor's thesis it does seem more warranted now considering the amount of pages that **you**, dear reader,

At some point,

Somewhere,

Will have to venture through.

I do hope all is well!

Although a part of me wants to refrain from it, I cannot help but plead guilty of using the ever-present statement, persistent in almost all preface texts, that "*there are too many people worth mentioning*" to whom I would like to express my sincere gratitude. It is however the case because during my time in Lund I have met some sincerely fantastic people.

Some honorable mentions are however in place:

My family for their love and support throughout these years.

All my friends from law-school who really are too many to mention.

Erik and Sebastian considering what we have been through together I do however have to mention the two of you.

My partner in crime and roommate Adrian who has kept me well fed throughout the final hours of the essay,

All the people I had the pleasure of getting to know during my first years of Uni. while living in the student corridor at Delphi. You know who you are!

I would also like to thank my tutor, Michael Bogdan, for his assistance in writing this essay.

On an ending note, I would like to dedicate this essay to my grandfather who never got the chance in life to experience University, although he should have.

Sven, you will never be forgotten.

Lund, 23 May 2016  
Simon Wilkens

# Abbreviations

BGH	Bundesgerichtshof/Federal Court of Justice of Germany
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
ECS	European Copyright Society
EU	European Union
EUCFR	European Convention for the Protection of Human Rights and Fundamental Freedoms
HTML	Hypertext Markup Language
IPR	Intellectual Property Rights
ISD	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society
ISP	Internet Service Provider
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty



# 1 Introduction

## 1.1 Background

The topic of what ought to be considered to be most important invention of all time might be one of those discussions that ultimately will never be settled. Despite this, it will always constitute an inviting and engaging topic of discussion where, once asked, plethora of possible contenders - ranging from the invention of the wheel to the invention of soymilk – are all answers that can be argued. That being said, and notwithstanding the importance of soymilk, one strong contender for this “would-be shortlist” of great inventions would surely be the internet. Since its emergence at the turn of the 21<sup>st</sup> century the impact this entity has had on humanity is hard to grasp, and perhaps even harder to quantify, but the inherent ability of the internet to allow worldwide communication and effective spread of information at the point of one’s fingertips has so far been unmatched.

As with all inventions, that drastically change and influence our way of living, it is almost inevitable for these to also bring about change and influence to the legal framework in various ways. When it comes to the internet that would almost constitute an understatement. Although the restrictions of usage and access of information varies greatly, depending on which state it is accessed from, the World Wide Web has few boundaries. This fact gives rise to a series of judicial questions. In the legal field of intellectual property rights, this is particularly true. Even though there are international treaties that strive to harmonize this area of legislation, the intellectual property rights have in general primarily had their protection established and granted within national legislation. The European Union (EU) has tried to address this by adopting legislation aimed at harmonizing the rules within EU.

## 1.2 Purpose and Questions of research

This essay aims to investigate whether certain aspects of internet use is compatible with EU copyright legislation. In recent years there have been a number of important rulings emanating from the Court of Justice of the European Union (*CJEU*) that have dealt with the relationship between the right holder’s exclusive right to control the spread of their works on the internet and the *linking* to them. In particular, this uncertainty concerns whether a link on the internet can be said to amount to a *communication to the public* in accordance with art. 3 of the *Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society (ISD)*, when a person publishes a link that directs towards a work that has been *illicitly* uploaded *without* the consent of the right holder. The research questions for this essay are therefore:

- Is the posting of a link on a website that directs the users to another website, containing protected works that were uploaded without the consent of the right holder, considered a *communication to the public* pursuant to art. 3(1) of the ISD?
- What are the potential consequences of either ruling for or against the scenario stated above in terms of the effect on the interests of both the right holder, on the one hand, and the general users of the internet, on the other?

In order to ascertain the answer to these stated questions it has been deemed relevant to include a historical viewpoint on how copyright harmonization within the EU has progressed with particular respect paid to the internet. In addition, the role of the EU judiciary will be discussed, as it is there the answer to the first question currently resides. Attention has also been paid to relevant international treaties that have affected the legal development.

### 1.3 Methodology and material used

This essay seeks to establish what is held within EU law, which is why the primary focus, especially when answering the first question, will be to write an assessment *de lege lata*, i.e. how the law *is*. However, as this is still somewhat of a “hot topic” within EU law there will be references made to opinions derived from legal doctrine within the field that are more in line with a *de lege ferenda*, i.e. how the law *should be*, approach. The second question more generally aims to establish what the potential consequences of the findings will result in in respect to the relevant parties, i.e. the right holders of copyright and the internet users

Although the legal field of study is within *intellectual property rights* (IPRs), and, to be more specific, within the field of *copyright*, it turns out that it is difficult to confine oneself solely to this field when investigating IPR in the EU. To understand why this is the case it is, as Nigel Foster notes in *Foster on EU Law*, important to begin with explaining the term *acquis communautaire* (*acquis*). The term refers to the *entirety* of relevant EU legislation from the outset of its formation, which thereby includes text ranging from its treaties to the case law of the CJEU.<sup>1</sup>

Despite comprising of such a substantial amount of legislation, it must not be forgotten that EU legislation is not at all universal. It follows from art. 4 - 5 *Treaty on European Union* (TEU) that the Union can only enact legal provisions within the fields that it has been granted by its Member States; non-conferred power must remain with the individual Member States.<sup>2</sup> However, exactly where the dividing line is located regarding this division of powers is not always easy to determine.

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<sup>1</sup> Foster (2013) p. 94-95.

<sup>2</sup> Chalmers et al. (2014) p. 393-395.

This difficulty is, according to Margot Horspool and Matthew Humphreys in *European Union Law*, because, on the one hand, each consecutive treaty has bestowed more competences to the EU, and on the other, that the interpretations of the CJEU regarding its legislation has done the same.<sup>3</sup> Some clarity is nevertheless achieved by dividing the provisions into different categories. Horspool and Humphreys categorize EU-law into three major categories; *primary legislation* and *secondary legislation* as well as the somewhat ambiguous category of *other legal sources* but this division is not universally used.<sup>4</sup> The reason for this is that there is no formal hierarchy established within the Treaties between the different types of legislation.<sup>5</sup> This division will be briefly touched upon in chapter 2.1.

As within most, if not all, legal systems the interpretation of the law is left to the judiciary. Within the EU, this role is fulfilled by the CJEU. That this is the case is evident from art. 19 TEU where it is stated that the CJEU's role is to ensure that the law is observed when the treaties are interpreted or applied.<sup>6</sup> It would therefore seem fit to employ the same method of interpretation as the CJEU uses in answering the previously stated questions. The CJEU goes further than looking at the actual wording of the provision it aims to dissect by seeking to establish what *aims* and *objectives* are behind it in the greater scheme of things. The interpretation method is commonly known as being *teleological*.<sup>7</sup> It is however not the easiest task to exert as the court is known to employ *several* methods of interpretation when answering what the law states.<sup>8</sup> As the essay evolves around this judiciary's case law to a substantial amount, its role will be discussed in chapter 2.

Although legal doctrine has been used within the essay, it has to be pointed out that the status of it, as a source of law within the EU-legal order, is not held to be very strong. Within the CJEU's judgments there are for instance never any express references made to it, but to state that it is inessential would be a precipitous conclusion. The Advocates General (AG) have for instance been known to reference it in their deliberations and it has been used by parties of EU-proceedings in order to assert their claims.<sup>9</sup> Opinions of the CJEU's judgments have also been referenced as this in addition presents the views of legal practitioners as well as interest groups that have been affected by the emanated case-law. Lastly, there are also references to preparatory works and studies conducted by the various EU-related bodies. In relation to this, there is a brief discussion of a legislative proposal from the Commission that might alter the studied legal field.

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<sup>3</sup> Horspool & Humphreys (2014) p. 86-87.

<sup>4</sup> Compare e.g. Horspool & Humphreys (2014) p. 86-87 and Hettne & Otken Eriksson (ed.) (2011) p. 40.

<sup>5</sup> Foster (2013) p. 95.

<sup>6</sup> Steiner & Woods (2014) p. 42.

<sup>7</sup> Foster (2013) p. 63.

<sup>8</sup> Hettne & Otken Eriksson (ed.) (2011) p. 40.

<sup>9</sup> Bergström & Hettne (2014) p.

## 1.4 Delimitations

This essay does not seek to discuss the wider field of *Intellectual property rights* (IPRs) but instead concerns itself with a discussion of the narrower category of *copyright*. It should be noted that the term *copyright*, although widely used, is multifaceted in the European context. This is due to it historically having been a right confined within the national legal system that naturally have led to national differences as to what the term entails.<sup>10</sup> The reader is therefore reminded that the term is used in the context of what copyright is said to constitute within the EU *acquis*.

Despite the fact that copyright protection may be awarded to a range of subjects, the essay will focus on non-tangible objects within the digital medium that fall under art. 3(1) of the ISD, i.e. the *works of authors*. In relation to the internet, there are several provisions within the ISD that are of relevance, e.g. art. 2 which deals with the *reproduction right*. Due to confinements of space, these will however not be discussed. However, a brief discussion on the ISD has been deemed relevant but it is not exhaustive as it merely presents the reader with a general view of its most salient features.

Although the essay is heavily reliant on EU-case law, the backgrounds to the cases have mostly been left out. Instead, the primary prerequisites that have emanated from them are presented. Despite the essay focusing on the internet, a number of CJEU cases are discussed that have dealt with other platforms. These are nonetheless relevant in order to understand the prerequisites of the provision

## 1.5 Outline of the essay

As stated above, chapter 2 of the essay seeks to establish the relevant backdrop. Besides a brief elaboration regarding EU law, focus turns towards the CJEU, as it is through this judiciary that the main question of research will be answered. Chapter 3 instead discusses the fore of relevance, i.e. the internet and its links. Chapter 4 turns its focus towards how copyright legislation has developed within the EU in order to investigate what the purpose and aims of this legislation can be said to be.

Chapter 5 narrows this focus towards the ISD, after a brief discussion of its general features, the discussion revolves around the provision that establishes what a *communication to the public* constitutes.. The findings are then brought into chapter 6 where the provision is discussed in relation to the internet. Within the chapter, there is also a brief discussion on future legislative plans within field of the Commission. Chapter 7 deals with the relevant case that will answer the stated research questions, currently pending before the CJEU, where an opinion of the AG has recently been

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<sup>10</sup> Geiger & Schönherr in Savin & Trzaskowski (ed.) (2014) p. 111-112.

published. Chapter 8 discusses the above findings before a conclusion to the stated questions is provided.

# 2 The CJEU and EU law

## 2.1 Short on EU law

The latest large-scale change of EU law came in 2007 with the introduction of the *Treaty of Lisbon*, which entered into force in 2009, and two treaties contained therein: *the Treaty on the European Union* (TEU) and *the Treaty on the Functioning of the European Union* (TFEU).<sup>11</sup> As already mentioned in the introduction it is possible to divide EU law into three groups, *primary* and *secondary* legislation as well as the larger group *other sources of law*. The constitutive treaties, including the Treaty of Lisbon, as well as some subsidiary conventions and acts by the representatives of the Member States are all within the “primary category”.<sup>12</sup> The TEU and the TFEU are the two main treaties of the Union and they are to be understood to be “framework treaties” since they lay down more broad stroked guidelines of what is to be achieved. The broad strokes are then made thinner and more precise through the EU secondary legislation and ultimately through the CJEU.<sup>13</sup>

The general legal structure of the Union can be said to resemble that of a civil law system, with particularly heavy influence drawn from the German and the French legal systems. Foster attributes this to the fact that the EU, back when its formation was initiated, had no common law country as a member. It has however to be noted that the common law system has had influence on the EU and vice versa.<sup>14</sup> The TEU, for instance, can be said to contain the principles of the EU and is in general considered to broader and “[...] *political* [...] *in nature*”.<sup>15</sup> It is moreover important to note that the *Charter of Fundamental Rights of the European Union* (EUCFR), since the adoption of the Treaty of Lisbon, is recognized as being of equal legal standing as the other two treaties within EU-law, which follows from art. 6 TEU.<sup>16</sup>

Secondary legislation consists of several different legislative instruments derived from the TFEU, more specifically art. 288-294, where art. 288 can be said to be the “general clause” as all of the instruments are mentioned there. The regulations, directives and decisions all constitute legally binding acts. Of this group, the regulations can be seen as the most encompassing form of secondary legislation as they act as stand-alone legal instruments and, with the exception of very special circumstances, require no further action to be taken by the Member States in order to apply. Regulations usually also target the EU as a whole rather than being directed towards certain Member States or groups. The directives require incorporation into

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<sup>11</sup> Tritton et al. (2014) p. 13.

<sup>12</sup> Horspool & Humphreys (2014) p. 86-87.

<sup>13</sup> Foster (2013) p. 95-96.

<sup>14</sup> Foster (2013) p. 91.

<sup>15</sup> Tritton et al. (2014) p. 15.

<sup>16</sup> Tritton et al. (2014) p. 20-21.

the national law by the Member States to whom they are addressed and they are only binding as to what effect is to be achieved. This has often led to legal uncertainties since their national incorporation have been different between the Member States.<sup>17</sup> Decisions are, according to art. 288 TFEU, like regulations binding in their entirety. The difference, however, is that they may be used to address a certain Member State or even individuals and will then only be binding towards the subject it addresses.<sup>18</sup>

Continuing with the categorization the third and final source for the EU legal base is, in respect to the amount of different sources, interestingly enough the largest one. International agreements, general legal principles, case law of the CJEU, the recommendations and opinions contained in art. 288 TFEU as well as what is oftentimes referred to as *soft law* (memoranda, circulars, statements and resolutions) are all ascribed to this category.<sup>19</sup> Despite the clear statement of art. 288 TFEU that recommendations and opinions have no binding force, it is in fact a bit more complicated as the CJEU held in C-322/88 *Grimaldi*. The CJEU stated that national courts cannot ignore these instruments if they are relevant for the interpretation of rules that originate from EU legislation.<sup>20</sup>

However, art. 288 TFEU is not to be viewed as an exhaustive list of legally binding acts that the EU can issue. The situation is more complex than that. The CJEU has explicitly held that all measures taken by EU institutions can be said to have a legal effect that can be subject to the review of the courts. Acts and measures that fall under this category have been termed to be *sui generis*, an expression from Latin that translates to “unique”, alternatively, “in a class of its own”. As there are no clear guidelines for these and there is a high level of uncertainty within the field, which has been subject to criticism. Press releases from the Commission dealing with guidelines in certain policy areas are one example of what has been considered to constitute such a measure.<sup>21</sup>

With the ratification of the *Treaty of Lisbon*, the EU was made a legal personality making it an independent entity in its own right, this follows from art. 47 TEU. Through this, the Union was granted, inter alia, the right to enter agreements that are binding not only for the institutions of the Union but also for the Member States, as stated in art. 216 TFEU.<sup>22</sup>

## 2.2 The Role of the CJEU

It is important to point out that although this essay uses the umbrella term *CJEU* to describe the court it actually consists of several courts that have different jurisdictions and personnel as stated by art. 19 TEU. Within the

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<sup>17</sup> Horspool & Humphreys (2014) p. 95-97.

<sup>18</sup> Foster (2013) p. 100.

<sup>19</sup> Horspool & Humphreys (2014) p. 87.

<sup>20</sup> Foster (2013) p. 100.

<sup>21</sup> Horspool & Humphreys (2014) p. 98 and Foster (2013) p. 100 and p. 115-116.

<sup>22</sup> Foster (2013) p. 102.

CJEU, one finds the *Court of Justice*, the *General Court* and other specialized courts.<sup>23</sup>

Besides its judges, the CJEU, following art. 252 FEUF also consists of *Advocates-General* (AG). Their duty is to assist the Court in its proceedings by giving reasoned *opinions*, which must be impartial, on what the law says on the matter at hand. Although their opinion was previously required, the procedure has now been changed to allowing the CJEU not to use the assistance of the AG if the Court considers that there are no new points of law in a case. The existence of the AGs is an influence drawn from some of the Member States' legal systems, in particular the French.<sup>24</sup> Although the AGs opinion is not binding to the CJEU it might, for legal research, be an important interpretive tool to establish what, and primarily why, the Court judges the way it does in a certain case. Despite this value, there are figures that suggest that the CJEU only follows what the AGs have held in roughly 50-60% of the cases.<sup>25</sup>

Art. 19 TEU can be seen as a general guideline for the CJEU and it prescribes the court to rule on the interpretation and application of the *Treaties*. The wording refers to the law emanating from them but it has also led them to use the article as a foundation to legitimize the introduction of a wide range of legal principles. The principles' legitimacy is further cemented by virtue of art. 280 TFEU since it prescribes that the judgments of the CJEU are enforceable.<sup>26</sup> A further discussion of these principles will ensue below in chapter 2.3.1.

## 2.3 Jurisdiction of the CJEU

Although the CJEU deals with a variety of cases, its jurisdiction can be classified into two main categories, *plenary jurisdiction* and *preliminary rulings*. In the former category the court either deals with infringement actions against Member States, e.g. under art. 258 TFEU, or it has jurisdiction to take so-called direct action, e.g. under art. 263 TFEU.<sup>27</sup> The above division may give rise to the idea that the jurisdiction of the CJEU is infinite but it has to be pointed out that the Treaties do prescribe jurisdictional limitations. Art. 276 TFEU for instance states that the court is not to deal with questions that relate to the internal security of a Member State or its law enforcement services.<sup>28</sup>

As will be shown below, the relevant case law is derived from preliminary rulings. Due to confinements of space, the former category will therefore not be discussed.

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<sup>23</sup> Steiner & Woods (2014) p. 42.

<sup>24</sup> Bergström & Hettne (2014) p. 320-321.

<sup>25</sup> Hettne & Eriksson (2011) p. 116-118.

<sup>26</sup> Foster (2013) p. 103-104.

<sup>27</sup> Horspool & Humphreys (2014) p. 65.

<sup>28</sup> Foster (2013) p. 61.



## 2.3.1 Preliminary rulings

If any court or tribunal of a Member State is unsure as to how certain, or several, provisions that stem from the Treaties are to be interpreted, it may under art. 267 TFEU ask the CJEU to give a reasoned opinion on the matter. As follows from reading art. 267 TFEU the CJEU has, besides the interpretation of the treaties, jurisdiction to give a preliminary ruling over “[...] *the validity and interpretation of acts produced by its institutions, bodies, offices or agencies* [...]”. The article is setup in such a way that it both *allows* and *forces* a national court to refer questions to the CJEU. The second paragraph of the article allows the court or tribunal to refer the case but, as the third paragraph states, a national court or tribunal whose ruling cannot be appealed *has* to refer its questions to the CJEU.<sup>29</sup>

Although it, at least to a non-EU national, might seem counterintuitive, the CJEU gives its preliminary ruling *during* the national Member State proceedings. This is because the CJEU does *not* decide the case; the national proceedings are stayed until the preliminary ruling has been delivered. The CJEU has the role of giving an opinion of what the EU-law relevant to the case states. After this opinion has been expressed, it is instead up to the national court to give the final verdict.<sup>30</sup>

In general, the courts of the Member States tend to comply with the answer given to the referred questions. A study that was conducted cross-country found that roughly ninety-six percent of the national courts implemented the answers given. It is furthermore interesting to note that the CJEU's authority rarely is questioned directly. Non-compliance to a judgement has instead been found to manifest itself more vaguely. National courts have for instance used *a contrario* reasoning or argued that the EU law presented does not apply to the facts. What must not be forgotten with preliminary rulings is that they do allow a national court or tribunal, that finds the CJEU answers to be too vague or unsatisfactory, to refer the question back again. This, as Chalmers et al. put it, then goes on to result in “[...] *a form of judicial ping-pong*”.<sup>31</sup>

## 2.3.2 Are the rulings precedents?

When dealing with preliminary rulings the CJEU has held that its verdict, based upon the questions referred by a national court of a Member State, binds the referring court.<sup>32</sup> It has also stated that each individual case is binding for the parties concerned.<sup>33</sup> Despite this, CJEU judgments, in the wider sense, should not necessarily be understood as *precedents* as there is no formal system that establishes this within the Treaties. When answering

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<sup>29</sup> Steiner & Woods (2014) p. 234.

<sup>30</sup> Horspool & Humphreys (2014) p. 65.

<sup>31</sup> Chalmers et al. (2014) p. 192.

<sup>32</sup> See C-52/76 *Benedetti v Munari* paragraphs 24-27 of the judgment.

<sup>33</sup> Foster (2013) p. 64.

referred questions, the CJEU has stated that it merely determines the pre-existing state of the law assessed.<sup>34</sup> Even though the Court does strive for legal uniformity it is therefore free, in the light of new facts, to deviate from what it has previously ruled, which is evident from its case law.<sup>35</sup> This ability of deviation does raise questions. Not only as regards how it corresponds with the generally accepted principle of *legal certainty* discussed below, see chapter 2.4.1, but also as to what status a judgment from the Court should be given.

Despite the lack of a system formally establishing judgments as precedents, the perceived notion that nothing of weight would come from the CJEU would be a premature conclusion. The Court does after all refer back to its older case law in its rulings. That the judgments are important, in terms of the effect they have had, is also evident.<sup>36</sup> Some cases have for example brought about change to provisions in the Treaties themselves, e.g. the fourth paragraph of art. 263 TFEU.<sup>37</sup> As Chalmers et al. point out, a judgment being only binding the referring court and its parties without having an effect on the wider community would ultimately render the Court ineffective. The Court itself has offered some clarity, as to the status of CJEU judgments.<sup>38</sup>

In C-66/80 *ICC* the Court declared that a judgement by the CJEU deeming a measure taken by the EU illegal was to be considered to be a “[...] *sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.*”<sup>39</sup> As this only concerned the interpretation of measures deemed illegal, the question of the effect its interpretations had on EU law and the wider Community remained. It was however clarified in C-453/00 *Kühne*. The CJEU there confirmed the notion that its interpretations “[...] *must be applied by an administrative body within the sphere of its competence even to legal relationships which arose or were formed before the Court gave its ruling on the question on interpretation.*”<sup>40</sup> This, according to Chalmers et al., is to be understood as to include all national authorities, including the judiciary, since the Court in a subsequent case, C-212/04 *Adeneler*<sup>41</sup>, interpreted *Kühne* to having established this. The above citation from *Kühne* furthermore highlights the fact that the CJEU does consider itself to determine the pre-existing state of law.<sup>42</sup>

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<sup>34</sup> Chalmers et al. (2014) p. 193.

<sup>35</sup> Steiner & Woods (2014) p. 44.

<sup>36</sup> Foster (2013) p. 64.

<sup>37</sup> Horspool & Humphreys (2014) p. 97.

<sup>38</sup> Chalmers et al. (2014) p. 193.

<sup>39</sup> Case 66/80 *International Chemical Corp. v. Amministrazione Finanze*, see the Courts answer to question 1.

<sup>40</sup> See C-453/00 *Kühne*, paragraph 24 of the judgment.

<sup>41</sup> C-212/04 *Adeneler* paragraph 122 of the judgment.

<sup>42</sup> Chalmers et al. (2014) p. 194-195.

## 2.4 The method of interpretation of the CJEU

What is perhaps the most striking feature of the CJEU is that it cannot be said to employ a single method of interpretation in its deliberations and subsequent judgments. The explanation for this can first and foremost be attributed to the fact that the CJEU on several occasions has reiterated that “[...]in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part.”<sup>43</sup> This has allowed the Court to, besides using a strict textual approach also to employ a comparative method by looking to the national laws of the Member States or to use an autonomous method by establishing that a concept within the EU shall be the same. The CJEU furthermore often uses an *analogous* interpretation method, whereby it bridges interpretations of different legal fields. It has e.g. used interpretations or principles from competition law when interpreting trademark law. It however rarely employs the use of *e contrario* reasoning so caution is of the essence before drawing that kind of conclusions when analysing CJEU judgments.<sup>44</sup>

The CJEU's main reason for using a wider interpretative approach is that it interprets measures in the light of the goals primarily prescribed by art. 3 TEU. Promoting peace, balanced economic growth and price stability as well as endorsing environmental sustainability are just some of the goals prescribed. A key objective is to ensure an internal market, which follows from art. 3(3) TEU.<sup>45</sup> With the internal market, or the so-called single market, the goal is enabling people, services, goods and capital to move more freely.<sup>46</sup>

The CJEU is particularly known for using a *teleological* interpretation method by which the Court examines the underlying objective of a provision. The purpose has been said to be three-fold, besides establishing the purpose of the provision, it seeks to prevent unwanted consequences of a literal approach and thirdly fills unwanted legal gaps.<sup>47</sup> The method has been much discussed, according to Chalmers et al. some scholars support it whilst others do not. The criticism largely revolves around the fact that it has allowed for what is been called *judicial activism*.<sup>48</sup> This activism has been held to undermine the role and will of the legislator as the CJEU by using this method, in combination with its introduction of general principles, has nullified legal acts on several occasions.<sup>49</sup>

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<sup>43</sup> This statement has primarily been attributed to two cases; see Case 292/82 *Merck* para. 12 and Case 337/82 *St Nikolaus Brennerei* para. 10.

<sup>44</sup> Hettne & Otken Eriksson (2011) p. 160-162 and Bergström & Hettne (2013) p. 390-393.

<sup>45</sup> Reichel in Korling & Zamboni (red.) (2013) p. 122-123.

<sup>46</sup> The Single Market Strategy; European Commission: [http://ec.europa.eu/growth/single-market/strategy/index\\_en.htm](http://ec.europa.eu/growth/single-market/strategy/index_en.htm) last accessed 2016-05-23.

<sup>47</sup> Bergström & Hettne (2014) p. 393-395.

<sup>48</sup> Chalmers et al. (2014) p. 176-177.

<sup>49</sup> Reichen in Korling & Zamboni (ed.) (2013) p. 130-132.

When it comes to interpreting provisions within *secondary legislation* the CJEU, besides looking to relevant *primary legislation* and international statutes, increasingly tends to look to the recitals, contained in the preamble to the secondary legislation.<sup>50</sup>

## 2.4.1 The development of general legal principles

Since a discussion on the general legal principles is relevant when discussing the legislative *acquis* of the EU, it has to be pointed out that the discussion here is not an exhaustive one. This is because of the limited space. Nonetheless, the importance of the general legal principles within the *acquis* cannot be understated. This was for instance illustrated in C-101/08 *Audiolux* where the CJEU held that “[t]he general principles of Community law have constitutional status [...]”.<sup>51</sup>

The development of how the general legal principles interact within EU law can largely be attributed to the workings of the CJEU. As the primary and secondary legislation has never been all-encompassing, the Court introduced the use of these principles as a way to ensure answers to judicial questions that could not be derived from the written legislation. As a result, besides aiding the Court in its interpretation, the principles have also been used in order to annul legislative measures.<sup>52</sup>

One of the most central principles can be said to be the *proportionality principle*, which prescribes that EU measures may not exceed what is necessary in order to fulfil the goals of the Treaties. The assessment of this is according to Chalmers et al. two-fold; first, the ends strived for are compared with the means used, and, second, an analysis is made whether the measures taken hamper other interests and values to such an extent that they cannot be deemed to be necessary.<sup>53</sup> The importance of the principle is evident from the fact that it is recognized within the Treaties, primarily art. 5(4) TEU.

Another important principle regards *legal certainty*. Besides prohibiting retroactive applicability of legislation, this principle can also be said to prevent vague legislation, which causes the subjects of it not to know what their obligations and rights are. This principle has been applied by the CJEU when it has considered whether a type of legislation has been foreseeable enough for the parties subjected to it.<sup>54</sup>

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<sup>50</sup> Trzaskowski (2015) p. 21.

<sup>51</sup> C-101/08 para. 63.

<sup>52</sup> Hettne & Otken Eriksson (2011) p. 64-65 and 74-75.

<sup>53</sup> Chalmers et al. (2014) p. 399-401.

<sup>54</sup> Chalmers et al. (2014) p. 441.

## 2.4.2 Fundamental rights as a legal principle

The CJEU in their judgement *Case 29/69 Stauder* held that EU law, as a general principle, recognize fundamental human rights. However, uncertainty remained how far this recognition would extend but this was resolved through the subsequent judgment *Case 11/70 Internationale Handelsgesellschaft*. Here the CJEU clarified that the fundamental rights were part of the general principles that the Court had to ensure and uphold. These cases have been seen as the initial reason for these rights now being recognized within the Treaties as follows from art. 6(3) TEU.<sup>55</sup>

Art. 2 TEU can be said to establish the basic values upon which the EU is founded, but it is art. 6 TEU that goes on to specify wherein these values can be found. The latter provision firstly states that the Union recognizes the *Charter of Fundamental Rights of the European Union (EUCFR)*, with its contained rights, freedoms and principles, and that it shall have the same legal status as the Treaties. Art. 6(2) TEU proclaims that the EU also recognizes the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* and that the EU shall accede to this convention. Thirdly, yet another source of fundamental rights are according to art. 6(3) TEU derived either from the ECHR or, from the Member States' constitutional traditions.<sup>56</sup>

It therefore follows from reading art. 6 TEU that there is no single legal text that can be said to encompass all the fundamental rights within the EU. This interplay between three different sources has inevitably led to there being a considerable overlap between them.<sup>57</sup> Although the EUCFR has been prescribed to have constitutional status, its relationship with the EU should be understood as controlling *what* the Union may do but not *how* it does it. This is due to the wording of art. 51(2) EUCFR, which states that its provisions are subject to the conditions and limits prescribed by the Treaties.<sup>58</sup> That being said, it is still important to ascertain that an interpretation of EU law, for instance secondary legislation, do not clash with these fundamental rights.<sup>59</sup>

## 2.4.3 The CJEU's treatment of colliding fundamental rights

In a context of copyright and the internet, there is an abundance of possible fundamental rights that are actualized. Following art. 52 of the EUCFR, and more specifically its subparagraph (1), it is there stated that any exception from the rights prescribed by the convention need to be subject to the

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<sup>55</sup> Bergström & Hettne (2014) p. 382-384 and Chalmers et al. (2014) p. 251-252.

<sup>56</sup> Steiner & Woods (2014) p. 137.

<sup>57</sup> Chalmers et al. (2013) p. 250.

<sup>58</sup> Bergström & Hettne (2014) p. 176.

<sup>59</sup> Raitio in Bernitz et. al. (ed.) (2013) p. 207-208.

proportionality principle. In a judiciary-context, the CJEU, if faced with a situation where *several* of these fundamental rights clash, will have to balance these rights against each other in the context of what measures are to be taken. To be noted is the fact that no right prescribed in the EUCFR stands higher in hierarchy than the other rights.<sup>60</sup>

That the right of intellectual property is protected follows from art. 17(2) EUCFR. However, with the internet, several other rights are also actualized. This is true for both internet users, who e.g. enjoy the right of freedom of expression and information enshrined in art. 11 EUCFR, as well as internet service providers (ISPs) who, inter alia, enjoy the freedom to conduct a business following art. 16 EUCFR. How the relationship between these conflicting rights are handled have been actualized by the CJEU in several cases. For instance, in *C-70/10 Scarlet Extended*, the question was if a right holder's organization could issue an injunction against ISPs, issuing them to install a filter that removed infringing content. Upon review of these suggested measures by the plaintiff, the CJEU held that this did not strike a fair balance between these fundamental rights.<sup>61</sup>

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<sup>60</sup> Schmitz (2015) p. 192-193.

<sup>61</sup> *C-70/10 Scarlet Extended*, in particular para. [44]- [54].

# 3 The internet and its links

## 3.1 The Internet

It was briefly mentioned in the introduction that the impact of the internet could not be understated. In terms of other available technologies, it is truly unique compared to other digital and analogue mediums available today. As Andrej Savin, associate professor at the Copenhagen Business School, points out, in his book *EU Internet Law*, its most distinctive feature might just be that it not only lets its users receive information but also actually invites them to participate actively in the actual formation of its content.<sup>62</sup> Perhaps one of the simplest ways to define the internet is to clarify that it is a system architecture, which has allowed several computers to inter-connect with one another and thereby facilitate them to exchange information.<sup>63</sup>

Savin has pointed out *three* groups of features that he deems to be the most noteworthy when discussing its architecture. First, he points out that the internet's structure is layered in so far as it can be said to be comprised of both different hardware and software as well as the substance on it. Different types of regulation introduced to govern it will ultimately be targeted at one of these layers. Besides this, he also points out its *end-to-end architecture*. There is no central distribution that its function depends on. The content, or data, is sent on the internet by allowing the computers connected to it, although individually managed, to follow a common standard of communication. The standard, termed TCP/IP<sup>64</sup> protocol breaks up the information sent into small pieces that freely navigate through the network towards their end destination where they are then re-assembled. This type of system, in combination with a largely non-governmentally controlled standard setting of the network itself, has allowed for unparalleled protection of one's identity that, although oftentimes beneficial in many respects, also has some drawbacks.<sup>65</sup>

The third salient feature of what is the internet is according to Savin finally its *neutrality*. *Net neutrality*, as it is often termed, refers to the relationship between the internet itself as a medium and its content, i.e. applications and services, which operates within its domain. Since its inception, the internet's structure has been impartial towards treating different types of data. Its neutrality has, come because of its inherent architecture where it is the end-users that ultimately shape the content which all operate under the same rules. The fear is that this neutrality of for example guaranteeing the same up- and download speeds regardless of applications or content used will be altered in the future by, for instance, allowing internet service providers

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<sup>62</sup> Savin (2013) p. 1.

<sup>63</sup> <http://academic.eb.com/EBchecked/topic/291494/Internet> Accessed on 2016-05-23.

<sup>64</sup> TCP/IP stands for *Transmission Control Protocol/Internet Protocol*.

<sup>65</sup> Savin (2013) p. 4-6.

(ISP) to alter this circumstance. Despite said neutrality, it is however clear that there is a plethora of different interests, ranging from service providers to end-users, which all operate within the medium.<sup>66</sup> It is, as will be illustrated below, within this clash of interests, that the essay takes aim to dissect what the EU-legislation has to say on the matter.

## 3.2 Links on the internet

In the light of the theme of this essay, it is necessary to take a closer look at what is meant by “linking”. To begin with, a simple but yet effective way of describing links in general can be found in Emanuela Arezzo’s article *Hyperlinks and Making Available Right in the European Union – What Future for the Internet After Svensson?* where she likens them to be the “[...] wires through which this net is weaved.”<sup>67</sup>

The word link is in fact a shortened version of the word *hyperlink* with the first part of the word (*hyper-*) referring to the programming language, *Hypertext Markup Language* (HTML) that it is written in. HTML supports two types of links, one being the aforementioned *hyperlink* and the other a so-called *inline-link*. As follows from the fact that they make out two different categories they have common as well as different features, which are important to address.<sup>68</sup> This categorization is however not universal as there currently is no standard definition of them.<sup>69</sup> Tsoutsanis pedagogically differentiates between the two categories by stating that hyperlinks *push* the user towards content whilst the inline-links instead *pull* content from another website.<sup>70</sup> This distinction will be used for the essay.

Although links are used as navigational tools on the internet it is safe to say that almost anyone, who has surfed the internet, has sometime encountered a “dead-end” after having clicked a link. The reasons for this could be many, and will not be exhaustively discussed here. However, two scenarios have been deemed important to mention. Firstly, once a link is selected, or clicked, what happens “behind the scenes”, is that the user’s computer communicates with the webserver that the link directs towards and, if present, it will redirect the user towards its target (by either *pushing* or *pulling* depending on the link). If, however the location redirected to has been *moved* or *removed* the link will not work thus resulting in a “dead-end”.<sup>71</sup>

Besides moving and removing the source content, there are other reasons for why the link might not work. The webserver administrator has the ability to implement restrictions on his or her website. Their design and function can

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<sup>66</sup> Savin (2013) p. 7.

<sup>67</sup> Arezzo (2014) p. 524.

<sup>68</sup> Westman (2012) p. 803.

<sup>69</sup> Sterling (2015) p. 688.

<sup>70</sup> Tsoutsanis (2014) p. 497.

<sup>71</sup> Westman (2012) p. 803-805.



vary greatly. Possible restrictions include not allowing certain IP-addresses from a specific country of origin, only allowing links within a certain website or blocking links whose *source anchor* originates from a certain website. Despite restrictions in place, it is perhaps not surprising that there are still possibilities to circumvent these but this is a matter that depends on the degree of technical proficiency.<sup>72</sup>

### 3.2.1 The hyperlink

The most distinctive feature of a hyperlink is that the author of it can choose a word, or a phrase, that will usually be highlighted differently to potential viewers of a webpage where it is placed. This is distinguished from the rest of the webpage. The software used will usually display the hyperlink in a different colour, if the link is displayed in a text-based format.<sup>73</sup>

The hyperlink has been likened to being similar to an “anchor”. More specifically, the location where the link is placed on the web is referred to as the *source anchor* whilst the target location is referred to as the *target anchor*. These can then be used to either link locations on the same website or link locations at different websites. The links that refer the user to a different website can additionally be distinguished from one another as the target anchor can be placed, or perhaps *thrown* is a more fitting word in this context, at different locations within the targeted website. A link that, when clicked, places the user on the homepage of a website is usually referred to as a *simple link* whereas if it refers to a location *deeper* within the same website, surpassing the homepage, it is instead termed a *deep link*.<sup>74</sup>

### 3.2.2 The inline-link

The most distinctive characteristic of the *inline-link* category is that it instead of text, as with the hyperlink, allows the linking of image files. It has to be pointed out, as Westman notes, that these types of links also have the ability to display text but that text is then stored as a graphics.<sup>75</sup> Furthermore, the inline-link is different from the hyperlink by, instead of directing towards something, is being used to collect information from another website. When used, the inline-link will make the referenced material displayed on, what in the above hyperlink scenario was termed to be the source website. Within this category, a distinction is usually made between the *embedded* and the *framed* link. The former is used to access certain digital content and the latter instead merely displays what the website linked to is containing within a “frame”.<sup>76</sup> Embedding is commonly used with videos from video platforms such as YouTube whereas framing is used to for instance display advertisements from other websites.

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<sup>72</sup> Westman (2012) p. 803-805 and ALAI opinion (2013) p. 8.

<sup>73</sup> Westman (2012) p. 803.

<sup>74</sup> Tsoutsanis (2014) p. 497.

<sup>75</sup> Westman (2012) p. 28.

<sup>76</sup> Arezzo (2014) p. 526.

# 4 Copyright legislation within the EU

## 4.1 Intellectual property rights

It can be argued, as Tritton et al. point out in *Tritton on Intellectual Property in Europe*, that the 21<sup>st</sup> century is in fact the first century in which intellectual property rights (IPRs) are recognized globally. The world has never been a smaller place in terms of how fast humans can access different parts of the globe, both regarding physical travel as well as regarding access to information. As a result, we are today looking at an ever-emerging global market, which results in ever-increasing competition. Tritton et al. therefore argue that businesses and persons alike now more than ever want to safeguard their creations.<sup>77</sup>

When used, the term *IPR* is in actuality an umbrella term that refers to several different legal areas, e.g. copyright law, trademark law and patent law. Their common denominator is that they seek to establish protection of human creation, hence the use of the adjective *intellectual*, by granting the creators ownership of these creations, hence the use of *property rights*. Although the etymology of the term IPR can be traced back to being used for the first time about 150 years ago when referring to a legal context, its common usage first saw its spread with the establishment of the *World Intellectual Property Organization* (WIPO) in 1967.<sup>78</sup>

IPRs however constitute a larger category and therefore a general discussion of them lies outside the scope of this essay. The further discussion will focus on copyright. After a short expose on what copyright generally entails, its context within the EU legal body will be examined. As already mentioned in the introduction, particular emphasis will be paid to the ISD.

## 4.2 Copyright

In terms of protecting intellectual creations, it could be claimed that copyright is the easiest to obtain. Once a work has been created, the protection of copyright is generally considered to exist automatically, without further actions needed to be taken by its creator to ensure it. This is of course subject to the state in which the creation takes place, as there may be requirements for the work to be materialized in some tangible form in order for there to be any existing right. Copyright restricts the use of these works by someone else than the right holder. One of these restrictions imposed can, as Tritton et al. point out, be found within the word *copyright*

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<sup>77</sup> Tritton et al. (2014) p. 3.

<sup>78</sup> Bently & Sherman (2014) p. 1.

itself as making non-consensual *copies* of a work is generally restricted.<sup>79</sup> That the requirement of tangibility may be justified follows from reading art. 2(2) of the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention), discussed below, to which 171 states are currently consignees.<sup>80</sup>

Besides the requirements for *when* a work is protected being a national matter, the same is true for *what* is protected. Copyright is typically enjoyed for a wide variety of creations such as films, literary works and musical pieces but this can nonetheless vary depending on the country of origin. This has not least been evident in the relationship between the EU and its Member States. For instance, in the English legislation regarding what works for which one is able to enjoy copyright was considered a finite list. This assumption has however come under challenge due to the case law of the CJEU.<sup>81</sup> Despite eventual lack of clarity, the concept of what is considered “a work” is highly flexible. This is to say the least evident in the fact that the concept of this type of protection has survived centuries of scrutiny and the protection has continuously been applied to new emerging technology.<sup>82</sup> Much more can be said about the nature of copyright, but for the continuation of the essay this will primarily be done under the confinements of EU law below.

### 4.3 International influences on EU copyright

It is perhaps not surprising that the harmonization of copyright and other IPRs began long before the internet was even envisioned. Historically, the starting point of the development of international harmonization regarding IPRs began in some countries, which dominated the export of nationally protected goods. These countries realized that they needed to protect these products abroad in order to combat unwanted exploitation as well as granting the right holders equitable remuneration. The process began with bilateral treaties but it was soon realized that further measures needed to be taken, resulting in multilateral treaties.<sup>83</sup>

One could imagine that copyright legislation within the EU is the result of combining the national legislation of different Member States. However, this is not entirely true. There are several international agreements, or treaties, which to a varying degree has affected the EU copyright legislation, either directly or indirectly. As already has been discussed, international agreements concluded by the EU are a valid source of Union law if they fall within its competences. The treaties bind not only the Union’s institutions

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<sup>79</sup> Tritton et al. (2014) p. 777.

<sup>80</sup> Contracting Parties; the Berne Convention; WIPO-administered treaties: [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15) accessed 2016-05-23

<sup>81</sup> Bently & Sherman (2014) p. 61.

<sup>82</sup> Synodinou in Savin & Trzaskowski (ed.) p. 83.

<sup>83</sup> Bently & Sherman (2014) p. 6.

but also the Member States, as stated in art. 216(2) TFEU. When studied, the method of interpretation will revolve around the object and purpose of it and its provisions.<sup>84</sup> This is in accordance with the teleological interpretation method, which has been shown to be a method employed by the CJEU.

It is however not a requirement for the EU to become a party to an international treaty in order for it to affect the EU's legal *acquis*. This was held to be the case by the CJEU in C-135/10 *SCF* where one of the questions put forwards was whether the *Rome Convention*<sup>85</sup> was to be seen as being directly applicable within the legal *acquis*. The CJEU stated that, although the EU was not part to the convention, it was by virtue of art. 1(1) of the *WIPO Performances and Phonograms Treaty* (WPPT), which states that the WPPT provisions are not to derogate from the Member States existing obligations under the Rome Convention, *indirectly* bound by it.<sup>86</sup> This clearly illustrates how broad the scope of influence may be on the EU's *acquis*. The review below will focus on the most important treaties that have either reformed or influenced EU copyright legislation.

### 4.3.1 The TRIPS Agreement

Within the field of copyright, the EU firstly acceded to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement). The TRIPS Agreement, as set out in annex 1C to the Marrakesh Agreement establishing the World Trade Organisation (WTO), was adopted by Council Decision 94/800/EC<sup>87</sup> in 1994.<sup>88</sup> The treaty, which largely focuses on harmonizing different IPRs, including copyright, can be said to be one of the most important treaties of the 20<sup>th</sup> century within the field.<sup>89</sup> In regards to copyright, the TRIPS Agreement furthered and altered the scope of the *Berne Convention* in various ways. Of major importance was that it concentrated on tackling the relationship between copyright and new emerging technologies. Art. 10(1) of the TRIPS Agreement states that computer programs are to be viewed as *literary works* within the meaning of the Berne Convention and that a compilation of data, or other material, may well be under copyright protection, if the method in which it has been selected or arranged can be said to constitute an *intellectual creation*. This latter feature is stated in its art. 10(2). Another important feature of the TRIPS Agreement was that it, through its art. 13, widened the scope of the so-called *three-step test*, discussed below in chapter 4.3.3, by declaring that it had to be applied to all limitations and exceptions.<sup>90</sup>

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<sup>84</sup> Chalmers et al. (2014) p. 112-113.

<sup>85</sup> *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done at Rome on October 26, 1961*.

<sup>86</sup> See C-135/10 *SCF* paras. 49-50 of the judgment.

<sup>87</sup> OJ 1994 L 336, p. 1.

<sup>88</sup> Davies in Stamatoudi & Torremans (ed.) (2014) p. 1068.

<sup>89</sup> Tritton et al. (2014) 73-74.

<sup>90</sup> Bently & Sherman (2014) p. 43.

Despite the EU becoming a party to the treaty in 1995, the provisions are not meant to be relied upon by individuals in court proceedings. Instead, the TRIPS Agreement has been held to influence the EU legal body in that it forces both the EU and its Member States to view and interpret national legislation by taking the TRIPS Agreement provisions into account.<sup>91</sup>

### 4.3.2 The WCT and the WPPT

In 1996, the EU became a party to two treaties, drawn up by the World Intellectual Property Organization (WIPO), namely the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT). The main reason for the development of these was the increasing use of the internet.<sup>92</sup>

The legislative reaction towards the internet is particularly obvious from three provisions of the WCT. Art. 8 of the WCT states that the owners of copyright, either by themselves or through authorization, have the exclusive right to *communicate their works to the public* irrespective if it is done by *wire or wireless means*. The article goes further by stating that this right includes the right to decide when the works are to be *made available* in such a way that the public can choose themselves when to access them. It is primarily this latter extension that affects the internet. Works can be uploaded to a website that internet users may access later. This is however “[w]ithout prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention [...]”<sup>93</sup>

The two remaining provisions are art. 11 and art. 12 of the WCT, which prohibit circumvention of technical protection of the works and interfering with the information of the work. This information e.g. refers to the identity of the work itself and to who the author is.<sup>94</sup> Although the WCT largely reiterates what was already stated in the TRIPS Agreement, such as the application of the three-step test, it can be said to have increased the scope of protection by extending several of those provisions. However, one of the most distinctive features of the WCT, in relation to the TRIPS Agreement is the inclusion of the *making available right* in art. 8 of the WCT. In addition to the WCT an agreed statement<sup>95</sup> was adopted which is meant to aid in the interpretation of it.<sup>96</sup>

The WPPT is on the other hand, somewhat narrower in scope as it specifically deals with the rights of performers and phonogram producers. Due to limited space, these provisions will not be discussed here.

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<sup>91</sup> Tritton et al. (2014) p. 79.

<sup>92</sup> Tritton et al. (2014) p. 800.

<sup>93</sup> See art. 8 WCT.

<sup>94</sup> Bently & Sherman (2014) p. 44.

<sup>95</sup> *Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996.*

<sup>96</sup> Tritton et al (2014) p. 801-802.

Nevertheless, it is important to point out that the treaty reiterates the three internet related rights from the WCT that were mentioned above.<sup>97</sup>

### 4.3.3 The Berne Conventions relationship with the EU

Although the Berne Convention does not allow for other entities than states to be signatories as well as parties to the convention, it still has an effect on the EU legislation. This is because the EU *is* a party to the WCT and the TRIPS Agreement and the WCT contains a provision that states that parties to the convention have to comply with arts. 1-21 of the Berne Convention and its appendix.<sup>98</sup> The same is also the case with the TRIPS Agreement as it, in its art. 9, states the same. One important difference is however that the application of art. *6bis* of the Berne Convention, concerning moral rights, is excluded. From this, it is evident that the EU has to apply the Berne Convention after all.<sup>99</sup> Because of this, some of the Berne Conventions most important features will be discussed below.

The Berne Convention was ratified on the 5th of December 1887 and the states that had ratified it, in accordance with the conventions art. 1, constituted the *Berne Union*. The primary concern was to ensure that its Member States did not discriminate between the works of national authors and the works of authors from other Member States by awarding them different levels of protection. Although, how this was to be handled was a matter to be decided by the Member States themselves. This became known as the *principle of national treatment*. Despite subsequent revisions, the principle has been a continuous present theme.<sup>100</sup>

According to art. 2 of the Berne Convention, works protected under the convention are held to be "[...] *every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression* [...]". The article then goes on to list examples of what this definition entails, e.g. books, musical pieces and artwork. Despite the long list of what types of works that are included, the signatories are by virtue of art. 1(2) able to require that some or all types have to be fixed in a material form.

Another important provision of the convention, contained in its art. 5, was the removal of formal preconditions, such as registration, for a work to enjoy copyright protection. Other subsequent amendments can generally be said to have provided a minimum standard of copyright protection for copyright owners and authors in various ways. The most recent revision of the convention undertaken, dates back to 1971 and it was undertaken in Paris but there have also been later amendments, the latest was carried out in 1979.<sup>101</sup>

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<sup>97</sup> Bently & Sherman (2014) p. 44.

<sup>98</sup> Art. 1(4) WCT.

<sup>99</sup> Tritton et al. (2014) p. 74.

<sup>100</sup> Tritton et al. (2014) p. 779-780.

<sup>101</sup> Bently & Sherman (2014) p. 41.

The division between copyright owners and authors is partly explained by a division between common law and civil law regimes of different parties to the convention. The common law countries have focused on copyright protection of the work in itself, with the economic rights derived from it being considered to cause incentive to create new works. There has been a tradition in civil law countries, emanating from the French legal system and titled *droit d'auteur*, which in addition to the economic rights has focused on the protection of the *moral rights* of the author. This was largely bridged by the Berne Convention as it also confers moral rights<sup>102</sup> to the authors.<sup>103</sup>

As mentioned above in the discussion regarding the TRIPS Agreement, the WCT and the WPPT, these sets of rules have been influenced by the so-called *three-step test*. The test can be found in art. 9(2) of the Berne Conventions. It states that the right holders exclusive right to decide when to reproduce his work, which is stated in art. 9(1) and is referred to as the right holder's *reproduction right*, may be deviated from given that this test is applied and satisfied. Firstly, exceptions to this right may only be applied in *special cases*; secondly, it must not conflict *with a normal exploitation* of the work and must thirdly, not *unreasonably prejudice the legitimate interests of the author*. Besides being prevalent in international treaties, it has also been a recurring standard within the EUs copyright-related directives.<sup>104</sup>

## 4.4 The development of Copyright harmonization within the EU

### 4.4.1 Treaty provisions allowing harmonization

EU-legislation introduced within the field of IPR, with the intent to harmonize Member State legislation, can be and has been implemented in several ways. It is primarily art. 114 TFEU, which provides that measures may be taken in order to approximate the laws of the Member States to ensure the functioning of the internal market that has been used to introduce several directives.<sup>105</sup> The harmonization of copyright legislation in the EU primarily began during the early 1990s in what Bently & Sherman term the *third wave of harmonization* in respect to EU IPR harmonization.<sup>106</sup>

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<sup>102</sup> See art. 6*bis* Berne Convention.

<sup>103</sup> Rosati (2013) p. 69-70 & Bently & Sherman (2014) p. 32.

<sup>104</sup> Janssens in Stamatoudi & Torremans (ed.) (2014) p. 137.

<sup>105</sup> Besides article 114 TFEU, there are other means of implementation in the Treaties but they have been deemed to lie outside the scope of this essay.

<sup>106</sup> Bently & Sherman (2014) p. 17-19.

## 4.4.2 The starting point of harmonization

The “green light” for copyright harmonization within the EU began with the Commission issuing one of its *Green Papers*, a document that is issued to encourage discussion of the proposals put forward in them. Entitled *Copyright and the Challenge of technology*<sup>107</sup> it was, as Tritton et al. note, primarily concerned with four different aspects relating to EU copyright law. Besides noting the need for harmonization between the Member States, to ensure the internal market, it was held that granting a high level of copyright protection was necessary to promote global competitiveness. In relation to global competition, it was held that misuse of works originating from the EU needed to be tackled internationally. The fourth concern was that copyright in some cases could risk the effectiveness of competition and instead hamper it.<sup>108</sup> To exemplify this latter concern the Green Paper mentioned industrial design and computer programs which, if granted copyright without appropriate restrictions, were at the risk of equalling “[...] a genuine monopoly, unduly broad in scope and lengthy in duration.”<sup>109</sup>

Subsequent to this, the EU began developing a number of directives with a varying scope. In the first half of the 1990s, directives concerning computer programs, rental rights, term of protection, satellite and cable and lastly databases were adopted.<sup>110</sup> With the issuing of the first of these came the starting point of the digital copyright era in the EU.<sup>111</sup> Tritton et al. have termed the issuing of these directives the *first generation* of copyright directives, which left many of the central aspects of copyright not harmonized. This instead came about with the subsequent *second generation* to some extent.<sup>112</sup> Although fewer directives were issued, the claim can be made that larger issues were tackled, primarily, as will be shown, through the ISD that signalled a shift towards a horizontal harmonization of copyright law instead of a vertical one. After the introduction of the ISD, aside from the fact that some harmonizing measures were taken in the form of *soft law*, further measures through directives lay dormant. This was until 2011 after which three directives have emerged. Despite being limited in scope, these directives have dealt with terms of copyright in sound recordings, orphan works, and collective management respectively.<sup>113</sup>

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<sup>107</sup> *Green Paper on Copyright and the Challenge of Technology- Copyright Issues Requiring Immediate Action* COM (88) 172 final.

<sup>108</sup> Tritton et al. (2014) p. 807.

<sup>109</sup> COM (88) 172 final. See para. 1.3.5, p. 5.

<sup>110</sup> Rosati (2013) p. 16.

<sup>111</sup> Synodinou in Savin & Trzaskowski (ed.) (2014) p. 83.

<sup>112</sup> Tritton et al. (2014) p. 808-809.

<sup>113</sup> Bently & Sherman (2014) p. 47.



### 4.4.3 Harmonizing upwards?

Within the legal doctrine, the case has been made that the EU in its harmonization of copyright has had a recurring theme of wanting to give the right holders an increasing amount of protection. In support of this theory it has been referred to the fact that the so-called *Term Directive*<sup>114</sup> which in its art. 1 extended the time of protection for performers and sound recordings by twenty years to seventy years after the authors death. This seventy-year period was already in force in Germany although several other Member States had the shorter period. Bently & Sherman see this as a clear indication of the EU impetus of increasing protection as, instead of asking Germany to shorten theirs, the rest of the Member States had to follow suite. They additionally also point towards the fact that the directives regarding copyright in general showcase a progressive evolution of limiting the Member States abilities to implement defences or exceptions to copyright infringement in their laws.<sup>115</sup>

The general approach of furthering copyright protection has not been free from scrutiny by legal scholars. Tritton et al. point out that if the measures taken were only done in order to harmonize the legislation of the Member States, the option to instead harmonize *downwards* would have been fully reasonable. The problem in doing so, however, would in practice have meant that right holders with already existing, fully valid rights, in some cases inevitably would have been stripped of them. Although this could have been considered, Tritton et al. further argue that harmonization is *not* the only goal of the EU. Instead, they argue, by looking at several of the copyright related directives recitals e.g. recitals 4 and 9 of the ISD, it becomes clear that a high level of protection is sought as it is claimed to reward and stimulate the creativity of the authors thus resulting in a higher output of works.<sup>116</sup>

### 4.4.4 Critique of the methods of harmonization

Whereas a discussion on whether the statement that higher protection equals a higher output of works is true or not lies outside the primary focus of this essay it is important to note that this has been contested. In relation to the prolonging of copyright protection, it has been argued that a too long period actually results in the contrary, hampering the incentives it tries to create.<sup>117</sup> In a law and economics analysis in relation to the duration of copyright protection conducted by William M Landes and Richard A Posner it was put forward that most works actually have lost most of their economic value after 28 years.<sup>118</sup> Moreover, the claim that IPRs in general increase

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<sup>114</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term protection of copyright and certain related rights (codified version).

<sup>115</sup> Bently & Sherman (2014) p. 48.

<sup>116</sup> Tritton et al. (2014) p. 809-810.

<sup>117</sup> Rosati (2013) p. 51.

<sup>118</sup> Landes & Posner (2003) p. 238.

creativity and innovation is also contested. Some scholars point out that there is not a satisfactory amount of empirical evidence in support of this claim.<sup>119</sup>

Disregarding the critique of the “to be or not to be” of IPRs, other critical voices have been raised regarding how the EU has chosen to harmonize the field of copyright. Tritton et al. refer to the above mentioned first generation of introduced directives as constituting a “[...] *patchwork of measures covering seemingly unrelated (and, in some cases, apparently unimportant) areas of the law*”.<sup>120</sup> The so-called second generation of directives has also come under scrutiny in some respects, particularly regarding the measures taken with the introduction of the ISD. Although broad-stroked in nature and with a wish to harmonize the rules horizontally, the directive was at the time of its implementation deemed by some scholars to be too ambiguous. It was therefore further argued that this directive would not provide legal certainty and therefore inevitably resulting in too many questions having to be answered by the judiciary. This claim, with more than ten years in hindsight, was according to Eleonora Rosati an impressively precise statement since the CJEU has turned out to be quite active within this field.<sup>121</sup>

The fact that the ISD in its art. 5 provides an exhaustive list of exceptions and limitations towards copyright protection has been subject to criticism. This revolves around the fact that art. 5(1) ISD constitutes the only mandatory exceptions for all Member States whilst the remaining ones within the article are optional. One explanation for this construction can be found within the directive itself, namely recital 32, where it is stated that the provision “[...] *takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market*”. However, arguments have been put forward that the goal of harmonization of the limitations has not been achieved.<sup>122</sup>

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<sup>119</sup> Trzaskowski (2015) p. 187.

<sup>120</sup> Tritton et al. (2014) p. 808.

<sup>121</sup> Rosati (2013) p. 52.

<sup>122</sup> Geiger & Schön herr in Savin & Trzaskowski (ed.) (2014) p. 111-113.

# 5 The Information Society Directive

## 5.1 The general features of the ISD

As mentioned before, the ISD was a direct result of the EU having acceded to both the WCT and the WPPT. Its final draft was approved in 2001 and it was, according to its art. 13 set to be implemented by the 22<sup>nd</sup> December 2002.<sup>123</sup> Only two Member States managed to meet this deadline whilst several others used much longer time. The last state to implement it was France in 2006.<sup>124</sup> This illustrates that the directive was not that easily digested throughout the EU. Bently & Sherman point out that one commentator even claimed it to be one of the most heavily contested directives in recent EU history.<sup>125</sup>

### 5.1.1 Main purpose of the directive

According to art. 1(1) the main-focus of the ISD is the statutory protection of copyright and related rights with a *particular emphasis on the information society*. Although this undoubtedly points towards the internet, the directive has an effect that goes much beyond the online-environment. This is exemplified by the rules regarding exemptions from liability, which are held to be exhaustive and to be generally applicable. Due to this general applicability, it has been claimed that the directive constitutes a first step towards a uniform copyright code within the EU.<sup>126</sup>

In the preamble of the ISD, it is obvious that individual Member States had already begun dealing with the challenges arising from the emerging worldwide web. However, these actions were deemed to risk the function and stability of the internal market within the EU, which called for further harmonizing measures.<sup>127</sup> As has already been mentioned there were already directives regarding copyright but this pre-existing EU-legislation is recognized within the ISD art. 1(2). It is there stated that certain, already existing community provisions, shall be left unaffected by the directive if they are not amended by art. 11 ISD.

### 5.1.2 What is protected in the ISD?

Although there will be no lengthy discussion on the matter it is still important to note *what* is considered to be a *work* within the ISD.

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<sup>123</sup> Savin (2013) p. 124.

<sup>124</sup> Tritton et al. (2014) p. 919.

<sup>125</sup> Bently & Sherman (2014) p. 54.

<sup>126</sup> Tritton et al. (2014) p. 886.

<sup>127</sup> This is first and foremost evident from reading recital 1 but also e.g. recital 6.

Interestingly enough, there is no such definition to be found within the directive. However, case law from the CJEU has clarified what is to be considered a subject matter that should be awarded protection. In C-5/08 *Infopaq*, the Court held, when discussing art. 2(a) ISD, that a *work* is protected as a subject matter only if it is the author's *own intellectual creation*.<sup>128</sup> In order to establish this the Court looked to the definition of what constituted a work in the Berne Convention as well as in other copyright directives. By referring to the recitals 4, 9, 11 and 20 of the ISD, the CJEU stated that the directive was based on the same principles as the other copyright-related directives. The CJEU thus held the requirement of being the author's own intellectual creation to be applicable to the definition of what was a *work* within the ISD. The same protection was also to be awarded to *parts* of a work, as the ISD did not establish any difference regarding parts of works.<sup>129</sup>

This ruling of the CJEU has been seen as having established a fully harmonized framework for what requirements placed on works in order for them to enjoy copyright protection.<sup>130</sup> Tritton et al. argue that since the ISD never establishes that a work must be fixed in a material form, this is not a requirement in the ISD.<sup>131</sup>

### 5.1.3 Exceptions to protection

If art. 2-4 of the ISD can be said to contain protection for the *creators* of works it is art. 5 of the ISD that protects the *users* of them. The article provides for an exhaustive list of exceptions and limitations of the rights conferred on the right holders. Despite striving for a high level of protection for the right holders, it is through recital 31 of the ISD clear that a balance between the interests of them and interests of the users of their works is envisioned.<sup>132</sup> Although not discussed within the scope of the essay it might be of interest to note that it is only art. 5(1), which excepts temporary acts of reproduction from the reproduction right in art. 2 that is mandatory for the Member States to implement.

When it comes to exceptions available as defenses towards the communication right in art. 3 of the ISD these are instead laid out in art. 5(2) that lists fifteen exceptions that the Member States may implement. These exceptions are, inter alia, use of works for scientific studies or teaching (a), incidental inclusions of a work in other material (i) or the use of works for parodies (k). Recital 32 of the directive confirms that the article is exhaustive and the Member States can therefore not implement other

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<sup>128</sup> C-5/08 *Infopaq* para. [35].

<sup>129</sup> C-5/08 *Infopaq* para. [32] – [38].

<sup>130</sup> Rosati (2013) p. 107.

<sup>131</sup> Tritton et al. (2014) p. 890.

<sup>132</sup> Geiger and Schönherr in Stamatoudi & Torremans (ed.) (2014) p. 437-438.

exceptions.<sup>133</sup> All of the exceptions are however subject to the Berne Convention's three-step test following art. 5(5) ISD in order to be lawful.

## 5.2 Art. 3 and the right of communication to the public

It is within art. 3 ISD that the right holders' exclusive right to exercise control over when they want to introduce their work to the world by publicly communicating it can be found. Authors are, following art. 3(1), granted protection of their works for *any* communication to the public, regardless of whether it is done by wire or wireless means. The directive however never defines who is to be considered the *author* and this is therefore subject to the law of the EU Member States. If someone is considered to an author in a Member State, it thus follows that the directive is applicable.<sup>134</sup> The article has proven to be quite controversial as the amount of references for preliminary rulings regarding this article has been unmatched within the field of copyright.<sup>135</sup>

The right awarded authors in art. 3(1) is furthermore granted to works that are made available in such a way that members of the public can access the works themselves at a time that suits them. This latter provision was an implementation of the internet-related provisions introduced by the WCT and the WPPT. Within the directive, it is seen as a part of the making available right.<sup>136</sup> It is therefore not seen as a *sui generis* right, i.e. a right of its own, within the directive which in effect means that the same limitations and exceptions apply to it as with the communication right. The main difference between it and the communication right is that the user, when accessing works made available, can decide at what time this is done.<sup>137</sup>

Another important feature of the provision is that the rights contained within art. 3 ISD are not *exhausted*. This follows from art. 3(3) ISD and in practice means that *every* act of communication requires authorization from the right holder.<sup>138</sup>

The right of communication to the public is however not generally explained by the directive, which has led to a considerable amount of case law emanating from the CJEU in which the provision has been of either direct or indirect concern. C-306/05 *SGAE* was the first important judgment in which the court shone a light on the prerequisites for there to be an act of communication and it came in 2006.<sup>139</sup> The background to the case was that *SGAE*, who were the body responsible for IPR-management in Spain,

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<sup>133</sup> Tritton et al. (2014) p. 912.

<sup>134</sup> Stamatoudi & Torremans (ed.) (2014) p. 408.

<sup>135</sup> Sterling (2015) p. 1143-1144.

<sup>136</sup> Schmitz (2015) p. 250.

<sup>137</sup> De Wolf & Partners (2013) p. 27.

<sup>138</sup> Stamatoudi & Torremans (ed.) (2014) p. 417-418.

<sup>139</sup> Tritton et al. (2014) p. 897.

claimed that the owner of a hotel had communicated works to the public by installing television sets in the hotel rooms as well as playing ambient music in the communal area of the hotel.

Although the CJEU established several important criteria in C-306/05 *SGAE*, as well as subsequent cases, to determine whether a communication to the public takes place, these can still be grouped into two categories. Whereas one group refers to the concept of *communication*, the other refers to what constitutes the *public*. First, some general remarks are necessary regarding what the CJEU has stated about the provision.

Due to the large amount of cases, the discussion below will not elucidate their background unless deemed relevant. Notwithstanding this, some detail has been provided with the cases that concern art. 3 ISD and its relationship with the internet.

## 5.2.1 General remarks on communications to the public

The general remarks contained in this chapter have largely emanated from C-306/05 *SGAE*. That this case was an important precedent has been illustrated by the court, as it continuously refers to these findings in subsequent cases. It is also important to point out that the CJEU has not confined itself to look at the provision in relation to art. 3 of the ISD. The exclusive right of communication to the public had already been introduced in other directives, e.g. art. 5(d) *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases* (Database Directive). The assessment of the prerequisites for when a communication to the public takes place has, within the case law of the Court, therefore been made in relation to those other directives as well. In the joined cases C-403/08 and C-429/08 *FAPL* the CJEU explicitly stated that the provision within this body of directives had to have the same interpretation by referencing what the Court had held prior in C-5/08 *Infopaq International*. This was also in accordance with the 20<sup>th</sup> recital of the ISD, which states that the ISD is based on pre-existing principles and rules already established.<sup>140</sup>

The CJEU has held that the Member States cannot decide the interpretation of when a communication to the public occurs since they are not expressly granted this right within the ISD. Since there is no definition of the term in the directive, the Court has contended that it has to be interpreted at EU level in order to fulfil the need for a uniform interpretation as well as the principle of equality.<sup>141</sup>

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<sup>140</sup> Joined cases C-403/08 and C-429/08 *FAPL* para. [187] - [188] and C-5/08 *Infopaq International* para. [36].

<sup>141</sup> C-306/05 *SGAE* para. [31] - [33].

In accordance with the teleological method, the court also expressly stated that the provision could not only be interpreted by looking at its wording. Attention has to be paid to the context and what underlying objectives were behind the drafting of the provision.<sup>142</sup> The CJEU has therefore considered the directive's 23<sup>rd</sup> recital, which states that the right should be broadly applicable in uniformity with the general objective of the directive as, by referring to the directive's 8<sup>th</sup> and 9<sup>th</sup> recitals, a high level of protection is pursued. Recital 9 explicitly states that the protection of copyright is seen as being vital to protect the intellectual creation.<sup>143</sup>

Another interesting aspect to the communication right, which has been raised by Bently and Sherman is whether the alleged “communicator” has to be *aware* of the act he or she is committing.<sup>144</sup> In several of the cases, the CJEU has explicitly included this fact in passing within three of their judgments concerning art. 3(1) ISD. In C-306/05 *SGAE*, the court stated that the hotel operator acted “[...] *in full knowledge of the consequences of its action* [...]”.<sup>145</sup> In joined cases C-403/08 & C-429/08 *FAPL*, it was instead rephrased as constituting an *intentional* conduct of transmission<sup>146</sup>, which it also reiterated in C-351/12 *OSA*.<sup>147</sup>

Besides citing the recitals to the directive, the CJEU has also stated that the provision needs to be interpreted in accordance with international law, especially if the provision in question is derived from a treaty.<sup>148</sup> In regards to the Berne Convention, the Court has also consulted a document<sup>149</sup> created by WIPO, which is meant to aid in the interpretation of it.<sup>150</sup>

## 5.2.2 Requisites for what constitutes a “communication”

When determining whether a transmission of a work can be said to constitute a *communication* it is hardly surprising that there are several prerequisites that need to be taken into account. To begin with, the CJEU has held that a communication occurs when a work is made accessible in accordance with the *making available right* discussed above. The Court has within this contention, held the fact of whether the work transmitted was *actually accessed* by the people subject to this transmission to be extraneous.<sup>151</sup>

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<sup>142</sup> C-306/05 *SGAE* para. [34], joined cases C-403/08 & C-429/08 *FAPL* para. [185].

<sup>143</sup> C-306/05 *SGAE* para. [36], joined cases C-403/08 & C-429/08 *FAPL* para. [186].

<sup>144</sup> Bently & Sherman (2014) p. 159-160.

<sup>145</sup> C-306/05 *SGAE* para. [42].

<sup>146</sup> Joined cases C-403/08 & C-429/08 *FAPL* para. [195] – [196].

<sup>147</sup> C-351/12 *OSA* para. [26] & [32] – [33].

<sup>148</sup> C-306/05 *SGAE* para. [35], joined cases C-403/08 & C-429/08 *FAPL* para. [189].

<sup>149</sup> The document in question is titled *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*.

<sup>150</sup> C-306/05 *SGAE* para. [41], joined cases C-403/08 & C-429/08 *FAPL* para. [201].

<sup>151</sup> C-306/05 *SGAE* para. [43].

If the acts of the alleged “communicator” are only carried out in order to ensure or improve the transmissions reception within the catchment area, this has been held not to constitute a communication.<sup>152</sup> The point was further elaborated in C-607/11 *ITV Broadcasting* where the CJEU held that the ensuring or improving of the reception has to pertain to an *already existing* transmission and not constitute another, standalone, transmission itself. In the said case, the defendants had re-routed television broadcasts to be streamed over the internet, which to the CJEU was therefore not to be seen as an improvement but rather a new transmission.<sup>153</sup>

The act of transmission is however broadly applicable in so far as it is not required that the person *communicating* commits the whole act, which naturally would constitute a communication as long as the other prerequisites are fulfilled<sup>154</sup>. The Court has namely held that the intercepting of an already existing transmission, before it reaches its final destination, can indeed amount to a communication. Within this reasoning, the CJEU specifically discussed the 27<sup>th</sup> recital of the ISD, which excludes the mere providing of *physical facilities*, e.g. a television set. What is required is that the provision actually allows a signal to go *through* it.<sup>155</sup> The nature of the transmission is however not a communication if there is no *physical separation* between the location where the work is carried out and where the transmission is received which is stated in the 23<sup>rd</sup> recital of the ISD.<sup>156</sup> From this, it follows that a communication should occur in a scenario where a wall separates the originating transmission, which uses technological means, and the receiving end.<sup>157</sup>

When dealing with the type of transmission the Court has had a consistent theme of neutrality towards what type of technique is used. Although hinted at vaguely in C-306/05 *SGAE*<sup>158</sup> the Court has elaborated this stance quite substantially since this judgment. Besides referencing the ISDs recitals, where it is stated that the concept should be broadly applicable, and looking to the related directives, which also contain the provision, it is art. 11bis(1)(iii) of the Berne Convention that has been of major influence. This provision states that a communication to the public can occur “[...] by *loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.*”<sup>159</sup> By virtue of this the Court therefore in the joined cases C-403/08 & C-429/08 *FAPL* contended that

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<sup>152</sup> C-306/05 *SGAE* para. [42] and the joined cases C-403/08 & C-429/08 *FAPL* para. [194].

<sup>153</sup> C-607/11 *ITV Broadcasting* at para. [28] - [30].

<sup>154</sup> See C-162/10 *Phonographic Performance Ireland* at para. [58] - [63]. The CJEU stated, when discussing art. 8(2) *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property* that the operator of a hotel, when providing both a record player of sorts as well as physical copies of phonograms, fulfilled all the requirements for constituting a *communication*.

<sup>155</sup> C-306/05 *SGAE* para. [45-46] and Stamatoudi & Torremans (ed.) (2014) p. 409-410.

<sup>156</sup> Joined cases C-403/08 & C-429/08 *FAPL* para. [201] and C-283/13 *Circul Globus* para. [36-37].

<sup>157</sup> Stamatoudi & Torremans (ed.) (2014) p. 409.

<sup>158</sup> C-306/05 *SGAE* para. [46].

<sup>159</sup> See art. 11bis(1)(iii) of the *Berne Convention*.



“[...] *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>160</sup> This case law approach towards different means of technology will be returned to below within an internet context.

### 5.2.3 Requisites for what constitutes the “public”

As was mentioned in chapter 5.2.1, the CJEU has held that the concept of communication to the public was to be decided at EU-level. When it comes to defining public this claim was in C-306/05 *SGAE* interjected by the Austrian government. It stated that when it came to defining the notion of *public* it was in fact a matter for the Member States. However, the CJEU did not accept this, as, according to the Court, there was no such express reference made within the directive.<sup>161</sup> Interestingly enough this development differs from the initial proposal of the Commission that meant this to be decided by the Member States themselves.<sup>162</sup>

In defining what constitutes the public it is, following the CJEU judgments, not surprising that an exact number has not been defined. In C-306/05 *SGAE*, the Court contended that the number of people had to be an *intermediate* amount. This sum is not to be determined at a given moment; instead, successive exposure to the communication is also to be taken into account, according to the CJEU.<sup>163</sup> This finding has been confirmed in subsequent cases and the Court elaborated its statement somewhat by saying that the number of people had to be *fairly large*.<sup>164</sup> Notwithstanding this requirement, the CJEU in C-607/11 *ITV* stated it to be “[...] *irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time.*”<sup>165</sup> As the broadcasts in the present case were streamed to potential recipients in the United Kingdom, the Court held it to be directed towards a public.<sup>166</sup>

Within the legal doctrine, there has been discussion on whether the CJEU's verdict in C-135/10 *SFC* can be said to have expressed a *de minimis*-threshold, *i.e.* what it considers an insignificant amount of people, so that the requirement of *public* is sometimes not fulfilled.<sup>167</sup> In C-135/10 *SCF*, the provision primarily in focus was art. 8(2) *Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights*

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<sup>160</sup> Joined cases C-403/08 & C-429/08 *FAPL* para. [193].

<sup>161</sup> C-306/05 *SGAE* para. [31].

<sup>162</sup> See Commission Proposal (December 1997) COM(97) 628 final at p. 25.

<sup>163</sup> C-306/05 *SGAE* para. [37] - [39].

<sup>164</sup> C-607/11 *ITV* para. [32-33], C-351/12 *OSA* para. [27- 28].

<sup>165</sup> C-607/11 *ITV* para. [34].

<sup>166</sup> C-607/11 *ITV* para. [35-36].

<sup>167</sup> Tritton et al. (2014) p. 899 and Bently & Sherman [2014] p. 166.

*related to copyright in the field of intellectual property*<sup>168</sup> which, inter alia, states that right holders of phonograms shall receive equitable remuneration from a user of their commercially published phonogram. The defendant in the national case was a dentist who had had a radio on in his dentistry office. The plaintiff, a right holder organization, claimed this to constitute a *communication to the public* within the meaning of said directive. Despite the CJEU recognizing that, the directive was somewhat different in scope in comparison with the ISD it still used several of the criteria established within the case law of art. 3 ISD in considering whether the patients constituted a *public*.<sup>169</sup> By referring to a glossary written by WIPO the CJEU contended that a too small amount of people did not amount to constituting a *public*.<sup>170</sup> Whilst this is an interesting find, it cannot be stated with confidence that the same would have been true if the CJEU would have interpreted it in the light of the ISD instead.

## 5.2.4 Requisites for what constitutes a “new public”

A further important aspect in the determination of whether the communication is made towards a *public*, which was hinted at in C-306/05 *SGAE*, and subsequently developed, by the CJEU, was that the receiving audience has to make up a *new public*.

The reference in C-306/05 *SGAE* to why this was of importance was firstly that the Berne Convention in its art. 11bis(1)(ii) states that *rebroadcasting*, which occurs when a different organization than the original one re-transmits the work, falls within the right holders’ exclusive right to authorize such an act.<sup>171</sup> The Court then secondly stated, by looking at the interpretation of art. 11bis in the *Guide to the Berne Convention* drawn up by WIPO that the public exposed to the communication had to be assessed in relation to the right holders’ original authorization of communicating their work. According to the guide, such an approval only took so-called *direct users* into account, i.e. the owners of the receiving equipment. Besides the owner, the CJEU stated that this could be extended to include *private or family circles*. If, however, the receiving end constituted a larger audience these would be seen as constituting a *new public* as it, according to the Court, no longer in such a scenario could be seen as a *simple reception* of the works transmitted.<sup>172</sup> This finding was later reiterated by the CJEU in the joined cases C-403/08 & C-429/08 *FAPL*.<sup>173</sup> The requirements regarding a *new public* in an internet context will be returned to in chapter 6.

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<sup>168</sup> The directive has since been repealed and replaced by *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property*.

<sup>169</sup> See, e.g., para. [84], [87], [90] in C-135/10 *SCF*.

<sup>170</sup> C-135/10 *SCF* para. [85] - [86].

<sup>171</sup> C-306/05 *SGAE* para. [40].

<sup>172</sup> C-306/05 *SGAE* para. [41] and *Guide to the Berne Convention* (1978) p. 68-69.

<sup>173</sup> See joined cases C-403/08 & C-429/08 *FAPL* para. [197-198].

Within the context of the *new public*-criterion, another aspect of which the CJEU has taken into consideration is whether the alleged “communicator” has committed the communication to the public with an intent to make profit. In C-306/05 *SGAE*, the Court held that, by referencing the WIPO-guide, the provision of television broadcasts to the visitors of the hotel could be seen as an additional service ultimately benefitting the hotel’s status. Although not constituting a requirement for a *communication to the public* it was still considered by the CJEU.<sup>174</sup>

With reference to this finding, the Court has taken the will of profit making from the “communicator” into consideration. Although discussed in the joined cases C-403/08 & C-429/08 *FAPL*, where it claimed that the actions taken by the alleged “communicator” were made in order to attract customers and thereby increase profit, the CJEU, in C-607/11 *ITV* firmly stated that the intent to make profit was not *decisive* for there to be a retransmission occurring.<sup>175</sup>

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<sup>174</sup> C-306/05 *SGAE* para. [41] & [42].

<sup>175</sup> Joined cases C-403/08 & C-429/08 *FAPL* para. [204] – [207] and C-607/11 *ITV* para. [41] – [44].

# 6 Communication to the public by linking on the internet?

## 6.1 Member states approach before the judgments of the CJEU

Stamatoudi and Torremans in *EU Copyright law – a commentary*, published before the CJEU's judgment in C-466/12 *Svensson*, stated that the provision of a hyperlink was generally not to be considered to constitute either a communication to the public or an act of making available within the Member States. One case they refer to is the German Supreme Court's decision in *Paperboy*<sup>176</sup> where it held that the provision of hyperlinks to lawfully uploaded content on a third-party website did not amount to a communication to the public and could not be seen as infringing. Instead, Member States have tended to view some linking activities to be liable in the sense that they constitute *accessory* infringement.<sup>177</sup>

A similar result was reached in a British case<sup>178</sup> before the CJEU's judgment in C-466/12 *Svensson* where it also held the act of hyperlinking not to constitute a communication.<sup>179</sup> That being said, the opposite has been true as well. For instance, it has been argued that the Swedish Supreme Court (Högsta Domstolen) in NJA 2000 s. 292 held deep-linking to be a communication to the public, but that conclusion has been contested.<sup>180</sup> Geiger and Schönherr point out that several Member States approached hyperlinking to freely available content by using a doctrine of implied license. If no restrictions were in place to a work, linking to it was permissible.<sup>181</sup>

## 6.2 The hyperlink as a communication to the public? The CJEU's judgment in C-466/12 *Svensson*

The first major clash at the EU-level between the posting of links on the internet, and the exclusive right of the right holder's right to communicate their works to the public took place in C-466/12 *Svensson* in the form of a preliminary ruling.

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<sup>176</sup> Case BGH I ZR 259/00 *Paperboy* Judgement on 17 July 2003.

<sup>177</sup> Stamatoudi & Torremans p. 414.

<sup>178</sup> *Paramount Home Entertainment International Ltd. V British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch.).

<sup>179</sup> Sterling (2015) p. 462.

<sup>180</sup> Westmann (2012) p. 810-811.

<sup>181</sup> Geiger & Schönherr in Savin & Trzaskowski (ed.) (2014) p. 123-124.

## 6.2.1 Background to the case at the national courts

The plaintiffs, which were four Swedish journalists, had all written articles that were published online on the homepage of a newspaper. The defendant, Retriever Sverige (Retriever), had subsequently linked to these articles. Retriever was a web-based company that specialized in providing their clients with clickable hyperlinks to news articles published on other webpages on the internet. Some of the links on Retriever's webpage had directed towards the webpage where the plaintiffs' articles had been published freely accessible.

The plaintiffs argued that the actions of Retriever were unlawful as it was unauthorized and interfered with the exclusive right of making available of the plaintiffs. The plaintiffs furthermore contended that Retriever's clients were not aware that they, when clicking the hyperlinks, were redirected to a different website. Besides disputing this latter allegation, Retriever argued that they were not infringing any rights, as the mere provision of links to another website did not meet the requirements of constituting a transmission.

The court of first instance rejected the plaintiff's claim and the case was dismissed in its entirety. The judgment was however appealed but proceedings were strayed at the appellate court as it was held that a preliminary ruling from the CJEU was necessary. The national court went on to state four questions:

- firstly, whether the activity of linking to a copyrighted work, if done by anyone other than the right holder, in the manner described amounted to constituting a communication to the public in accordance with art. 3(1) ISD;
- secondly, the court wanted to know whether the answer to the first question was affected by the fact that the works linked to were freely accessible;
- thirdly, whether there was any difference as regards the first question between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website;
- fourthly, whether it is possible for a Member State to give wider protection to the exclusive right of authors by enabling communication to the public to cover a greater range of acts than provided for in art. 3(1) ISD.

## 6.2.2 Opinions before the judgment

Before dealing with the CJEU judgment regarding C-466/12 *Svensson* it might be relevant to look into what different scholars or legal practitioners had to say before the judgment was delivered.

To begin with, the *European Copyright Society* (ECS), consisting of various European legal scholars, issued a statement to the effect that the use of links could not constitute a communication to the public. A hyperlink could not amount to a transmission. Such a link is just pointing towards where the work is to be found, according to the opinion. If the opposite was held by the CJEU, the ECS still maintained that a hyperlink never could be seen as transmitting the work itself. They ECS also argued that it could not be directed towards a new public, if the material that was directed towards was freely accessible. They did however opt for the provider of the hyperlink being liable for, *inter alia*, accessory infringement or circumventing technological measures.<sup>182</sup>

This position was largely criticised by Tsoutsanis in his article *Why Copyright and Linking can Tango*, as, according to him, the ECS above all failed to recognise the function of the making available right contained in art. 3(1) ISD. By referencing preparatory works of both the WCT and the ISD, it is the act of granting *access* that is to be held as the relevant factor for determining when such an act occurs. The ECS claim, that a hyperlink therefore is not to be understood as an act equalling a *transmission*, was according to Tsoutsanis therefore immaterial.<sup>183</sup>

Finally, taking somewhat of a middle ground, the *Association Littéraire et Artistique Internationale* (ALAI), an interest group for right holders, issued an opinion on the matter in 2013. They in short held there to be an existing difference between *simple* hyperlinks, referring a person to another website and *deep* hyperlinks that instead directed the users towards a specific work. As the latter category granted direct access to the work, they were to be seen as making the works available.<sup>184</sup>

### 6.2.3 The deliberations of the CJEU

The CJEU held that providing links, which redirected to another freely accessible website, fulfilled the requirements of constituting an act of *making available* and thereby constituted an act of communication in accordance with art. 3(1) ISD. The links gave *access* to the public and, as had been held in C-306/05 *SGAE*, it was immaterial if the potential users had actually clicked these. This was in accordance with the broad applicability of what constituted a communication in order to safeguard the interests of the right holders.<sup>185</sup>

When it came to determining what constituted the public in a web-based context the CJEU contended that these were the potential website-users of the webpage where the links were posted. This was, in accordance with art. 3(1) ISD and the settled case law, held to fulfil the requirement of an intermediate number of people. These actions were therefore held to

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<sup>182</sup> European Copyright Society (2013) p. 2.

<sup>183</sup> Tsoutsanis (2014) p. 498-500.

<sup>184</sup> ALAI opinion (2013) p. 4-5.

<sup>185</sup> C-466/12 *Svensson* para. [16] – [20].

constitute a communication to the public.<sup>186</sup> The CJEU did however, notwithstanding this finding, go further in its deliberations.

Due to the fact that the communication took place on the same platform, i.e. the internet, there was according to the Court no difference in the technicalities of the transmission between the authorized communication on the plaintiffs' website and the subsequent communication on the website of the defendant. This therefore brought the discussion of whether the subsequent communication was directed towards a *new public*, as discussed in chapter 5.2.3.1, to the fore. As the initial communication was authorized, a requirement the CJEU already in the beginning of the case had reiterated to be essential to *every* act of communication<sup>187</sup>, to a freely accessible website, it in effect meant that that public were all potential internet users.<sup>188</sup>

In the light of these findings, the CJEU held that although the defendant's actions amounted to constituting a communication to the public, there was no need for any *authorization* for this subsequent communication as there was no new public in relation to what the right holder had authorized.<sup>189</sup> The Court furthermore held that this finding was not altered depending on the potential users' experience regarding whether it was apparent that the link directed towards another website. The reason for this, it reiterated, was simply that it was not directed towards a new public.<sup>190</sup>

However, if restrictions had been put in place on the initial website where the communication to the public of the works had been authorized, and the links on the other website, which directed to the authorized website were constructed in such a way that they circumvented these restrictions, the answer to the first question would be a different one. In this scenario, the CJEU stated that the right holder had *not* taken this public into account when authorizing the initial communication, which thus fulfilled the requirement of reaching a new public. This thereby required authorization from the right holder and if not received was seen as being unlawful conduct. The Court went on to state that this would also be true in a scenario where the work was removed from the initial authorized website or became restricted but would still be accessible from the linking website.<sup>191</sup>

The fourth question, which was discussed separately in the judgment, was also answered in the negative by the CJEU. Although the plaintiffs in the national proceedings had pointed out that art. 20 of the Berne Convention allowed for its signatories to enter agreements which extended its prescribed rights, it was according to the CJEU already established that such measures if risking to be contrary to EU law was not allowed. The CJEU held this to be the case as increasing the scope of activities covered by art. 3(1) ISD

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<sup>186</sup> C-466/12 *Svensson* para. [21] – [23].

<sup>187</sup> C-466/12 *Svensson* para. [15].

<sup>188</sup> C-466/12 *Svensson* para. [24] & [26].

<sup>189</sup> C-466/12 *Svensson* para. [25] & [27] – [28].

<sup>190</sup> C-466/12 *Svensson* para. [29] – [30].

<sup>191</sup> C-466/12 *Svensson* para. [31].

within a Member State risked hampering the function of the internal market as well as increasing legal uncertainty, which were all considered to be contrary to the main objectives of the ISD.<sup>192</sup>

## 6.2.4 Reactions to the judgment

Because of the judgement, several commentators have discussed the implication of what the CJEU's use of the *new public*-requirement in relation to the author's authorization. Tritton et al. argue that the requirement cannot be applicable if the author has never authorized any communication. All acts of communication should therefore be viewed as being infringing.<sup>193</sup> Schovsbo et al. contended the same and said that the CJEU with this judgment had put a stop to eventual ambiguities concerning what the law said regarding linking.<sup>194</sup>

Arezzo however, in her article *Hyperlinks and Making Available Right in the European Union*, arrived at a somewhat more cautious conclusion of what the CJEU judgment meant. To her, the Court had not answered the implication that linking to content placed on the internet without the right holders consent, always equalled infringement. There was a possibility for such a conclusion to be drawn but it would be detrimental for the function of the internet if linkers were held responsible to such an extent, she considered. Primarily, it was the person who uploaded the content that was in direct violation of the making available right.<sup>195</sup> She concluded that the judgment was too ambiguous for it to be guiding for future cases and that the making available right had to be more clearly defined.<sup>196</sup>

The CJEU decision was furthermore subject to harsh criticism from ALAI. They published an opinion following the judgment where they scrutinized the use of the *new public* criterion and claimed it to be contrary to international copyright law. In particular, it was the CJEU's reading of art. 11bis(1)(ii) of the Berne Convention that they contested. ALAI held that that article of the convention must not preclude the communication right from being actualized when a transmission was not subjected to a new public. Instead, the only relevant factor was that it was another broadcaster who communicated the work than the original one.<sup>197</sup>

## 6.3 The inline-link in C-348/13 *BestWater*

After the CJEU's judgment in C-466/12 *Svensson* the question regarding links and their relation to art. 3(1) ISD was yet again the main-focus in C-348/13 *BestWater*.

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<sup>192</sup> C-466/12 *Svensson* para. [34] - [41].

<sup>193</sup> Tritton et al. (2014) p. 899.

<sup>194</sup> Schovsbo et al. (2015) p. 191.

<sup>195</sup> Arezzo (2014) p. 546-547.

<sup>196</sup> Arezzo (2014) p. 552-553.

<sup>197</sup> ALAI opinion (2014) p. 14-15.



### 6.3.1 Background to the case at the national courts

The case originated in Germany where *BestWater International* (BestWater), the plaintiff in the case, was a company specialised in creating filtration systems for water. BestWater had commissioned the recording of an information video to which it had the exclusive rights. The video was however uploaded to the video-platform *YouTube* and it was disputed at the national courts whether this had been done with BestWater's consent, although they claimed that this was not the case. This video had then been used by the defendants, Mr. Mebes and Mr. Potsch (hereinafter referred to as the defendants), who were commercial agents of a competing business. They had, by using an in-line link on the website of their business *framed* the YouTube-video to which BestWater had the rights. When clicked the video played on the defendants' website. The dispute took several turns before reaching the *Federal Court of Justice of Germany* (translated from *Bundesgerichtshof*, hereinafter shortened BGH).

The BGH contended that the video was freely accessible and the transmission of it, by using an in-line link, did not differentiate from the technical process used in the original upload. The BGH was however still unsure whether it could be said to constitute a communication to the public in accordance with art. 3(1) ISD. Although not clearly stated it is apparent, from reading the BGH's reasoning contained in the 10<sup>th</sup> paragraph of C-348/13 *Bestwater* that the BGH considered whether the use of an in-line link was a way to allow circumvention of the reproduction right contained in art. 2 ISD as, by using this technique, the work was never copied. It therefore asked the CJEU if the use of an in-line link under similar circumstances as the national case could be held to constitute a communication to the public in accordance with art. 3(1) ISD.

### 6.3.2 Deliberations at the CJEU

To begin with, the CJEU held that it could issue its judgment as a *reply by reasoned order* in accordance with art. 99 of the *Rules of Procedure of the Court of Justice*. This article is only used by the CJEU when it has been suggested by the *Judge-Rapporteur* that the questions stated are either clear from previous case-law or that there can be no reasonable doubt as to what it will answer. The only further requirement is that the Court hears the opinion of the Advocate General beforehand.<sup>198</sup>

The CJEU then went on to reiterate the findings from its previous case-law, in particular the findings in C-466/12 *Svensson*. As the defendants had used a link on the internet it could according to the court only constitute a communication to the public if the work was presented to a new public. An uploaded work on the internet, which had been authorized by the right

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<sup>198</sup> C-348/13 *BestWater* para. [12] – [13].

holder, to a freely accessible website did not meet this requirement.<sup>199</sup> Despite the fact that the framing technique gave the appearance of the work residing on the website of the defendants' the CJEU referenced its findings in C-466/12 *Svensson* where it had held that this did not alter the judgment as long as the other requirements were fulfilled. The CJEU thereby held that the conduct of using an in-line link under such circumstances was not a communication to the public.<sup>200</sup>

### 6.3.3 Aftermath at the BGH

What is interesting to note is that the BGH, after having received this judgement from the CJEU in the preliminary ruling, interpreted the ruling to having held that what was of importance was whether or not the initial upload of the video to YouTube had been lawful or not. As this was a fact which was still disputed in the national case the BGH decided to re-refer this question to the court of second instance in order to ascertain if the upload was unlawful or not. Notwithstanding this, the BGH did recognize that the question was going to be answered by the CJEU in C-160/15 *G.S. Media*. Despite this, they decided that this fact had to be settled by the lower court.<sup>201</sup>

### 6.3.4 Opinions after the judgment

Critique of the CJEU's judgment was voiced by ALAI as they reaffirmed their position that the neutrality of the CJEU towards different types of linking led to unwanted results. Simple hyperlinks should not to be viewed as making works available while they held the opposite to be true for framed- and deep-links.<sup>202</sup> They furthermore, *inter alia*, stated that there were several well-established exceptions in art. 5 ISD that should be applicable in a hyperlinking context.<sup>203</sup>

## 6.4 Future plans of the EU Commission

In December 2015, the EU Commission issued a press release declaring, *inter alia*, that the Commission hereby was outlining its vision to modernise EU copyright rules. The intention of the Commission was/is to develop legislative proposals and policy initiatives during 2016.<sup>204</sup> The intentions were further explained in an action plan: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; *Towards a modern, more European copyright framework* (COM(2015) 626 final). From the plan, it can be noted that the Commission is considering,

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<sup>199</sup> C-348/13 *BestWater* para. [14] – [16].

<sup>200</sup> C-348/13 *BestWater* para. [17] – [19].

<sup>201</sup> Case BGH I ZR 46/12 *Die Realität II* (Judgment 9 July 2015).

<sup>202</sup> ALAI opinion (2015) p. 2-4.

<sup>203</sup> ALAI opinion (2015) p. 5-8.

<sup>204</sup> Commission Press Release, December 2015

among other things, whether any action is needed regarding the definitions of the rights of "communication to the public" and of "making available".<sup>205</sup>

One of the areas that the Commission provided comments on was that there are “*contentious grey areas and uncertainty about the way these concepts are defined in EU law, in particular about which online acts are considered ‘communication to the public’ (and therefore require authorisation by right holders), and under what conditions*”.<sup>206</sup> The Commission considered that the lack of clarity on these definitions create a number of problems, uncertainty for ordinary internet users is among them.<sup>207</sup> So far, no legislative proposals have been presented in this regard (May 2016). It might also be interesting to note that the Commission did declare that it is however too early to consider a full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, but the Commission believed that this should remain an objective for the future.<sup>208</sup>

As a background for the proposals as above, the Commission made clear that the coming legislative proposals will be based on preparatory work carried out during the past few years regarding the current framework, that is to say the set of 10 directives, including the ISD and the international obligations deriving from international treaties to which the EU and/or its Member States are parties.<sup>209</sup> The background for the proposals also includes the results of a public consultation in 2013-2014<sup>210</sup>, a resolution by the European Parliament regarding the implementation of the Directive on Copyright in the Information Society<sup>211</sup> as well as the conclusions of the European Council meeting in June 2015<sup>212</sup>.

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<sup>205</sup> Paragraph 4, p. 10, Communication from the Commission, COM(2015) 626 final, December 2015.

<sup>206</sup> Paragraph 4, subparagraph 4, p. 9, Communication from the Commission, COM(2015) 626 final, December 2015.

<sup>207</sup> Paragraph 4, subparagraph 4, p. 9, Communication from the Commission, COM(2015) 626 final, December 2015.

<sup>208</sup> “A long-term vision for copyright”; Commission Press Release, December 2015

<sup>209</sup> Paragraph 1, subparagraph 7, p. 3, Communication from the Commission, COM(2015) 626 final, December 2015.

<sup>210</sup> Paragraph 1, subparagraph 7, p. 3, Communication from the Commission, COM(2015) 626 final, December 2015 and Report on the Response to Public Consultation, July 2014.

<sup>211</sup> Paragraph 1, subparagraph 7, p. 3, Communication from the Commission, COM(2015) 626 final, December 2015 and European Parliament Resolution, July 2015.

<sup>212</sup> Paragraph 1, subparagraph 7, p. 3, Communication from the Commission, COM(2015) 626 final, December 2015 and Report on European Council Meeting, June 2015.

# 7 Linking to *illicit* content

## 7.1 The case of C-160/15 *GS Media*

As showcased by the aftermath to the decision in C-348/13 *BestWater* the German BGH interpreted the decision to depend on whether the video, which was freely accessible on the internet, was authorized to be placed there by the right holder. However, this question is at the heart of the issue in C-160/15 *GS Media* a court case that has emanated from the Netherlands. To date<sup>213</sup>, it has not been finally decided by the CJEU but the opinion of the AG has been issued. In addition to this, several Member States have expressed their opinion on how they believe the CJEU should rule. Both the opinion of the AG and the opinions of the Member States will be discussed but at first, the background will be explained.

## 7.2 Background to the case at the national courts

The main events that have led up to the court proceedings at the CJEU took place in 2011 in the Netherlands. *Sanoma Media Netherlands BV* (Sanoma), responsible for publishing the monthly magazine *Playboy*, had commissioned a photographer, Mr. Hermés, to take pictures of a TV-personality, Ms. Dekker. These pictures were published, or “leaked” as it is usually termed on the internet, before the pictures had made it to print in the monthly *Playboy* magazine.

Enter *GS Media*, the defendant in the proceedings. A website, *GeenStijl*, operated by *GS Media* published an article referring to the leak of the pictures of Ms. Dekker.<sup>214</sup> In addition, it contained a portion of one of the pictures in the article (in the opinion referenced as “the cutout”).

A *hyperlink* was provided which, when clicked, redirected the visitors to *Filefactory.com*, an Australian website designed for web data-storage. Clicking the hyperlink led to another window being opened and a webpage was displayed with a button that said, “download now”. By clicking this button, a file in zip format was opened that contained 11 images from the photoshoot of Ms. Dekker.

*Sanoma*, who had received full power of attorney to represent the photographer Mr. Hermes immaterial rights arising from the pictures, demanded that *GS Media* would have to remove the hyperlink on their webpage. Although *GS Media* refused to do this, the *filefactory.com*

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<sup>213</sup> 2016-05-23.

<sup>214</sup> The wording used here is the same as in the Advocate General’s opinion, see paragraph 10 of the judgement.

webpage with the file, containing the images was removed. This was however not the end of the interactions between Sanoma and GS Media. Another article appeared on the GeenStijl website. The article, although largely discussing the dispute between GS Media and Sanoma, ended with another provided hyperlink. This time the provided link instead directed to Imageshack.us where a number of the photographs could be found. At the request of Sanoma, these were however removed by the imageshack.com website.

A few weeks later, yet another article was published on the GeenStijl with another hyperlink that led to the pictures. Following the publication of the article there were reportedly several users of the GeenStijl forum that continued posting links directing the users towards web locations where the images could be found.

## 7.2.1 Deliberations of the national courts

Sanoma, Ms. Dekker and Playboy (hereinafter jointly referred to as Sanoma et al.) jointly brought an action at the District Court (Rechtbank) of Amsterdam claiming that GS Media's actions on their GeenStijl webpage amounted to an infringement on Mr. Hermès' immaterial rights. They further claimed that GS Media had acted unlawfully towards Sanoma et al. The District Court largely supported the claims put forward by Sanoma et al. but the case was appealed to the Gerechtshof Amsterdam. The latter court largely abrogated the judgment as it held that GS Media had not infringed any immaterial rights by posting the different hyperlinks that directed towards the photographs. The reason given was that the Court held that the images published on the websites that GeenStijl linked to had already been communicated to the public. Notwithstanding this, the court did however, hold GS Media accountable for their conduct in so far that the links posted facilitated the visitors of the GeenStijl website to view the illegally uploaded content. These actions were by the Gerechtshof deemed to be unlawful. It furthermore held that the cut-out that was posted of one of the pictures on the website did infringe on Mr. Hermès' copyright. Neither the defendant nor the plaintiffs were pleased with these findings and therefore both respectively appealed, and cross appealed, the judgment to the *Supreme Court of the Netherlands* (translated from *Hoge Raad der Nederlanden*, hereinafter shortened Hoge Raad).

Whilst GS Media contested the Gerechtshof's finding that the cut-out of one of the pictures infringed on any copyright, Sanoma et al.'s cross appeal contested the court's finding that the links were not a communication to the public. Sanoma et al. claimed that, by largely referencing the CJEU's judgment in C-466/12 *Svensson*, that a link to a website containing a copyrighted work placed there, without the consent of the rights holder, did in fact amount to a communication to the public and was therefore unlawful. This was, according to Sanoma et al., held to be true, regardless of whether the work had been published previously with or without the consent of the

right holder. By referencing paragraph 31 of the C-466/12 *Svensson* judgment, Sanoma et al. moreover claimed that the pictures contained on the Filefactory.com website were under restrictions, in accordance with what the CJEU had stated there. GS Medias intervening actions were therefore to be seen as facilitating the users of the GeenStijl website to access the pictures, which, according to Sanoma et al. were placed in a “digital safe”. The intervening actions of GS Media was therefore to be seen as giving a wider audience the possibility to view them.

The Hoge Raad held that it could not ascertain what the applicable law said on the matter. Even though it looked at similar case law from the CJEU, more specifically the judgments in C-466/12 *Svensson* and C-348/13 *BestWater*, there were still uncertainties. The Hoge Raad considered it unclear whether there could be a communication to the public when a work had been previously published without the consent of the right holder. In addition, the Hoge Raad also found the requirements to be unclear for what was to be considered a “restriction”, as discussed in the C-466/12 *Svensson* judgment, and more specifically when such a restriction was considered to be circumvented. Since the location of the files containing the photographs was not easy to find, albeit not unfindable, the hyperlink provided by GS Media was indicative of having a “highly facilitating character”<sup>215</sup>.

## 7.2.2 The referred questions

The Hoge Raad therefore referred three questions, with sub-questions, to the CJEU. Below the main questions will be presented whilst the author will summarize the related sub-questions.

*1. (a) If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the right holder, does that constitute a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29?*

In addition to this, the Hoge Raad wanted to know whether the first question would be answered differently if the work that was uploaded without authorization had not previously been communicated to the public in another way.<sup>216</sup> The referring court also wondered if the answer to question one was affected if the person publishing the link, the so called “hyperlinker”, knew, or ought to have known, that the work uploaded to the third-party website was non-consensual. In addition, the referring court wanted to know if it, pertaining to the knowledge of the “hyperlinker”, was of importance that the work had previously not been communicated to the public with the right holder’s consent.<sup>217</sup>

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<sup>215</sup> See C-160/15 *GS Media* paragraph 19 of the judgment.

<sup>216</sup> Sub-question (b) to question 1.

<sup>217</sup> Sub-question (c) to question 1.

2. (a) *If the answer to question 1(a) is in the negative: in that case, is there, or could there be deemed to be, a communication to the public if the website to which the hyperlink refers, and thus the work, is indeed findable for the general internet public, but not easily so, with the result that the publication of the hyperlink greatly facilitates the finding of the work?*

The referring court, as a sub-question to question two, also wondered whether it was of any importance that the “hyperlinker” was, or ought to have been, aware that the website directed to was difficult to navigate to without the link being posted.<sup>218</sup> The final and third question stated by the referring court was the most open one as the Hoge Raad wondered if there were any other circumstances that needed to be taken into account when dissecting the provisions regulating the right to communicate works to the public.

### **7.2.3 Observations of the Member States and the Commission**

Despite the case not yet having been finally decided, it is within the opinion of the AG made clear that, in addition to the two parties of the national case, there were written observations presented by the Commission and several Member States. Representatives of Germany, France, Portugal and Slovakia all expressed opinions. Of these, besides the parties to the case, Germany, France and the Commission also presented oral arguments before the CJEU in a hearing held on 3 February 2016.<sup>219</sup>

Portugal contended that the CJEU's findings in C-466/12 *Svensson*, although not disputing the validity of the ruling, were at issue with the Court's assertion that hyperlinks could constitute an act of communication. It was to them fully possible not to consider the hyperlink as constituting an act of communication and instead view the link as having a similar function to that of a “footnote”. This meant that it was the person who uploaded a work to the internet that in effect made it available which thus constituted a communication to the public. Given that the work was freely accessible, the use of hyperlinks could therefore not be seen to constitute a communication regardless of whether the work to which was linked was placed there with or without authorization.<sup>220</sup>

The Commission stated that its view was that a hyperlink did not constitute a transmission or retransmission in line with the ISD, a position it had already held in C-466/12 *Svensson*.<sup>221</sup> GS Media, Germany, Portugal, Slovakia and the Commission all held that neither the fact that the upload to the internet was unauthorized, nor the fact that the work had previously not been communicated were sufficient reasons to view the linking as a

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<sup>218</sup> Sub-question (b) to question 2.

<sup>219</sup> AG opinion in C-160/15 *G.S Media* para. [21].

<sup>220</sup> AG opinion in C-160/15 *GS Media* para. [22] – [24].

<sup>221</sup> AG opinion in C-160/15 *GS Media* para. [25].

communication to the public.<sup>222</sup> Save Portugal and Slovakia, the same parties held this to be true with respect to the knowledge of the “hyperlinker” that the right holder had not authorized the initial communication to the public of the work.<sup>223</sup> France also held that both the consent of the right holder and the knowledge of the uploader were of no importance in determining if the actions constituted a communication to the public.<sup>224</sup>

Although Portugal largely agreed with the statement it still contended that if the Court would instead rule that there was a communication to the public it would require that the “hyperlinker” was indisputably aware of his or her actions. Slovakia instead said that the awareness of the person posting the link was of importance in order to safeguard the objectives of the ISD, which meant that if the person posting the link was made aware of his unlawful conduct he or she would have to stop it.<sup>225</sup>

Sanoma et al. reiterated their position by stating that all the relevant criteria for there to be a communication to the public to be met. It was especially relevant that the acts by GS Media were done with full knowledge. Sanoma et al. claimed this fact constituted a requirement that should be taken into account.<sup>226</sup>

When it came to the highly facilitating character of the link posted there were differing views. GS Media, Germany, Portugal, Slovakia and the Commission all held it to be immaterial whether the works were hard to find. They further contended that if the CJEU would create substantial legal uncertainty and hamper the right of freedom of expression as well as information.<sup>227</sup> Besides Sanoma et al., France agreed with the highly facilitating character in the light of the claim brought forward that the link circumvented a restriction.<sup>228</sup>

## 7.2.4 The opinion of the AG

When considering the questions put forward by the Hoge Raad the AG began by reasoning whether the authorization of the right holder constituted a prerequisite for there to be or not be a communication to the public when someone used a hyperlink directing towards a third-party website on which unlawful content resided. To begin with, the AG maintained that the CJEU, despite mentioning the requirement of authorization in C-466/12 *Svensson* several times, did not include this as a prerequisite in the operative part of the judgment. In addition, the fact that the CJEU in its judgment in C-

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<sup>222</sup> AG opinion in C-160/15 *GS Media* para. [26].

<sup>223</sup> AG opinion in C-160/15 *GS Media* para. [27].

<sup>224</sup> AG opinion in C-160/15 *GS Media* para. [31].

<sup>225</sup> AG opinion in C-160/15 *GS Media* para. [27].

<sup>226</sup> AG opinion in C-160/15 *GS Media* para. [29].

<sup>227</sup> AG opinion in C-160/15 *G.S Media* para. [28].

<sup>228</sup> AG opinion in C-160/15 *GS Media* para. [30].



348/13 *BestWater* never took the claim that was put forward, that the video that had been in-line linked was unlawfully uploaded, into consideration hinted, according to the AG that it was not a relevant circumstance to take into consideration. Notwithstanding this however, the AG did point out that the question of authorization was not a relevant question posed by the referring courts in any of the cases.<sup>229</sup>

In a quick passage the AG considered whether the arguments proposed by Portugal and the Commission that the CJEU should deviate from what it had held in C-466/12 *Svensson*, i.e. that the use of hyperlinks to freely accessible websites constituted an act of communication. If this position was altered, it would naturally follow that no further deliberation was required.<sup>230</sup> The AG, after having stated this, began by answering the first and second question, including their sub-questions. The discussion was divided into discussing firstly, the requisites for what constituted *an act of communication* and secondly, the requisites for what constituted *the public*.

## 7.2.5 The AGs opinion regarding “an act of communication”

By beginning with referencing both the ISDs 23<sup>rd</sup> recital, which states that an act of communication should cover any transmission or retransmission, and what the CJEU had held in C-283/10 *Circul Globus* where it stated that acts that do not involve such a transmission or retransmission do not constitute such an act, the AG contended that this act is not defined within the ISD. However, with the additional inclusion of the making available right in art. 3(1) ISD it was clear that a high level of technology neutral IPR protection was what was sought for in the ISD, according to the AG.<sup>231</sup>

However, the AG pointed out that the Commission in C-466/12 *Svensson* had stated that it did not, by referencing the 23<sup>rd</sup> recital of the ISD, consider a hyperlink to constitute such a transmission when it was directed towards a freely accessible website containing copyrighted material. Despite the fact that the CJEU previously seemed to have rejected this position, the AG contested whether the use of a hyperlink in said manner really could be held to constitute an act of making available. Despite the AG acknowledging that hyperlinks, including deep-links<sup>232</sup>, had a facilitating nature, they did not make the works available to the public. In accordance with what Portugal had held, the AG contended that the act of making available was only done by the person who carried out the original upload on to the internet.<sup>233</sup>

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<sup>229</sup> AG opinion in C-160/15 *GS Media* para. [37] – [42].

<sup>230</sup> AG opinion in C-160/15 *GS Media* para. [44] – [46].

<sup>231</sup> AG opinion in C-160/15 *GS Media* para. [48] – [50].

<sup>232</sup> This is the authors own assumption from reading the opinion. At para. [54] the AG namely states: “*I consider that hyperlinks which lead, even **directly**, to protected works [...]*” (emphasis added) which is taken to be a reference to the so-called deep links.

<sup>233</sup> AG opinion in C-160/15 *GS Media* para. [51] – [54].

In support of this claim, the AG referenced the joined cases C-403/08 & C-429/08 *FAPL*, more specifically the findings in para. 195-196 where it was stated that the actions of the therein alleged “communicator” were crucial for the customers to enjoy the transmission. This argument was developed in the 33<sup>rd</sup> footnote of the opinion where the AG pointed towards the CJEU using this line of reasoning from *FAPL* mentioned above in C-135/10 *SCF* where it at the 82<sup>nd</sup> paragraph reiterated how vital the actions of the user were for there to be an act of communication. The same requirement was according to the AG also to be applied to a person using a hyperlink in said manner.<sup>234</sup>

The AG did however point out that the CJEU previously had used the same test to view whether the actions of the alleged “communicator’s” actions were indispensable in relation to the new-public criterion. The test were however according to the AG only applicable in relation to whether there had been an act of communication as it is within this act that the making available right lies. Despite the allegation that GS Media were, or ought to have been, aware of the lack of authorization it was according to the AG immaterial to the outcome of the case as there was still no act of communication in his view. This led to the AG suggesting that the entirety of question 1 should be answered in the negative.<sup>235</sup>

## 7.2.6 The AGs opinion regarding “the public”

Despite the AGs contention on whether there had been an act of communication the AG, in the event of the CJEU ruling otherwise, went on to discuss the applicability of the *public*-criterion in the present case. Despite stating that the potential users of the GeenStijl to whom the hyperlinks were directed constituted a large enough amount of visitors, the AG held that they could not be taken to constitute a new public. However, the CJEU’s judgments in the joined cases C-403/08 & C-429/08 *FAPL* and C-466/12 *Svensson* had only held this criterion to be relevant when there had been an initial authorization to a certain public. According to the AG, this was interpreted to mean that if there had never been any initial authorization this criterion was never actualized.<sup>236</sup>

If the CJEU were to rule that the criterion of a new public was applicable, it would according to the AG still not constitute a communication to the public. If the pictures were freely accessible, the actions of GS Media were according to the AG not indispensable for them to be made available to the general users of the internet, which thus resulted in there not being a communication to the public. It was therefore immaterial whether the hyperlinks had a facilitating character. However, this hinged upon the fact that the hyperlink did not circumvent any restrictions.<sup>237</sup>

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<sup>234</sup> AG opinion in C-160/15 *GS Media* para. [55] – [57].

<sup>235</sup> AG opinion in C-160/15 *GS Media* para. [58] – [63].

<sup>236</sup> AG opinion in C-160/15 *GS Media* para. [65] – [68].

<sup>237</sup> AG opinion in C-160/15 *GS Media* para. [69] – [74].

## 7.2.7 Additional observations of the AG

In answering the third question, concerning whether there were any further circumstances that needed to be taken into account, the AG began by stating that the CJEU in *C-466/12 Svensson* had stated that art. 3(1) of the ISD did not allow Member States to increase the scope of application of the provision. To the AG, an interpretation of said article resulting in hyperlinking being considered to be a communication to the public would impair one of the main objectives of the directive, i.e. the development of the information society. Hyperlinking was an inherent function that was necessary for the internet architecture. If hyperlinks were considered to constitute an act of communication in said manner it would furthermore, contrary to the 31<sup>st</sup> recital of the ISD, distort the balance between right holders and users.<sup>238</sup>

In addition, and despite the fact that there was an indication of awareness on GS Media's part concerning the illegality of the content they linked to, the AG held most internet users to be unaware of whether the content linked to on the internet was placed there lawfully or not. If such acts were unlawful it would make internet users hesitant and impair the mentioned strive to improve the information society as well as the functioning of the internet itself. Further measures were instead to be taken by the legislator.<sup>239</sup>

On an ending note the AG, inter alia, pointed to the fact that if the Court would reach the same conclusion, deeming the use of hyperlinks to be lawful in the said manner, this would still not preclude right holders from exercising their rights towards the initial uploader or the website where the works were uploaded.<sup>240</sup>

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<sup>238</sup> AG opinion in *C-160/15 GS Media* para. [75- [78].

<sup>239</sup> AG opinion in *C-160/15 GS Media* para. [78] – [80].

<sup>240</sup> AG opinion in *C-160/15 GS Media* para. [80] – [87].

# 8 Deliberation of the found facts and stated questions

## 8.1 Introductory remarks

What has become particularly apparent from the research presented above is that copyright of all the IPRs is the field where harmonization has been met with the most resistance in several aspects. This is in several ways peculiar as the need to harmonize copyright legislation on an *international* level has been a constant theme for over a hundred years. The resistance seems, *inter alia*, to be evident from the fact that the EU consistently has used secondary legislation in the form of directives, which have the inherent ability to allow a certain leeway for implementation for the Member States. The will for national control seems to be deeply rooted in the area of copyright. Despite the fact that the formation of the Union traces back to the mid-20<sup>th</sup> century, measures to provide copyright harmonization *through* the Union, instead of via international treaties, were initiated as late as the turn of the 21<sup>st</sup> century. The steps taken were furthermore not very comprehensive. Instead, narrower areas within the field were initially targeted. Then however, there came a catalyst, the *internet*.

Some surely view the internet and copyright as an “oxymoron-like” relationship. This borderless medium, although undoubtedly constituting a revolutionary shift for humanity in terms of technological advancement, has become a “game changer” when it comes to the legal field. Through it, *users* now more than ever, at an ever-increasing, even an exponential, pace, have been able to interact with both free as well as protected works in an unprecedented manner. As has been illustrated this is not only true in terms of users partake of material/works; with the internet there is an inherent ability to copy and spread the works in various ways, which some surely would claim risk dispersing the exclusive rights conferred upon creator of the works.

That the internet meant that there was time for action became clear. The WCT and the WPPT were developed and with the introduction of the ISD, the EU were quick to follow. Some action was required on EU level in order not to risk the functioning of the internal market. Any national measures undertaken by individual Member States could otherwise have proven to be disruptive. Member States It is clearly in the light of this endeavor that the ISD should be viewed. However, there are additional objectives with the ISD. There is a clear commitment of wanting to balance the right holder’s copyright with the development of the so-called *information society*. It is by triangulation of these three inherent wills of the directive that an assessment of the stated essay questions should be made. At first however, a discussion of the provisions and its prerequisites is necessary.

## 8.2 The implications of Art. 3(1) ISD

Undoubtedly, the structuring of the provision in art. 3(1) ISD seems to have puzzled the Member States judiciaries throughout the EU since its implementation. Although the directive's 4<sup>th</sup> recital states that harmonization improves legal certainty, it was first through the case law of the CJEU that both the definition of what was to be a *communication* as well as the definition of *public* was decided at the EU level. Although this conclusion seems well-grounded by the CJEU as such, a harmonization leaves little room for difference between the Member States. It is interesting to note that the Commission, at least intended to allow the Member States to determine what was to be considered to constitute a *public*.

This broad approach with vague wording of the provision in order to ensure that new technologies are included by the scope of the directive, hindering it from becoming dated, has undoubtedly at the same time led to substantial uncertainty. As showcased, the provision has caused quite a stir throughout the EU as the amount of preliminary rulings derived from the provision are unmatched in the field of copyright. A dichotomy of wanting to apply a neutral wording while at the same time wanting to ensure legal certainty to the parties that are subjected to it is apparent. If there are any provisions that can be said to having been subjected to the so-called *judicial activism* of the CJEU this provision has to be a strong contender.

With regards to internet hyperlinks one could have hoped that the answer to the first essay question would have been easier to ascertain. The EU judiciary has after all had several chances to give an answer, but unfortunately the interpretation of these judgments diverge.

## 8.3 Is linking an act of “making available”?

It is important to note that the CJEU has expressed it to be immaterial whether the communication of the work has been accessed or not, the central prerequisite is the *offering* of the work. Although several opinions claim that a hyperlink cannot constitute a transmission as it only points out the location of a work, this argument seems somewhat irrelevant to the Court.

Some commentators argue that the making available right differentiates itself from the criteria of being a *transmission*. As was stated in Tsoutsanis' article, it is to him established that the relevant point of something being *made available*, by consulting the preparatory works of the WCT and subsequent statements by WIPO, is that the work is made *accessible*. Undoubtedly, hyperlinks provide *access* to locations, irrespective of whether they *push* or *pull*.

With the CJEU's statement in C-466/12 *Svensson* it does seem to be clear that the Court views the provision of a *pushing* hyperlink as an act of *making available*. As the Court evidently refrained from asking for an opinion of the AG, it almost appears as if the Court held this to be clear from the outset of said judgment. However, that is a purely speculative statement. Within the judgment itself it seems clear that the Court did not deliberate too long on the matter as it arrived at this conclusion in mere passing, more specifically within one sentence, at the [20] paragraph. Hyperlinks were communications to the public as they make works available.

Even if this fact seemed obvious to the Court, the judgment was clearly not received with the same straightforwardness throughout the Member States. The same is true for what the CJEU held in C-348/13 *BestWater*. The Court obviously saw no new points of law as it made a decision by a reasoned order. If anything is to be derived from the CJEU decision it is that the Court does not view the in-line link category different from the hyperlink. *Pushing* or *pulling* links are thereby not differentiated from one another. They both make works available.

This perhaps leads the reader to find the title of this chapter to seem superfluous. However, as has been illustrated, there are differing views – not least in the opinion of the AG. As has been shown, and will be discussed below, the CJEU in earlier judgements turned their focus towards the *new public*-criterion in an internet context but the AG as regards in C-160/15 *GS Media* still contended that there cannot be an act of *making available* of something that is already freely accessible. There is merit to this argument. As has been illustrated by the case law of the provision much focus has been put on the essential actions of the “communicator” for people to access the works. If it is freely accessible on the internet, these actions are no longer necessary. The fact that several of the Member States when issuing their opinion regarding C-160/15 *GS Media* had the same view is also important to note. Clearly, there are strong opinions with regards to the use of hyperlinks.

Notwithstanding this, it is however clear that the links could be seen as highly facilitating, as was asked by the Hoge Raad, but this has not yet been a prerequisite that has been voiced by the CJEU. This, paired with the fact that several of the Member States held it to be immaterial, therefore seems unlikely this will be discussed at length in C-160/15 *GS Media*.

Although the arguments by the AG regarding C-160/15 *GS Media*, and the representatives of the Member States, in the same proceeding, are strong, the fact of the matter remains that the CJEU twice has held the provision of links to be an act of making available. Although the Court has the ability to refrain from what they have previously held this seems highly unlikely. If said scenario however would amount to an act of making available, this could create far-reaching complications provided that the other prerequisite as regards the communication to the public is fulfilled. The making

available right does seem to still possess quite vague features. Not least evidenced by the fact that the Commission is planning new measures and that several of the Member States in their opinion to C-160/15 *GS Media* did not consider hyperlinking to constitute such an act.

## 8.4 The role of the “new public”

As only freely accessible works under protection is discussed, it has been shown that the public requirement is fulfilled automatically when looking at the case law that has emanated from art. 3(1) of the ISD when dealing with an internet context. The World Wide Web truly reaches the world. However, there is the question of how the *new public* criterion is actualized in a scenario where the content is placed on the internet without the right holder’s consent.

It is worth noting that the ALAI did issue an opinion where it held the criterion to be contrary to what is stated in the Berne Convention. Although there might be merit to this argument, it stands clear that this has gone unnoticed by the CJEU. It has continuously applied this criterion in different scenarios ever since one of the first judgments that dealt with the provision, i.e. C-306/05 *SGAE*. If one looks to the date of the ALAI opinion it was published on the 17 September 2014<sup>241</sup> whilst the order of C-348/13 *BestWater* dates to the 21<sup>st</sup> October of the same year. That the CJEU would change its mind based on this argument in the case of C-160/15 *GS Media* therefore seems unlikely.

However, both C-466/12 *Svensson* and C-348/13 *BestWater* have *not* dealt with the scenario where the works placed on the internet are placed there without consent. It is unfortunate that the CJEU did not address this directly but the explanation from them not doing so seems to be two-fold. The referring German court never expressly asked whether this was of any importance and as has been showcased it was neither settled in the national proceedings that the video was uploaded to YouTube without authorization.

It is here interesting to note that some legal scholars already after C-466/12 *Svensson* interpreted the judgment as there is *always* a communication to the public in an internet context if the right holder has not authorized the communication, whilst Arezzo in her article was more cautious to draw that conclusion. The Member States who issued their opinion in C-160/15 *GS Media* bluntly stated that the authorization of the right holder was immaterial for there to be a communication to the public. The AG furthermore pointed out that the authorization was never expressed as a prerequisite in any of the prior judgments and that this therefore was to be interpreted as not being a relevant factor for establishing a communication to the public. It stands clear that there are two camps regarding this matter.

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<sup>241</sup> See the ALAI opinion (2014) p. 1.

If the CJEU were to find that the authorization of the right holder is immaterial in deciding whether there is a communication to the public, this would ultimately lead to the *new public*-criterion being actualized. As with the same previous cases that have been discussed, if the works are freely accessible, it would mean that there is no *new public*. However, the question is then what function art. 3(3) of the ISD can be said to have. Surely, some would argue that that provision would be rendered useless. However, the claim can still be put forward that the right holder still has the ability to target the initial uploader or the host of the website where the content was placed.

## 8.5 Does it come down to the right holders authorization?

If one is to believe the strongly voiced opinions of the parties that claim that lack of authorization always equals a communication, the author of this essay finds such a solution to be highly problematic. If all were to hinge upon the right holders authorization it does raise questions about the legal certainty of such a prerequisite. How would one go about in ascertaining that the work on the webpage that was linked to was placed there with consent? There furthermore seems to be a substantial lack of harmonization concerning under what terms such an authorization would be. Can an author place a work on a website and subsequently change his mind?

It was briefly touched upon that the sole criterion for there to be a work is that it can be said to be the author's intellectual creation. Not understanding the law is usually not an argument. However, in an internet context actions are more rapid than ever, one could only imagine how much infringement would occur if every hyperlink directing towards unauthorized content was held to be infringing. As the AG furthermore in C-160/15 *GS Media* pointed out, there is reason to believe that the vast majority of internet users are unaware of the fact that their linking activities may be infringing.

The fact of the matter is that since the directive was introduced the amount of internet users has grown considerably. In general, internet users must, since there has not yet been any decisive action regarding regular use of hyperlinking, undoubtedly have grown accustomed to using the internet with its links in a manner that would be deemed unlawful in several cases if not even the majority of them. That being said, the judgments of the CJEU, as Bently and Sherman noted, that have dealt with art. 3(1) of the ISD, have continuously indicated that the alleged "communicator" has to be *aware* of the actions he commits. It is a speculative statement to make but it may well be that the CJEU could take the awareness of the "hyperlinker" into account.

If such a prerequisite was created, at least some sort of balance would be struck. In the case of C-160/15 *GS Media* for instance, the hyperlinking



activities committed by Sanoma on their GeenStijl-website were undoubtedly done in full awareness of the fact that the pictures were placed unlawfully on the internet. General internet users would thereby be exempt from their activities if unaware.

The question that then instead would be brought to the fore is how one would go about to prove this awareness of the “hyperlinker”. Right holders would in several cases be stripped of the right to chase after infringing “hyperlinkers” and it would furthermore take a great amount of effort to prove this. The situation ultimately seems to satisfy no one the way this has developed so far.

## 8.6 Why are some criteria “left by the roadside”?

In the case law that has developed it has to be stated that especially two factors seem unfortunate to not be of importance when one assesses art. 3(1) of the ISD in an internet context. To begin with, the profit making nature of the alleged communicator seems to have taken twists and turns. Although mentioned in several cases, the Court did in C-607/11 *ITV* finally contend that it was not a decisive factor for establishing there to be communication to the public. With regard to the use of internet links directing to freely accessible content, one could argue that the override of this prerequisite disregards different types of linking activity.

As mentioned, *everyone* practices linking on the internet. It is however done in different ways. Ranging from private exchanges of information between friends and family, to being used in connection with much clearer commercial intent by businesses and private individuals alike, the intent of profit making could be used to “tip the scale” for whether a communication took place. By instead shifting attention to this profit-making intent, links placed on sites directing towards illicitly uploaded content where revenue is attained by e.g. the use of advertisements could with the use of this criteria be seen as “communicators”. The argument against such a criteria is however that this in several cases would be difficult and costly to prove for the right holder.

That the CJEU has displayed a complete indifference towards the different types of links also seems counterintuitive. As the ALAI notes, although written with the same programming language, the links are not all the same. In terms of revenue, this is usually generated by the amount of visitors one has on one’s webpage. To therefore for instance differentiate between hyperlinks and in-line links seems to be a more satisfactory solution.

## 8.7 Final conclusion

As was mentioned in chapter 8.1 there seems to be *three* underlying interests that the ISD strives to protect. The right holder's right of being awarded an effective copyright protection, a sound development of what has been termed *the information society* as well as safeguarding the function of the internal market.

When looking to the general trend of EU-copyright legislation there is a strong case for arguing that the Union considers the protection of copyright holders to be elemental. It is after all a recognized fundamental right. As laid out in the recitals of the ISD protection of copyright fosters creativity and the development has in several aspects been shown to go in the direction of ever-increasing protection. That the right holder needs to decide when his or her works are communicated to the public is undoubtedly an important right. That it is not to be exhausted is only logical as the author thereby has the ability to generate an income for a very long time.

However, as has been illustrated there several other actors that operate on the internet that are *not* authors. They also have several fundamental rights prescribed to them and they need to be respected as well. Both freedom of expression as well as ensuring the function of the internal market are interests that the ISD strives to assert.

In conclusion, the answer to whether it is lawful to link to freely accessible content that has been placed unlawfully on the internet currently lies at the mercy of the EU judiciary the CJEU. Opinions on the matter diverge in today's Europe. It is hard to ascertain a definitive answer. Undoubtedly, art. 3(1) of the ISD has caused much uncertainty between the Member States. The ruling in C-160/15 *GS Media* furthermore seems to disadvantage all the parties concerned. Either right holders will more or less lose the right to control when to communicate their works to the public on the internet or internet users in general will have to surf the web more cautiously. The effects of the CJEU's judgment however might not cause either side of the spectrum too much damage. This as there seems to be new legislative proposals from the Commission on the horizon. Perhaps these next measures taken will be to fully harmonize copyright legislation within the EU. If that is the case, the internet will surely be seen as a catalyst of this occurring.

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