



Communication to a New Public?

A Critical Analysis of the CJEU's 'New Public' Criterion in
European Copyright Law

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1. Introduction

1.1. The problem

Digital technologies have challenged the traditional principles of copyright law. With the rise of the Internet and other technological developments, it has become easier to reproduce a copyright protected work and to communicate it to a large public. Especially on the Internet, means to communicate a work to a (worldwide) public have increased drastically. Works are largely made available on the Internet and linking techniques are used to make a work more accessible. These new technologies may affect the authors' (or right holders') ability to protect their works and the question has arisen how the communication to the public right, which protects the immaterial exploitation of a work, should be interpreted in response to digital technologies in order to provide sufficient protection online.

Due to the rapid development of digital technologies, it is insufficient to adapt copyright law and create new rights each time a new exploitation form emerges. The essence of copyright law should remain intact and new exploitations have to be assessed in light of established copyright principles, such as the right of communication to the public. Hence, this right has to be interpreted and new criteria or requirements should be formulated to accommodate digital development. But how should this right be interpreted in response to new forms of immaterial exploitations on the Internet?

In the legal order of the European Union (EU), the general right of communication to the public is protected in Article 3(1) of the Information Society Directive (InfoSoc Directive).¹ Genre-specific rights of communication to the public are laid down in different directives. For example, the right to communicate a work to the public by satellite is protected in the Satellite and Cable (SatCab) Directive² and communications of software programmes are regulated in the Software Directive.³ These specific rights are largely superseded by Article 3(1) of the InfoSoc Directive, which protects *any* communication to the public of works created by authors, including the making available of works.⁴ Article 3(1) is formulated in a technologically neutral manner in order to respond to digital and technological development. As a result, the Court of Justice of the European Union (CJEU), which is the judiciary entity of the EU and has the power to interpret and explain EU law,⁵ has broad discretion with regard to the interpretation of the exclusive right.

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereafter referred to as "InfoSoc Directive").

² Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereafter referred to as "SatCab Directive").

³ Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs. All genre-specific rights are protected in Article 4 (3) of the Software Directive, Article 8 (1) of the Rental and Lending Directive, Articles 1 (2), 2, 4 and 8 of the Satellite and Cable Directive and Article 5 (c-e) of the Database Directive.

⁴ Hugenholtz 2009-2, at 10; Dreier and Hugenholtz 2006, at 275, 335; Stamatoudi and Torremans 2014, at 209, 397; Walter and Von Lewinski 2010, at 958.

⁵ Article 19 of the Treaty on European Union (TEU) in conjunction with Article 267 of the Treaty on Functioning of the European Union (TFEU).

The CJEU has created different criteria to interpret and explain the right.⁶ The criterion of the ‘new public’ was originally created to determine whether a retransmission of a broadcast signal to television sets in hotel rooms constitutes a communication to the public.⁷ A ‘new public’ is a public that has not been taken into account by the right holder when he or she authorised the original communication.⁸ In *Svensson*,⁹ a case regarding the role of hyperlinks in copyright law, the CJEU made this criterion a decisive requirement of Article 3(1) of the InfoSoc Directive. As a result, it seems like the CJEU has applied the ‘new public’ test to respond to digital development in the information society.

1.1.1. A ‘new public’

A ‘new public’ is a concept created by the CJEU and defined as a public that “*has not been taken into account by the copyright holder when it authorised the initial communication to the public.*”¹⁰ Originally, the CJEU applied this test to determine that the broadcast of football matches in a bar or restaurant is a communication to the public because the customers in the bar are regarded as a ‘new public’.¹¹ Or that the retransmission of a broadcast signal to private hotel rooms is a restricted act because the hotel guests constitute a ‘new public’.¹² After the *Svensson* case, the requirement of the ‘new public’ has become a decisive factor to constitute – online – a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.

The *Svensson* case concerned the debated question of whether a hyperlink to a protected work is a restricted act. The CJEU held that a hyperlink satisfies the requirements of Article 3(1) of the InfoSoc Directive if the hyperlink makes a work available to a ‘new public’. According to the CJEU, all Internet users are able to access *freely* available online works and are deemed to be the potential recipients of such works. Hyperlinks to freely available works will not expand the group of recipients and will therefore not satisfy the requirement of the ‘new public’.¹³ Consequently in the online world, the criterion of the ‘new public’ has become an integral part of the right of communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.¹⁴

⁶ A thorough analysis of the CJEU’s interpretation of the communication to the public right is set out in section 2.2 of this thesis.

⁷ CJEU 7 December 2006, C-306/05 (*SGAE v Rafael Hoteles SA*)(hereafter referred to as “*SGAE*”), par. 37-38, 40, 42.

⁸ *SGAE*, at 37-42; CJEU 4 October 2011, nos C-403/08 and 429/08 (*Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen / Karen Murphy v Media Protection Services Ltd*)(hereafter referred to as “*Premier League*”), at par 197.

⁹ CJEU 13 February 2014, C-466/12 (*Nils Svensson & others v Retriever Sverige AB*)(hereafter referred to as “*Svensson*”), par. 21, 24.

¹⁰ *SGAE*, par. 37-38, 40, 42; *Premier League*, at par 197; CJEU 18 March 2010, no C-139/09 (*Organismos Sillogikis Diacheirisis Dimiourgou Theatikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etairia*)(hereafter referred to as “*Organismos*”), at par 38; CJEU 13 October 2011, nos C-431/09 and C-432/09 (*Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) / Airfield NV v Agicoa Belgium BVBA*)(hereafter referred to as “*Airfield*”), at par 76; *Svensson*, at par 21, 24; CJEU 27 February 2014, no C-351/12 (*OSA – Ochranňý svaz autorský pro práva k dílu hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*)(hereafter referred to as “*OSA*”), at par 32.

¹¹ *Premier League*, at par 197.

¹² *SGAE*, par. 37-38, 40, 42; *Organismos*, at par 38; *OSA*, at par 32.

¹³ *Svensson*, at par 27-28; Seignette 2014 (note).

¹⁴ This conclusion is confirmed in the so-called ‘hyperlinks-cases’ that followed after *Svensson*, see CJEU 21 October 2014, no C-348/13 (*BestWater International GmbH v Michael Mebes and Stefan Potsch*) (hereafter referred to as “*BestWater*”); CJEU 26 March 2015, no C-279/13 (*C More Entertainment AB v Linus Sandberg*)(hereafter referred to as “*C More*”).

The criterion of the ‘new public’ is currently a hot topic amongst copyright scholars and it has raised many questions.¹⁵ Some questions relate to the scope of the ‘new public’ test and build on the existing case law. For example, does the requirement of the ‘new public’ similarly apply if a hyperlink redirects Internet users to unlawfully published works, i.e. works that have not been made available with authorisation of the right holder?¹⁶ And when is a work ‘freely available’ on the Internet? Is it allowed to contractually restrict the availability of a work or are technical restriction measures necessary? Other questions are more fundamental in nature and relate to the legal basis and legality of the criterion as such. For example, what is the origin of the criterion and does it have a legal basis in EU and international copyright law? Or does the criterion unreasonably prejudice the exploitation right of the right holder on the Internet? As a result of the *Svensson* case, right holders are no longer able to invoke Article 3(1) in the online world if they already freely published a work on the Internet. Is this development consistent with the exhaustion principle in EU copyright law?¹⁷

All these questions illustrate that the CJEU’s interpretation of the communication to the public right in response to digital development, by applying the criterion of the ‘new public’, requires an in-depth analysis. Such an analysis is currently missing in the debate but highly needed to assess whether the criterion is consistent with EU and international copyright law or whether a new interpretation should be found. This thesis aims to provide a thorough examination of the criterion of the ‘new public’ in EU and international copyright law and if necessary, formulate a recommendation for the CJEU on how the communication to the public right, as laid down in Article 3(1) of the InfoSoc Directive, should be interpreted in response to digital development in the information society.

1.2. Research framework

1.2.1. Research question

The research question in this thesis is as follows:

Is the criterion of the ‘new public’ consistent with EU copyright law and in compliance with international copyright law and if not, how should the communication to the public right within the meaning of Article 3(1) of the InfoSoc Directive be interpreted in response to digital development?

The question is twofold and first requires a descriptive analysis of EU and international copyright law, which is conducted in Part I of this thesis. Secondly, part II sets out a normative analysis on how the right *should* be interpreted in response to digital development.

¹⁵ See for example ALAI 2014; Ficsor 2014; Depreeuw 2014; Rosen 2015.

¹⁶ This question is referred to the CJEU in the *Britt Dekker* case, see Dutch Supreme Court 9 January 2015, no 14/01158, *NJB* 2015/748 (*GS Media BV v Sanoma Media Netherlands BV*).

¹⁷ Article 3(3) of the InfoSoc Directive explains that the right of communication to the public cannot be exhausted, which means that each time a work is communicated to the public, authorisation of the right holder is required (of course within the limits set by law).

1.2.2. Methodology

1.2.2.1. General concepts

The ‘new public’ and ‘communication to the public’ are two central concepts in this thesis. The concept of a ‘new public’ is a European one created by the CJEU. It is part of the communication to the public right but not defined in the legislative framework of the EU. The concept of ‘communication to the public’ is not merely a European one but derives from international copyright agreements. In order to assess the legality of the ‘new public’ requirement, the EU and international concept of ‘communication to the public’ has to be thoroughly examined. This means that the concept of a ‘new public’ will be tested in a EU and international context.

‘Communication to the public’ encompasses an exclusive right for immaterial exploitations of copyright protected works and protects *any* communication to a public not present at the original performance. The concept does not include public performances, whereby the public is physically present at the performance. This distinction derives from the genre-specific approach in the Berne Convention, which explains in different articles which subject matters and rights are protected.¹⁸ A ‘general’ right of communication to the public was laid down in Article 8 of the WIPO Copyright Treaty, which includes a non-derogation clause of the provisions of the Berne Convention. Article 8 formed the basis of the EU’s general right of communication to the public in Article 3(1) of the InfoSoc Directive. Consequently, the concept of ‘communication to the public’ leads all the way back to the Berne Convention.

In Europe, the communication to the public right is protected in different directives.¹⁹ The InfoSoc Directive is the directive that protects *any* communication to the public and applies to *all* types of works created by authors. This right encompasses the genre-specific rights in other directives, without disturbing the function or prejudice in any respect these directives.²⁰ Thus, when the EU concept of ‘communication to the public’ is discussed, this thesis mainly focuses on Article 3(1) of the InfoSoc Directive.

1.2.2.2. Research methods Part I

The first part of this research analyses whether the concept of ‘communication to the public’ allows for a ‘new public’ test. ‘Communication to the public’ is analysed in a EU and international context and the main question in this part is whether the criterion of the ‘new public’ is consistent with EU copyright law and complies with international copyright law.

The distinction between ‘consistency’ and ‘compliance’ is necessary because the criterion, which is created by the CJEU, cannot be in conflict with EU copyright law. The CJEU has wide discretion to interpret EU provisions and its decisions are binding. Principles of the CJEU are regarded as

¹⁸ Articles 11, 11*ter*, 11*bis*, 14(1)(ii) of the Berne Convention, see Berne Convention for the Protection of Literary and Artistic Works, Paris 24 July 1971.

¹⁹ For example, in Article 3(1) of the InfoSoc Directive, Article 4 (3) of the Software Directive, Article 8 (1) of the Rental and Lending Directive, Articles 1 (2), 2, 4 and 8 of the Satellite and Cable Directive and Article 5 (c-e) of the Database Directive.

²⁰ Stamatoudi and Torremans 2014, at 206, 397

clarifications of EU law and cannot be in conflict with this law. It is, however, possible to analyse to what extent the interpretation of the CJEU is consistent with established EU law and earlier case law.

This thesis first sets out the EU consistency analysis before the international compliance analysis is conducted. The ‘new public’ test is a European concept and created in case law of the CJEU. Therefore, it is important to first analyse how the criterion has emerged in EU copyright law and to assess the scope of this criterion. Then, an international compliance analysis can be conducted to evaluate the legality of the requirement.

Consistency with EU law

The consistency analysis comprises a doctrinal legal method as well as a conceptual analysis. An internal perspective is applied to assess the concept of ‘communication to the public’ from within “*the logic and framework*” of the EU.²¹ Directives and case law of the CJEU are the main tools to examine the EU’s concept of ‘communication to the public’ and to analyse the scope of this right. The criterion is consistent with EU law if it is not contrary to the provisions of the directives or interpretations of the CJEU. In this thesis, EU copyright law should be regarded as an autonomous legal framework, independent from national laws of its Member States. National laws are not analysed. This “*Europeanist perspective*” is also applied by the CJEU.²²

The main legislative sources in this analysis are the SatCab Directive and the InfoSoc Directive. The SatCab Directive protects the rights of communication to the public by satellite and retransmission by cable. These rights are the EU equivalent of Article 11*bis* of the Berne Convention. According to case law of the CJEU, the criterion of the ‘new public’ derives from this provision in the Berne Convention. A thorough analysis of the SatCab Directive may provide insight in the scope of these rights. In addition, the InfoSoc Directive is examined, which protects the general right of communication to the public in the EU and embraces the genre-specific rights in other EU directives.²³ As a result, the general concept of ‘communication to the public’ in the EU is protected in Article 3(1) of the InfoSoc Directive. Furthermore, the CJEU has made the criterion of the ‘new public’ an integral part of Article 3(1) of the InfoSoc Directive. Thus, this directive is an important source. The two directives together with their recitals and legislative history are examined in order to assess whether the EU’s concept of ‘communication to the public’ allows for a ‘new public’ test.

The second source that should provide insight in the EU’s concept of ‘communication to the public’ is case law of the CJEU. The interpretation power of the CJEU is broad and the CJEU has developed different requirements and definitions to make the communication to the public right adaptable to technological and digital development. One of these requirements is the ‘new public’. An in-depth analysis of case law of the CJEU should explain the origin of the criterion and examine whether it is consistent with established case law.

²¹ Eckes 2013, at 166.

²² Eckes 2013, at 175.

²³ Walter and Von Lewinski 2010, at 958.

Compliance with international law

The EU copyright law is largely interlocked with international copyright law, especially the concept of ‘communication to the public’ has its roots in international agreements.²⁴ These international agreements have become part of the “*present state of the art*” in EU copyright law.²⁵ Consequently, in order to assess the legality of the criterion of the ‘new public’, international law regarding the concept of ‘communication to the public’ has to be analysed. Similar to the section on EU law, this compliance analysis involves a doctrinal legal method and conceptual analysis. In addition, a historical legal method is applied to examine the origin of the concept of ‘communication to the public’. In this section, the distinction between an internal and external perspective blurs.²⁶ In principle, this thesis tests a EU concept, i.e. the ‘new public’, against a different legal framework, namely international copyright law. This would result in an external legal perception. However, “[i]nternational law increasingly penetrates domestic legal orders, including the EU’s”.²⁷ This is not only acknowledged by the CJEU, which frequently refers to international copyright agreements to explain EU provisions, but it is also illustrated in the EU directives such as the InfoSoc Directive, which implements the provisions of the WIPO Copyright Treaty. Accordingly, the compliance analysis combines an internal and external legal perspective.

Three different international agreements are analysed, which are all (directly or indirectly) applicable in the legal order of the EU, namely the Berne Convention, the WIPO Copyright Treaty (WCT) and the TRIPS Agreement.²⁸ These three agreements together with their recitals and legislative history are examined in order to assess whether the concept of ‘communication to the public’ allows for a ‘new public’ test. Above all, the Berne Convention plays an important role.²⁹ This is the primary treaty on copyright law and the first to lay down the right of communication to the public. It sets the minimum requirements for copyright law in the larger part of the world and is (in)directly applicable in later copyright agreements, such as the WCT and TRIPS Agreement but also in EU directives. Thus, the criterion of the ‘new public’ should comply with the provisions in the Berne Convention.

To provide insight in the concept of ‘communication to the public’ in an international context a historical legal method is applied.³⁰ The legislative history of the international agreements, and especially the Berne Convention, are thoroughly analysed in order to assess whether a requirement of the ‘new public’ can be part of this concept. The legislative history of the Berne Convention consists of preparatory works and documents of multiple revision conferences. These documents illustrate the discussions regarding the adoption of the communication to the public right and show how the international concept of ‘communication to the public’ should be interpreted.

²⁴ Eckes 2013, at 167.

²⁵ Snel 2014, at 4.

²⁶ Eckes 2013, at 169, 173; Hesselink 2009, at 36-38.

²⁷ Eckes 2013, at 170.

²⁸ The Berne Convention; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh 15 April 1994; WIPO Copyright Treaty, Geneva 20 December 1996.

²⁹ The Berne Convention does not have a general right of communication to the public, such as Article 3(1) of the InfoSoc Directive, but protects genre-specific rights of communication to the public.

³⁰ Watkins and Burton 2013, at Ch 5.

The provisions of the Berne Convention are, as opposed to EU law, not subject to a judicial review system and there is no overarching entity that explains how provisions have to be interpreted. Interpretation of international law follows the customary rules of the Vienna Convention on the Law of Treaties.³¹ In addition, national laws and case law of national supreme courts serve as examples on how the provisions of the Berne Convention should be interpreted. Those supreme courts that directly applied provisions of the Berne Convention in their national legal order should be regarded as influential and authoritative interpretations.³² In this thesis, decisions of the Dutch, Belgian and Swiss supreme courts are examined because they directly applied Article 11*bis* of the Berne Convention.³³

Hence, the historical analysis together with the interpretations of national supreme courts should explain how the international concept of ‘communication to the public’ has to be interpreted and should show whether a ‘new public’ test can be part of this concept. If the criterion is in conflict with this interpretation or contrary to principles in the WCT or TRIPS Agreement, the criterion of the ‘new public’ will not pass the international compliance test.

1.2.2.3. Research methods Part II

If the criterion of the ‘new public’ does not satisfy the consistency and compliance assessments, a new interpretation of the communication to the public right has to be found in order to respond to digital development. This is the main focus of the second part of this thesis. This part takes a normative approach and assesses the concept of ‘communication to the public’ in light of the intentions of the legislator of the InfoSoc Directive, which is referred to as the ‘benchmark-test’. The normative framework is based on the objectives of the InfoSoc Directive, which reflect the aims and intentions of the legislator. In this thesis, a *good* interpretation of the communication to the public right in response to digital development is one that is consistent with the objectives of the InfoSoc Directive.

The benchmark test derives from the recitals of the InfoSoc directive and its explanatory memorandum. These sources reflect the aims of the legislator regarding the communication to the public right and show how, in light of the InfoSoc Directive, this right should be interpreted. The objectives are divided in five requirements, namely (1) compliance with international law, (2) a high level of protection for the author, (3) stimulate and sustain technological development, (4) a fair balance between right holders and users, and (5) enhance legal certainty.³⁴ In light of this test, two new criteria and one new interpretation method are examined.

The test is illustrated on the basis of an example, i.e. the ‘hyperlink-example’. Hyperlinks are currently an important issue and the CJEU seems to struggle with the qualification of hyperlinks in copyright

³¹ Articles 30-33 of the Vienna Convention on the Law of Treaties, Vienna on 23 May 1969.

³² Hesselink 2009, at 40.

³³ Dutch Supreme Court 30 October 1981, no 11.739, *NJ* 1982, 435, *Auteursrecht* 1981/5:100, *RIDA* 112 (1982):168 (*Amstelveense Cable I*); Dutch Supreme Court 25 May 1984, no 12.281, *NJ* 1984, 697, *AMR* 1984/3:62, *AA* 1986: 628, *GRUR Int.* 1985:124 (*Amstelveense Cable II*); Belgian Supreme Court 3 September 1981, *Pas*, 1982, I, 8, *GRUR Int* 1982: 448. (*Coditel / Cine Vog Films*); Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 404 (*SUISA/Rediffusion SA*); Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 642 (*ORF/PTT en Rediffusion SA*).

³⁴ A similar benchmark test is applied in Guibault, Westkamp and Rieber-Mohn 2007, at 5-6.

law.³⁵ A new criterion or method should provide a solution for the hyperlink issue that is consistent with the intentions of the EU legislator. A criterion or method satisfies the benchmark test if the outcome of the hyperlink example (largely) meets the five requirements. The normative analysis results in a recommendation for the CJEU on how the communication to the public right within the meaning of Article 3(1) of the InfoSoc Directive should be interpreted in response to digital developments.

1.2.3. Social relevance

The right of ‘communication to the public’ is an important concept of copyright law and encompasses one of the exclusive rights of the right holder. Especially on the Internet, the right of communication to the public is of increasing value because it allows a right holder to make a work available to a large (and worldwide) public. The right is defined in a technologically neutral manner and has to be interpreted in order to be applicable to online communications. Given the importance of the exclusive right, this interpretation should be applied in a way that it strikes a fair balance between all the interests at stake, such as among others protection of the right holder, stimulating technological development and protection of the users of works. It is questionable whether the CJEU’s current interpretation – by applying the ‘new public’ test – strikes such a fair balance. The benchmark test, as applied in this thesis, will reflect a fair balance between all competing interests. Thus, this thesis aims to find an interpretation of the immaterial exploitation right that is informed by the realities of the current information society and that responds to digital development. Such an interpretation is needed given the importance and swift development of the Internet and digital technologies.

1.3. Reading guide

The thesis is divided in two parts, of which the first part contains the consistency and compliance analysis. Chapter 2 sets out the EU copyright law regarding the right of communication to the public and first explains the legislative framework in Section 2.1. Next, Section 2.2 thematically sets out case law of the CJEU with regard to the communication to the public right and assesses how the criterion of the ‘new public’ has emerged. Finally, Section 2.4 concludes whether the requirement of the ‘new public’ is consistent with EU copyright law.

In Chapter 3, the right of communication to the public is examined in an international context. Section 3.2 analyses the different rights of communication to the public in the Berne Convention and explains their legislative history. Section 3.3 discusses the other two international agreements, i.e. the WIPO Copyright Treaty (Section 3.3.1) and the TRIPS Agreement (Section 3.3.2). The interim conclusion on the international compliance analysis is explained in Section 3.4. The general conclusion on the first part of this thesis is carried out in Chapter 4.

The second part of this thesis – “Restore EU Copyright law” – focuses on finding a new criterion or interpretation method in light of the benchmark test. This test is explained in Chapter 5. The next

³⁵ See for example the *Svensson* case.

chapter examines two different criteria and one interpretation method on the basis of the test. The conclusions and test results are explained in section 6.3.

Finally, Chapter 7 sets out the conclusion and answers the research question. This chapter formulates a recommendation for the CJEU on how the communication to the public right should be interpreted in response to digital technologies.

1.4. Table of legal framework

	Legal framework	Article(s)	Right	Section
EU level	Information Society Directive (InfoSoc Directive)	Art. 3(1)	General communication to the public, including making available	s. 2.1.2
	Satellite and Cable Directive (SatCab Directive)	Art. 1(2)(a) jo Art. 2	Communication to the public by satellite	s. 2.1.1
		Art. 1(3) jo Art. 2	Retransmission by cable	s. 2.1.1
International level	Berne Convention	Art. 11	Public performance and communication to the public of performance (dramatic, dramatico-musical and musical works)	s. 3.1.3
		Art. 11bis	Broadcasting Rebroadcasting Communication by wire of broadcasted works (cable and digital transmission) Communication by loudspeaker	s. 3.1.4
		Art. 11ter	Public recitation and communication to the public of recitation (literary works)	s. 3.1.3
		Art. 14(1)(ii)	Public performance and communication to the public of film (cinematographic adaptations)	s. 3.1.3
	WIPO Copyright Treaty (WCT)	Art. 8	General communication to the public, including making available	s. 3.2.1
	TRIPS Agreement	Art. 9	Implementation of the provisions of Berne Convention	s. 3.2.2

Part I: Consistency and Compliance

2. EU Law

2.1. Legislative framework

The European Union (EU) was originally established to enhance the Internal Market and to improve free movement of goods, services, persons and capital. In light of this objective, the Council is empowered to adopt appropriate measures in the course of the operation of the common market.³⁶ Such measures are subject to the principle of subsidiarity, which means that the EU can only take action if the objectives cannot sufficiently be achieved with national laws.³⁷ In the field of copyright law, Article 118 of the TFEU provides for a legal basis to adopt legislative measures. According to this article, the European parliament and the Council are competent to create a uniform legal framework for the protection of intellectual property rights.

The EU institutions have different binding means to harmonise the national laws of Member States, of which directives are most common in the field of copyright law.³⁸ A directive is “*binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*”³⁹ Directives harmonise national laws of Member States but will not lead to a uniform application due to the absence of direct effect. A regulation, on the contrary, has the power to uniform national laws because they are directly applicable in the legal order of Member States. Academics have argued that Article 118 of the TFEU may provide a legal basis to adopt a uniform European copyright law.⁴⁰ However, so far, the EU has only adopted directives and due to the cultural differences and the diversities in national copyright laws, a uniform copyright regulation is unlikely in the near future.⁴¹

Member States also have to comply with international agreements of which the EU is a contracting party.⁴² This is for example the case with the WCT and the TRIPS Agreement. The EU is not a contracting party of the Berne Convention, however, due to Article 1 of the WCT and Article 9 of the TRIPS Agreement, the principles in the Berne Convention are indirectly applicable in EU law.⁴³ Furthermore, the European Economic Agreement (EEA) obliges that Member States adhere to the principles in the Berne Convention, thus, this convention can be described as “*quasi-acquis*”.⁴⁴

³⁶ Article 308 of the Treaty on the Functioning of the European Union (TFEU), Lisbon 13 December 2007.

³⁷ Article 69 of the TFEU; Walter and Von Lewinski 2010, at 10.

³⁸ Other measures are regulations and decisions of the Commission and the Council (binding) and recommendations and opinions (non-binding), see Article 288 TFEU.

³⁹ Article 288 TFEU.

⁴⁰ Hugenholtz 2012, at 353; Stamatoudi and Torremans 2014, at 1136.

⁴¹ Walter and Von Lewinski 2010, at 14.

⁴² Article 216(2) of the TFEU; CJEU 19 September 2000, no C-156/98 (*Germany v Commission*).

⁴³ These articles include a non-derogation clause of the provisions of the Berne Convention, see also Chapter 3 on international copyright law.

⁴⁴ See in this regard J. Gaster, “Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts”, ZUM 1 (2006): 8–14, at 9, cited in Hugenholtz 2009-1.

The general communication to the public right and sub-categories of this right are protected in different directives.⁴⁵ In this section, two frameworks are analysed, namely the SatCab Directive and the InfoSoc Directive. The history and purpose of the directives are assessed before the relevant communication to the public right(s) is (are) analysed.

2.1.1. Satellite and Cable Directive

2.1.1.1. History and purpose

The SatCab Directive contains copyright law with regard to satellite broadcasting and cable retransmission. It is the copyright equivalent of the Television without Frontiers Directive of 1989, which addresses cross-border issues of broadcasts within the EU.⁴⁶ The Television without Frontiers Directive derives from the Green Paper on Television without Frontiers in which the European Commission acknowledged the need to eliminate barriers to cross-border television services in the EU.⁴⁷ The Television without Frontiers Directive includes provisions with regard to broadcast rights, however, it does not harmonise copyright issues. In 1990, the Commission issued a discussion paper on Broadcasting and Copyright in the internal Market, which led to the adoption of a copyright framework in 1993, namely the SatCab Directive.⁴⁸

Reasons to adopt the SatCab Directive were, first of all, the issues with regard to cross-border satellite broadcasting within the EU. Broadcasts by means of satellite increased the scope of the reception and could easily reach a cross-border public. Traditional means of broadcasting could also reach a cross-border public, which is known as the ‘spill-over’ effect, however, this spill-over effect was insignificant compared to the scope of satellite broadcasting. Satellite broadcasts made works available in different territories, which led to questions and uncertainties regarding the applicable law and scope of protection of broadcast works.⁴⁹ Another reason to adopt the SatCab Directive was the *Coditel I* judgment of the CJEU, in which the CJEU held that if a Member State recognises a cable retransmission right, such a right cannot be exhausted and does not inhibit the free movement of services.⁵⁰ If these retransmissions were conducted on a cross-border level, similar uncertainties would arise regarding the applicable law and scope of protection.

⁴⁵ For example, in Article 3(1) of the InfoSoc Directive, Article 4 (3) of the Software Directive, Article 8 (1) of the Rental and Lending Directive, Articles 1 (2), 2, 4 and 8 of the Satellite and Cable Directive and Article 5 (c-e) of the Database Directive.

⁴⁶ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, Official Journal L 298/23, 17 October 1989. The Directive has since been amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities *OJ L* 332/27 (18 December 2007).

⁴⁷ European Commission, “Television without Frontiers”, Green Paper, COM (84) 300 final, Brussels, 14 June 1984. This Green Paper was followed by European Commission, Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June), COM (1985) 310 final, June 1985.

⁴⁸ Discussion Paper of the Commission on Copyright Questions concerning Cable and Satellite Broadcasts, “Broadcasting and Copyright in the internal Market”, II/F/5263/80-EN, Brussels November 1990.

⁴⁹ Recital 14 of the SatCab Directive.

⁵⁰ Free movement of services is protected in Article 56 of the TFEU (old Article 49 of the EC Treaty); CJEU 18 March 1980, no C-62/79 (*Coditel I*); Walter and Von Lewinski 2010, at 399.

In 1993, the final version of the SatCab Directive was concluded and it came into effect in 1995. The Directive incorporates the country of transmission theory, which means that the copyrights can only be exercised in the country in which the transmission takes place and not in the countries that receive the transmission.⁵¹ Furthermore, the Directive makes no distinction between different types of satellites. All satellite signals, either directly receivable or received after an intermediary has decoded a signal, are subject to provisions in the SatCab Directive.⁵²

The Directive aims to remove uncertainties with regard to cross-border broadcasts. The differences in national copyright laws led to legal uncertainty and made it difficult to communicate EU-wide broadcasts. The purpose of the Directive is to strengthen the harmonisation of national laws, thereby contributing to the functioning of the Internal Market. The objective is to ensure that audio-visual programmes are broadcasted across the EU and to provide remuneration for right holders on the basis of a facilitated acquisition of satellite broadcasting and cable retransmission rights.⁵³ The SatCab Directive provides minimum harmonisation, which means that Member States are allowed to incorporate more far-reaching provisions to protect the right holders.⁵⁴

2.1.1.2. Communication to the public by satellite and retransmission by cable

The Directive protects two exploitation rights, namely the communication to the public by satellite and the retransmission to the public by cable.⁵⁵ The latter is not harmonised in EU law. The Directive only prescribes that the right is “*observed*” and that if Member States provide for such a right, it takes place on the basis of individual or collective contractual agreements.⁵⁶

Article 1(2)(a) defines a communication to the public by satellite as “*the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.*” Article 2 of the SatCab Directive refers to this right as the broadcasting right, which is a harmonised right that can only be exercised in the country of origin of the satellite transmission.⁵⁷ This right includes four conditions, namely (1) a communication by means of satellite, (2) the transmission must be under control and responsibility of the broadcast organisation, (3) the broadcast signal should be intended for the public and (4) the signal should be an uninterrupted chain of communication.

With regard to the first criterion, Article 1(1) of the Directive defines a satellite as “*any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point*

⁵¹ Article 1(2)(a-b) of the SatCab Directive.

⁵² Article 1(2)(c) in conjunction with Recital 6 of the SatCab Directive.

⁵³ Walter and Von Lewinski 2010, at 404.

⁵⁴ Article 6 of the SatCab Directive.

⁵⁵ Article 2 of the SatCab Directive contains the broadcasting right and Article 8 of the SatCab Directive encompasses the cable retransmission right.

⁵⁶ Article 8(1) of the SatCab Directive; Hugenholtz 2009-2, at 16.

⁵⁷ Hugenholtz 2009-2, at 7.

communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case.”⁵⁸ In order to be qualified as a communication to the public by *satellite*, the public has to be able to receive a broadcast signal ‘individually and directly’.⁵⁹ Coded signals that can only be received by means of professional equipment, which is not available to the general public, cannot constitute a communication to the public by satellite.⁶⁰ It is important to note that the communication to the public right only applies to satellite signals. Cable networks are not covered but may be subject to the retransmission by cable right.

Secondly, the signals have to be transmitted under control and responsibility of the broadcast organisation. The broadcast organisation does not have to perform every chain in the communication process. It is sufficient if a third party transmits a signal under control or responsibility of the broadcast organisation.⁶¹

The third criterion requires that the signal is intended to reach a public. It is not necessary that the public actually receives the signal and watches the broadcast, but a transmission with the ‘intention to reach a public’ is sufficient.⁶² What constitutes a ‘public’ is not explained in the SatCab Directive. As will be explained below, the CJEU has provided – or tried to provide – clarity on the notion of ‘public’ in several cases.⁶³

Lastly, the programme-carrying signal has to be introduced into “*an uninterrupted chain of communication leading to the satellite and down towards the earth.*”⁶⁴ In other words, once broadcast signals have been sent to the satellite station, there is “*no option but to immediately transmit them to the public*”.⁶⁵ This criterion should not be interpreted too strictly. The recitals of the directive explain “*normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting.*”⁶⁶ It is important that the signal is transmitted to the public without modifications, unless such alterations are technically necessary, for example to decode the broadcast signal. The CJEU has held that this criterion should be explained as “*a closed communications system, of which the satellite forms the central, essential and irreplaceable element, so that, in the event of malfunctioning of the satellite, the transmission of signals is technically unfeasible and, as a result, the public receives no broadcast.*”⁶⁷ Transmissions by intervening earth stations do not interrupt the communication chain if the broadcast organisation maintains control and responsibility over the signal.

⁵⁸ Article 1(1) of the SatCab Directive.

⁵⁹ *Lagardère*.

⁶⁰ *Lagardère* at par 32.

⁶¹ Walter and Von Lewinski 2010, at 412; Dreier and Hugenoltz 2006, at 271; Depreeuw 2014, at 372.

⁶² Walter and Von Lewinski 2014, at 409.

⁶³ For example, in *Lagardère* and *Airfield*. These cases are analysed below.

⁶⁴ Article 1(2)(a) of the SatCab Directive.

⁶⁵ Depreeuw 2014, at 376.

⁶⁶ Recital 14 of the SatCab Directive.

⁶⁷ *Lagardère*, at par 92; *Airfield*, at par 58.

The second exploitation right in the SatCab Directive is the cable retransmission right. Article 1(3) defines a cable retransmission as “*the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.*” This secondary transmission right is subject to an earlier broadcast, a primary broadcast. The primary broadcast has to be transmitted to the public by wire or over the air.⁶⁸ Thus, the retransmission right applies to cable-originated programmes, as opposed to the retransmission right in Article 11bis(1)(ii) of the Berne Convention, which will be explained in the next section. Article 1(3) of the SatCab Directive excludes satellite retransmissions but only includes retransmissions by cable or microwave systems.

The definition of ‘cable retransmission’ is interpreted narrowly. It applies to simultaneous retransmissions in other Member States. Retransmission can only take place at the same time, without any alterations. It is not allowed to modify a broadcast, for example by shortening it or changing the commercials. On-demand transmissions and purely national retransmissions are excluded from the application of the SatCab Directive.

The cable retransmission right, which is set out in Article 8 of the Directive, is not a harmonised exclusive right but only prescribes that if a Member State protects such a right in its copyright framework, this right is subject to compulsory collective management. Such a collective management assists cable operators to clear all rights before programmes are transmitted.⁶⁹ Furthermore, the *Coditel I* judgment has shown that the cable retransmission right cannot be exhausted and right holders maintain the right to oppose against unauthorised retransmissions, provided that the retransmission is conducted by another organisation than the original broadcast organisation.⁷⁰

Whether the retransmission right includes retransmissions over the Internet is speculative.⁷¹ The directive specifically states that retransmissions by cable or microwave systems are covered, thereby making the provision technologically specific. As opposed to the Berne Convention, it does not state that retransmissions by *wire* are included in this right. Whether the notion of ‘cable’ includes the Internet is questionable and it is likely that the Commission did not consider Internet transmissions as part of the retransmission by cable right.⁷² If Internet retransmissions would be subject to the cable retransmissions right, then online retransmissions may be subject to mandatory collective licencing.⁷³

The SatCab Directive does not clarify the notion of ‘public’ but leaves it to the Member States to interpret it in their national laws.⁷⁴ Although the directive leaves it to the discretion of Member States,

⁶⁸ Depreeuw 2014, at 394.

⁶⁹ Hugenholtz 2009-2, at 7.

⁷⁰ Article 10 of the SatCab Directive; Dreier and Hugenholtz 2006, at 279.

⁷¹ Dreier and Hugenholtz 2006, at 274; Hugenholtz 2009-2, at 13; Dreier 1996, at 58.

⁷² Depreeuw 2014, at 396.

⁷³ Article 9 of the SatCab Directive; Stamatoudi and Torremans 2014, at 231.

⁷⁴ This is confirmed in CJEU 3 February 2000, no C-293/98 (*Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)*)(hereafter referred to as “*Egeda*”).

the CJEU does provide – or tried to provide – clarification on this notion, which is explained in the section on case law of the CJEU.

The two exploitation rights in this Directive have been superseded by the general communication to the public right in Article 3(1) of the InfoSoc Directive, which includes the broadcasting by satellite and cable retransmission right.⁷⁵ Thus, the relevance of the separate exploitation rights in the SatCab Directive has decreased with the adoption of the InfoSoc Directive.⁷⁶ Article 3(1) of the InfoSoc Directive is explained in the next paragraph.

2.1.2. Information Society Directive

2.1.2.1. History and purpose

In 1993, the European Commission recognised in its White Paper that technological developments have an important effect on the protection of copyright law.⁷⁷ Due to new (digital) forms of exploitation, protection of copyright was challenged. The European Commission issued several recommendations for action to respond to the challenges of the information society, of which one was the creation of a common legal framework for a high level of protection of intellectual property.⁷⁸ According to the Commission, intellectual property protection gives rise to *“new challenges of globalisation and multimedia, and must continue to have a high priority at both European and international levels.”*⁷⁹

In 1995, the European Commission delivered a Green Paper on Copyright and Related Rights in the Information Society, in which solutions were suggested for the technological developments in the information society.⁸⁰ The Commission explained that the solutions should protect the basic notion and principles of copyright law. In this Green Paper, the Commission stated that the communication to the public right should not include private communications.⁸¹ The Green Paper also addressed the issue of digital transmission but not in relation to the communication to the public right. According to the Commission, digital transmissions, such as on-demand television, should be subject to the Rental and Lending Rights Directive because they fall within the scope of the lending right.⁸²

In 1996, the Commission issued a follow-up paper in which it changed its opinion with regard to digital transmissions.⁸³ In this paper, the Commission suggested that online transmissions should be

⁷⁵ Hugenholtz 2009-2, at 10.

⁷⁶ Dreier and Hugenholtz 2006, at 275; Stamatoudi and Torremans 2014, at 209.

⁷⁷ White Paper on Growth, Competitiveness and Employment. The Challenges and ways forward into the 21st century, COM(93)700 final of 5 December 1993.

⁷⁸ Europe and the Global Information Society, Recommendations of the high-level group on the Information Society To the Corfu European Council (Bangemann Group), in Bulletin of the European Union, Supplement No. 2/94, follow-up to the White Paper, 1994 (hereafter referred to as “Bangemann report”).

⁷⁹ Bangemann report, at 37.

⁸⁰ Green paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, Communication from the Commission, COM(88)172 final, Brussels 7 June 1988 (hereafter referred to as “Green Paper 1988”).

⁸¹ Green Paper 1988.

⁸² Ficsor 2002, at 194-195; Green Paper 1988, at 58-59.

⁸³ Follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final, Brussels 20 November 1996.

protected on the basis of the communication to the public right.⁸⁴ During the WIPO Diplomatic Conference in 1996, this suggestion was adopted in Article 8 of the WIPO Copyright Treaty (WCT).⁸⁵ The European Union and all its Member States are contracting parties to the WCT. In order to adopt the main principles of the WCT (and the WPPT) and to respond to the challenges in the information society, a new directive was proposed, namely the Information Society Directive.

The InfoSoc Directive largely reflects the Green Paper of the Commission and the provisions of the WCT and WPPT.⁸⁶ One of the centrepieces of the Directive is Article 3, which protects the general communication to the public right, including the making available right, and resembles Article 8 of the WCT. Article 3 is technologically neutral in order to respond to digital developments and future immaterial forms of exploitation. Furthermore, paragraph 3 of this article explains that communications to the public are not subject to exhaustion.⁸⁷ The right holder is able to control any immaterial exploitation of a work, within the limits of the law.

The Information Society Directive, which was adopted in 2001, is the most far-reaching Directive of the EU in the field of copyright law. It applies to all types of works created by authors and neighbouring right holders and is applicable to online and analogous forms of exploitation.⁸⁸ The directive aims to create a favourable environment in which creative and innovative activities are protected and stimulated.⁸⁹ The development of the information society should be fostered and the creation of new products has to be stimulated. Furthermore, it aims to strike a fair balance between the rights and interests of, on the one hand, the right holders and, on the other hand, the users of a work.

The general objective is to provide a high level of protection of authors and to give them an appropriate reward for the use of their works. In order to ensure this, the exploitation rights should be construed broadly, in particular the communication to the public right.⁹⁰ This high level of protection, however, has to be weighed against the rights and interests of users and the stimulation of the information society. Another objective is to overcome legal uncertainty with regard to the protection of on-demand services. Therefore, the directive tries to harmonise the legal framework regarding interactive on-demand transmissions of protected works.⁹¹

⁸⁴ Studies (in 1994 and 1995) conducted by P. B. Hugenholtz were an important reason to change the opinion of the previous Green Paper, see Hugenholtz 1996, at 89-91. This paper is based on studies prepared for the European Commission (DGXIII and DGXV) in 1994 and 1995.

⁸⁵ See section on international law for an in-depth analysis on the adoption of the making available right.

⁸⁶ Explanatory Memorandum, at 11 par 10; Walter and Von Lewinski 2010, at 495.

⁸⁷ Article 3(3) of the InfoSoc Directive.

⁸⁸ Stamatoudi and Torremans 2014, at 397; Dreier and Hugenholtz 2006, at 355.

⁸⁹ Explanatory Memorandum, at par 1.

⁹⁰ Recital 23 of the InfoSoc Directive.

⁹¹ Recital 25 of the InfoSoc Directive; Explanatory Memorandum, at 25 par 2.

2.1.2.2. Communication to the public right

Prior to the InfoSoc Directive, the communication to the public right was protected in genre-specific provisions.⁹² Although these specific rights remain in force, they are largely superseded by the general communication to the public right in Article 3 of the InfoSoc Directive.⁹³ Article 3 reads as follows:

“Article 3

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.”

Paragraph 1 reflects the general communication to the public right as protected in Article 8 of the WCT.⁹⁴ However, it is not completely identical because it does not include the non-derogation clause to the provisions of the Berne Convention. Nonetheless, the Berne Convention is indirectly applicable in the legal order of the EU because of EU’s membership to the WCT and TRIPS Agreement and ‘quasi-acquis’ through the EEA. Thus, Article 3 should also be interpreted consistently with the principles of the Berne Convention.⁹⁵ The second paragraph of Article 3 provides protection for neighbouring rights and incorporates the principles of the WPPT.

The general right of communication to the public regulates the exploitation of a work in immaterial forms by making it perceptible to the public.⁹⁶ The recitals of the InfoSoc Directive explain that the right should be interpreted broadly. However, not all public communications are included. Recital 23 restricts the scope of the right to “*all communication to the public not present at the place where the communication originates*”.⁹⁷ Walter and Von Lewinski refer to this requirement as a ‘distance

⁹² For example, in Article 4 (3) of the Software Directive, Article 8 (1) of the Rental and Lending Directive, Articles 1 (2), 2, 4 and 8 of the Satellite and Cable Directive and Article 5 (c-e) of the Database Directive.

⁹³ Stamatoudi and Torremans 2014, at 408.

⁹⁴ Article 8 of the WCT: “Without 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, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

⁹⁵ This is for example determined in SGAE.

⁹⁶ Green paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, Communication from the Commission, COM(88)172 final, Brussels 7 June 1988, at 53; Depreeuw 2014, at 424.

⁹⁷ Recital 23 of the InfoSoc Directive; CJEU 24 November 2011, no C-283/10 (*Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)*) (hereafter referred to as “*Circus Global*”), at par 39-40; Stamatoudi and Torremans 2014, at 409; Dreier and Hugenholtz 2006, 360; Walter and Von Lewinski 2010, at 958.

element’.⁹⁸ According to the Common Position of the European Parliament and the Council with regard to the adoption of the InfoSoc Directive, direct representation or performance is excluded.⁹⁹ The interpretation of ‘public performance’ is stricter in EU law than in the Berne Convention. Only actual live performances in which the public is physically present at the performance are excluded.¹⁰⁰ If a live performance is communicated by other means, for example by broadcast or over the Internet – and the public is not physically present – the InfoSoc Directive is applicable.¹⁰¹ Thus, showing a broadcast in a pub or restaurant is a communication to the public and subject to the InfoSoc Directive.¹⁰²

Recital 23 further explains that the directive applies to “*any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.*”¹⁰³ Any other acts that do not match this description are excluded. Member States are not allowed to provide more protection with respect to the communication to the public right than is provided for in the InfoSoc Directive because such protection would likely affect the Internal Market and prejudice the harmonisation of copyright law within the EU.¹⁰⁴ Additionally, Recital 23 refers to a ‘transmission or retransmission’ but does not explain these concepts.¹⁰⁵ Neither is the concept of ‘communication’ defined in the directive. It is generally understood that broadcasting, streaming, on-demand television and online transmissions are ‘communications’.¹⁰⁶ A more difficult issue is whether a hyperlink constitutes such an act. This question was referred to the CJEU and, as will be explained below, the CJEU found that a hyperlink is indeed a ‘communication’, not because it is a ‘transmission’ but because it makes a work available.¹⁰⁷

According to Recital 27, the mere provision of physical facilities does not amount to a communication to the public. This principle derives from the Agreed Statement of the WCT and should be interpreted strictly.¹⁰⁸ The CJEU has held that when there is an ‘intentional intervention’, an act goes beyond the provision of physical facilities to ensure or improve reception.¹⁰⁹ In light of this, the CJEU explained that the transmission of broadcast signals and the installation of television sets in hotel rooms can constitute a ‘communication’ and does not satisfy the test in Recital 27.¹¹⁰ This recital is mainly incorporated in the directive to protect Internet Service Providers (ISPs) from copyright liability

⁹⁸ Walter and Von Lewinski 2010, at 980.

⁹⁹ Common Position (EC) No 48/2000 of the Council with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, (2000/C 344/01), 28 September 2000, at 15 par 12. A Common Position is non-binding but influential agreement before the adoption of a Directive.

¹⁰⁰ *Premier League*, at par 210.

¹⁰¹ *Premier League*; Depreeuw 2014, at 432.

¹⁰² *Premier League*.

¹⁰³ Recital 23 of the InfoSoc Directive.

¹⁰⁴ *Svensson*.

¹⁰⁵ Recital 23 of the InfoSoc Directive; Stamatoudi and Torremans 2014, at 408.

¹⁰⁶ Stamatoudi and Torremans 2014, at 409.

¹⁰⁷ See in this regard *Svensson*.

¹⁰⁸ Agreed statement concerning Article 8, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295456 (accessed 15 July 2015).

¹⁰⁹ *Airfield*.

¹¹⁰ *SGAE; Organismos*.

claims.¹¹¹ But even for ISPs, this recital should be interpreted strictly. Knowledge or some degree of control over the content may constitute a communication to the public, even for ISPs.

In order to invoke Article 3 of the InfoSoc Directive, it is not necessary that a public receives a communication of a work. The restricted act is the ‘transmission’ or the ‘making available’ of a work, irrespective if no member of the public actually accesses or watches a work.¹¹²

Article 3 includes the right to make a work available to the public, which means that “*members of the public may access [a work] from a place and at a time individually chosen by them.*” The form in which the works are made available to the public is not decisive; the only relevant factor is that the public is able to access a particular work at an individually chosen place *and* time. If the public is not able to freely select a time, there is no making available but only a communication to the public.¹¹³ This right protects on-demand transmissions and is explained in a technologically neutral manner. It includes transmissions by wire and wireless means and applies to all types of devices that are used to receive the transmission, for example televisions, computers and smartphones. This way, the EU legal framework is able to respond to future (digital) exploitation forms.

This right reflects the so-called “*umbrella-solution*” of the WCT, which means that Member States have discretion with regard to the implementation of the making available right in national law. Member States are free to decide how to incorporate the making available right in their national laws, for example as part of the communication to the public right, the distribution right or as a separate making available right.¹¹⁴ Member States should only ensure that the communication to the public and the making available right are incorporated in their national frameworks. EU law does not define the form in which this result should be achieved.¹¹⁵

The scope of the making available right is broad and open-ended, which makes it easier to respond to technological developments. However, it may also lead to uncertainties. It is difficult to assess whether a particular exploitation form is an act of making available, communication to the public, reproduction or a combination of those. For example, when online works are offered on peer-to-peer platforms, this ‘offering’ is an act of making available. But once an Internet user downloads a particular work from the platform, a reproduction of the work is made. Does the making available right include the act of reproduction or are there two distinct acts for which authorization of the right holder is required? Such questions are not resolved in the InfoSoc Directive but continue to exist when new (digital) exploitation forms emerge. It is difficult to anticipate each and every future exploitation form in a legal framework. It is the task of the judiciary, in this case the CJEU, to apply clear and consistent interpretation methods in response to new and digital exploitations. These methods should enhance legal certainty in the information society.

¹¹¹ Koelman 2007 (note).

¹¹² SGAE, at par 42; *Premier League*, at 171.

¹¹³ Stamatoudi and Torremans 2014, at 413.

¹¹⁴ For more information on the umbrella-solution see the section on international law (WCT).

¹¹⁵ Stamatoudi and Torremans 2014, at 419.

Both the communication to the public and the making available right require that a work is communicated to a ‘public’. However, the directive does not define this notion. According to the Explanatory Memorandum, it is a matter for national law to define the notion of ‘public’ but the interpretation should be consistent with the objectives of the directive.¹¹⁶ Thus, it should be construed in a broad manner in order to provide a high level of protection for the author.¹¹⁷ The interpretation should not affect the legitimate interests of the author.¹¹⁸ Similar to the interpretation in international law, the ‘public’ should be defined as the opposite of ‘private’, thereby excluding communications within a closed circle of relatives or friends.¹¹⁹

The ‘public’ notion has led to several referrals to the CJEU. According to the CJEU, provisions in the InfoSoc Directive should be construed in an autonomous and uniform manner.¹²⁰ In light of this, the CJEU has reserved itself the power to interpret the notion. Bateman argues that different applications of the ‘public’ would not inhibit the Internal Market and the CJEU was, therefore, not authorised to interpret it.¹²¹ As will be shown in the following section on case law of the CJEU, the CJEU actually plays an important role in the interpretation of the communication to the public right and its interpretation is not always consistent.

2.1.2.3. Exhaustion

An important principle in Article 3 of the InfoSoc Directive is the ‘non-exhaustion’ principle, which means that the communication to the public right cannot be exhausted. The CJEU explicitly ruled in the *Coditel I* case that services, such as communications to the public, are not subject to exhaustion.¹²² This principle is incorporated in the InfoSoc Directive in Recital 29 and Article 3(3). As a consequence, within the limits set out by law, authorisation of the right holder is required each time a work is communicated or made available to the public.¹²³

‘Exhaustion’ is a European principle established to enhance the free movement of tangible goods. It relates to the fact that the first sale of a work by the right holder or with his consent is not subject to further control of the right holder. The right holder has – with the sale – exhausted the right to control the work. This principle applies to sales within the EU, not to international sales.¹²⁴ The underlying principle of exhaustion is that right holders should not be able to exploit a work once he or she has realised the full economic value of the work by putting it on the market. It would inhibit the Internal Market if a right holder was able to further control a work once he or she has exploited its distribution right.

¹¹⁶ Explanatory Memorandum, at 25 par 1.

¹¹⁷ Recital 9 and 10 of the InfoSoc Directive; Walter and Von Lewinski 2010, at 988.

¹¹⁸ Stamatoudi and Torremans 2014, at 416.

¹¹⁹ Guibault, Westkamp and Rieber-Mohn 2007, at 39.

¹²⁰ CJEU 6 February 2003, no C-245/00 (*Stichting ter exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*); SGAE; Walter and Von Lewinski 2010, at 989.

¹²¹ Bateman 2007 (note), at 25.

¹²² CJEU 18 March 1980, no C-62/79 (*Coditel I*) (hereafter referred to as “*Coditel I*”).

¹²³ Explanatory Memorandum, at 27 par 4.

¹²⁴ Recital 28 of the InfoSoc Directive; Explanatory Memorandum, at 27 par 2.

The exhaustion principle applies to the distribution right, however, *not* to the communication to the public right. Recital 29 of the InfoSoc Directive states “[t]he question of exhaustion does not arise in the case of services and on-line services in particular”.¹²⁵ The right holder should be able to control each communication to the public, including the ability to make a work available to the public.¹²⁶

With the rise of digital technology and digital goods, the question has arisen whether the exhaustion principle applies similarly in the online world. This question was raised in *UsedSoft*, a case concerning the sale of ‘used’ licenses for the download of software programmes. According to the CJEU, the distribution right of a computer programme is exhausted if the right holder sells the license to download the programme to another party for an unlimited time. The CJEU stressed that a ‘sale’ on the Internet requires that the seller deletes the software from its own server. Maintaining a copy is not allowed because this would constitute a reproduction. According to the CJEU, “the objective of the principle of the exhaustion [...] is, in order to avoid partitioning of markets, to limit restrictions of the distribution of those works to what is necessary to safeguard the specific subject-matter of the intellectual property concerned.”¹²⁷ This case seems to allow the possibility of a digital exhaustion principle, however, whether this decision applies outside the realm of software is questionable and debated.¹²⁸

The sections above have set out the relevant legislative frameworks and provisions regarding EU’s communication to the public right. The following section analyses case law of the CJEU with regard to this right and in particular regarding the interpretation of the notion of ‘public’.

2.2. Case law of the CJEU

The CJEU is the judicial institution of the European Union and has the authority to rule on matters concerning the interpretation of EU law.¹²⁹ Member States can refer questions to the CJEU on the interpretation or validity of an EU provision in order to interpret and apply it correctly in their national laws. Decisions of the CJEU are binding and have to be applied in national laws of Member States.

The CJEU has applied different interpretation methods to define the communication to the public right. These methods are not always consistent and predictable. This may be explained by the fact that

¹²⁵ Recital 29 of the InfoSoc Directive.

¹²⁶ This conclusion was already drawn in EU’s Green Paper on copyright in the information society. The Commission suggested that exhaustion should not apply to intangible means of transmission, also known as services. This suggestion is later adopted in case law of the CJEU and the InfoSoc Directive.

¹²⁷ CJEU 3 July 2012, no C-128/11 (*UsedSoft GmbH v Oracle International Corp.*), at par 62.

¹²⁸ The case has led to many new questions in particular with regard to the resale of e-books. The CJEU has to determine whether the *UsedSoft* case is also applicable to the resale of e-books and other digital goods. The Dutch District Court of The Hague has referred questions to the CJEU in the *Leenrecht* case and it is likely that more questions will be referred in the *Tom Kabinet* case. Dutch District Court The Hague 1 April 2015, no. 445039 HA ZA 13-690, *IEF 14829 (VOB v Stichting Leenrecht, NUV, Lira, Pictoright)*; Court of Appeal Amsterdam 20 January 2015, no. 200.154.572/01 SKG, *IER 2015/13 (NUV tegen Tom Kabinet)*.

¹²⁹ Article 19 of the Treaty on European Union (TEU) in conjunction with Article 267 of the Treaty on Functioning of the European Union (TFEU).

judges lack specialist expertise in the field of copyright law.¹³⁰ The judges give binding decisions on the increasing number of referrals in the field of copyright law, without actually being a professional in this field. Consequently, decisions are not always in line with established international copyright norms, which is for example the case with the criterion of the ‘new public’.

Three different interpretation methods can be construed from CJEU’s case law regarding EU copyright law.¹³¹ First of all, the CJEU applies a semantic approach, in which the wording of the text is essential, including the recitals of a directive. Secondly, the CJEU applies a systematic interpretation method, in which the context of a provision is important. This method generally includes references to international law, legislative history or other EU legal frameworks. Lastly, the CJEU applies a teleological interpretation method, in which the CJEU refers to the aim and objectives of a provision, which is generally expressed in the recitals of a directive. With regard to this method, the CJEU has a large amount of discretion.¹³²

The teleological and systematic methods are generally applied in cases concerning the communication to the public right. The CJEU has repeatedly held that the wording of the communication to the public right has to be explained within its context and in light of the objectives pursued.¹³³ The aim of the InfoSoc Directive is to provide a high level of protection for the author. Thus, in light of the teleological method, the right has to be interpreted broadly. Furthermore, the CJEU has held that the right should be interpreted consistent with international law, which is an example of the systematic approach of the CJEU.¹³⁴ International agreements to which the EU is a party are applicable in the legal order of the EU.¹³⁵

In this chapter, all cases that are relevant for this thesis are analysed, that is to say those that relate to the communication to the public right and in particular to the interpretation of the notion of public. The relevant cases are *Egeda*¹³⁶, *Mediakabel*¹³⁷, *Lagardère*¹³⁸, *SGAE*¹³⁹, *Organismos*¹⁴⁰, *Premier*

¹³⁰ Favale, Kretschmer and Torremans 2015, at 33.

¹³¹ Favale, Kretschmer and Torremans 2015, at 21-22.

¹³² Favale, Kretschmer and Torremans 2015, at 21-22.

¹³³ CJEU 19 September 2000, no C-156/98 (*Germany v Commission*); CJEU 6 July 2006, no C-53/05 (*Commission v Portugal*).

¹³⁴ CJEU 14 July 1998, no C-341/95 (*Bettati*); Walter and Von Lewinski, 2010 at 989; Depreeuw 2014, at 421.

¹³⁵ Article 216(2) of the TFEU; CJEU 19 September 2000, no C-156/98 (*Germany v Commission*).

¹³⁶ CJEU 3 February 2000, no C-293/98 (*Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)*) (hereafter referred to as “*Egeda*”). Opinion AG La Pergola 9 September 1999, no C-293/98 (*Egeda*).

¹³⁷ CJEU 2 June 2005, no C-89/04 (*Mediakabel BV v Commissariaat voor the Media*) (hereafter referred to as “*Mediakabel*”). Opinion AG Tizzano 10 March 2005, C-89/04 (*Mediakabel*).

¹³⁸ CJEU 14 July 2005, no C-192/04 (*Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE), Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) and Compagnie européenne de radiodiffusion et de télévision Europe 1 SA (CERT)*) (hereafter referred to as “*Lagardère*”). Opinion AG Tizzano 21 April 2005, C-192/04 (*Lagardère*).

¹³⁹ CJEU 7 December 2007, no C-306/05 (*Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*) (hereafter referred to as “*SGAE*”). Opinion AG Sharpston 13 July 2006, C-306/05 (*SGAE*).

¹⁴⁰ CJEU 18 March 2010, no C-139/09 (*Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai*) (hereafter referred to as “*Organismos*”).

*League*¹⁴¹, *Airfield*¹⁴², *Circus Global*¹⁴³, *Del Corso*¹⁴⁴, *PPI*¹⁴⁵, *TVCatchup*¹⁴⁶, *Svensson*¹⁴⁷, *OSA*¹⁴⁸, *BestWater*¹⁴⁹, *C More*¹⁵⁰ and *SBS*.¹⁵¹ This thesis focuses on the communication to the public in copyright law. However, the communication to the public right in neighbouring rights is discussed in exceptional cases, that is when a case closely relates to a copyright case. The main focus is on the communication to the public right in Article 3(1) of the InfoSoc Directive. To provide an in-depth analysis on the communication to the public right, cases that relate to other legal frameworks, such as the SatCab Directive and Rental and Lending Directive, are analysed as well.

The cases are analysed on the basis of different themes, namely the application of international law, the notion of ‘communication’, the notion of ‘public’ and the ‘profit making nature’ requirement. After this analysis, relevant pending cases of the CJEU with regard to the communication to the public right in the online world are explained before the main findings of the CJEU are summarised.

2.2.1. Application of international law

According to Article 216(2) of the TFEU, agreements concluded with the EU are applicable in the legal order of the EU, which are for example the WCT and TRIPS Agreement. The EU is not directly a member of the Berne Union but the provisions of the Berne Convention are indirectly applicable in the EU legal order through Articles 1 of the WCT and 9 of the TRIPS Agreement. The CJEU is authorised to interpret these international agreements and the CJEU has frequently applied them, in particular the Berne Convention, to interpret the EU’s communication to the public right.¹⁵²

Advocate-General (AG) La Pergola was the first to refer to the principles of the Berne Convention in his opinion in the *Egeda* case. The question in *Egeda* was whether the retransmission of a broadcast signal to television sets in a hotel room constitutes a protected act within the meaning of the SatCab

¹⁴¹ CJEU 4 October 2011, nos C-403/08 and 429/08 (*Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen / Karen Murphy v Media Protection Services Ltd*) (hereafter referred to as “*Premier League*”). Opinion AG Kokott 3 February 2011, C-403/08 and C-429/08 (*Premier League*).

¹⁴² CJEU 13 October 2011, nos C-431/09 and C-432/09 (*Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) / Airfield NV v Agicoa Belgium BVBA*) (hereafter referred to as “*Airfield*”). Opinion AG Jääskinen, C-321/09 and C-432/09 (*Airfield*).

¹⁴³ CJEU 24 November 2011, no C-283/10 (*Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)*) (hereafter referred to as “*Circus Global*”).

¹⁴⁴ CJEU 15 March 2012, no C-135/10 (*Società Consortile Fonografici (SCF) v Marco Del Corso*) (hereafter referred to as “*Del Corso*”). Opinion AG Trstenjak 29 June 2011, C-135/10 (*Del Corso*).

¹⁴⁵ CJEU 15 March 2012, no C-162/10 (*Phonographic Performance (Ireland) Limited v Ireland and Attorney General*) (hereafter referred to as “*PPI*”). Opinion AG Trstenjak 29 June 2011, C-162/10 (*PPI*).

¹⁴⁶ CJEU 7 March 2013, no C-607/11 (*ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd and ITV Studios Ltd v TVCatchup Ltd*) (hereafter referred to as “*TVCatchup*”).

¹⁴⁷ CJEU 13 February 2014, no C-466/12 (*Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB*) (hereafter referred to as “*Svensson*”).

¹⁴⁸ CJEU 27 February 2014, no C-351/12 (*OSA – Ochranný svaz autorský pro práva k díluům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*) (hereafter referred to as “*OSA*”). Opinion AG Sharpston 14 November 2013, C-351/12 (*OSA*).

¹⁴⁹ CJEU 21 October 2014, no C-348/13 (*BestWater International GmbH v Michael Mebes and Stefan Potsch*) (hereafter referred to as “*BestWater*”).

¹⁵⁰ CJEU 26 March 2015, no C-279/13 (*C More Entertainment AB v Linus Sandberg*) (hereafter referred to as “*C More*”).

¹⁵¹ CJEU 19 November 2015, no C-325/14 (*SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*) (hereafter referred to as “*SBS*”).

¹⁵² In particular, in *SGAE*, *Premier League*, *Circus Global* and *Del Corso*.

Directive.¹⁵³ The AG stated that the Directive did not provide a basis to answer the question because the retransmission right was not harmonised. Article 11*bis*(1)(iii) of the Berne Convention, however, did provide a legal basis and should, according to the AG, be interpreted in light of the Guide to the Berne Convention of 1978.¹⁵⁴

The CJEU did not follow AG La Pergola's opinion in the *Egeda* case, however, the CJEU did apply the provisions of the Berne Convention in later cases concerning the communication to the public right. In *SGAE*, a similar case on the retransmission of broadcast signals to hotel rooms, the CJEU had to decide whether the retransmission is a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. According to the CJEU, Article 3(1) has to be interpreted in light of Article 11*bis*(1)(ii) of the Berne Convention, which subsequently has been interpreted in light of the 1978 Guide.¹⁵⁵ In *Premier League*, Article 11*bis* of the Berne Convention also played a role in the interpretation of Article 3(1) of the InfoSoc Directive. This case concerned television broadcasts in public houses, such as bars and restaurants.

The CJEU furthermore applied the Berne Convention to interpret Recital 23 of the InfoSoc Directive, which states that Article 3(1) protects “*all communication to the public not present at the place where the communication originates*”.¹⁵⁶ The CJEU applied Article 11(1) of the Berne Convention to explain which acts constitute such a ‘public performance’ and are excluded from Article 3(1) of the InfoSoc Directive.¹⁵⁷

With regard to the application of international law, the CJEU has held that individuals cannot directly invoke the principles of international agreements before national courts. The provisions of the Berne Convention, the WCT and the TRIPS Agreement are not sufficiently precise to be directly applicable in national law for individuals.¹⁵⁸

2.2.2. Communication

The InfoSoc Directive does not define the communication to the public right nor does it explain the notions of ‘communication’ and ‘public’. This paragraph sets out the (little) guidance that the CJEU has given regarding the ‘communication’ notion. In each case concerning the communication to the public right, the CJEU begins to explain the objectives of the InfoSoc Directive, which is to provide a high level of protection for the author. This high level of protection results in a broad interpretation of the communication to the public right, which means that the notion of ‘communication’ should cover a wide range of activities.¹⁵⁹

¹⁵³ *Egeda*.

¹⁵⁴ Opinion AG La Pergola (*Egeda*). In this opinion, the AG refers for the first time to the criterion of the ‘new public’, which is explained in the paragraph on the notion of public.

¹⁵⁵ *SGAE*, at par 35; CJEU 14 July 1998, no C-341/95 (*Bettati*), at par 20; Koelman 2007 (note).

¹⁵⁶ Recital 23 of the InfoSoc Directive; *Circus Global*, at par 39-40; Stamatoudi and Torremans 2014, at 409; Dreier and Hugenholz 2006, 360; Walter and Von Lewinski 2010, at 958.

¹⁵⁷ *Premier League*, at par 200-203; *Global Circus*, at par 35-36; Bonadio and Santo 2012 (note), at 277-279.

¹⁵⁸ *Del Corso*, at par 46, 48.

¹⁵⁹ *SGAE*, at par 36; *Premier League*, at par 186; *Circus Global*, at par 33; *TVCatchup*, at par 20; *Svensson*, at par 17; *OSA*, at par 23; *SBS*, at par 14.

The CJEU generally defines a communication as an intentional intervention, without which the public is not able to access a work.¹⁶⁰ In *SGAE*, the CJEU held that “*the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.*”¹⁶¹ The CJEU explains that such an act is more than just a technical means to ensure or improve reception of the original communication, thus, it is a ‘communication’. A similar reasoning is used in the *Premier League* case. According to the CJEU, “*the proprietor of a public house intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers. Without his intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast’s catchment area.*”¹⁶² In *Del Corso*, the CJEU held that a dentist intentionally intervenes in the broadcast of phonograms when he turns on the radio in the waiting room of his dental practice.¹⁶³

An act is a ‘communication’ irrespective of whether the public actually accesses a work.¹⁶⁴ The CJEU has held that the fact that a work is made available, for example by means of a broadcast signal and television set, is sufficient to constitute a ‘communication’ within the meaning of the InfoSoc Directive.¹⁶⁵ Acts that merely maintain or improve the quality of an original transmission are not regarded as a ‘communication’.¹⁶⁶ According to the CJEU, this requirement has to be interpreted strictly. New transmissions, such as retransmissions of broadcast works over the Internet, cannot be regarded as an act that merely improves or maintains the quality of the original transmission.¹⁶⁷

In *TVCatchup*, the CJEU had to interpret the communication to the public right in a dispute involving the Internet. TVCatchup is an online broadcasting service that allowed its users to watch live streams of television broadcasts on the Internet. Only those Internet users that had a television license were allowed to watch the live streams on TVCatchup. With regard to the notion of ‘communication’, the CJEU stated “*the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question.*”¹⁶⁸ The CJEU explained that the retransmission of a terrestrial television broadcast over the Internet is a specific technical means different from the original communication, and cannot be regarded as a transmission that merely intends to maintain or improve the quality of

¹⁶⁰ *SGAE*, at par 42; *Organismos*, at par 38; *Premier League*, at par 195; *Del Corso*, at par 82; *PPI*, at par 31.

¹⁶¹ *SGAE*, at par 42.

¹⁶² *Premier League*, par 195.

¹⁶³ *Del Corso*, at par 94.

¹⁶⁴ *SGAE*, at par 43.

¹⁶⁵ *SGAE*, at par 43.

¹⁶⁶ *Premier League*, at par 194; *Airfield*, at par 74, 79; *TVCatchup*, at par 28-29.

¹⁶⁷ *TVCatchup*, at par 29.

¹⁶⁸ *TVCatchup*, at par 24.

the initial communication.¹⁶⁹ Therefore, the CJEU held that the live streams were ‘communications’ within the meaning of Article 3(1) of the InfoSoc Directive.¹⁷⁰

In *TVCatchup*, the CJEU applied a ‘different technical means’ criterion to assess the notion of ‘communication’ and did not apply the ‘intentional intervention’ requirement.¹⁷¹ Another interesting observation from the *TVCatchup* case is that it seems like the CJEU has created a ‘transmission’ requirement. According to the CJEU, a ‘communication’ is any *transmission* or *retransmission* conducted by different technical means. This condition may also be derived from earlier case law of the CJEU. In each of the earlier communication to the public cases, the ‘intentional intervention’ test included a transmission or retransmission of a broadcasted work.¹⁷² Thus, in light of these cases, it may be argued that a ‘communication’ should be defined as an intentional intervention that consists of a *transmission*, without which the public is not able to access a work. If such a transmission is conducted by technical means different from the original transmission, it is clear that the act constitutes a ‘communication’.

However, the CJEU did not apply this definition in the so-called ‘hyperlink cases’.¹⁷³ In *Svensson*, the CJEU had to decide whether a hyperlink constitutes a communication to the public. According to the CJEU, a hyperlink is a ‘communication’ because it provides access to a work.¹⁷⁴ The mere making available is enough and, therefore, the provision of clickable links is an act of ‘communication’.¹⁷⁵ The CJEU based this conclusion on the fact that the communication to the public right should be construed broadly in order to provide a high level of protection to the author. This (poorly reasoned) decision seems to leave no room for a ‘transmission’ requirement.¹⁷⁶ A hyperlink does not transmit a work, it merely indicates where a work is to be found. Although this conclusion may be surprising in light of earlier case law, it seems consistent with EU copyright law because the communication to the public right includes a making available right, which protects the act proceeding an actual transmission.

The interpretation method of the CJEU with regard to the notion of ‘communication’ is incoherent and confusing. This is, moreover, illustrated in the *OSA* case, a judgment issued 14 days after *Svensson*. In this case, the CJEU defined the notion of ‘communication’ as “*any transmission of the protected works, irrespective of the technical means or process used.*”¹⁷⁷ The CJEU stated that the owner of a spa establishment carries out a ‘communication’ if he or she intentionally distributes broadcast signals through television sets to the rooms of a spa establishment. This decision is in line with *SGAE* and *Premier League*, however, it seems to be contradictory to the ‘hyperlink cases’, which

¹⁶⁹ *TVCatchup*, at par 26-30. Curry 2013 (note), at 594-596.

¹⁷⁰ *TVCatchup*, at par 40.

¹⁷¹ The CJEU also applied this ‘different technical means’ criterion in *SBS*, at 17-18.

¹⁷² For example, in *SGAE*, *Premier League*, *Del Corso* and *PPI*.

¹⁷³ So far, there are three hyperlink-cases, i.e. *Svensson*, *BestWater* and *C More*.

¹⁷⁴ *Svensson*, at par 19; This is confirmed in *BestWater*; De Bruin 2014 (note), at 178.

¹⁷⁵ Stevens 2014 (note), at 549.

¹⁷⁶ Headdon 2014, at 665; Predonzani 2014 (note), at 40.

¹⁷⁷ *OSA*, at par 25. The CJEU refers in this regard to *Premier League*, at par 193. The CJEU recently confirmed this in *SBS*, at par 16.

do not allow for a ‘transmission’ test.¹⁷⁸ Case law of the CJEU appears to be inconsistent. Nonetheless, the judgments of the CJEU are binding upon Member States and have to be adhered with.

2.2.2.1. Public

The CJEU cases regarding the communication to the public right largely focus on the interpretation of the notion of ‘public’. In principle, Member States have discretion to interpret this notion in their national laws and the ‘public’ was not a European concept. The CJEU confirmed this in the *Egeda* case and held that the SatCab Directive does not provide for a basis to interpret the communication to the public right. According to the CJEU, the SatCab Directive provides minimum harmonisation and does not proscribe how the provisions should be incorporated in national laws.¹⁷⁹ The CJEU, however, did note that this might change when the proposal of the InfoSoc Directive would enter into force.¹⁸⁰

After the *Egeda* judgment, the Commission issued a report that stated that the issue of retransmissions of broadcast signals in hotel rooms has led to different applications in Member States.¹⁸¹ These different interpretations interfere with the free movement of services and may affect the Internal Market. According to the Commission, more clarification on the notion of public is welcomed and a uniform application is preferred.

In later case law, the CJEU has created different definitions and criteria to interpret the notion of ‘public’. First of all, the public is generally defined as an indeterminate number of (potential) recipients, which implies a fairly large number of persons.¹⁸² Secondly, the EU’s communication to the public right only includes those communications of which the public that is not physically present at the original communication. Public performances are excluded.¹⁸³ Thirdly, a work has to be communicated to a ‘new public’, that is a public that has not been taken into account when the right holder originally authorised a communication.¹⁸⁴ Finally, the CJEU has held that this ‘new public’ requirement does not apply if a work is communicated with ‘different technical means’.¹⁸⁵ These criteria are individually analysed below.

2.2.2.2. Indeterminate and fairly large number of people

Following case law of the CJEU, the notion of ‘public’ is generally defined as ‘an indeterminate number of (potential) recipients, which implies a fairly large number of people’.¹⁸⁶ This test was originally created in *Mediakabel*, a case concerning the Television without Frontiers Directive. In this

¹⁷⁸ *Svensson, BestWater and C More*.

¹⁷⁹ *Egeda*, at par 24, 29.

¹⁸⁰ *Egeda*, at par 26-28.

¹⁸¹ Report from the European Commission on the Application of Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final, Brussels, 26 July 2002, at 12-13.

¹⁸² *Mediakabel*, at par 30; *Lagardère*, at par 31; *SGAE*, at par 37; *Del Corso*, at par 85-87; *PPI*, at par 41-42; *TVCatchup*, at par 32; *Svensson*, at par 21; *OSA*, at par 27.

¹⁸³ *Premier League*, at par 200-203; *Circus Global*, at par 36.

¹⁸⁴ *SGAE*, at par 40; *Organismos*, at par 38; *Premier League*, at par 197; *Airfield*, at par 76; *Svensson*, at par 21-24; *OSA*, at par 32; *BestWater*, at par 14-16.

¹⁸⁵ *TVCatchup*, at par 39.

¹⁸⁶ *Mediakabel*, at par 30; *Lagardère*, at par 31; *SGAE*, at par 37; *Del Corso*, at par 84; *PPI*, at par 33; *TVCatchup*, at par 32; *Svensson*, at par 21; *OSA*, at par 27; *SBS*, at par 21.

case, the CJEU explained that the public, within the meaning of that directive, should be defined as an “*indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously.*”¹⁸⁷

Although the *Mediakabel* case does not relate to copyright law, this interpretation is applied in later case law of the CJEU regarding the communication to the public right. In *Lagardère*, the CJEU applied the ‘indeterminate number of potential viewers’ test to interpret the notion of ‘public’ within the meaning of the SatCab Directive. According to the CJEU in this case, a work is communicated to a ‘public’ if an “*indeterminate number of potential listeners*” is able to receive a communication.¹⁸⁸ The CJEU continued to explain that “*a limited circle of persons who can receive the signals from the satellite only if they use professional equipment cannot be regarded as part of the public*”.¹⁸⁹ Recently, the CJEU also confirmed in *SBS* that “*specified individual professionals*”, such as individual distributors that are not potential viewers of a broadcast, do not constitute a ‘public’.¹⁹⁰

The CJEU did not explain why the same definition is applied in the Television without Frontiers Directive and the SatCab Directive. Although the two directives are closely related, the rights protected in each directive are different, since the Television without Frontiers Directive does not protect copyrights.¹⁹¹ Nevertheless, the “*indeterminate number of potential listeners*” requirement has found its way in EU copyright law and is frequently applied in case law regarding the communication to the public right.¹⁹² In *SGAE*, for example, the CJEU held that the ‘public’ within the meaning of Article 3(1) of the InfoSoc Directive is an “*indeterminate number of potential television viewers*” and generally involves “*a fairly large number of persons*”.¹⁹³ According to the CJEU, a “*general approach*” should be taken into account to define the ‘public’, which means that not only the customers in the hotel rooms should be taken into consideration but also “*customers who are present in any other area of the hotel and able to make use of a television set installed there*”.¹⁹⁴ In addition, hotel customers in succession should be taken into account because they quickly succeed one another.¹⁹⁵

In *Premier League*, the CJEU provided (some) explanation for the similar applications of the notion of ‘public’ in the different directives. The CJEU held in this case, “*given the requirements of unity of the European Union legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the European Union legislature has, in a specific legislative context, expressed a different intention.*”¹⁹⁶ Thus, the communication to the public right within the meaning of

¹⁸⁷ *Mediakabel*, at par 30.

¹⁸⁸ *Lagardère*, at par 31.

¹⁸⁹ *Lagardère*, at par 31.

¹⁹⁰ *SBS*, at par 22-23.

¹⁹¹ *Seignette*2006 (note).

¹⁹² *SGAE*, at par 37; *TVCatchup*, at par 32; *Svensson*, at par 21; *OSA*, at par 27.

¹⁹³ *SGAE*, at par 37-38

¹⁹⁴ *SGAE*, at par 38.

¹⁹⁵ *SGAE*, at par 38.

¹⁹⁶ *Premier League*, at par 188.

the InfoSoc Directive should be construed similarly as the rights protected in the SatCab Directive and the Rental and Lending Directive.¹⁹⁷

Following *SGAE*, the CJEU delivered a surprising judgment in the *Del Corso* case. This case concerned radio broadcasting in the waiting room of a private dental practice and concerns neighbouring rights law. Although the CJEU applied a similar definition of the notion of ‘public’ as in *SGAE*, the court came to the conclusion that patients in a waiting room of a dental practice do not constitute a ‘public’ because the patients are not “*persons in general*”.¹⁹⁸ It seems artificial to treat hotel guests differently from dentist patients, moreover because some dental practices may attract more patients than a hotel attracts guests.¹⁹⁹ The CJEU justified this difference on the distinction between copyright and neighbouring rights law.²⁰⁰ According to the CJEU, “*the concept of communication to the public [in copyright and neighbouring rights law] is used in contexts which are not the same and pursue objectives which, while similar, are none the less different to some extent.*”²⁰¹ The communication to the public right in copyright law is an exclusive right, while in neighbouring rights law it is a remuneration right.²⁰²

The *Del Corso* case has led to confusion and new preliminary questions regarding the notion of ‘public’ in copyright law.²⁰³ The CJEU has tried to remove some of this confusion in *OSA*, in which the CJEU stated that the *Del Corso* case is only applicable to neighbouring rights cases and not to copyright matters.²⁰⁴ In this case, the CJEU held that patients in a spa establishment are regarded as an indeterminate number of potential recipients and a fairly large number of persons.²⁰⁵ The “*persons in general*” test is not applied. This case seems to introduce a different application of the notion of ‘public’ in copyright and neighbouring rights law.²⁰⁶ The German *Landgericht Köln* is not so sure whether the concept of communication to the public should be interpreted differently, and has referred preliminary questions to the CJEU.²⁰⁷ The CJEU has yet to decide what the impact of the *Del Corso* case is in copyright law, and whether the two communication to the public rights in copyright and neighbouring rights law are similar or not.

2.2.2.3. Public not physically present at communication

In line with Recital 23 of the InfoSoc Directive, the CJEU has held on several occasions that the communication to the public right within the meaning of the Directive only protects works that have

¹⁹⁷ *Premier League*, at par 187-188.

¹⁹⁸ *Del Corso*, at par 85-87, 95-96.

¹⁹⁹ Hugenholtz 2013-1 (note).

²⁰⁰ Hugenholtz argues that a different application of the communication to the public right in copyright and neighbouring rights law is justified, because of the economic ratio in neighbouring rights law. However, he also argues that the conclusion of the CJEU seems rather artificial. See Hugenholtz 2013-1 (note).

²⁰¹ *Del Corso*, at par 74.

²⁰² *Del Corso*, at par 75; Visser 2012 (note); Hugenholtz 2013-1 (note).

²⁰³ *OSA* and the German case in which preliminary questions are referred to the CJEU, see Landgericht Köln 20 February 2015, no. 14 S 30/14, *GRUR* 2015, 885-890, *GRUR Int* 2015, 982-987, *ZUM* 2015, 596-601 (*Rehabilitationszentrum*).

²⁰⁴ *OSA*, at par 34-35. Visser and Kreijger 2014 (note), at 161.

²⁰⁵ *OSA*, at par 27; Rosati 2014-1 (note), at 631.

²⁰⁶ Visser and Kreijger 2014 (note), at 161.

²⁰⁷ Landgericht Köln 20 February 2015, no. 14 S 30/14, *GRUR* 2015, 885-890, *GRUR Int* 2015, 982-987, *ZUM* 2015, 596-601 (*Rehabilitationszentrum*).

been communicated to a public not present at the place where the communication originates.²⁰⁸ Public performances are excluded from the concept. In *Premier League*, the CJEU interpreted Recital 23 strictly. In this case, the CJEU had to decide among many other things whether broadcasting football matches in a public house is a communication to the public. AG Kokott was of the opinion that in this case Article 11bis(1)(iii) of the Berne Convention, which protects public communication by loudspeaker, applied instead of sub-paragraph (ii), which protects retransmissions of broadcasted works.²⁰⁹ Article 11bis(1)(ii) of the Berne Convention is implemented in Article 3 of the InfoSoc Directive, however sub-paragraph (iii) is not, according to AG Kokott.²¹⁰ The AG held that with regard to broadcasts in public houses, the communication originates on the screens where the customers of a public house are present and there is no communication to the public within the meaning of the InfoSoc Directive.²¹¹

The CJEU, however, applied a much stricter interpretation of Recital 23 and held that only those communications in which the public is in physical contact with the performers are excluded from the InfoSoc Directive. This ‘physical contact’ is missing when a broadcast is transmitted in a public house and, thus, the broadcast is a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.²¹² This requirement of ‘physical contact’ is similarly applied in later case law such as *Circus Global*.²¹³

2.2.2.4. New public

In *SGAE*, the CJEU created a new requirement to interpret the notion of ‘public’, namely the criterion of the ‘new public’.²¹⁴ The CJEU held in *SGAE* that hotel guests are an indeterminate and fairly large group of people, but to constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive, the public has to be a ‘new public’. The CJEU based this criterion on Article 11bis(1)(ii) of the Berne Convention and the 1987 Guide to the Berne Convention.²¹⁵ The CJEU stated that:

“[W]hen the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public.”²¹⁶

It is important to note that the CJEU referred in this paragraph to a section of the 1978 Guide that interprets Article 11bis(1)(iii) of the Berne Convention and not sub-paragraph (ii).²¹⁷ Thus, the ‘new

²⁰⁸ *Premier League*, at par 200-203; *Global Circus*, at par 35.

²⁰⁹ Opinion AG Kokott (*Premier League*), at par 142.

²¹⁰ Opinion AG Kokott (*Premier League*), at par 143.

²¹¹ Hugenholtz 2012 (note).

²¹² *Premier League*, at par 200-203; Bonadio and Santo 2012 (note), at 277-279.

²¹³ *Global Circus*, at par 35. Koelman 2012 (note).

²¹⁴ *SGAE*, at par 41.

²¹⁵ Bulger 2007 (note), at 281-283.

²¹⁶ *SGAE*, at par 41 (emphasis added).

²¹⁷ Seignette 2014 (note).

public’ criterion derives from an incorrect interpretation of Article 11*bis*. The CJEU ignored this misinterpretation in the *SGAE* case and concluded that the hotel guests constitute a ‘new public’.²¹⁸

SGAE is the first case in which the CJEU applied the ‘new public’ test. However, AG La Pergola already referred to this requirement in his opinion in the *Egeda* case. The facts in *Egeda* and *SGAE* are similar as they both concern the retransmission of broadcast signals to private hotel rooms. AG La Pergola explained that the CJEU was allowed to interpret the notion of ‘public’, not on the basis of the SatCab Directive, but on the basis of the Berne Convention. According to the AG, Article 11*bis*(1)(iii), which protects communications to the public of broadcast works via loudspeakers or other analogous means, provides for a basis to interpret the notion of ‘public’. The AG further explains that the television sets are such ‘other analogous means’. It is surprising that AG La Pergola applies sub-paragraph (iii) instead of sub-paragraph (ii), which protects retransmissions of broadcasted works. When a hotel owner transmits a broadcast signal to television sets in hotel rooms, the hotel owner retransmits a work within the meaning of sub-paragraph (ii). In *SGAE*, the CJEU also interpreted the retransmission of broadcast signals on the basis of sub-paragraph (ii).

Nevertheless, AG La Pergola applied Article 11*bis*(1)(iii) and explained that this article has to be interpreted in light of the Guide to the Berne Convention of 1987. The Guide explained that all secondary use of a broadcast is prohibited if it gives rise to an “*independent economic exploitation for financial profit*” and relates to “*the economic importance of the new public, which is the group of persons to whom the particular act of communication via the television is addressed.*”²¹⁹ In other words, AG La Pergola tried to explain that once a broadcasted work is communicated to a new public that “*differs from the public the author had in mind when he first authorised the broadcast in the exercise of his exclusive right*”, there is a new act of communication to the public for which authorisation is required.²²⁰

In *Egeda*, the CJEU did not follow the opinion of AG La Pergola, but the opinion did form the basis of the CJEU’s decision in the *SGAE* case. This may clarify why the CJEU confused sub-paragraphs (ii) and (iii) of Article 11*bis* of the Berne Convention. La Pergola deliberately applied sub-paragraph (iii), however, the CJEU in *SGAE* referred to sub-paragraph (ii) and explained this provision on the basis of the 1978 Guide that interprets sub-paragraph (iii). If the CJEU had applied Article 11*bis*(1)(ii) correctly, it would have adopted the criterion of an ‘organisation other than the original one’.²²¹ This requirement has not found its way in the EU’s communication to the public right. The criterion of the ‘new public’ on the contrary has become an essential condition to determine whether an act is a communication to the public in EU copyright law.

In later case law concerning the communication to the public right, the CJEU has applied the ‘new public’ test and defined it as “*a public which was not taken into account by the authors of the*

²¹⁸ *SGAE*, at par 42.

²¹⁹ Opinion AG La Pergola (*Egeda*), at par 24.

²²⁰ Opinion AG La Pergola (*Egeda*), at par 20.

²²¹ Seignette 2014 (note); Ficsor 2014, at 8-9.

protected works when they authorised their use by the communication to the original public".²²² In light of this, the CJEU has held that customers in a public house, such as a bar or restaurant, are a new public if a work is broadcasted by means of a television set.²²³ According to the CJEU, a right holder only considered the owners of a television set as the public, and not the customers of a bar or restaurant.²²⁴ The CJEU also held that patients of a spa establishment are a new public when they watch a broadcast work in the private rooms of the spa.²²⁵

The scope of the criterion of the 'new public' further expanded after the *Svensson* decision. In this landmark case, the CJEU had to decide whether a hyperlink to a protected work is a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. This case has drawn a lot of attention, and many academics wrote articles on how the CJEU should decide this question.²²⁶ Hyperlinks are a difficult issue in copyright law. On the one hand, if a hyperlink would constitute an exclusive act, a large part of the Internet would infringe copyrights and this outcome would have an adverse effect on the functioning of the World Wide Web.²²⁷ On the other hand, copyright law should provide a high level of protection for the right holder and a hyperlink to a protected work may inhibit this protection. In particular, embedded and framed hyperlinks can have an adverse effect on the exploitation right of the right holder because he or she, for example, no longer has the ability to exclusively generate advertisement incomes from the communication of the work on the Internet.²²⁸ In *Svensson*, the CJEU finally had a chance to provide clarity on this issue and explain the role of hyperlinks in copyright law. Given the importance of this case, it is rather surprising that the CJEU gave its decision without an opinion of an AG.²²⁹

According to the CJEU, a hyperlink to a protected work can constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive, if the work is communicated to a 'new public'.²³⁰ A new public is a public that "*has not been taken into account by the copyright holder when it authorised the initial communication to the public.*"²³¹ In this case, the CJEU held that hyperlinks to freely available online works do not satisfy the 'new public' requirement. According to the CJEU, all Internet users are able to access freely available online works and are deemed to be the potential recipients of a work made available on the Internet. A hyperlink to such freely available works will not expand the group of recipients.²³² The CJEU explained this as follows:

²²² *Premier League*, at par 197; *Organismos*, at par 38; *Airfield*, at par 76; *OSA*, at par 32.

²²³ Woods 2012 (note), 203-207.

²²⁴ *Premier League*, at par 198-199; Opinion AG Kokott (*Premier League*), at par 118; De Cock Buning and Speyart 2012 (note); Grosheide 2012 (note).

²²⁵ *OSA*, at par 32. The CJEU refers in this regard to *SGAE*, at par 41-42.

²²⁶ European Copyright Society 2013; Tsoutsanis 2014; ALAI 2014.

²²⁷ Strowel and Hanley 2009, at 71; Arezzo 2014, at 6.

²²⁸ The differences between different types of hyperlinks and the adverse effect of hyperlinks on the exploitation right of right holders is further explained in the second part of this thesis.

²²⁹ Rosati 2014-2, at 619; Seignette 2014 (note).

²³⁰ *Svensson*, at par 21-24.

²³¹ *SGAE*, at par. 37-38, 40, 42; *Svensson*, at par. 21, 24.

²³² *Svensson*, at par 27-28; Seignette 2014 (note).

“26. The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.

27. In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.”²³³

The CJEU further stated that a hyperlink to a protected work will only constitute a communication to the public if it links to a restricted or secured work. If a link would provide free access to other, non-freely available works, by “*circumventing restrictions put in place by the site on which the protected work appears in order to restrict public access*”, the hyperlink constitutes an intervention without which the Internet users would not have been able to access the work. In these circumstances, the hyperlink makes a work available to a ‘new public’ that was not taken into account by the right holder when he or she authorised the initial communication, and the link needs to be authorised by the right holder.²³⁴

The CJEU made no distinctions with regard to different types of hyperlinks, for example simple, deep, embedded or framed hyperlinks. All links are treated similarly and have to satisfy the ‘new public’ requirement in order to constitute a communication to the public.²³⁵

It seems like the CJEU has made the ‘new public’ criterion an integral part of Article 3(1) of the InfoSoc Directive. With regard to communications to the public in the online world, the CJEU interpreted the ‘new public’ requirement rather broadly. All Internet users are regarded as a (potential) public to freely available works and a hyperlink to such a work will not satisfy the test of the ‘new public’.²³⁶ This development can have an adverse effect on the exploitation right of the right holder because once a work is communicated on the Internet – freely – the right holder loses control over secondary communications online.

The CJEU has (so far) given two other decisions regarding the role of hyperlinks in copyright law, i.e., *BestWater* and *C More*. These decisions, however, did not lead to more clarification. In *BestWater*, the CJEU had to decide whether a framed hyperlink to a YouTube video is a communication to the public. This case could have been an interesting one, but it was unclear whether the YouTube video was uploaded with consent of the right holder. However, since this fact was not explicitly established by the lower courts, the CJEU could not rule on the question whether a hyperlink to unlawful content constitutes a communication to the public. Therefore, the CJEU merely issued an order²³⁷ and stated

²³³ *Svensson*, at par 26-27 (emphasis added).

²³⁴ *Svensson*, at par 31.

²³⁵ *Svensson*, at par 29; Lodder 2014 (note).

²³⁶ *Svensson*, at par 26-27; Seignette 2014 (note); Arezzo 2014, at 19; Stevens 2014 (note), at 548-549; Predonzani 2014 (note), at 38-39; De Boer 2014 (note), at 178.

²³⁷ Article 99 of the Rules of Procedure of the Court of Justice, “Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt,

that the framed hyperlink is not a communication to the public within the meaning of the InfoSoc Directive because the YouTube video is freely available on the Internet.²³⁸ This case confirmed that framed hyperlinks are treated similarly as simple and deep hyperlinks.²³⁹ In *C More*, a neighbouring rights case, the CJEU had to decide whether a hyperlink to live broadcast streams of ice hockey matches constituted a communication to the public within the meaning of Article 3(2) of the InfoSoc Directive. The CJEU, however, did not have the opportunity to answer this question because the Swedish court withdrew it after the *Svensson* decision.²⁴⁰

2.2.2.5. Different technical means

The application of the ‘new public’ criterion by the CJEU is broad, especially in the online world, but it is not absolute. The CJEU explained in *TVCatchup* that the requirement of the ‘new public’ does not apply if works are communicated by ‘different technical means’.²⁴¹ For example, if a primary and secondary communication of a work is conducted on the Internet, the ‘new public’ criterion applies. However, if the primary communication is conducted by means of satellite transmission and the secondary communication by means of the Internet, the requirement is irrelevant. This was confirmed by the CJEU in *TVCatchup*.

TVCatchup is an online broadcasting service that allows its users to watch via the Internet near-simultaneous streams of television broadcasts in the United Kingdom, provided that the Internet users have a valid TV license.²⁴² Thus, recipients of TVCatchup’s live streams were already entitled to receive the original broadcast on television, which indicates that the online service does not reach a ‘new public’. The CJEU held in this case that the requirement of the ‘new public’ is not applicable:

*“the present case concern the transmission of works included in a terrestrial broadcast and the making available of those works over the internet. [...] [E]ach of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public. In those circumstances, it is no longer necessary to examine below the requirement that there must be a new public, which is relevant only in the situations on which the Court of Justice had to rule in the cases giving rise to the judgments in *SGAE*, [*Premier League*] and [*Airfield*].”*²⁴³

As a result, the CJEU ruled that the criterion of the new public only applies if works are communicated by similar technical means and the requirement is irrelevant for communications conducted by different technical means.²⁴⁴ The CJEU does not explain why this distinction is necessary. It seems like the CJEU wanted to limit the scope of the questionable ‘new public’ criterion

the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.” Available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf (accessed 6 August 2015).

²³⁸ *BestWater*, at par 14-16.

²³⁹ Schmid 2015 (note), at 82-83.

²⁴⁰ Rosati 2015 (note), at 582-583.

²⁴¹ *TVCatchup*, at par 39.

²⁴² Baggs and Hansson 2013 (note), at 363-364.

²⁴³ *TVCatchup*, at par 39 (emphasis added).

²⁴⁴ This is confirmed in *Svensson*, at par 24.

and tried to prevent that communications of protected works are subject to exhaustion.²⁴⁵ Although *TVCatchup* may have limited the scope of the criterion of the ‘new public’, a year later in the *Svensson* case, the CJEU expanded the scope and made the criterion an integral part of communications to the public on the Internet.

2.2.3. Profit making nature

Occasionally, the CJEU has applied an additional condition to interpret the communication to the public right, namely the requirement that a communication is of a ‘profit making nature’. The importance of this criterion is questionable. In some cases, it seems to be a relevant factor, while in other cases, the criterion plays no role in the assessment of the CJEU.

In *SGAE*, the CJEU stated that the ‘profit making nature’ of a communication is not a necessary condition to constitute a communication to the public.²⁴⁶ The CJEU acknowledged that the provision of television sets in hotel rooms are an additional service that can contribute to the profit of the hotel owner. However, the CJEU explained that this is difficult to prove and should, therefore, not be an essential condition. In *Premier League*, the CJEU referred to the ‘profit making nature’ requirement as a “*not irrelevant*” criterion.²⁴⁷ According to the CJEU in *TVCatchup*, the fact that a communication of a work is for profit is not “*necessarily an essential condition*” and “*does not determine conclusively whether a retransmission [...] is to be categorised as a ‘communication’ within the meaning of Article 3(1) of [the InfoSoc Directive].*”²⁴⁸

In neighbouring rights law, the ‘profit making nature’ of a communication plays a more substantial role. In *Del Corso* and *PPI*, the CJEU held that an individual assessment of all relevant circumstances must be taken into account to determine whether, in a specific case, an act is a communication to the public.²⁴⁹ An important criterion in this assessment is, according to the CJEU, the fact that a communication is for profit. In *Del Corso*, the CJEU concluded that the communication is not of ‘profit making nature’ because a dentist would not increase the price of the treatment when he or she broadcasts phonograms in the waiting room. The broadcast has no impact on the income of the dentist.²⁵⁰ According to the CJEU, “[t]he patients of a dentist visit a dental practice with the sole objective of receiving treatment, as the broadcasting of phonograms is in no way a part of dental treatment. They have access to certain phonograms by chance and without any active choice on their part, according to the time of their arrival at the practice and the length of time they wait and the nature of the treatment they undergo.”²⁵¹ In *PPI*, the CJEU explained that the ‘profit making nature’ test is satisfied because the provision of television sets in hotel rooms is an additional service and has an influence on the price of the rooms. The service attracts more guests from which the hotel owner benefits.

²⁴⁵ Hugenholtz 2013-2 (note); Seignette 2014 (note); Seignette 2013 (note).

²⁴⁶ *SGAE*, at par 44.

²⁴⁷ *Premier League*, at par 204.

²⁴⁸ *TVCatchup*, at par 42-43; Hugenholtz 2013-2 (note).

²⁴⁹ *Del Corso*, at par 79; Visser 2012 (note).

²⁵⁰ *Del Corso*, at par 97.

²⁵¹ *Del Corso*, at par 98.

2.2.4. Pending cases

There are interesting cases in the pipe line of the CJEU with regard to the application of the communication to the public right on the Internet, and in particular regarding the role of hyperlinks in copyright law. In *Svensson*, the CJEU confirmed that hyperlinks to freely available works do not infringe Article 3(1) of the InfoSoc Directive. This case concerned hyperlinks to lawful content, i.e., content that has been communicated on the Internet with consent of the right holder.²⁵² It is questionable whether the same principles apply with regard to hyperlinks to unlawful content.²⁵³ This question has been referred to the CJEU in the Dutch *Britt Dekker* case.²⁵⁴

The *Britt Dekker* case concerned a hyperlink to leaked photographs of the Dutch reality star Britt Dekker for Playboy (of which Sanoma is the right holder). Geen Stijl, a Dutch blog known for controversial and provocative blog posts, placed a hyperlink to an Australian website on which the pictures of Britt Dekker were published without the authorisation of Sanoma. The Australian website was (very) difficult to trace and the hyperlink on Geen Stijl greatly contributed to the amount of people that had access to the photographs. The Dutch Supreme Court questioned whether the *Svensson* principles are similarly applicable to hyperlinks that refer to unlawfully published works and has referred preliminary questions to the CJEU.

Many academics hope and call for abolition of the criterion of the ‘new public’.²⁵⁵ Nonetheless, Visser believes that the CJEU will continue to apply it in the *Britt Dekker* case.²⁵⁶ According to Visser, the CJEU will state that the hyperlink of Geen Stijl makes the photographs available to a ‘new public’ because the right holder (Sanoma) has not taken the Internet public into account when it authorised the original communication. Moreover, the right holder has not authorised any communication to the public yet. Thus, according to Visser, the CJEU will argue that the Internet users of Geen Stijl constitute a ‘new public’ and that the hyperlink is an infringement. Visser further explains that once a website intentionally and knowingly links to unlawful content – in other words if a person is reasonably aware of the unlawful content – a hyperlink can constitute a copyright infringement. If there was no knowledge of the unlawful content, there is no infringement.

It is recommended that the CJEU does not follow this conclusion because it would inhibit legal certainty. It is difficult to assess whether an Internet user is ‘reasonably aware’ of the unlawful content.²⁵⁷ A better solution would be to abolish – or at least limit – the application of the ‘new public’ criterion. Part two of this thesis analyses how the communication to the public right should be interpreted in the online world without applying the requirement of the ‘new public’. One of these new interpretations may provide a solution for the *Britt Dekker* case.

²⁵² Koelman 2014 (note).

²⁵³ Headdon 2014, at 665-667.

²⁵⁴ Dutch Supreme Court 9 January 2015, no 14/01158, *NJB* 2015/748 (*GS Media BV v Sanoma Media Netherlands BV*) (hereafter referred to as “Britt Dekker”).

²⁵⁵ ALAI 2014; Ficsor 2014; Rosen 2015.

²⁵⁶ Visser 2015.

²⁵⁷ Predonzani 2014 (note), at 39-40.

The *Britt Dekker* referral is not the only Dutch referral with regard to the communication to the public right in the online world, but there are two other interesting cases. The first case concerns Stichting Brein, a Dutch civil rights organisation for the protection of copyright law, and Filmspeler, the provider of a media player that allows users to watch streams of films, shows and sport matches on television by so-called ‘add-ons’.²⁵⁸ The add-ons stream a video by means of hyperlinks from the Internet. At least fourteen videos in the add-ons are from unlawful sources. In this case, the Dutch District Court referred preliminary questions and asked whether the add-ons constitute a communication to the public and make unauthorised works available to the public.

The second case relates to the highly controversial file-sharing website ‘The Pirate Bay’.²⁵⁹ The website provides a platform for Internet users to trace, upload and download (largely illegal) copyright protected works. The works are directly downloaded from users’ files (peer-to-peer file-sharing) and The Pirate Bay does not store the (unlawful) content itself. Thus, the website is a facilitator – an intermediary – and the users are the direct copyright infringers. The Dutch Supreme Court questions among other things whether The Pirate Bay constitutes a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.²⁶⁰

2.2.5. The CJEU’s communication to the public right

In conclusion, the CJEU has had many occasions to rule on the communication to the public right and generously made use of its interpretation power. It created different (incoherent) rules and definitions to clarify the right and made it applicable to technological and digital development. Most cases, in particular the most recent ones, relate to Article 3(1) of the InfoSoc Directive. In these cases, the CJEU starts to set out the objectives of the Directive, which is to provide a high level of protection for the author, in particular by enhancing the right to communicate a work to the public. The communication to the public right has to be interpreted broadly.²⁶¹ The CJEU makes a distinction between the notion of ‘communication’ and the notion of ‘public’ and interprets them separately.

The CJEU originally defined a ‘communication’ as an intentional intervention, without which the public would not have been able to access a work.²⁶² In later case law regarding the interpretation of the right in the online world, the CJEU explained that merely providing access to a work and making it accessible to a public will constitute a ‘communication’ within the meaning of Article 3(1) of the InfoSoc Directive.²⁶³ An actual ‘transmission’ of a work seems irrelevant.

²⁵⁸ Dutch District Court Midden-Nederland 30 September 2015, no C/16/372666 / HL ZA 14-204, IEF 15299 (*Brein v Mediaplayer*) (hereafter referred to as “Mediaplayer”).

²⁵⁹ Dutch Supreme Court 13 November 2015, no 14/02399, NJB 2015/2064 (*Brein v Ziggo and XS4ALL*) (hereafter referred to as “*Brein v Ziggo and XS4ALL*”).

²⁶⁰ *Brein v Ziggo and XS4ALL*, at par 5.9, 7.

²⁶¹ Bonadio and Santo 2012 (note), 277-279.

²⁶² *SGAE*, at par 42; *Organismos*, at par 38; *Premier League*, at par 195; *Del Corso*, at par 82; *PPI*, at par 31.

²⁶³ *Svensson*.

The CJEU has interpreted the notion of ‘public’ as an indeterminate number of potential recipients, which implies a fairly large number of people.²⁶⁴ According to the CJEU, Article 3(1) of the InfoSoc Directive applies if a work is communicated to a ‘new public’, which is a public that has not been taken into account by the right holder at the time of the initial communication.²⁶⁵ However, if a work is communicated by ‘different technical means’, the requirement of the ‘new public’ does not apply.²⁶⁶

In four cases, the CJEU had to apply the communication to the public right to exploitations on the Internet.²⁶⁷ In this regard, it created two requirements, namely the ‘new public’ and the ‘different technical means’ criteria.²⁶⁸ Accordingly, a communication on the Internet can be freely re-communicated on the Internet (because there is no ‘new public’), irrespective of the organisation or person that conducts the secondary communication. Only if a work is re-communicated by different technical means, authorisation is required (regardless of the ‘new public’ test).

2.3. Consistency with EU law

The legal framework of the EU and in particular case law of the CJEU does not apply a clear and coherent interpretation of the communication to the public right. Under EU law, it is difficult to determine which acts constitute a communication to the public and which acts do not. Article 3(1) of the InfoSoc Directive is a broad and technologically neutral right, which gives the CJEU wide discretion to interpret it. In order to respond to digital developments, the CJEU *created* new requirements of which one is the ‘new public’ criterion. In the online world, the requirement of the ‘new public’ seems to lead to favourable outcomes because the test excludes (most) hyperlinks from copyright law. Nonetheless, the implementation and application of the criterion is problematic and inconsistent with EU copyright law because (1) the requirement is created on the basis of a misinterpretation of international copyright law and (2) it is inconsistent with Article 3(3) of the InfoSoc Directive, which protects the ‘non-exhaustion’ principle.

First of all, the implementation of the criterion of the ‘new public’ in EU copyright law is based on a misinterpretation of Article 11*bis*(1) of the Berne Convention. In *SGAE*, the CJEU confused subparagraphs (ii) and (iii) of Article 11*bis*(1) and came to the conclusion that the communication to the public right requires that a work is communicated to a ‘new public’. The CJEU has not acknowledged or rectified this misinterpretation but held on to the ‘new public’ test and expanded the scope in later cases regarding the right of communication to the public.

A more substantial argument why the requirement of the ‘new public’ is inconsistent with EU copyright law is that it effectively exhausts the immaterial exploitation right of the right holder on the

²⁶⁴ *Mediakabel*, at par 30; *Lagardère*, at par 31; *SGAE*, at par 37; *Del Corso*, at par 84; *PPI*, at par 33; *TVCatchup*, at par 32; *Svensson*, at par 21; *OSA*, at par 27.

²⁶⁵ *SGAE*, at par 41-42; *Premier League*, at par 197; *Organismos*, at par 38; *Airfield*, at par 76; *Svensson*, at par 24; *OSA*, at par 32.

²⁶⁶ *TVCatchup*, at par 39; Baggs and Hansson 2013 (note), at 364.

²⁶⁷ *TVCatchup*, *Svensson*, *BestWater* and *C More*.

²⁶⁸ Depreuw 2014, at 488. The new public is originally established in the *SGAE* case and applied to communications on the Internet in the *Svensson* case. The different technical means criterion is created in the *TVCatchup* case.

Internet.²⁶⁹ According to the CJEU in *Svensson*, all Internet users are potential recipients of online – freely available – communications and regarded as the same ‘public’. Once a work has been communicated freely on the Internet, the requirement of the ‘new public’ does not allow any further exploitation of the same work on the Internet. As a consequence, the right holder cannot prohibit a ‘communication’ or ‘making available’ by another organisation on a different website because all Internet users are able to receive the initial communication. The right holder maintains the right to oppose unauthorised reproductions or communications to the public by ‘different technical means’, but on the Internet, the communication to the public right is exhausted.

The ‘new public’ criterion is not completely identical to the ‘exhaustion’ principle in the distribution right. The scope of the criterion is more limited because it does not apply to communications by ‘different technical means’. With regard to the distribution right, the resale right is exhausted irrespective of the technical means used.

However, although the scope is stricter, the application of the ‘new public’ test on the Internet has the same effect as the exhaustion principle. The right holder is no longer able to oppose any further online immaterial exploitation because all Internet users are potential recipients of the initial communication. Nowadays, the Internet is one of the principal means to communicate a work to the public and it is likely that this will increase in the future. Thus, the criterion of the ‘new public’ seriously limits a right holder’s right of communication to the public. The underlying principles are also similar. According to the CJEU, a new communication on the Internet does not prejudice the exploitation rights of the right holder and should, therefore, not be prohibited. The exhaustion principle is similarly established to prohibit right holders to take advantage of their distribution right once they have realised the full economic value of the work. Thus, both principles prevent that right holders take unfair advantage of their exploitation right.

This principle, however, has no place in the communication to the public right. The CJEU has traditionally held that the right holder should be able to exploit *any* immaterial exploitation of a work, within of course the limits set by law, irrespective whether the exploitation right already realised its full economic value.²⁷⁰ This is laid down in Article 3(3) of the InfoSoc Directive. Thus, the requirement of the ‘new public’ appears to contravene established case law of the CJEU and the InfoSoc Directive.

In conclusion, this chapter has set out the communication to the public right in EU copyright law and analysed whether the criterion of the ‘new public’ is consistent with it. The criterion derives from case law of the CJEU and does not seem to exist in the legislative framework. The CJEU has discretion to interpret EU law and is allowed to create new requirements. However, with regard to the ‘new public’ test, the CJEU has created a requirement inconsistent with EU copyright law. The next chapter analyses whether the requirement of the ‘new public’ complies with international copyright law. These results will be used to assess whether the ‘new public’ test should be rejected or not.

²⁶⁹ ALAI 2014; ALAI 2015; Ficsor 2014; Rosen 2015.

²⁷⁰ *Coditel I*.

3. International law

3.1. The Berne Convention

3.1.1. General information

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)²⁷¹ is the primary treaty for copyright law.²⁷² It was adopted in 1886 and originally included 10 articles. After the adoption, multiple revision conferences amended the provisions and created new principles in response to technological development.²⁷³ The Berne Convention turned out to be one of the supreme conventions within the field of copyright law and formed the basis for other multilateral agreements.²⁷⁴ The ‘Berne Union’ – all contracting parties to the Berne Convention – consists of 168 members.²⁷⁵

The Union States have to interpret the provisions of the Berne Convention in their national copyright laws. To make sure that this interpretation is conducted in a harmonised manner, the World Intellectual Property Organization (WIPO) issued in 1978 a Guide to the Berne Convention written by Mr. Claude Masouyé in which the articles of the Berne Convention are explained individually.²⁷⁶ WIPO is an intergovernmental organisation established in 1967 to administer the Berne Convention. It replaced the ‘*Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle*’ (BIRPI), which was established in 1893. WIPO acknowledges that it is not competent to make a binding interpretation of the Berne Convention but the principles should provide, in a simple and clear manner, clarification on the nature, aims and scope of the provisions.²⁷⁷ The 1978 Guide was updated in 2003 by Mr. Mihály Ficsor. This new guide aims to explain and clarify the provisions of the Berne Convention and their relationship with policy, economic, cultural and technological considerations.²⁷⁸ In this guide, the relation between the convention and later international treaties, such as the WIPO Copyright Treaty, are set out.

According to the preamble, the Berne Convention aims to protect the *author’s* right. “*The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works*”.²⁷⁹ According to Masouyé, the expression ‘effective and uniform protection’ means that a high level of protection is needed and Union States should create, for as far as possible, similar regimes for such protection.²⁸⁰ ‘As possible’ relates to the fact that other interests should also be taken into account, such as for example the public

²⁷¹ Berne Convention for the Protection of Literary and Artistic Works, Paris 24 July 1971.

²⁷² Goldstein and Hugenholtz 2013, at 48.

²⁷³ Paris 1896, Berlin 1908, Rome 1928, Brussels 1948, Stockholm 1967 and Paris 1971.

²⁷⁴ Goldstein and Hugenholtz 2013, at 50. Other treaties are for example the TRIPS Agreement and the WIPO Copyright Treaty.

²⁷⁵ All participating states together are referred to as the Berne Union. See also Article 1 of the Berne Convention.

http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (accessed 22 July 2015).

²⁷⁶ Masouyé Guide 1978. This guide was mainly created to assist the authorities in developing countries. Nonetheless, the interpretation of the Berne Convention can also be used as guidance for other Union States.

²⁷⁷ Masouyé Guide 1978, at 4.

²⁷⁸ Ficsor Guide 2003.

²⁷⁹ Preamble of the Berne Convention.

²⁸⁰ Masouyé Guide 1978, par 0.2.

interest or economic and social interests.²⁸¹ Copyright is not an absolute right but should be weighed against these interests in order to strike a fair balance.

Berne's communication to the public rights are protected in genre-specific provisions, which are explained in the following sections. These rights together with their legislative history are analysed in order to assess whether they provide a legal basis to adopt 'new public' requirement.

3.1.2. Communication to the public rights

The first text of the Berne Convention in 1886 contained two exploitation rights, namely the rights to translation and to publicly perform a work. It did not include a reproduction right because it was too obvious that this right was subject to *copyright* law. These two rights have changed majorly during the next revision conferences and new rights emerged as well, such as the rights of communication to the public. The Berne Convention does not have a general overarching communication to the public right but specifically explains in Articles 11, 11*bis*, 11*ter* and 14(1)(ii) which rights are protected with regard to which subject matters. The table below shows briefly the genre-specific approach of the convention.

Berne Convention	Subject matter	Public performance	Communication to the public
Article 11	Dramatic, dramatico-musical and musical works	Yes, by any means Public present at performance (live?)	Yes, of the performance by any means, except broadcasting (11 <i>bis</i>)
Article 11<i>bis</i>	Literary and artistic works (all subject matter)	-	Broadcasting Rebroadcasting Communication by wire of broadcasted works (cable and digital transmission) Communication by loudspeaker
Article 11<i>ter</i>	Literary works	Yes, by any means Public present at recitation	Yes, of the recitation by any means, except broadcasting (11 <i>bis</i>)
Article 14(1)(ii)	Cinematographic adaptations of literary and artistic works	Yes, performance of film or other digital video medium	Yes, of the performance of the film other digital video medium by any means, except broadcasting (11 <i>bis</i>)

Articles 11, 11*ter* and 14(1)(ii) protect different subject matters but similar acts, namely the right to publicly perform a work and to communicate it to a public. These two acts are different with regard to the presence of the 'public'. At a public performance, the public is present at the time *and* place the work is performed. The communication to the public right covers the transmission of a work by broadcast or wire and assumes that the public is at a different place than where the performance is rendered.²⁸² Article 11*bis* is different from these three articles because it applies to all subject matters,

²⁸¹ Ficsor 2002, at 412. Ficsor Guide 2003, at 21.

²⁸² Ricketson 1987, at 706-707; Dreier and Hugenholtz 2006, at 49.

namely literary and artistic works. The scope of the protected acts is limited; Article 11*bis* applies to broadcasts, other communications by wireless means and to retransmissions of broadcasted works.

Due to the genre-specific focus, not all subject matters are fully protected.²⁸³ The Berne Convention shows lacunas, which is one of the reasons why the WIPO introduced a general communication to the public right in the WIPO Copyright Treaty.²⁸⁴ These lacunas particularly concern the right to communicate a work by wire, which includes the right to digitally transmit a work over the Internet. Article 11*bis* explains that this right only applies to broadcasted works. Non-broadcasted works have to invoke Articles 11, 11*ter* or 14(1)(ii).²⁸⁵ However, these three rights merely protect the performance of dramatic, dramatico-musical and musical works, the recitation of literary works and adapted cinematographic works. Other works, such as works of visual arts and computer programmes, are not covered and lack sufficient protection in the online world.²⁸⁶

One of the reasons why the Berne Convention does not include sufficient protection for digital transmissions is because the last revision conference was in 1971, long before there was Internet and before new digital challenges emerged. After that conference, Berne Union membership increased drastically and it became difficult to reach an agreement with regard to new principles.

Thus, Articles 11, 11*bis*, 11*ter* and 14(1)(ii) remained unchanged after 1971. These articles determine the scope of Berne's communication to the public right and have to be analysed in order to assess whether they provide a legal basis to create a 'new public' requirement. Articles 11, 11*ter* and 14(1)(ii) are assessed together because they include similar protected acts. Article 11*bis* is discussed separately because it protects different acts and it has an interesting legislative history where the requirement of the 'new public' plays an important role. Furthermore, the CJEU has repeatedly referred to this article in relation to the 'new public' criterion. The articles are examined below.

3.1.3. Articles 11, 11*ter* and 14(1)(ii)

In 1886, the public performance right, together with the translation right, were the first two exclusive rights protected in the convention.²⁸⁷ The scope of the public performance right was limited, as it was only granted the advantage of national treatment. If a country had a national public performance right, foreign works needed to be able to invoke a similar right. However, if national copyright law did not include such a right, the Berne Convention did not contain an obligation to grant it. Public performance rights differed among Union States, therefore, no understanding could have been reached regarding the scope of this right.

During the Rome Conference in 1928, the need to adopt a general public performance right for dramatic, dramatico-musical and musical works came to the surface. No agreement was, however,

²⁸³ Ricketson and Ginsburg 2006, at 717.

²⁸⁴ This will be explained below in the section on the WIPO Copyright Treaty.

²⁸⁵ Non-broadcasted works are for example cable-originated works.

²⁸⁶ Ricketson and Ginsburg 2006, at 739-741; Ficsor 2002, at 495.

²⁸⁷ The public performance right was protected in Article 9 of the Berne Convention 1886.

reached until the Brussels Conference in 1948, in which the current text of Article 11 was adopted. Article 11^{ter} was introduced in the Berne Convention during the Brussels Conference and adapted in 1967 to bring it in line with Article 11.²⁸⁸ Article 14(1)(ii) was also included in 1967. Articles 11, 11^{ter} and 14(1)(ii) read as follows:

Article 11

- (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:
 - (i) the public performance of their works, including such public performance by any means or process;
 - (ii) any communication to the public of the performance of their works.
- (2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 11^{ter}

- 1) Authors of literary works shall enjoy the exclusive right of authorizing:
 - (i) the public recitation of their works, including such public recitation by any means or process;
 - (ii) any communication to the public of the recitation of their works.
- (2) Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 14

- (1) Authors of literary or artistic works shall have the exclusive right of authorizing:
 - (i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
 - (ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

Article 11 of the Berne Convention protects the performance of dramatic, dramatico-musical and musical works when they are publicly performed (paragraph (1)(i)) or communicated to the public (paragraph (1)(ii)). The communication to the public right in this article is broad in scope, as it includes *any* communication to the public. The specific subject matter is, however, very strict, which limits the application of the article.

Paragraph (1)(i) protects public performances “*by any means or process*”, such as live performances that are communicated by means of loudspeakers or other sound system.²⁸⁹ The public performance right requires that the public is present at the place where the performance is rendered. This is also the case when the performance is transmitted electronically, otherwise the right to communicate a work to the public applies and not the public performance right.²⁹⁰

The communication to the public right in paragraph (1)(ii) applies to transmissions of dramatic, dramatico-musical and musical works, provided that they are not communicated by means of broadcast or fixed in a film or videotape.²⁹¹ The public does not have to be present at the place where

²⁸⁸ Masouyé Guide 1978, at par 11^{ter}4 at 74.

²⁸⁹ Ricketson 1987, at 432.

²⁹⁰ Ricketson and Ginsburg 2006, at 715.

²⁹¹ Such performances are subject to Articles 11^{bis} and 14(1)(ii).

the performance is rendered but is able to individually choose the place of the communication.²⁹² This right was originally created to protect so-called ‘theatrephone’ performances, which are live performances of theatre plays communicated by phone. A more recent example is the communication of live performances over the Internet. This right has drastically increased importance since the rise of the Internet.²⁹³

Article 11^{ter} provides similar public performance and communication to the public rights for the recitation of literary works.²⁹⁴ Masouyé explains in the 1978 Guide that ‘literary works’ are “*any work other than a dramatic one which is capable of being delivered, by being read, or recited from memory, in public.*”²⁹⁵ This article does not protect all types of literary works but only the recitation thereof, which means that for example computer programs – which are regarded as literary works – are excluded. Similar to Article 11(1)(ii), this right includes communications to the public over the Internet.

Lastly, Article 14(1)(ii) protects cinematographic adaptations and reproductions of literary and artistic works. Thus, if a performance or recitation of a dramatic, dramatico-musical, musical or literary work is fixed in a film or other digital video medium, Article 14(1)(ii) applies instead of Article 11 or 11^{ter}. Cinematographic reproductions are protected similarly as Articles 11 and 11^{ter}.²⁹⁶

In all three articles, the notion of ‘public’ plays an important role, however, the Berne Convention does not define it. Union States are free to interpret it in their national laws and have a certain amount of discretion. In literature, this notion has been further explained and clarified. According to Ricketson, the ‘public’ should be interpreted as the opposite of ‘private’. In light of this, private communications and communications to a closed circle of family and friends are excluded.²⁹⁷ Ficsor explained in the 2003 Guide to the Berne Convention that the concept of ‘private’ has to be interpreted strictly.²⁹⁸ A communication to a circle of family and friends that is very broad does not constitute a ‘private’ communication. Von Lewinski argues that the purpose of the Berne Convention has to be taken into account when the notion of public is interpreted. She explains that the interpretation of national authorities with regard to the notion of ‘public’ should not be too narrow in such a way that it undermines the core potential of the communication to the public right.²⁹⁹ Thus, Union States are free to interpret the notion in their national laws as long as it does not prejudice the legitimate interest of the author.³⁰⁰ All these explanations can be used to guide national authorities on how the notion of ‘public’ should be implemented in national copyright law.

²⁹² Ricketson and Ginsburg 2006, at 715.

²⁹³ Ricketson and Ginsburg 2006, at 730-731; Dreier and Hugenholtz 2006, at 55.

²⁹⁴ Von Lewinski 2008, at 146-147.

²⁹⁵ Masouyé Guide 1978, at par 11^{ter}3 at 74.

²⁹⁶ Dreier and Hugenholtz 2006, at 59.

²⁹⁷ Ricketson 1987, at 432-433.

²⁹⁸ Ficsor Guide 2003, at 68.

²⁹⁹ Von Lewinski 2008, at 151.

³⁰⁰ Ricketson 1987, at 433.

3.1.4. **Article 11bis**

3.1.4.1. Legal history

In 1928, communications by means of radio broadcast were rising and television broadcasting started to emerge. These technological developments led to new forms of communications to the public and imposed new threats on the rights of copyright holders. These threats were acknowledged during the Rome Conference in 1928 and a new communication to the public right was introduced, namely the right to communicate a work to the public by “*radio-diffusion*”, which was laid down in Article 11bis.³⁰¹ Union states had to determine the conditions under which this right was granted in national law, thus, the scope of the article was limited.³⁰² During the Rome Conference, France proposed that the issue of retransmission of radio-diffusions was also dealt with in Article 11bis. However, consensus was not reached until the next conference in 1948, the Brussels Revision Conference.³⁰³ At the time of this conference, the Berne Convention had 40 members of which 35 were present.³⁰⁴ During this conference, the current text of Article 11bis was adopted after an interesting discussion on the scope of the broadcasting right.

The Brussels Revision Conference

During the Brussels conference, the question emerged when a retransmission of a broadcast signal is a ‘new’ act of broadcasting and when is it part of the original broadcast (and does not require authorisation of the right holder). The main issue in this regard is that broadcast signals not always reach the entire public, or reach a public at an inconvenient time. For example, when tall buildings block a broadcast signal, not everyone is able to receive the broadcast. Or in case of a worldwide public, different time zones make it inconvenient to broadcast a programme only at one particular time. Intervening stations are used to strengthen a signal or to record it and send it at a later, more convenient time.³⁰⁵ But what is the legal status of this retransmission of the intervening station? Is the subsequent transmission a new communication to the public for which a second authorisation of the right holder is required or is it part of the original broadcast? It was clear that when an intervening station recorded the broadcast in order to transmit it at a later time, the recording is a separate act of reproduction. However, it was not clear whether the retransmission also constitutes a separate act of communication to the public.

³⁰¹ *Actes de la Conference Reunie a Rome* (Documents on the Rome Revision Conference in 1928), Berne Convention, 7 May – 2 June 1928, at 210, (hereafter referred to as “*actes 1928*”) available at <http://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/RomeConference1928/RomeConference1928.pdf> (accessed 11 August 2015); in Ricketson and Ginsburg 2006, at 732.

³⁰² Ricketson 1987, at 103.

³⁰³ Mom 1990, at 21.

³⁰⁴ These countries were Austria, Australia, Belgium, Brazil, Canada, Denmark, Spain, Finland, France, the UK, Greece, Hungary, India, Ireland, Iceland, Italy, Lebanon, Lichtenstein, Luxembourg, Monaco, Morocco, Norway, NZ, Pakistan, the Netherlands, Poland, Portugal, Sweden, Switzerland, Syria, Czechoslovakia, Tunisia, South Africa, Vatican City and Yugoslavia. Germany was not present at the conference because of the recent war, see *Documents de la Conference de Bruxelles* (Documents on the Brussels Revision Conference in 1948), Berne Convention, 5-26 June 1948, at 20 (hereafter referred to as “*Documents 1948*”) available at <http://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/BruxellesConference1948/BruxellesConference1948.pdf> (accessed 11 August 2015); in Ricketson 1987, at 107.

³⁰⁵ Ricketson and Ginsburg 2006, at 725.

Different proposals were submitted to solve this issue during the conference. Belgium proposed an amendment explaining that a new communication to the public arises if a rebroadcast “*procure[s] a fresh circle of listeners*”.³⁰⁶ In other words, when a broadcast reaches a ‘new public’, authorisation of the right holder is required. There were three types of responses to this proposal. Firstly, Italy and the Nordic countries stated that they rather deal with this issue contractually and do not need a statutory provision because such a provision inhibits freedom of contract.³⁰⁷ Secondly, according to Monaco, the Netherlands and Luxembourg, the notion of ‘public’ should not be decisive but the ‘organisation’ that makes the communication should be conclusive to establish a new communication to the public.³⁰⁸ Finally, France was of the opinion that only those rebroadcasts that fall outside the scope of the contract, in which the right holder gave permission for a particular broadcast, should be subject to new authorisation of the right holder.³⁰⁹

During the conference, the criterion of the ‘new public’ led to criticism because it was not applicable in practice. From the documents of the conference, it was unclear how this criterion should be applied and how a functional distinction between a ‘new’ and an ‘old’ public should be drawn. According to Ricketson, this criterion would best been interpreted on the basis of a ‘geographical’ criterion. A ‘geographical new public’ criterion would mean that the ‘public’ is subject to a particular territory. A new communication in that territory would not constitute a communication to a ‘new public’ because the people in that area were already able to receive the initial communication. For example, the entire Dutch population would be regarded as the ‘public’ for works communicated in the Netherlands. If the same work is secondary communicated in that territory, the communication would not satisfy the requirement of the ‘new public’ because the Dutch citizens already received the work. Ricketson argues, however, that this ‘geographical’ interpretation of the ‘new public’ criterion is not sufficient in all countries. In Australia for example, regional time differences make it inconvenient to broadcast a programme at one fixed time and relay stations are used to make sure that each citizen receives a programme at a convenient time.³¹⁰ Thus, all citizens of Australia cannot be regarded as the same public for a broadcast.

These practical issues were the main reason to reject the ‘new public’ criterion during the Brussels Conference. According to the documents of the conference, the conclusion was that although the requirement seems useful in theory, it is not a sufficient criterion to assess whether a new act of broadcast arises because it is (very) difficult to make a functional distinction between the ‘original’ public and the ‘new’ public.³¹¹

Therefore, Belgium came with a new proposal, in which the ‘new public’ criterion was replaced with a more practical criterion, namely the criterion of the “*organisation other than the original one*”. This

³⁰⁶ *Documents* 1948, at 266. Ricketson 1987, at 448.

³⁰⁷ *Documents* 1948, at 290, in Mom 1990, at 22.

³⁰⁸ *Documents* 1948, at 289, in Mom 1990, at 22.

³⁰⁹ *Documents* 1948, at 290, in Mom 1990, at 23.

³¹⁰ Ricketson 1987, at 448.

³¹¹ *Documents* 1948, at 289, in Mom 1990, at 23.

suggestion reflects the initial response of Monaco, the Netherlands and Luxembourg. This proposal explained that a new act of communication to the public arises if a work is communicated by an organisation other than the organisation that conducted the initial communication. This is a more functional requirement because the identity of the organisation that transmits a work is relevant and not the nature of the ‘public’.³¹² It is much easier to make a functional distinction between different broadcast organisations. This proposal was adopted with 12 to 6 votes in favour.³¹³

The documents of the Brussels Conference show that there is no room for a ‘new public’ criterion in Article 11*bis*. However, Masouyé gave an unfortunate interpretation of this article in the 1978 Guide. In paragraph 11*bis*11 of the Guide, the question is raised whether authorisation given by an author to a broadcast station covers all the use made of a work, including commercial uses. According to Masouyé, this question has to be answered negatively because the work is “*made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given.*”³¹⁴ Once a broadcast is transmitted to a wider circle – often for profit – an additional section of the public is able to receive the work. Masouyé argues that authorisation for the right holder is required for this new public performance.

In light of this interpretation, it may appear that a requirement of the ‘new public’ would be allowed in the Berne Convention. However, it is important to note that Masouyé explains in this paragraph the communication to the public right by loudspeaker or any other analogous instrument of a broadcast, as protected in Article 11*bis*(1)(iii). What Masouyé is trying to explain, is that once an author gives permission to broadcast a work (within the meaning of Article 11*bis*(1)(i)) this does not imply that the author has given permission for all types of uses of the broadcast. If a company wants to publicly communicate a broadcast, for example in a bar or restaurant (often for commercial ends), additional permission is required. Not because a ‘new public’ is reached, but because it is a ‘new act’ of communication to the public. Moreover, it is important to keep in mind that the guide is a non-binding document and does not give a binding interpretation of Article 11*bis* of the Berne Convention.

3.1.4.2. Application of Article 11*bis*

Article 11*bis*

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where

³¹² Ricketson 1987, at 449.

³¹³ *Documents* 1948, at 290, in Mom 1990, at 23.

³¹⁴ Masouyé Guide 1978, at par 11*bis*12 at 68.

they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation

Article 11*bis* is different from Articles 11, 11*ter* and 14(1)(ii) because it applies to all types of subject matters and protects different types of rights, namely broadcasting, rebroadcasting, communication to the public by wire of broadcasted works and public communication by loudspeaker of broadcasted works.

Paragraph (1)(i) deals with broadcasts and communications to the public by wireless diffusion. Broadcast – the English translation of the French ‘*radiodiffusion*’ – is not explicitly defined in the Berne Convention because at the time of the drafting, legislators believed that the term ‘broadcasting’ was “*known to everyone*” and no further definition was needed.³¹⁵ Ricketson defines ‘broadcasting’ as a “*transmission of sound or images, or both, by electromagnetic waves without any artificial means of guidance or support (such as wire or cable), for the purpose of enabling reception of sounds or images which are transmitted by members of the general public.*”³¹⁶ Masouyé explains ‘broadcasting’ as a “*matter of transmission intended to be received directly by the general public.*”³¹⁷ Broadcasting is a form of communication to the public. The emission of the signal is important to constitute a broadcast; it is not relevant that the public actually receives or watches the broadcast.³¹⁸ There is a communication to the public because the public is able to watch a broadcast. In other words, the broadcast is made available to the public.

The technologically neutral formulation of Article 11*bis* allows that all types of wireless communications are protected, also transmissions by satellite, which pass a broadcast signals from the original organisation via a satellite to the individual receivers, the public..³¹⁹ Satellite transmissions have increased the number of potential recipients of a broadcast and can easily reach a transnational public.

Cable distribution is not included in the notion of ‘broadcasting’. ‘Cable-originated’ works, works that have not been broadcasted but are directly distributed to the public by cable, are subject to Article 11(1)(ii). An important difference between Article 11 and Article 11*bis* is the application of a compulsory license. Paragraph (2) of Article 11*bis* allows for compulsory licenses for communications subject to this article. However, under Article 11, such licenses are not allowed.

³¹⁵ Documents 1985 (1951), 114-15 and 286-7.

³¹⁶ Ricketson 1987, at 435.

³¹⁷ Masouyé Guide 1978, at par 11*bis*6 at 67.

³¹⁸ Masouyé Guide 1978, at par 11*bis*3 at 66.

³¹⁹ Depreeuw 2014, at 273; Ricketson and Ginsburg 2006, at 733.

Paragraph (1)(ii) covers the right of rebroadcasting, provided that it is done by ‘an organisation other than the original one’. The original broadcast organisation is allowed to rebroadcast the work as much and as wide as it wants to. However, it must use its own relay station.³²⁰ If another organisation rebroadcasts a work, authorisation of the right holder is required. If a broadcast organisation records a broadcast in order to rebroadcast it at a later time, the organisation needs to get permission to make a reproduction of the broadcast. After such permission, the organisation is free to rebroadcast the work at any time. This article does not prejudice the right holders right to limit the scope of authorisation to, for example, one broadcast.

The legislative history of Article 11bis(1)(ii) shows that the expression “*when this communication is made by an organization other than the original one*” replaces the controversial ‘new public’ criterion. Although the application of this sub-paragraph seems clear, i.e. it applies if another organisation conducts a communication, it has led to confusion in national laws. The following paragraph of this thesis explains how national supreme courts have interpreted this article in their national laws.

Furthermore, paragraph (1)(ii) deals with communications to the public by wired transmission, including cable and digital transmissions.³²¹ The notion ‘wire’ encompasses an artificial device through which signals are conducted from one point to another. National authorities are free to define the concepts of ‘wire’ and ‘cable’ in their national laws as long as they are interpreted broadly and include actual and potential means of transmission. Such a broad interpretation is necessary to comply with the aim of Article 11bis to include *any* communication to the public by wire.³²² Similar to the right of rebroadcasting, a broadcast organisation is allowed to retransmit a broadcast on the Internet. If this is conducted by a different organisation, permission of the right holder is required.

Regarding the right to communicate a work to the public by wire, the question has emerged whether on-demand transmissions are included.³²³ With on-demand transmissions, the public is able to watch a programme at a specific place *and* time. The Berne Conventions allows broadcasts to be separated in space, which means that the public is able to watch a broadcast at an individually chosen place. However, members of the public cannot separate a broadcast in time because broadcasts are received simultaneously at a fixed time. Is this different for the communication to the public right? According to Ricketson and Ginsburg, it is a matter for Union States to determine whether a communication can be separated in both space and time.³²⁴ The Berne Convention does not permit that on-demand transmissions are protected. As will be explained below, the WIPO Copyright Treaty does contain an obligation to protect on-demand transmissions.

³²⁰ Ricketson 1987, at 449.

³²¹ Ricketson and Ginsburg 2006, at 734.

³²² Ricketson and Ginsburg 2006, at 734.

³²³ Ricketson and Ginsburg 2006, at 742; Ginsburg 2004, at 7-8.

³²⁴ Ricketson and Ginsburg 2006, at 743.

Paragraph 11bis(1)(iii) protects the right to publicly communicate a broadcast by loudspeaker or any other analogous instrument. This paragraph includes playing broadcasts in public houses, such as restaurants and bars. Private communications are not included. ‘Public’ in this regard means “*above all, where people meet: in the cinema, in restaurants, in tea rooms [and] railway carriages.*”³²⁵ Similar to Articles 11, 11ter, and 14(1)(i), this article does not define the notion of ‘public’ or provide more explanation on this concept. Member States have discretion with regard to the interpretation of this notion in their national laws.

3.1.4.3. Interpretation of Article 11bis

The Berne Convention does not have an overarching judicial system that resolves questions with regard to the interpretation of provisions, such as the CJEU. Therefore, national laws and case law of national supreme courts serve as examples on how the provisions of the Berne Convention should be interpreted. In national law, most discussion have arisen with regard to the application of Article 11bis(1)(ii) of the Berne Convention. In three Union States, namely the Netherlands, Belgium and Switzerland, the national supreme courts have provided clarity on the interpretation of this article.³²⁶ The disputes generally concern cable retransmissions of broadcasts that are simultaneously broadcasted over the air in the same geographical area. The question arose whether the retransmission is a retransmission within the meaning of Article 11bis(1)(ii) of the Berne Convention. The judgments are influential and authoritative interpretations of Article 11bis(1)(ii) of the Berne Convention.

The Netherlands

The so-called *Amstelveense Cable* decisions (I and II) relate to cable retransmissions of broadcasted programmes in Amstelveen, a suburb of Amsterdam. These broadcasts were simultaneously received in Amstelveen over the air. The cable company and the original broadcast company were distinct organisations. The main question in these cases was whether the subsequent cable transmission, which is conducted simultaneously with the original broadcast, is a new act of communication to the public for which authorisation is required, or whether the retransmission is part of the original broadcast over the air.

According to the Court of Appeal in Amsterdam, cable retransmission was not a new act of communication to the public because the communication does not reach a ‘new public’. The Dutch government supported this opinion.³²⁷ However, in 1981, the Supreme Court overruled this decision and held that the retransmission is a new act of communication to the public for which authorisation is required. The Dutch court based this decision on the legislative history of Article 11bis(1)(ii) of the Berne Convention. The Supreme Court stated that the ‘new public’ criterion was explicitly rejected

³²⁵ Documents 1984(1951), at 266, cited in Ricketson and Ginsburg 2006, at 738.

³²⁶ Dutch Supreme Court 30 October 1981, no 11.739, *NJ* 1982, 435, *Auteursrecht* 1981/5:100, *RIDA* 112 (1982):168 (*Amstelveense Cable I*); Dutch Supreme Court 25 May 1984, no 12.281, *NJ* 1984, 697, *AMR* 1984/3:62, *AA* 1986: 628, *GRUR Int.* 1985:124 (*Amstelveense Cable II*); Belgian Supreme Court 3 September 1981, *Pas*, 1982, I, 8, *GRUR Int* 1982: 448. (*Coditel / Cine Vog Films*); Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 404 (*SUISA/Rediffusion SA*); Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 642 (*ORF/PTT en Rediffusion SA*).

³²⁷ *Mom* 1990, at 35.

during the Brussels Conference and replaced by a more functional criterion, namely the ‘organisation other than the original one’ criterion. This is the only criterion to assess whether a retransmission takes place. According to the court, the requirement of the ‘new public’ is not useful in practice. It is difficult to determine the ‘original’ public, moreover because new technologies may change and expand the scope of the original public. Thus, the court held that the criterion is unpractical and does not sustain technological development.³²⁸ The court concluded that the cable retransmission was conducted by a ‘different organisation’ than the original broadcast organisation. Therefore, there is a new act of communication to the public for which authorisation is required.

This conclusion was confirmed in the second *Amstelveense Cable* case in 1984. In this case, the cable organisation claimed that the outcome of *Amstelveense Cable I* would lead to double payment. The Supreme Court rejected this argument and stated there are two distinct exploitations, i.e. the broadcast over the air and the cable retransmission. A payment is required for each act of exploitation. Thus, there is no double payment but two payments for two communications to the public.

This decision confirms that a cable retransmission is a separate act of exploitation in copyright law. If the retransmission is conducted by a ‘different organisation’, authorisation of the right holder is required. The Dutch Supreme Court explained that Article 11bis(1)(ii) of the Berne Convention has to be interpreted in accordance with the wording of the text and its legislative history. According to the court, there is no room for a ‘new public’ requirement and the only relevant criterion is the ‘organisation other than the original one’, which is explicitly mentioned in the text of Article 11bis.

Belgium

The Belgian case relates to a cable retransmission of the movie ‘Le Boucher’.³²⁹ In 1971, the German broadcast company ARD broadcasted the movie in Germany. Coditel, a Belgian cable company, simultaneously retransmitted the broadcast signal to their subscribers in Belgium. Coditel had not acquired authorisation from Cine Vog Film, which owned the exclusive right to broadcast the movie in Belgium. Cine Vog Film claimed that Coditel’s cable retransmission infringed their copyrights. The national laws of Belgium did not contain a specific provision with regard to cable transmission. There was, however, a law that allowed individuals to directly invoke the provisions of the Berne Convention, if the Berne Convention provided more protection than national law. Thus, Cine Vog Film could directly invoke Article 11bis(1)(ii) of the Berne Convention.

The District Court of Brussels held that Coditel infringed Article 11bis(1)(ii) because it ‘actively’ intervened in the retransmission to the public. If such an active transmission is conducted by ‘an organisation other than the original organisation’, permission of the right holder is required. According to the Court of Appeal, Article 11bis(1)(ii) of the Berne Convention only requires that a communication is made ‘publicly’ and conducted by ‘an organisation other than the original one’. The Berne Convention does not require that the communication is an ‘active’ intervention. The Court of

³²⁸ *Amstelveense Cable I*, at par 5.

³²⁹ Belgian Supreme Court 3 September 1981, Pas, 1982, I, 8, *GRUR Int* 1982: 448. (*Coditel / Cine Vog Films*).

Appeal stated that such a criterion is inconsistent with the wording and preparatory works of the Berne Convention.

In 1981, the Belgian Supreme Court confirmed the decision of the Court of Appeal and held that the Berne Convention does not require a distinction between ‘active’ and ‘passive’ communications. According to the Supreme Court, the wording of the Berne Convention and its preparatory works show that the only criteria in Article 11bis(1)(ii) of the Berne Convention are (1) the public nature of a communication and (2) that it is conducted by an organisation other than the original one. There is no room for other requirements. The Supreme Court concluded that Coditel constituted a communication to the public when it retransmitted – simultaneously – a broadcasted work by cable and infringed Cine Vog Films’ copyright.

This case also concerned the question whether prohibiting retransmissions of broadcasted works in other Member States of the EU is in conflict with the free movement of services. As explained in the section on EU law, this question was referred to the CJEU, which held that services, such as communications to the public, are not subject to exhaustion.³³⁰

Switzerland

In the Swiss cases SUIISA and ORF, the main question was whether an organisation needs permission of the right holder if a broadcast is simultaneously retransmitted by cable.³³¹ On 20 January 1981, the Swiss Supreme Court gave its judgment in both cases.

In SUIISA, the Supreme Court explained that the only criterion in Article 11bis(1)(ii) of the Berne Convention is that a communication is conducted by ‘an organisation other than the original organisation’. Other criteria are not applicable. The court based this on the legislative history of the Berne Convention. According to the Supreme Court, the preparatory works of the Brussels Conference in 1948 explain that even if a communication does not reach a ‘new audience’, Article 11bis(1)(ii) can still be applicable. The fact that another organisation performs the communication is decisive, not the status of the public. The Swiss court held that if the ‘new public’ would have been a relevant criterion, the expert commission would have said so and incorporated it in Article 11bis(1)(ii). However, the contrary has happened and the criterion is explicitly rejected during one of the revision conferences, mainly because it delineates the rights of the author. According to the court, the requirement of the ‘new public’ should not be reintroduced in national laws via the backdoor. The court explained that this conclusion is not affected by the fact that the subscribers have to pay twice to watch a broadcasted work via the cable. There is no double payment because there are two separate acts for which remuneration is required.³³²

³³⁰ CJEU 18 March 1980, no C-62/79 (*Coditel I*).

³³¹ Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 404 (*SUIISA/Rediffusion SA*); Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 642 (*ORF/PTT en Rediffusion SA*).

³³² Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 404 (*SUIISA/Rediffusion SA*), at par 7. Unofficial translation “*es liegt in der Natur der Sache, daß der Genuß eines geschützten Werkes sich für das Publikum verteuert, wenn der Urheber dafür zu entschädigen ist.*”

In ORF, the Supreme came to the same conclusion with regard to the application of Article 11bis(1)(ii) of the Berne Convention. According to the court, the only requirements in Article 11bis(1)(ii) are that a communication is (1) made publicly and (2) by an organisation other than the original one. There is no room for other criteria, such as a ‘new public’ test.

3.1.5. Berne Convention and the ‘new public’

The Berne Convention does not provide clarity on how the notion of ‘public’ within the meaning of the communication to the public rights has to be interpreted. It is left to the discretion of Union States to interpret the notion in their national laws, provided that the interpretation does not “*prejudice the author’s right to exploit his works by means of public performance or communication to the public*”.³³³

The provisions of the Berne Convention were created in a particular point in time, when the Internet and other digital technologies had not yet emerged. Thus, the provisions of the Berne Convention have to be interpreted in order to be applicable in today’s digital society. The Berne Convention is not subject to an overarching judicial system that explains how the provisions have to be interpreted, so other methods should be found. These methods are first of all, the customary rules in the Vienna Convention on the Law of Treaties and secondly, judgments of national courts that have directly applied the provisions of the Berne Convention in their national legal order.

The Vienna Convention on the Law of Treaties³³⁴ has set out rules with regard to the interpretation of treaties, which are explained in Articles 31 to 32.

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

³³³ Ricketson and Ginsburg 2006, at 705.

³³⁴ Vienna Convention on the Law of the Treaties.

According to Article 31, the Berne Convention has to be interpreted in accordance with its ‘ordinary meaning’, within its context and in light of their object and purpose.³³⁵ The text is conclusive, which includes the preamble and supplement agreements between the Union Members. This objective interpretation method is decisive. However, if it leads to ambiguities or unreasonable outcomes, supplementary means of interpretation can be used, such as historical documents. These documents are for example the documents of the Revision Conferences of the Berne Convention. This interpretation method will be referred to as the supplementary interpretation method.

The ordinary meaning of the communication to the public rights of the Berne Convention does not explain whether a ‘new public’ criterion would be allowed. Neither the wording of the text, nor the preamble explain how the notion of ‘public’ should be defined. The Berne Convention leaves it to the discretion of the Union States to determine the notion in their national laws.

In light of the supplementary interpretation method, the legislative history of the communication to the public rights should be taken into account. During the Brussels Conference in 1948, the ‘new public’ requirement was explicitly rejected in Article 11*bis*(1)(ii) of the Berne Convention. According to the conference, the criterion is not functional in practise because it is difficult to make a distinction between the ‘original’ public and the ‘new’ public. Therefore, Article 11*bis*(1)(ii) included the expression “*when this communication is made by an organization other than the original one*”. The legislative history shows that this should be the only criterion in Article 11*bis*(1)(ii).

The interpretations of national supreme courts confirm this conclusion, which serve as influential and authoritative interpretations of the provisions of the Berne Convention. In the Netherlands, Belgium and Switzerland, the courts directly applied Article 11*bis*(1)(ii) in their national legal framework. Each court held that the article only requires that a communication is made ‘publicly’ and that the communication is conducted by ‘an organisation other than the original one’. There is no room for other criteria. The courts have derived this conclusion from the wording of Article 11*bis*(1)(ii) and its legislative history. In the Netherlands and Switzerland, the supreme courts explicitly stated that there is no room for a ‘new public’ criterion.

The documents of the Brussels Revision Conference and the national judgments relate to Article 11*bis*(1) sub-paragraph (ii), which protects the right to rebroadcast and to communicate a broadcasted work to the public by wire. However, the same arguments can be applied to all types of communications to the public. For each communication, it will be difficult to make a functional distinction between the ‘original’ and the ‘new’ public. Especially with regard to communications on the Internet, it is very hard to assess which Internet users have received a communication and which users have not. Thus, the ‘new public’ criterion should be rejected for all types of communication to the public rights.

³³⁵ See Article 31 of the Vienna Convention on the law of treaties; Ricketson 1987, at 135.

Taking into account the interpretation method of the Vienna Treaty and the judgments of national supreme courts, the Berne Convention does not provide a legal basis to adopt a ‘new public’ requirement in the communication to the public right.

3.2. Other international agreements

3.2.1. WIPO Copyright Treaty

3.2.1.1. General Information

Another important framework in international copyright law is the WIPO Copyright Treaty (WCT).³³⁶ The WCT, also known as the Internet Treaty, is the first treaty in the field of copyright law that anticipated on issues raised by digital technologies.³³⁷ The WCT was adopted during the Diplomatic Conference in 1996 and entered into force in 2002. During this conference, the WIPO Performers and Phonograms Treaty (WPPT) was also adopted.

Initially, the WCT would be a protocol to the Berne Convention and not a new legal instrument.³³⁸ However, it eventually turned into a separate multilateral treaty, a special agreement within the meaning of Article 20 of the Berne Convention. Special agreements are allowed if they provide more extensive rights to authors or if they contain provisions that are not contrary to the provisions in the Berne Convention.³³⁹ The WCT is a ‘Berne-plus’ agreement, which means that the WCT provides additional protection to authors. This is reflected in the non-derogation clause of Article 1 of the WCT.³⁴⁰

The preamble of the WCT is short and drafted after the provisions of the WCT were adopted. Thus, it does not reflect principles and objectives that were agreed upon by member states in advance, but the preamble is more a summary of what was discussed during the Diplomatic Conference.³⁴¹ Nonetheless, the preamble is an integral part of the text of the Treaty and has to be used in order to interpret the provisions of the WCT.³⁴²

According to its preamble, the aim of the WCT is similar to the Berne Convention, namely “*develop and maintain the protection of the right of authors in their literary and artistic works in a manner as effective and uniform as possible*”.³⁴³ The only difference is the expression “*develop and maintain*”, which relates to the fact that the provisions in the WCT should be able to respond to technological development.³⁴⁴ The preamble further stresses that copyright protection should be an incentive for the creation of literary and artistic works and that it should strike a fair balance between

³³⁶ WIPO Copyright Treaty, Geneva 20 December 1996 (hereafter referred to as “WCT”), available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166 (accessed 11 August 2015).

³³⁷ Dreier and Hugenholtz 2006, at 87; Ficsor 2002, at 415.

³³⁸ Hansen and Dixon 1996, at 604-612.

³³⁹ Ficsor 2002, at 19.

³⁴⁰ Article 1 of the WCT.

³⁴¹ Ficsor 2002, at 411.

³⁴² According to the Vienna Treaty, a treaty has to be interpreted in accordance with its ordinary meaning, in their context and in light of their object and purpose. The context comprises the text of the treaty, which includes the preamble. See Article 31 of the Vienna Treaty.

³⁴³ Preamble of the WCT.

³⁴⁴ Ficsor 2002, at 413.

the author's rights and the larger public interest, such as education, research and access to information.³⁴⁵ The objectives in the preamble show that the WCT is not only an author-based treaty, such as the Berne Convention, but also takes economic considerations into account, such as the incentive to create new works.

3.2.1.2. General Communication to the Public right

3.2.1.2.1. Legal history

With the rise of digital technology, it became easy to transmit nearly all types of works over the Internet. Internet users were able to choose at which place and time they want to receive a copyright protected work, so-called on-demand transmissions. The Berne Convention did not provide clarity on this new exploitation form and discussion arose on the question how digital technologies, and in particular on-demand transmissions, should be protected in copyright law. Should these transmissions be part of the distribution right, the communication to the public right or should a new 'making available' right be introduced?

Ficsor, at that time the assistant director of the WIPO, proposed the "*umbrella solution*", a neutral and 'legal-characterisation-free' description of interactive transmissions.³⁴⁶ Neutral in this sense means that it would not be characterised as a distribution or communication to the public right but it would be up to Member States to interpret these new technological transmissions into their national laws. Thus, there would be a general right that protects all types of works and that includes a "*making available right*" for on-demand transmissions.³⁴⁷ The solution leaves a large amount of discretion to national authorities and intends to grant "*effective and sufficient protection in the digital environment*" and to "*facilitate interoperability between different systems*".³⁴⁸ Harmonisation of Member States' law was secured by introducing strict conditions on how the 'umbrella solution' – and particularly the 'making available right' – should be implemented in national law.³⁴⁹

In response to this solution, the European Community (EC) and its Member States proposed the so-called 'half-open umbrella solution'.³⁵⁰ In this proposal, a general communication to the public right would apply to all types of subject matters and include a making available right. Because the proposal only referred to the communication to the public right and there was no reference to the distribution right, it was called the 'half-open umbrella solution'.

The suggestion of the EC was adopted in the draft treaty at the diplomatic conference.³⁵¹ However, during this conference the 'umbrella solution' was fully opened again after a statement was adopted that explained that contracting parties are free to determine upon which right the making available

³⁴⁵ Preamble of the WCT.

³⁴⁶ Ficsor 2002, at 406.

³⁴⁷ Ficsor 2002, at 204-208.

³⁴⁸ Ficsor 2002, at 208.

³⁴⁹ Ficsor 2002, at 208-209.

³⁵⁰ Hugenholtz 1996, at 89-91. This paper is based on studies prepared for the European Commission (DGXIII and DGXV) in 1994 and 1995; Ficsor 2002, at 239-240

³⁵¹ Ficsor 2002, at 242.

right is based. In other words, national authorities can either protect the making available right as part of the communication to the public right, the distribution right or as a distinct making available right.³⁵²

During the Diplomatic Conference, the current text of Article 8 of the WCT was adopted. It was phrased as a ‘half-open umbrella’ but applied as a ‘fully-open umbrella’ solution. The article reads as follows:

*“Without 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, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”*³⁵³

Article 8 is subject to an agreed statement, “[i]t is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication within the meaning of this Treaty [the WCT] or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).”³⁵⁴ The latter sentence relates to the compulsory licence schemes in Article 11bis(2) of the Berne Convention.

3.2.1.2.2. Application of Article 8

The genre-specific protection of the communication to the public right in the Berne Convention has been replaced in the WCT with a general communication to the public right, providing protection for “any communication to the public” with regard to all types of works. The lacunas in the Berne Convention with regard to the scope of protection are removed and all copyright protected works are now equally protected.

According to the text of Article 8, ‘any communication’ by wire or wireless means is protected. This technologically neutral definition shows that a broad interpretation of the communication right should be applied, which covers not only broadcasting and cable transmission but also digital transmission and future forms of communications.³⁵⁵ The WCT does not define the notion of ‘communication’. Earlier proposals of the WCT stated that a communication is the “*transmission of images and sounds in a way that these can be perceived at places where they otherwise (without transmission) could not be perceived.*”³⁵⁶ This definition was, however, not included in the final text of the WCT.

The WCT is a special agreement within the meaning of Article 20 of the Berne Convention, which is allowed because it grants more protection for the author. Therefore, Article 8 does not affect the

³⁵² Ficsor Guide 2003, at 209; Records of the Diplomatic Conference, at 675 par 301.

³⁵³ Article 8 of the WCT.

³⁵⁴ Agreed statement concerning Article 8, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295456 (accessed 15 July 2015); Ficsor 2002, at 250; Records of the Diplomatic Conference, at 799, par 1003.

³⁵⁵ Ricketson and Ginsburg 2006, at 745.

³⁵⁶ Reinbothe and Von Lewinski 2002, at 100.

communication to the public rights in the Berne Convention but only fills in the gaps. It provides protection for subject matters that were not protected under the Berne Convention but it does not override existing principles. Furthermore, the general communication to the public right in the WCT does not apply to public performances. This can be derived from the phrase “*without prejudice*” to principles of the Berne Convention. The Berne Convention explicitly makes a distinction between public performance and communication to the public rights.³⁵⁷ Article 8 only mentions the communication to the public right, thus, public performances are excluded.

The general communication to the public right includes a ‘making available right’ for on-demand transmissions. The actual transmission of a work is not relevant, but making it available by providing access to it suffices.³⁵⁸ It is irrelevant whether the public actually watches or receives a work. The fact that it is available to the general public makes it a restricted act. Even if no member of the public watches a video that has been made available on the Internet without the consent of the right holder, the up-loader of the video commits an act of copyright infringement.

The term ‘making available’ was not *invented* in the WCT but already applied in Article 4(4) of the Rome Act 1928 of the Berne Convention to define a published work. “*The expression ‘published work’ means, for the purposes of this Convention, works copies of which have been made available to the public. [...]*”.³⁵⁹ However, the expression “*have been made available to the public*” was changed during the Brussels Conference into “*provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public*”.³⁶⁰ In addition, Article 7 of the Berne Convention, which sets out the term of protection, states “*protection shall expire fifty years after the work has been made available to the public [...]*”.³⁶¹

The wording of Article 8 seems to imply that the making available right is part of the communication to the public right. However, the legislative history of the WCT shows that it is also allowed to interpret it differently, for example as part of the distribution right or as a separate making available right. Member States are free to determine the application of the right, as long as it is – together with the general communication to the public right – protected in national copyright law.

Similar to Article 3 of the InfoSoc Directive, Article 8 does not include the mere provision of physical facilities for enabling or making a communication, which is explained in the agreed statement.³⁶² Agreed statements can be used to interpret the provision of the WCT. They can, however, not change the language of a provision since the text is regarded as ‘paramount’.³⁶³ This statement explains that

³⁵⁷ Dreier and Hugenholtz 2006, at 104

³⁵⁸ Depreeuw 2014, at 353.

³⁵⁹ Article 4(4) of the Rome Act 1928 of the Berne Convention (emphasis added), in Ficsor 2002, at 167.

³⁶⁰ Article 3(3) of the Brussels Act 1948 and also the current text of Article 3(3) of the Berne Convention (emphasis added).

³⁶¹ Article 7(2) of the Berne Convention (emphasis added).

³⁶² Agreed statement concerning Article 8.

³⁶³ Ficsor 2002, at 63.

ISPs and other telecom organisations should not be regarded as organisations that communicate works to a public.³⁶⁴

While the Berne Convention left it to the discretion of the contracting states to determine whether the notion of ‘public’ can be separated in time – in order to include on-demand transmissions – the WCT limited this discretion and firmly stated that on-demand transmissions are included in Article 8. More clarification on the notion of ‘public’ is not provided. Member States are free to implement the notion in national law as long as it does not affect the legitimate exploitation of the right holder when he or she communicates a work to the public.

3.2.2. TRIPS Agreement

3.2.2.1. General information

The TRIPS Agreement³⁶⁵ was created within the framework of the General Agreement on Tariffs and Trade (GATT) and established during the Uruguay round, which is a round of multilateral trade negotiations between 1986 and 1994. At the end of these negotiations, the TRIPS Agreement was adopted. During the Uruguay Round, the World Trade Organization (WTO) was also established, which replaced the GATT.

The TRIPS Agreement is in many ways different from the Berne Convention and WCT. First of all, it protects all intellectual property rights and not only copyright. Secondly, it contains detailed provisions on the enforcement of intellectual property rights. Thirdly, the provisions in the TRIPS Agreement are subject to an effective dispute settlement procedure in case conflicts between states emerge.³⁶⁶ Finally, the aim of the TRIPS Agreement is different because it is more focused on impediments to international trade. Although it also aims to provide effective and adequate protection for intellectual property rights, such protection should not become barriers to legitimate trade.³⁶⁷ This aim is incorporated in the preamble of the agreement and should, according to the Vienna Treaty and Gervais, be considered an integral part of the text.³⁶⁸ Provisions of the TRIPS Agreement have to be interpreted in light of this objective. Thus, the protection of the authors, which is the main objective in the Berne Convention, has to be weighed against barriers to legitimate trade.³⁶⁹ Excessive and inadequate protection for copyright will distort trade.³⁷⁰ In light of this economic welfare-based perspective, it is argued that the provisions in the TRIPS Agreement should be interpreted differently from the provisions in the Berne Convention and WCT.³⁷¹

The TRIPS Agreement explains in Article 7 that the protection and enforcement of rights “*should contribute to the promotion of technological innovation and to the transfer and dissemination of*

³⁶⁴ Ricketson and Ginsburg 2006, at 745.

³⁶⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh 15 April 1994.

³⁶⁶ Part III of the TRIPS Agreement; Gervais 2013, at 10.

³⁶⁷ Preamble TRIPS Agreement.

³⁶⁸ Gervais 2013, at 154-155.

³⁶⁹ Gervais 2013, at 158.

³⁷⁰ Gervais 2013, at 155.

³⁷¹ Gervais, at 159.

*technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*³⁷² This objective is not mentioned in the preamble but explicitly protected in a provision of the agreement. This seems to heighten the status of the objective.³⁷³ However, the provision states that such a right *should* contribute to innovation and not that it is obliged to. In other words, this provision explains that a balance has to be struck between, on the one hand, the interests of the right holders and, on the other hand, the interest of users and the public interest.³⁷⁴

Article 1 of the TRIPS Agreement states that the agreement sets minimum obligations for Member States. These obligations have to be interpreted in national laws. Members are allowed, but not obliged to provide more protection for the protection of intellectual property rights, provided that this will not contradict the provisions in the Agreement.³⁷⁵ The TRIPS Agreement is a ‘Berne-plus agreement’, which is reflected in Articles 2(2) and 9. Article 2(2) explains that the provisions in the TRIPS Agreement do not derogate from the obligations in the Berne Convention. Article 9 further requires that Member States comply with Articles 1-21 of the Berne Convention (minus the moral right provision in Article 6bis). Due to Article 9, the provisions of the Berne Convention became enforceable, which was a major improvement for the protection of the author.³⁷⁶

3.2.2.2. Communication to the public right

The TRIPS Agreement has not drastically changed the substantive norms of copyright law but generally reflects the principles of the Berne Convention. This is also the case with the communication to the public right. Article 9 of the TRIPS Agreement implies that Articles 11, 11bis, 11ter, and 14 (1)(ii) of the Berne Convention are applicable. The agreement does not include a separate provision on the communication to the public right.

With regard to the notion of ‘public’, the July 1990 draft of the TRIPS Agreement contained an interesting provision:

*“[...] public communication shall include:
communicating a work in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
communicating or transmitting a work, a performance, or a display of a work, in any form, or by means of any device or process to a place [mentioned above] or to the public, regardless of whether the members of the public are capable of receiving such communications can receive them in the same place or separate places and at the same time or at different times”.*³⁷⁷

³⁷² Article 7 TRIPS Agreement.

³⁷³ Gervais 2013, at 203.

³⁷⁴ Gervais 2013, at 203.

³⁷⁵ Article 1(1) TRIPS Agreement.

³⁷⁶ Ricketson and Ginsburg 2006, at 353.

³⁷⁷ Trips Agreement Draft of 23 July 1990 (W/76), available at https://www.wto.org/gatt_docs/English/SULPDF/92110034.pdf (accessed 11 August 2015), Gervais 2013, 262.

Later, during the Brussels Draft, this provision was changed into “[t]he term ‘public’ shall not be defined in the domestic law of PARTIES in a manner that conflicts with a normal commercial exploitation of a work and unreasonable prejudices the legitimate interests of right holders.”³⁷⁸

Neither of those proposals eventually reached the final text of the TRIPS Agreement. Thus, TRIPS does not provide more clarification on the notion of public than the Berne Convention.

3.2.2.3. Interpretation of communication to the public right

As opposed to the other international copyright agreements, the TRIPS Agreement is subject to an overall judicial system, namely the dispute settlement procedure of the WTO.³⁷⁹ A Member of the WTO is able to bring a case before the dispute settlement procedure, for example when it believes that another Member infringes a provision of the TRIPS Agreement. The Dispute Settlement Body (DSB), which consists of all the members of the WTO, establishes a panel of experts.³⁸⁰ This panel considers the case and presents its findings in a panel report. The DSB gives its ruling by rejecting or accepting the report.³⁸¹ In the panel report, the provisions of the TRIPS Agreement are interpreted in order to be applicable to the dispute. The panel generally relies on the interpretation methods of the Vienna Treaty to interpret the provisions of the TRIPS Agreement but also other international agreements are used to interpret the provisions.³⁸²

With regard to copyright law, an interesting dispute arose between the EU and US. This case concerned the application of Section 110(5) of the US Copyright Act, which contains a ‘business’ and ‘homestyle’ exemption for communications to the public.³⁸³ The EU argued that these exemptions infringed Article 9 of the TRIPS Agreement. Article 9 explains that the articles of the Berne Convention (minus Article 6bis) have to be adhered. According to the EU, the exemptions were in conflict with Articles 11(1) and 11bis(1) of the Berne Convention.

In the report, the panel interpreted Articles 11(1) and 11bis(1) of the Berne Convention. With regard to Article 11bis(1), the panel explained that each sub-paragraph is a separate exclusive right for which authorisation is required. The broadcast right in sub-paragraph (i) is a separate act of exploitation from sub-paragraph (ii) and (iii). The panel illustrated this by explaining that “*the communication to the public of a broadcast creates an additional audience and the right holder is given control over, and may expect remuneration from, this new public performance of his or her work.*” The panel explained that sub-paragraph (ii) requires that the communication is conducted “*by an organization*

³⁷⁸ Brussels Draft of the TRIPS Agreement, Gervais 2013, at 261.

³⁷⁹ Article 64 of the TRIPS Agreement in conjunction with the Dispute Settlement Understanding, available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed 12 October 2015).

³⁸⁰ Gervais 2008, at 510.

³⁸¹ Von Lewinski 2008, at 310.

³⁸² Gervais 2008, at 511.

³⁸³ Panel Report 15 June 2000, WT/DS160/R (*United States – Section 110(5) of the US Copyright Act*), available at https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (accessed 12 October 2015).

other than the original one.” When these concepts of “*additional audience*” and “*new public performance*” are satisfied is not further explained in the panel report.

This interpretation seems similar to the confusing interpretation of Masouyé in the Guide to the Berne Convention of 1987. According to this report, it may seem that the communication to the public right requires an ‘additional audience’ or ‘new public’ criterion. However, the legislative history of Article 11*bis* of the Berne Convention showed that such a criterion is not valid. So far, there have been no other panel reports on the application of Article 11*bis*(1) of the Berne Convention. Thus, this report does not provide more clarity on the interpretation of the communication to the public right.

With regard to Article 11(1) of the Berne Convention, the panel report stated that this article only covers ‘public’ performances. ‘Private’ performances are not protected. The report did not explain when a performance is private or public. The panel report further explained the relationship between Articles 11 and 11*bis*. Article 11*bis* is a specific rule, relating to specific rights, while Article 11 protects public performances of works in general. In other words, Article 11*bis* is a *lex specialis* and overrules the application of Article 11.

The panel report did not provide more clarification on the interpretation of Articles 11(1) and 11*bis*(1) of the Berne Convention. The report continued to focus on the question whether the articles allow for a ‘minor exceptions’ doctrine. Such a doctrine excludes uses from copyright protection that are minimal or of minor significance to the author.³⁸⁴ Taking into account the preparatory works of the revision conferences and the interpretation methods of the Vienna Treaty, the panel concluded that the context of Articles 11 and 11*bis* of the Berne Convention allow such a doctrine. The next part of the report discussed whether the exemptions of the US Copyright Act satisfy the three-step test, which is not further discussed in this thesis.³⁸⁵ In conclusion, the panel report does not provide more guidance on the application of the communication to the public rights in the TRIPS Agreement and the Berne Convention.

3.2.3. WCT, TRIPS and the ‘new public’

The WCT and TRIPS Agreement are both ‘Berne-plus’ Agreements since they incorporate the principles of the Berne Convention into their own framework and extend the scope of protection. In addition, the WCT is a special agreement within the meaning of Article 20 of the Berne Convention. Thus, the communication to the public rights of the Berne Convention – Articles 11, 11*bis*, 11*ter* and 14(1)(ii) – are applicable in the legal order of the WCT and the TRIPS Agreement.

³⁸⁴ Ricketson and Ginsburg 2006, at 834.

³⁸⁵ The three-step test derives from the Berne Convention to assess whether a particular exception or limitation is allowed under copyright law. The TRIPS Agreement protects this test in Article 13: “*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*”

The TRIPS Agreement does not provide more protection with regard to the communication to the public right in copyright law, but incorporates the provisions of the Berne Convention without alterations. Thus, if the Berne Convention does not allow a ‘new public’ test, the TRIPS Agreement neither provides for a legal basis.

The WCT, on the contrary, has changed the communication to the public rights of the Berne Convention and adapted it in response to digital technologies. Article 8 of the WCT encompasses a general right of communication to the public, including a making available right to protect on-demand transmissions. This right explicitly incorporates a non-derogation clause from the communication to the public provisions in the Berne Convention. According to this clause, an interpretation of Article 8 that is inconsistent with Articles 11, 11*bis*, 11*ter* and 14(1)(ii) of the Berne Convention is invalid.

The question is whether the general communication to the public right provides a legal basis to adopt a ‘new public’ criterion. Such a criterion is allowed if it complies with Article 20 of the Berne Convention, i.e. if it provides more protection for the author or if it is not in conflict with the provisions of the Berne Convention.

First of all, it cannot be argued that the criterion of the ‘new public’ provides more protection for the author. On the contrary, it limits the author’s exploitation right to communicate a work on the Internet. As explained in the section on EU copyright law, the requirement exhausts the author’s right to exploit his or her work in the online word. The CJEU has held that all Internet users should be regarded as (potential) recipients of freely available works on the Internet. Thus, secondary communications of such works will likely not satisfy the ‘new public’ test. This requirement prejudices the author’s online exploitation right. Therefore, the ‘new public’ criterion cannot be justified on the basis that it strengthens the rights of the author.

Secondly, the criterion may be allowed under Article 20 of the Berne Convention if it does not conflict with the provisions of the Berne Convention. However, the legislative history and national interpretations of Article 11*bis*(1)(ii) of the Berne Convention show that the requirement of the ‘new public’ is inconsistent with the principles of the Berne Convention. If the WCT would incorporate such a criterion in the general communication to the public right, it would contradict the principles of the Berne Convention and violate Article 20. Consequently, the WCT does not provide for a legal basis to incorporate the ‘new public’ requirement in the communication to the public right.

3.3. Compliance with international law

In light of the international compliance analysis set out above, the conclusion is that the criterion of the ‘new public’ does not comply with international copyright law, mainly because it is in conflict with Article 11*bis*(1) of the Berne Convention. The legislative history and the national interpretations of this provision show that there is no room for a ‘new public’ test. Such a criterion was explicitly replaced by a more functional one, namely the requirement of the ‘organisation other than the original one’. However, this requirement has not found its way into EU copyright law.

The historical documents of the Berne Convention and judgments of national supreme courts have explicitly rejected the requirement of the 'new public' in Article 11*bis*(1)(ii), which includes the retransmission right of broadcasted works. However, this conclusion can be extended to the general communication to the public right. The main argument to replace the criterion was the lack of a functional application in practice. With the rise of digital technologies, it became much easier to communicate a work to a large and worldwide public. Especially in light of these technologies, it is difficult to make a distinction between an 'original' and a 'new' public. Such a distinction would only detract from the author's exploitation right. Therefore, the 'new public' test should not be subject to the communication to the public right in general.

This chapter showed that the Berne Convention is applicable in the legal orders of the WCT and TRIPS Agreement. Thus, an interpretation of the communication to the public right that is in conflict with the Berne Convention is also in conflict with the WCT and TRIPS Agreement. Consequently, the requirement of the 'new public' does not satisfy the international compliance analysis.

4. Interim conclusion on consistency and compliance

The criterion of the ‘new public’ has become an integral part of the communication to the public right within the meaning of Article 3(1) of the InfoSoc Directive. Especially in the online world, the requirement is the decisive condition to constitute a communication to the public. This development is disputed and as the in-depth analysis of EU and international copyright law has shown, it is rightly disputed.

The first chapter of this analysis examined how the criterion of the ‘new public’ has emerged in the legal order of the EU and whether it is consistent with EU copyright law. The implementation of the requirement is problematic because it is based on a misinterpretation of Article 11*bis*(1)(ii) of the Berne Convention. The CJEU interpreted Article 11*bis*(1)(ii) on the basis of a non-binding and old WIPO Guide that explained subparagraph (iii) of Article 11*bis*(1). Furthermore, it is inconsistent with Article 3(3) of the InfoSoc Directive, which explains that the communication to the public right cannot be exhausted. On the Internet, the criterion has the same effect and ratio as the exhaustion principle. As a result, the ‘new public’ test is inconsistent with EU copyright law.

The second chapter conducted an international compliance analysis. This analysis showed that the criterion of the ‘new public’ is in conflict with the Berne Convention. According to the legislative history of Article 11*bis*(1)(ii) of the Berne Convention, the requirement is invalid. During the Brussels Revision Conference of 1948, the criterion was explicitly rejected because it was not functional to apply in practice. It was replaced with a more functional one, namely the criterion of ‘an organisation other than the original one’. Other interpretations that are based on different requirements are inconsistent with the Berne Convention. National case law confirmed this conclusion. The Supreme Courts of Belgium, the Netherlands and Switzerland have rejected all other requirements and held that the only conditions to invoke the communication to the public right, as laid down in the Berne Convention, are (1) that a work is communicated publicly and (2) that a work is communicated by an organisation other than the original one. Other requirements, such as a ‘new public’, are invalid.

The analysis in this thesis showed that this conclusion can be extended to the general communication to the public right because the same arguments to reject the criterion in Article 11*bis*(1)(ii) of the Berne Convention can be applied to the general right of communication to the public. For each communication to the public right it will be very difficult to make a functional distinction between an ‘original’ and ‘new’ public. As a result, the Berne Convention does not provide for a legal basis to incorporate a ‘new public’ test in the international concept of ‘communication to the public’. The provisions of the Berne Convention are applicable in other international copyright agreements, such as the WCT and TRIPS Agreement. Consequently, if the criterion is in conflict with the Berne Convention, it is in conflict with the WCT and TRIPS Agreement. Therefore, it does not comply with international copyright law.

In light of these arguments, the requirement of the ‘new public’ should be rejected in EU’s communication to the public right. A new interpretation method or criterion has to be found to apply the communication to the public right in the online world. Part II of this thesis analyses different solutions in order to formulate a recommendation for the CJEU on how the communication to the public right, within the meaning of Article 3(1) of the InfoSoc Directive, should be interpreted in response to digital technologies.

Part II: Restore EU Copyright Law

5. Intentions of legislator

A descriptive analysis of the criterion of the ‘new public’ in the right of communication to the public showed that the criterion should be rejected. In recent case law of the CJEU, the requirement has become a decisive element to determine whether a communication on the Internet is a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. If the ‘new public’ test is rejected, a new criterion or interpretation method has to be found to make EU’s communication to the public right applicable in the online world.

Part II of this thesis analyses three alternative solutions. In this thesis, a good alternative is consistent with the intentions of the legislator of the InfoSoc Directive. The intentions of the legislator form the ‘benchmark test’ with which a new criterion or method has to comply. This test is explained in Section 5.1. Section 5.2 briefly explains why the requirement of the ‘new public’ is in conflict with the intentions of the legislator. Chapter 6 focuses on finding a new criterion or method to make the communication to the public right applicable in the online world. Two different criteria are analysed in light of the benchmark test, namely the ‘transmission’ and ‘different organisation’ criteria. These criteria are examined in Section 6.1. Section 6.2 assesses the economic interpretation method. Finally, Section 6.3 sets out the conclusion on the alternative solutions. In this section, a recommendation for the CJEU is formulated on how the communication to the public right should be interpreted in the online world, and in particular how the CJEU should respond to the current issues regarding hyperlinks (Section 6.3.1). This section also touches upon the issue of secondary liability for copyright infringements. Secondary liability may apply to the providers of hyperlinks and the lack of a harmonised EU framework is perhaps one of the underlying problems why the CJEU struggles with the interpretation of the communication to the public right in the online world. This problem is set out in Section 6.3.2.

5.1. Benchmark test

A good criterion or interpretation method has to respond to digital developments, while protecting the intentions of the legislator of the InfoSoc Directive. The intentions can mainly be derived from the recitals of the InfoSoc Directive and its explanatory memorandum. The explanatory memorandum states that the objective of the InfoSoc Directive is twofold. On the one hand, the directive aims to harmonise national copyright laws of Member States, in particular with regard to challenges that have occurred with the rise of digital technologies. On the other hand, the directive implements important provisions of the WCT and WPPT.³⁸⁶ A closer analyses of the InfoSoc Directive shows that five requirements can be derived from the intentions of the legislator with regard to the communication to the public right, namely (1) compliance with international law, (2) a high level of protection for the

³⁸⁶ Explanatory Memorandum of the InfoSoc Directive, at 50; Guibault, Westkamp and Rieber-Mohn 2007.

author, (3) stimulate and sustain technological development, (4) a fair balance between right holders and users, and (5) enhance legal certainty.³⁸⁷ Each requirement is briefly explained below.

One of the main objectives of the InfoSoc Directive is to implement the WIPO Internet treaties in the legal order of the EU. Recital 15 explains that the directive implements a number of new international obligations, arising from the WCT and WPPT. An important new obligation is the general communication to the public right, including the making available right, as mentioned in Article 8 of the WCT. This article includes a non-derogation clause from the communication to the public rights in the Berne Convention, making the principles of the Berne Convention indirectly applicable to Article 8 of the WCT. Article 8 served as the basis for Article 3(1) of the InfoSoc Directive. An interpretation of the EU's communication to the public right that is in conflict with the principles of the WCT and the Berne Convention is, therefore, inconsistent with the intentions of the EU legislator.

The second requirement is a high level of protection for the author. Recital 9 of the directive states “[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.” This high level of protection is among others ensured by a broad application of the communication to the public right. All communications to the public not present at the place where the communication originates should fall within the scope of Article 3(1) of the InfoSoc Directive. According to the recitals, this includes any transmission or retransmission, by wire or wireless means, of a work to the public.³⁸⁸ The directive does not define the notions of ‘communication’ or ‘public’ but merely explains that they have to be interpreted broadly to provide a high level of protection for the author.

As the name of the directive indicates, the InfoSoc Directive aims to adapt copyright law to digital technologies in the information society. Accordingly, the communication to the public right should stimulate *and* sustain technological developments. On the one hand, the communication to the public right has to provide room for technological and digital developments. Recital 2 reflects this objective and explains the need to create a “*general and flexible legal framework at Community level in order to foster the development of the information society in Europe.*” Copyright plays an important role in the creation of new products and services and copyright laws should contribute to this progression, without hindering technological development. As a result, not all future forms of communications should fall within the scope of copyright law.³⁸⁹ Take for example a hyperlink. Hyperlinks have become common and indispensable features of the Internet. Without these links the World Wide Web would not be so compelling and functional.³⁹⁰ If all hyperlinks would fall within the scope of copyright law, many websites and search engines could be held liable for acts of copyright infringement because a great amount of content on the Internet is from unlawful sources. This outcome would seriously affect the functioning of the Internet and would have a negative effect on technological and digital

³⁸⁷ A similar benchmark test is applied in Guibault, Westkamp and Rieber-Mohn 2007, at 5-6.

³⁸⁸ Recital 23 of the InfoSoc Directive.

³⁸⁹ Recital 2 of the InfoSoc Directive.

³⁹⁰ Strowel and Hanley 2009, at 71; European Copyright Society 2013, at 1 par 2.

developments. Thus, copyright law should not be applied too broadly but leave room for technological and digital developments.

On the other hand, the communication to the public right should be sustainable in the information society. The right has to be technologically neutral in order to respond to future technologies. Article 3(1) of the InfoSoc Directive satisfies this requirement because *any* communication of a work to the public, including future forms of exploitation, is protected. No new concepts or rights have to be created but the current framework suffices. This objective is reflected in recital 5 of the InfoSoc Directive, which states “*no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.*” The environment in which works and other subject matters are created and exploited may change, but this does not mean that basic copyright concepts have to change.³⁹¹ Copyright law has to be dynamic and able to respond to new technologies within its current framework. A new criterion or interpretation method has to protect this objective and should not prejudice the technologically neutral character of Article 3(1).

The fourth requirement that can be derived from the intentions of the legislator is a fair balance. The objectives of the InfoSoc Directive explain that copyright law should strike a fair balance between the rights and interests of, on the one hand, the right holder and, on the other hand, the users of a work. Recital 31 of the InfoSoc Directive states that this fair balance is particularly important for the creation of exceptions and limitations. However, the exploitation rights also have to maintain a fair balance. The high level of protection for the author has to be weighed against the rights and interests of users. The rights of users are for example the right to freedom of expression.³⁹²

Finally, the EU legislator intended to enhance legal certainty. The rise of digital technology has changed the environment in which copyright protected works are exploited. Member States of the EU have responded differently to these new forms of exploitation, which led to uncertainty with regard to the scope of protection. The recitals of the InfoSoc Directive explain that “*those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted*”.³⁹³ The communication to the public right should be applied in a transparent and comparable manner across Member States. This means that different interpretations have to be resolved. A harmonised application of the communication to the public right creates a level playing field, which in the end – according to the legislators of the directive – contributes to an economy of scale for new products and services. Interactive on-demand transmissions were one of the main issues that led to legal uncertainty. Article 3(1) of the directive explains that such transmissions are protected under the making available right. A new criterion or interpretation method should enhance legal certainty.

³⁹¹ Explanatory Memorandum of the InfoSoc Directive, at 9.

³⁹² Freedom of expression is protected in Article 10 of the European Convention on Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union.

³⁹³ Recital 7 of the InfoSoc Directive.

In conclusion, five different requirements are extracted from the intentions of the legislator of the InfoSoc Directive. First of all, the communication to the public right has to be consistent with international copyright law. Secondly, the right has to be interpreted broadly to provide a high level of protection for the author. Thirdly, the right should stimulate and sustain technological and digital developments. Fourthly, the right has to strike a fair balance between the rights and interests of the right holder and users of a work. And finally, the communication to the public right should enhance legal certainty. These five requirements serve as the 'benchmark test' with which an alternative criterion or interpretation method has to comply to be regarded as a good alternative to the criterion of the 'new public'.

An optimal solution satisfies all five requirements. However, the next chapter shows that it is difficult to find a criterion or method that satisfies the test with flying colours. It is likelier that a criterion satisfies a larger part of the benchmark test. Nevertheless, it should be noted that the first requirement – compliance with international law – is a mandatory requirement. Any criterion or method in conflict with the Berne Convention, the WCT or the TRIPS Agreement is invalid. The 'new public' requirement did not pass the first requirement of the benchmark test. The next section shows that it also fails to satisfy the other requirements of the test.

5.2. Deficiencies of the 'new public' criterion

The main reason to reject the requirement of the 'new public' is the conflict with international copyright law. But, as this paragraph shows, there are more reasons to reject the criterion. First of all, it limits the scope of the communication to the public right, thereby decreasing the level of protection of the author. Especially in the online world, the exploitation right of the right holder is limited. Right holders are no longer able to control communications to the public on the Internet once they freely communicated a work on the web. Thus, the criterion does not provide a high level of protection for the right holder.

Secondly, the 'new public' test does not strike a fair balance between rights and interests of the right holder and users of a work. It favours Internet users and disregards the rights and interests of right holders.

Furthermore, it does not enhance legal certainty. The condition of the 'new public' contains a subjective element, namely the intention of the right holder.³⁹⁴ It is difficult to assess whether a work is communicated to a public with the *intention* of the right holder. Especially on the Internet, it is challenging to ascertain which public the right holder had in mind when he or she communicated a work. This impracticality was one of the reasons to reject the criterion in 1948 during the Brussels Revision Conference. Moreover, the subjective element raises new questions. For example, how far does the intention of the right holder reach? Is it possible to express the intention of the right holder

³⁹⁴ Baker 2014 (note).

in a contract, for example in the terms and conditions of a website or with a Creative Commons By license?³⁹⁵ Or should the intention of the right holder relate to technical restrictions, such as a pay wall or password? The CJEU has not provided clarity on these questions.

The fact that the criterion leads to legal uncertainty can also be derived from the new referrals for preliminary questions. Already two new referrals arose regarding hyperlinks after the *Svensson* decision.³⁹⁶ These referrals mainly ask whether a hyperlink to unlawful content is a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. The new preliminary questions and the subjective element show that the requirement does not enhance legal certainty.

The criterion does probably not prejudice the development of new exploitation forms and does not affect the technologically neutral character of the communication to the public right. Thus, the criterion would likely have satisfied one requirement of the benchmark test. However, this does not outweigh the fact that the e ‘new public’ test runs counter to all other requirements. It shows many deficiencies, therefore, the next chapter aims to find a new criterion or interpretation method for Article 3(1) of the InfoSoc Directive to restore EU copyright law.

³⁹⁵ Guibault and Quintais 2014, at 20. Creative Commons is a non-profit organisation that provides free licences for online works. The licence makes it easy for the right holder to express which rights are reserved and which rights are waived for the benefit of reception of other creators. The intention of the right holder is expressed on the basis of simple symbols. The licence does not replace copyright law but is built upon it. See for more explanation <http://creativecommons.org/> (accessed 12 October 2015); Moir, Montagnon and Newton 2014 (note), at 4; Stevens 2014 (note); Baker 2014 (note); Predonzani 2014 (note), at 39.

³⁹⁶ See also the referrals for preliminary questions in *Britt Dekker* and *Filmtime*.

6. Alternative solutions

The benchmark test is used to assess whether a criterion or method is consistent with the intentions of the legislator. The test is illustrated on the basis of an example in the online world, namely hyperlinks. Hyperlinks are currently an important issue and the CJEU seems to struggle with the qualification of hyperlinks in copyright law.³⁹⁷ The outcome of the hyperlink example is used to assess whether a criterion or method satisfies the benchmark test. The application of the alternative criterion or method is, however, broader and should be applied as well to all types of online communications. Hyperlinks merely serve as an example to clarify when the benchmark test is satisfied and to show how a particular criterion or method should be applied in practice. This chapter analyses two alternative criteria and one interpretation method to make the communication to the public right applicable in the online world.

6.1. A new criterion

This section analyses whether an alternative criterion can be found. If only the criterion is the ‘new public’ is rejected, but all other principles of the CJEU with regard to Article 3(1) of the InfoSoc Directive remain intact, is there an alternative criterion that serves its purpose? This means that the notion of ‘public’ is still defined as an indeterminate number of potential receivers, which implies a fairly large number of people. The notion of ‘communication’ is defined as an intentional intervention without which the user is not able to receive a work. Also, merely making a work available, i.e. providing access to a work, can constitute a ‘communication’.

In light of these principles, two alternative criteria are analysed. The ‘new public’ requirement focused mainly on the notion of ‘public’. Since this has led to an incorrect interpretation, this thesis focuses first on the notion of ‘communication’ by introducing a ‘transmission’ criterion. The second criterion is independent from the notions of ‘communication’ and ‘public’, namely the ‘different organisation’ requirement. Whether these alternative criteria satisfy the benchmark test is analysed below.

6.1.1. ‘Transmission’ criterion

A focus on the notion of ‘communication’, by introducing a ‘transmission’ requirement, may be a sufficient alternative to the ‘new public’ criterion. Such a criterion is not new. Some academics argue that the communication to the public right already includes this requirement. The European Copyright Society (ECS) claims that the communication to the public right includes a transmission requirement, meaning that only those communications that transmit a work (to the public) are subject to authorisation of the right holder.³⁹⁸ The ECS supports this argument by referring to the language and preparatory works of Article 3 of the InfoSoc Directive and Article 8 of the WCT.³⁹⁹ Recital 23 of the InfoSoc Directive, for example, explains that a communication includes “*any transmission*” of a

³⁹⁷ See in this regard *Svensson*.

³⁹⁸ European Copyright Society 2013, at 2-3.

³⁹⁹ See Recital 23 of the InfoSoc Directive; Explanatory Memorandum of the InfoSoc Directive, at 25; Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Geneva 1996, Vol 1, (Geneva: WIPO 1999), at 206.

work to the public. In light of this, the ECS is of the opinion that a hyperlink is not a communication to the public because there is no transmission of a work. It merely redirects an Internet user to a work.⁴⁰⁰

The transmission requirement could also be read in (older) case law of the CJEU with regard to the communication to the public right. For example, in *Premier League*, the CJEU held that “*the concept of communication must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used.*”⁴⁰¹ In *TVCatchup*, the CJEU explained that a transmission by technical means different from the original transmission, constitutes a communication.⁴⁰² Until *Svensson*, it could have been argued that the CJEU applied a transmission requirement for the communication to the public right because the “*intentional intervention*” criterion generally included a transmission or retransmission of a broadcasted work.⁴⁰³

However, in *Svensson*, the CJEU stated that a hyperlink is a communication because it makes a work available.⁴⁰⁴ No other requirement was necessary to constitute a communication. According to the CJEU, the provision of access is sufficient to constitute a communication and an actual transmission is not needed. Although this decision seems inconsistent with earlier case law, it is consistent with EU and international law. The EU’s communication to the public right includes a making available right, which is triggered once a work is made accessible to a public.⁴⁰⁵

The WCT and InfoSoc Directive not only protect the actual communication but also those acts that make a work available to the public.⁴⁰⁶ The latter encompasses a broader range of activities than solely transmissions of a work. The making available right protects the act preceding the transmission.⁴⁰⁷ Thus, the mere offering of a work is sufficient to constitute a communication to the public and a transmission requirement would not be in line with the WCT and InfoSoc Directive.⁴⁰⁸ Since this requirement does not satisfy the mandatory requirement of the benchmark test – conformity with international law – it is not necessary to assess the other conditions. This criterion is invalid and not a good alternative for the criterion of the ‘new public’.

6.1.2. ‘Different organisation’ criterion

Mainly focusing on the notions of ‘communication’ or ‘public’ seems to lead to outcomes that are inconsistent with the intentions of the EU legislator. Thus, a new criterion independent from the two notions should be found. The CJEU has derived the criterion of the ‘new public’ from Article 11bis(1)(ii) of the Berne Convention. However, as the international compliance analysis showed, this

⁴⁰⁰ European Copyright Society 2013, at 9-10.

⁴⁰¹ *Premier League*, at par 193 (emphasis added).

⁴⁰² *TVCatchup*, at par 24.

⁴⁰³ For example, in *SGAE, Premier League, Del Corso* and *PPI*.

⁴⁰⁴ *Svensson*, at par 19.

⁴⁰⁵ Tsoutsanis 2014, at 10.

⁴⁰⁶ WIPO, *Copyright in the digital environment: the WIPO Copyright TREATY (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, WIPO/CR/KRT/05/7, February 2005, at par 56 at 13; Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(97)0628, 21 January 1998, at 25-26.

⁴⁰⁷ Explanatory Memorandum of the InfoSoc Directive, at 26.

⁴⁰⁸ Tsoutsanis 2014, at 12-13; Depreeuw 2014, at 479.

article does not include a ‘new public’ test but only requires that a work is made available by ‘an organisation other than the original one’. If this criterion would be applied, the interpretation of the communication to the public right is in line with the principles of the Berne Convention. It seems logical to assess whether this requirement – ‘an organisation other than the original one’ – provides a good alternative for the controversial ‘new public’ criterion and complies with the other conditions of the benchmark test. This alternative will hereafter be referred to as the ‘different organisation’ criterion.

The ‘different organisation’ criterion requires that the organisation (or person) that communicates a work to the public is decisive and not the nature of the public or other technical conditions. This means that each primary communication to the public that is conducted by an organisation (or third party) other than the right holder requires authorisation of the right holder. Secondary communications to the public only require permission of the right holder if they are conducted by a ‘different organisation’, which is an organisation other than the one that conducted the initial communication. The initial organisation (that acquired permission from the right holder) is allowed to secondary communicate a work as far and as wide as it desires, provided that the authorisation is not subject to contractual restrictions. But any other organisation needs to obtain permission, even if the communication does not reach a new public. This requirement was created in 1948 during the Brussels Revision Conference to clarify what types of communications were subject to authorisation of the right holder and adopted in Article 11*bis* of the Berne Convention.

The criterion is a good alternative if the application leads to a high level of protection for the right holder, stimulates and sustains technological developments, strikes a fair balance between the right holder and the user and enhances legal certainty. These requirements are assessed on the basis of the hyperlink example. As mentioned above, the new criterion would only replace the ‘new public’ requirement. All other principles of the CJEU would remain intact. Following CJEU’s decision in *Svensson*, this means that Internet users can be regarded as a ‘public’ because they are an indeterminate and fairly large number of potential recipients. The offer of a work by means of a hyperlink falls within the scope of the making available right and constitutes a ‘communication’. The CJEU used the ‘new public’ test as the essential and decisive criterion to constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. In light of the ‘different organisation’ criterion, the crucial requirement to satisfy Article 3(1) is whether the hyperlink is made available by a different organisation.

Retriever Sverige, the organisation that made the copyright protected works available to the public by means of hyperlinks, is a different organisation than the Göteborgs-Posten, which was the organisation that conducted the primary communication on the Internet. In light of this, Retriever Sverige would need authorisation of the right holder to communicate the works to the public. This reasoning applies to all types of hyperlinks and there is no distinction between simple, deep,

embedded or framed links.⁴⁰⁹ This conclusion is applicable irrespective of the nature of the content that the hyperlink refers to. So, whether a hyperlink links to unlawful or lawful content is irrelevant. Consequently, the different organisation criterion makes all types of hyperlinks – lawful or unlawful – subject to authorisation of the right holder, provided that the hyperlink is conducted by another organisation (read: another website).

This result would have an adverse effect on the functioning of the Internet. Hyperlinks have become essential features of the Internet and without these links, the Internet would not be as compelling.⁴¹⁰ Thus, the criterion of the ‘different organisation’ has a chilling effect on the development of digital technologies. Furthermore, it does not strike a fair balance between right holders and users of a work. The rights and interests of right holders are extremely favoured because they have the ability to oppose against all unauthorised hyperlinks that redirect to their works. Internet users are no longer allowed to use any type of hyperlink without permission of the right holder, unless they fall within the scope of the exceptions and limitations. But these exceptions and limitations are applied in a strict manner and do not always restore the fair balance between right holder and users. A fair balance could, for example, have been struck if particular type of links, such as simple or deep hyperlinks, were excluded from copyright law. Since the ‘different organisation’ requirement makes all hyperlinks subject to copyright law, it is unlikely that the criterion satisfies the intentions of the EU legislator.

Although it may enhance legal certainty – because all hyperlinks are communications to the public and there is no distinction between lawful and unlawful content – this does not outweigh the extremely unfair balance between right holders and users and the adverse effect on digital development. The conclusion can be drawn that the requirement of the ‘different organisation’, although in line with international law, is inconsistent with the intentions of the legislator of the InfoSoc Directive.

6.2. A new method

So far, this thesis has shown that mainly focusing on a particular part of the communication to the public right, for example on the notion of ‘public’ or on the notion of ‘communication’, does not lead to a good interpretation of the communication to the public right in response to digital technologies. Therefore, it is important to assess the right as a whole. The right should not be subject to one decisive criterion, but assessed in its totality by applying an alternative interpretation method. This method may introduce different requirements or criteria, but there should not be one essential criterion in order to establish a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. The interpretation method has to take a normative approach and focus on the underlying purpose of the communication to the public right. What did the legislator want to protect with the communication to the public right? This purpose has to be the centre of the interpretation method.

⁴⁰⁹ See for more explanation on the different hyperlinks the next section on the economic interpretation method. *Svensson*, at par 29; *BestWater*.

⁴¹⁰ Strowel and Hanley 2009, at 71.

6.2.1. Economic interpretation method

The underlying purpose of the communication to the public right is the power to *exploit* a work in its immaterial form. The right protects the immaterial exploitation of a work.⁴¹¹ The right holder has to be able to control his or her work and to act against unauthorised exploitations. The exploitation has to be the centre of the communication to the public right. This interpretation method is supported by Depreeuw, who held that the current technical approach to the exclusive rights should be left behind and that the exploitation of the work has to be the reference to determine the scope of a right.⁴¹² An act has to be considered in light of the exploitation it enables. Although the technical features are important to qualify a particular act, the exploitation finally determines whether an act is an act of communication to the public or not.⁴¹³ Technical requirements are no longer decisive. This method interprets the communication to the public right in a technologically neutral manner and contributes to its sustainability in the digital society.

Hugenholtz states that a normative approach should be applied to interpret the communication to the public right. According to Hugenholtz, “[e]xisting rights and limitations are not merely technical, descriptive notions, but purpose-oriented; they must be applied and interpreted accordingly.”⁴¹⁴ He explains that the purpose of the communication to the public right is of economic nature. The right tries to protect right holders from acts of exploitation outside the private sphere.⁴¹⁵ In light of this, Hugenholtz stated in 1996 that not only actual acts of digital transmission to the public fall within the scope of the communication to the public right but also offering a protected work on the Internet can constitute a communication to the public. Such an offer to the public can have an adverse effect on the exploitation right of the right holder and should, therefore, be subject to copyright law.⁴¹⁶ Today, the offer would fall within the scope of the making available right. Legislators and scholars seem to ignore the economic purpose – i.e. the exploitation requirement – of the current exploitation rights. Hugenholtz argues that this economic perspective has to be reinstated in copyright law.⁴¹⁷

ALAI interprets the making available right broadly, thereby including every type of use of works of some economic relevance.⁴¹⁸ According to ALAI, there is no infringement as long as the right holder’s decision whether and under which conditions media content is made available on the Internet is not interfered with.⁴¹⁹ In other words, as long as the right holder has control over the work, the communication to the public right is not infringed. The ability to control a work is also an important element of the exploitation of a work. The right holder should be able to decide when, where and to which public a work is communicated. Only then the exclusivity of a work is protected which indirectly contributes to the (economic) benefit of the right holder.

⁴¹¹ Depreeuw 2014, at 511; Spoor 1996, at 71.

⁴¹² Depreeuw 2014, at 506-507.

⁴¹³ Depreeuw 2014, at 506.

⁴¹⁴ Hugenholtz 1996, at 87, also cited in Depreeuw 2014, at 510.

⁴¹⁵ Hugenholtz 1996, at 90.

⁴¹⁶ Hugenholtz 1996, at 90-91.

⁴¹⁷ Hugenholtz 1996, at 100.

⁴¹⁸ ALAI 2013, at 4; Depreeuw 2014, at 478.

⁴¹⁹ ALAI 2013, at 10.

The economic interpretation method derives from the underlying purpose of the exclusive (economic) rights in international and EU copyright law and is not new. The CJEU has – occasionally – applied this interpretation method in its case law on the communication to the public right.⁴²⁰ For example in *TVCatchup*, the CJEU held that each communication intended for a public that uses different technical means than the initial communication is a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. The fact that the public is not a new public is irrelevant. What matters is that there is a new act of exploitation that uses different technical conditions. These acts of exploitations are intended for a public, which makes the act a communication to the public. Each communication may have an adverse effect on the exploitation model of the right holder and should therefore be subject to authorisation of the right holder.

However, this economic interpretation method is left behind in *Svensson*. In this case, the CJEU applied a more technical approach to the communication to the public right, making the notion of a ‘new public’ subject to technical requirements instead of economic considerations. This thesis aims to restore EU copyright law by recommending that the CJEU goes back to its initial interpretation method and interpret the communication to the public in a normative and economic manner.

6.2.1.1. How to apply the method

The normative interpretation method (hereafter referred to as the ‘economic interpretation method’) of the communication to the public right requires that the right is examined on the basis exploitation it enables. It has to be interpreted in light of its economic purpose. A work is generally exploited when it generates or contributes to an economic benefit or counterpart. The exploitation should be interpreted broadly and relate to “*any form of presentation of a work that has the ability to generate an (economic) benefit.*”⁴²¹ The exploitation right provides the right holder the possibility to control a work, which directly or indirectly contributes to generate (economic) benefit for the right holder.⁴²²

It is not necessary that a right holder generates actual benefit to constitute an act of exploitation. Acts that do not attract (financial) benefit, such as peer-to-peer file-sharing platforms, can still be an act of exploitation and regarded as a communication to the public. The act prejudices the exclusivity of a work, which indirectly has a negative effect on the exploitation of a work. Relevant is the fact that the right holder no longer has to ability to control his or her work and no longer has the ability to decide when and how a work is communicated to the public. The economic interpretation method is, therefore, different from the CJEU’s “*not-irrelevant*” profit making nature requirement.⁴²³ Even if there is no financial gain, there can still be an act of exploitation. The interpretation method is much broader than the profit making nature requirement and includes all acts that compete directly and indirectly with the offer and availability of a right holder’s work. Nevertheless, as is explained below,

⁴²⁰ Guibault and Quintais 2014, at 16.

⁴²¹ Depreeuw 2014, at 517.

⁴²² Depreeuw 2014, at 516, 534; Rognstad also argues that the right holder should be able to control all reasonable exploitations, see Rognstad 2015, at 11-13.

⁴²³ *Premier League*, at par 204.

the profit making nature may be used as an indicator to assess whether a particular act on the Internet is a communication to the public.

The economic interpretation method is, in this thesis, assessed in light of communications to the public in the online world and not in light of analogous exploitations. Nevertheless, the underlying principle of analogous communications is similar. The method may also provide sufficient guidance for these communications to the public, however, this will not be further examined in this thesis.

In order to apply an economic interpretation method to online communications to the public, it is important to become familiar with different exploitation models on the Internet. A right holder can generate financial benefit from advertisements, which are the primary – and sometimes the only – source of income on the Internet.⁴²⁴ Another way to generate benefit from a work is to protect the exclusivity of a work by installing a subscription model or pay wall to restrict access to a work. The communication to the public right should protect these online exploitation models and provide help in case the model is impaired by a third party. Not all third party interferences with the exploitation model can, of course, be prohibited but only those that fall within the scope of the InfoSoc Directive and are not excluded in the exceptions and limitations.

The main question in the economic method is whether a particular act infringes the right holder's ability to exploit a work. If this is the case, it is likely that the act infringes one of the exclusive rights of the right holder. Then, it is important to assess whether the act is a communication to the public. Different indicators can be used to assess whether an act is one of exploitative nature and infringes the communication to the public right. These indicators are the 'non-public' and the 'profit making or profit losing' nature. These indicators are not cumulative, mandatory or exhaustive requirements but merely serve as an illustration and as guidance to assess whether an act is an act of exploitation.

6.2.1.1.1. The non-public

The public is the main indicator to assess whether a particular act on the Internet is an immaterial exploitation. Without a public, the immaterial exploitation rights of the right holder cannot be prejudiced. It is important to establish what constitutes a public and what not. Here, the economic interpretation method plays an important role. Ricketson and Ginsburg explain that the 'public' – within the meaning of the provisions in the Berne Convention – has to be interpreted in such a way that it does not prejudice the *exploitation* right of the author. The Berne Convention does not explain how the notion of 'public' has to be interpreted, thus Ricketson and Ginsburg applied an economic method to explain that it should be defined as those that are willing to pay to consume a work. The greater the public; the greater the impact on the author's ability to exploit a work. This indicates that there is a relation between the public and the right holder's exploitation right.⁴²⁵ Spoor, Verkade and

⁴²⁴ ALAI 2015, at 3.

⁴²⁵ Ricketson and Ginsburg 2006, at 704-705.

Visser also explain that the notion of ‘publicity’ is used as “*a tool to decide in some cases whether the exploitation is sufficiently important to justify the author’s control. To this extent, it is rather a teleological than a technical or grammatical criterion.*”⁴²⁶

The economic interpretation method requires that a distinction is made between the ‘public’ and the ‘non-public’. The ‘non-public’ does not affect the exploitation right of the right holder and should be distinguished in three categories, namely (1) private persons, (2) a closed circle of family and friends and (3) a *de minimis* public.⁴²⁷ In a dispute settlement case of the WTO between the US and EU, the panel report concluded that Article 11 and 11bis of the Berne Convention allow for a minor exceptions doctrine, i.e. a *de minimis* rule.⁴²⁸ This rule excludes communications to a minor public that is not a private public or a closed circle of family and friends. The public is so small that it does not affect the legitimate exploitation right of the right holder. In other words, it is *de minimis*. Settled principles of the CJEU can be used to assess whether a public is *de minimis*. For example, if a public is an indeterminate number of potential recipients and a fairly large number of people, the public is not a *de minimis* public and the communication is likely one of exploitative nature. An example of the *de minimis* rule on the Internet is if a work is communicated within the internal network of a company, only made available to a small number of employees. Although the employees do not fall within the scope of a closed circle of family and friends, it may be argued that they do not affect the exploitation right of the right holder and are *de minimis*.

The ‘public’ should be defined in a negative manner, including all groups of people that do not constitute a ‘non-public’. The current principles of the CJEU with regard to the notion of ‘public’ may serve as guidance to assess whether there is a ‘non-public’, but they are not binding.⁴²⁹ The CJEU has defined the public as an indeterminate number of potential recipients, which implies a fairly large number of people. However, a determinate number of people may still constitute a public. If a work is communicated to all subscribers of a website, the subscribers may be qualified as a determinate number of people. The fact that the ‘public’ comprises a fixed number of people does not affect the exploitative nature of the communication and can still inhibit the exploitation right of the right holder. Furthermore, a public does not always have to imply a fairly large number of people. As long as a small group of recipients does not fall within the scope of a closed circle of family or friends or constitute a *de minimis* public, a communication can infringe Article 3(1) of the InfoSoc Directive.

The notion of ‘public’ in the economic interpretation method does not provide room for a ‘new public’ requirement. Each time a work is communicated to a public, the exploitation right of the right holder

⁴²⁶ Spoor, Verkade and Visser 2011, at 178, also cited in Depreeuw 2014, at 467.

⁴²⁷ Depreeuw 2014, at 340.

⁴²⁸ Panel Report 15 June 2000, WT/DS160/R (*United States – Section 110(5) of the US Copyright Act*), available at https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (accessed 12 October 2015).

⁴²⁹ An IViR study on recasting copyright law also explained that the current principles with regard to the notion of ‘public’ are not sufficient but should be focused more on commercial considerations, see Hugenholtz, van Eechoud, van Gompel and Helberger 2006, at 57.

may be affected, even if the public already received a work in another way. There is no distinction between the public in a primary and secondary communication. As long as the public is not qualified as a ‘non-public’, a public can have an exploitative character. This economic interpretation of the notion of ‘public’ is consistent with the ‘non-exhaustion’ principle in the InfoSoc Directive. *Any* immaterial exploitation, within – of course – the limits of the law, should be subject to the right holder’s control.⁴³⁰ Thus, the economic interpretation method seems to be consistent with EU copyright law.

6.2.1.1.2. Profit making or profit losing nature

Another indicator to determine the exploitative nature of an act is the profit making or profit losing nature. On the one hand, if another organisation gains profit from the presentation of a work in the online world, this can indicate that the act is one of exploitative nature. On the other hand, if the right holder misses out on (financial) gain, this may similarly indicate that an act is an act of exploitation for which authorisation is required. In this regard, knowledge of different online exploitation models can be of help. For example, if the unauthorised presentation of a work by a third party leads to a decrease of advertisement income or to a decrease of subscribers, this may show that the act is a communication to the public. Although actual benefit or actual loss of benefit is not a requirement to constitute an act of exploitation, it can serve as an indicator that a particular act on the Internet is one of exploitative nature and falls within the scope of Article 3(1) of the InfoSoc Directive.

It may be argued that the different indicators do not enhance legal certainty because it is unclear which indicators apply and are decisive in a particular case. However, if the interpretation method is applied in a coherent and consistent manner, mainly focusing on the exploitative character of an online act, the method can contribute to legal certainty. The CJEU should assess each time whether a particular act directly or indirectly inhibits the ability to generate benefit. Such a consistent application can strengthen legal certainty. Also, the interpretation method is not subject to technological requirements, which makes the method sustainable to digital developments. This increases legal certainty with regard to the application of the communication to the public right in response to future digital exploitations.

So far, the economic interpretation method seems to be the best alternative to replace the criterion of the ‘new public’. The hyperlink example is used to assess whether the method is also applicable in practice and satisfies the benchmark test.

6.2.1.1.2. Economic interpretation method and hyperlinks

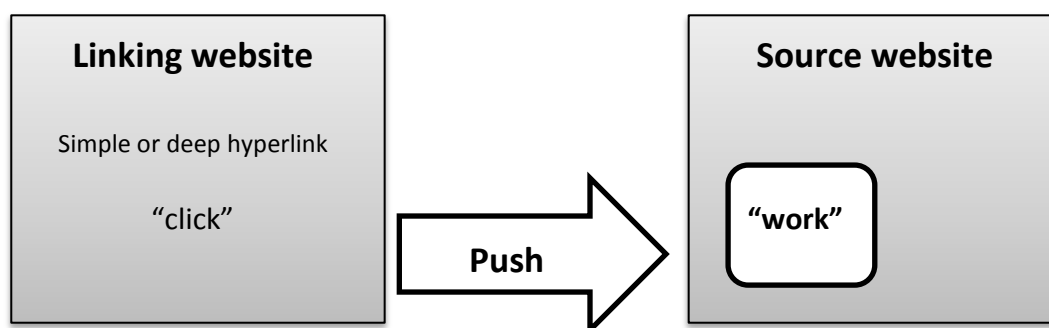
Hyperlinks have become an important digital issue of the CJEU with regard to the communication to the public right.⁴³¹ The main question in the hyperlink cases was whether a hyperlink to a protected

⁴³⁰ Article 3(3) of the InfoSoc Directive; *Coditel I*.

⁴³¹ This importance is also reflected in a great amount of literature on this issue, see for example European Copyright Society 2013; ALAI 2013; Tsoutsanis 2014.

work constitutes a communication to the public. The expectations of the *Svensson* case were high, however, the decision of the CJEU was disappointing and lacked a thorough analysis of the communication to the public right. The CJEU held that hyperlinks are a communication to the public because they make a work available to a public. If this public is a ‘new public’, the hyperlink may constitute a copyright infringement. This thesis has shown that the decision in *Svensson* is in conflict with international copyright law and inconsistent with the intentions of the EU legislator. This paragraph analyses whether the economic interpretation method can be applied as an alternative method to resolve the issue of hyperlinks in copyright law and provide an outcome that is consistent with the intentions of the legislator of the InfoSoc Directive.

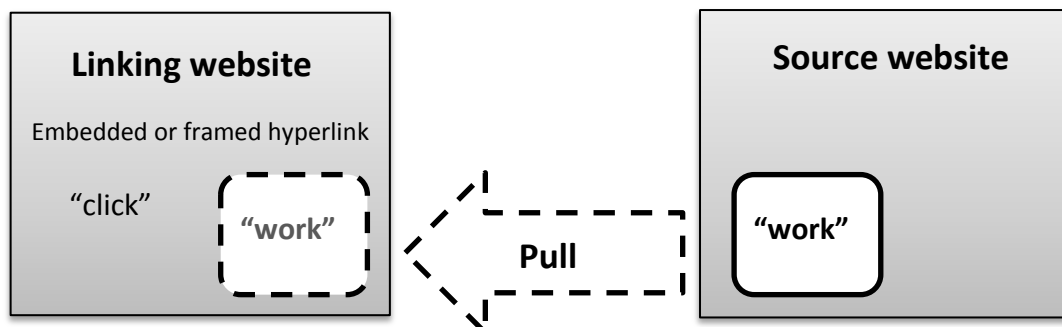
In order to apply the economic interpretation method to the issue of hyperlinks, first, some technical features of different types of hyperlinks have to be explained.⁴³² It is important to make a distinction between, on the one hand, simple and deep hyperlinks, and on the other hand, embedded and framed hyperlinks. Simple and deep hyperlinks are clickable pointers that redirect (‘push’) the user to another website (the source website). The source website opens in a new window, so it is clear for the Internet user that it is pushed to another website. A simple link redirects the user to the homepage of the source website. Deep links forward the user to a specific sub-page of the source website.



Embedded and framed links, on the contrary, give users the impression that the link appears on the same website (the linking website). With an embedded link, content from the source website is ‘pulled’ and embedded in the linking website. A framed link shows the content from the source website within a frame of the linking website, such as a pop-up window. With embedded and framed linking, the user stays on the linking website and content is retrieved (pulled) from the source website, so-called ‘pull links’. In a simple and deep link, the user leaves the linking website and is redirected to the source website, hereafter referred to as ‘push links’.⁴³³ This distinction between push and pull links is important for the qualification of hyperlinks in copyright law.

⁴³² For a technical explanation, see <http://www.w3.org/TR/html401/struct/links.html> and http://www.w3.org/MarkUp/html-spec/html-spec_7.html (accessed 9 November 2015). The following articles are also used to explain the different types of hyperlinks: Guibault and Quintais 2014, at 17; Tsoutsanis 2014, at 5-6; Arezzo 2014, at 535-536; Strowel and Hanley 2009, at 72-74.

⁴³³ Guibault and Quintais 2014, at 17; Tsoutsanis 2014, at 5-6; Arezzo 2014, at 535-536; Strowel and Hanley 2009, at 72-74.



The economic interpretation method requires that the communication to the public right is assessed in light of the exploitation it enables. With regard to hyperlinks, the main question is whether a link prejudices the right holder's exploitation model on the Internet and affect – directly or indirectly – the right holder's ability to generate (economic) benefit.

First of all, it is important to establish whether a hyperlink to a protected work reaches a 'public'. Hyperlinks are available to all visitors of a website. Although the Internet users may click on a hyperlink in private, this does not detract from the fact that a large number of people can have access to the link. It is difficult to determine how much Internet users will actually click on the link, but it is clear that an indeterminate number of people, which is likely a fairly large group of people, have access to the link. Thus, the Internet users cannot be regarded as a *de minimis* public. Neither can they be qualified as a private public or fall within the scope of a closed circle of family and friends. In light of this, the visitors of a website should be regarded as a 'public' because they are not a 'non-public'. This conclusion applies to both pull and push links. One indicator is satisfied, however, this does not imply that a hyperlink has an exploitative character. The indicator only shows that there *could* be a communication to the public because there is an exploitation public.

Secondly, if the hyperlink generates benefit for a third party or if it contributes to (economic) losses for the right holder, the second indicator is satisfied. Here, the distinction between pull and push links becomes important. Push links (deep and simple hyperlinks) should not be regarded as a communication to the public because they do not have an exploitative character. With a push link, an Internet user is redirected to the website on which the right holder – directly or with his consent – exploits a work (the source website). The linking website does not compete with the source website, but merely pushes Internet users to the website on which the copyright protected work is communicated. The source website is the website that exploits the work and has installed online exploitation models such as advertisements. The right holder does not lose any (economic) benefit from the hyperlink because in the end, the work can only be consumed on the source website on which the exploitation model is installed. Thus, push hyperlinks do not affect the exploitation right of the right holder and cannot be regarded as a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.⁴³⁴

⁴³⁴ Depreeuw 2014, at 466.

This conclusion is based on the assumption that the right holder gains benefit from the publication of the work on the source website, i.e. that the work is lawful and made available with consent of the right holder. However, even if a push link redirects the user to unlawful content, the hyperlink should not be regarded as a communication to the public. It is clear that the publication of the work on the source website (without authorisation of the right holder) is an infringement. However, the hyperlink does not contribute to this unlawful exploitation. The hyperlink merely redirects a user and this does not have an effect on the source website's ability to unlawfully generate benefit from the exploitation. Thus, the hyperlink is not of exploitative nature.

A rather broad view of the economic interpretation method would suggest that a push link to unlawful content is an act that inhibits the right holder's exploitation right because it leads to more exposure of the work. The hyperlink indirectly contributes to the unlawful exploitation and increases the number of visitors of the source website. However, this would affect legal certainty in the online world because simple and deep hyperlinks to unlawful content would become subject to copyright law. It is very difficult for a reasonable Internet user to assess whether content is lawful or not. Furthermore, such a broad interpretation drastically expands the communication to the public right to secondary liability acts. The economic interpretation method should not be used to broaden the scope of copyright law and make secondary liability acts subject to primary liability rules.⁴³⁵ This argument is further explained in section 6.3.2. Thus, the strict view of the economic interpretation is recommended, which excludes push links in general from the communication to the public right.

Pull hyperlinks should, according to an economic interpretation method, be treated differently from push hyperlinks. Pull links, such as embedded and framed links, do not redirect the Internet user to the source website on which a work is exploited but show a link within its own website, with its own advertisements or subscribers. These models compete with the advertisements and subscribers on the source website. Thus, the hyperlink competes with the original exploitation model. Internet users are able to consume a work on a different website, using a different exploitation model. Although the work is retrieved from the source website, this website no longer enjoys the benefits from the communication of the work to the public. Therefore, pull links are generally of exploitative nature and may constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.

This conclusion can similarly be applied to pull hyperlinks to unlawful content because the linking website makes profit from the hyperlink to unlawful content. Internet users do not have to leave a website but are able to receive an unlawful published work on the linking page that has installed its own exploitation model. The work is, thus, exploited by two different exploitation models, namely on the source and on the linking website. As a result, embedded and framed hyperlinks to unlawful content have an exploitative nature and should be subject to authorisation of the right holder.

⁴³⁵ Depreeuw 2014, at 482.

Note, however, that not all embedded and framed hyperlinks are directly a copyright infringement. A pull hyperlink is only an infringement if it is made available to the public without authorisation of the right holder. Some argue that freely available works, made available with the permission of the right holder, do not need authorisation of the right holder because there is implied consent for hyperlinks.⁴³⁶ This view is based on the fact that the Internet is an open and accessible network in which hyperlinks are common features and important for the normal infrastructure of the Internet.⁴³⁷ If a right holder communicates a work online, without any restrictions, the right holder indirectly consents to embedded and framed hyperlinks. The right holder should install (technical) restrictions to prevent his or her work against pull hyperlinks.

The concept of implied consent is similarly applied to right holders that do not want their works to be indexed by Google.⁴³⁸ Right holders can install a security code in the source code of their works so that Google is not able to index the work in their search engine. If such a code is not installed, Google can reasonably expect that it is allowed to index the work. Such an implied concept regime seems favourable for the functioning of the Internet and may enhance legal certainty. However, consent is a matter of contract law and subject to review of national courts. Thus, whether implied consent would apply and limit the scope of the communication to the public right is a matter of national law to determine and will not be further discussed in this paper.⁴³⁹

6.2.1.3. Consistency with intentions of legislator

According to the economic interpretation method, simple and deep links do not constitute a communication to the public but embedded and framed links can. If this outcome is consistent with the intentions of the legislator, i.e. if it satisfies the five requirements of the benchmark test, the economic interpretation method can be regarded as a good method to interpret the communication to the public right in the online world.

Firstly, the economic interpretation method is consistent with international copyright law because it is based on the underlying purpose of the communication to the public right. The general objective to protect public performances and communications to the public in the Berne Convention was to give the author the ability to exploit his or her work in an immaterial form. Secondly, the method provides a high level of protection for the right holder because it protects all online acts that prejudice the right holder's immaterial exploitation right, within the limits set by law. Other acts are not worth protecting because they will not have a negative effect on the rights and interests of the right holder.

Further, if the method is applied in a coherent and consistent manner, the method can enhance legal certainty. It is not necessary to make a distinction between hyperlinks to lawful and unlawful content.

⁴³⁶ ALAI argues that national courts have to decide whether, in a particular case, consent of the right holder may be implied. See ALAI 2013, last paragraph; See also ALAI 2015, at 2-3; Pihlajarinne 2012, at 701.

⁴³⁷ Pihlajarinne 2012, at 702.

⁴³⁸ Implied consent is for example used in a US case, *Field v Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006), available at <http://www.yale.edu/lawweb/jbalkin/telecom/fieldvgoogle.pdf> (accessed 12 October 2015); See also Strowel and Hanley 2009, at 87-88.

⁴³⁹ For a more in-depth analysis of implied consent in copyright law see, Pihlajarinne 2012, at 701; Fischman Afori 2008.

The exploitative nature of the hyperlink is decisive. Internet users do not have to verify whether a particular work is made available with consent of the right holder, or whether they should reasonably be aware of the unlawful nature of the work. The method is not subject to a subjective element such as the ‘intention’ of the right holder or the ‘reasonable knowledge’ of the Internet user. An objective test is applied, relating to the exploitation right of the right holder, and this certainly increases legal certainty in the online world.

As a fourth requirement, the economic interpretation method should strike a fair balance between the rights and interests of the right holder and Internet users. This will likely be the case because not all hyperlinks are protected under copyright law. Simple and deep links are still free to use, even if such links redirect to unlawful content. The rights of the right holder are protected to the extent that direct or indirect harm is done to the exploitation right of the right holder. If there is no harm to the exploitation right, then there is no communication to the public. A fair balance is struck between the rights and interests of the right holders and users of a work.

A more difficult question is whether this method stimulates and sustains digital development. The latter is most likely satisfied because the method is applied in a technologically neutral manner. The main issue is whether this method provides room for digital developments. As mentioned earlier, it is important that the Internet is able to function in a sufficient manner. Hyperlinks are essential features for the functioning of the World Wide Web and are intimately bound to the conception of the Internet as a network.⁴⁴⁰ When embedded and framed hyperlinks are subject to copyright law, it can be argued that this has an adverse effect on the functioning of the Internet and limits technological development.

However, the protection of the right holder and the stimulation of digital development cannot both be applied in an absolute manner. A middle way has to be found, which is the economic interpretation method. Not all types of hyperlinks are prohibited – the most common ones are free to use – and the right holder’s exploitation right is still protected. Thus, this method is the best possible solution for the interpretation of the communication to the public right in response to digital developments and is overall consistent with the intentions of the EU legislator.

The example of hyperlinks has shown that the economic interpretation method leads to an outcome that is consistent with the intentions of the EU legislator. It is important to note that this method is not limited to hyperlinks but can similarly be applied to all online communications to the public.

6.3. Conclusion on the alternative solution

The second part of this thesis has demonstrated that it is important to assess the communication to the public right as a whole and not merely focus on one particular requirement. The criterion of the ‘new public’ showed that merely focusing on the notion of ‘public’ is not sufficient. Neither is a focus on the ‘communication’ notion by introducing a ‘transmission’ requirement. The creation of a new criterion (a ‘different organisation’ criterion), independent from the two notions, did likewise not

⁴⁴⁰ European Copyright Society 2013, at 1.

result in an adequate solution. Thus, the communication to the public right has to be interpreted in its totality, focusing on the underlying purpose, namely the exploitation of the right.

The two criteria and the interpretation method have been analysed in light of the benchmark test, which reflects the intentions of the legislator of the InfoSoc Directive. The table below shows how the three alternatives have scored on the test. The ‘new public’ criterion is also included.

	‘New public’ criterion	‘Different organisation’ criterion	‘Transmission’ criterion	Economic interpretation method
Compliance with international law	NO	Yes	NO (in conflict with making available right)	Yes
High level of protection	No	Yes	-	Yes
Stimulate and sustain technological developments	Yes (probably)	No	-	Stimulating: Yes/No Sustainable: Yes
Fair balance	No	NO	-	Yes
Legal certainty	No	Yes	-	Yes
Score:	(4) Worst	(2) Bad	(3) Worse	(1) Best

The table clearly demonstrates that the economic interpretation method is the best alternative for the ‘new public’ test. Focusing on the exploitation of a communication to the public leads to an outcome consistent with international law and consistent with the intentions of the EU legislator. According to the table, one requirement is not fully satisfied, namely the stimulation of digital development. As the hyperlink example has shown, the economic interpretation method makes pull hyperlinks, such as embedded and framed links, subject to copyright law. Hyperlinks are important for the functioning of the Internet. Thus, making them subject to a primary copyright liability regime may have a chilling effect on the functioning of the Internet and on future digital technologies. In light of this, it may be argued that all hyperlinks should fall outside the scope of copyright law. However, such an outcome would have an adverse effect on the level of protection of the right holder and would not lead to a fair balance between the rights and interests of right holder and users. As a result, the economic interpretation method is the best alternative and strikes a fair balance between all competing interests.

Moreover, pull hyperlinks may fall within the scope of the communication to the public right, this does not imply that all embedded and framed hyperlinks are copyright infringements and prohibited. As mentioned above, the concept of ‘implied consent’ may apply when a right holder freely makes a work available on the Internet, without technical restrictions. Whether there is room for an implied consent doctrine requires further research and falls outside the scope of this thesis. For now, national courts have to decide in a particular case whether an embedded or framed hyperlink constitutes an unlawful communication to the public.

6.3.1. A solution for hyperlinks and *Britt Dekker*

One of the issues regarding the ‘new public’ criterion is amongst others that it does not provide clarity and legal certainty with regard to new questions in the hyperlink debate. At the moment, the debate is overtaken by the question whether a hyperlink to unlawful content is a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. This question is referred to the CJEU in the *Britt Dekker* case. This paragraph explains how the CJEU should answer the preliminary question in light of the economic interpretation method.

The economic interpretation method makes a distinction between push (simple and deep) hyperlinks and pull (embedded and framed) hyperlinks. Push hyperlinks are not subject to copyright law because they do not enable an act of exploitation. Pull hyperlinks, however, may constitute a communication to the public because they can have a negative effect on the exploitation right of the right holder, for example due to loss of advertisement income. This outcome is not affected by the nature of the content. Thus, whether a hyperlinks refers to lawful or unlawful content is irrelevant.

In *Britt Dekker*, Geen Stijl (the linking website) published a deep link to an Australian website (source website) that made photographs available without consent of Sanoma the right holder. The main question in this case is whether a hyperlink to unlawful content is a communication to the public. In light of the economic interpretation method, the answer is simple. No. A deep hyperlink does not constitute a communication to the public because it does not inhibit the right holder’s exploitation right.

This answer may seem unsatisfactory because Geen Stijl deliberately made the unlawful published photographs available to a large number of people. However, the fact that Geen Stijl does not constitute a communication to the public does not mean that its conduct is not subject to other redress regimes such as tort law. It could be argued that Geen Stijl is indirectly liable for copyright infringement.

The CJEU should clearly make a distinction between primary acts that fall within the scope of copyright law and secondary acts that do not fall within the scope of copyright law, but may be subject to other national tort regimes.⁴⁴¹ Push hyperlinks should not constitute a primary act of copyright infringement, not even if the linking website (such as Geen Stijl) deliberately links to unlawful

⁴⁴¹ Depreeuw 2014, at 482.

content. This conduct has to be assessed in light of secondary liability regimes, which are not harmonised in the EU legal framework. This lack of harmonisation may be the underlying problem and one of the reasons why the CJEU on occasion has tried to broaden the scope of the communication to the public right. The issue with regard to secondary liability for copyright law is explained in the next paragraph.

6.3.2. Secondary liability

The InfoSoc Directive harmonises the communication to the public right in national copyright laws of Member States of the EU. This harmonisation contributes to legal certainty, which is an important objective of the directive. National tort laws, on the contrary, differ majorly amongst Member States and are not harmonised in the EU. Different tort regimes may affect legal certainty and run counter to the objectives of the InfoSoc Directive. Therefore, the CJEU is very eager to expand the provisions of the InfoSoc Directive to all issues that more or less relate to copyright law. While national courts would probably protect a particular act under tort laws, the CJEU tries to let as much acts as possible fall within the scope of copyright law.⁴⁴²

However, as the ‘new public’ criterion showed, the expansions of the scope of the communication to the public right leads to unsatisfactory and questionable outcomes. The CJEU tries to make secondary acts of liability – such as simple and deep hyperlinks – subject to a primary liability regime, i.e. copyright law. This may enhance harmonisation amongst Member States, however, it contradicts the essence of copyright law and in particular the communication to the public right. Legal certainty should not be the main incentive of the CJEU to qualify a particular act as a communication to the public, this should be the exploitation that the act enables. Harmonisation is important but not if this leads to an overly broad communication to the public right. A better solution would be to harmonise secondary liability for copyright infringements on the EU level.

This is easier said than done. There is very limited EU law on secondary liability. With regard to online intermediaries, such as Internet Service Providers (ISPs), secondary liability rules are regulated in the e-Commerce Directive. This Directive protects in Articles 12 to 15 so-called ‘safe harbours’ for intermediaries that merely transmit, store or host online content, without having actual knowledge of the specific content. For example, a hosting provider is not liable for unlawful published works on its website if it does not have, or reasonably should not have, knowledge of the unlawful character and acts expeditiously to remove the content after it becomes aware of it. Furthermore, Recital 27 of the InfoSoc Directive explains that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. According to this recital, ISPs or other online intermediaries can

⁴⁴² This is for example the case in the *Svensson* case, in which the CJEU determined that all types of hyperlinks fall within the scope of copyright law. Depreeuw argues that in *Svensson*, the CJEU could have applied different rules, “*rather than stretching the right of communication to the public*”. “*It may be incidentally observed that not all linking issues must be dealt with under copyright: a coherent notion of the communication to the public may have a narrower scope and exclude some “uses” of a work*”, but the right holder may have other legal grounds to put an end to the harmful effects of those hyperlinks (e.g. general liability rules).” See Depreeuw, at 482.

indemnify themselves from copyright liability unless they do more than, for example, providing access to the Internet.

As opposed to the US, EU law does not have a safe harbour provision for hyperlinking. Paragraph 512(d) of the US Online Copyright Infringement Liability Limitation Act (OCILLA) provides a safe harbour for “*Information Location Tools*”.⁴⁴³ According to this provision, online service providers are not liable for an act of copyright infringement when they link users to an online location that stores unlawful content, provided that the online service provider is not aware of it and acts promptly to disable the hyperlink once it becomes aware of the unlawful character. This safe harbour is mainly created to protect search engines such as Google and Yahoo. It is not available to individual Internet users but only to online service providers. Thus, the scope of this safe harbour is limited.

The safe harbour principles of the e-Commerce Directive and Recital 27 of the InfoSoc Directive show that there is very limited EU law with regard to secondary liability for copyright infringements. One of the reasons is the lack of consensus amongst Member States with regard to secondary liability.⁴⁴⁴ Some Member States, such as the UK, have extensive secondary liability provisions in their copyright framework, while others, such as Germany and the Netherlands, rely on general tort law.⁴⁴⁵ National tort laws show (major) differences and these differences make it difficult to reach consensus with regard to an EU wide secondary liability regime.

However, such a harmonised regime is not unfeasible. There are studies that show that despite the differences of national laws, there are common trends with regard to the application of secondary liability in copyright law.⁴⁴⁶ These common trends could be the basis for a harmonised legal framework. The creation of an EU secondary liability framework for copyright infringements provides much more research. As interesting as it sounds, such research falls outside the scope of this thesis.

For this thesis, it is important to keep in mind that copyright law has to protect direct copyright infringements. Secondary liability acts should not be subject to the communication to the public right. The exploitative nature and economic rationale of an act is important to constitute a communication to the public. Legal certainty or other objectives should not be used to overly broaden the communication to the public right within the meaning of Article 3(1) of the InfoSoc Directive. Therefore, the CJEU should not make push hyperlinks subject to copyright law.

⁴⁴³ Paragraph 512(d) of the Online Copyright Infringement Liability Limitation Act (OCILLA), available at <https://www.law.cornell.edu/uscode/text/17/512> (accessed 7 October 2015).

⁴⁴⁴ Ohly 2009, at 235.

⁴⁴⁵ Ohly 2009, at 234; Angelopoulos 2013.

⁴⁴⁶ Angelopoulos 2013, at 19; Leistner 2014.

7. Conclusion: a recommendation for the CJEU

This thesis aims to assess the legality of the criterion of the ‘new public’ in the communication to the public right on the basis of an in-depth analysis of EU and international copyright law. The analysis showed that the criterion is inconsistent with EU law and in conflict with international copyright law and should be rejected. The second part of this thesis focussed on finding a new criterion or interpretation method in order to make the communication to the public right, as laid down in Article 3(1) of the InfoSoc Directive, applicable on the Internet.

The EU and international analysis showed that there are multiple reasons to reject the ‘new public’ criterion. To begin with, the criterion is incorporated in EU law on the basis of a misinterpretation of a non-binding guide that explains the provisions of the Berne Convention. According to the CJEU, the ‘new public’ test derives from Article 11*bis* of the Berne Convention. However, a historical analysis of this right confirmed that Article 11*bis* does not provide a legal basis to adopt such a criterion. In 1948 during the Brussels Revision Conference of the Berne Convention, the criterion of the ‘new public’ was explicitly rejected because it was very difficult to make a functional distinction between an ‘old’ and a ‘new’ public. It was replaced with a more practical requirement, namely the requirement that a work should be communicated to a public by ‘an organisation other than the original one’.

A handful of national court decisions confirmed that the right of communication to the public, as laid down in the Berne Convention, does not provide a legal basis to incorporate a ‘new public’ requirement. The Supreme Courts in Belgium, the Netherlands and Switzerland have ruled that the only conditions to invoke Article 11*bis*(1)(ii) are that a communication is made (1) publicly, and (2) by an organisation other than the original one. There is no room for other requirements. These decisions serve as authoritative interpretations of the provisions of the Berne Convention and can be used to confirm that the ‘new public’ test is in conflict with the Berne Convention. Although these decisions relate to Article 11*bis*(1)(ii), which protects retransmissions of broadcasted works, the conclusion can be extended to the general right of communication to the public. In practice, it is very difficult to make a functional distinction between an ‘old’ and a ‘new’ public, irrespective of the type of communication. Especially in the information society, where it is rather easy to reach a large and world-wide public, such a distinction is difficult to make and would only detract from the author’s exploitation right.

Another reason to reject the criterion is that it is inconsistent with an established EU principle, namely the ‘non-exhaustion’ principle, laid down in Article 3(3) of the InfoSoc Directive. The CJEU and EU legislators have stated that the communication to the public right is not subject to exhaustion. This thesis, however, showed that on the Internet the criterion of the ‘new public’ has the same effect and the same underlying purpose as the exhaustion principle in the distribution right. The CJEU has held that all Internet users should be regarded as (potential) recipients to freely available online works. As a result, it is not possible to further exploit a work on the Internet once the right holder made it freely available online. The right holder is no longer able to exploit *any* immaterial exploitation on the Internet and this contravenes Article 3(3) of the InfoSoc Directive.

Thus, taking into account the misinterpretation of the criterion in EU law, the explicit rejection during the Brussels Revision Conference of 1948, the decisions of the national supreme courts on the interpretation of Article 11*bis*(1)(ii) of the Berne Convention and the ‘non-exhaustion’ principle in Article 3(3) of the InfoSoc Directive, the conclusion in this thesis is that the criterion of the ‘new public’ is inconsistent with EU law and in conflict with international copyright law.

The second part of this thesis focussed on finding a new criterion or interpretation method for the communication to the public right in response to digital technologies. Two new criteria and one interpretation method were analysed in light of a ‘benchmark test’, which reflects the intentions of the legislator of the InfoSoc Directive. The test includes five requirements, namely (1) consistency with international law, (2) a high level of protection for the right holder, (3) stimulate and sustain digital development, (4) a fair balance between right holders and users of a work and (5) legal certainty.

The benchmark test showed that the economic interpretation method is the best alternative for the ‘new public’ criterion. This method requires that the communication to the public right is interpreted in a normative manner, in light of its underlying purpose, namely the exploitation that an act enables. If a communication of a work on the Internet inhibits the right holder’s ability to exploit his or her work, for example by loss of advertisement income, the communication should be regarded as a communication to the public and be subject to authorisation. If an act does not prejudice the right holder’s exploitation right, the act should not fall within the scope of copyright law. Such an act may be subject to other legal regimes, such as tort law, but copyright law should not be available for non-exploitative online communications.

This method is illustrated on the basis of the hyperlink example, which is an important online issue with which the CJEU seems to struggle. The method requires that a distinction is made between push (simple and deep) hyperlinks and pull (embedded and framed) hyperlinks. Push hyperlinks do not affect a right holder’s ability to exploit a work because Internet users are merely redirected to the original website on which the work is communicated and exploited. Pull links, on the contrary, retrieve a work from the source website and show it as if it is part of the linking website. Each website can install its own exploitation model. These models compete with one another and can affect the exploitation of the right holder. Therefore, pull hyperlinks should be regarded as communications to the public. Accordingly, embedded and framed hyperlinks can constitute a communication to the public but simple and deep hyperlinks are not subject to authorisation of the right holder and fall outside the scope of copyright law. This result is in line with the benchmark test and leads to an outcome that is consistent with the intentions of the EU legislator.

The economic interpretation method should restore EU copyright law and has to replace the controversial ‘new public’ test. But how can this result be achieved? This is where the CJEU plays an important role. This thesis recommends that the CJEU rejects the criterion of the ‘new public’ and

interprets the communication to the public right, within the meaning of Article 3(1) of the InfoSoc Directive, on the basis of the economic interpretation method.

It is important to note that the economic interpretation method is not new and does not require rigorous changes in established copyright principles. For example, in *TVCatchup* the CJEU already applied an economic interpretation method. In this case, economic considerations played a role to limit the scope of the ‘new public’ requirement because it would have adverse effects on the right holder’s exploitation right. In addition, although some principles of the CJEU need to change, such as the notion of ‘public’, established principles of the CJEU still play a role in the economic interpretation method. For example, the notion of ‘public’ should be defined in a negative manner, including all groups of people that do not constitute a ‘non-public’. The CJEU’s definition of ‘an indeterminate number of potential recipients, implying a fairly large number of people’ can be used to explain what *not* constitutes a ‘non-public’. This example shows that the current principles of the CJEU align with the economic interpretation method and the application of the method does not require drastic changes.

The first case in which the CJEU should apply this new method is the pending *Britt Dekker* case. This case can serve as a landmark case in which the CJEU makes an effort to restore EU copyright law. The *Britt Dekker* case concerns deep hyperlinks to unlawful published photographs on an Australian website. In light of the economic interpretation method, the CJEU should rule that the hyperlink does not constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. Deep hyperlinks do not inhibit a right holder’s exploitation right and are not subject to copyright law. The hyperlink may constitute an act liable under national tort law. However, it is a matter for national law to decide whether the act falls within the scope of secondary liability for copyright infringement. The CJEU is not competent to rule on secondary liability matters.

It may be naïve to think that the CJEU will publicly reject the criterion of the ‘new public’ and will state that earlier case law is based on an incorrect interpretation of the communication to the public right. So far, the CJEU has not admitted an erroneous interpretation of EU law. It is more likely that the CJEU, step by step, moves away from the incorrect interpretation and focuses on a new one. This means that the CJEU will gradually abandon the ‘new public’ test and will focus more and more on the economic interpretation method. This can for example be accomplished by referring to case law in which economic considerations play a role, such as *TVCatchup*, and by ignoring case law in which the ‘new public’ requirement was decisive, such as *Svensson*. This development takes more time but in the end it can lead to a correct interpretation of Article 3(1) of the InfoSoc Directive. Taking into account the increasing number of referrals on the interpretation of the communication to the public right, the CJEU will likely have many opportunities to abandon the ‘new public’ test and restore EU copyright law.

8. Bibliography

Literature

ALAI 2013

ALAI Executive Committee, “Report and opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet”, adopted unanimously by the Executive Committee on 16 September 2013, available at <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf> (accessed 11 August 2015).

ALAI 2014

ALAI Executive Committee, “Opinion on the criterion “New Public”, developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public”, proposed to the Executive Committee and adopted at its meeting, 17 September 2014, available at <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf> (accessed 11 August 2015).

ALAI 2015

ALAI Executive Committee, “Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the Internet”, adopted by the Executive Committee on 17 June 2015, available at <http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf> (accessed 12 October 2015).

Angelopoulos 2013

Christina Angelopoulos, “Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe”, *Intellectual Property Quarterly*, 2013, 3, at 253-274, Amsterdam Law School Research Paper No. 2013-72, Institute for Information Law Research Paper No. 2013-11, available at <http://ssrn.com/abstract=2360997> (accessed 12 October 2015).

Arezzo 2014

Emanuela Arezzo, “Hyperlinks and making available right in the European Union – What Future for the Internet after Svensson?”, *IIC* 2014, 45(5), at 524-555.

Baggs and Hansson 2013 (note)

Simon Baggs & Sunniva Hansson, “What’s the catch? The CJEU judgment in *ITV v TVCatchup*”, *European Intellectual Property Review* 2013, 35(6), at 363-365 (note).

Baker 2014 (note)

Alan Baker, “EU Copyright Directive: Can a Hyperlink be a “Communication to the Public”?”, *Computer and Telecommunications Law Review* 2014, at 100-103 (note).

Bateman 2007 (note)

Anne Bateman, “The use of Televisions in Hotel Rooms”, *European Intellectual Property Review* 2007, 1, at 22-26 (note).

Beer and Burri 2013

Jeremy de Beer & Mira Burri, “Transatlantic Copyright Comparisons: Making available via Hyperlinks in the European Union and Canada”, working paper no 2013/22, August 2013, available at: http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp3/Making_Available_via_Hyperlinking.pdf (accessed 12 October 2015).

Bonadio and Santo 2012 (note)

Enrico Bonadio & Mauro Santo, ““Communication to the public” in FAPL v QC Leisure and Murphy v Media Protection Services (C-403/08)”, *European Intellectual Property Review* 2012, 34(4), at 277-279 (note).

Bulger 2007 (note)

Lianne Bulger, “Are works communicated through television sets in hotel rooms a ‘communication to the public’?”, *Journal of Intellectual Property Law & Practice* 2007, 2 (5), at 281-283 (note).

Curry 2013 (note)

Josephine Curry, “‘Communication to the public’ and online retransmission of programmes”, *Journal of Intellectual Property Law & Practice* 2013, 8(8), at 594-596 (note).

De Bruin 2014 (note)

Roeland de Bruin, “Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB”, *Mediaforum* 2014, 6, at 177-179 (note).

De Cock Buning and Speyart 2012 (note)

Madeleine de Cock Buning & Herman M.H. Speyart, “Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen / Karen Murphy v Media Protection Services Ltd”, *Intellectuele Eigendom & Reclamerecht* 2012, 26 (note).

Depreeuw 2014

Sari Depreeuw, *The variable scope of the exclusive economic rights in copyright*, Information Law Series, The Netherlands: Kluwer Law International (2014).

Dreier 1996

Thomas Dreier, “The Cable and Satellite Analogy”, in P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Information Law Series, The Hague: Kluwer Law International (1996).

Dreier and Hugenholtz 2006

Thomas Dreier & P. Bernt Hugenholtz, *Concise European copyright law*, Alphen a/d Rijn: Kluwer Law International (2006).

Eckes 2013

Christina Eckes, “European Union Legal Methods – Moving Away from Integration”, in Ulla Neergaard and Ruth Nielsen, *European Legal method - Towards a New European Legal Realism?*, Copenhagen: DJOF Publishing (2013), at 163-188, available at <http://ssrn.com/abstract=2342517> (accessed 23 November 2015).

European Copyright Society 2013

Lionel Bently et al., “European Copyright Society, Opinion on The Reference to the CJEU in Case C-466/12 Svensson”, 15 February 2013, available at: http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf (accessed 13 July 2015).

Favale, Kretschmer and Torremans 2015

Marcella Favale, Martin Kretschmer & Paul C. Torremans, “Is there a EU Copyright Jurisprudence? An empirical analysis of the workings of the European Court of Justice”, forthcoming in *Modern Law Review* (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643699 (accessed 12 October 2015).

Ficsor 2002

Mihály J. Ficsor, *The Law of Copyright and the Internet; The 1996 WIPO Treaties, their Interpretation and Implementation*, New York: Oxford University Press (2002).

Ficsor Guide 2003

Mihály J. Ficsor, “Guide to the Copyright and Related Rights Treaties administered by WIPO”, Geneva November 2003, available at http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf (accessed 11 August 2015).

Ficsor 2014

Mihály J. Ficsor, “Svensson: Honest attempt at establishing due balance concerning the use of hyperlinks - spoiled by the erroneous "new public" theory”, 5 May 2014, available at http://www.copyrightseesaw.net/archive/?sw_10_item=63 (last accessed 13 July 2015).

Fischman Afori 2008

Orit Fischman Afori, “Implied License: An Emerging New Standard in Copyright Law”, *Santa Clara Computer and High Technology Law Journal* 2008, 25, available at <http://ssrn.com/abstract=1266083> (accessed 12 October 2015).

Gervais 2013

Daniel Gervais, *The TRIPS Agreement; Drafting History and Analysis*, London: Sweet & Maxwell (2013), 4th edition.

Ginsburg 2004

Jane Ginsburg, “The (new) right of making available to the public”, in David Vayer & Lionel Bently, *Intellectual Property in the New Millennium, Essays In Honour Of William R. Cornish*, Cambridge: Cambridge University Press (2004), at 234-247, available at <http://ssrn.com/abstract=602623> (accessed 12 October 2015).

Goldstein and Hugenholtz 2013

Paul Goldstein & P. Bernt Hugenholtz, *International Copyright, Principles, Law, and Practice*, Oxford: Oxford University Press (2013), 3th edition.

Grosheide 2012 (note)

Frederik W. Grosheide, “Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen / Karen Murphy v Media Protection Services Ltd”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2012, 1, at 21-24 (note).

Guibault, Westkamp and Rieber-Mohn 2007

Lucie Guibault, Guido Westkamp & Thomas Rieber-Mohn, “Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society”, Report to the European Commission, DG Internal Market, February 2007, Amsterdam Law School Research Paper No. 2012-28, Institute for Information Law Research Paper No. 2012-23, available at <http://ssrn.com/abstract=2006358> (accessed 12 October 2015).

Guibault and Quintais 2014

Lucie Guibault & Joao P. Quintais, “Copyright, technology and the exploitation of audiovisual works in the EU”, *IRISPlus* 2014, 4, at 9-24.

Hansen and Dixon 1996

Martin F. Hansen and Allen N. Dixon, "The Berne Convention Enters the Digital Age", *European Intellectual Property Review* 1996, 11, at 604-612.

Headdon 2014

Toby Headdon, "An epilogue to Svensson: the same old new public and the worms that didnot turn", *Journal of Intellectual Property Law & Practice* 2014, 9(8), at 662-668.

Hesselink 2009

Martijn Hesselink, "A European Legal Method? On European Private Law and Scientific Method", *European Law Journal* 2009, 15(1), at 20-45.

Hugenholtz 1996

P. Bernt Hugenholtz, "Adapting Copyright to the Information Superhighway", in P. Bernt Hugenholtz, *The future of copyright in a digital environment*, Information Law Series, The Hague: Kluwer Law International (1996), at 81-102.

Hugenholtz 2009-1

P. Bernt Hugenholtz, "The Last Frontier: Territoriality", in P. Bernt Hugenholtz, *Harmonising European copyright law*, Information Law Series, Alphen aan den Rijn: Kluwer Law International (2009), Chapter 9, available at http://www.ivir.nl/syscontent/uploads/2013_10_01_d5506a7dc3e13bca0879eb57b9d0132e (accessed 18 November 2015).

Hugenholtz 2009-2

P. Bernt Hugenholtz, "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", *IRIS Plus* 2009, 8, at 7-19, available at <http://ssrn.com/abstract=2129782> (last accessed 9 September 2015).

Hugenholtz 2012

P. Bernt Hugenholtz, "Wittem Group's European Copyright Code" in Tatiana-Eleni Synodinou, *Codification of European Copyright Law: Challenges and Perspectives*, information law series, Alphen aan den Rijn: Kluwer Law International (2012), at 339-354.

Hugenholtz 2012 (note)

P. Bernt Hugenholtz, "Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen / Karen Murphy v Media Protection Services Ltd", *Nederlandse Jurisprudentie* 2012, 13(164), at 1737-1762 (note).

Hugenholtz 2013-2 (note)

P. Bernt Hugenholtz, “ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd and ITV Studios Ltd v TVCatchup Ltd”, *Nederlandse Jurisprudentie* 2013, 42(444), at 5083-5089 (note).

Hugenholtz 2013-1 (note)

P. Bernt Hugenholtz, “Società Consortile Fonografici (SCF) v Marco Del Corso and Phonographic Performance (Ireland) Limited v Ireland and Attorney General”, *Nederlandse Jurisprudentie* 2013, 16(197-198), at 2266, 2273-2276. (note).

Hugenholtz, van Eechoud, van Gompel and Helberger 2006

P. Bernt Hugenholtz, Mireille van Eechoud, Stef van Gompel & Natali Helberger, “The Recasting of Copyright & Related Rights for the Knowledge Economy”, Report to the European Commission, DG Internal Market, November 2006, Amsterdam Law School Research Paper No. 2012-44, Institute for Information Law Research Paper No. 2012-38. Available at <http://ssrn.com/abstract=2018238> (accessed 12 October 2015).

Koelman 2007 (note)

Kamiel J. Koelman, “Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2007, 2, at 50 (note).

Koelman 2012 (note)

Kamiel J. Koelman, “Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2012, 1, at 27 (note).

Koelman 2014 (note)

Kamiel J. Koelman, “Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2014, 3, at 87-89 (note).

Leistner 2014

Matthias Leistner, “Structured aspects of secondary (provider) liability in Europe”, *Journal of Intellectual Property Law & Practice* 2014, 9(1), at 75-90, available at <http://jiplp.oxfordjournals.org/content/9/1/75.full.pdf> (accessed 9 October 2015).

Lodder 2014 (note)

Arno R. Lodder, “Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB”, *Computerrecht* 2014, 75 (note).

Masouyé Guide 1978

Claude Masouyé, “Guide to the Berne Convention for the Protection of Literary and Artistic Works”, Paris Act 1971, Published by the World Intellectual Property Organisation, Geneva 1978 (Guide 1978), available at <ftp://ftp.wipo.int/pub/library/ebooks/historical-ipbooks/GuideToTheBerneConventionForTheProtectionOfLiteraryAndArtisticWorksParisAct1971.pdf> (accessed 11 August 2015).

Moir, Montagnon and Newton 2014 (note)

Andrew Moir, Rachel Montagnon & Heather Newton, “Communication to the public: the CJEU finds linking to material already “freely available” cannot be restricted by copyright owners: Nils Svensson and Others v Retriever Sverige AB (C-466/12)”, *European Intellectual Property Review* 2014, 36(6), at 399-400 (note).

Mom 1990

Gerard J.H.M. Mom, *Kabeltelevisie en auteursrecht*, Koninklijke Vermande, Lelystad (1990).

Ohly 2009

Ansgar Ohly, “Economic Rights”, in Estelle Derclay, *Research Handbook on the Future of EU Copyright Law*, Cheltenham: Edward Elgar Publishing, (2009), at 212–241.

Pihlajarinne 2012

Taina Pihlajarinne, “Setting the Limits for the Implied License in Copyright and Linking Discourse – The European Perspective”, *IIC* 2012, 43(6), at 700-710.

Predonzani 2014 (note)

Giulia Predonzani, “Connecting Hyperlinks to Copyright Law”, *European Law Reporter* 2014, 2, at 34-41 (note).

Reinbothe and Von Lewinski 2002

Jorg Reinbothe and Silke von Lewinski, *The WIPO Treaties 1996*, London: Butterworths Lexis Nexis (2002).

Ricketson 1987

S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College, Kluwer (1987).

Ricketson and Ginsburg 2006

S. Ricketson & J.C. Ginsburg, *International Copyright and Neighbouring Rights; The Berne Convention and Beyond*, Volume I, New York: Oxford University Press (2006), 2nd edition.

Rijgersberg and Van der Kaaij 2013

Rudolf Rijgersberg & Hester van der Kaaij, “A plea for Rigorous Conceptual Analysis as a Central Method in Transnational Law Design”, *Law and Method* 2013, 1, at 48-60.

Rognstad 2015

Ole-Andreas Rognstad, “Restructuring the Economic Rights in Copyright – Some Reflections on an ‘Alternative Model’”, forthcoming in *Journal of the Copyright Society of the U.S.A.*, University of Oslo Faculty of Law Research Paper No. 2015-12, available at <http://ssrn.com/abstract=2612862> (accessed 9 November 2015).

Rosati 2014-1 (note)

Eleonora Rosati, “CJEU on communication to the public and national systems of collective rights management”, *Journal of Intellectual Property Law & Practice* 2014, 9(8), at 630-631 (note).

Rosati 2014-2

Rosati, “Luxembourg, we have a problem: where have the Advocates General gone?”, *Journal of Intellectual Property Law & Practice* 2014, 9(8), at 619.

Rosati 2015 (note)

Eleonora Rosati, “Unauthorized hyperlinks to live TV broadcasts not infringements under the InfoSoc Directive”, *Journal of Intellectual Property Law & Practice* 2015, 10(8), at 582-583 (note).

Rosen 2015

J. Rosen, “The CJEU 'new public' criterion? National judges should not apply it, says Prof Jan Rosen”, 15 April 2015, available at <http://ipkitten.blogspot.nl/2015/04/the-cjeu-new-public-criterion-national.html> (accessed 11 August 2015).

Schmid 2015 (note)

Gregor Schmid, “BestWater: framing no ‘communication to the public’”, *Journal of Intellectual Property Law & Practice* 2015, 10(2), at 82-83 (note).

Seignette 2006 (note)

Jacqueline M.B. Seignette, “Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE), Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) and Compagnie européenne de radiodiffusion et de télévision Europe 1 SA (CERT)”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2006, 1, at 30-31 (note).

Seignette 2013 (note)

Jacqueline M.B. Seignette, “ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd and ITV Studios Ltd v TVCatchup Ltd”, *Intellectuele Eigendom & Reclamerecht* 2013, 26 (note).

Seignette 2014 (note)

Jacqueline M.B. Seignette, “Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB”, *Intellectuele Eigendom & Reclamerecht* 2014, 59 (note).

Seville 2009

Catherine Seville, *EU Intellectual property law and Policy*, Cheltenham/ Northampton: Edward Elgar Publishing Limited (2009).

Snel 2014

Marnix V.R. Snel, “Source-usage within doctrinal legal inquiry: choices, problems, and challenges”, *Law and Method* 2014, 6.

Spoor 1996

Jaap H. Spoor, “The copyright approach to copying on the Internet: (Over)stretching the reproduction right?”, in P. Bernt Hugenholtz, *The future of copyright in a digital environment*, Information Law Series, The Hague: Kluwer Law International (1996), at 67-79.

Spoor, Verkade and Visser 2011

Jaap H. Spoor, D.W. Feer Verkade, Dirk J.G. Visser, *Auteursrecht, naburige rechten en databankenrecht*, Recht en Praktijk, Deventer: Kluwer (2011), 3rd edition.

Stamatoudi and Torremans 2014

Irina Stamatoudi & Paul Torremans, *EU Copyright Law, A Commentary*, Cheltenham/ Northampton: Edward Elgar Publishing (2014).

Stevens 2014 (note)

Paul Stevens, “A hyperlink can be both a permissible and an infringing act at the same time”, *Journal of Intellectual Property Law & Practice* 2014, 9(7), at 548-549 (note).

Strowel and Hanley 2009

Alain Strowel & Vicky Hanley, “Secondary liability for copyright infringement with regard to hyperlinks”, in Alain Strowel, *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Cheltenham/ Northampton: Edward Elgar Publishing Limited 2009, 71-109.

Tsoutsanis 2014

Alexander Tsoutsanis, “Copyright and linking can tango”, *Journal of Intellectual Property Law & Practice* 2014, 9(6), at 495-509, available at <http://ssrn.com/abstract=2333686> (accessed 9 November 2015).

Visser 2012 (note)

Dirk J.G. Visser, “Società Consortile Fonografici (SCF) v Marco Del Corso and Phonographic Performance (Ireland) Limited v Ireland and Attorney General”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2012, 3, at 111-113 (note).

Visser and Kreijger 2014 (note)

Dirk J.G. Visser & Paul J. Kreijger, “OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.”, *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2014, 5, at 160-164 (note).

Visser 2015

Dirk Visser, “Hoe 'Luxemburg' de Britt Dekker-vragen gaat beantwoorden” (“How ‘Luxembourg’ will answer the *Britt Dekker*-questions”), blogpost on IE-Forum, 12 January 2015, available at <http://www.ie-forum.nl/?//Hoe+%26%23039%3BLuxemburg%26%23039%3B+de+Britt+Dekker-vragen+gaat+beantwoorden////33418/> (accessed 11 August 2015).

Von Lewinski 2008

Silke von Lewinski, *International copyright law and policy*, New York: Oxford University Press (2008).

Walter and Von Lewinski 2010

Michel Walter & Silke von Lewinski, *European Copyright Law*, Oxford: Oxford University Press (2010).

Watkins and Burton 2013

Dawn Watkins & Mandy Burton, *Research methods in law*, Oxon: Routledge (2013).

Woods 2012 (note)

Adrian Woods, “The CJEU’s ruling in Premier League pub TV cases – the final whistle beckons: joined cases Football Association Premier League LTD v QC Leisure (C-403/08) and Murphy v Media Protection Services Ltd (C-429/08)”, *European Intellectual Property Review* 2012, 34(3), at 203-207 (note).

Legislation

International agreements

- Vienna Convention on the Law of Treaties, Vienna on 23 May 1969, available at <http://www.wipo.int/export/sites/www/wipolex/en/glossary/vienna-convention-en.pdf> (accessed 11 August 2015).
- Berne Convention for the Protection of Literary and Artistic Works, Paris 24 July 1971, available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698 (accessed 15 July 2015).
- Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh 15 April 1994, available at https://www.wto.org/english/tratop_e/trips_e/t_agmo_e.htm (accessed 11 August 2015).
- Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement, available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed 12 October 2015).
- WIPO Copyright Treaty, Geneva 20 December 1996, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166 (accessed 11 August 2015).
- WIPO Performances and Phonograms Treaty, Geneva 20 December 1996, available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295578 (accessed 11 August 2015).
- Treaty on European Union, Lisbon 13 December 2007, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN> (accessed 11 August 2015).
- Treaty on the Functioning of the European Union, Lisbon 13 December 2007, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN> (accessed 11 August 2015).

EU law

- European Convention on Human Rights, Rome 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 12 October 2015).
- Charter of Fundamental Rights of the European Union, 2000/C 364/01, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed 12 October 2015).
- Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l24101&from=EN> (accessed 11 August 2015).
- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0083&from=EN> (accessed 11 August 2015).

- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> (accessed 11 August 2015).
- Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, amended 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, available at (2006 version) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0115&from=EN> (accessed 11 August 2015).
- Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:111:0016:0022:EN:PDF> (accessed 18 November 2015).

US

- Online Copyright Infringement Liability Limitation Act (OCILLA), 1998, available at <https://www.law.cornell.edu/uscode/text/17/512> (accessed 7 October 2015).

Additional documents

International

- *Actes de la Conference Reunie a Rome* (Documents on the Rome Revision Conference in 1928), Berne Convention, 7 May – 2 June 1928, available at <ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/RomeConference1928/RomeConference1928.pdf> (accessed 11 August 2015).
- *Documents de la Conference de Bruxelles* (Documents on the Brussels Revision Conference in 1948), Berne Convention, 5-26 June 1948, available at <ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/BruxellesConference1948/BruxellesConference1948.pdf> (accessed 11 August 2015).
- Trips Agreement Draft of 23 July 1990 (W/76), available at https://www.wto.org/gatt_docs/English/SULPDF/92110034.pdf (accessed 11 August 2015).
- Records of the Diplomatic Conference on certain Copyright and Neighboring Rights Questions, no 348(E), Geneva 1996, available at ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_348e_v1.pdf (accessed 11 August 2015).
- WIPO Glossary of key terms related to intellectual property and traditional knowledge, 20 January 2011, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_iwg_2/wipo_grtkf_iwg_2_inf_2.pdf (accessed 11 August 2015).

EU

- European Commission, “Television without Frontiers”, Green Paper, COM (84) 300 final, Brussels, 14 June 1984, available at http://ec.europa.eu/green-papers/pdf/tv_without_frontiers_green_paper_table_com_84_300.pdf (accessed 9 September 2015).
- European Commission, Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June), COM (1985) 310 final, June 1985, available at http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf (accessed 9 September 2015).
- Green paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, Communication from the Commission, COM(88)172 final, Brussels 7 June 1988, available at [http://ec.europa.eu/green-papers/pdf/green_paper_copyright_and_challenge_of_thechnology_com_\(88\)_172_final.pdf](http://ec.europa.eu/green-papers/pdf/green_paper_copyright_and_challenge_of_thechnology_com_(88)_172_final.pdf) (accessed 11 August 2015).
- Discussion Paper of the Commission on Copyright Questions concerning Cable and Satellite Broadcasts, “Broadcasting and Copyright in the internal Market”, II/F/5263/80-EN, Brussels November 1990, available at http://aei.pitt.edu/1331/1/copyright_broadcast_work_paper_1990.pdf (accessed 11 August 2015).
- White Paper on Growth, Competitiveness and Employment. The Challenges and ways forward into the 21st century, COM(93)700 final, Brussels 5 December 1993, available at http://europa.eu/documentation/official-docs/white-papers/pdf/growth_wp_com_93_700_parts_a_b.pdf (accessed 11 August 2015).
- Europe and the Global Information Society, Recommendations of the high-level group on the Information Society To the Corfu European Council (Bangemann Group), in Bulletin of the European Union, Supplement No. 2/94, follow-up to the White Paper, 1994, available at http://aei.pitt.edu/1199/1/info_society_bangeman_report.pdf (accessed 11 August 2015).
- Follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final, Brussels 20 November 1996, available at http://aei.pitt.edu/939/1/copyright_gp_follow_COM_96_568.pdf (accessed 11 August 2015).
- Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(97)0628, 21 January 1998, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:51997PC0628&from=EN> (accessed 11 August 2015).
- Common Position (EC) No 48/2000 of the Council with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, (2000/C 344/01), 28 September 2000, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52000AG0048&from=EN> (accessed 11 August 2015).

- Report from the European Commission on the Application of Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final, Brussels, 26 July 2002, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0430:FIN:EN:PDF> (accessed 11 August 2015).

Case law

WTO Dispute Settlement

- Panel Report 15 June 2000, WT/DS160/R (*United States – Section 110(5) of the US Copyright Act*), available at https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (accessed 12 October 2015).

CJEU

- CJEU 18 March 1980, no C-62/79 (*Coditel I*).
- CJEU 26 October 1982, no C-104/18 (*Hauptzollamt Mainz v Kupferberg*).
- CJEU 14 July 1998, no C-341/95 (*Bettati*).
- CJEU 15 June 1999, no C-321/97 (*Andersson and Wakeras-Andersson v Swedish State*).
- CJEU 3 February 2000, no C-293/98 (*Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)*).
- CJEU 19 September 2000, no C-156/98 (*Germany v Commission*).
- CJEU 6 February 2003, no C-245/00 (*Stichting ter exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*).
- CJEU 2 June 2005, no C-89/04 (*Mediakabel BV v Commissariaat voor the Media*).
- CJEU 14 July 2005, no C-192/04 (*Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE), Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) and Compagnie européenne de radiodiffusion et de télévision Europe 1 SA (CERT)*).
- CJEU 6 July 2006, no C-53/05 (*Commission v Portugal*).
- CJEU 7 December 2007, no C-306/05 (*Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*).
- CJEU 16 July 2009, no C-5/08 (*Infopaq International A/S v Danske Dagblades Forening*).
- CJEU 18 March 2010, no C-139/09 (*Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai*).
- CJEU 4 October 2011, nos C-403/08 and 429/08 (*Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen / Karen Murphy v Media Protection Services Ltd*).

- CJEU 24 November 2011, no C-283/10 (*Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)*).
- CJEU 15 March 2012, no C-135/10 (*Società Consortile Fonografici (SCF) v Marco Del Corso*).
- CJEU 15 March 2012, no C-162/10 (*Phonographic Performance (Ireland) Limited v Ireland and Attorney General*).
- CJEU 3 July 2012, no C-128/11 (*UsedSoft GmbH v Oracle International Corp.*).
- CJEU 7 March 2013, no C-607/11 (*ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd and ITV Studios Ltd v TVCatchup Ltd*).
- CJEU 15 January 2014, no C-176/12 (*Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*).
- CJEU 13 February 2014, no C-466/12 (*Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB*).
- CJEU 27 February 2014, no C-351/12 (*OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*).
- CJEU 21 October 2014, no C-348/13 (*BestWater International GmbH v Michael Mebes and Stefan Potsch*).
- CJEU 26 March 2015, no C-279/13 (*C More Entertainment AB v Linus Sandberg*).
- CJEU 19 November 2015, no C-325/14 (*SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*).

Opinions Advocate General (EU)

- Opinion AG La Pergola 9 September 1999, no C-293/98 (*Egeda*).
- Opinion AG Tizzano 10 March 2005, C-89/04 (*Mediakabel*).
- Opinion AG Tizzano 21 April 2005, C-192/04 (*Lagardère*).
- Opinion AG Sharpston 13 July 2006, C-306/05 (*SGAE*).
- Opinion AG Kokott 3 February 2011, C-403/08 and C-429/08 (*Premier League*).
- Opinion AG Jääskinen, C-321/09 and C-432/09 (*Airfield*).
- Opinion AG Trstenjak 29 June 2011, C-135/10 (*Del Corso*).
- Opinion AG Trstenjak 29 June 2011, C-162/10 (*PPI*).
- Opinion AG Sharpston 14 November 2013, C-351/12 (*OSA*).

National case law

Austria

- Austrian Supreme Court 25 June 1974, Case 4 OB 371/24, *GRUR Int* 1975, 68, IIC, 1976, 125 (*Gemeinschaftsantenne-Feldkirch*).

Belgium

- Belgian Supreme Court 3 September 1981, Pas, 1982, I, 8, *GRUR Int* 1982: 448. (*Coditel / Cine Vog Films*).

Germany

- Landgericht Köln 20 February 2015, no. 14 S 30/14, *GRUR* 2015, 885-890, *GRUR Int* 2015, 982-987, *ZUM* 2015, 596-601 (*Rehabilitationszentrum*).

The Netherlands

- Dutch Supreme Court 30 October 1981, no 11.739, *NJ* 1982, 435, *Auteursrecht* 1981/5:100, *RIDA* 112 (1982):168 (*Amstelveense Cable I*), available at (in Dutch) [http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum_nl%20HR%2030%20oktober%201981%20\(Kabel%20TV-1%20CAI%20Amstelveen%20I%20of%20Kabel%20I\).pdf](http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum_nl%20HR%2030%20oktober%201981%20(Kabel%20TV-1%20CAI%20Amstelveen%20I%20of%20Kabel%20I).pdf) (accessed 11 August 2015).
- Dutch Supreme Court 25 May 1984, no 12.281, *NJ* 1984, 697, *AMR* 1984/3:62, *AA* 1986: 628, *GRUR Int* 1985:124 (*Amstelveense Cable II*), available at (in Dutch) [http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum_nl%20HR%2025%20mei%201984%20\(Kabeltelevisie%20Amstelveen_%20Kabel%20II\).pdf](http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum_nl%20HR%2025%20mei%201984%20(Kabeltelevisie%20Amstelveen_%20Kabel%20II).pdf) (accessed 11 August 2015).
- Dutch Supreme Court 9 January 2015, no 14/01158, *NJB* 2015/748 (*GS Media BV v Sanoma Media Netherlands BV*), available at (in Dutch) <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2015:7> (accessed 9 August 2015).
- Dutch Supreme Court 13 November 2015, no 14/02399, *NJB* 2015/2064 (*Brein v Ziggo and XS4ALL*), available at (in Dutch) <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:3307>.
- Court of Appeal Amsterdam 20 January 2015, no. 200.154.572/01 SKG, *IER* 2015/13 (*NUV tegen Tom Kabinet*), available at (Dutch) <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:66> (accessed 23 November 2015).
- Dutch District Court The Hague 1 April 2015, no. 445039 HA ZA 13-690, *IEF* 14829 (*VOB v Stichting Leenrecht, NUV, Lira, Pictoright*), available at (Dutch) <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:5195> (accessed 23 November 2015);
- Dutch District Court Midden-Nederland 30 September 2015, no C/16/372666 / HL ZA 14-204, *IEF* 15299 (*Brein v Mediaplayer*), available at (in Dutch) <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2015:4343> (accessed 5 October 2015).

Switzerland

- Schweizerische Bundesgericht 20 March 1984, *GRUR Int* 1985, 412 (Gemeinschaftsantenne Altdorf/SUISA-Suissimage).
- Swiss Supreme Court 20 January 1981, *GRUR Int.* 1981: 642 (*ORF/PTT en Rediffusion SA*).

US

- *Field v Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006), available at <http://www.yale.edu/lawweb/jbalkin/telecom/fieldvgoogle.pdf> (accessed 12 October 2015).