

# The Influence of New Technologies on Copyright

The following article:

## *Copyright, technology and the exploitation of audiovisual works in the EU*

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# Foreword

Technology affects economics and economics affects regulation. This is generally how the chain operates. The rules usually come later, and sometimes they may become outdated.

The last time the European rules on copyright were adapted to fit technological developments was almost fifteen years ago. This had a particular effect on the notion of communication to the public, which includes the right of the public to have access to copyright protected works, at their preferred place and time. In the meantime many audiovisual services developed online, yet it is not always clear whether certain acts of making audiovisual content available online fall within the scope of the right to communicate to the public, as defined by the InfoSoc Directive. Another interesting aspect is knowing when there has been a case of retransmission under the SatCab Directive, which has remained unchanged since 1993. Might it be timely to consider a REFIT exercise for these directives?

The Lead Article of this edition of IRIS *plus* explores the criteria that have been developed over the years by the Court of Justice of the European Union (CJEU) to assess whether there has been a “communication to the public” under the terms of the InfoSoc Directive. These criteria are used to determine the identity of the “user”, the definition of “the public”, the profit-making nature of communication to the public and the concept of “new public”.

Assessing each of these criteria may become a fairly complex exercise when it comes to live streams of TV broadcasts or hyper-linking to internet sites, where standard hyperlinks, embedded links and framing links are distinguished from one another. The authors of the Lead Article, Lucie Guibault and João Pedro Quintais, explore the European jurisprudence on each of these cases and guide us through the different scenarios of technical restrictions, subsequent unavailability of the content, contractual restrictions, access to unauthorised content and unfair competition.

Cable retransmission is another issue relevant to addressing technological development and the scope of copyright rules. In this case the usual suspect is the SatCab Directive and the requirement of a “retransmission” to justify mandatory collective administration. The authors consider in depth the case of “direct injection”, taking into account recent decisions of the Dutch and Norwegian courts that held there is no retransmission where there is no “secondary communication” following the “primary communication”. It is worth noting that the CJEU has recently been asked to address this question, following a Belgian preliminary ruling.

The Related Reporting in this edition of IRIS *plus* covers rulings from the CJEU and from national courts. It gives an insight into recent developments in private copying and liability for service providers in the case of online infringement. Interesting cases of non-liability are also included.

The Zoom section focuses on the issue of cross-border access to online content. Francisco Cabrera and Sophie Valais give an overview of the most recent initiatives that have been taken at EU level, i.e. the “Licences for Europe” stakeholder dialogue and the public consultation on the review of EU copyright rules, both launched in 2013; they also look into the announcements made by the newly elected Commission regarding future programmes.

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# Copyright, technology and the exploitation of audiovisual works in the EU

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## I. Introduction

Two generations ago,<sup>1</sup> members of the European public watched movies in cinema theatres and television programmes on their local or national broadcasters' television channels. Roughly one generation ago, the advent of satellite broadcasting and cable retransmission opened new horizons for makers of audiovisual works and the viewing public alike: foreign productions were accessible not only in cinemas but also from the comfort of people's own homes. Today, less than half a generation later, digital technology allows an increasingly higher proportion of the European public to screen movies and programmes from all over the world on their high definition television sets, computer equipment and mobile devices. Audiovisual works are now available everywhere through broadcasting (including by satellite), rebroadcasting, webcasting, pay-per-view, video-on-demand, streaming, internet-based video platforms, video on demand (VoD) services, and countless other channels. Most of these services are offered on a territorial basis and subject to different conditions.<sup>2</sup>

To keep up with the progress of digital technology, new business models for the production and distribution of films and television programmes continuously emerge, in an attempt to match the supply of audiovisual works to the demand for those works. At the root of these business models is the rightsholder's expectation that the law grants in each territory of operation the right to authorise or prohibit others from exploiting their works; or, in absence of an exclusive right, that they can at least count on the payment of an equitable remuneration for the use of their works. New business models promoting innovative forms of exploitation of works are developed only if rightsholders and their assignees can rely on the existing copyright framework to license and enforce rights in their audiovisual works in each territory. Without the protection of the law, no income could be generated from the exploitation of these works and no new investment would be made.

Over the years, the European copyright framework has undergone a number of adaptations to adjust the regime to each new technological reality. Directive 2001/29/EC on copyright and related rights in the information society (InfoSoc) has brought the most recent change to the general right of communication to the public. It has done so by the insertion of a right to make works publicly available, in such a way that members of the public may access them from a place and at a time individually chosen by them. New forms of online exploitation of works, like streaming, video-on-

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1) The length of one generation is estimated to last about 25 years: <http://en.wikipedia.org/wiki/Generation>

2) Helberger N. et al., *Digital Consumers and the Law: Towards a Cohesive European Framework*, Kluwer Law International: Alphen aan den Rijn, 2013.

demand or webcasting, arguably fall within the scope of the broad right of communication to the public. Or do they? The question arises whether these, and future, acts of communication to the public are indeed covered by the owner's exclusive right. In other words, following which criteria can a form of exploitation be said to amount to an act of communication to the public in the sense of the European copyright *acquis*? National courts, but more importantly the Court of Justice of the European Union (CJEU), play an important role in the interpretation and delineation of the scope of the exclusive right of communication to the public.

However, the advent of digital technologies can also seriously disrupt existing business models, for example when new forms of exploitation push older forms of exploitation into obsolescence. Legal uncertainty is likely to arise where a business model is based on a specific, technology-dependent rights system. This situation has arisen in several Member States with respect to cable retransmission: the right of remuneration for the cable retransmission of programs is governed under the European *acquis* by a specific legal regime.<sup>3</sup> Directive 93/83/EC on satellite broadcasting and cable retransmission (SatCab),<sup>4</sup> defines '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.'

But what if no act of 'retransmission' takes place anymore? How must the law be interpreted and what consequences could it have for rightsholders?<sup>5</sup> Put differently, if what broadcasters do no longer qualifies as cable retransmission under the SatCab Directive, will it qualify as a communication to the public under the InfoSoc Directive? Are rightsholders then entitled to claim royalties on the basis of their exclusive right, rather than an equitable remuneration for rebroadcasting?

This article explores, in two different but related ways, how digital networked technology has an impact on the exploitation of audiovisual works under the applicable EU copyright regulation. Firstly, it analyses whether the exploitation of works via the internet falls within the scope of the right of communication to the public; secondly it considers how digital technology affects the exercise of specific forms of communication to the public, particularly the right of cable retransmission. This article is further structured as follows: section 2 gives a general overview of the legal framework that constitutes the European *acquis* on the subject of the right of communication to the public. Section 3 analyses the impact of internet use as a mode of exploitation of audiovisual works, with particular reference to the CJEU interpretation of 'communication to the public' in the InfoSoc Directive in relation to communication on the Internet. On the basis of the relevant case law of the CJEU and of national jurisdictions, section 4 discusses the impact of digital technology on the regulatory regime applicable to cable retransmission and its impact on the actions of cable distributors. Section 5 draws conclusions on the scope of the right of communication to the public, the future of the cable retransmission right and the exercise of exclusive rights in the digital environment.

## II. Current Landscape: what rights of exploitation?

### 1. Legal Framework

Economic rights can be distinguished as rights to authorise or prohibit on the one hand, and remuneration rights on the other. Under the Information Society Directive, the three main clusters of economic rights (rights of reproduction, distribution and communication to the public) have been

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3) Hugenholtz P. B. "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS *plus* 2009-8, European Audiovisual Observatory, Strasbourg, 2009, p. 7.

4) 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 OJ L 248, 06.10.1993, pp. 15-21.

5) Triaille J.-P. et al. *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, p. 199 et seq.

broadly harmonised for works of authorship and related subject matter. The Directive leans heavily on the WIPO 'Internet Treaties' (WCT and WPPT), which in turn build on the Berne Convention, the Rome Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Article 2 of the Directive sets out a broad, comprehensive definition of the reproduction right, covering all relevant acts of reproduction, whether on-line or off-line, in material or immaterial form. Adapting the *acquis communautaire* to the needs of all rightsholders, under the InfoSoc Directive the reproduction right is conferred on authors, performers, phonogram and film producers and broadcasting organisations. In respect of the acts protected by the reproduction right, each of these enjoys the same level of protection of their works or other subject matter.<sup>6</sup> In practice, the very broad wording of the right of reproduction ensures an overlap with the right of communication to the public. Indeed, the right of reproduction covers almost any use of a work or other subject matter, even where similar acts of use in the analogue world (such as receiving a television signal or reading a book) would fall well outside the scope of what intellectual property aims to protect.<sup>7</sup> The reproduction right extends in practice to all parties involved in the dissemination and use of protected works and other subject matter, even where in the physical distribution environment their roles – especially those of mere carriers – would not have involved restricted acts. But the broad scope of the reproduction right also increases the number of restricted acts of content providers such as broadcasters or online providers. That has the effect that multiple licenses are required for unitary acts of usage.<sup>8</sup>

In accordance with Europe's international obligations,<sup>9</sup> Article 3(1) of the InfoSoc Directive grants authors a general 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'. One of the main objectives of the provision is to make it clear that this right covers interactive 'on-demand' services. It ensures legal certainty by confirming that the right of communication to the public is also relevant when members of the public have individual access, from different places and at different times, to a work that is on a publicly accessible site. This provision regulates not only acts of making works available online, but also more traditional methods of communicating works to the public, such as broadcasting. Indeed, one of the most challenging aspects of the right of making available is its delineation vis-à-vis broadcasting. A clear distinction is important because it provides legal certainty for all stakeholders.

Pursuant to Article 1(2) of the InfoSoc Directive, the framework leaves unaffected the rules applicable to broadcasting of programmes by satellite and cable retransmission. Cable retransmission is regulated under Article 8 of the SatCab Directive, which states that 'Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators'. According to Article 9 of the SatCab Directive, 'the right of copyright owners and holders or related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society'. As mentioned in the introduction to this article, the regime that applies to cable retransmission is characterised as

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6) Guibault L. "Le tir manqué de la Directive européenne sur le droit d'auteur dans la société de l'information", *Cahiers de propriété intellectuelle*, 2003-2, p. 545.

7) See inter alia, Hugenholtz P. B. "Adapting copyright to the information superhighway", in Hugenholtz P.B. (ed.), *The future of copyright in a digital environment*, Kluwer Law International, The Hague, 1996, pp. 81-102 at pp. 92-93; Westkamp G. "Towards access control in UK Copyright law?", *Cri*, 2003-1, pp. 11-16; Hart M. "The Copyright in the information society directive; an overview", *EIPR*, 2002, pp. 58-64; Spoor J. "The copyright approach to copying on the internet: (over)stretching the reproduction right?", in Hugenholtz P.B. (ed.), 1996, *op. cit.*, pp. 67-79.

8) Guibault L. et al., *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, p. 24.

9) Article 8 of the WIPO Copyright Treaty and Art. 10 and 14 WIPO Performances and Phonograms Treaty, both signed in Geneva, on 21 December 1996.

'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'. If the transmission does not meet all of the requirements of the definition, the regime of mandatory collective administration of rights does not apply, as we shall see in section 4 below.<sup>10</sup>

Since the adoption of the InfoSoc Directive in 2001, the need for interpretation of the notion of 'communication to the public' has given rise to numerous requests to the CJEU for a preliminary ruling. Interestingly, the cases have shown a progression in the modes of exploitation submitted for consideration by the Court, from broadcasting signals through terrestrial transmitters between subsidiaries of a single organisation,<sup>11</sup> to television and/or radio installations in hotel bedrooms through which the hotelier distributes a broadcast signal,<sup>12</sup> to the transmission of broadcasts of copyright protected works in a pub,<sup>13</sup> to a single communication to the public by satellite,<sup>14</sup> to playing music in the waiting room of a dentist's office.<sup>15</sup> Through the passage of time, the Court developed several criteria for the assessment of whether a specific act of communication constitutes a 'communication to the public'. Four main criteria can be distilled from this series of cases:

1) *The identity of the 'user'*

According to the CJEU, when making a communication to the public, the 'user' (i.e. the person using a means of communication) makes an act of communication when she intervenes, with full knowledge of the consequences of her action, to give her customers access to a broadcast containing the protected work. Without that intervention the customers, although physically within the area covered by the broadcast, would not otherwise be able to enjoy the broadcast work.<sup>16</sup> This criterion received a fairly flexible interpretation in the Premier League case, the Del Corso case and the Phonographic performance case: transmitting football matches in a pub on a television screen, broadcasting music in hotel rooms and broadcasting music in a dental practice have been considered to involve the intervention of the user, as defined.

2) *Definition of the 'public'*

The 'public' has been consistently interpreted as encompassing an indeterminate and fairly large number of potential beneficiaries of the communication. In the Phonographic Performance case, the Court summarised its previous case law as follows:

*[A]s regards, the criterion of 'a fairly large number of people', the Court has made clear that this is intended to indicate that, on the one hand, the concept of public encompasses a certain de minimis threshold, which excludes from the concept groups of persons which are too small, or insignificant. On the other hand, in order to determine that number, account must be taken of the cumulative effects of making works available to potential audiences. In that connection, not only is it relevant to know how many persons have access to the same work at the same time but it is also necessary to know how many of them have access to it in succession.<sup>17</sup>*

To fall within the terms of the InfoSoc Directive, the communication must be made at a distance to a public that is not present at the place where the communication originates, within the meaning

10) Hugenholtz P. B. "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS *plus* 2009-8, European Audiovisual Observatory, Strasbourg, 2009, p. 7.

11) CJEU 14 July 2005, Case C-192/04, *Lagardère Active Broadcast v. Société pour la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, Reports of Cases 2005 I-07199 (*Lagardère*).

12) CJEU 7 December 2006, Case C-306/05 (*SGAE v. Rafael Hoteles*); CJEU 15 March 2012, Case C-162/10 (*Phonographic Performance (Ireland)*).

13) CJEU 4 October 2011, Case C-403/08 (*FA Premier League v. QC Leisure and Case C-429/08 Karen Murphy v. Media Protection Services Limited*).

14) CJEU 13 October 2011, Cases C-431/09 and C-432-09 (*Airfield/AGICOA*).

15) CJEU 15 March 2012, Case C-135/10 (*Società Consortile Fonografici (SCF)/Del Corso*).

16) CJEU 15 March 2012, Case C-162/10 (*Phonographic Performance (Ireland)*), para. 31.

17) CJEU 15 March 2012, Case C-162/10 (*Phonographic Performance (Ireland)*), para. 35.

of recital 23 in the preamble to the Copyright Directive.<sup>18</sup> According to the Court, the public that is the audience of the communication should be both targeted by the user and receptive, in one way or another, to that communication, and not merely 'caught' by chance.<sup>19</sup>

### 3) *The profit-making nature of communication to the public*

Referring to the decision in the SGAE case,<sup>20</sup> the Court has reiterated in several decisions that, as a third criterion, it is not irrelevant that a 'communication' within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature.<sup>21</sup> The Court has justified this reasoning by saying that in a situation such as that in the Premier League case, 'it is indisputable that the proprietor transmits the broadcast works in his public house in order to benefit therefrom and that that transmission is liable to attract customers to whom the works transmitted are of interest. Consequently, the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results'. This criterion was in fact one of the main factors in the Del Corso case that led the Court to dismiss the playing of music in the waiting room of a dentist's office as a communication to the public under Article 3 of the InfoSoc Directive.<sup>22</sup>

The requirement developed by the Court concerning the profit-making character of the communication is less straightforward than the first two criteria. This requirement is difficult to explain in view of the wording of Article 3(1) of the InfoSoc Directive and the corresponding international obligations in the WCT and WPPT. None of these statutory provisions even suggest that the entity making the communication should be motivated by profit. In fact the reference passage in the SGAE case the Court seems to downplay the importance of this factor:

*Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings.*<sup>23</sup>

Considering the cautious wording used by the Court, it is remarkable that this requirement received so much attention in the later cases. Moreover, it is surprising that this interpretation was retained, as it seems to contradict the age-old licensing practice of collective management organisations (CMOs) in the area of public performance of musical works. CMOs grant licenses to users of musical works who perform the works in public, irrespective of the commercial nature of the activity pursued. Hence, licenses are commonly issued to public and social institutions like hospitals, care homes and schools. This begs the question whether the Court's interpretation would affect this traditional practice of CMOs.

### 4) *The concept of 'new' public*

In the SGAE, Airfield and Premier League rulings, the CJEU held that copyright owners must authorise any communication to the public. Such authorisation must be obtained in particular where the communication makes the protected works accessible to a 'new' public, that is to say, a public that was not envisaged by the authors of the protected works within the framework of an authorisation given to another person.<sup>24</sup> The origin of this requirement is also rather vague. The Court explained that the criterion has its origin in recital 17 of Directive 93/83, according to which the rightsholders must be ensured an appropriate remuneration for the communication to the public by satellite of their works, that takes account of all aspects of the broadcast, such as its

18) CJEU 4 October 2011, Case C-403/08 (*FA Premier League v. QC Leisure*) and Case C-429/08 (*Karen Murphy v. Media Protection Services Limited*), para. 203.

19) CJEU 15 March 2012, Case C-135/10 (*Società Consortile Fonografici (SCF)/Del Corso*), para. 91.

20) CJEU 7 December 2006, Case C-306/05, (*SGAE v. Rafael Hoteles*), para. 44.

21) CJEU 4 October 2011, Case C-403/08, para. 204.

22) CJEU 15 March 2012, Case C-135/10 (*Società Consortile Fonografici (SCF)/Del Corso*), para. 97.

23) CJEU 7 December 2006, Case C-306/05, (*SGAE v. Rafael Hoteles*), para. 44.

24) CJEU 13 October 2011, Cases C-431/09 and C-432-09 (*Airfield/AGICOA*), para. 72.

actual audience and its potential audience. In other words, the Court consistently links the concept of 'potential audience' to that of 'new public', both of which are very ambiguous terms, prone to various interpretations and difficult to specify in practice.

## 2. Rights of exploitation in the audiovisual sector

Against this backdrop, the predominant exploitation model in films is currently individual management based on exclusivity and contractual freedom. Unlike the model followed in music production, film producers aggregate all relevant rights; this solves problems of fragmentation, the principal obstacle to multi-territorial licenses. In spite of this the EU licensing market for films is mostly national, mirroring a territorially-based copyright regime. From the recent Licences for Europe initiative, it appears that the audiovisual sector is aware of the challenges posed by cross-border access, and that it seeks to address them within a framework of copyright exclusivity and flexible market based licensing.<sup>25</sup> In that vein, pledges were made to further develop cross-border portability of subscription services for consumers and to improve identification and discoverability of audiovisual content online, with an aim to increase legal offers.<sup>26</sup> It is believed that legal offers constitute the most effective means to curb mass scale online piracy.<sup>27</sup> From a consumer perspective, access restrictions on audiovisual services caused by territorial exploitation and technical measures are problematic and give rise to complaints of unjustified price discrimination, artificial partitioning of markets and lack of transparency. Most online service providers share some of these concerns with cross-border availability of content.<sup>28</sup>

Copyright law is a key determinant in the development of this landscape. Because most online dissemination of audiovisual works encompasses technical reproductions and/or online dissemination of works (browsing, downloading, streaming, uploading, linking), the interpretation of the scope of the rights of reproduction and public communication/making available has an impact on the legal status of existing and future offers. The variable scope of these rights, the challenges of localising of the making available right, and the potential application of both rights to a single act of digital transmission, raise challenges for licensing and enforcement which are met with diverging positions by each category of rightsholder, service providers and consumers.<sup>29</sup>

In that respect, the InfoSoc Directive provides normative guidance by recommending that copyright law, 'should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation', to face technological development, rather than through 'new concepts for the protection of intellectual property'.<sup>30</sup> When interpreting the *acquis* and its Member State progeny, national courts and the CJEU seem to follow this guidance and are thus shaping the scope of exclusive rights in old and new forms of exploitation of audiovisual works, with an emphasis on the right of communication to the public. The following sections explore in greater detail the relevant case law and its implications.

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25) See the following documents coming out of the Licences for Europe Audiovisual Subgroup discussions 2013: *Language Versioning...*; *Statement by EuroVoD on Portability...*; Joint Statement on Cross-border Portability of lawfully-acquired Audiovisual Content. All documents are available at the website of Licences for Europe: <http://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site>

26) Licences for Europe, Ten pledges to bring more content online 2013, available at: [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf)

27) See, e.g., Mazziotti G. (rapporteur), *Copyright in the EU Digital Single Market*, Centre for European Policy Studies – CEPS Digital Forum, 2013, 29-30, 50.

28) *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, pp. 6-7, 10-11. Available at [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf)

29) *Public Consultation on the review of the EU copyright rules*, p. 11, available at: [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf). See also Report on Public Consultation Copyright 2014, pp. 13-14, 16ff.

30) Recital 5 InfoSoc Directive.

### III. Internet: a new form of communication to the public?

After a first generation of CJEU cases on the interpretation of the right of communication to the public in relation to more traditional forms of exploitation, the CJEU is now called upon to rule on the scope of the right of communication to the public in the light of new forms of communication made possible by the internet, like live-streams of TV broadcasts and hyper-linking to web pages. This section discusses the criteria developed by the Court as applied to both the traditional and the internet-based forms of exploitation. Importantly, these cases do not explicitly address two key issues for online provision of audiovisual services: the overlapping of the right of reproduction and to the making available right, and the localization of the latter.<sup>31</sup>

#### 1. Live streams of TV broadcasts

On 7 March 2013 the CJEU delivered its judgment in *ITV Broadcasting* following a request for a preliminary ruling from the High Court of Justice (England and Wales).<sup>32</sup> The judgment focused on the interpretation of the author's right of communication to the public over the internet under Article 3(1) of the InfoSoc Directive, as well as on the corresponding related rights in Articles 2 and 8(1) of the SatCab Directive.

The case relates to the distribution by TV Catch-up (TVC) over the internet, substantially in real time, of television broadcasts transmitted by certain broadcasters, including ITV Broadcasting Ltd (ITV). TVC uses a four-level network of servers (comprising acquisition, encoding, origin and edge servers) to allow users access to TV broadcasts via an internet stream.<sup>33</sup> In essence, TVC offers a service that allows users to receive through the internet 'live' streams of free-to-air television broadcasts, including those transmitted by ITV. However, users can access only that content which they are legally entitled to watch under a UK television license.

With this in mind, the ECJ examined whether the concept of 'communication to the public' covers the above described internet retransmission of the works included in a terrestrial television broadcast. The Court did so through a step-by-step analysis.

The first step was to inquire whether such retransmission qualifies as a 'communication' for copyright purposes. The Court considered that it does, arguing that a TVC service amounts to a separate – and therefore restricted – act of transmission or retransmission of a work through a specific technical means. In supporting this conclusion, the Court argued that TVC's intervention goes beyond the provision of a mere technical means to ensure or improve reception of the original transmission in its catchment area.<sup>34</sup>

Having established this to be a copyright-relevant communication of works, the Court then moved to the second step of analysis and asked whether such communication is to a 'public'? The answer is again affirmative. The concept of public includes an indeterminate number of potential recipients, implying a fairly large number of persons.<sup>35</sup> It is therefore relevant to ascertain the number of persons who have access to the same work at the same time and successively.<sup>36</sup> TVC's internet retransmission acts are aimed at all UK residents with an internet connection and a valid television licence. Because these users may simultaneously access the live streaming of television programs online, the Court considers there is a communication to the public.<sup>37</sup>

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31) See Triaille J.-P. et al., *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, p. 120 et seq., for a detailed analysis of the "localization" issue.

32) CJEU 7 March 2013, Case C-607/11 (*ITV Broadcasting/TV Catchup*).

33) CJEU *ITV Broadcasting*, paragraphs 9-13.

34) CJEU *ITV Broadcasting*, paragraphs 28-30.

35) CJEU *ITV Broadcasting*, para. 32, referring to *SGAE*, 37 and 38 and the case law cited therein.

36) CJEU *SGAE*, para. 39; CJEU *ITV Broadcasting*, para. 34.

37) CJEU *ITV Broadcasting*, para. 35.

Referring to previous case law on the public communication right, the CJEU went on to consider a third requirement: whether the communication in question reaches a 'new' public. However, because TVC's internet retransmission is a separate restricted act requiring an independent authorisation – due to specific technical conditions, means and intended public – there was no need to examine the 'new public' requirement.<sup>38</sup> In completing its analysis, the Court found that only the first two elements were essential to the qualification of an act as a copyright-relevant (and therefore restricted) communication to the public. Other complementary but non-essential elements are the profit-making nature of the act (e.g. if the business model is funded by advertising) – typically linked to the role of the user and his intent – or the fact that the organisation responsible for the act 'is acting in direct competition with the original broadcaster'.<sup>39</sup>

The ITV Broadcasting case can be seen as an example of the CJEU taking an economic approach to the interpretation of exclusive rights. The Court was faced with a new mode of exploitation with economic significance and placed it under the umbrella of the public communication right, interpreted in light of the 'existence and degree of several interdependent criteria with regard to the person of the user (potential infringer) and the targeted public'.<sup>40</sup>

A fundamental aspect of the decision is that it highlights a novel and alternative criterion to qualify acts under this exclusive right, namely that 'of an independent, specific technical means of making available to the public'.<sup>41</sup> Thus qualified, such acts configure an intervention that goes beyond the provisions of mere technical means to ensure or improve reception of the original transmission, and therefore does not trigger the need to examine the 'new public' requirement. However, it is not always clear when a technically distinct transmission takes place, which makes it unnecessary to examine the existence of a new public.<sup>42</sup> While transmissions via new communication mediums will surely meet the 'specific technical means' requirement, it remains doubtful whether the same conclusion can be drawn for disruptive technologies within the same communications medium.<sup>43</sup> Imagine, for example, an innovative model of internet retransmission of audiovisual works where such content is previously available for online streaming.

In sum, transmissions and retransmissions of audiovisual works through different communication means, trigger the exclusive right and require individual authorisations. Importantly, this implies that the entity responsible for the initial transmission wishing to engage in these new uses will (also) need to secure the requisite authorisations for those rights it does not own. This already seems to be happening, at least with broadcasters involved in online cross border provision of services, as noted above. Conversely, new uses within the same communications media will probably not trigger the 'specific technical means' requirement and thus the public communication right. However, where they do not, the subsequent analysis of the 'new public' criterion might assist rightsholders in securing control of novel forms of exploitation, especially after the Svensson decision (see below).

Going forward, the CJEU's economic approach is favorable to rightsholders as it guarantees control over prospective models for online dissemination of audiovisual works. The more technologically disruptive the third party use, the more likely it is that it amounts to an 'independent, specific

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38) CJEU *ITV Broadcasting*, para. 39. On this requirement see: CJEU *SGAE*, para. 40; CJEU *Premier League*, para. 197; CJEU *Airfield*, para. 72. On the latter case, see Vousden S. "Airfield, intermediaries and the rescue of EU copyright law", *Intellectual Property Quarterly*, 2012(4), 311-325.

39) CJEU *ITV Broadcasting*, paragraphs 43-46. Note however the argument that the profit making nature of the act may be determinative of its qualification under the public communication right of related rightsholders pursuant to CJEU case law, made by Klafkowska-Wasniowska K. "Public communication right: towards the full harmonisation?", *E.I.P.R.* 2013, 35(12), 751-758, at pp. 756-757.

40) Leistner M. "Europe's Copyright Law Decade: Recent Case Law of The European Court Of Justice And Policy Perspectives", *Common Market Law Review* 2012, 51, 559-600, at pp. 569-570.

41) Leistner 2014, 569-572.

42) Raising the issue, see Klafkowska-Wasniowska K. "Public communication right: towards the full harmonisation?", *E.I.P.R.* 2013, 35(12), 751-758, p. 756.

43) See: Arezzo E. "Hyperlinks and making available right in the European Union - what future for the Internet after Svensson?", *IIC*, 2014, 45(5), 524-555, pp 535-536; Savola P. "Blocking injunctions and website operators' liability for copyright infringement for user-generated links", *E.I.P.R.* 2014, 36(5), 279-288.

technical means', thus requiring a license, even where the communication is not aimed at a new public. Where that is not the case, the 'new public' criterion may nevertheless trigger the exclusive right, as demonstrated below.

## 2. Hyper-linking to websites on the internet and the 'new public' criterion

On 13 February 2014 the CJEU delivered its judgment in the *Svensson* case following a request from the *Svea hovrätt* (Sweden) for a preliminary ruling. The question before the Court related to the interpretation of Article 3(1) of the InfoSoc Directive, namely whether the author's exclusive right of communication/making available to the public applies to acts of 'linking'. Because of its importance, the technology involved and the debate it generated preceding the CJEU's decision in the *Svensson* case<sup>44</sup>, we first provide some background and context, before analysing the judgment and its implications.

'Linking' is an umbrella term encompassing multiple similar acts, such as 'deep-linking, framing, inline linking and embedded linking'.<sup>45</sup> Linking can be characterised by the different techniques used.<sup>46</sup>

- **Standard hyperlinks** are clickable pointers (e.g. text, thumbnail or other format) that once clicked cause the web browser to redirect or 'push' the user to another (target) page. This can either be the main or home page (*surface linking*) or a sub-page or resource (*deep linking*). Such links were addressed by the ECJ in *Svensson*.
- **Inline or Embedded links** are links where the 'browser transparently fetches material (e.g. an image or another web page) and displays it as part of the current [*source*] page'. Here, the content is stored in a certain website but is pulled and embedded' in the source website, where it appears to users. This type of linking to a YouTube video is the subject of the *Bestwater International* case.<sup>47</sup>
- **Framing links** preserve the original web page address even when linking to foreign pages and display it in such a way that it appears part of the linking site, i.e. within a 'frame', such as a pop-up window, and without the need to open a new browser window. This act of 'pulling' content to the vicinity of the source page makes framing similar to embedded linking. The legal status of framed links to internet streams of sports matches is the subject of the *C More Entertainment* case (pending before the CJEU).<sup>48</sup>

In essence, hyperlinks act as references and means of access to other sources on the web. As such, they constitute essential reference tools for programmers, online service providers and users. Because hyperlinks will at best constitute a means to indirectly make works available online, it may be difficult to qualify them as falling under the 'making available' right. Given the centrality of hyperlinking to the functioning of the internet, the wisdom of so qualifying them is questionable.<sup>49</sup> These descriptive and normative considerations caused the *Svensson* decision to polarise European copyright scholarship.<sup>50</sup>

44) CJEU 13 February 2014, Case C-466/12 (*Svensson/Retriever Sverige AB*).

45) Headdon T. "An epilogue to *Svensson*: the same old new public and the worms that didn't turn", *Journal of Intellectual Property Law & Practice*, 2014, 9(8), 662-668, p. 662.

46) See Savola, p. 280 and fn.10, on which this characterisation heavily relies. (Citations in the following paragraphs are to this source). See also Tsoutsanis A. "Why Copyright and Linking can Tango", *Journal of Intellectual Property Law & Practice* 2014, 9(6), 495-509, pp 496-497; Arezzo 2014, 526-527.

47) CJEU 21 October 2014, Case C-348/13 (*BestWater International*). [Editor's note] The decision of the CJEU in this case was issued after the writing of this article.

48) CJEU -279/13, Request for a preliminary ruling from the Högsta domstolen lodged on 22 May 2013 - *C More Entertainment AB v. Linus Sandberg*, pending.

49) Making the same point, see Savola 2014 (EIPR), 281. See also Arezzo, 525.

50) See: Tsoutsanis 2014; Ginsburg 2014; and Savola 2014 (EIPR).

On one side of the debate, the European Copyright Society (ECS) argued that hyperlinking (including framing) should be not be covered by the right of communication to the public, for three separate reasons. First, hyperlinks are not acts of communication as they are not transmissions of a work. Second, even if so qualified, they are not interventions giving access to a work or a communication of a work, but instead references or location tool for an Internet protocol (IP) address (via a request to a server). Third, even if hyperlinks are considered communications of a work, they are not communications to a new public, in light of the universality of the targeted public.<sup>51</sup> It is important to note that this opinion predated the *ITV Broadcasting* case, which introduced the 'separate technical means' criterion that preempts analysis of the 'new public' requirement.

In a subsequent 2013 Report and Opinion focusing on internet linking techniques, the International Literary and Artistic Association (ALAI) followed a different route. It argued that the 'right of making available covers links that enable members of the public to access specific protected material', but not those 'that merely refer to a source from which a work may subsequently be accessed'.<sup>52</sup> Both the technical means (e.g. hypertext or inline linking) and the infringing nature of the work referred to are irrelevant; what matters is the act of offering (for individualised streaming or downloading) that triggers the exclusive right. The right is therefore infringed in any of the following circumstances: (1) the content is initially made available without consent; (2) technological protection measures were circumvented; or (3) the content is made available against 'the declared or clearly implied will of the rightholder'.<sup>53</sup> In essence, the ALAI position results in rightholders having an exclusive 'right to control the contexts where a work is mentioned or referenced'.<sup>54</sup>

The *Svensson* case involved a Swedish company, Retriever Sverige AB, operating a website that provided clients with links to articles published on other websites. The applicants in the main proceedings – all journalists, including *Svensson* – claimed compensation from Retriever for loss suffered as a result of the inclusion on its website of hyperlinks redirecting users to freely accessible press articles in which the former held the copyright. The main question before the Court was whether the provision on a website of links to protected works 'freely accessible' on another website constitutes a restricted act of communication to the public. For that to be the case, the Court ruled that two cumulative criteria must be met: (1) that it is an 'act of communication' of a work; and (2) that the communication is to a 'public'.<sup>55</sup>

Regarding the first criterion, the CJEU found that Article 3(1) of the InfoSoc Directive merely requires the work to be made available in such a way that members of the public may access it. As such, the provision of direct access to the work via a link from one website to another constitutes an act of 'making available' and, therefore, 'communication to the public'.<sup>56</sup> Note that the act of transmission is not mentioned as a requirement.

With respect to the second criterion, because the link is aimed at all potential users of the website – i.e. an 'indeterminate and fairly large number of recipients' – the Court found that works are indeed communicated to a public.<sup>57</sup> However, for such communication to trigger Article 3(1) it 'must also be directed at a new public', meaning a 'public not taken into account by the copyright holders when they authorised the initial communication to the public'.<sup>58</sup> The Court considered that in this case there was no communication to a new public, because the public targeted by the initial

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51) ECS Opinion 2013, para. 6 et seq., relying for all three reasons on the language and the *Travaux préparatoires* of the InfoSoc Directive, International law, and CJEU case law on communication to the public, namely *SGAE*, *Premier League*, and *Airfried*.

52) ALAI Report and Opinion on the making available and communication to the public in the internet environment - focus on linking techniques on the Internet, available at: <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf>. On the broader context of the report, see Ginsburg 2014.

53) *Ibid.*

54) Savola 2014 (EIPR), 281 and fn. 23.

55) CJEU *Svensson*, para. 16. See, to that effect, CJEU *ITV Broadcasting*, paragraphs 21 and 31.

56) CJEU *Svensson*, paragraphs 19-20.

57) CJEU *Svensson*, para. 25.

58) CJEU *Svensson*, para. 24.

communication comprised all potential visitors to the website in question, which consists of 'all internet users', as access to the works was not subject to 'restrictive measures'. That would be the case, for example, if the linked works originated from a subscription only website. Accordingly, Retriever's website users are part of the public taken into account by the applicants when they first authorised the making available of their works.

Hence, even if there is a 'communication to the public', no authorisation is required because it is not to a *new public*. That conclusion remains valid even if the link causes the work to appear 'in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site'.<sup>59</sup> That could exempt acts of 'framing' *per se* (and possibly embedding) from copyright infringement. Conversely, where a link allows users to circumvent restrictions that have been put in place by the linked website and that are designed to limit access to subscribers to the linked web site, it 'constitutes an intervention without which those users would not be able to access the works transmitted'. In such cases, those users are considered to comprise a new public (not targeted by the initial communication) and an authorisation by the copyright holders is required.

The CJEU ruled that Article 3(1) cannot be construed as allowing Member States to give 'wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision'.<sup>60</sup> To do so would undermine the InfoSoc Directive's objectives of remedying legislative differences and legal uncertainty vis-à-vis copyright protection, in a way that adversely affects the functioning of the internal market. Contrary to the *ITV Broadcasting* decision, which considered public communication through retransmission, the *Svensson* decision mostly addressed acts of making available on-demand. It clarifies several important aspects, namely the requirements of *transmission* and *new public* in the making available right. If access by the public is a requirement, then it is arguable that certain cloud services that merely allow individual users (or a close circle of family and friends, depending on the applicable law) to make upstream copies of works in hosting servers and subsequently to download/stream their material for private or personal use, do not trigger the making available right, even if they will for the most part trigger the reproduction right.<sup>61</sup>

A second major aspect of *Svensson* relates to the new public criterion. In a nutshell, an online act of making available that is not carried out through a 'specific technical means' (pursuant to *ITV Broadcasting*) can give rise to the need for authorisation, if it is made to a new public. Two elements are crucial in examining this criterion:

- a) Whether the link targets material that was made freely accessible,<sup>62</sup> and
- b) Whether the link expands the audience of the original website by circumventing access restrictions.<sup>63</sup>

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59) CJEU *Svensson*, para. 29.

60) CJEU *Svensson*, paragraphs 37, 41.

61) See Triaille J.-P. et al., *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, p. 45, 119. The private copying limitation covers reproductions on all technologies and media, of all types of protected subject matter, with the exception of computer programs and databases. To qualify, reproductions must be for private use, meaning for personal purposes of the natural person beneficiary and within his/her private sphere, which in several EU Member States can include a broader or narrower circle of (close) family and friends. See von Lewinski S. and Walter M.M. "Information Society Directive", in: Walter & Von Lewinski (eds.) *European Copyright Law. A Commentary*, Oxford University Press, 2010, 1032-1033. The term "private use" features also in Art. 15(1)(a) Rental and Lending Rights Directive (2006/115/EC), and Arts. 6(2)(a) and 9(a) of the Database Directive (96/9/EC). For further implications of this concept, see: Poort J. and Quintais J.P. "The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies", 2013, 4 *JIPITEC*, 207-209; Karapapa S. *Private Copying*, 2012, Routledge, London, 49-78.

62) *Arezzo* 2014, 541-543.

63) Similarly, see Stevens P. "A hyperlink can be both a permissible and an infringing act at the same time", *Journal of Intellectual Property Law & Practice*, 2014, 9(7), 548-549.

If the link points to freely accessible content and does not broaden the initially targeted audience, then it does not infringe copyright, even if it is possible that injured parties avail themselves of unfair competition type of protection.<sup>64</sup> Where this is not the case, the link infringes the right of making available. It is important to understand how these two prongs of the 'new public' requirement might apply to different linking scenarios. In the following paragraphs we briefly outline some possibilities, including those covered in the case *C More Entertainment and BestWater* cases.

#### *Technical restrictions*

If the (deep) link provides access to content that is subject to technical measures restricting access (e.g. subscription paywalls or 'sessions IDs'), it clearly infringes copyright. Current geo-blocking access control measures used by broadcasters and service providers in the audiovisual sector would qualify as technical restrictions. Infringement would result from the fact that the content is not freely accessible and the link circumvents access requirements, which amounts to a communication to a new public.<sup>65</sup> This would apply to content made available on demand, as well to content originally streamed through the internet (if subject to technical restrictions).

#### *Subsequent unavailability*

If the link provides access to content initially freely accessible but subsequently subject to technical restrictions, it infringes copyright. However, this will rarely happen automatically, as the original link will technically not provide access to the work once the restrictions are put in place. Only where the link circumvents the subsequent restrictions will it be infringing; therefore, concerns that *Svensson* imposes a 'duty to monitor' by 'linkers' seem implausible.<sup>66</sup> Such a duty would result from the Court's stipulation that links are exempted from the authorisation requirement only where they provide access to a work that was made available on freely accessible terms and remains available on such terms.<sup>67</sup> Immunity from infringement would, the argument goes, be dependent on the constant monitoring by 'linkers' of the freely accessible nature of the work. This fact pattern is unlikely to occur, as removal of the content or imposition of technical restrictions by rightsholders should prevent the link from providing access to works. However, this issue might become relevant if subsequent contractual restrictions imposed by rightsholders are considered per se sufficient to legally restrict access to works.

#### *Contractual restrictions*

The situation is unclear if the link provides access to content on freely accessible websites that impose restrictive terms and conditions (or 'legal restrictions').<sup>68</sup> *Svensson* opens the door for implied license theories insofar as it considers the making available of works without technical or contractual terms, to be a blanket permission engage in the act of linking. However, nothing is said of cases where the rightsholder of the linked work, for example, subsequently places a notice on the web page prohibiting embedded links to that content, without removing the work itself or putting in place technical restrictions.<sup>69</sup>

#### *Unauthorised content*

What if the link provides access to an unauthorised copy of a film on website A that a rightsholder has made freely accessible on website B? Headdon responds by focusing on the concept of work,

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64) Moir et al. 2014, 400.

65) See: Tsoutsanis 2014, 507; Moir A. et al. "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)*", *E.I.P.R.* 2014, 36(6), 399-400, p. 400; Headdon 2014, 665.

66) See Headdon 2014, 665; See Arezzo 2014, 545-546 (articulating the concern mentioned in the text).

67) See Arezzo 2014, 545-546.

68) Moir et al. 2014, 400; Headdon 2014, 665.

69) See Savola 2014 (*EIPR*), 282-283, arguing that *Svensson* does not prohibit linking in this scenario. See also Arezzo 2014, 541-542.

rather than that of public. He argues the act to be infringing because the copy is unauthorised, there is no exhaustion of the public communication right, and the hyperlink amounts to a communication to a new public as it provides access to a different copy.<sup>70</sup> Conversely, Savola argues that the legality of linking to this material should not depend on authorisation by the rightsholder or the source's lawfulness, because such elements are typically unknown to the linker.<sup>71</sup> Hence, it is preferable to judge infringement based on secondary (rather than strict) liability.<sup>72</sup> Doing so would require first to determine whether the reproduction and making available of the work on the third party website constitute copyright infringement; if so, it needs to be determined whether the act of linking to the third party web site could give rise to secondary liability. The contrasting arguments highlight the uncertainty surrounding this linking scenario, which extends to the effect of imposing technical restrictions on originally freely accessible content.<sup>73</sup> Whatever the outcome, rightsholders should have some means of redress under this scenario.

### *Unfair competition*

Some authors suggest that acts of linking that do not infringe copyright (e.g. certain instances of framing) might be still be prevented on the ground of passing-off (in the UK) or unfair competition (in other EU jurisdictions).<sup>74</sup> This would afford rightsholders an extra layer of protection through tort law, triggering the civil liability of 'linkers'.

In the EU there are no harmonised rules on unfair competition applying to business-to-business acts, such as linking to third party content. In fact, harmonisation of unfair competition law is a reality only in specific areas, such as certain conflict of laws rules on non-contractual obligations,<sup>75</sup> consumer protection against unfair commercial practices<sup>76</sup> and protection of traders against misleading and unlawful comparative advertising.<sup>77</sup> Applicability of tort law to an act of linking would therefore require an analysis of each fact pattern against national laws, which is beyond the scope of this paper. However, the following examples may illustrate the point.

In the UK, specific acts of framing could amount to passing off, if they cause consumer confusion in the market. This provision therefore protects traders against the unfair behavior of competitors. On this basis, the goodwill of the original content provider would be protected against misrepresentations by the linking platforms that mislead the public as to the origin or the quality of goods/services. In Germany, in contrast, the Act against Unfair Competition (the Gesetz gegen den unlauteren Wettbewerb or UWG) contains a general tort of unfair competition in §3 UWG, which could be invoked to prohibit acts of linking likely to significantly affect the interests of competitors, consumers or other market participants. Beyond confusion regarding the origin of the content displayed, economic damage giving rise to unfair competition torts may result from linking techniques (e.g. deep-linking) that circumvent access restrictions and/or point directly to secondary pages, bypassing advertisements on the main page and therefore causing losses of related revenue.<sup>78</sup> In sum, even where copyright infringement is not found, unfair competition torts might provide rightsholders with tools for use against unauthorised acts of linking.

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70) See Headdon 2014, 665, relying on Article 3 and Recital 29 InfoSoc Directive.

71) Savola *EIPR*, 282-283.

72) *Ibid.* See also Arezzo 2014, 545 et seq.

73) Debating this issue, see Arezzo 2014, 545-547.

74) See Moir et al. 2014, 400; Arezzo 2014, 527.

75) See Art. 6 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

76) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

77) Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version).

78) Arezzo 2014, 427.

#### IV. Cable retransmission: a disappearing form of communication to the public?

Only in the *ITV Broadcasting* case did the CJEU briefly touch upon the issue of the interaction between the general regime of the InfoSoc Directive's right of communication to the public and the special regime of the SatCab Directive's remuneration right for cable retransmission.<sup>79</sup> However, because the case dealt primarily with live streams for which TV Catchup ensures that those using its service can obtain access only to content which they are already legally entitled to watch in the United Kingdom by virtue of their television licence, the Court could not discuss the impact of technological change on the workings of the cable retransmission services and on the need for cable distributors to obtain authorisation for this type of activity.

Let us recall that, pursuant to Article 3 of the SatCab Directive, 'cable retransmission' is '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'. As such, cable retransmission implies a 're-broadcasting' of programmes that had been initially broadcast by another organisation. Cable retransmission organisations 'captured' the broadcast signals in order to reach their own, separate audience, different from the 'primary' communication, which must be intended for reception by the public and could occur either over the air or by wire. The cable retransmission therefore qualifies as an act of 'secondary' communication to the public.<sup>80</sup> On the basis of Article 9(1) of the SatCab Directive, this act of 'secondary' transmission is subject to mandatory collective administration.

The gradual switchover from analogue to digital television that took place during the first decade of the new millennium was completed by 2012.<sup>81</sup> As a result broadcasting companies no longer directly deliver their content to viewers via analogue terrestrial television. In a number of Member States viewers can now receive the content indirectly via distributors – e.g. through a media gateway, through free to air digital terrestrial television or through the cable, telephone, and satellite TV companies, with whom viewers have a contractual relationship.<sup>82</sup> The reception of programs via a media gateway is known as 'direct injection'. Since no retransmission of signals initially broadcast by another organisation occurs any more, broadcasting and cable companies in some Member States argue that they are no longer engaged in 'secondary' communication, but rather in 'primary' communication. Consequently, under this argument the rules of the SatCab Directive on mandatory collective administration would not apply.

As early as 2007 a long and complex dispute arose in the Netherlands on this very issue between Norma, the CMO entrusted with the administration of Dutch performers' rights, and the Association of Dutch cable operators. The Dutch Supreme Court handed down its ruling on 28 March 2014.<sup>83</sup> The Court had to answer two questions: are the activities of the cable operators to be qualified as an act of communication to the public; and if so, who is the owner of the right, between the television program producer and the CMO?

The Dutch Supreme Court applied the criteria in Article 3 of the SatCab Directive and concluded that, because the delivery of program-carrying signals by broadcasters through an accessible one-to-one connection between broadcasters and cable operators did not reach the general public, no communication to the public took place. Two key aspects of the ruling are worth mentioning:

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79) CJEU 7 March 2013, Case C-607/11 (*ITV Broadcasting/TV Catchup*).

80) Hugenholtz 2009, p. 12.

81) Communication of 24 May 2005 from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final.

82) EU Law Radar, 'Case C-325/14, SBS Belgium – broadcasting via third parties', available at: <http://eulawradar.com/case-c-32514-sbs-belgium-broadcasting-via-third-parties/>

83) Dutch Supreme Court 28 March 2014, ECLI:NL:HR:2014:735, (*Norma/NL Kabel*).

1. The cable distribution of television programmes as it currently takes place in the Netherlands is indeed no longer a 'cable retransmission' in the sense of the SatCab Directive, because it is no longer preceded by an 'initial transmission' that is 'intended for reception by the public'. Since 2006 cable operators have received the signal directly in a one-on-one transmission from the 'MediaGateway' at which the broadcasters make it available to them. Therefore the mandatory collective management of cable retransmission rights prescribed by Article 9 of the SatCab Directive no longer applies, nor does the rule in Article 9.2 that the relevant collecting societies have a mandate to represent non-members.<sup>84</sup>
2. The rights transfer from individual performing artists of all their broadcasting rights relating to their past and future performances, to the relevant collecting society, was not precise enough in this case and therefore not valid under Dutch civil law.

The Dutch case is not unique in Europe; similar disputes between cable broadcasters and CMOs have arisen in Norway and Belgium. In Norway, the district court of Oslo came to a similar conclusion to that of the Dutch Supreme Court. This happened on two separate occasions, in cases involving the CMO Norwaco against cable broadcasters.<sup>85</sup> As in the Netherlands, the Oslo court ruled in favour of the cable operators on the basis that the lack of an initial transmission meant that there was no retransmission in the sense of the SatCab Directive and therefore no remuneration was due.

In July of this year, the Court of Appeal of Brussels referred a very similar question to the CJEU for a preliminary ruling:

*Does a broadcasting organisation which transmits its programmes exclusively via the technique of direct injection — that is to say, a two-step process in which it transmits its programme-carrying signals in an encrypted form via satellite, a fibre-optic connection or another means of transmission to distributors (satellite, cable or xDSL-line), without the signals being accessible to the public during or as a result of that transmission, and in which the distributors then send the signals to their subscribers so that the latter may view the programmes – make a communication to the public within the meaning of Article 3 of InfoSoc Directive?*<sup>86</sup>

It is hoped that this request for a preliminary ruling from the CJEU will shed some light on the question of whether the activities of the cable operators qualify as cable retransmission under the SatCab Directive or as an act of communication to the public under the InfoSoc Directive. But it will unfortunately not clarify the very important issue of the future role of CMOs in the administration of broadcasting rights, let alone the question of whether it is the producer or the CMOs to whom the rights of the authors or performers is transferred.

## V. Conclusion

The definition of the concept of 'communication to the public' in copyright law is essential for the determination of the scope of the rightsholder's exclusive right, with the consequential possibility to license the right to third parties and to stop unauthorised uses. But as the case law of the Court of Justice of the European Union shows, defining what constitutes an act of communication to the public is no easy task. Over the years and through the cases before it, the Court developed several criteria that should come into play when determining whether an act of communication qualifies under Article 3(1) of the InfoSoc Directive as an act of communication to the public for which the rightsholder's authorisation is required. It is hoped that these criteria will help evaluate situations arising in the future as a result of improvements in the technology.

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84) Ibid. para. 4.2.3.

85) District court of Oslo, 30 May 2013, (*Rikstv AS/Norwaco*); District Court of Oslo, 31 December 2013 (*Get AS/Norwaco*).

86) C-325/14, Application filed on 29 August 2014 (*SBS Belgium/SABAM*).

The first criterion concerns the identity of the person using a means of communication, i.e. whether the user intervenes in the process of communicating a work to the public. As the CJEU proposed in the *ITV Broadcasting* case, a novel and alternative criterion to assess whether acts of communication fall within the scope of the exclusive right, is that 'of an independent, specific technical means of making available to the public.'<sup>87</sup>

The second criterion is the definition of the public, which the CJEU consistently interprets as an indeterminate and fairly large number of potential recipients.

The third factor is that of a 'new' public, i.e. whether the communication reaches a 'public... not taken into account by the copyright holders when they authorised the initial communication to the public.'

Finally the fourth requirement, albeit of lesser importance since the *Svensson* decision, is whether the act of communication pursues a profit motive.

Already in 2009, the future of the *SatCab* Directive's dedicated regime for cable retransmission was said to be very bleak,<sup>88</sup> in large part due to the changes brought about by digital technology to the way cable broadcasters are communicating works to the public. Five years later, in light of the case law in the Netherlands, Norway and Belgium, as well as on the basis of the criteria developed by the CJEU with respect to the notion of 'communication to the public', the fate of the cable retransmission regime seems bleaker than ever.

Technology evolves: new forms of exploitation emerge; older forms become obsolete. With the emergence of new modes of exploitation that reach a 'new' public, rightsholders can hope to receive remuneration from new sources. But while cable retransmission of audiovisual works is fading out as a secondary means of communication of works to the public, important questions arise: does the communication by a cable operator through 'direct injection' constitute an act of communication to a 'new' public, or does it fall within the scope of another pre-existing 'primary' act of communication to the public? Does the cable operator need to obtain separate authorisation and pay additional remuneration for such acts? If so, from whom would the cable company need to obtain permission: the producer of the audiovisual work or the CMO? What is the impact on the remuneration of individual authors? As the technological landscape changes, individual authors risk getting short changed: they may lose the benefit of an unwaivable right of remuneration for acts of cable retransmission, in exchange for an exclusive right of communication to the public that may be difficult to enforce in practice.

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87) Leistner 2014, 569-572.

88) Hugenholtz 2009, p. 12.