

"The controlling of access as a right? Discussion on music streaming and whether 'a right to bestow access' falls under Article 3 of the InfoSoc Directive"

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ABSTRACT

The accretion of Article 3 of the InfoSoc Directive has been driven by a focus on access. Article 13 of the proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market adapts our understanding of Article 3 of the InfoSoc Directive: 'Information society service providers that store and provide to the public access to large amounts of works or other subject-matter' had not previously been understood to fulfil the requirements of Article 3 of the InfoSoc Directive, yet the proposed Directive seems to alter this understanding.

In its attempt to address the music 'value gap', the EU Commission has – in Article 13 of the proposed Directive – dramatically shifted copyright law. Indeed, after *The Pirate Bay* decision, the limitation from liability under Article 14 of the E-Commerce Directive seems to have been eviscerated for Web 2.0 service providers.

This paper attempts to look at the danger in focussing primarily on access. Access should be understood as merely a characteristic of the right of communication to the public and should not be the primary legal mechanism that governs copyright transactions. The danger in allowing access to creative works to be legally controlled is that, in the online environment, use of creative works would necessarily be controlled through access. This would represent a dramatic expansion in the rights reserved to authors, would damage the public domain and would make copyright protected works similar to 'use IP rights', such as patents or trade marks, where use is controlled entirely by the rightsholder.

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Introduction

The recent *Pirate Bay*¹ case, combined with Article 13 of the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market², have caused controversy in the copyright community. Article 13 of the proposed Directive is the EU Commission's response to the 'music value gap', which is an argument put forward by the music industry that posits that creators are disadvantaged by Web 2.0 hosting providers (those websites whose services rely and focus upon user-generated content, such as Facebook, Wikipedia, Twitter, YouTube and Vimeo) because these providers are not obligated to take out licences from rightsholders.

Article 13 of the proposed Directive essentially obligates 'Information society service providers that store and ***provide to the public access*** to large amounts of works or other subject-matter uploaded by their users' to either take out copyright licences and ensure the enforcement of these licences or to prevent copyrighted works from being posted at all. When Article 13 was released, it seemed to drastically modify our understanding of the Communication to the Public ("CTP") right (Article 3 of the InfoSoc Directive³): Article 13 apparently targets Web 2.0 hosting providers which 'communicate to the public', yet these service providers had never previously been understood to be communicating

¹ C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, EU:C:2017:99 (hereinafter "*Pirate Bay*")

² Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593 (hereinafter "the proposed Directive")

³ 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 (hereinafter, "InfoSoc Directive")

works to the public and have also been understood to benefit from a limitation from liability under Article 14 of the E-Commerce Directive⁴.

Of significant interest to this writer has been the fact that much of the literature surrounding Article 13 focusses on access: the Article itself is directed towards ‘Information society service providers that store and **provide to the public access** to large amounts of works or other subject-matter uploaded by their users’. The impact assessment relating to the proposed Directive stated that:

“user uploaded content services [such as Web 2.0 services] often provide the public with large amounts of protected content. In addition **to giving access** to the content, these platforms provide functionalities such as categorization, recommendations, playlists, or the ability to share content. ***These services use copyright protected content in order to attract and retain users to their websites thereby increasing the value of their services. Access to such content is generally ‘free’ for users and the service draws its revenues, directly or indirectly, from advertising and user data.***⁵” (emphasis added)

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter “E-Commerce Directive”)

⁵ Commission Staff Working Document – Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes, SWD(2016) 301 final, Brussels, 14 September 2016 (hereafter: ‘Impact Assessment’) at 138

Additionally, it was stated in *The Pirate Bay* case that “as a rule, any act by which a user, with full knowledge of the relevant facts, **provides its clients with access to protected works** is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29.⁶” The wide interpretation of the CTP right in *The Pirate Bay* case has led to the situation where:

“operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, *intervene, with full knowledge of the consequences of their conduct, to **provide access** to protected works, **by indexing** on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network.⁷” (emphasis added)*

This wide understanding of access – that operators are even providing access through the indexing of works posted by third parties – has prompted this writer to explore what access is in relation to the CTP right. The importance of access in the literature relating to Article 13 of the proposed Directive, as also *The Pirate Bay* ruling, is dangerous. As discussed below, the provision of access is merely a characteristic of the CTP. Access is a Hohfeldian power, not a right. However, where the emphasis is placed on access (and a seemingly ever-expanding notion thereof) in the legal analysis, there is a clear and present danger of rights accretion, to the extent that we could potentially reach the point where the control of access will itself be understood as a right, which would represent an unprecedented control of the use of copyright protected works.

⁶ C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, EU:C:2017:456 (hereinafter “*The Pirate Bay*”) at 34. This case is discussed at section 3.3 below.

⁷ *The Pirate Bay* at 36

The first section of this paper explores the genesis of the Communication to the Public right, how it relates to the provision of access and how this right has been dealt with in the CJEU. The middle section briefly covers our understanding of Article 14 of the E-Commerce Directive and how it relates to hosting providers. The final section discusses the music ‘value gap’, the EU commissions response thereto and the latest CJEU ruling in *The Pirate Bay*. The conclusion of this paper is that the focus on and expansion of our understanding of what access is is dangerous for the freedom of use of creative works in our culture.

1 The Communication to the Public Right, Access and the CJEU case law

1.1 The legal basis of the Communication to the Public Right

The Berne Convention for the Protection of Literary and Artistic Works of 1886⁸ was the world’s first multilateral copyright treaty, which – *inter alia* – introduced the first international iteration of the right of communication to the public (“CTP”) in relation to technical means of communication⁹. As it was initially developed for Berne, the CTP is designed specifically for linear communication models, that is, where the signal is

⁸ Berne Convention for the Protection of Literary and Artistic Works (adopted Sept. 9, 1886), 1161 U.N.T.S. 3 (hereinafter, “Berne”)

⁹ Article 11bis of Berne. Paragraph 1 of this Article reads: 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. The formulation of the right resulted from the Paris Act of 24 July 1971, which was amended on 28 September 1979.

‘pushed’ to the recipient at a specific date and time. The ‘push’ aspect of the right is made clear in the WIPO Guide to Berne:

“The primary right is to authorise the broadcasting of a work and the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images. It applies to both sound and television broadcasts. *What matters is the emission of signals*; it is immaterial whether or not they are in fact received.”¹⁰ (emphasis added)

In order for the CTP right to be engaged, the communication must be made to a public. Importantly, however, the treaty is silent on how to interpret ‘the public’, instead seemingly leaving signatories to determine its meaning. Article 9(1) of the TRIPs Agreement incorporates Berne into TRIPs (except of course the moral rights provision in Article 6^{bis} of Berne).

The 1990’s saw further international co-operation to develop supplementary copyright treaties in an effort to tackle the challenges posed by the ever-evolving technological and digital landscape. Included in this effort was an overhaul of the CTP right, found in Article 8 of the World Intellectual Property Organisation (“WIPO”) Copyright Treaty (“WCT”) of 1996¹¹. Article 8 of the WCT reads:

¹⁰ WIPO ‘*Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*’ (1978) (hereinafter “*WIPO Guide to Berne*”), available at http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf, page 66, paragraph 11bis3

¹¹ WIPO Copyright Treaty (adopted Dec. 20, 1996, entered into force Mar. 6, 2002) (1997), 36 I.L.M. 65 (hereinafter “WCT”)

“Without prejudice to the provisions of Articles 11(1)(ii), 1^{bis}(1)(i) and (ii), 11^{ter}(1)(ii), 14(1)(ii) and 14^{bis}(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.**” (emphasis added)

This new iteration of the CTP right broadened the scope of the right to “any communication” and also to communications where “members of the public may access these works from a place and at a time individually chosen by them” bringing every activity carried out on the internet involving a copyright work within the scope of its copyright provisions¹². Indeed, the records of the negotiation of the WIPO Treaties state that “The use of the non-restrictive term “any” in front of the word “communication” in Article 10, and in certain provisions of the Berne Convention, emphasizes the breadth of the act of communication.¹³” Whilst broadening the right to on-demand services, the WCT however remains silent – like Berne – in defining ‘the public’. Again, Signatories are left to define ‘public’ – “It is a matter for national legislation and case law to define what is ‘public’¹⁴”. Interestingly, the *Diplomatic Records* also states of the right, “The relevant act is the making available of the work by providing access to it.¹⁵” This statement shows that

¹² M. Sundara Rajan., *Moral Rights* (Oxford University Press, USA, 2011), 259

¹³ WIPO ‘*Records of the Diplomatic Conference on Certain Copyright and Neighbouring Right Questions, Geneva 1996, Vol 1*’ (Geneva: WIPO, 1999) (hereinafter “*the Diplomatic Records*”) available at ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_348e_v1.pdf, page 204, paragraph 10.14

¹⁴ *The Diplomatic Records*, page 206, paragraph 10.17

¹⁵ *Ibid.* page 204, paragraph 10.10

access is an important characteristic of the CTP right, and is indeed key to how we deal with copyright in the online environment.

At the European level, the Information Society Directive¹⁶ was the vehicle through which the European Union sought to meet its treaty obligations, as specifically stated in Recital 15 to the Directive. The CTP right was transposed into article 3(1) of the InfoSoc Directive, which reads:

“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.”

In particular, Recital 25 to the Directive seeks to dispel any uncertainty that interactive on-demand services are to be protected under the CTP right by stating that “all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works ... by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.¹⁷”

¹⁶ 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 (hereinafter, “InfoSoc Directive”)

¹⁷ Recital 25 to the InfoSoc Directive

1.2 The CTP right and access

From the institution of the CTP right (along with the legal protection of Technological Protection Measures under Article 11 of WCT, which is not discussed here as there is not enough space to cover it in sufficient detail), numerous scholars have posed the question of whether access in the online environment should be regulated via the law¹⁸. Professor Ginsburg was ardent in her case for the adoption of an access right for the online environment, which she defined as being “the right to control the manner in which members of the public apprehend the work. The concept is distinct from reproduction or communication to the public...¹⁹” The way in which copyrighted works are exploited by creators was central to the argument for the adoption of an access right:

“When the exploitation of works shifts from having copies to directly experiencing the content of the work, the author’s ability to control access becomes crucial. Indeed, in the digital environment, without an access right, it is difficult to see how authors can maintain the ‘exclusive Right’ to their ‘Writings’ that the Constitution authorizes Congress to ‘secure’.²⁰”

Professor Ginsburg was correct in her assertion that having copies of works would decrease and users would look to directly experiencing content. Users have changed their

¹⁸ See J. Ginsburg, *Essay: from having copies to experiencing works: the development of an access right in U.S. copyright law*, 50 J. Copyright Soc’y U.S.A. 113 2002-2003; S. Olswang, *Accessright: an evolutionary path for copyright into the digital era?* 5 EIPR 1995; T. Heide, *Copyright in the EU and US: what ‘access-right’?*, 48 J. Copyright Soc’y U.S.A. 363 2000-2001; Z Efroni, *Access-Right: The Future of Digital Copyright law*, (Oxford University Press, Madrid, 2011); M. Favale, *The Right of Access in Digital Copyright: Right of the Owner of Right of the User?*, *The Journal of World Intellectual Property* 15.1 (2012) 1

¹⁹ J. Ginsburg, *Essay: from having copies to experiencing works: the development of an access right in U.S. copyright law*, 50 J. Copyright Soc’y U.S.A. 113 2002-2003 at 120

²⁰ *Ibid.* at 113.

behaviour, with music streaming being one of the most common ways that people now enjoy music. The IFPI stated in its 2017 Report that “Streaming is now established as the most prevalent and significant format in the modern music industry, fuelling growth in almost all major markets and starting to unlock the phenomenal potential within developing territories.”²¹ Streaming has become the predominant model through which users consume music and it appears that – for now – the access-based business model will prevail. The EU Commission signalled its acceptance of an access-based music industry when it stated that “The functioning of the online market place is complex. There has been a progressive shift from ownership to access-based models.”²² Professor Ginsburg was correct in her assertion about the changes in how users experience music, yet whether the proliferation we have seen in access-based business models should necessarily lead to a change in copyright law is still contentious.

Heide approaches the question of an ‘access right’ under the Hohfeldian framework, asserting that since there “is no ‘right against the gaining of unauthorised access’ to a copyrighted work,²³” there therefore appears to be no access right. Instead, Heide categorises access as a ‘power’:²⁴ rightholders may exercise the power to give access for the purposes of making the work available. Heide states that the extent of the power:

²¹ International Federation of the Phonographic Industry (IFPI), Global Music Report 2017, ‘Annual State of the Industry’ available at <http://www.ifpi.org/downloads/GMR2017.pdf> (hereinafter “IFPI Report”) at 16

²² Commission Staff Working Document – Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes, SWD(2016) 301 final, Brussels, 14 September 2016 (hereafter: ‘Impact Assessment’) at 137

²³ T. Heide, ‘Copyright in the EU and US: what ‘access-right’?’, 48 J. Copyright Soc’y U.S.A. 363 2000-2001 at 366

²⁴ *Ibid.* at 364 - 366

“depends on the scope of the right of making available and whether the user can be deemed to engage in any act reserved to the rights-holder simply by gaining access. ... Particularly because the right of making available is drafted specifically with the digitally networked environment in mind – where any, ‘on-demand’ or otherwise, necessarily includes an act of access – and because the right is geared towards the access of individual ‘members of the public,’ the argument that this right is equivalent to or implicitly includes an ‘access-right can be appreciated. Nevertheless, it is important to note that the sequence of events indicates that individual acts of access *result from* and *not in* the making available of the work.²⁵”

This analysis is convincing, as under the CTP right, once a work has been communicated, the right is exhausted. When understood as a consequence of the CTP right rather than the focus of the right, access is relegated (rightly) to being an accessory aspect of the right, merely a characteristic. In contrast, where access is (mis)understood to be the primary aspect of the right, *uses* of the work are in danger of falling under the thrall of this access right. Rightsholders would be able to grant access based on a narrow agreement of permitted uses, thereby giving rightsholders unprecedented control over creative works. This is especially true that use can be controlled through technological means in the online environment²⁶.

²⁵ *Ibid.* at 371 and 372, internal citations omitted.

²⁶ Even though the circumvention of Technological Protection Measures is prohibited by law, TPMs are still not protected under *copyright* principles. However, should the power of access that is currently found within the CTP right be expanded into a right to control access, our understanding of copyright would be fundamentally changed, to the detriment of the public domain.

The wide scope of the CTP right is evident when one examines 'off-line' communications of works, protection of which is generally reserved for commercial communications to the public. The broadening of the scope to encompass all communications to the public – as it is found in Article 3 of the InfoSoc Directive – extensively expands the activities reserved for rightsholders in the online environment. The rationale for the protection of commercial communications clearly emanates from the desire that authors are able to generate income from their works, yet the online incarnation of the CTP right is lacking in any commercial delineator. This argument is eloquently stated by Westkamp:

“The traditional set of communication rights does not necessarily refer to a general communication right ... These acts are strongly associated with a commercial act: Both the broadcast of a film or the performance of drama in a theatre therefore became recognized as being within the owners control. This recognition of certain rights that do not involve physical copying of the work is based on the insight that the copyright owner uses the work to generate income, not because the owner has a right to control any use.²⁷

As well as having no delineation between commercial communications and non-commercial communications, the requirements to be met in engaging the CTP right have been left to the interpretation of Signatories. Therefore, the wider the CTP right is

²⁷ G. Westkamp, *'Transient copying and public communications: the creeping evolution of use and access rights in European copyright law'* (2004), Westkamp, Guido, *Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law* (2004). *George Washington International Law Review*, Vol. 36, No. 5, 2004. Available at SSRN: <https://ssrn.com/abstract=1115401>

understood to be by Signatories, the wider the power of access will be bestowed upon rightsholders:

“To underscore our point, our analysis of the reproduction right and the communication to the public right holders for any of the rights found under copyright. Where these rights are expanded to include further acts or are defined broadly or with a specific activity in mind, they will bring into play the power to control access for a broader number of activities deemed exploitation. But only where the access is undertaken with the express and immediate purpose of engaging in any of the reserved acts of exploitation will the right-holder’s power to control access come into play.²⁸”

Where powerful interests within the music industry wish to further proliferate the access-based business model, lobbying to increase the power to control access by way of pushing for a broader interpretation of the CTP right would be a strategic plan that would lead to an increase in revenue generation. As will be discussed in the following sections, the CTP right has been expansively defined by the CJEU, from declaring that linking potentially attracts liability under the CTP right, to the latest case in this line of jurisprudence stating that “as a rule, any act by which a user, with full knowledge of the relevant facts, ***provides its clients with access to protected works*** is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29.²⁹” The strong emphasis by the court on the importance of the provision of access in relation to the CTP right, and the unceasing expansion of the concept of access is troubling. It suggests the possibility that the concept

²⁸ Ibid. at 372

²⁹ C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, EU:C:2017:456 (hereinafter “*The Pirate Bay*”) at 34. Emphasis has here been added. This case is discussed at section 3.3 below.

of access will be expanded beyond the point from which it is understood as merely a characteristic of the CTP right but rather a right in itself, which would potentially allow rightsholders to control the use of creative works. This point is significant because where the focus of analysis is on a subordinate power and its expansion rather than the legal right, the resulting legal framework may have undesired consequences, such that continued access to works may only be granted by the rightsholder under a narrow set of circumstances. Obfuscation within legal analysis should be avoided, and the present focus on access is decidedly unhelpful in engaging in a clear critical appraisal of the current copyright situation.

1.3 The case law pertaining to the CTP right

SGAE³⁰

SGAE is the body that manages intellectual property rights in Spain, which in this case argued that the provision of television sets in hotel rooms, as well as the playing of ambient music in communal areas, constitute a communication of protected works to the public.

Of vital importance to the reasoning in *SGAE* is the emphasis on the *intervention* made by the hotel in installing the televisions into the room. Channel signals were received by the main hotel aerial and then were redistributed via cable to each of the hotel rooms:

“The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the

³⁰ C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, 2006 ECR I-11543 at 34 (hereinafter “*SGAE*”)

original broadcast in the catchment area. On the contrary, 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.³¹ (emphasis added)

The idea of indispensably intervening to give access to copyright protected works began in *SGAE* has been expanding ever since.

*Svensson*³²

An expansion of the concept of the CTP right took place in *Svensson*, which case is significant because the Court of Justice of the European Union (“CJEU”) ruled that providing a link to a copyright work is an act of communication. The court went on to re-iterate, as had been ruled in previous cases³³, that the RCP consists of two cumulative criteria; (i) an act of communication of a work and (ii) the communication of that work to a public.³⁴

The actions required to engage the right of CTP in Article 3(1) of the InfoSoc Directive are not defined therein. It is therefore incumbent upon the court to define and delineate the right, and according to settled case law “it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it

³¹ *SGAE* at 42

³² C-466/12, *Svensson v Retriever Sverige AB* [2014] E.C.D.R. 9 (hereinafter “*Svensson*”)

³³ C-607/11, *ITV Broadcasting Ltd v TVCatchup Ltd* Case [2013] IP & T 607 at 21 (communication analysis) and 31 (public analysis)

³⁴ *Svensson* at 16

is part.³⁵ It was indeed essential and correct that the CJEU attempt to shape the right in order that it might be utilised by rightsholders. However, somewhat problematically, the CJEU chose to shape the right in a rather terse manner in *Svensson*, stating abruptly that “the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, and ‘act of communication’, within the meaning of the provision.³⁶” No further elucidation on how the provision of a link is to be understood as a communication to the public is given. This short statement means that one of the essential cumulative criteria for the infringement of the RCP is fulfilled, and regrettably no further analysis is provided.

Such short treatment of whether linking is an act of communication is in contrast with treatment which had previously been accorded at the national level in Germany and Norway, as well as the Canadian Supreme Court.

The German *Paperboy*³⁷ case again involved a news aggregator, and the German Federal Supreme Court “excluded infringement of both the reproduction and the making available right by eloquently stating that a person making a hyperlink to a website containing a copyrighted work - the latter bearing already available on the internet with the copyright holder's consent - does not infringe the rights of the former as it only “refers to the work in a manner which facilitates the access already provided by others.”³⁸ Of significance in

³⁵ *SGAE*; C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, EU:C:2016:644 (hereinafter “*GS Media*”) at 29; C-527/15, *Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler*, EU:C:2017:300 (hereinafter “*Filmspeler*”) at 26; and C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, EU:C:2017:456 (hereinafter “*The Pirate Bay*”, or “*Pirate Bay*”) at 20

³⁶ *Svensson*. at 20

³⁷ *Paperboy*, case I ZR 259/00, 17 July 2003, 35 *IIC* 1097 (2004).

³⁸ Arezzo, Emanuela, ‘*Hyperlinks and Making Available Right in the European Union: What Future for the Internet after Svensson?*’ (March 4, 2014). Available at SSRN: <https://ssrn.com/abstract=2404250> or <http://dx.doi.org/10.2139/ssrn.2404250>

the *Paperboy* case was the lack of control that the linker has over the website containing the protected work; where the protected work is removed at a later date the link will no longer function, and will never amount to a transmission of the protected work to the third-party user.

The Norwegian Supreme Court held that linking should not always necessarily be categorised under the CPT right, holding in the *Napster*³⁹ case that “it cannot be doubted that simply making a website address known by rendering it on the internet is not making a work publicly available.⁴⁰”

Linking is essential to the operation of the internet, yet the categorisation of linking as an act of communication – and therefore falling under Article 3(1) – for which authorisation from rightsholders is *always* required, potentially detrimentally harms the operation of the internet. In order to avoid serious difficulties in the normal functioning of the internet, the CJEU court in *Svensson* relied upon the ‘new public’ concept to delimit the power of rightsholders in linking to content which is freely available on the internet. Contrastingly, the Germany *Paperboy* court and the Norwegian *Napster* court did not feel the necessity to reason that providing a link is a communication to the public and therefore must not rely on the ‘new public’ concept to allow for the normal functioning of the internet. Importantly however, in the Norwegian court found in the *Napster* case that, even though providing links does not necessarily infringe the RCP, the activities of Napster could “amount to a ***contributory*** infringement of copyright.⁴¹” (emphasis added)

³⁹ *TONO et al. v. Bruvik*, 37 IIC 120, at 121 (2006)

⁴⁰ *Ibid.* at para 48

⁴¹ Arezzo, Emanuela, ‘*Hyperlinks and Making Available Right in the European Union: What Future for the Internet after Svensson?*’ at 27 (emphasis added)

The potential categorisation of linking as falling under article 3(1) and therefore being a communication to the public was controversial, even while the CJEU *Svensson* judgment was pending. The European Copyright Society (“ECS”), a group of leading academics from across Europe whose goal is lend a voice to the public interest in copyright matters, voiced its concerns regarding the classification of linking as a communication to the public in its opinion:

“If every intervention that gave access to a work were treated as a communication, the effect would be to transform the “communication” right into an “access right” covering any act that provides access to a work, as for example, where a bookstore or newsagent lets the public into its premises or a library allows access to its collection or reading rooms. To do so would confuse “communication” with rights such as “distribution”, “rental”, “lending”.⁴²”

The ECS was aware of the danger of classifying every intervention that gives access to a work as a communication. The danger is an ever-expanding copyright that has very few delimiting principles and seems to creep towards the recognition of an access right.

GS Media

GS Media provided links to protected works that had been uploaded without the consent of the copyright holder. Of particular significance was that Playboy had contacted GS

⁴² European Copyright Society “*Opinion on The Reference to the CJEU in Case C-466/12 Svensson*”, at 26. Available at <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>

Media to inform it that the upload of these photos had not been authorised, therefore GS Media knew that it was providing links to infringing content. Eventually, the photos to which GS Media had originally linked to were taken down, thereby making the links defunct. However, GS Media staff decided to simply provide new links to a different website that hosted the same photos.

The CJEU focussed on the role of the linker and whether they had “provided access to works that otherwise would not or should not have been accessible. In so doing, the hyperlinking party might have given access to those works to a new public.⁴³” The knowledge of the linking party is paramount – whether they knew or ought to have known that the rightsholder had not given their authorisation – to the assessment of whether there has been a communication to the public. In terms of commercial websites, the CJEU instituted a presumption of knowledge of unlawfulness where the content linked to has been uploaded without authorisation. Therefore, it is incumbent upon a linker who operates commercially to verify that any protected content to which they link has been authorised by the rightsholder. This presumption is only overturned where the person or entity providing the links is able to prove that all the necessary checks were carried out.

The decision introduced a *knowledge* presumption in the infringement of the CTP right, which has traditionally been understood as a strict liability tort. This aspect of the case potentially blends primary and secondary liability, as secondary liability in copyright infringement (in the UK at least) requires a knowledge element.

⁴³ E. Nuttall ‘Case report: *Hyperlinking and the role of intention and knowledge*’ C.T.L.R. 2016, 22(8), 198-199 at 199

Filmspeler

In its *Filmspeler* decision, the CJEU held that ‘communication to the public’ covers the sale of multimedia players with pre-installed add-ons (available on the internet) containing links to websites where copyright works have been made available to the public without the authorisation of the rightsholders. This case denotes a remarkable expansion of the CTP right, specifically the court greatly expanded the access power within the right. The intervention that the *Filmspeler* devices made merely made it easier for purchasers of the device to access the copyright protected material:

“That intervention enabling a direct link to be established between websites broadcasting counterfeit works and purchasers of the multimedia player, *without which the purchasers would **find it difficult** to benefit from those protected works*, is quite different from the mere provision of physical facilities...⁴⁴”

While it appears socially correct that the seller in *Filmspeler* was found to be infringing copyright, the technical legal means used to reach this outcome are unsatisfactory. It required an extremely broad interpretation of the ‘indispensable intervention to provide access’ to find the seller liable under the CTP right, to the extent that the device merely made it *less difficult* for users to access infringing content.

⁴⁴ *Filmspeler* at 41

The scope of the CTP right was broadened in *Svensson*, *GS Media* and *Filmspeler*. Interpreting the provision of links as an act of communication was a conceptual leap that caused criticism throughout the copyright community, with the ECS providing inciteful commentary on the danger of expanding the CTP right. *GS Media*, with its rebuttable presumption of knowledge blurred the lines between primary and secondary liability. Finally, *Filmspeler* expanded our understanding of what an ‘indispensable intervention that provides access’ is. The case showed that this concept is to be understood widely, seemingly encompassing any intervention that provides access.

2 Liability and intermediary service providers

2.1 Safe harbours

The E-Commerce Directive introduced the ‘safe harbour’ regime⁴⁵, whereby passive intermediary service providers are not held liable for any infringing content that they transmit, store or host as a result of third party activities. These safe harbours were introduced to ensure legal certainty for intermediary service providers in the digital economy: for those companies providing services that allow the internet to function, it was felt that they should benefit from exemptions from liability for the actions of third parties. The Commission has stated that safe harbours are enacted principally to “ensur[e] both the provision of basic services which safeguard the continued free flow of information in the network and the provision of a framework which allows the internet and e-commerce to develop.”⁴⁶ The safe harbours offer a reprieve to businesses from the

⁴⁵ See Section 4 of the Ecommerce Directive

⁴⁶ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of Directive 2000/31/EC of the European Parliament

fragmented approach to secondary liability across Member States, preventing the imposition of liability in the circumstances prescribed in Section 4 of the E-Commerce Directive. The purpose of this approach is to strengthen the single market and ensure legal certainty for intermediary service providers.

Article 14 of the E-Commerce Directive deals with hosting providers⁴⁷ whose services consist of the storage of information provided by a recipient of the service. This particular safe harbour is limited to situations in which the hosting provider does not have actual knowledge of the infringing content and is the basis of the 'notice-and-takedown' regime, whereby rightsholders notify hosting providers of infringing content, thereafter hosting providers being obligated to remove infringing content.

Essential to note in relation to intermediaries protected under the safe harbour regime is that the commercial nature of their services do not affect their limitation from liability. This is clarified through Recital 18, which states that "information society services are not solely restricted to services giving rise to on-line contracting but also, *in so far as they represent an economic activity*, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of

and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), COM/2003/0702 final, §65.

⁴⁷ Article 14(1) of the E-Commerce Directive states that:

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

data⁴⁸". The 2014 case of *Papasavvas*⁴⁹ confirmed that indirect commercial profit – in this instance it was income generated through adverts on a free-to-use website – serves to fulfil the ‘remuneration’ requirement of the definition of Information Society service provider⁵⁰.

2.1 Article 14 of the E-Commerce Directive and ‘Web 2.0’ service providers

“Web 2.0” providers are those websites whose services rely and focus upon user-generated content, such as Facebook, Wikipedia, Twitter, YouTube and Vimeo. Despite such interactive platforms not yet having reached proliferation at the point at which the Directive was drafted, it has been established through a line CJEU caselaw that Web 2.0 sites fall under the Article 14 limitation from liability provided for in the E-Commerce Directive.

The first major case in this regard was *Google France*⁵¹, which concerned whether the Google ‘AdWords’ referencing service qualified for safe harbour protection. The Google ‘AdWords’ service enabled businesses “to obtain the placing ... of an advertising link to its site. That advertising link appears under the heading ‘sponsored links’, which is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above the natural results.⁵²”

⁴⁸ Recital 18 to the E-Commerce Directive

⁴⁹ C-291/13, *Sotiris Papasavvas v O Fileleftheros and Others*, EU:C:2014:2209 (hereinafter “*Papasavvas*”)

⁵⁰ *Ibid.* at 30

⁵¹ Joined Cases C-236/08 to C-238/08, *Google France and Google Inc. v Louis Vuitton Malletier*, ECLI:EU:C:2010:159 (hereinafter “*Google France*”)

⁵² *Ibid.* at 23

As the exemptions from liability found in section 4 of the E-Commerce Directive apply only to intermediary service providers, it was necessary for the court to discuss how to define these. In determining this definition, the court looked to Recital 42 of the E-Commerce Directive⁵³, which focusses on the neutrality of the intermediary service provider. The court stated that “it is necessary to examine whether the role played by that **service provider is neutral**, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.⁵⁴” (emphasis added). Reliance on Recital 42 in relation to Hosting Providers (those services limited from liability under Article 14) however, proved to be controversial. Even though Recital 42 states that “The exemptions from liability established in this Directive...” – thereby seemingly covering all three types of intermediary service provider – it goes on to describe only mere conduit services (“operating and giving access to a communication network”) and caching services (“transmitted or temporarily stored”) in its substantive text. The lack of reference to hosting services within the substantive text of this Recital would lead to a reasonable conclusion that hosting services do not fall within the ambit of its provisions.

In *L’Oreal*⁵⁵, the proceeding case in this line of jurisprudence, AG Jääskinen strongly opposed the reasoning in *Google France*, arguing that Recitals 42 to 44 should be applied

⁵³ *Ibid.* at 112 – 114. Recital 42 to the E-Commerce Directive reads as follows (emphasis added): The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of **operating and giving access to a communication network** over which information made available by third parties is **transmitted or temporarily stored**, for the sole purpose of making the transmission more efficient; *this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.*

⁵⁴ *Google France* at 114

⁵⁵ C-324/09, *L’Oréal SA and Others v eBay International AG and Others* EU:C:2011:474 (hereinafter “*L’Oreal*”)

only to mere conduit and caching providers and that Recital 46⁵⁶ should be read as applying to hosting providers. AG Jääskinen even states that, should the limitation in liability provided for in Article 14 be tethered to Recital 42 to the E-Commerce Directive, “the objectives of the Directive 2000/31 would be seriously endangered and called into question.⁵⁷” In relation to hosting providers, the AG states that “I would find it surreal that if eBay intervenes and guides the contents of listings in its system with various technical means, it would by that fact be deprived of the protection of Article 14 regarding storage of information uploaded by the users.⁵⁸”

Along with other scholars⁵⁹, Angelopoulos argues that AG Jääskinen’s reasoning is sound when she states that:

⁵⁶ Recital 46 to the E-Commerce Directive reads:

“In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, ***upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned***; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States’ possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.” (emphasis added)

⁵⁷ C-324/09, *L’Oreal SA and Others v eBay International AG and Others*, EU:C:2010:757, Opinion of AG Jääskinen at 142

⁵⁸ *Ibid.* at 147

⁵⁹ See S Stalla-Bourdillon, ‘*Sometimes one is not enough! Securing freedom of expression, encouraging private regulation, or subsidizing Internet intermediaries or all three at the same time: the dilemma of Internet intermediaries’ liability*’, 7 J. Int’l Com. L. & Tech. 154 2012 at 158 – “Google France ... relies essentially upon Recital 42 of the Directive on e-commerce despite the fact that Recital 42 does seem to concern only mere conduits and caching providers to the exclusion of hosting providers.” See also P. Van Eecke, ‘*Online service providers and liability: a plea for a balanced approach*’ 48 Common Market Law Review 1455 (2011) at 1482 – “Advocate General Jääskinen’s point of view should be supported. Hosting providers must, obviously, maintain a certain degree of distance from their users in order to benefit from the protection regime, as also reflected in Article 14.2 (which holds that the liability protection set forth in Art. 14(1) “shall not apply when the recipient of the service is acting under the authority or the control of the provider”). However, contrary to the passive transport role of mere conduit and caching providers, hosting providers will almost necessarily have some degree of involvement with their users. For example, when offering a website on which users can upload and store their personal photos or videos, the website operator must make available some tools to allow users to upload, categorize and display the information.”

“Commentators have mostly agreed with the AG, noting that hosting providers will almost [always] necessarily have some degree of involvement in the information stored, at least in the form of making available tools for its uploading, categorisation and display, while any other interpretation would result in a so-called ‘Good Samaritan paradox’, whereby a hosting intermediary would be disincentivised from taking precautions against infringement for fear of losing safe harbour protection.⁶⁰”

Rather unfortunately, the Recitals to the Directive do not offer sufficient guidelines to *determinately* argue neither for the reasoning expounded in the *Google France* case nor the reasoning in *L’Oreal*, so the issue remains contentious amongst commentators in Europe and confusion still arises from this issue. However, the most reasonable interpretation of the law appears to be that of AG Jääskinen, given that hosting services generally require to be involved in the information uploaded by third parties as part of their business model.

The ruling in *L’Oreal*, rather than distance itself from the requirement of neutrality, instead expanded its notion of neutrality so that hosting providers may still benefit from the limitation of liability. A general criterion that a service provider not play “an active role of such a kind as to give it knowledge of, or control over the data.⁶¹” This criterion was further elucidated when the court stated that:

⁶⁰ C. Angelopoulos, ‘On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (January 2017) Angelopoulos, Christina, On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market (January 2017). Available at SSRN: <https://ssrn.com/abstract=2947800>

⁶¹ *L’Oreal* at 113

“the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 (see, by analogy, *Google France and Google*, paragraph 116).

Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.⁶² (emphasis added)

In grappling with whether Web 2.0 services qualify for the limitation of liability under Article 14, the court seems to have laid down some guidance in terms of the behaviour of the hosting provider, that behaviour being contribution to the infringement or optimisation thereof. Angelopoulos states that

“While the borderline that turns a neutral host into an active content provider therefore remains a fuzzy one, it appears that Web 2.0 providers

⁶² *L’Oreal* at 115 & 116

cannot per se be excluded. Instead, the case law would indicate that, ***as long as they don't contribute to the creation of the relevant content or provide assistance geared at optimising the presentation of or promoting that content*** then they are sufficiently neutral.⁶³ (emphasis added)

The guidance laid down in *L'Oreal* as to when liability will be incurred by Web 2.0 providers is perhaps not entirely comprehensive, yet it would seem that the provision of automated support to all users in the form of guidance web pages, tools for the uploading and categorization of content, as well as search facilities, will maintain the Article 14 limitation on liability. Van Eecke articulates the point persuasively:

“because the ECJ now interprets neutrality as ‘lack of knowledge’, the hosting provider will remain protected when offering tools to upload, categorize, display or search for photos or videos. This will also be the case if the hosting provider offers tools to allow the user to edit the content of his texts, or an automatic ‘recommendation engine that offers text suggestions on the basis of text submissions of other users. Conversely, as suggested by the ECJ, a hosting provider would gain knowledge and therefore no longer remain neutral if the procedures on its platform would generally cause its staff to obtain knowledge of user data (e.g., because staff members would always need to screen information before publication). ...

⁶³ C. Angelopoulos, ‘On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (January 2017) Available at SSRN: <https://ssrn.com/abstract=2947800> at 12

Any other interpretation would expose many hosting activities to liability claims.⁶⁴

This cogent interpretation maintains the limitation of liability for the majority of Web 2.0 service providers yet provides guidance on the activities that these providers should not engage in in order to avoid liability.

3 The ‘value gap’, the EU Commission’s response thereto and The Pirate Bay

3.1 The ‘value gap’

The problem

The ‘value gap’ – as argued by the music industry – emerges where online intermediaries (specifically hosting providers) benefit unfairly from the safe harbour provisions by hosting and monetising infringing content which has been uploaded by third parties without the authorisation of rightsholder. Since Web 2.0 hosting providers benefit from a *conditional* limitation of liability in Article 14 of the E-Commerce Directive, these companies are under no obligation to licence content from rightsholders. Instead, the notice-and-takedown regime described at 2.1 above applies, with rightsholders required to inform hosting providers of infringing content before an obligation to remove infringing content is imposed. Alternatively, these hosting providers may offer rightsholders a share in the revenue generated from the content on the site. However,

⁶⁴ P. Van Eecke, ‘Online service providers and liability: a plea for a balanced approach’ 48 Common Market Law Review 1455 (2011) at 1483

rightsholders argue that these revenues are substantially smaller than those revenues that would be extracted through licensing agreements and that rightsholders are in an extremely weakened negotiating position because hosting providers are not obligated to negotiate on this issue.

The industry describes the 'value gap' as "the growing mismatch between the value that user upload services, such as YouTube, extract from music and the revenue returned to the music community – those who are creating and investing in music. The value gap is the biggest threat to the future sustainability of the music industry.⁶⁵" This exceptionally vehement description of the 'value gap' posits that many hosting providers categorised as Web 2.0 services actually abuse the safe harbour limitations on liability to the detriment of creators. Figures presented by the music industry argue that subscription audio streams (paid and ad-supported) consist of approximately 212 million users and generate around \$3,904 million in revenue. In contrast, Web 2.0 hosting providers consist of around 900 million users yet generate only \$553 million in revenue⁶⁶. Interests within the music industry are seeking legislative change in order to redress this issue, with the IFPI Report stating that "The value gap is now the industry's single highest legislative priority as it seeks to create a level playing field for the digital market and secure the future of the industry.⁶⁷" It is clear from this statement that interests within the music industry are pushing to amend the safe harbour for Web 2.0 providers in order to generate greater revenues. The push from within the music industry is targeted towards increasing monetisation by narrowing the scope of the safe harbour limitations from liability that were introduced in Article 14 of the E-Commerce Directive.

⁶⁵ IFPI Report at 25

⁶⁶ IFPI Report at 25

⁶⁷ IFPI Report at 24

An example of the contentions on both sides of the issue can be drawn from the YouTube and Gesellschaft für musikalische Aufführungs (“GEMA”) (the German collection society) standoff that took place over a number of years. A licence between the two entities expired in March 2009, without another being negotiated. The two were at a stalemate until November 2016, with users being met on YouTube with a greeting such as “Unfortunately, this UMG-music-content is not available in Germany because GEMA has not granted the respective music publishing rights.⁶⁸” The deal that was eventually negotiated between YouTube and GEMA was kept confidential, making it impossible to determine whether the compensation given to rightsholders was at the market rate or at the lower rate generated through advertising revenue, which is often the rate offered by YouTube in such circumstances.

With one side arguing that Web 2.0 services should take licences out for the use of copyrighted content and the other side maintaining its limitation from liability under Article 14 of the E-Commerce Directive, the Commission’s response to the ‘value gap’ has caused much controversy.

⁶⁸ For an example see, B. Challis, ‘*The sound of music: YouTube and GEMA finally settle*’, 02 November 2016, available at <http://the1709blog.blogspot.co.uk/2016/11/the-sound-of-music-youtube-and-gema.html>

3.2 The EU Commission's response to the 'value gap'

Article 13 of the proposed Directive

In its Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market⁶⁹ which was released in September 2016, the EU Commission introduced measures to combat the 'value gap'. The measures are to be found in Article 13 and Recitals 37, 38 and 39 of the proposed Directive. Article 13 of the proposed Directive provides:

1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter ***or*** to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

⁶⁹ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593 (hereinafter "the proposed Directive")

2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.

3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

This Article is the Commission's attempt to redress the 'value gap', seemingly obligating 'Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users' to either take out copyright licences and ensure the enforcement of these licences or to prevent copyrighted works from being posted at all.

The Commission sets out the reasoning behind the introduction of this Article in the Explanatory Memorandum⁷⁰ to its Proposal. The Commission states that the

⁷⁰ Commission, 'Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market', 2016, at 137 and 138 available at <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>

“Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works.⁷¹”

Unfortunately, the Explanatory Memorandum begins its analysis from the assertion that rightholders are disadvantaged in the current framework and therefore this must be amended. This may indeed be the case, yet without a discussion of the competing interests at stake such an assertion seems hollow and one sided. Article 13 is aimed at strengthening the position of rightholders (after having assumed that rightholders are disadvantaged) yet does not examine or give a balancing analysis of the issues at stake. Since the construction of laws depends on an appropriate balancing of interests, the lack thereof within the Explanatory Memorandum is disappointing and leads to the conclusion that this law has been drafted with the interests of only section of the copyright community having been considered. The one-dimensional nature of the Commission’s understanding of the interests at stake in this debate was excellently expressed in an open letter sent to MEPs and members of the IP working party of the European Council:

“the Commission’s proposals take the ‘value gap’ as given as a rationale for intervention. The idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis. The concept was invented by the music industry in 2006, initially as a ‘value recognition

⁷¹ *Ibid.* at 3

right' in the copyright levy debate. This led quickly to reports commissioned from economic consultants that confirm the views of the commissioners. It is disturbing that the European legislator now appears to take the concept for granted. The value gap language also obfuscates the legitimate goal of improving the economic positions of creators.⁷²

The drafting of Article 13 and the Commission's literature surrounding this provision suggests that one particular set of interests are at the centre of copyright policy development within the EU, and that set of interests is determined to reserve access as a main component of protection afforded to rightholders in the online environment.

In its Impact Assessment which was drafted prior to the release of the proposed Directive, the Commission describes the problem as such:

“user uploaded content services [such as Web 2.0 services] often provide the public with large amounts of protected content. In addition ***to giving access*** to the content, these platforms provide functionalities such as categorization, recommendations, playlists, or the ability to share content. ***These services use copyright protected content in order to attract and retain users to their websites thereby increasing the value of their services. Access to such content is generally 'free' for users and the***

⁷² Open letter to members of the European Parliament and the European Council, 'EU Copyright Reform Proposals Unfit for the Digital Age', available at <http://www.create.ac.uk/policy-responses/eu-copyright-reform/>

service draws its revenues, directly or indirectly, from advertising and user data.⁷³ (emphasis added)

The focus of this statement on the provision of access as posing unfairness to rightsholders shows that the Commission thinks that access is at the heart of copyright in the online environment: providing access to copyrighted content, as well as various functionalities, is posited as adding value to Web 2.0 services, and that such access should be the genesis of revenue generation for rightsholders. Provision of access as the genesis of value in the online environment with the vaguely defined limiting caveats of the provision of ‘functionalities such as categorization, recommendations, playlists, or the ability to share content’ suggests that the approach of the EU Commission is to broaden the scope of the CTP right as it applies to Web 2.0 service providers. All Web 2.0 providers provide functionalities – it is an essential aspect of usability of these business models that content is categorized and shareable, recommendations are made, playlists are provided.

Comment – Problems with Article 13 of the proposed Directive

Problem: *Article 13 and Article 3 of the InfoSoc Directive*

Recital 38 to the proposed Directive seems drafted on the basis that Information Society Service Providers communicate works to the public:

⁷³ Commission Staff Working Document – Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes, SWD(2016) 301 final, Brussels, 14 September 2016 (hereafter: ‘Impact Assessment’) at 138

“Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council⁷⁴”

The structure of this provision seems to suggest that the nature of the services offered by ‘information society service providers store and provide access to the public to copyright protected works’ are infringing Article 3 of the InfoSoc Directive. This assertion had previously been unknown in EU case law. As discussed above at 1.3, the two requirements of the CTP rights are (i) an act of communication (which is achieved through an indispensable intervention) and (ii) a public. From *Svensson* to *Filmspeler*, the court never discussed the possibility that such services communicated to the public. Angelopoulos eloquently states that:

“While the case law of the CJEU has, in recent years, increased our understanding of what ‘communication to the public’ involves, no judgement to date has examined whether or not hosting providers may, on its basis, be said to be directly infringing copyright and related rights themselves. This interpretative void is particularly significant given that the

⁷⁴ Recital 38 to the proposed Directive

CJEU has made clear is [sic] that an ‘individual assessment’ of each case is necessary.”⁷⁵

Such a change in the understanding of the CTP right being found within a Recital to the proposed Directive was a somewhat drastic alteration to the state of the law. This change is an expansion in the scope of the CTP right which signifies that the provision of access is becoming a noteworthy legislative component of the rights reserved for authors in the online environment.

Problem Recital 38 to the proposed Directive and Article 14 of the E-Commerce Directive

Problems also arise in relation to Article 14 of the E-Commerce Directive. As discussed above, Article 14 covers hosting providers, including Web 2.0 service providers and it is important to note that the E-Commerce Directive is not included in the list of existing Directives that the proposed Directive is intended to leave intact⁷⁶. The services to which Article 13 of the proposed Directive refer – ‘Information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users’ – appear to fall within the scope of Article 14 of the E-Commerce Directive. Paragraph 2 of Recital 38 states that:

“In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of

⁷⁵ C. Angelopoulos, ‘CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public’ at 31

⁷⁶ Article 1(2) of the proposed Directive

the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.⁷⁷”

This wording of ‘optimising ... [and] promoting’ seems to refer back to *L’Oreal* at paragraph 116, discussed at 2.1 above. Also discussed in that section is the interpretation that automated help tools will allow a Web 2.0 provider to maintain its limitation on liability, whereas assistance that would cause the provider’s staff to know of infringing content would disqualify the provider from the limitation of liability. Yet Recital 38 outlined above states that the nature of the means used for optimising and promoting is irrelevant, which is seemingly incongruous with the case law surrounding the neutrality of hosting providers. Indeed, the ‘nature of the means used’ has been understood as *pivotal* in determining whether a hosting provider should incur liability, not irrelevant.

3.3 The Pirate Bay case

The Pirate Bay platform

The Pirate Bay case originated from proceedings between Stichting Brein (a Dutch anti-piracy organisation) and two internet access providers, Ziggo and XS4ALL. Stichting Brein was seeking an order to obligate the internet access providers to block access to the third party website The Pirate Bay (“TPB”).

⁷⁷ Paragraph 2 of Recital 38 to the proposed Directive

TPB does not host any content but is instead a file-sharing engine which indexes and manages BitTorrent files. TPB does not host any copyright-protected works but rather, users can share files with other users using a technical process called torrenting. An essential aspect of the process is provided by TPB's categorizing and indexing of the files, so that these are searchable by users. It also maintains the 'usability' of the platform by removing faulty links. TPB is most well-known for its availability of copyright protected works, with approximately 90% – 95% of the files shared on the network being infringing⁷⁸.

AG Szpunar provided an eloquent explanation of 'torrenting' in his Opinion when he stated that in the

“Peer-to-peer ... model, the computer of each user, that is to say each peer, is not only a client which receives information, but also a server which stores the information and makes it available to other peers. The network is therefore decentralised (no central servers) and has a 'variable geometry', since only connected peer-servers form the network at any given time (unlike a 'traditional network', in which servers are usually permanently connected and where only the clients connect and disconnect temporarily). ... Such a network is also, due to its decentralised architecture, more resistant to attacks and to intervention by the security forces or persons holding rights under a copyright. It is difficult inter alia to remove

⁷⁸ C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, EU:C:2017:99, Opinion of AG Szpunar at 23 (hereinafter “AG Opinion of Pirate Bay”)

content from a peer-to-peer network, since it is on different servers belonging to different individuals in different countries.⁷⁹”

AG Szpunar’s explanation illustrates clearly the difficulties faced in combating the wide-scale copyright infringement that takes place on peer-to-peer networks. With the computer of each user acting as a server to other users, copyright infringement can occur between individuals rather than having to be committed through a central server. With peer-to-peer networks, infringement is committed by a collective of users rather than merely one computer server. It is the collective nature of the infringement that makes peer-to-peer file sharing so difficult to combat, as users are multitudinous and spread over the globe.

As well as providing a cogent explanation of peer-to-peer networking, AG Szpunar provided a description of the services provided by TPB in relation to the peer-to-peer sharing, and how this service facilitates copyright infringement between users:

The use of any peer-to-peer network depends on the possibility of **finding** peers available to share the desired file. The information, whether it is technically in the form of torrent files, ‘magnet links’ or some other form, is found on websites such as TPB. *Those sites provide not only a search engine but also, as in the case of TPB, indexes of the works contained in those files, classified in various categories, for example, ‘100 best’ or ‘the latest’. So it is not even necessary to look for a particular work, it is*

⁷⁹ *Ibid.* at 20

sufficient to choose from those on offer, as in the catalogue of a library
(or rather an audio or video collection, since it is mainly music and films).
Those sites also often provide additional information, inter alia on the
estimated download time and the *number of active 'seeders' and 'leechers' for*
*a particular file.*⁸⁰ (emphasis added)

The Advocate General emphasises in his explanation the search and indexing functions provided by TPB, as also the categorisation it carries out, indicating that these activities are critical components of TPB's platform. Without TPB's services, infringement collectives would probably not be able to form as torrent files would not be indexed or searchable.

Questions referred to the CJEU

The Dutch Supreme Court sought clarification "as to whether the online sharing platform TPB ... communicates works to the public within the meaning of Article 3(1) of Directive⁸¹" and would therefore be able to grant a blocking injunction compelling the internet access providers to block access to TPB. The following questions were referred to the CJEU:

1. Is there a communication to the public within the meaning of Article 3(1) of Directive 2001/29 by the operator of a website, if no protected works are available on that website, but a system exists ... by means of which

⁸⁰ *Ibid.* at 25 and 26

⁸¹ *The Pirate Bay* at 16

metadata on protected works which are present on the users' computers are indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof?

2. If Question 1 is answered in the negative:

Do Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48 offer any scope for obtaining an injunction against an intermediary as referred to in those provisions, if that intermediary facilitates the infringing acts of third parties in the way referred to in Question 1?

The court interprets the first question as asking whether “the making available and management ... of a sharing platform which ... allows users of that platform to locate those works and to share them in the context of a peer-to-peer network⁸²” falls within the scope of Article 3 of the InfoSoc Directive, the CTP right. Should TPB’s activities be deemed to fall within the scope of Article 3 of the InfoSoc Directive, it would be clear a blocking injunction could be granted under Article 8(3), since TPB would be infringing copyright.

In its second question, the Dutch Supreme Court enquired if – in the circumstance that the activities of TPB do not fall under the CTP right – an injunction may be issued under Article 8(3) of the InfoSoc Directive⁸³ or Article 11 of Directive 2004/48⁸⁴. Since the operators of

⁸² *The Pirate Bay* at 18

⁸³ Article 8(3) of the InfoSoc Directive states that: “Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”

⁸⁴ In his opinion at 56, AG Szpunar found that Article 8 of the InfoSoc Directive takes precedence over Article 11 of Directive 2004/48, therefore only Article 8(3) is here discussed.

TPB do not post infringing content themselves but instead provide an infrastructure whereby copyright infringement may be committed by its users, the Dutch Supreme Court was questioning whether the scope of Article 8(3) may extend to such circumstances. AG Szpunar clarifies this point by stating that

“The circumstances envisaged in Article 8(3) of Directive 2001/29 presuppose the existence of a link between the subject of the injunction and the copyright infringement. A measure blocking a website implies that it has been established that the operator of that site has been held liable for copyright infringement using the services of the intermediary to which the injunction is addressed. In that case that operator constitutes a third party infringing copyrights within the meaning of Article 8(3) of Directive 2001/29. ... If the operator in question does not itself carry out the act covered by the author’s exclusive rights (for example, communication to the public), the infringement is only indirect.”⁸⁵

Contextually, the second question essentially asked whether – where TPB activities do not fall within the scope of Article 3, yet the users of TPB *by virtue of the platform* are able to infringe – an injunction can be granted against the internet access providers Ziggo and XS4ALL to block TPB under Article 8(3) of the InfoSoc Directive.

AG Szpunar cited *UPC Telekable Wien*⁸⁶ as somewhat analogous to the current case, but the contrasting feature that that case: “concerned the blocking of access to a website

⁸⁵ *AG Opinion of Pirate Bay* at 64 - 65

⁸⁶ C-314/12, *UPC Telekable Wien v Constantin Film Verleih & Wega Filmproduktionsgesellschaft*
EU:C:2014:192

whose *operator had been regarded as being itself the originator of the copyright infringement*. The works illegally made available to the public were on the website in question and were downloaded by users from that site. It was in those circumstances that the Court could hold that the operator of that site was using the services of the internet service provider of the persons viewing the site in order to commit copyright infringements. ... The situation is very different in the present case, since although it has been established that TPB is not itself making communication of works to the public without the consent of copyright holders, it cannot be concluded that it is using the services of the internet service providers of users of the peer-to-peer network in order to commit copyright infringements”⁸⁷ (emphasis added)

The judgement

The activities of TPB and the CTP right

As discussed above⁸⁸, it is essential for the CJEU to give shape to the CTP right since its exact requirements are not set out within Article 3 of the InfoSoc Directive. This is again found in *The Pirate Bay*, with the court providing “an individual assessment⁸⁹” of the right, which consists of (i) an act of communication and (ii) a public. The court sets out the “complementary criteria, which are not autonomous and are interdependent⁹⁰” that should be examined when determining whether a ‘communication to the public’ has been made. These criteria include the indispensable role played by the user and the deliberate

⁸⁷ Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV*, EU:C:2017:99, Opinion of AG Szpunar at 62 - 63

⁸⁸ See above at 1.3, entailing the discussion on how the CJEU interprets the CTP right under the InfoSoc Directive

⁸⁹ *The Pirate Bay* at 23

⁹⁰ *Ibid.* at 25

nature of his intervention⁹¹; the concept of the ‘public’⁹²; the communication of a work using specific technical means (“a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public⁹³) and the profit-making nature of a communication⁹⁴.

‘Act of Communication’

As discussed in section 1.3 above, whether a user played an ‘indispensable role’ through a ‘deliberate intervention’ is an essential criterion to be established when determining if an act of communication has taken place. The CJEU recalled how linking⁹⁵, as also the selling of multimedia players⁹⁶ both fall under the right of communication to the public where the user intervened, in full knowledge of the consequences of their actions, to give access to a protected work to third parties who otherwise would not have had access. The court concluded that:

“It can therefore be inferred from this case-law that, as a rule, any act by which a user, with full knowledge of the relevant facts, ***provides its clients with access to protected works*** is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29.⁹⁷” (emphasis added)

⁹¹ *Ibid.* at 26

⁹² *Ibid.* at 27

⁹³ *Ibid.* at 28

⁹⁴ *Ibid.* at 29

⁹⁵ *Ibid.* at 32, citing *Svensson*, *Bestwater International* and *GS Media*

⁹⁶ *Ibid.* at 33, citing *Filmspelers*

⁹⁷ *Ibid.* at 34

This latest guidance given by the CJEU concerning the CTP right shows that providing access to copyright works is at the heart of communicating to the public in the online environment. Specifically, intervening in an indispensable manner to provide access to copyrighted works is key. The *type* of intervention that takes place seems to be inconsequential – what is important is that there is an indispensable intervention. The focus on access is troubling, as it seems to be leading to an accretion in the CTP right; Svensson concerned linking and was understood to be a controversial broadening of the right, Filmspeler again broadened our understanding of how an indispensable intervention is to be understood. Now *The Pirate Bay* decision appears to touch even upon platform providers, potentially entering the realm of the E-Commerce Directive and affecting the limitation from liability for hosting providers. This steady expansion of the CTP right is troubling, as if the focus on the provision of access.

In the context of the case, TPB was found by the court to have intervened in an indispensable manner in the committing of copyright infringement through the making available and management of the platform:

“it is true, as noted by the referring court, that the works thus made available to the users of the online sharing platform TPB have been placed online on that platform not by the platform operators but by its users. However, the fact remains **that those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that**

***platform torrent files* which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network. The view must therefore be taken that the operators of the online sharing platform TPB, by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.⁹⁸** (emphasis added)

Since it would not be possible “or, at the very least ... more complex⁹⁹” to participate in the torrenting of copyright works without TPB platform, the court found that TPB intervenes in an indispensable way to give access to protected works. This is also troubling, as TPB’s intervention was hardly indispensable and it marks a significant broadening of the CTP right.

The court also ruled that TPB does not make the “mere provision of physical facilities for enabling or making a communication¹⁰⁰”, which would have freed TPB from liability. The court ruled that TPB goes beyond the provision of facilities because the:

“platform ***indexes*** torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by the users of that sharing platform. Moreover, it is clear from the observations submitted to the Court that, in addition to a search engine, the online sharing platform TPB offers an index classifying the works under different categories, based

⁹⁸ *Ibid.* at 36 and 37

⁹⁹ *Ibid.* at 36

¹⁰⁰ Recital 27 to the InfoSoc Directive

on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform's operators checking to ensure that a work has been placed in the appropriate category. In addition, ***those operators delete obsolete or faulty torrent files and actively filter some content.***¹⁰¹ (emphasis added)

Comment

Direct or Indirect Liability?

Since the copyrighted works are neither uploaded nor hosted by TPB, this would initially seem to suggest that the *relevant* act of communication is conducted not by TPB but instead by its users. Yet, in an expansion of the rules of direct copyright liability, the CJEU was able to find TPB directly liable for unauthorised acts of communication of works to the public. The potential for this decision to impact upon other internet intermediaries is clear: for the purposes of the 'indispensable intervention' requirement in "determining what amounts to an act of communication merely requires the making of acts of indexing, categorization, deletion, or filtering of content."¹⁰² All web 2.0 service providers index, categorize, delete and filter content, therefore potentially fulfilling one of the major requirements for copyright infringement. Broadening the control of the provision of access, so that rights reserved to the rightsholder are thereby increased, is a troubling aspect of current copyright law, as we seem to be crawling further and further towards greater control of access to creative works.

¹⁰¹ *The Pirate Bay* at 38

¹⁰² E Rosati 'The CJEU *Pirate Bay* judgment and its impact on the liability of online platforms' forthcoming in *European Intellectual Property Review*, at 11, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591

Also of great significance in the finding of liability under Article 3 was TPB's knowledge, i.e. the knowledge that by its indispensable intervention, copyrighted works were communicated to a *new public*. The knowledge requirement, which was introduced in *GS Media*, is here widened in scope to cover activities other than linking. The requirement of knowledge does present some difficulty, as copyright infringement has traditionally been understood to be a tort of strict liability. Angelopoulos argues that the CJEU took this approach because of an overwhelming need to standardise indirect liability for copyright infringement across the EU community¹⁰³. Indeed, AG Szpunar stated quite clearly that should the circumstances of the case be dealt with under indirect liability, that

“Such an approach would, however, mean that liability, and ultimately the scope of the copyright holders' rights, would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightholders within the single market. That is why the answer to the problems raised in the present case must, in my view, be sought rather in EU law.¹⁰⁴

¹⁰³ C. Angelopoulos, 'CJEU Decision on *Ziggo: The Pirate Bay Communicates Works to the Public*', 30 June 2017, available at <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>. She states that “in the era of the internet, a comprehensively harmonised European copyright law makes much more sense than a fragmented one. But the lack of a real harmonisation of indirect liability in the directives nevertheless remains the current reality of EU copyright law.”

¹⁰⁴ *AG Opinion of Pirate Bay* at 3

With this statement, AG Szpunar seems to be accepting that the circumstances of the case lead one to reason that indirect liability is the most sensible approach, yet the fragmented nature of indirect liability across the EU makes that an undesirable situation. He is essentially advocating judicial activism in the area of copyright infringement and arguing for the court to harmonise the indirect liability for copyright infringement. Although harmonisation of indirect liability may be desirable, the broadening of the CTP right in order to achieve this end is unfortunate. It increases the control of access that rightsholder possess in the online environment.

Through its judgement, CJEU seems indeed to have essentially harmonised the rules of indirect liability through an expansion of the rules of direct liability – Angelopoulos states that:

“Combined with the safe harbours of the E-Commerce Directive, the result could be a fairly robust EU harmonisation of indirect copyright liability: the directive-based safe harbours determine when liability cannot be imposed on indirect infringers and the CJEU-made expansive interpretation of the right of communication to the public determines when it can. The result is a pleasing complementarity between the E-Commerce Directive and the InfoSoc Directive.¹⁰⁵”

Whether this judgement will be expanded to other intermediaries is an anticipated question within the copyright community, with members positing on its relation to Article

¹⁰⁵ C. Angelopoulos, *‘CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public’*

13 of the proposed Directive¹⁰⁶. The strong lobbying of the music industry discussed in 3.1 above led to Article 13 of the proposed Directive, which has widely been condemned due to its assertion that intermediaries routinely communicate to the public. *The Pirate Bay* decision has shown that the CJEU jurisprudence now appears to be in line with Article 13 by holding a website that provides services directly liable for copyright infringement.

The expansion of our understanding of the provision of access – i.e. the management of a platform that indexes and categorises works – is troubling because it seems to be reaching into the realms of secondary liability, which is not a harmonised area of law. The ruling in *The Pirate Bay* case may – from a non-legal viewpoint be satisfactory because of the entity’s clear intention to infringe copyright. However, yet another expansion of the CTP right is troubling. The seemingly unending evolution of the CTP right, and the focus on the provision of access, represents an alarming accretion of the CTP right that favours rightsholders predominantly over every other stakeholder in society. From the case law, the way in which access is given (via a link, device or platform like TPB), is inconsequential. The act that will induce liability is to give access, and *The Pirate Bay* seems to suggest that intervention that merely makes achieving access easier is enough to attract liability. As discussed in 1.2 above, our traditional understanding of the communication right related to commercial communications. The separation from commercial communication has led to an unprecedented expansion of the CTP right so that infringement occurs in any situation where access is provided by a user who has full knowledge of the relevant facts. Given the accretion of the CTP right that has occurred

¹⁰⁶ See E Rosati ‘*The CJEU Pirate Bay judgment and its impact on the liability of online platforms*’; European Digital Media Association press release, dated 26 June 2017, accessible at http://www.europeandigitalmediaassociation.org/pdfs/latest_news/The%20Pirate%20Bay.pdf; and C De Cock, ‘The CJEU Pirate Bay decision and the censorship filter’ accessible at <http://copybuzz.com/analysis/cjeu-pirate-bay-decision-censorship-filter/>

through the case law, there seems to be a danger that access control will soon be understood to be a right under copyright.

Does the presumption of knowledge from GS Media apply?

As discussed in 1.3 above, *GS Media* introduced a rebuttable presumption of knowledge of infringement where a linker is operating for profit. This presumption operates to the effect that, where a linker is operating for profit, they should or ought to know whether the work was uploaded with the authorisation of the rightsholder. It was not explicitly stated within *The Pirate Bay* that this rebuttable presumption should apply in the circumstances of the case, and early scholarly opinion regarding this issue has emerged with differing views.

Angelopoulos argues that in *The Pirate Bay*,

“the knowledge condition was softened considerably in comparison to the earlier hyperlinking judgments. While in *GS Media* the CJEU introduced a rebuttable presumption of knowledge where the hyperlinking activity is carried out for profit, in *Ziggo* the Court makes no mention of such a ***mechanism***. The Court does note that TPB operates for the purpose of obtaining profit, but only as one indication among many of TPB’s knowledge of the infringements on its platform. ***This would seem to suggest that the kind of knowledge that is necessary to find an infringement can be***

*calibrated depending on the circumstances of the case.*¹⁰⁷ (emphasis added)

This interpretation of the ruling leads us further down the path of legal uncertainty. If the level of knowledge necessary in order to impose liability is to be calibrated per each new set of circumstances, we are left with a situation where outcomes that cannot be predicted and legal risk is increased.

In contrast, Rosati argues that the presumption of knowledge does apply. She cites paragraphs 46 and 47 of the ruling in support of this assertion:

“Furthermore, there can be no dispute that the making available and management of an online sharing platform, such as that at issue in the main proceedings, is carried out with the purpose of obtaining profit therefrom, it being clear from the observations submitted to the Court that that platform generates considerable advertising revenues.

Therefore, it must be held that the making available and management of an online sharing platform, such as that at issue in the main proceedings, constitutes a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29.¹⁰⁸”

¹⁰⁷ C. Angelopoulos, ‘CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public’

¹⁰⁸ *The Pirate Bay* at 46 and 47

Rosati argues that it would be “difficult to understand the meaning¹⁰⁹” of paragraphs 46 and 47 if the presumption of knowledge did not apply. Additionally, Rosati points out that *The Pirate Bay* cites¹¹⁰ paragraph 50 of *Filmspeler*, which approves of the presumption developed in *GS Media*.

Should Rosati’s interpretation be followed, *The Pirate Bay* decision would have far reaching consequences. As mentioned above, most Web 2.0 services are likely to meet the first requirement for the CTP right – they perform indispensable interventions such as indexing, categorization, deletion, or filtering of content. These services also operate for a profit, therefore they are subject to the presumption of knowledge, which fulfils the second requirement for the imposition of liability. In contrast, as discussed at section 2.1, the protection of hosting providers under Article 14 of the E-Commerce Directive has nothing to do with whether the hosting provider is a commercial entity or not. In Rosati’s interpretation, *The Pirate Bay* case is not only on par with Article 13 of the proposed Directive but actually goes farther and imposes on every web operator that indexes, categorizes, deletes or filters third party content for profit an obligation to take licences from rightsholders or risk being found against for copyright infringement.

It is impossible to predict which view will succeed – whether Angelopoulos’ calibration of knowledge will apply or whether Rosati’s assertion that a presumption of knowledge will apply. The interpretation offered by Angelopoulos results in greater legal uncertainty and therefore greater risk. Where a court can calibrate the amount of knowledge necessary to impose liability, no one will truly be able to predict their own liability. Unpredictability of

¹⁰⁹ E Rosati ‘*The CJEU Pirate Bay judgment and its impact on the liability of online platforms*’ at 9

¹¹⁰ *The Pirate Bay* at 45

liability will potentially result in more licences being taken from rightsholders by hosting providers in order to avoid costly court battles. Licences may become an industry standard for companies looking to minimise legal risk, and by industry standard the rights under Article 3 would – in practical terms – be expanded to reach Web 2.0 providers.

In the interpretation offered by Rosati, a much wider application of the Article 3 right applies, where Web 2.0 service providers will have to acquire copyright licences from rightsholders because they will be found to be infringing the CTP right. The hosting providers index and optimise the content uploaded by users and will be presumed to have knowledge of the infringement. A new public will be deemed to have been communicated to because the rightsholder did not authorise the communication. The decision in *The Pirate Bay* seems to strip Web 2.0 service providers of their limitation from liability under Article 14 of the E-Commerce Directive, thereby forcing such services to take licences from rightsholders.

Conclusion

This paper has explored the accretion of the CTP right from *Svensson* to *The Pirate Bay* and has attempted to unpack the dangers posed by the focus on access in the legal discourse. Our traditional understanding of the communication rights – the showing of a film in a cinema or the playing of music at a concert – were understood mainly to be commercial activities, from which the author was intended to generate income. The lack of commercial delineation in the current CTP right has expanded its scope.

The expansion of the CTP right in *Svensson* was eloquently argued against by the ECS, who stated that “If every intervention that gave access to a work were treated as a communication, the effect would be to transform the “communication” right into an “access right” covering any act that provides access to a work.¹¹¹” Unfortunately, *Filmspeler* and *The Pirate Bay* seem to have fulfilled the ECS’s fear because the case law suggests that every intervention that gives access to a work where the user has full knowledge of the relevant facts will incur liability under the CTP right. What is especially chilling about Article 13 and *The Pirate Bay* is the seeming evisceration of the limitation of liability offered by Article 14 of the E-Commerce Directive for Web 2.0 service providers.

The focus on access in the legal literature is troubling. Its position as a Hohfeldian power under the CTP right has been considerably widened in the jurisprudence. The business model of providing access to music streaming services in exchange for money has proliferated yet this does not necessarily mean that access should be the primary focus of legal analysis. Where access can be controlled, use is inevitably under the thrall of access, which would represent an unacceptable expansion of the rights reserved under copyright. The provision of access as it is understood under the CTP right must be delimited by the legislator or the court. Our current understanding seems to be that any intervention by a user in possession of all the relevant facts that provides access will infringe the CTP right. This gradual accretion of the CTP right is dangerous and appears to be creeping towards bestowing a right of controlling access, which is a dangerous evolution of copyright.

¹¹¹ European Copyright Society “*Opinion on The Reference to the CJEU in Case C-466/12 Svensson*”, at 26. Available at <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>

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