HIGH COUNCIL FOR LITERARY AND ARTISTIC PROPERTY

MISSION: RIGHT OF COMMUNICATION TO THE PUBLIC

- Report and Proposals -

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The views expressed in this report are the authors’ alone. The content covers observations made during a presentation of the Mission’s work at the Council’s plenary session on 12 November 2016, and during the ensuing talks.
Overview

Findings - An analysis of Court of Justice of the European Union (CJEU) case law on the right of communication to the public (Section 2 of the report, Appendices 5 and 6) revealed that Luxembourg judges, in their interpretation of Directive 2001/29 (Article 3) and Directive 2006/115 (Article 8), deviated from not only the meaning which is generally conferred upon these provisions, but also from internationally-recognised solutions.

It would of course be excessive to state that all of the interpretations made by the CJEU are questionable. Yet the study conducted by the Mission shows that, in too many instances, the case law has become not only unpredictable but also complex and contorted. This is demonstrated by the fact that in order to rule on the existence of an act of communication to the public, the CJEU sets out no less than 16 criteria, further complicating the exegete’s task by aiming to confer a different role upon each of these parameters (viewed as the building blocks of the law), in isolation or in connection with other parameters, and according to each scenario.

One consequence of this shift is that culture professionals are unable to gauge exactly which approach to adopt or what precautions ought to be taken, even though this right has become the most frequently-implemented prerogative, primarily due to the growth in digital technology and networks.

Analysts of the case law are not alone in being unable to anticipate or predict outcomes. National judges are now often immediately tempted to raise preliminary questions on this topic, particularly given that the CJEU has pronounced the right of communication to the public to be an ‘autonomous concept of EU law’. In other words, the CJEU’s interpretative role has been unsuccessful in formulating a theory on the right of communication to the public that a number of national judges would be likely to apply without hesitation.

Some Luxembourg judges are probably aware of this phenomenon, and one in particular is working to provide training by attending conferences or formal meetings to explain the case law which is currently being constructed. This approach, although highly commendable, does however often indicate that the CJEU’s construction has become divorced from the wording and spirit of the legislation. Some judges explain the movement away from a shared purpose by the fact that the international legislation which ought to clarify European standards is often deemed inaccurate, or even outdated. In any case, the growing gulf between the legal provision itself and its interpretation calls for legislative action, based on the democratic principles of the separation of powers.

This notion of action by the Commission and Parliament is present in the mind of many professionals, who have expressed a wish for the legislative texts to be clarified when the European authorities take one of their planned legislative actions. This does not involve grouping case law together and codifying it, but rather reverting to the solutions which were originally sought by international negotiators. Their modest ambitions simply involve reiterating the primary meaning of the legislation in the new instrument (in connection with international standards) in order to achieve a return to orthodoxy, consistency and predictability, which are key qualities for any legal system.
The Mission decided to explore this route after conducting a number of hearings.

**Solutions** - The Mission deems it crucial to clarify Europe’s legislative corpus to eliminate any ambiguity and prevent any continuation of the observed discrepancies with international standards (due to the CJEU’s interpretations). The proposals put forward by this report (Section 3) are either classified as ‘comprehensive’ or ‘targeted’.

- The Mission prefers the first approach. It is more general, understandable and consistent. However, it requires actions which, for the time being, the Commission has not yet scheduled despite its stated intentions.
- The second approach is less ambitious but more pragmatic, as it would be incorporated into the legislation which the Commission already proposed on 14 September. In other words, it would therefore be able to use the components that are more likely to be fully adopted.

**I - Comprehensive Approach**

As with the targeted approach, this method does not aspire to create new solutions, except for certain hyperlinks. For other areas, it simply aims to revert to the primary meaning of the legislation by providing a clearer definition of the boundaries.

This approach firstly proposes **adding to** the section of Directive 2001/29 which deals with the right of communication to the public (**Article 3** and recital 24a), in order to **set clearer boundaries for this right** (General Modifications (A)). Next, in consideration of fundamental rights, it suggests **adding a recital and provision to the legislative text of Article 5**, in order to add to the current system a **mandatory exception which excludes the creation of certain hyperlinks** from the scope of acts which require authorisation (Specific Modifications (B)).

**A – General Modifications:**

*Set clearer boundaries for the right of communication to the public*

The proposed solution aims to set clearer boundaries for the right of communication to the public after the two paragraphs (1&2) in Directive 2001/29 which establish it. Therefore, a paragraph 3 would be added (with the current para. 3 becoming para. 4).

Therefore:

- Paragraph 3, point 1 (Art. 3.3.1) eliminates any ambiguity on the nature of the act of communication to the public and/or making available to the public, which consists of making a protected work or subject-matter accessible to the public.
- Each of the following points (Art. 3.3.2 and 3.3.3) adds clarification on the specific features of this right, which in order to be applied requires:
  - Firstly, the existence of an act defined as communication to the public (3.2)
And secondly, this act should have a public purpose (3.3).

On this basis:
- Paragraph 3, point 2 therefore provides a clearer definition of the boundaries of the relevant acts;
- Paragraph 3, point 3 offers a definition of the notion of ‘public’.

More specifically:

1 - **Point 1 of paragraph 3 (3.1)** reiterates that the right of communication to the public is implemented by the fact of making accessible a protected work or other subject-matter.

Recital 24a stipulates that for the right of communication to the public to be applied, the act of making the protected work or other subject-matter accessible to the public does not need to be followed by an actual act of transmission.

2 - **Point 2 of paragraph 3 (3.2)** is more focused on defining the concept of an act that might fall within the scope of the right of communication to the public. It is subdivided into three sub-paragraphs:
   - **Paragraph 1** gives an overview of the range of acts that might be committed by listing general information.
   - **Paragraphs 2 and 3** set out the concept through two sets of specific acts. In the light of Court of Justice of the European Union case law, it is necessary to recall that these acts are subject to the right of communication to the public.
     - **In the area of so-called ‘secondary’ communication, sub-paragraph 2,** states that, contrary to the CJEU approach:
       - The intervention of a third party in the act of communication to the public is enough to trigger the application of the right of right of communication to the public,
       - With no need to question:
         - Whether the technology used is identical or different,
         - Whether or not there is a new public.
     - **As regards ‘direct injection’, sub-paragraph 3 aims to reinstate the scope of the right of communication to the public by reiterating the principle that if there is only one legal act of communication to the public, the two people/entities who have each fulfilled a physical act as part of the operation must be jointly liable for this legal act, i.e. obtain authorisation and make a payment.

3 - **Point 3 of paragraph 3 (3.3)** clarifies the concept of the public, the second condition on which the application of the right of communication is based.

The new provision advocates a return to the method used in almost all WIPO and WTO Member States, i.e. the contrast with the circle of close friends or the family circle.

**Recital 24a** reiterates a number of self-evident facts:
The concept of the public should not be confused with that of customers. Whether or not the committed act is profitable therefore has no bearing on the qualification of the act.

Contrary to the CJEU’s stance, there is no need to apply a quantitative approach to the concept of the public.

And the existence of a ‘new public’ is not required in order to qualify the committed act.

The second insertion recommended by the Mission will be made in Article 5 on exceptions to copyright and related rights.

B – Specific Modifications:
Establish a mandatory exception to literary and artistic property right covering the creation of certain hyperlinks

The creation of an exception departs from the notion that the freedom to link should be guaranteed wherever possible, which the CJEU deems to be a fundamental right.

Given, however, that this freedom to link cannot be a total freedom due to the risk of copyright being eliminated through exhaustion from the first use, the new provision sets out a number of (cumulative) requirements which, if not met, ensure that the enforceability of copyright and related rights remains intact.

These conditions are as follows:

- i) - Creators of hyperlinks must not know or have reason to believe that the protected work or content has been illegally communicated to the public or made available to the public on the target website;
- ii) - The protected work or material to which the link points must be freely accessible on the target website.
- iii) - The creator of the hyperlink must not be seeking a profit-making purpose.
- iv) – The hyperlink should not give the impression to the web user that he/she is viewing the work on the site which includes the link.

The mandatory exception does not include any compensation system.

II – ‘Targeted’ Approach

Some professionals have developed the notion of a less ambitious and therefore narrower approach, which some believe is more pragmatic and therefore more realistic. This approach is ‘targeted’ for two main reasons: Firstly, its attempt to match the legislative proposals revealed by the European Commission on 14 September. Secondly due to the
way in which the Mission’s proposals are distributed. Indeed, the proposed modifications are spread over several legislative texts rather than being grouped together in one text. They therefore include:

- The Proposal for a Directive on copyright in the Digital Single Market,

And the Proposal for a Regulation 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. Leaving aside hyperlink-related issues (which are out of scope for the proposed changes), this approach will resolve the same issues as the comprehensive approach.

Thus:

- The clarifications which aim to re-establish the original boundaries of the concept of a ‘public’ are included in the Proposal for a Directive, by adding the text that the Commission submitted a recital 39a;
- The clarifications which aim to resolve the ‘direct injection’ issue find their place in the Proposal for a Regulation, in the suggestions firstly of adding to Article 1, and secondly of creating a new Article 3a.

This second route should however only be viewed as an alternative option to be used in the event that the comprehensive approach is likely to be unsuccessful, for political or scheduling reasons. It is also important to note that it faces a very real obstacle given that the French Government (and a number of professionals) are against the adoption of a Regulation on certain online broadcasts by broadcasters and retransmissions of television and radio programmes.
In a mission letter dated 5 February 2016, CSPLA President Pierre-François Racine tasked the Mission (comprising Professors Pierre Sirinelli and Alexandra Bensamoun as well as Lawyer Josée-Anne Benazeraf) with examining the content of the right of communication to the public.

This request is in line with previous missions performed for the CSPLA, and was driven by the evolution of Court of Justice of the European Union case law which increasingly resembles a judicial creation. This is perhaps one of the reasons that led the European Commission to express its wish to regain control of the subject in its communication of 9 December 2015.

The mission letter stated the following:

“You will examine what issues the wording of this right currently raises, in respect of its scope and its ability to comprehend the new activities which have developed since Directive 2001/29 was adopted.

You will then assess the legality and suitability of the drafting changes that would be required in order to make a distinction between what constitutes an act of exploitation and what ought to be excluded from this description, while remaining technologically neutral.

Finally, you will outline a drafting proposal which France can raise at European level.”

The Mission responded to this request with great care. In other words, it did not assume from the outset that action was required. It started by carefully checking that there were indeed problems to be resolved, in order to be sure that there was a genuine need for action.

For this purpose, and in consideration of the existing legislation which is binding on the European Union and the Member States, it examined Court of Justice of the European Union case law to verify that it had been constructed in compliance with the international legislation which is binding on France. The Mission naturally conducted a large number of hearings in order to obtain the legal opinions of professionals within the sector, to assess the practical and economic effects of the solutions raised and finally to gather the opinions of these professionals on the merits of legislative action and on the content of such action should it be implemented.

In addition, the Mission endeavoured to study all aspects of the right of communication to the public, even though the main request of the contributors related to the more specific issue of hyperlinks. Although hyperlinks are included in the final analysis\(^2\), they form just one component of the proposals, which far exceed this particular issue.

After assessing the regulatory framework for the right of communication to the public in the various legislation which binds the European Union and the Member States (Section 1), and systematically studying CJEU case law which interprets this legislation and verifying whether the interpretations comply with the provisions (Section 2), the Mission decided to propose changes to the legislative texts (Section 3).

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\(^2\) In the so-called ‘comprehensive’ approach, see Section 3.
Section 1. Background

The right of communication to the public has sources that are European (I) and international (II).

I- European Union Legislation

Although the Rome Treaty does not contain any direct reference to literary and artistic property, it should not be assumed that European law has failed to take control of this area. In the Musik-Vertrieb judgment, the Court of Justice quite rightfully extended the implementation of Articles 34 and 36 of the TFEU to literary and artistic property. Community harmonisation of copyright and related rights was applied against this backdrop, with the EU basing its methods primarily on Article 114 of the TFEU with a view to establishing the internal market. The EU has clearly shown great dedication to the area of literary and artistic property, with a ‘step-by-step’ approach which is nevertheless ambitious.

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society is characterised by its cross-disciplinary nature. However, although the CJEU has made reference to the ‘ordinary law’ of literary and artistic property on a number of occasions, it should be reiterated that the above-mentioned Directive only implements partial harmonisation linked to the existence of online services (the ‘information society’).

Article 3 stipulates the following regarding the right of communication to the public of works and the right of making available to the public other subject-matter:

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

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

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

(b) for phonogram producers, of their phonograms;

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3 CJEC, 20 Jan 1981, cases C-55 and C-57/80.
(c) for the producers of the first fixations of films, of the original and copies of their films;
(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

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

The Directive does not give a precise definition of the act of communication to the public and making available to the public, or of the concept of the public. This does not however mean that the concept is free of boundaries. The European legislation works both on a positive basis by providing interpretation guidelines, and on a negative basis by setting out exclusions.

First of all on a positive basis, Directive 2001/29 provides interpretation guidelines which direct its regulatory content.

Recitals 9 and 10 set out the first guideline indicator based on the general direction of harmonisation of copyright and related rights, stating that the process should in effect: "take as a basis a high level of protection, since such rights are crucial to intellectual creation". This high level of protection is also "necessary in order to guarantee the [...] [appropriate] reward and provide the opportunity for satisfactory returns on this investment".

Recitals 23 and 24 set out the second, more specific indicator which refers to a 'broad' interpretation of the right of communication to the public and the right of making available to the public, to respectively cover "all communication to the public not present at the place where the communication originates" and "all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates".

On a negative basis, exclusions are set out to clarify the concept. Firstly, recitals 23 and 24 indicate that the Directive shall only be applied where the public is not in immediate and direct contact with the protected work or subject-matter.

In addition, please note that it is specifically the right of making available to the public which is harmonised here. The right of communication to the public for related rights is covered by Article 8 of Directive 2006/115 of 12 December 2006 on rental right and

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lending right and on certain rights related to copyright in the field of intellectual property (codified version)\(^5\).

The content of the right of communication to the public can also be determined by referring to international legislation.

\section*{II- International Legislation}

European law should be compatible with France’s international commitments, firstly the 1886 Berne Convention, and secondly the legislation derived from the Berne Convention, including the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) which is annexed to the Marrakesh Agreement of 15 April 1994 Establishing the World Trade Organization, and the WIPO treaties of 20 December 1996.

The Berne Convention was adopted in 1886 with the backing of ALAI [International Literary and Artistic Association]. The Berne Convention is a multilateral Convention which has been revised several times (most recently under the Paris Act on 24 July 1971). It holds a prestigious international role, both through the number of signatory States and its willingness to address every facet of international copyright (including foreigner status and conflict of laws).

It refers to the right of communication to the public in several of its provisions:

\textit{Article 11}

1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (…) 

(ii) any communication to the public of the performance of their works. …

\textit{Article 11bis}

\footnote{Article 8 - Broadcasting and communication to the public
1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.
2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.
3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.}
1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

Article 11ter

1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (...) (...) (ii) any communication to the public of the recitation of their works.

Article 14

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

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced. (...)

Article 14bis

1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article. (...)

The European Union is not a signatory of the Berne Convention. It is however required to comply with the Convention due to the provisions of the other conventions binding upon it. There are two conventions which form part of the European Union’s legal system and which refer to the Berne Convention: the TRIPS Agreement, and the WIPO Copyright Treaty (WCT).

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6 For a more comprehensive report on the link between international and Community law, see below, Appendix 7: Analysis by Ms Brunessen Bertrand.
The TRIPS Agreement to which the EU is party (Dec. No. 94/800/EC, 22 Dec 1994) indicates its affiliation to the Berne Convention in several articles through an incorporation mechanism. Article 2.2 in particular contains a very broad safeguard clause\(^7\), which covers both copyright in relation to the Berne Convention and related rights in relation to the Rome Convention. Article 9.1 again stipulates that States must comply with Articles 1 to 21 of the Berne Convention. Although the European Union is not directly bound by the Berne Convention (as it is not a member), it is indirectly tied to this incorporation mechanism, which indeed the CJEU does not contest\(^8\).

The WIPO Copyright Treaties (WCT) and Performances and Phonograms Treaty (WPPT), which were signed in Geneva on 20 December 1996 and ratified by the EU on 14 December 2009, also use content from the Berne Convention and the Rome Convention (for related rights), whether implicitly or explicitly through references. Article 1(4) of the WCT specifically states that “Contracting Parties shall comply with Articles 1 to 21 and with the Appendix of the Berne Convention”. In addition, the WCT describes itself as a “special agreement within the meaning of Article 20 of the Berne Convention” (Art. 1.1) (although this statement should be viewed in context).

Recital 15 of Directive 2001/29 also claims a direct affiliation with the Treaties, stating that: “This Directive also serves to implement a number of the new international obligations”.

Article 8 of the WCT states, in relation to the right of communication to the public:

\[\text{Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public}\(^9\) 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.\]

On the topic of making available fixed performances, Article 10 of the WPPT states:

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\(^7\) None of the provisions of Parts I to IV of this agreement shall derogate from the obligations that members may have in respect of one another under the Paris Convention, Berne Convention, Rome Convention or the Treaty on the Protection of Intellectual Property in respect of Integrated Circuits.

\(^8\) CJEU, *Premier League* (as above): “[... ] Article 3(1) of the Copyright Directive must, so far as possible, be interpreted in a manner that is consistent with international law, in particular taking account of the Berne Convention and the Copyright Treaty. The Copyright Directive is intended to implement that treaty which, in Article 1(4), obliges the Contracting Parties to comply with Articles 1 to 21 of the Berne Convention. The same obligation is, moreover, laid down in Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (see, to this effect, the SGAE judgment, paragraphs 35, 40 and 41 and the cited case law)” (paragraph 189).

\(^9\) Article 2, g) defines the right of communication to the public as “the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram”.
Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 14 of the WPPT uses the same definition for producers of phonograms.

In all cases, the CJEU, in a judgment dated 16 November 2016\textsuperscript{10} which criticised French legislation for 20th Century out-of-print books, made specific reference to the Berne Convention as a basis for its decision, also noting the reference in the WCT and calling for compliance with the provisions of the Convention.

These three conventions\textsuperscript{11} form part of the European Union’s legal system, and European institutions must therefore adhere to them, together with any secondary legislation that they create\textsuperscript{12}. It follows that the Court of Justice must adhere to the law of the Berne Convention and the interpretations that it makes.

This seems unlikely in the light of our analysis of CJEU case law.

\textsuperscript{10} CJEU, 16 November 2016, case C-301/15.
\textsuperscript{11} See Appendix 2 for a review of the relevant international legislation.
\textsuperscript{12} CJEC, 30 April 1974, Haegeman, case 181/73.
Section 2. Critical Analysis of CJEU Case Law

Introduction

Over ten years and a number of judgments (16 to be precise), the Court of Justice of the European Union has constructed its concept of the right of communication to the public, regarded from the outset (by way of the SGAE judgment\textsuperscript{13}) as an autonomous concept of EU law.

This concept is both complex and ever-shifting, and has been constructed in a series of layers, making it difficult to explain.

The Reha Training judgment delivered on 31 May 2016 by the Grand Chamber, at the request of the French authorities, therefore raised hopes that the Court’s previous case law would be clarified and consolidated, offering practitioners a predictable basis for their decisions\textsuperscript{14}. Such a consolidation was however cast into doubt when, just a few months later, the GS Media judgment again overturned assumptions on the (albeit) specific issue of hyperlinks.

If we however attempt to combine the two judgments and formalise their wording in order to write a definition of the right of communication to the public as it is interpreted by the CJEU, it would be worded as follows:

The concept of communication to the public must be assessed in accordance with the same criteria and be given the same meaning under both Article 3(1) of Directive 2001/29 as regards copyright, and Article 8(2) of Directive 2006/115 as regards the right to remuneration under related rights.

It includes two cumulative criteria, namely, an ‘act of communication’ of a protected work or subject-matter, and the communication of that work or other subject-matter to a ‘public’.

The concept requires an individualised assessment, taking into account several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another.

An act of communication means an act by a user, who intervenes in full knowledge of the consequences of its actions, give access to a protected work or other subject-matter to its customers. It is understood that the public which is the subject of the communication is is not merely 'caught' by chance, but is targeted by the user.

\textsuperscript{13} The dates, factual background and key points of the judgments cited in this analysis are provided in Appendices 5 and 6.

\textsuperscript{14} The submissions of Advocate General Bot state, under paragraph 4: "The present case gives the Court an opportunity to reiterate and clarify its case-law on this subject".
The public refers to an indeterminate number of potential recipients constituting 'persons in general', as opposed to specific individuals belonging to a private group. It should comprise a fairly large number of persons, with a *de minimis* threshold excluding groups of persons which are too small or insignificant. However, the cumulative effect of the number of persons having access to the same work or same subject-matter at the same time or successively should be taken into account.

In order to be categorised as a communication to the public, the secondary communication of a work or subject-matter must be using specific technical means, different from those used previously or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by rightholders when they authorised the initial communication to the public of their work or subject-matter.

It is not irrelevant that a communication is of a profit-making nature. This implies that the public which is the subject of the communication is receptive.

In order to determine whether providing a hyperlink which gives access to a work or to subject-matter constitutes an act of making available to the public, and therefore an act of communication to the public, a distinction should be drawn depending on whether or not the communication of the work or subject-matter on the website to which the hyperlink allows access is made with the consent of the rightholder.

If the communication is authorised and given that the internet is a single technical means, providing the hyperlink will only be categorised as making available to the public if access to the work or subject-matter on the target website to which the hyperlink refers is subject to restrictive measures. Failing that, the public taken into account by the rightholder when he/she authorised the communication of the work or other subject-matter on the target site includes all internet users, and therefore the hyperlink does not constitute a making available to a new public.

If such a communication on the target website is unauthorised and the work or other subject-matter is freely available on this target site which the hyperlink allows access, providing this hyperlink does not constitute making available to the public. However, where it is established that the person posting the link knew or ought to have known that the work or subject-matter was being illegally communicated on the target site, or if the link circumvents the restrictions taken by the aforesaid site to restrict the public’s access to its own subscribers, the provision of the link must be deemed to constitute a communication to the public. When the posting of a hyperlink is carried out for profit, it must be presumed that the link was posted in full knowledge of the protected nature of the work or subject-matter and of the possible lack of consent to publication on the internet by the copyright holder. This presumption is rebuttable.

There are several observations to be made on this attempted definition.

1) Firstly, it is only taken from the most recent judgments issued by the Court in the *Reha Training* and *GS Media* cases. To some extent it is simply a **snapshot of the situation at**
a given time, which of course in no way prejudges future changes in the short- or medium-term, but which does not take sufficient account of previous rulings. And yet these rulings should not be overlooked, given that as they have been issued and over time, the Court has developed a set of criteria which it allows itself to draw on for each specific case. An in-depth analysis of the Court’s judgments shows that, in fact, the failure to use any of the criteria in a particular ruling in no way signifies that this criterion has been dismissed. Thus, by way of an example, in the GS Media judgment the Court used a definition of the act of communication used in its Del Corso judgment which had been issued four years previously, even though this definition had evolved in the meantime.

The Court’s thought process cannot be understood without a detailed analysis of each judgment, which identifies the changes, hesitations and contradictions which are inherent to each ruling or to the construction as a whole. The analysis to which these observations refer is provided in Appendix 6 of the report, preceded by a table in Appendix 5 which sets out a summary of the key points of each decision.

2) Secondly, a comparison of the patchwork definition above with the provisions of Article 3 of Directive 2001/29 helps to gauge the scale of the additions made by the Court. The construction created by the Court extends far beyond a simple interpretation of the Directive, and can be defined as law-making, based on concepts that are not included in either Directive 2001/29 or Directive 2006/115 concerning the right of communication to the public in the area of related rights, or indeed in any of the international treaties which govern this issue.

Given the lack of approval by the European legislator, this judicial construction poses an issue of legitimacy, especially as the drafters of Directive 2001/29 did not anticipate such a construction. 15

Please note that in the Explanatory Memorandum of the Proposal for a Directive, the reason that the European legislator refrained from defining the concept of “communication to the public” and particularly that of a ‘public’ was to leave this task to Member State law, rather than encouraging the Court to do so. 16

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15 See on this point Silke von Lewinski, “Réflexions sur la jurisprudence récente de la Cour de justice de l’Union européenne en droit d’auteur, en particulier sur le droit de communication au public” [Reflections on recent Court of Justice of the European Union copyright case law, specifically relating to the right of communication to the public] in Mélanges André Lucas, Litéc, 2014, p. 775 as cited: “Based on our participation in Member States working group meetings in the context of the rental Directive, there is no doubt that the Member States did not plan for the Court to one day interpret the central concepts of copyright as those of the “public” or “communication to the public”. Instead at the time they considered that the Member States would adopt a certain amount of discretion including in the way in which the directives were transposed and in which such concepts were interpreted, the concepts having already been developed independently by the Member States.”

16 The notion of 'communication to the public' has been used in the acquis communautaire and the relevant international provisions, such of the Berne Convention and the WCT. As in the acquis communautaire, it is a matter for the national law to define 'public'": Proposal for a directive on the
3) The third observation relates to the **extreme complexity of the resulting standard**, which makes it difficult to access for those answerable to the law. Note for example that the patchwork definition above uses no less than **16 different concepts**17, which are in themselves not easy to comprehend. If one is to have any hope of understanding it, each ruling must be read and re-read several times in order to reach the crux of the issue.

This complexity could however easily have been avoided, primarily through a strict application of Article 11 bis (1) (ii) of the Berne Convention.

Indeed, the vast majority of the judgments issued cover the scenario of secondary acts of communication performed by a third person to the initial act of broadcasting.

And yet, Article 11 bis(1) (ii)18 here provides authors of literary and artistic works with the exclusive right of authorising such a secondary communication, **solely based on the fact that the act is performed by an organisation** other than the one that performed the initial communication.

The wording is perfectly clear and does not leave any room for hesitation. The Court’s case law is clearly in contravention of this legislation. For this reason in particular it has been strongly criticised by eminent specialists, and particularly those of the International Literary and Artistic Association19 (ALAI), a learned society with a decisive influence in this domain.

Others however contest that the age of the Berne Convention could legitimise the distance practised by the Court.

This argument is unconvincing for at least **three reasons**.

① The first is that the “new public” criterion, which has greatly contributed to complicating the Court’s case law, stems from the Court’s legitimate wish to incorporate

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18 "1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
   i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
   ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one"

the Berne Convention, even though it is a result of a misinterpretation of the Convention. Indeed, in its *SGAE* judgment, the Court wrongly inferred from the concept of “organization other than the original one”, i.e. a different organization, (the only condition required by the above-mentioned Article 11bis (1) (ii) of the Berne Convention for the exclusive right to apply), that of a ‘different public’.

It believed that a communication made by a ‘different organization’ would by necessity be directed to a ‘different public’, i.e. a ‘new public’20. Yet this assumption is inaccurate, as a different organization may perfectly communicate a work or other subject-matter to the same public as that targeted by the original communication. The exclusive right will still apply in this case, and consequently the Court’s interpretation produces the opposite result to the result obtained by applying the straightforward wording of the Convention21.

The ‘new public’ criterion therefore stems from a misinterpretation of the Berne Convention, rather than a wish (whether legitimate or not) to bring it up to date.

2) In addition, this criterion is far from innovative. Indeed, it was considered during the 1948 Brussels Conference which led to the adoption of Article 11bis (1) of the Berne Convention, before being specifically rejected during the same Conference in favour of the criterion of another organization22.

3) Finally, it should be noted that almost all of the criteria proposed by the Court in order to understand the right of communication to the public stem from submissions made by Advocate General La Pergola in the *EGEDA* case on which the Court ruled on 3 February 2000, in other words prior to the adoption of Directive 2001/29, and therefore the interpretation criteria precede the very act that they are attempting to interpret. The origins of the Court’s case law therefore go back a long way.

4) The final and most crucial observation to be made relates to the consequences of CJEU case law on the protection offered to authors and holders of related rights, which have been continually eroded over the course of the rulings issued since the *Del Corso* judgment (notwithstanding the *ITV* and *OSA* judgments).

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20 *SGAE* judgment, paragraph 40: “It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11bis(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. *Thus*, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.”

21 See Appendix 6 for a more detailed analysis of the *SGAE* judgment.

22 For a full history on this matter, see the principles discussed in relation to cable transmission, *Copyright*, WIPO 1984, no. 63-67, p. 148 et seq.: “In order to solve these difficulties, it was examined whether the notion of ‘new public’ could help.” (...) However, it was held that it is difficult to define, for practical purposes, the notion of ‘new public’ and it could not be used as a criterion. The proposal was rejected by 13 votes against 5. (...) While the criteria of ‘new communication to the public’ and ‘new public’ were found to be an impracticable with regard to qualifying distinct activities of the organization authorized by the author to broadcast his work, no doubt had been raised during the Conference about the fact that distribution of the broadcast of a work by a third person always constitutes a new act of communication to the public. (...) The provision, as it stands now in Article 11 bis (1) (ii) of the Berne Convention, was adopted in the Subcommittee by 12 votes to 6 (Br. Doc. p. 290), and later on unanimously by the Conference itself.”
**GS Media** – the most recent judgment, is particularly concerning in this respect. The issue of links is certainly complex, and it is perfectly understandable that the Court wishes to arrive at a balanced solution. It is regrettable however that the balance sought is leading to the destruction of the fundamental principles of copyright.

This weakening of protection seems paradoxical given that in each ruling, the Court always reiterates the objective of providing a high level of protection as set out by recitals 9 and 10 of Directive 2001/29, as well as the resulting principle set out by recital 23 that the right of communication to the public should be understood in a broad sense. This statement, which is reiterated in all of the judgments using nearly exactly the same words, appears to be no more than a stylistic addition.

These general observations must of course be checked against a more detailed examination of the Court’s case law, which shows and from which it will be demonstrated that:

- Three conditions need to be fulfilled in order for there to be a ‘communication to the public’ (an act of communication, a public, and in the case of a secondary act of communication, a new public or a specific technical means), which are (albeit not systematically) linked to the criterion of a ‘profit-making nature’, the role of the latter being uncertain at this stage,
- these conditions being themselves defined by a set of criteria which are subject to the ‘individualised assessment’ rule.

This rule raises a problem of principle which should be addressed before analysing the above-mentioned conditions.

### 1 - VARIABILITY APPLIED AS A PRINCIPLE: THE INDIVIDUALISED ASSESSMENT RULE

The Court introduced this rule in the *Del Corso* and *PPL* cases, and reiterated it using the same wording in the *Reha Training* and *GS Media* judgments. It comprises two main factors:

- assessing each situation according to the case in point,
- applying ‘individualised’ criteria to them that can be defined as ‘floating’ criteria, as they "may be present to widely varying degrees" and that ultimately

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23 See for example the most recent *GS Media* ruling: “In that regard, it should be borne in mind that it follows from recitals 9 and 10 of Directive 2001/29 that the latter’s objective is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that ‘communication to the public’ must be interpreted broadly, as recital 23 of the directive indeed expressly states” (paragraph 30).

24 “For the purposes of such an [individual] assessment, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another".
have more meaning when they are “interdependent” and in their "interaction with one another” than they do individually, meaning that a different combination may be applied for each particular scenario.

Both of these factors can be contested.

1.1 - Assessment on a case-by-case basis

The Court claims to rule on “the situation of a specific user”25. Therefore it may be a private dental practice "such as the one at issue in the main proceedings"26, “a rehabilitation centre, such as that at issue in the main proceedings”27, a “spa establishment, such as that at issue in the main proceedings”28, or even a “broadcasting organisation, such as that in the main proceedings”29, which of course means that what is important for a particular organisation or professional may not necessarily be relevant to another.

The judgments do not however contain any detail on the “situation” of each “specific user”.

Returning to the example of the “dentist such as the one in question in the case in the main proceedings”30, what do we know about him apart from his name (Del Corso)? How many practitioners work at his practice? How many customers does he have? What is the turnover of the practice? These are all small details which are nevertheless relevant to the in concreto approach adopted by the Court.

We do not have any further information on how many radio transmissions were broadcast by the dental practice. Were they only played in the treatment room(s), or also in the waiting room(s)? If that was the case, the set-up would be the same as that in the Reha Training judgment where, unlike the Del Corso judgment, the Court accepted that there was a public, as the television programmes were rebroadcasted both in the waiting room and in the two treatment rooms.

The lack of any clarification on the factual circumstances specific to the dental practice would not however prevent the Court from considering that it “has all the evidence necessary (...) to assess whether there is such an act of communication to the public”, as paragraph 93 of its judgment states:

“Although, as was pointed out in paragraph 80 of the present judgment, it is, in principle, for the national courts to determine whether that is the situation in a particular case and to make all definitive findings of fact in that regard, it must none the less be held that the Court has all the evidence necessary in relation to the

25 Del Corso, paragraph 78.
26 Ibid., paragraph 102.
27 Reha Training, paragraphs 62 and 63.
28 OSA, paragraphs 33, 34, and 67.
29 SBS, paragraphs 23, 24, and 30.
30 Del Corso, paragraph 100.
case in the main proceedings to assess whether there is such an act of communication to the public.”

The same statement appears in paragraph 39 of the PPL judgment issued on the same day.

And yet, when assessing the situation of the hotel at issue in the main proceedings in the PPL case, paragraph 42 of the judgment states:

“As regards, further, the number of potential listeners referred to in paragraph 33 of the present judgment, it must be observed that the Court has held that the guests of a hotel constitute a fairly large number of persons, such that they must be considered to be a public (SGAE, paragraph 38).”

Therefore, should assessments be made on a case-by-case basis but without factual clarifications, or based on categories?

In truth, the approach appears to be a source of confusion.

The result is that national courts have a strong incentive to always ask more preliminary questions. Should a final resolution be deemed to have been found on the issue of dental practices, and if so, how can this be justified as part of an approach which claims to be in concreto? On the contrary, should a distinction be made for any specific situation of a particular party? What about, for example, a dental practice with 30 practitioners with three waiting rooms? What happens if the practice only has 20 dentists? Furthermore, should a distinction be made between those which accept all of the new customers who wish to make an appointment and those who only treat existing customers?

The situation appears to be very uncertain when one looks at the many issues ruled on by the Court.

Does it for example go without saying that the interpretation of the right of communication to the public within the scopes of copyright and related rights, respectively on the bases of Directives 2001/29 and 2006/115, has indeed been harmonised?

We may recall that in the Del Corso case, the Court justified the decision to apply a different interpretation to each domain by the differences in type of the two rights, an exclusive right which is preventive in nature’ on the one hand, and a right which is compensatory in nature on the other hand. In the OSA case, it confirmed this by deeming that the “principles developed in SCF [Del Corso] are not relevant” to a copyright case.

The Court then overturned its case law in the Reha Training judgment. In this case, which covered both copyright and related rights, it deemed that the concept of communication to the public ought to be assessed “in accordance with the same criteria”, and must be given “the same meaning”, “in order to avoid, inter alia, contradictory and incompatible interpretations depending on the applicable provision” (paragraphs 33 and 34).
Yet such an assessment “in a case such as that in the main proceedings, concerning the broadcast of television programmes which allegedly affects not only copyright but also, inter alia, the rights of performers or phonogram producers, both Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115 must be applied, whilst giving the concept of ‘communication to the public’ in both those provisions the same meaning” (paragraph 33).

Therefore, for a harmonised interpretation to be applied, is it necessary that the same case relates to both rights simultaneously? And what would be the answer if the case only covered the related right to remuneration?

It is important to gauge the risk of an explosion in the number of preliminary questions that such an approach might create.

In reality, assuming, as the Court states, that each case is a case in point with its own factual circumstances, how are national courts supposed to rule on such cases without raising new preliminary questions, when the facts are not similar enough to those of a case on which the Court has ruled in the past?

We could then examine the role of a regulatory court, and ask whether it should rule on specific cases or rather prepare overarching guidelines that can be applied by the courts of each state? The division of competences of the Court of Justice of the European Union and the national courts is at stake, and it is concerning that the CJEU’s chosen methods only serve in practice to deprive national courts of their ability to assess each case on its own merits.

1.2 ‘Floating’ criteria: adapting the rule to the facts

The other aspect of the ‘individualised assessment’ rule is the freedom that it grants the Court to draw on the criteria that it has developed for each case, in order to highlight specific criteria, vary their weighting and adapt them to the circumstances in order to achieve the desired result\(^{31}\).

The situation is particularly blatant as regards the act of communication. The Court has successively set out ten criteria in order to define this act, as indicated below\(^{32}\).

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31 See on this point Pierre-Yves Gautier, “Eloge du syllogisme” [Eulogy on syllogism], JCP ed. G. 2015, p. 1494: “There is a shift from a thought process based on deduction, based on the rule which governs the facts, to an inductive process based on the facts themselves, concealed by generic standards and principles which are so flexible that the judge ends up being entirely free to offer the solution which he/she deems fitting”: – Also see Vincent Varet, “Liens hypertextes et droit d’auteur (suite) : la balance des intérêts selon la CJUE, ou quand la Cour de justice s’emmêle dans la toile” [Hyperlinks and copyright (cont.): the balance of interests according to the CJEU, or when the Court of Justice becomes entangled in the web], Légipresse no. 343, Nov. 2016: “The now long series of judgments on the right of communication to the public (...) is a rather accurate testament to this construction built in a succession of layers and levels, where defining criteria are added to, refined and combined in different ways according to the specifics of each case. The Court adds nuances, clarifications and repentances, and the painting keeps changing, without a relatively fixed pallet of colours to govern the direction of such changes.”

32 Also see the summary table shown in Appendix 5.
Two judgments issued on the same day (Del Corso and PPL) use different criteria to characterise the act of communication: In the first: “which intervenes, in full knowledge of the consequences of its action, to give access to the protected work”, and “distributes a broadcast signal” in the second.

Sometimes there are even variations within the same judgment. In the Reha Training judgment, the criterion provided in order to define the act of communication (“any transmission of the protected works, irrespective of the technical means or process used”, paragraph 38) is not the same as that actually applied (“intentionally broadcasts protected works”, paragraph 55); in the second case the broadcast is intentional, while in the first case it is not.

This intentional nature is a ‘sub-criterion’ of the other criteria used to define the act of communication, and a perfect example of variability: it was used in the Organismos case and reaffirmed in Premier League, then disappeared in Airfield, and reappeared in Del Corso and PPL before disappearing in ITV. It then reappeared in OSA, disappeared again in Svensson and Bestwater, reappeared in SPA, disappeared in Reha Training (at least as regards the stated criterion), and finally made a reappearance in GS Media.

Such variations do not only apply to the act of communication.

Thus, for example, the criterion of the “indeterminate number of people” used in the SGAE judgment (and its precursors in media law Mediakabel and Lagardère) to define the public becomes the “indeterminate nature of the public” (Reha Training), before reverting to the “indeterminate number” (GS Media).

The semantic variation makes reference to two circumstances: the indeterminate number and the indeterminate public. The CJEU cannot limit as it wishes the scope of the ‘public’ using the indeterminate ‘number’ criterion only. For this reason, there is a shift in meaning towards a qualitative assessment which defines the people themselves rather than their number alone.

Another example is the “indispensable role of the user”. This criterion is in fact primarily used to fully or partially define the new public (SGAE, Organismos, OSA, Svensson, Reha Training), but sometimes also to define the act of communication (Del Corso, GS Media). Here, the variability applies to the purpose of the same criterion.

New criteria may of course appear, such as that of the ‘specific technical means’ in the ITV judgment, enabling the new public requirement to be set aside, and most recently – in the GS Media judgment – the criterion of the link poster’s ‘knowledge’ of the illegal nature of the publication of a work on the original site to which the link points.

It appears that the extreme versatility of the system that the Court has implemented gives rise to a risk of arbitrary rulings, where the boundaries of the right of communication to the public change at the whim of the factual circumstances, and where the rule of law is almost dismissed, ultimately granting the Court the leeway to issue a ruling that it deems fair and balanced based on ‘floating criteria’ which seem to be nothing more than a window dressing.
This system lacks the legal certainty required by cultural sector stakeholders in order to negotiate and enter into agreements. And yet, increased legal certainty is one of the fundamental objectives of Directive 2001/29 and is reiterated six times, in recitals 4, 6 (twice), 7, 21 and 25. In this case, the objective appears to be largely unknown.

Since 1962, the CJEU has even itself accepted that such legal certainty is a general principle of EU law, and even, since 1972, a “fundamental requirement”. This principle is also enshrined by the ECHR, which, since the Marckx case, deems it to be “necessarily inherent to the law of the Convention as in European law”.

The legal uncertainty which governs the CJEU’s rulings on the right of communication to the public is even more deplorable.

2 - CONDITIONS DEFINED BY MULTIPLE CRITERIA

The variability of the criteria which causes this legal uncertainty can be categorised around four main ‘pillars’, around which the Court coordinates its case law on the right of communication to the public:

- The act of communication and the public. These conditions are taken from the actual wording of the legislation,
- The requirement for a new public or a specific technical means. The Court added this condition for secondary communications,
- And the profit-making nature of the act of communication. The role of this criterion is currently in doubt.

2.1 - The act of communication

33 See aforementioned Vincent Varet: “the role of standardised interpretation of EU law, spearheaded by the preliminary question system, and the legitimately-sought legal predictability that accompanies this, appears to be incompatible with the wish to adapt solutions (and particularly defining criteria for interpreted concepts) in accordance with the cases brought.” – See aforementioned Pierre-Yves Gautier: “Where one perceives that the analytical method used by the judge creates legal uncertainty, through case law that is far more difficult to grasp, in spite of appearances (copious reasoning).”

34 CJEC, 6 April 1962, case 13-61.
35 CJEC, 14 July 1972, case 48-69. - See Racha El Herfi, under the supervision of Fabrice Burgaud, Les principes de confiance légitime et de sécurité juridique en droit européen, [The principles of legitimate expectations and legal certainty in European law], French Court of Cassation documentation, studies and reports service: https://www.courdecassation.fr/IMG///Principes_confiance_legitime_securite_juridique_droit_europeen.pdf
Over the course of **16 rulings**, the Court has developed no less than **ten definitions** of the act of communication:

- Distributing a signal (**SGAE** and **PPL**),
- Intentionally making accessible (**Organismos**),
- Intentionally transmitting (**Premier League**, **SPA**),
- Triggering a communication or intervening in the course of a communication to render the works accessible (**Airfield**),
- Intervening, in full knowledge of the consequences of its action, to give access to the work (**Del Corso**),
- Retransmitting by using a specific technical means different from that of the original communication (**ITV**),
- Deliberately transmitting by distributing a signal (**OSA**),
- Affording direct access to works (**Svensson**),
- Transmitting the protected works, irrespective of the technical means or process used (**SBS, Reha Training**),
- Intervening, in full knowledge of the consequences of its action, to give customers access to a protected work illegally posted on the internet (**GS Media**).

It should be noted regarding the right of making available to the public (which is a component of the right of communication to the public under copyright law), that the criteria which activate the concept of ‘transmission’ have not been and cannot be used, as the link only performs the making available. The transmission is activated on-demand, from the original website to which the link points. The Court has defined the concept of ‘giving access’ without an element of intent in the **Svensson** and **Bestwater** ruling, and with an element of intent in the **GS Media** ruling.

The Advocate General for the **GS Media** case reiterated that the Commission’s Legal Service had used the argument of the lack of transmission as a basis for deeming that the link did not perform an act of communication to the public (which was not followed by the Court).

This position cannot be justified. In fact, it confuses the act of making available (consisting of the act of offering access via a link) with the actual subsequent transmission which happens if the link is used. Incidentally, the Commission explained this very clearly in the above-mentioned Explanatory Memorandum for the Proposed Directive dated 10 December 1997, which subsequently became Directive 2001/29. Referring to the WIPO Conference which adopted the WIPO Copyright Treaty (WCT), it

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37 "The wording of recital 23 of Directive 2001/29 had led the Commission, in Svensson and Others (C-466/12, EU:C:2014:76), to take the position that the concept of ‘act of communication’ had to be limited to ‘transmission’ or ‘retransmission’, which would not be the case with a hyperlink on a certain website which directs to a work protected by copyright contained on another website, where visitors to the first website thus have access to that work" (Opinion of Advocate General, paragraph 51).
emphasised that “the critical act is the "making available of the work to the public", (...) which precedes the stage of its actual "on-demand transmission".

That said, in addition to its fragmented nature in the light of the aforementioned ten definitions, there are two main objections to be raised on the subject of the Court’s act of communication case law:

- The consideration of an intentional element in half of the judgments,
- The artificial fragmentation of the act of communication in the SBS judgment.

(a) Taking into account an intentional element

The fact that the subjective intent of the perpetrator of the act of communication is taken into account is at the very least surprising, given the nature of copyright, a right in rem protected under the right to property by Article 17 of the EU Charter of Fundamental Rights. Compliance with this right should not be based “on the third party's awareness (or absence of awareness) of having committed an infringement”.

The act of communication constitutes a purely objective act which must be considered as such.

Of course, in criminal law, intent is usually a requirement in order to determine an act of infringement, but it is a separate element which comes after the offence has been established. Thus, in this domain also, intent does not need to be considered when assessing the existence of an act of communication.

Intent has no bearing in civil law.

Neither Directives 2001/29 and 2006/115, nor the WIPO Treaties (WCT and WPPT), nor the Berne Convention contain any such requirement of the intent to perform an act of communication.

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38 “The second part of Article 3(1) addresses the interactive environment. It follows closely the pattern chosen in Article 8 WCT and implements it at Community level. (...) As was stressed during the WIPO Diplomatic Conference, the critical act is the "making available of the work to the public", thus offering a work on a publicity accessible site, which precedes the stage of its actual "on-demand transmission". It is not relevant whether any person actually has retrieved it or not.” Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the information society, Brussels, 10 December 1997, COM (97) 628 final, Explanatory Memorandum p. 26. – Also see Basic Proposal for the WIPO Treaty, Geneva Diplomatic Conference, 2-20 Dec. 1996, comment 10.10: “The relevant act is the making available of the work by providing access to it.”

39 Vincent Varet, aforem.

40 In French law, in principle the mens rea is required under Article 121-3 of the French Criminal Code (Code Pénal): “There is no felony or misdemeanour in the absence of an intent to commit it.”, except where legislation states otherwise, specifically in the case of recklessness, negligence or failure to observe an obligation of due care or attention imposed by any statute or regulation. According to case law which has been established since the 19th Century, in copyright and related rights, the wrongful intent of the infringer is presumed as soon as the offence is established.

41 Note the three-pronged approach which prevails in criminal law: actus reus/legal element/mens rea.
The Court’s addition of this element as a defining principle of the act therefore derogates from the principles traditionally used for such matters.

It must be noted that there is a gradation in the judgments of the Court:

1) "Intentionally"

In some rulings, the act of communication consists of ‘intentionally making accessible’ or ‘intentionally transmitting’.

But can one transmit without being aware of it? Or provide access accidentally? Other than unforeseeable circumstances, which are textbook cases and have never raised any issues, (e.g. a celebratory summer evening when neighbours can hear music played by friends in an apartment, or music on full-blast in a car with all of the windows open), this scenario is unlikely, and therefore the clarification made by the Court would appear to be unnecessary.

Moreover, it may be dangerous, as it opens the floodgates to potential challenges, for example in the case of peer-to-peer networks, where users of such tools might claim to have been unaware of making content available by upload and therefore of performing an act of communication.

2) Intervening, in full knowledge of the consequences of its action, to give access to a protected work

This wording taken from the Del Corso judgment clearly sets out a new direction.

But what does it mean? Do the “consequences of its action” simply refer, as in the first case set out above, to an awareness of performing an act of communication? This is most likely the case, and this is undoubtedly why the Reha Training judgment links the act of communication to the statement that “It is therefore understood that the public which is the subject of the communication in these establishments is not merely ‘caught’ by chance, but is targeted by their operators”\(^{42}\) (paragraph 48).

And yet, this wording may be interpreted in a manner which is contrary to the Court’s intention, i.e. to claim that the user should be aware of the harm that he/she is causing, a special condition which, as shown above, constitutes an infringement of a right in rem (right to property).

3) Intervening, in full knowledge of the consequences of its action, to give customers access to a protected work illegally posted on the internet

\(^{42}\) This wording originates from the Del Corso judgment, which relates it to “the receptiveness of the public”. In the Reha Training judgment, the Court disassociates the ‘targeting’ (which is linked to the act of communication as stated above) from the ‘receptiveness’ criterion, which may be considered when assessing the profit-making nature as analysed below.
In this wording taken from the GS Media judgment, the mens rea is now clearly linked to the subject of the communication by the new condition implemented for hyperlinks, i.e. the condition of the link poster’s knowledge that authorisation has not been granted for the communication of the work or other subject-matter on the original site to which the link points.

Such knowledge is of course presumed if the link is posted for profit, but this is a simple, rebuttable presumption. In addition, the burden of proof of the profit-making nature (which is assumed to be borne by rightholders) may lead to a disagreement. If there is no profit-making nature or evidence of a circumvention of a restrictive measure on the original website, rightholders will have great difficulty in finding evidence of such knowledge. They would therefore need to ‘establish’ this knowledge by informing the link poster, as proposed by the judgment (paragraph 51), which in practice involves sending him/her a notification.

Here, the judgment enshrines the principle of the paralysis of the right of communication to the public, unless the knowledge of the link poster can be proven, with presumption facilitating such proof if profit is sought.

It in fact establishes:

- **A principle**: The provision of a link to a work which has been illegally made available on the target website and which is freely accessible on this website is not an act of communication to the public, on the grounds that the link poster "does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet" (paragraph 48);

- **An exception**: Should it be established that the link poster "knew or ought to have known" that the resource (the file of the work) had been illegally posted online on the target website, or if the link is able to "circumvent the restrictions" taken by said website "to restrict the public’s access to its own subscribers", "it is necessary to consider that the provision of that link constitutes a ‘communication to the public’" (paragraph 49 and 50);

- **And a simple presumption**: If the link is posted for profit.

There is a clear break from the founding principles of copyright and related rights.

While the solution is of course limited to the specific case of hyperlinks, due to the balance sought by the Court, it firstly creates an exceptional system, which bears an uncanny resemblance to that set out for hosting providers by Directive 2001/31(14) of 8 June 2000, and secondly it creates a risk that this system will spread to cover all aspects of the right of communication to the public, or at the very least a risk of numerous challenges and an explosion of preliminary questions linked to the potential extension of this specific system to cases other than those involving hyperlinks.

A final observation should be made on the Court’s introduction (in the presumption paragraph) of ‘knowledge’ which is, on this occasion linked to the protected nature of the work.
“Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29” (paragraph 51).

One can only assume that in this instance, the Court let its pen run away with it, as this reference to the “knowledge of the protected nature of that work” is fortunately not included in the previous paragraphs of the judgment. And yet even if this rather optimistic scenario is upheld, we must await a new ruling before this inappropriate link can be corrected.

(b) Fragmentation of the act of communication

The scenario used is that of direct injection, a two-step process during which:

- A broadcaster transmits programme-carrying signals to a distributor\(^{43}\), to be received by subscribers of the distributor. The transmission is performed using a private wired or wireless point-to-point line, or by satellite, in such a way that the programme-carrying signals cannot be captured by the general public during the transmission.

- While the distributor receives the programmes and distributes them to its subscribers.

The broadcaster and the distributor therefore act as a team to operate a single broadcast to the same public, comprised of the distributor’s subscribers. They each receive different remuneration in accordance with their role, i.e. the broadcaster receives advertising revenue (and/or subsidies, gifts or donations as per the economic model), and the distributor receives the price paid by its subscribers.

This now common practice is different to the more traditional (and increasingly rare) approach whereby the cable operator or satellite TV distributor captured programmes that the broadcaster was transmitting directly to the public via terrestrial broadcasts, and/or by satellite that can be directly accessed by the public. Both of these acts of communication to the public comprise a primary communication by the broadcasting organisation, as governed by Article 11 bis (1) i) of the Berne Convention, and a secondary communication by the distributor, governed by Article 11 bis (1) ii) of the Berne Convention.

\(^{43}\) Cable operator, satellite TV operator, x(DSL) TV operator, fibre optic network operator (FTT(x)) or an operator broadcasting via mobile telephony networks.
1) In the *Airfield* case, a preliminary question was referred to the CJEU on communication to the public in the case of a direct injection process as described above. The debate related to whether:

- The broadcaster and satellite TV distributor were together performing a single act of communication to the public by satellite or whether, on the other hand, the transmissions performed (one by the broadcaster to the satellite TV distributor, and the other by the latter to its subscribers) constituted two separate communications,

- And, in the former case, if, due to its intervention in the act of communication to the public, the distributor was required to obtain authorisation from the rightholders in addition to the authorisation previously obtained by the broadcaster.

In the framework of Directive 93/83 ('satellite and cable'), interpreted in the light of Directive 2001/29, the Court deemed that the disputed action should “be regarded as constituting a single communication to the public by satellite and thus as indivisible” (paragraph 69), this single communication being attributable to the broadcaster, which ‘triggers’ it, and to the satellite TV distributor due to its ‘intervention’ during the aforementioned communication. It concluded that the satellite operator should also obtain authorisation.

2) This assessment reflected not only a fair analysis of the act and its intended purpose, from the outset, of programmes being received by the distributor’s public, but also the practice which for over 30 years has provided a basis on which authors’ societies in France are able to enter into contracts:

- Firstly with broadcasters, to whom they issue an authorisation for the right to broadcast works within their repertoires in return for remuneration based on the broadcaster’s advertising revenues (and/or on their subsidies, gifts or donations as per the economic model),

- Secondly with cable network operators, satellite TV operators, xDSL TV, fibre optic network and mobile telephony operators, to whom they also issue an authorisation for the right to broadcast works within their repertoires in return for remuneration based on the revenues that they receive from their subscribers.

3) It is also in line with the positions adopted in the work led by WIPO in the 1980s on new utilisations (specifically cable TV and direct satellite broadcasts) which affect the interests of holders of copyright and related rights.

The Committee of Governmental Experts convened by the WIPO Director General and the Director-General of UNESCO have thus acknowledged the singularity of the act of communication to the public, and the joint and indisputable role of the broadcaster and the distributor, as well as their joint responsibility.
Regarding the cable distribution of programmes broadcast by fixed service satellites, the Committee stated the following:

“As far as the phase of the cable distribution is concerned, both the broadcasting organization transmitting the program through a fixed service satellite and the organization distributing the program by cable should be considered to be responsible — jointly — towards the owners of copyright in audiovisual works and towards performers, phonogram producers and broadcasting organizations whose rights may be concerned by such broadcasting. As far as the phases preceding the phase of the cable distribution are concerned, the originating organization alone should be considered to be responsible towards the said owners of rights” (principle AW 36).

On the subject of broadcasting via a fixed service satellite, the Committee of Experts deemed that the up-link phase (including the emission of signals), the down-link phase, and the final signal transformation phase making them directly accessible by the public constituted a single process with the purpose of communicating the relevant content to the public:

"106. (...) the transmitted signals passing through the fixed service satellite, although not receivable as such by the public, are intended for public reception from the outset, irrespective of the question at what stage in their transmission they become receivable by the public at large. What really matters seems to be whether the entire process of the distribution to the public of the sounds, images or both, carried by the signals, has been definitely decided and scheduled at the time of the beginning of the transmission, or on the contrary, the reaching of the public, at that time, remained conditional on decisions to be taken later, either by the originating organization or by the distributing earth station. (...) the transmission of programme-carrying signals in a single determined process, consisting of various subsequent phases aiming at reaching the public at large, should be considered broadcasting also as regards the initial emission of relevant signals not yet available to the public, (...)”.

109. Consequently, the transmission of the signals from the emitting point to the satellite, then from the satellite to the earth station and, finally, from the earth station onwards, should be considered as one single utilization of the audiovisual works involved. If the final phase (earth station to the public) is done by a separate organization (which is the case in general), then there are two organizations that are jointly responsible towards the right owners (...)”.

This joint responsibility between the broadcaster and the distributor necessarily implies that each of them is required to obtain authorisation from rightholders for the acts performed by them for the purpose of communication to the public.

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44 This was the only type of distribution used at the time, but the conclusions adopted could easily be transposed to other types of distribution.
46 Ibid., paragraphs 106 and 109.
The analyses performed in the framework of WIPO’s work are fully transposable to the distribution of programmes by direct injection.

4) In the SBS judgment, this time assessing the circumstances of a broadcasting organisation in the context of a process of direct injection, the CJEU nonetheless considered that although this organisation was performing an act of communication, it did not address the public given that it “transmits the programme-carrying signals to specified individual distributors without potential viewers being able to have access to those signals”.

The Court therefore deemed that the condition of a public was absent as, in its opinion, there was no ‘public’ or potential recipient of the act of communication, but instead “specified individual professionals”.

This ruling appears to contradict the solution previously adopted in the Airfield case.

This is made clear by the contradictory assessments of the concept of the ‘public’. In both cases, the Court rightfully ruled that there is only one public, consisting of the subscribers of the distributor(s).

Yet in the Airfield case, this public is described as having been targeted by the broadcaster from the outset:

“(…) it is not in dispute that, from the moment when those signals are beamed up to the satellite, they are addressed to a public, namely the public in possession of a decoder card, supplied by Airfield” (paragraph 65).

In the SBS judgment, the broadcaster’s only public is its distributors, which is all the more curious given that it receives advertising revenue for the broadcasting of its programmes to its distributor’s subscribers (which, as summarised above, in turn receive revenue from their customer subscriptions).

This assessment is as absurd from a functional analysis and ensuing legal analysis point of view, as it is from an economic analysis point of view.

This initial contradiction between the two judgments relating to the assessment of the public conceals yet another contradiction, this time concerning the act of communication.

Indeed, the SBS judgment proposes that there are two acts of communication – one performed by the broadcaster and the other by the distributor. According to the judgment only the second is addressed to the public. So, there are in fact two acts of communication, yet a single act of communication to the public (performed by the distributors). A single public yet two acts of communication...

In the Airfield case, on the other hand, it analysed the process as a whole, following the path taken by the governmental experts in the context of the aforementioned WIPO work.

The fragmented and artificial view of a whole process adopted by the Court in the SBS case flies in the face of common sense. It is also dangerous, considering the potential for exploitation by certain broadcasters who may question the need for collecting society contracts.
2.2 - The public

The Court defines the public according to **two cumulative criteria** which must be fulfilled: an ‘**indeterminate number**’ and a ‘**fairly large number**’ of potential recipients.

Since the **Del Corso** judgment, these criteria have been applied in such a way as to produce a restrictive assessment of the public, which was originally specific to related rights as governed by Directive 2006/115.

The **Reha Training** judgment might have been expected to rectify this assessment, given that the Court had reiterated its intention to harmonise the concept of communication to the public under copyright and related rights. But in fact the opposite result has ensued, the Court having instead triggered a **race to the bottom**.

Furthermore, on reading the **Reha Training** judgment, one notes that its main reference is the precedent of the **Del Corso** judgment, which is cited nine times.

(a) The indeterminate number

As explained in Appendix 6\(^47\), the ‘indeterminate number’ criterion is taken from the old Guide to the Berne Convention, published in 1978, followed by a lexicon in 1980. It included a comment on paragraph (iii) of Article 11bis (1) on public communication by loudspeaker or any other analogous instrument. This provision does not apply to the majority of the cases which the Court has ruled upon, which relate to the scenario of a retransmission by a third party to the initial act of broadcasting, governed by paragraph (ii) of the same legislation.

It should be pointed out that WIPO has published two guides to the Berne Convention. Dr. Mihaly Ficsor, a world-renowned intellectual property expert and former Deputy Director General of WIPO, reiterated the conditions under which they were drawn up at the Conference of the Belgian Copyright Association [**Association Belge pour le Droit d’Auteur**] on the right of communication to the public, held in Brussels on 15 January 2016.

The old **1978 Guide**\(^48\), together with the **lexicon** which was published in 1980, is an awareness-raising document which is drafted in the simplest possible language, aimed at developing countries who did not yet have copyright legislation and wanted access to **general information** on the Berne Convention. It was drawn up unilaterally under

\(^47\) See commentary on the **EGEDA** case.
\(^48\) **Guide to the Berne Convention**, WIPO, Geneva, 1978:
unscientific conditions. Sources for observations are not cited, and it contains a number of approximations, as one would expect of a ‘simplified’ instrument. The second, published in 2003, accompanied by a glossary, is a far more detailed work with a far broader purpose, as it covers all of the Copyright and Related Rights Treaties administered by WIPO (with chapter one focusing on the Berne Convention). This work was drawn up under scientific conditions, to act as a reference for the interpretation of the Convention by member countries of the Berne Union. It was preceded by a number of studies, and was prepared in compliance with the Vienna Convention rules of interpretation. It was submitted to the Committees of Governmental Experts, the competent authorities of the Member States, then to the Berne Union Executive Committee and the Rome Convention Committee. It is therefore a reference guide to the Berne Convention.

The criterion of an ‘indeterminate number’ of people constituting a public, which the old Guide referred to, does not appear in the new Guide, which defines the concept of the public exclusively in relation to the private circle and, more specifically, to “the circle of a family and its close social acquaintances”:

“BC-11.4. The Convention does not provide a definition of the concept of “public”, either as an adjective or as a noun. It is, however, quite obvious that, as regards the adjective “public,” it is the opposite of the adjective “private” and, thus, what may not be characterized as “private” is supposed to be regarded “public.” If “public” is used as a noun, it may similarly be regarded to be the contrary of the “private circle”; that is, those people who are beyond the private circle of the user. The definition of “public” in statutory law or through court decisions is left, in principle, to the countries of the Union. What has just been mentioned about the “public”-“private” antonyms must be taken into account, and it is, obviously, not allowed to artificially and arbitrarily reduce the scope of the concept of “public” and, through this, the coverage of rights where the public element is decisive. In any way, the dominant opinion seems to be that all uses should be regarded “public” and all acts directed “to the public” which go beyond the circle of a family and its close social acquaintances.”

49 See Mihály J. Ficsor, ”Svensson: honest attempt at establishing due balance concerning the use of hyperlinks - spoiled by the erroneous “new public” theory”, http://www.copyrightseesaw.net/archive/?sw_10_item=63 : "This explains the nature and style of the old Guide. It was not supposed to be written as a scholarly study. It was intended to be as a general introduction to the Berne Convention. As the Foreword pointed out, “[t]he sole aim of this Guide is to present as simply and clearly as possible, the contents of the Berne Convention” (emphasis added). The as-simple-as-possible style did not allow a thorough analysis of complex interpretation issues." - Also see Antoon Quaedvlieg, “Le droit de communication au public dans la jurisprudence de la CJUE” [The right of communication to the public in CJUE case law], Propriétés Intellectuelles [Intellectual Properties], April 2015, no. 55 p. 125: “Thus, the most humble of texts was raised to the rank of Doctors of the Church.”

It is important to reiterate the following clarification from the above-mentioned passage: “it is (...) not allowed to artificially and arbitrarily reduce the scope of the concept of “public” and, through this, the coverage of rights where the public element is decisive”.

Yet this is what the Court of Justice has done.

While the ‘indeterminate number’ criterion is not necessarily problematic in itself\(^{51}\), its contribution to understanding the concept of the ‘public’ is dubious. Even in the eyes of the Court, it does not seem to provide the necessary enlightenment, as in the Del Corso judgment it felt it necessary to refer to the sub-criterion of “persons in general, that is, not restricted to specific individuals belonging to a private group”, stemming from the old 1980 glossary. As reiterated above, the Court introduces the sub-criterion with a shift in concept from the ‘indeterminate number’ to the ‘indeterminate nature of the public’:

“As regards, to begin with, the ‘indeterminate’ nature of the public, the Court has observed that, according to the definition of the concept of ‘communication to the public’ given by the WIPO glossary, which, while not legally binding, none the less sheds light on the interpretation of the concept of public, it means ‘making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group’ (paragraph 85).”

The criterion thereby becomes dangerously restrictive, with the Court using it to disqualify the customers of a dental practice which, in its opinion, do not constitute a public:

“Next, as regards the patients of a dentist such as the one in the case in the main proceedings, it must be observed that they generally form a very consistent group of persons and thus constitute a determinate circle of potential recipients, as other people do not, as a rule, have access to treatment by that dentist. Consequently, they are not ‘persons in general’ as defined in paragraph 85 of the present judgment” (paragraph 95).

But why would a dentist’s customers be a “very consistent group of persons”? Does the Court mean that the customers don’t change, which seems highly unlikely? Who are the “other people” who do not “as a rule, have access to treatment by that dentist”? Perhaps those who have another dentist? And would it then be the case that there would be no communication to the public for members of a concert hall, a film club, a sports club or a works council, as the ‘circle’ is more or less known in advance?

This hardly constitutes a satisfactory solution, and also opens the floodgates to arbitrary rulings. This is demonstrated by the comparison with the rehabilitation centre in the Reha Training judgment, in which the referring court deemed itself to be bound by the factual similarities with the dental practice in the Del Corso case. The Court takes the opposite view to the referring court, but does not provide any justification for this. The judgment

\(^{51}\) And yet, in his aforementioned article in Mélanges en l'honneur du Professeur André Lucas [Tributes to Professor André Lucas], Silke von Lewinski noted that: “If we took seriously this approach to interpreting the concept of the ‘public’ based on the criterion of an indeterminate number of potential recipients, we might even conclude that a communication to the public in a concert hall with a pre-determined maximum number of seats constituted a communication to a pre-determined number of potential recipients, and therefore not to the public, which proves how absurd such reasoning is.”
simply states that it “is apparent from the documents submitted to the Court”, as a basis on which to consider that “the body of patients of a rehabilitation centre, such as that at issue in the main proceedings” is formed by “persons in general” (paragraph 57).

It is also worth noting that the Court’s distinction between ‘private groups’ and ‘persons in general’, and the exclusion of the first category, appear to contradict the wording of Directive 2001/29. Indeed, it is not in keeping with a number of the exceptions set out by Article 5.3, which cover specific and restricted groups. And yet, if they did not constitute a public, the exception would not be required. The result is that the Court’s stance since the Del Corso judgment, which was reiterated by the Reha Training judgment issued in the Grand Chamber, conflicts with the European standard.

This primarily relates to the following exceptions:

“a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”;

"e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings”;

"g) use during religious celebrations or official celebrations organised by a public authority”;

“l) use in connection with the demonstration or repair of equipment”.

...
(b) The ‘fairly large number’

This purely quantitative criterion, which does not appear in the old Guide to or glossary of the Berne Convention, was used by the Court in the SGAE judgment:

“In a context such as that in the main proceedings, a general approach is required, making it necessary to take into account not only customers in hotel rooms, such customers alone being explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to make use of a television set installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public, having regard to the principal objective of Directive 2001/29, as referred to in paragraph 36 of this judgment” (paragraph 38).

From the outset, this criterion raises significant questions: “What is a fairly large number of persons? Should there be an absolute threshold, or should it be set according to the type of activity? Is it enough to target such a number, as the wording of the Court appears to suggest, or should the assessment be made in hindsight in the light of the public actually “reached”?52

This demonstrates that the criterion is clearly a source of legal uncertainty. In addition, it has the potential to lead to interpretations which are far too restrictive.

It should however be noted that, in order to promote a wide interpretation of this criterion, in the SGAE judgment the Court introduced a remedial criterion inspired by the Opinion of Advocate General La Pergola in the EGEDA case. It thereby stipulated that the ‘cumulative effects’ resulting from the fact that “hotel customers quickly succeed each other” should be taken into account (paragraph 38 and 39).

This remedial criterion is however greatly restricted by the Del Corso judgment, as although the Court still recommends taking into account customers who succeed each other, in this case it is those who have access to the same work in parallel or in succession:

“In order to determine that number, the Court took account of the cumulative effects of making works available to potential audiences (SGAE, paragraph 39). In that connection, not only is it relevant to know how many persons have access to the same work at the same time but it is also necessary to know how many of them have access to it in succession” (paragraph 87)

And yet, in the case of a retransmission of radio programmes, which is the scenario in the Del Corso case, and paradoxically all the more in the case of television programmes, which is the scenario in the Reha Training case, the number of patients or customers who

52 Valérie-Laure Benabou, "Droit de communication au public : harmonie, vous avez dit harmonie ?” [Right of communication to the public: harmony, did you say harmony?], Dalloz IP/IT September 2016.
have access to the same work or same subject-matter in succession is limited by necessity. The Court itself makes the same point in the Del Corso judgment (96):

"Moreover, although there are a number of patients in succession, the fact remains that, as those patients attend one at a time, they do not generally hear the same phonograms, or the broadcast phonograms, in particular."

This observation clearly applies beyond dental practices.

The Del Corso judgment promotes an even more restrictive approach by also introducing the "de minimis threshold" criterion, which excludes from the concept groups of persons which are too small, or insignificant" (paragraph 86).

Yet again, this assessment has the potential to lead to arbitrary rulings as the distinctions made by the Court have become difficult to comprehend, e.g. the distinction made between the customers of a dentist and those of a rehabilitation centre in the Reha Training case.

In the latter judgment, the Court states that "the circle of persons constituted by those patients is not 'too small or insignificant', it being understood, in particular, that those patients may enjoy works broadcast at the same time in several places in the establishment." (paragraph 58).

Yet how does the fact that the public is spread between several places (in this case, two waiting rooms and a training room) have any bearing on its quantity? How does this situation differ from that of a dental practice which has a waiting room and usually a number of treatment rooms? The Court does not explain this.

The criterion of a ‘sufficient number of people’ is therefore unpredictable, potentially arbitrary, and reduces the rights granted to authors and holders of related rights. In the same way as the ‘private group’/persons in general’ dichotomy, it conflicts with the above-mentioned exceptions as set out by Article 5.3 of the Directive regarding restricted groups of persons.

The criterion also appears to be alien to the national law of a number of Member States, in which, as Agnès Lucas-Schloetter demonstrated, the concept of the public is understood as being opposed to the private nature of the communication, with this private

53 See on the same point, Valérie-Laure Benabou aforesm.: “Finally, what time period should be taken into account in order to assess the cumulative nature of the persons having access to the work in succession? And incidentally, is this criterion adequate in order to truly understand the communication of a specific work? The cases in which it is used primarily involve broadcasting streams. Moreover, the frequency at which the persons have successively viewed or heard the same work at the same public place - be it a café, restaurant, shop, hairdresser or clinic - is extremely difficult to predict, and one might deem that a very long time period would be required before this specific work would have been accessible to a fairly large number of persons.”

54 Speeches at the Conference of the Belgian Copyright Association on the right of communication to the public, held in Brussels on 15 January 2016, and at the Madrid colloquium also on the right of communication to the public: El derecho de comunicación al público, Congreso internacional, Ministerio de Educación, Cultura y Deporte, Madrid, 13 October 2016.
nature being itself defined either in contemplation of the existing relationships between group members\textsuperscript{55}, or according to a spatial criterion (in the domestic sphere)\textsuperscript{56}.

Relevant in this sense are the criticisms made by Silke Von Lewinski and Michel M. Walter of the lack of anchoring of the Court’s case law to the Member States’ legal traditions:

“\textit{It is certain that, to date, the majority of the Member States have interpreted the concept of the ‘public’ according to criteria other than those applied by the Court}”\textsuperscript{57}.

“The main disadvantage of this type of copyright case law at European Union level is that the Court positions itself more or less outside the traditions of the Member States’ copyright systems, which explains why judgments are issued from a sort of ‘legal nirvana’”\textsuperscript{58}.

2.3 - Condition which applies to secondary communications: a new public or a specific technical means

2.3.1 - The condition of a new public

\textbf{Origin}

\textsuperscript{55} “Cercle de famille” in France and Belgium; "relatives or friends or equivalent persons" in the Netherlands, "personal relationship" in Germany.

\textsuperscript{56} “Un ambito estrictamente domestico” in Spain.

\textsuperscript{57} Silke von Lewinski, “Réflexions sur la jurisprudence récente de la Cour de justice de l’Union européenne en droit d’auteur, en particulier sur le droit de communication au public” [Reflection on recent Court of Justice of the European Union case law on copyright, and specifically the right of communication to the public], in Mélanges André Lucas, [Tributes to Professor André Lucas], Litec, 2014, p. 775 et seq. Ms von Lewinski adds that: “In general, we increasingly find ourselves in a situation in which the Court (presided by generalists rather than copyright experts) is called on to interpret concepts of copyright which are incorporated into all Member State copyright laws and based on long-standing national traditions which often have particular specifications, on the basis of the principle of autonomous and uniform interpretation of all concepts used in the directives. Under such circumstances, and given the wish of the Member States that drafted these directives to keep some margin for interpretation, the European Union legislator may be well-advised to be more vigilant in the future, and to clearly explain any references to national law where it does not wish to leave interpretations of concepts to the Court of Justice, given that the Court’s case law is likely to have an extremely detrimental effect of some of the fundamental concepts of copyright and related rights which the Member States have enshrined and have been applying for a long time. Otherwise, should the European legislator wish to apply a different interpretation to the concepts used in the directives, it could simply adopt a specific legislative act to amend the Court’s case law.”

\textsuperscript{58} Michel M. Walter, “Du développement du droit d’auteur européen durant la dernière décennie et du rôle de la Cour de justice de l’Union européenne” [Development of European copyright over the previous decade and the role of the Court of Justice of the European Union], in Mélanges André Lucas, [Tributes to Professor André Lucas], Litec, 2014, p. 785 et seq.
As reiterated above, the new public criterion, which was considered and then expressly rejected in 1948 at the Brussels Conference which led to the adoption of the current wording of Article 11bis (1) of the Berne Convention, resurfaced in the Opinion of Advocate General La Pergola, on the EGEDA case, dated 9 September 1999.

The analysis of this Opinion in Appendix 6 shows that this criterion has resurfaced due to a mistaken qualification of the method of communication in question in this case\(^{59}\), combined with the use of an inappropriate section of the old Berne Convention Guide.

Six years later Ms Sharpston, the Advocate General in charge of the SGAE case, initially avoided repeating the errors of her predecessor by basing her analysis on the correct text, i.e. sub-paragraph (ii) rather than (iii) of Article 11bis (1), as well as reiterating that this text originated from the 1948 revision of the Berne Convention. She also specifies that it enshrines the ‘purely functional’ criterion of the communication ‘by an organization other than the original one’, and even highlights, based on the reference work of Professor Sam Ricketson on the Berne Convention\(^{60}\), that “the option of requiring a fresh authorisation wherever a retransmission ‘procured a fresh circle of listeners’ was deliberately rejected” (paragraph 50).

However, Ms Sharpston nevertheless incomprehensively invoked the “deliberately rejected” new public criterion relying on the old WIPO Guide (despite the new Guide having been already released) and, more specifically, comments on Article 11bis (1) (iii) which does not apply to this particular circumstance\(^{61}\).

As the Court followed the Opinion of its Advocate General and, as recalled above, established a non-existent causal connection between the concept of an ‘organization other than the original one’ from the Berne Convention, and that of a ‘distinct and therefore new public’, the new public criterion thus appeared in the Court’s case law.

In the SGAE case, this criterion seemed to occupy an additional role simply to strengthen the reasoning used. However, since the Organismos order, it has been used as a prerequisite in order to define ‘communication to the public’, which has been inserted by the Court now with no reference to the Berne Convention or its old Guide. It has therefore become empowered in its own right.

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\(^{59}\) Retransmitting of a broadcast in hotel rooms, covered by Article 11 bis (1) (ii) qualified as public communication by loudspeaker covered by paragraph (iii) of this Article.


\(^{61}\) See on the same point, Silke von Lewinski aforem.: “While the SGAE case refers to the retransmission of a television programme by a hotel owner to the hotel’s individual rooms, a scenario which is covered by Article 11 bis (1) (ii) of the Berne Convention, the Court bases its reasoning on explanations of Article 11bis (1) (iii) taken from the Berne Convention Guide, which covers communication by loudspeaker or any other analogous instrument.”
The concept of a ‘new public’ quite rightly does not appear in the authorised Guide to the Berne Convention published in 2003, which, as regards Article 11bis (1) (ii), reiterates the extremely simple and objective criterion of a third party retransmitting an original broadcast. One might therefore assume that, had this new Guide been brought to the attention of the Court, the error might have been avoided.

This error is however particularly damaging, as it leads to a restriction of the rights granted to authors by imposing a new condition, with no legislative basis other than an erroneous reference to a simplified and obsolete Guide which, moreover, “simply aims to explain the reasons why the Berne Convention established minimum rights separate to the direct broadcasting right”, but not “in any way introducing the condition of a ‘new public’.”

This condition does not appear in any Convention or Treaty, nor in Directive 2001/29.

The aforementioned work of ALAI (which may be referred to) demonstrates the condition’s complete contradiction of both Directive 2001/29, and of the WIPO Treaties that the Directive primarily seeks to implement, as well as its distortion of the Berne Convention.

Criteria which define the condition of a new public

Two criteria are used separately or together to define a new public:

- The subjective criterion of the assumed expectations of rightholders where they have authorised the primary communication, as defined in the Reha Training judgment:

"(...) the Court has held that, in order to fall within the concept of ‘communication to the public’ the work broadcast must be transmitted to a ‘new public’, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public” (paragraph 45).

- The other, objective criterion inferred from the ‘indispensable role of the user’ who performs a secondary communication, as defined by the Reha Training judgment:

“In that context, the Court emphasised the indispensable role of the user. It has held that, in order for there to be a communication to the public, that user must,

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62 Silke von Lewinski, aforen.

in full knowledge of the consequences of its actions, give access to the television broadcast containing the protected work to an additional public and that it appears thereby that, in the absence of that intervention those ‘new’ viewers are unable to enjoy the broadcast works, although physically within the broadcast’s catchment area” (paragraph 46).

(a) The first criterion undoubtedly stems from a commendable wish to take into account the expectations of rightholders when they authorise the primary communication of the work or other subject-matter. It was enshrined by the Court in the SGAE case, where it served as a reinforcement of the analysis which led the Court to consider that the retransmission of television programme signals in hotel rooms was indeed covered by the right of communication to the public.

This is however an extremely subjective criterion, which grants rightholders an assumed intention, the assessment of which will by its very nature be partially arbitrary. The criterion can in fact be moulded equally in either direction, either in favour of stronger protection, or indeed weaker protection, as demonstrated by the Court’s reductive case law in the area of hyperlinks, as opposed to the directive route taken in the SGAE case.

One might recall in this respect the Svensson judgment, in which the Court considered, in the case of a work which is lawfully communicated to the public on website one (which we will call the ‘target website’), with no restrictive measures in place insofar as said work is freely accessible, the creation of a link pointing to the work resource on the target website does not constitute a communication of the work to the public.

Indeed, in the opinion of the Court, the public of website two which contains the link is not new in respect of the public of the target website, and is to some extent included in the virtual public of the target website. Visitors to website two “must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication” (paragraph 27)-The Court confirmed and even extended this approach in its Bestwater order.

While in the Svensson judgment (paragraph 26), the Court attributes to copyright holders who have authorised the original communication on the target website that they have targeted “all potential visitors to the site concerned” (therefore including, as mentioned above, visitors to website two which contains the link), in the Bestwater order it makes the more radical statement that copyright holders have “taken into account all internet users as the public” (paragraph 18).

Web users are therefore considered to be a single and unique public. This statement is surprising given that it has never been clearer that each website has its own public,

See for ex. Séverine Dusollier, "Les hyperliens en droit d'auteur européen : quand tout devient communication" [Hyperlinks in European copyright: when everything becomes communication", Revue du droit des technologies de l'information [Information Technology Journal] no. 54/2014: “All communication on the internet requires the consent of rightholders as it constitutes a communication to the public, but
particularly to advertisers, who attempt to target them as accurately as possible. Moreover: “It goes without saying from an economic and sociological viewpoint that web users do not form a single mass group, but instead can be broken down into countless mixed and disparate publics”.

In attributing to copyright holders that they intend to consider web users as a single public which is assumed to be included in the scope of the authorisation for the original communication on the target website, the Court has applied the ‘implied consent’ theory, inspired by American legal theory on implied license, together with its opt-out corollary. Under this system, which is opposed to the exclusive right principle on which European copyright is based, the author is in principle deemed to have implicitly authorised the exploitation of his/her work unless he/she has expressed a decision to the contrary.

On this point, in its recent judgment on the French law on the digital exploitation of unavailable books from the 20th Century (known as "Re-LIRE")67, the Court stated that the consideration of implicit consent would not contradict Directive 2001/29, on the grounds that it did not stipulate the way in which the prior consent of the author should be expressed68.

This statement of principle does however have the following reservations attached:

“However, the objective of increased protection of authors to which recital 9 of Directive 2001/29 refers implies that the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author’s prior consent” (paragraph 37).

"In particular, every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes" (paragraph 38).

And yet it is doubtful that restricted access to the target website (which constitutes the opt-out in the area of hyperlinks) fits within the restricted concept of implicit consent as that set out by the Re-LIRE ruling.

rightholders are assumed to have considered web users as a single public, leading to the conclusion that a communication by hyperlink does not constitute an act of communication. This logic of such reasoning cannot be upheld”.


66 Séverine Dusollier, aforem.

67 CJEU, 16 Nov. 2016, case C-301/15.

68 Paragraph 35: Nevertheless, Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly.” - This point is followed by a reference to the Svensson judgment.
Indeed, other than the objections in principle raised by the inclusion of the theory of implied consent, the Svensson judgment has been subjected to strong criticism, given that no details are provided of the restricted access to the target website that the copyright holder is supposed to apply in order to express his/her opposition to the creation of links pointing to the work communicated on the aforementioned site, and that this is likely to be impractical (at least as regards its implementation by said rightholder).

Finally, one might question how the scope of the original authorisation (albeit implicit) could be taken into account for the related right to remuneration as set out by Directive 2006/115 (Article 8), which by definition excludes any authorisation granted by the beneficiaries of such a right, while in the Reha Training judgment, the same criteria should be applied for copyright and related rights.

(b) The other new public criterion, inferred from the ‘indispensable role of the user’ who performs a secondary communication, should be understood in the following way: a new public is a public which accesses the work by way of a deliberate action by the user (“in full knowledge of the consequences of its actions”), without which it could not receive the broadcast work even if it were located within the catchment area of the original communication.

This is based on the Court’s premise (as reiterated above) according to which, for the exclusive right of communication to the public to apply, the secondary communication performed by an organisation other than the organisation which performed the primary communication would necessarily imply that such secondary communication is also aimed at a public separate to that of the primary communication.

And yet, as explained previously, the right established by Article 11bis (1) (ii) of the Berne Convention grants authors of literary and artistic works a right implemented solely

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69 See for ex.: Séverine Dusollier, afores.: “Finally, and in a logical continuation of the implied consent theme, the judgment accepts that restricted access may be applied by the author. A hyperlink cannot link to content which is not freely-accessible elsewhere. This seems to be legitimate. However, could restricted access not also be generated by the straightforward refusal of the rightholder to allow hyperlinks to point to or reference his/her work? Search engines already prohibit referencing of content including a tag which indicates such refusal. But what about a warning on a website, or in the terms and conditions? How then can a refusal by authors having authorised communication on a website that they do not control be communicated to posters of hyperlinks to the aforementioned website?” - Also see afores. "ALAI Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet": “One approach, which ALAI has at length considered, but ultimately rejected, is implied license. (...) More importantly, ALAI is concerned that the inference of the license derives from the characteristics of the website or search engine through which the work is accessed, rather than from choices made by the author or rightholder. For example, if the author posts his or her work to a website which allows search engine crawling, has the author consented to unlimited forms of access because a search engine that indexes the website responds only to all-or-nothing instructions? Also see Valérie-Laure Benabou, Joëlle Farchy, Cécile Méadel, Le référencement des œuvres sur Internet [The referencing of works on the internet], CSPLA report 91-94 (2013) criticising opt-out solutions imposed by service providers based on an all-or-nothing approach. Authorisation should not be left to the developers of code used by the intermediary. The enforceability of copyright should not depend on whether the author has observed rules which have been written by potential infringers.”
by a communication of a broadcast work by an organization other than the original one. No other condition is required.

**However, the Court reduces the scope of the exclusive right, which is a conventional minimum, by making it subject to two conditions:**

- The other organization must act knowingly (“in full knowledge of the consequences of its actions”);
- And its action must be an overriding factor in the granting of access to the protected work insofar as, without this action, the recipients of the communication “are unable to enjoy the broadcast works.”

In so doing, it clearly contravenes the provisions of the Berne Convention.

Moreover, Professor Mihály Ficsor correctly observed\(^\text{70}\) that the Court’s position is expressly contradicted by the “Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution by Cable”, as adopted by the Executive Committee of the Berne Union in December 1983\(^\text{71}\).

Indeed, the above Annotated Principles exclude any restriction as regards the reception zone of the broadcast:

> “the Berne Convention explicitly recognizes, without any reference to “zones” or any other territorial restriction, a separate right to authorize any distribution by wire of broadcasts of works, if made by a person other than the original organization.”

Consequently, the criterion of the indispensable role of the user without whose action “those ‘new’ viewers are unable to enjoy the broadcast works, although physically within the broadcast’s catchment area” contravenes the principles adopted by WIPO Member States under the Berne Convention.

**2.3.2 – The alternative of a specific technical means**

In the *ITV* case, which covers the live web retransmission of broadcast programmes, the Court was faced with a scenario in which, unlike the cases it had dealt with in the past, the public had equal access to programmes both via their television sets and on the internet.

\(^{70}\) Mihály J. Ficsor, "Svensson: honest attempt at establishing due balance concerning the use of hyperlinks - spoiled by the erroneous “new public” theory", [http://www.copyrightseesaw.net/archive/?sw 10 item=63](http://www.copyrightseesaw.net/archive/?sw 10 item=63)

\(^{71}\) Copyright, Monthly Review of the World Intellectual Property Organization (WIPO), No. 4, April 1984.
There was therefore no ‘new public’, yet it would have been incomprehensible for the Court to therefore fail to qualify web streaming (i.e. retransmission) of the disputed programmes as a communication to the public.

The Court could have seized the opportunity to re-establish a simple and orthodox application of the Berne Convention, by abandoning the new public criterion for that of the ‘organization other than the original one’, as the High Court of Justice implicitly suggested in its question referred for a preliminary ruling by referring to the concept of a third-party organisation (with no reference made to the concept of a ‘new public’).

Instead, it opted to create a remedial criterion based on the technical means of retransmission of the works, deeming that the act of communication was characterised by the fact that “the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication” (paragraph 26).

This is an alternative condition to that of a new public, which is irrelevant when there are two transmissions (a primary one and a secondary one), where “each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public” (paragraph 39).

This alternative condition is however unsatisfactory. Indeed, like all of the criteria that the Court has used, its meaning is far too uncertain, and the risk is that it may soon become obsolete as Professor Séverine Dusollier emphasises:

“When is there a different technical means? The transmission of programmes by satellite in the Airfield judgment (which uses the new public condition) is however technically different to classic broadcasts over the airwaves, and yet the Court classifies the case as using the same technical means of transmission. (...) It is a safe bet that the gap between different technical means will one day no longer be a relevant consideration in some contexts. The merging of transmission techniques and digital media may cause the claimed distinction between transmission processes to become very fluid.”

In the GS Media case, the Court states that “the hyperlink and the website to which it refers give access to the protected work using the same technical means, namely the

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72 The first question referred for a preliminary ruling was worded as follows: “1) Does the right to authorise or prohibit a “communication to the public of their works by wire or wireless means” in Article 3(1) of [Directive 2001/29] extend to a case where: (...) b) A third party (that is to say, an organisation other than the original broadcaster) provides a service whereby individual subscribers within the intended area of reception of the broadcast who could lawfully receive the broadcast on a television receiver in their own homes may log on to the third party’s server and receive the content of the broadcast by means of an internet stream?”

73 In the SGAE case, the technical means of transmission were also different: i.e. wireless transmission (broadcasting) for the primary communication, and retransmission by cable for the secondary communication.

internet” (paragraph 42). From a technical viewpoint, it seems somewhat bold to assert that a link and a website would constitute the same technical means. Stating this same technical means is ‘the internet’ is equally dubious, as the internet is more of a medium than a technical means.

Finally, Professor Ficsor\textsuperscript{75} also correctly observes that this alternative condition of the specific technical means also contradicts the aforementioned Article 11bis (1) (ii) of the Berne Convention. As has already been reiterated, this legislation indeed establishes the exclusive right to authorise or prohibit: “any communication to the public \textbf{by wire or by rebroadcasting} of the broadcast of the work, when this communication is made by an organization other than the original one”. And yet, when the secondary communication is made by wireless rebroadcasting, it uses the same technical means as the primary communication.

The right established by the Berne Convention is therefore equally applicable to cases in which the secondary communication has the same public as the primary communication, and in which the same means of communication is used for both.

\textit{2.4 - The profit-making nature}

Whether an additional criterion or a true condition, the profit-making nature has undergone some unusual transformations at the hand of the Court’s judgments.

In the \textit{SGAE} case, while the Court noted that the exploitation in question was of a profit-making nature, it did not deal with whether or not it was a prerequisite for an act of communication to the public.

In the \textit{Premier League} case, the profit-making nature is defined as ‘\textit{not irrelevant}’. It was then raised as a ‘\textit{strong}’ criterion constituting a condition in the \textit{Del Corso} and \textit{PPL} judgments, before conversely deemed in the \textit{ITV} judgment not to ‘\textit{determine conclusively}’ and ‘\textit{with no influence on the qualification}’, then again ‘\textit{not irrelevant}’ in the \textit{SPA} judgment. It was credited as being relatively pertinent in the \textit{Reha Training} judgment “\textit{for the purpose of determining any remuneration}”, but not for defining communication to the public, before again being described as ‘\textit{relevant}’ in the \textit{GS Media} case, in which it has a leading role in terms of evidence, as part of a brand-new system created by the Court for links pointing to works or other subject-matter illegally communicated to the public on the source website.

Therefore, the role that the Court attributes to the pursuit of profit is at the very least in doubt. Should one uphold the restricted scope assigned to this criterion in the \textit{Reha Training} judgment, and deem that the \textit{GS Media} judgment’s description of the criterion as ‘\textit{relevant}’ is specific to the issue of hyperlinks?

\textsuperscript{75} \textit{Abovem.}
It would be very risky to comment, and yet again this demonstrates the recurrent issue of legal uncertainty which characterises the Court’s case law on the right of communication to the public.

The extreme variability of the role assigned to the pursuit of profit might be explained by the fact that this criterion has rightly been subject to strong criticism due to its conflict with both European and international legislation, and with the Member States’ legal traditions.

In the Del Corso case, Advocate General Ms Verica Trstenjak provided a perfect demonstration of how imposing the pursuit of profit as a condition of the act of communication to the public would contradict Directives 2006/115 and 2001/29:

"132. First of all, the existence of communication to the public does not depend on whether the user pursues a profit-making purpose.

133. The concept of communication to the public does not imply that it is dependent on a profit-making purpose.

134. Furthermore, not only does the connection with the abovementioned Article 8(3) of Directive 2006/115 militate against such a requirement, but also the connection with Article 5 of Directive 2001/29, to which Article 10(2) of Directive 2006/115 refers. Thus, Article 5(3)(a), (b) and (j) of Directive 2001/29 provides that Member States may provide for exceptions or limitations to the right of communication to the public provided they are in respect of certain privileged uses and no commercial purpose, or no commercial purpose going beyond the privileged activity, is pursued. It follows, conversely, that communication to the public can also exist where no commercial purpose or no profit-making purpose is pursued."

Paradoxically, it was actually in this case that the Court gave the ‘profit-making nature’ its most prominent role. However, no definitive findings can be inferred from this.

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Conclusion

Following our analysis, the Court of Justice of the European Union remarkably appears to have bypassed the legislation which it is tasked with interpreting. It has not only deviated from the letter of the European provisions, which should be read in the light of international legislation, but it has also partly disregarded its spirit, despite having constantly reiterated the aim of a high level of protection for the interests of rightholders.
The report reveals a proliferation of parameters which are at the mercy of contorted case law.

The analysis therefore shows that over the course of the cases it has handled, the Court of Justice has uncovered a bank of criteria to be taken into consideration. Some readers may therefore deduce that the CJEU is scrabbling around for answers. Others might consider that the Court offers an ‘open’ system for judges to draw on. In other words, it is a toolbox which provides the benefit of flexibility. But where is the predictability? The diverse nature of these criteria means that – with the exception of each specific case in question – the solution and (more seriously) the reasoning cannot be known in advance.

The Court of Justice’s solutions are not simply too far removed from the legislation that it is tasked with interpreting, nor are they even too diverse and inconsistent, but quite simply of little use and impractical to implement.

In practice, this means that:

- Rightholders cannot count on the predictability or certainty that they legitimately expect from a legal system,
- National judges do not have access to any real operational clarifications,
- The harmonisation sought is far from being achieved, as no-one knows anymore what constitutes the right of communication to the public!

Aside from these observations, there is a real fear of an inflationary spiral of questions referred for a preliminary ruling, as each new solution brings with it a new set of questions. Furthermore, the construction being created does not seem to be gaining in clarity.

A return to the primary meaning of the legislation would have undoubtedly helped to prevent shifts in meaning, and to quell doubts in the minds of professionals in the sector (including users of works and operators as well as rightholders).

For this reason, many are demanding a push towards the clarification of the legislation when one of the legislative actions planned by the European authorities is taken.

There are multiple and indeed contradictory justifications for this goal.

For the majority, it is at the very least a question of re-establishing a certain amount of predictability, either because the construction used contains too many uncertainties, or because the legislation to be interpreted is perceived to be inaccurate, or sometimes even outdated.

For others, there is a will to reinstate an orthodox approach. It is inconceivable that national judges of 28 countries should be bound to enforce CJEU solutions which deviate from the letter and spirit of international law, which European law (interpreted by Luxembourg judges) must itself adhere to. Each national judge is therefore torn between two (usually compatible) obligations which here lead to two contradictory solutions. The
National judge is bound by a duty to comply with the highest standards by which the State in which he/she is located is bound. He/she must therefore read the national legislation in the light of international legislation. He/she must also comply with the CJEU’s interpretation of the European legislation in consideration of international standards. But what is the answer when the two sets of solutions differ? Should one enforce the international standard at the risk of being accused of a breach of European law? Or, to avoid such a penalty, should one favour the interpretation of Luxembourg judges at the risk of a third State seeking to set up a WTO panel?

For other European case law analysts, the action is justified for purely institutional reasons. In the name of the democratic principle of the separation of powers, the discrepancy (which is irrefutable in the light of the above evidence) between the written legislation and the Court’s interpretation means that control should be passed back to the legislator.

There is therefore support for legislative action by the Commission and the Parliament, i.e. the only institutions with the jurisdiction to take such action.

‘Dialogue’ between the judge and the legislator is a worldwide and timeless phenomenon. It is likely to be more prominent during periods of great change or transformation, and usually leads to one of three outcomes:

- A passive approach by the legislator, allowing the judge adapt the legislation to new scenarios. This is the expected outcome which is usually based on a desire to avoid inappropriate or premature action. This approach is however not possible here for the reasons outlined.
- The enshrinement of the CJEU’s case law construction by incorporating it into the legislation. This route seems very unlikely insofar as it is difficult to envision how a legislator could incorporate solutions into a Directive which have just been shown to contradict European and international legislation binding on EU Member States.
- The ‘breaking’ of the case law. This would simply involve a reiteration of commonly-accepted meanings. This route ultimately seems to be the only reasonable measure to restore order, consistency, predictability and security.

However, at least on this point, the action to be taken would be minimal. It would simply involve reiterating the primary meaning of the legislation in the new European instrument, in order to reinstate an orthodox approach.
Section 3. Reform proposals

Following its work and hearings, the Mission has observed that the Court of Justice of the European Union case law deviates from the usual interpretations of the provisions of international legislation as regards the right of communication to the public. This discrepancy disrupts the work of national judges ruling in this area, as they must adhere to the CJEU’s interpretation, while also remaining mindful of the international commitments of the States in which they practise. This situation is also disconcerting for the various professionals in the sectors covered by the right of communication to the public, as there is no predictability. And yet the main quality expected of a legal system is legal certainty, regardless of the content of the legislation in question.

It is of course impossible to state conclusively that the whole of the construction offered by the Luxembourg judges bypasses all points of the solutions adopted by international legislation or by the various EU States. Nevertheless, the analysis performed in the previous section irrefutably demonstrates that:

- The requirement in a number of cases of the ‘new public’ condition fails to understand the solutions set out under the Berne Convention;
- The interpretation adopted by the CJEU of the concept of the ‘public’ generates uncertainty due to the unpredictable nature of the solutions that it allows to persist;
- The construction upheld by judges on the issue of hyperlinks is based on unusual or inappropriate criteria.

Consequently, we believe that the text of the European directives which deal with this area should be amended (and specifically Directive 2001/29), so that generally-accepted concepts can be re-established for the provisions in question. In other words, the purpose of this action is not to transform the rules which would normally apply within the European Union, but simply to ensure that the meaning that these rules have (or had) in almost every other context is restored. For this reason, a number of clarifications should be applied to the legal corpus.

The request for action is also justified by the need for the legislation to be predictable, and in the interests of a separation of powers (legislative and judiciary), which is an argument made both by the despisers and flatterers of the construction that the CJEU has currently adopted.

With this in mind, all that remains is what form such action will take, and which legislative medium will be used to restore the provisions’ rightful meanings.

Two routes could be considered.
The first route, which is being explored as the primary option, is based on an approach which adds to Directive 2001/29 (Article 3), which covers the general provision on the right of communication to the public, combined with another measure to create a new hyperlinks exception (the so called ‘comprehensive’ approach).

The advantages of this approach can be easily summarised:

- This measure would be the most complete and relevant, particularly given that it would restore consistency to the concept of the right of communication to the public, to the extent that a general theory of this concept could be deemed to exist.

- This route would enable the striking of a balance sought by the legislator (rather than relying solely on the analysis of the judge), by reiterating the principles and implementing a new exception.

- It could be all the more likely given that the European Commission has expressed a desire to reopen Directive 2001/29. The European authorities’ planned approach – which rightholders deem as reducing the content of the prerogatives granted – would therefore be regarded as being more comprehensive and balanced.

- Even though the Proposal for a Directive on “Copyright in the Digital Single Market”, which the Commission put forward on 14 September 2016, would be a separate instrument to Directive 2001/29, it should be noted that the issue of the right of communication to the public, although not clearly set out by the Articles likely to be added to EU law, is mentioned in some of the proposed constructions. These references primarily appear in recital 38 of the Proposal for a Directive, which deals with the issue of the liability of some service providers who make available certain works or other subject-matter, implying the implementation of the right of communication to the public. This recital could be used more broadly as part of the change in legislative action.

Yet, in the event that more comprehensive legislative action is not sought, another route could be taken in order to make the clarifications required to restore the full scope of the right of communication to the public in international legislation, as well as the scope used by the majority of the States.

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76 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 Council.
For this reason, we also deemed it worth exploring other mediums, and in particular the legislation that the Commission proposed on 14 September.

With this in mind, it seems possible to provide additional references to some of the provisions sought, which may restore the original meaning of the right of communication to the public. This second so-called ‘targeted’ approach might propose alterations to the solutions contained in:

- The Proposal for a Directive on “Copyright in the Digital Single Market”,
- The Proposal for a “Satellite and Cable” Regulation from the same date.

This route is however less comprehensive that the first. Despite the benefit of being more immediately open that the so-called ‘comprehensive’ approach, given that the legislation to be implemented can be easily integrated into the legislation which has already been discussed, it is less comprehensive as it does not enable an overall construction on the issue of hyperlinks to be proposed. It also has the disadvantage of a less cohesive vision by being spread over two legislative texts, therefore dissipating the components of the general theory of the right of communication to the public. It is also tainted by uncertainty given that some professionals and Member States oppose this Proposed Regulation. It is therefore essentially considered due to its pragmatism in the light of the Commission’s current proposals. For this reason, the Missions’ contributors consider it a fallback solution in the event that the European authorities were to express no interest in a more ambitious approach.

We will first cover the ‘comprehensive’ approach (I), followed by the ‘targeted’ approach (II).

I – ‘Comprehensive’ approach

Proposed modification of Directive 2001/29 (Article 3) on the right of communication to the public, tempered by a mandatory exception

The so-called ‘comprehensive’ approach aims to restore the meaning of the concept of communication to the public, while moderating the resulting scope in the specific case of the creation of certain hyperlinks.

It therefore proposes an addition to Directive 2001/29 (Article 3), which provides the general basis for the concept in European law77, as well as Article 5 which contains an exhaustive list of exceptions to copyright and related rights. However, should the European authorities fail to officially reopen Directive 2001/29, it goes without saying

77 It goes without saying that these amendments will also convey the full meaning of the concept in Directive 2006/115 (which codified and repealed Directive 92/100, as amended by Directive 93/98), given that the concept also appears in this directive.
that the proposed construction could be incorporated into the new instrumentum proposed by the Commission. The new construction is presented as a cohesive whole with the purpose of conveying the full meaning of the concept of communication to the public. It can be inserted into any legislative text provided that there is a simple reference to Articles 3 and 5 of Directive 2001/29, so that the desired effect is clearly expressed.

That said, the legislative construction proposed by the Mission can be broken down into two steps:

- First of all, the Mission suggests adding to Directive 2001/29 (Article 3) in order to restore the scope of the right of communication to the public, in compliance with international legislation (A).
- Secondly, we recommend the creation of a new exception to the right of communication to the public within Article 5, to prevent certain hyperlinks being subject to this prerogative due to the restored scope of the right (B).

**A – The boundaries of the right of communication to the public**

As mentioned above, the focus is to restore the full scope of the right of communication to the public as it should be in the light of international legislation (Berne Convention\(^78\), WIPO Treaties of 20 December 1996, WTO Marrakesh Agreement) rather than contributing new solutions to this area.

The approach adopted is therefore to insert certain clarifications into Article 3 of Directive 2001/29 (and into a new recital 24 bis), in order to eliminate any ambiguity created by the Luxembourg judges to support their liberal interpretations of the legislation.

The suggested regulations would therefore be presented as shown below (with the new solutions in italics):

**Article 3 - Right of communication to the public of works and right of making available to the public other subject-matter**

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

\(^78\) For related rights see the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), Articles 7, 12 and 13.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for the producers of the first fixations of films, of the original and copies of their films;
(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3.1. Any act consisting of giving access to the public to a protected work and/or other subject-matter shall constitute an act of communication and/or making available to the public.

3.2. Such act of communication and/or making available to the public may be performed by one or several people, either simultaneously or consecutively, primarily or by way of a secondary act.

Should a third party to the primary act of communication and/or making available to the public of a protected work and/or other subject-matter give access to the public to such work and/or other subject-matter, this shall constitute an act of communication and/or of making available to the public, even if the third party uses the same technical means as the original communication and/or making available. In this respect, it is irrelevant whether the public could otherwise have access to this work and/or other subject-matter.

Should a natural person or legal entity initiate an act of communication and/or making available to the public by transmitting a protected work and/or other subject-matter to another natural person or legal entity so that the latter can give access to the public to it, these natural persons/legal entities shall be deemed to have performed the act of communication and/or making available to the public together. They shall therefore both be jointly liable for such single and indivisible act.

3.3. The public means persons who do not belong to the circle of personal and intimate relationships of the party who accomplishes the act of communication and/or making available to the public.

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

Recital 24 bis (sole recital for the whole of Article 3.3)

The mere act of giving access to the public to a protected work and/or other subject-matter constitutes an act of communication and/or making available to the public under Article 3.1 and/or 3.2. In this respect, it is irrelevant whether the public makes use of this option, or whether the protected work and/or other subject-matter is transmitted.
It is also irrelevant whether this act is performed in the pursuit of profit.

A third party who gives access to the public to a protected work and/or other subject-matter which has already been communicated and/or made available to the public, legally or illegally, performs an act of communication and/or making available to the public which is separate to the original act. In this respect, it is irrelevant whether this third party uses the same technical means of communication, or a different technical means from that of the original act. It is also irrelevant whether the public could otherwise have access to this protected work and/or other subject-matter.

Should a natural person or legal entity initiate an act of communication and/or making available to the public by transmitting a work and/or other subject-matter to another natural person or legal entity so that the latter can give access to it to the public, these natural persons/legal entities shall be deemed jointly liable for this single and indivisible act of communication and/or making available to the public, and shall therefore each obtain the authorisation of the right holders for their participation in the concerned act.

The public means persons who do not belong to the circle of personal and intimate relationships of the party who performs the act of communication and/or making available to the public. This circle is defined as the circle of a family and its closest social acquaintances.

There is no need to conduct a quantitative analysis of the public.

The public in question may be real or potential.

It is also irrelevant whether the public is able to access the work and/or other subject-matter at the same place or in different places, or at the same time or different times.

General commentary on the proposed provisions

**Objective sought** - The proposal to alter Article 3 of Directive 2001/29 is the most logical insofar as this provision currently contains the right of communication to the public, and given that this text is referred to in rulings of the Court of Justice of the European Union. However, as explained above, the construction proposed here could also be incorporated into another instrumentum, should the European authorities not plan to review Directive 2001/29. It is crucial that the proposed construction is understood as a cohesive whole which re-specifies the meaning of the solutions originally implemented by international organisations. In this respect, it should be reiterated that Directive 2001/29 (Article 3) is, in the copyright domain, an exact transposition of the World Intellectual Property Organization Treaty (Article 8) of 20 December 1996. An analysis of the preparatory work for the above Treaty indicates that the European Union Member States had a considerable influence on the drafting of this international convention and therefore on choosing the wording which was ultimately used. For this reason, the international
solutions were virtually copied and pasted into the European Directive. This background thereby demonstrates to what extent the interpretation of the Court of Justice of the European Union is out of step with the shared legislation.

**Chosen construction** - The solution proposed for the new Article 3 involves:

- Inserting a new paragraph (3.3) sub-divided into three points;
- Moving the former paragraph 3 (non-exhaustion of rights) to the position of paragraph 4.

The idea is to set clearer boundaries for the right of communication to the public after the two paragraphs (1&2) in Directive 2001/29 which establish it.

The **layout** of the new paragraph 3 will be as follows:

- Paragraph 3, point 1 (Art. 3.3.1) eliminates any ambiguity on the nature of the act of communication to the public and/or making available to the public, which consists of making a protected work or subject-matter accessible to the public.
- Each of the following points (Art. 3.3.2 and 3.3.3) adds clarification on the specific features of this right, which in order to be applied requires:
  - Firstly, that an act defined as a communication to the public has been performed (3.2)
  - Secondly, that this act of communication has targeted the public (3.3).
Which in practical terms means that:
  - Paragraph 3, point 2 therefore provides a clearer definition of the boundaries of the relevant acts;
  - Paragraph 3, point 3 offers a definition of the notion of the 'public'.

**Detailed analysis of the proposed legislation**

1 - **Paragraph 3 (3.1)** reiterates that making accessible a work or protected material is covered by the right of communication to the public.

This solution is self-evident when judged in the light of preparatory work for international legislation. But although it goes without saying, it is even better to make it clear given the unusual stances taken by some people and/or States.

For this reason, recital 24 stipulates that the act of making the work or protected material accessible to the public does not actually have to be followed by an act of transmission in order for the right of communication to the public to be applied (“In this respect, it is irrelevant whether the public makes use of this option, or whether the work and/or other subject-matter is transmitted”). Offering access is therefore sufficient in itself.
2 - Point 2 of paragraph 3 (3.2) is more focused on defining the concept of an act that might fall within the scope of the right of communication to the public. It is subdivided into three sub-paragraphs:

Paragraph one gives an overview of the range of acts that might be performed by listing general information ("3.2. Such act of communication to the public and/or making available to the public may be performed by one or several people, either simultaneously or in succession, primarily or by way of a secondary act").

Paragraphs two and three set out the concept through two specific sets of acts which are reiterated as being subject to the right of communication to the public, in the view of Court of Justice of the European Union case law.

- **Paragraph two** sets out the scenarios of a so-called ‘secondary’ communication. It reiterates that such acts are subject to copyright and related rights, as the CJEU accepts, but does not make the enforceability of copyright dependent on the construction put in place by the Luxembourg judges. Therefore, in this approach:
  - The intervention of a third party in the initial communication to the public is enough to trigger the application of the right of communication to the public,
  - With no need to question:
    - The identity or difference of the technology used,
    - Whether or not there is a new public.

- **Sub-paragraph three** aims to re-establish the scope of the right of communication to the public in the scenario of so-called ‘direct injection’, both for legal and economic reasons. The proposed construction aims to reverse the effects of the reasoning put in place by the Court of Justice of the European Union in the SBS case. The recommended analysis is as follows:
  - There are two physical acts performed by two separate persons/entities;
  - These two actions constitute one and the same legal act of communication to the public;
  - If only the final physical act actually reaches the public, the two persons/entities both of whom have performed a physical act must be jointly accountable for this legal act, i.e. they must obtain consent and pay a fee.

As previously stated, this solution is required not only for legal reasons but also economic reasons. Each contributor has a source of remuneration for the act that it performs, given that:

- The television channel monetizes its audience through advertising;
- The distributor receives remuneration according to how many subscribers it has.
3 - **Point 3 of paragraph 3 (3.3)** will clarify the concept of the **public**, the second condition on which the implementation of the right of communication is based.

The new provision is concise, and in order to define the concept of the public, simply advocates a return to the method used in almost all WIPO and WTO Member States, i.e. the contrast with the circle of close friends or family circle.

Paragraph 3, point 3 uses the expression “**close circle of personal and intimate relationships**”, which is the most commonly-used and equivalent to the ‘**family circle**’ concept used in other States (including France), which the WIPO Guide refers to.

Thus, a work is communicated to the public as soon as it reaches people who are outside the circle of close friends and acquaintances, or indeed the family circle.

**Recital 24 bis** reiterates a number of self-evident facts which are also applied by almost all of the WIPO and WTO Member States.

- The concept of the public should not be confused with that of customers. Whether or not the committed act is of a profit-making nature therefore has no bearing on the qualification of the act.
- Contrary to what is imposed by the Court of Justice of the European Union, there is no need to apply a quantitative approach to the public (whether counting is applied simultaneously or in succession).
- Therefore, the following points should be taken into account:
  - There is no minimum threshold for the number of persons reached to constitute a public,
  - The public can be a potential public,
  - The public is defined by the qualitative factors described previously, i.e. in contrast with the circle of close friends and family;
- There is no ‘new public’ requirement in order to qualify the performed act.

These stipulations serve to reiterate the content of the positive law which existed prior to the rulings of the Court of Justice of the European Union, and to re-establish the globally-accepted concept of the public. This would dispel existing uncertainty which is also caused by the unpredictable nature of the criteria used by the Luxembourg judges.

The Mission’s second recommended action would be an insertion under Article 5 on exceptions to copyright and related rights.
B – The creation of an exception which aims to remove certain hyperlinks from the right of communication to the public.

The removal of the ‘new public’ requirement which the Court of Justice of the European Union put forward for secondary communications may result in a number of hyperlinks being covered by the right of communication to the public.

This would not be a positive outcome, should it be considered that the creation of certain links involves fundamental rights which conflict with the enforceability of the right of communication to the public, or that the links are needed for the internet to be properly organised and efficient.

Rather than leaving national judges to resolve this conflict by searching for a balance between two fundamental rights – i.e. freedom of information on the one hand, copyright and related rights on the other – we deemed it appropriate to set out the guidelines for this balance by laying down a rule under which hyperlinks are not covered by copyright and related rights unless they meet a certain number of requirements. In so doing, the balance sought is carefully thought through by the legislator and exists ‘within’ copyright and related rights.

Therefore, the proposed construction advocates freedom to create certain hyperlinks, by way of an exception from the exclusive right, while framing this right with conditions which are intended to avoid certain purely parasitic activities or those likely to promote acts of infringement.

We propose the following construction:

Article 5
Exceptions and limitations

Article 5.1.b. Acts of communication and/or making available to the public on an online service through hyperlinks which give access to the public to a protected work and/or other subject-matter communicated and/or made available to the public on another online service are exempt from authorisation under the right of communication and/or making available to the public as set out by Article 3, provided that:

- i) the poster of the hyperlink has no knowledge, nor reasonable grounds to know that the target content is communicated or made available to the public illegally on the online service to which the hyperlink leads, and
- ii) the work and/or other subject-matter is accessible without any restriction from the online service to which the hyperlink leads, and
- iii) the hyperlink has not been provided for profit, and
- iv) the hyperlink does not enable the protected work or other subject-matter to be directly displayed or broadcast on the online service on which the hyperlink has been posted.
Recital 33 bis

In order to uphold the freedom to perform certain acts required for the internet to operate smoothly, and to take into consideration certain fundamental rights, a mandatory (yet conditional) exception is established for the creation of certain hyperlinks which give access to the public to a protected work and/or other subject-matter.

Consequently, rightholders cannot contest the communication and/or making available to the public of a protected work and/or other subject-matter by creating certain hyperlinks, provided that the poster of the hyperlink has no knowledge, nor reasonable grounds to know that the target content has been illegally communicated or made available to the public, and that the protected work and/or other subject-matter is accessible without any restriction from the online service to which the hyperlink leads. This is specifically the case where:

- Access to the work and/or other subject-matter requires a code or subscription, or is protected by technological measures.
- The aforementioned online service states that the work and/or other subject-matter located there is not accessible from another online service without the authorisation of the rightholder.

In any case, if hyperlinks are created for profit, the exception shall not apply. It shall also not apply in the event that the hyperlink is in a format which enables the work or other subject-matter to be directly displayed or broadcast on the online service on which the hyperlink has been posted”.

Commentary on the proposed provisions

It ought to be noted here that the proposed exception should be mandatory in nature in order to ensure that the whole of the European Union benefits from the freedom to create hyperlinks.

Therefore, if the new exception is to be incorporated into Directive 2001/29 (Article 5), the provision will need to be altered in the following way:

- The exception for transient technical copies would be moved to a new point 5.1.a, which would also mean that the conditions of this exception would need to be renumbered as i and ii.
- The new exception would be placed under Article 5 (1) (b).

A priori, the initial general statement of the proposed text does not distinguish between different types of hyperlink (simple, deep, framing etc.).
Given that the freedom to link cannot be a total freedom due to the risk of copyright being eliminated through exhaustion from the first use, the new provision sets out a number of requirements which define the boundaries of the exception and impose limitations on it. These requirements work as an exception to an exception, and work by re-establishing the principle of the enforceability of copyright and related rights.

The requirements on which the benefit of the freedom to link exception is based are cumulative. This means that should any of them not be met, the creation of the hyperlink will be subject to copyright and related rights.

The following limitations re-establish the enforceability of copyright and related rights:

- i) - Creators of hyperlinks must not have knowledge, nor reasonable grounds to know that the protected work or content has been illegally communicated to the public or made available to the public on the target website.
  o This wording is taken from Directive 2001/29 (Article 6) (1) on the circumvention of protective technological measures.
  o The construction used by the Court of Justice of the European Union in the GS Media case is not reproduced to the letter: the solution establishes a balance between rights and interests and upholds the user’s freedom to link, and is less ruthless that the requirement of the legality of the communication to the public or making available to the public on the target site.

- ii) - The work or protected material to which the link points must be freely-accessible on the target website.
  o The construction adopted by the Mission here uses the solution provided by the Court of Justice of the European Union in the Svensson and Bestwater cases.
  o The target site will not be deemed to be freely-accessible if it may only be viewed under certain conditions, i.e. based on a subscription or an access code, or if the target works or materials are protected by technological protection measures which have been circumvented, or even if General Terms and Conditions are posted on the site which restrict the freedom of the web user.

- iii) - The creator of the hyperlink must not be seeking to make a profit.
  o Profit does not necessarily mean receiving a fee for using the link.
  o Seeking to make a profit may, for example, be defined as soon as the site or online service on which the link is located generates advertising revenue.
  o Re-using personal data collected by the online service on which the hyperlink is located may be considered as seeking to make a profit,
iv) - Although there is no need to distinguish between the type of hyperlink, hyperlinks which cause the web user to believe that he/she is viewing the work on the site on which the link is located should not be covered by the exception.
  o The scenario in mind is that of hyperlinks which use the framing technique.
  o However, the proposed legislation is not tied to the technique used, but rather to the effect obtained in the mind of the web user. The reason for wording the legislation this way is so that it is not rooted to a technological system which may well become outdated.

It should be noted:
- That none of the conditions imposed for coverage by the exception create unpredictability for link posters.
  o Conditions iii and iv are entirely dependent on the will of the link creator;
  o Conditions i and ii are entirely under his/her control. It is for this reason that the proposal does not use the wording which had at one time been put forward, excluding coverage by the exception as soon as the created link pointed to illegal content. Instead it adds a knowledge element.

- That the mandatory exception thus created is not linked to any type of compensation system. It should be considered that the requirements set out by the legislation (which therefore creates exceptions to the exception and prompts a return to the principle of the enforceability of the right of communication to the public) significantly limits the risk of economic loss that a proliferation of hyperlinks would be likely to cause. It is also important to note that the three-step test will also limit any risks of harm in this area.

II – ‘Targeted’ Approach

Provisions to be integrated into proposed European legislation

Alongside the comprehensive approach, which the Mission’s contributors favour due to its potential to consistently and fully redress the problems caused by the Court of Justice of the European Union’s case law construction, we have developed the concept of a less comprehensive and therefore less ambitious approach, which is perhaps more pragmatic and realistic. In this context, we have described this approach as a ‘targeted’ approach.

This description gives us an idea of what the planned approach attempts to do. Rather than pooling all of the changes required to restore the original scope of the European legislation together as a whole, this approach takes the more measured approach of attempting to implement some of the solutions set out by the comprehensive approach in proposed legislation which the European Commission unveiled on 14 September 2016. The idea would therefore be to add a number of changes and clarifications to the
solutions already planned, in order to redress some of the shifts in meaning caused by the CJEU.

The approach is described as being ‘targeted’ due to its purpose of being incorporated into existing proposed legislation. The proposed changes will therefore be spread over various legislative texts rather than being pooled together in a single text. This involves:

- Adding to the Proposal for a Directive on copyright in the Digital Single Market (hereinafter the ‘Proposal for a Directive’) \( A \)
- And to the Proposal for a Regulation 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 (hereinafter the “Proposal for a Regulation”) \( B \).

As outlined previously, this approach is structured and therefore limited by the framework defined by the European Commission on 14 September 2016, given that it links in with the measures that the Commission has considered.

Please note: In the interests of readability, we will only cover the proposals for changes which are directly linked to the issues raised in the report, i.e. the concept of the ‘public’, and the joint responsibility of parties involved in a direct injection. We will however refer to more general topics to provide greater consistency (‘Background’).

All of the proposed changes are listed in Appendix 4.

\section*{A – Inserting new clauses into the Proposal for a Directive on copyright in the Digital Single Market}

We are mindful of the need to clarify the scope of some of the provisions of the proposed changes to the Proposal for a Directive, in the interests of clarity and legal certainty.

\section*{Recital 33 – Hyperlinks}

The final sentence of recital 33 is ambiguous and may be interpreted as refusing to qualify the creation of hyperlinks as a communication to the public and/or making available to the public, regardless of their characteristics or the conditions under which they were created.
And yet, in actual fact this sentence clearly means that the protection granted to press publications does not exceed that granted by Directive 2001/29/EC (Article 3) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter the ‘Information Society Directive’). In other words, when the creation of a hyperlink does not constitute an act of communication to the public and/or making available to the public as defined by Article 3 of the Information Society Directive, hyperlinking to press publications is not protected under the new right created by the Proposal for a Directive for the publishers of these publications.

It might have been possible to make further alternations to the recital to attempt to express the solutions set out by the comprehensive approach (above, not. I, B). However, this would have been difficult, albeit impossible to achieve, for two sets of reasons:

- The solution set out by the comprehensive approach together with the mandatory exception, for which two Articles would need to be enacted, could not have been expressed in the ‘anchor point’ of a straightforward recital in the legislative text as proposed by the Commission.
- Such an attempt would be ill-advised, as the solution would have only covered newly-created related rights rather than literary and artistic property as a whole (i.e. copyright and all related rights).
**Recital 38**

This recital has been subject to particular focus, and we propose some changes:

- Some are purely form-based and aim to ensure that the recital is easier to read and understand,
- Others hark back to the idea expressed by the comprehensive approach of re-establishing the meaning of the concept of the ‘public’ which existed prior to the CJEU’s implementation of complex and inappropriate distinctions.

**Translation error** - In recital 38, the first priority is to rectify the translation errors in sub-paragraph one, and to cover the right of mechanical reproduction which is of course at issue in any online exploitation involving storing and offering works and/or other subject-matter to the public.

**Active role** - Sub-paragraph two of recital 38 could be interpreted as meaning that the active role of the service provider would need to be assessed for every single work or item of subject-matter, which would be unjustified not to mention absurd. To prevent later confusion, we suggest using terminology which covers all of the service provider’s activities.

**Breakdown** - Furthermore, recital 38 deals with various issues which are not necessarily related. It would therefore be preferable, in the interests of clarity and readability, to distinguish them without applying any changes. This could be done by separating them structurally and creating a new recital (38bis).

**New recital 39 bis**

Several of the provisions in the Proposal for a Directive refer to acts of communication to the public and/or of making available to the public.

The Proposal for a Directive therefore provides an opportunity to stipulate the meaning that should be given to this concept, in a return to the founding principles of the 2003 WIPO Guide.

With this in mind, adding a new recital after the considerations on copyright and related rights seems to be the most appropriate option insofar as the legislation makes a number of references to Article 3 of the Information Society Directive. This is the purpose of the new recital (39bis) which we advise adding into the Proposal for a Directive.
It should be recalled that, in a general manner as well as in light of the references made to Article 3 of Directive 2001/29/EC throughout this Directive, a protected work and/or other subject-matter is communicated and/or made available to the public where the persons who may access such work and/or other subject-matter go beyond the circle of personal and intimate relationships. This circle is defined as the circle of a family or its closest social acquaintances. It does not matter whether such persons are actually gathered in one place or are in different places and whether they may receive the protected works and/or other subject-matter at the same time or different times.

Art. 10 of the Proposal for a Directive

Collective management - Finally, insofar as Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (hereinafter the ‘Collective Management Directive’) sets out rules for negotiation and dispute resolution procedures between collective management organisations and users, it would not make sense to include collective management organisations in Article 10 of the Proposal for a Directive when they are already covered by the rules of this Directive.

B - Inserting new clauses into the Proposal for a Regulation 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

Background - Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereinafter the ‘Satellite and Cable Directive’) established a mandatory collective management system for secondary cable operators, to counteract the problems that such operators have in identifying all of the rightholders whose works and/or subject-matter are included in the programmes communicated to the public by the primary broadcaster, which they then provide a secondary retransmission of. Such operators therefore have no control over these programmes and cannot change them.

The Satellite and Cable Directive only addresses the difficulties faced by cable retransmission service providers.

In a bid to remain technologically neutral, the Proposal for a Regulation extends the solution found for cable operators to satellite, digital terrestrial, closed IP network, mobile and other retransmission service providers, and to all service providers who
perform a secondary act of communication to the public and/or making available to the public in relation to the original communication to the public by the broadcaster.

**Service providers and mandatory collective management** - By defining the service providers that may be covered by the mandatory collective management system in this way, the European Commission has overlooked one category of service providers, i.e. TV package operators which do not perform a secondary act of communication to the public and/or making available to the public of a programme originally communicated to the public by a broadcaster, but which instead work together with the broadcaster in a single and indivisible act of communication to the public and/or making available to the public as part of a direct injection process.

These operators are in fact in the same situation as retransmission service providers, as they have no control over the programmes which they receive from broadcasters, and also have the same issues in identifying and contacting the rightholders whose works and/or other subject matter are included in these programmes.

Under such conditions, the mandatory collective management system must therefore be extended to these operators.

However, such an extension of the system would not apply to the rights of broadcasting organisations under the direct injection process, for the same reasons as it would not apply to the right held by broadcasting organisations in the context of secondary retransmissions as, due to existing business relationship between the broadcasting organisations and the retransmission service providers, there would be no real hindrance to the acquisition of these rights by the service providers.

**Direct injection** - This is the focus of sub-paragraph one of the recital (14bis) and of the first sentence of Article 3bis, which it would make sense to add after the considerations on secondary retransmission, Article 1(c) defining ‘direct injection’, which has become a key concept of the Proposal for a Regulation in the same way as secondary ‘retransmission’ and ‘ancillary online service’. The proposed wording covers all technical broadcasting means, which are the same in the case of a secondary retransmission.

**Article 1**

**Definitions**

*For the purposes of this Regulation, the following meanings shall apply:*

(...)
(c) “direct injection” means a two-step process by which broadcasting organisations transmit “point to point” – by wire or over the air, including by satellite – in such a way that the programme-carrying signals cannot be received by the general public during such transmission, their programme-carrying signals for reception by the public to operators who then offer these programmes to the public, simultaneously in an unaltered and unabridged manner, for viewing or listening on cable, microwave systems, satellite, digital terrestrial, closed circuit IP-based or similar networks.

The Proposal for a Regulation also provides an opportunity to clarify the responsibility of broadcasting organisations in the context of direct injections (both cross-border and single state).

**Joint responsibility of parties involved in the direct injection.** - In this situation, organisations take the initiative of broadcasting radio or television programmes in return for remuneration, which cannot be communicated to the public and/or made available to the public without their contribution. They therefore act in full knowledge of the consequences of their actions, and play an indispensable role in this communication to the public and/or making available to the public. It is thus normal that they should be held jointly responsible for this act together with TV package operators, and that they should obtain consent from the rightholders concerned.

In this respect, it is important to reiterate the position adopted by the Committee of Governmental Experts, convened by the WIPO Director General and the Director-General of UNESCO in the 1980s to study new utilisations (primarily cable television and live satellite broadcasting) which have an impact on the interests of holders of copyright and related rights. Indeed, the Committee concluded that the satellite transmission of a programme to a cable operator and the broadcasting of said programme by this operator constitute a single act of communication to the public, for which the broadcaster and the distributor are jointly responsible, which necessarily implies that each of them is required to obtain consent from the rightholders for the communication to the public that they perform.

The Court of Justice of the European Union also clearly acknowledged this joint responsibility of a broadcaster and a TV package operator for a single and identical act of communication to the public in its *Airfield* judgment of 13 October 2011, in the situation in which said broadcaster sends the distributor its programmes so that the latter can make them accessible to its subscribers.

Sub-paragraph two of the recital (14bis) and the second sentence of Article 3bis provide much-needed clarification of this point, following the Court of Justice of the European Union’s *SBS* judgment of 19 November 2015 which fails to understand the role adopted.
by the broadcaster, does not take into account WIPO and UNESCO principles, and contradicts the solution adopted in the *Airfield* judgment.

(1) **Article 3bis**

*Exercising of rights as part of a direct injection by rightholders other than broadcasting organisations*

Article 3 shall apply to operators who, within a direct injection process, transmit the programmes of broadcasting organisations, originating from another Member State, to the public for viewing or listening. It shall however not apply to such broadcasting organisations that shall be required to obtain an authorisation from the concerned right holders for the single and indivisible acts of communication to the public and making available to the public, as provided in Directive 2001/29/EC (Article 3), as the operators with whom they are jointly liable.

**Collective management** - The purpose of the most recent change to the Proposal for a Regulation (Article 3(3)) was to ensure that rightholders are able to choose a collective management organisation from the many that are available, rather than Members States imposing a particular collective management organisation on a rightholder to manage its rights under a mandatory collective management system. As recital 19 of the Collective Management Directive states, rightholders should always be able to choose their collective management organisation even if a mandatory collective management system is in place. In addition, the Satellite and Cable Directive does not contain any provision which is identical to the one we have recommended for deletion.
Report Mission: ‘Right of communication to the public’
Appendices

1. Mission letter

2. Legislation on the communication to the public right

3. Changes: ‘Comprehensive’ approach


5. CJEU case law summary table

6. Detailed analysis of CJEU judgments

7. Analysis of Ms Brunessen Bertand, Professor at Université Rennes, on the linking of international and European standards

8. List of contributors and participants in plenary meetings
Appendix 1: Mission Letter

Paris, on [date]

Professor Pierre Sirinelli
Maître Josée-Anne Benazeraf
Ms Alexandra Bensamoun

Dear Sir, Maître and Madam,

Over the past two years, the High Council of Literary and Artistic Property [Conseil supérieur de la propriété littéraire et artistique] has been actively advising the Minister for Culture and Communication [ministre de la culture et de la communication] as part of reforms to the European copyright framework initiated by the European Commission.


Your proposal to apply copyright to those stakeholders who, rather than simply hosting protected content are actually providing public access to such content, explored in further detail one of the focus areas introduced by the previous CSPLA report from December 2014 on the revision of Directive 2001/29.

Alongside the bid to replace copyright in the broader regulations governing operators in the digital single market, this report also suggested a second line of approach based on definitions of the exclusive rights themselves, and specifically the right of communication to the public, which appears to be out of step with the digital world.

The Court of Justice of the European Union has indeed been called upon by national courts time and time again over recent years as regards the scope of this right on the internet, and specifically in the area of hyperlinks. Its rulings have not however provided a consistent legal response to all of the questions posed.

The European Commission highlighted its intention to address this issue in its communication of 9 December 2015, entitled “Towards a modern, more European copyright framework”. Point 4 indicates that the Commission is currently leading reflection on the various competing factors in value sharing between the different market stakeholders, as a result of new ways of distributing protected content. In this context, it states that it will examine whether any action should be taken to define the rights of ‘communication to the public’ and ‘making available’. It will also assess if any specific measures should be implemented for information aggregators, including changes to rights.
Therefore, following your previous study, I would like to entrust you with a new Mission to define the right of communication to the public. You will examine what issues the wording of this right currently raises, in respect of its scope and its ability to process the new activities which have developed since Directive 2001/29 was adopted. You will then assess the legality and suitability of the drafting changes that would be required in order to make a distinction between what constitutes an act of exploitation and what ought to be excluded from this description. Finally, you will outline a drafting proposal which France can raise at European level.

Given the autumn deadline set by the European Commission, I would be grateful if you could send your recommendations by July 2016, in the form of a proposals memo accompanied by drafting proposals.

Thank-you for agreeing to take on this new project, which is crucial to communicating the new French proposals at European level. Yours faithfully,

Pierre-François Racine
Annexe 2 : texts relating to communication to the public (extracts)


on the harmonisation of certain aspects of copyright

and related rights in the information society

(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. (...) Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation (...).

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. (...) This Directive also serves to implement a number of the new international obligations.

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC(5), 92/100/EEC(6), 93/83/EEC(7), 93/98/EEC(8) and 96/9/EC(9), and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.
The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter 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.

The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

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

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

   (a) for performers, of fixations of their performances;
   (b) for phonogram producers, of their phonograms;
   (c) for the producers of the first fixations of films, of the original and copies of their films;
   (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

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


on rental right and lending right and on certain rights related to copyright

in the field of intellectual property

(7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.

(13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. It should take account of the importance of the contribution
of the authors and performers concerned to the phonogram or film.

(16) Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.

Article 8

Broadcasting and communication to the public

1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Berne Convention, 1886

Article 11

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(...) (ii) any communication to the public of the performance of their works.

Article 11bis

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

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.
Article 11ter
(1) Authors of literary works shall enjoy the exclusive right of authorizing: (...)
(ii) any communication to the public of the recitation of their works.

Article 14
(1) Authors of literary or artistic works shall have the exclusive right of authorizing:
(i) the cinematographic adaptation and reproduction of these works, and the distribution of the
works thus adapted or reproduced;
(ii) the public performance and communication to the public by wire of the works thus adapted or
reproduced.

Article 14bis
(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a
cinematographic work shall be protected as an original work. The owner of copyright in a
cinematographic work shall enjoy the same rights as the author of an original work, including the
rights referred to in the preceding Article.

WIPO Copyright Treaty

Article 8 – Right of communication to the public
Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii)
and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the
exclusive right of authorizing any communication to the public of their works, by wire or wireless
means, including the making available to the public of their works in such a way that members of
the public may access these works from a place and at a time individually chosen by them.

Agreed statements concerning Article 8:
It is understood that the mere provision of physical facilities for enabling or making a
communication does not in itself amount to communication within the meaning of this Treaty or the
Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party
from applying Article 11bis(2).

WIPO Performances and Phonograms Treaty

Article 2 – Definitions
For the purposes of this Treaty: (...)
(g) “communication to the public” of a performance or a phonogram means the transmission to the
public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or
the representations of sounds fixed in a phonogram. For the purposes of Article 15,
“communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 10 – Right of making available of fixed performances
Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 14 – Right of making available of phonograms
Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 15 – Right to remuneration for broadcasting and communication to the public
(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.
(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.
(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.
(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

NB: no agreed statement concerning these texts.
Appendix 3: Changes to the ‘comprehensive’ approach

Article 3 - Right of communication to the public of works and right of making available to the public other subject-matter

(...) 

3.1. Any act consisting of giving access to the public to a protected work and/or other subject-matter shall constitute an act of communication and/or making available to the public.

3.2. Such act of communication and/or making available to the public may be performed by one or several people, either simultaneously or consecutively, primarily or by way of a secondary act.

Should a third party to the primary act of communication and/or making available to the public of a protected work and/or other subject-matter give access to the public to such work and/or other subject-matter, this shall constitute an act of communication and/or of making available to the public, even if the third party uses the same technical means as the original communication and/or making available. In this respect, it is irrelevant whether the public could otherwise have access to this work and/or other subject-matter.

Should a natural person or legal entity initiate an act of communication and/or making available to the public by transmitting a protected work and/or other subject-matter to another natural person or legal entity so that the latter can give access to the public to it, these natural persons/legal entities shall be deemed to have performed the act of communication and/or making available to the public together. They shall therefore both be jointly liable for such single and indivisible act.

3.3. The public means persons who do not belong to the circle of personal and intimate relationships of the party who accomplishes the act of communication and/or making available to the public.

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

Recital 24 bis (sole recital for the whole of Article 3.3)

The mere act of giving access to the public to a protected work and/or other subject-matter constitutes an act of communication and/or making available to the public under Article 3.1 and/or 3.2. In this respect, it is irrelevant whether the public makes use of this option, or whether the protected work and/or other subject-matter is transmitted.

It is also irrelevant whether this act is performed in the pursuit of profit.

A third party who gives access to the public to a protected work and/or other subject-matter which has already been communicated and/or made available to the public, legally or illegally, performs an act of communication and/or making available to the public which is separate to the original act. In this respect, it is irrelevant whether this third party uses the same technical means of communication, or a different technical means from that of the original act. It is also irrelevant whether the public could otherwise have access to this protected work and/or other subject-matter.
Should a natural person or legal entity initiate an act of communication and/or making available to the public by transmitting a work and/or other subject-matter to another natural person or legal entity so that the latter can give access to it to the public, these natural persons/legal entities shall be deemed jointly liable for this single and indivisible act of communication and/or making available to the public, and shall therefore each obtain the authorisation of the right holders for their participation in the concerned act.

The public means persons who do not belong to the circle of personal and intimate relationships of the party who performs the act of communication and/or making available to the public. This circle is defined as the circle of a family and its closest social acquaintances.

There is no need to conduct a quantitative analysis of the public.

The public in question may be real or potential.

It is also irrelevant whether the public is able to access the work and/or other subject-matter at the same place or in different places, or at the same time or different times.

Article 5
Exceptions and limitations

(...)
• Access to the work and/or other subject-matter requires a code or subscription, or is protected by technological measures.

• The aforementioned online service states that the work and/or other subject-matter located there is not accessible from another online service without the authorisation of the rightholder.

In any case, if hyperlinks are created for profit, the exception shall not apply. It shall also not apply in the event that the hyperlink is in a format which enables the work or other subject-matter to be directly displayed or broadcast on the online service on which the hyperlink has been posted.”
Appendix 4: Changes to the ‘targeted’ approach  
(changes to be added to two European Commission legislative proposals)
1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The evolution of digital technologies has changed the way works and other protected subject-matter are created, produced, distributed and exploited. New uses have emerged as well as new actors and new business models. In the digital environment, cross-border uses have also intensified and new opportunities for consumers to access copyright-protected content have materialised. Even though the objectives and principles laid down by the EU copyright framework remain sound, there is a need to adapt it to these new realities. Intervention at EU level is also needed to avoid fragmentation in the internal market. Against this background, the Digital Single Market Strategy\(^1\) adopted in May 2015 identified the need “to reduce the differences between national copyright regimes and allow for wider online access to works by

\(^1\) COM(2015) 192 final.
users across the EU”. This Communication highlighted the importance to enhance cross-border access to copyright-protected content services, facilitate new uses in the fields of research and education, and clarify the role of online services in the distribution of works and other subject-matter. In December 2015, the Commission issued a Communication “Towards a modern, more European copyright framework". This Communication outlined targeted actions and a long-term vision to modernise EU copyright rules. This proposal is one of the measures aiming at addressing specific issues identified in that Communication.

Exceptions and limitations to copyright and neighbouring rights are harmonised at EU level. Some of these exceptions aim at achieving public policy objectives, such as research or education. However, as new types of uses have recently emerged, it remains uncertain whether these exceptions are still adapted to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. In addition, these exceptions remain national and legal certainty around cross-border uses is not guaranteed. In this context, the Commission has identified three areas of intervention: digital and cross-border uses in the field of education, text and data mining in the field of scientific research, and preservation of cultural heritage. The objective is to guarantee the legality of certain types of uses in these fields, including across borders. As a result of a modernised framework of exceptions and limitations, researchers will benefit from a clearer legal space to use innovative text and data mining research tools, teachers and students will be able to take full advantage of digital technologies at all levels of education and cultural heritage institutions (i.e. publicly accessible libraries or museums, archives or film or audio heritage institutions) will be supported in their efforts to preserve the cultural heritage, to the ultimate advantage of EU citizens.

Despite the fact that digital technologies should facilitate cross-border access to works and other subject-matter, obstacles remain, in particular for uses and works where clearance of rights is complex. This is the case for cultural heritage institutions wanting to provide online access, including across borders, to out-of-commerce works contained in their catalogues. As a consequence of these obstacles European citizens miss opportunities to access cultural heritage. The proposal addresses these problems by introducing a specific mechanism to facilitate the conclusion of licences for the dissemination of out-of-commerce works by cultural heritage institutions. As regards audiovisual works, despite the growing importance of video-on-demand platforms, EU audiovisual works only constitute one third of works available to consumers on those platforms. Again, this lack of availability partly derives from a complex clearance process. This proposal provides for measures aiming at facilitating the licensing and clearance of rights process. This would ultimately facilitate consumers' cross-border access to copyright-protected content.

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. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share

of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content. A fair sharing of value is also necessary to ensure the sustainability of the press publications sector. Press publishers are facing difficulties in licensing their publications online and obtaining a fair share of the value they generate. This could ultimately affect citizens' access to information. This proposal provides for a new right for press publishers aiming at facilitating online licensing of their publications, the recoupment of their investment and the enforcement of their rights. It also addresses existing legal uncertainty as regards the possibility for all publishers to receive a share in the compensation for uses of works under an exception. Finally, authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights. In addition, transparency on the revenues generated by the use of their works or performances often remains limited. This ultimately affects the remuneration of the authors and performers. This proposal includes measures to improve transparency and better balanced contractual relationships between authors and performers and those to whom they assign their rights. Overall, the measures proposed in title IV of the proposal aiming at achieving a well-functioning market place for copyright are expected to have in the medium term a positive impact on the production and availability of content and on media pluralism, to the ultimate benefit of consumers.

- **Consistency with existing policy provisions in the policy area**

The Digital Single Market Strategy puts forward a range of initiatives with the objective of creating an internal market for digital content and services. In December 2015, a first step has been undertaken by the adoption by the Commission of a proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market.\(^3\)

The present proposal aims at addressing several of the targeted actions identified in the Communication ‘Towards a modern, more European copyright framework’. Other actions identified in this Communication are covered by the ‘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’\(^4\), the ‘Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled’\(^5\) and the ‘Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled’.

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This proposal is consistent with the existing EU copyright legal framework. This proposal is based upon, and complements the rules laid down in Directive 96/9/EC\(^7\), Directive 2001/29/EC\(^8\), Directive 2006/115/EC\(^9\), Directive 2009/24/EC\(^10\), Directive 2012/28/EU\(^11\) and Directive 2014/26/EU\(^12\). Those Directives, as well as this proposal, contribute to the functioning of the internal market, ensure a high level of protection for right holders and facilitate the clearance of rights.

This proposal complements Directive 2010/13/EU\(^13\) and the proposal\(^14\) amending it.

- **Consistency with other Union policies**

This proposal would facilitate education and research, improve dissemination of European

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cultures and positively impact cultural diversity. This Directive is therefore consistent with Articles 165, 167 and 179 of the Treaty on the Functioning of the European Union (TFEU). Furthermore, this proposal contributes to promoting the interests of consumers, in accordance with the EU policies in the field of consumer protection and Article 169 TFEU, by allowing a wider access to and use of copyright-protected content.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis
The proposal is based on Article 114 TFEU. This Article confers on the EU the power to adopt measures which have as their object the establishment and functioning of the internal market.

• Subsidiarity (for non-exclusive competence)
Since exceptions and limitations to copyright and related rights are harmonised at EU level, the margin of manoeuvre of Member States in creating or adapting them is limited. In addition, intervention at national level would not be sufficient in view of the cross-border nature of the identified issues. EU intervention is therefore needed to achieve full legal certainty as regards cross-border uses in the fields of research, education and cultural heritage.

Some national initiatives have already been developed to facilitate dissemination of and access to out-of-commerce works. However, these initiatives only exist in some Member States and are only applicable on the national territory. EU intervention is therefore necessary to ensure that licensing mechanisms for the access and dissemination of out-of-commerce works are in place in all Member States and to ensure their cross-border effect. As regards online exploitation of audiovisual works, to foster the availability of European works on video-on-demand platforms across the EU, there is a need to facilitate negotiations of licensing agreements in all Member States.

Online distribution of copyright-protected content is by essence cross-border. Only mechanisms decided at European level could ensure a well-functioning marketplace for the distribution of works and other subject-matter and to ensure the sustainability of the publishing sector in the face of the challenges of the digital environment. Finally, authors and performers should enjoy in all Member States the high level of protection established by EU legislation. In order to do so and to prevent discrepancies across Member States, it is necessary to set an EU common approach to transparency requirements and mechanisms allowing for the adjustment of contracts in certain cases as well as for the resolution of disputes.

• Proportionality
The proposal provides for mandatory exceptions for Member States to implement. These exceptions target key public policy objectives and uses with a cross-border dimension. Exceptions also contain conditions that ensure the preservation of functioning markets and rightholders' interests and incentives to create and invest. When relevant, and while ensuring that the objectives of the Directive are met, room for national decision has been preserved.

The proposal requires Member States to establish mechanisms aiming at facilitating the clearance of copyright and related rights in the fields of out-of-commerce works and online exploitation of audiovisual works. Whereas the proposal aims at ensuring a wider access and
dissemination of content, it does so while preserving the rights of authors and other rightholders. Several safeguards are put in place to that effect (e.g. opt-out possibilities, preservation of licensing possibilities, participation in the negotiation forum on a voluntary basis). The proposal does not go further than what is necessary to achieve the intended aim while leaving sufficient room for Member States to make decisions as regards the specifics of these mechanisms and does not impose disproportionate costs.

The proposal imposes obligations on some information society services. However, these obligations remain reasonable in view of the nature of the services covered, the significant impact of these services on the online content market and the large amounts of copyright-protected content stored by these services. The introduction of a related right for press publishers would improve legal certainty and their bargaining position, which is the pursued objective. The proposal is proportionate as it only covers press publications and digital uses. Furthermore, the proposal will not affect retroactively any acts undertaken or rights acquired before the date of transposition. The transparency obligation contained in the proposal only aims at rebalancing contractual relationships between creators and their contractual counterparts while respecting contractual freedom.

• **Choice of the instrument**

The proposal relates to, and in some instances modifies, existing Directives. It also leaves, when appropriate and taking into account the aim to be achieved, margin of manoeuvre for Member States while ensuring that the objective of a functioning internal market is met. The choice of a Directive is therefore adequate.

3. **RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

• **Ex-post evaluations/fitness checks of existing legislation**

The Commission carried out a review of the existing copyright rules between 2013 and 2016 with the objective to “ensure that copyright and copyright-related practices stay fit for purpose in the new digital context”\(^\text{15}\). Even if it started before the adoption of the Commission's Better Regulation Agenda in May 2015\(^\text{16}\), this review process was carried out in the spirit of the Better Regulation guidelines. The review process highlighted, in particular, problems with the implementation of certain exceptions and their lack of cross-border effect\(^\text{17}\) and pointed out to difficulties in the use of copyright-protected content, notably in the digital and cross-border context that have emerged in recent years.

\(^{15}\) COM(2012) 789 final.


\(^{17}\) Covering, respectively, the exception on illustration for teaching and research (as it relates to text and data mining) and on specific acts of reproduction (as it relates to preservation).
• **Stakeholder consultations**

Several public consultations were held by the Commission. The consultation on the review of the EU copyright rules carried out between 5 December 2013 and 5 March 2014\(^\text{18}\) provided the Commission with an overview of stakeholders' views on the review of the EU copyright rules, including on exceptions and limitations and on the remuneration of authors and performers. The public consultation carried out between 24 September 2015 and 6 January 2016 on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy\(^\text{19}\) provided evidence and views from all stakeholders on the role of intermediaries in the online distribution of works and other subject-matter. Finally, a public consultation was held between the 23 March 2016 and 15 June 2016 on the role of publishers in the copyright value chain and on the 'panorama exception'. This consultation allowed collecting views notably on the possible introduction in EU law of a new related right for publishers.

In addition, between 2014 and 2016, the Commission had discussions with the relevant stakeholders on the different topics addressed by the proposal.

• **Collection and use of expertise**

Legal\(^\text{20}\) and economic\(^\text{21}\) studies have been conducted on the application of Directive 2001/29/EC, on the economic impacts of adapting some exceptions and limitations, on the legal framework of text and data mining and on the remuneration of authors and performers.


\(^\text{21}\) Study “Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU”: [EN](#)
• Impact assessment

An impact assessment was carried out for this proposal\(^{22}\). On 22 July 2016, the Regulatory Scrutiny Board gave a positive opinion on the understanding that the impact assessment will be further improved.\(^{23}\) The final Impact Assessment takes into account comments contained in that opinion.

The Impact Assessment examines the baseline scenarios, policy options and their impacts for eight topics regrouped under three chapters, namely (i) ensuring wider access to content, (ii) adapting exceptions to digital and cross-border environment and (iii) achieving a well-functioning marketplace for copyright. The impact on the different stakeholders was analysed for each policy option; taking in particular into account the predominance of SMEs in the creative industries the analysis concludes that introducing a special regime would not be appropriate as it would defeat the purpose of the intervention. The policy options of each topic are shortly presented below.

Access and availability of audiovisual works on video-on-demand platforms: A non-legislative option (Option 1), consisting in the organisation of a stakeholder dialogue on licensing issues, was not retained as it was deemed insufficient to address individual cases of blockages. The chosen option (Option 2) combines the organisation of a stakeholder dialogue with the obligation for Member States to set up a negotiation mechanism.

Out-of-commerce works: Option 1 required Member States to put in place legal mechanisms, with cross-border effect, to facilitate licensing agreements for out-of-commerce books and learned journals and to organise a stakeholder dialogue at national level to facilitate the implementation of that mechanism. Option 2 went further since it applied to all types of out-of-commerce works. This extension was deemed necessary to address the licensing of out-of-commerce works in all sectors. Option 2 was therefore chosen.

Use of works and other subject-matter in digital and cross-border teaching activities: Option 1 consisted in providing guidance to Member States on the application of the existing teaching exception in the digital environment and the organisation of a stakeholder dialogue. This was considered not sufficient to ensure legal certainty, in particular as regards cross-border uses. Option 2 required the introduction of a mandatory exception with a cross-border effect covering digital uses. Option 3 is similar to Option 2 but leaves some flexibility to Member States that can decide to apply the exception depending on the availability of licences. This option was deemed to be the most proportionate one.

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\(^{22}\) Add link to IA and Executive Summary.

\(^{23}\) Add link to RSB opinion.
Text and data mining: Option 1 consisted in self-regulation initiatives from the industry. Other options consisted in the introduction of a mandatory exception covering text and data mining. In Option 2, the exception only covered uses pursuing a non-commercial scientific research purpose. Option 3 allowed uses for commercial scientific research purpose but limited the benefit of the exception to some beneficiaries. Option 4 went further as it did not restrict beneficiaries. Option 3 was deemed to be the most proportionate one.

Preservation of cultural heritage: Option 1 consisted in the provision of guidance to Member States on the implementation of the exception on specific acts of reproduction for preservation purposes. This Option was rejected as it was deemed insufficient to achieve legal certainty in the field. Option 2, consisting in a mandatory exception for preservation purposes by cultural heritage institutions, was chosen.

Use of copyright-protected content by information society services storing and giving access to large amounts of works and other subject-matter uploaded by their users: Option 1 consisted in the organisation of a stakeholder dialogue. This approach was rejected as it would have a limited impact on the possibility for rightholders to determine the conditions of use of their works and other subject-matter. The chosen option (Option 2) goes further and provides for an obligation for certain service providers to put in place appropriate technologies and fosters the conclusion of agreements with rightholders.

Rights in publications: Option 1 consisted in the organisation of a stakeholder dialogue to find solutions for the dissemination of press publishers' content. This option was deemed insufficient to ensure legal certainty across the EU. Option 2 consisted in the introduction of a related right covering digital uses of press publications. In addition to this, Option 3 leaves the option for Member States to enable publishers, to which rights have been transferred or licensed by an author, to claim a share in the compensation for uses under an exception. This last option was the one retained as it addressed all relevant problems.

Fair remuneration in contracts of authors and performers: Option 1 consisted in providing a recommendation to Member States and organising a stakeholder dialogue. This option was rejected since it would not be efficient enough. Option 2 foresaw the introduction of transparency obligations on the contractual counterparts of creators. On top of that, Option 3 proposed the introduction of a remuneration adjustment mechanism and a dispute resolution mechanism. This option was the one retained since Option 2 would not have provided enforcement means to creators to support the transparency obligation.

- Regulatory fitness and simplification

For the uses covered by the exceptions, the proposal will allow educational establishments, public-interest research institutions and cultural heritage institutions to reduce transaction costs. This reduction of transaction costs does not necessarily mean that rightholders would suffer a loss of income or licensing revenues: the scope and conditions of the exceptions ensure that rightholders would suffer minimal harm. The impact on SMEs in these fields (in particular scientific and educational publishers) and on their business models should therefore be limited.

Mechanisms aiming to improve licensing practices are likely to reduce transaction costs and increase licensing revenues for rightholders. SMEs in the fields (producers, distributors, publishers, etc.) would be positively affected. Other stakeholders, such as VoD platforms,
would also be positively affected. The proposal also includes several measures (transparency obligation on rightholders' counterparts, introduction of a new right for press publishers and obligation on some online services) that would improve the bargaining position of rightholders and the control they have on the use of their works and other subject-matter. It is expected to have a positive impact on rightholders' revenues.

The proposal includes new obligations on some online services and on those to which authors and performers transfer their rights. These obligations may impose additional costs. However, the proposal ensures that the costs will remain proportionate and that, when necessary, some actors would not be subject to the obligation. For instance, the transparency obligation will not apply when the administrative costs it implies are disproportionate in view of the generated revenues. As for the obligation on online services, it only applies to information society services storing and giving access to large amounts of copyright-protected content uploaded by their users.

The proposal foresees the obligation for Member States to implement negotiation and dispute resolution mechanisms. This implies compliance costs for Member States. However, they could rely in most cases on existing structures, which would limit the costs. The teaching exception can also entail some costs for Member States linked to the measures ensuring the availability and visibility of licences for educational establishments.

New technological developments have been carefully examined. The proposal includes several exceptions that aim at facilitating the use of copyright-protected content via new technologies. This proposal also includes measures to facilitate access to content, including via digital networks. Finally, it ensures a balanced bargaining position between all actors in the digital environment.

4. **Fundamental rights**

By improving the bargaining position of authors and performers and the control rightholders have on the use of their copyright-protected content, the proposal will have a positive impact on copyright as a property right, protected under Article 17 of the Charter of Fundamental Rights of the European Union (‘the Charter’). This positive impact will be reinforced by the measures to improve licensing practices, and ultimately rightholders' revenues. New exceptions that reduce to some extent the rightholders’ monopoly are justified by other public interest objectives. These exceptions are likely to have a positive impact on the right to education and on cultural diversity. Finally, the Directive has a limited impact on the freedom to conduct a business and on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders.

5. **Budgetary Implications**

The proposal has no impact on the European Union budget.

5. **Other Elements**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

In accordance with Article 22 the Commission shall carry out a review of the Directive no sooner than [five] years after the date of [transposition].
• **Explanatory documents**
In compliance with recital 48 of the proposal, Member States will notify the Commission of their transposition measures with explanatory documents. This is necessary given the complexity of rules laid down by the proposal and the importance to keep a harmonised approach of rules applicable to the digital and cross-border environment.

• **Detailed explanation of the specific provisions of the proposal**
The first title contains general provisions which (i) specify the subject-matter and the scope of the Directive and (ii) provide definitions that will need to be interpreted in a uniform manner in the Union.

The second title concerns measures to adapt exceptions and limitations to the digital and cross-border environment. This title includes three articles which require Member States to provide for mandatory exceptions or a limitation allowing (i) text and data mining carried out by research organisations for the purposes of scientific research (Article 3); (ii) digital uses of works and other subject-matter for the sole purpose of illustration for teaching (Article 4) and (iii) cultural heritage institutions to make copies of works and other subject-matter that are permanently in their collections to the extent necessary for their preservation (Article 5). Article 6 provides for common provisions to the title on exceptions and limitations.

The third title concerns measures to improve licensing practices and ensure wider access to content. Article 7 requires Member States to put in place a legal mechanism to facilitate licensing agreements of out-of-commerce works and other subject-matter. Article 8 guarantees the cross-border effect of such licensing agreements. Article 9 requires Member States to put in place a stakeholder dialogue on issues relating to Articles 7 and 8. Article 10 creates an obligation for Member States to put in place a negotiation mechanism to facilitate negotiations on the online exploitation of audiovisual works.

The fourth title concerns measures to achieve a well-functioning marketplace for copyright. Articles 11 and 12 (i) extend the rights provided for in Articles 2 and 3(2) of Directive 2001/29/EC to publishers of press publications for the digital use of their publications and (ii) provide for the option for Member States to provide all publishers with the possibility to claim a share in the compensation for uses made under an exception. Article 13 creates an obligation on information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders and to prevent the availability on their services of content identified by rightholders in cooperation with the service providers. Article 14 requires Member States to include transparency obligations to the benefit of authors and performers. Article 15 requires Member States to establish a contract adjustment mechanism, in support of the obligation provided for in Article 14. Article 16 requires Member States to set up a dispute resolution mechanism for issues arising from the application of Articles 14 and 15.

The fifth title contains final provisions on amendments to other directives, the application in time, transitional provisions, the protection of personal data, the transposition, the review and the entry into force.
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on copyright in the Digital Single Market

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee 24,

Having regard to the opinion of the Committee of the Regions 25,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights should contribute further to the achievement of those objectives.

(2) The directives which have been adopted in the area of copyright and related rights provide for a high level of protection for rightholders and create a framework wherein the exploitation of works and other protected subject-matter can take place. This harmonised legal framework contributes to the good functioning of the internal market; it stimulates innovation, creativity, investment and production of new content, also in the digital environment. The protection provided by this legal framework also contributes to the Union's objective of respecting and promoting cultural diversity while at the same time bringing the European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the


European Union requires the Union to take cultural aspects into account in its action.

(3) Rapid technological developments continue to transform the way works and other subject-matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject-matter in the digital environment. As set out in the Communication of the Commission entitled ‘Towards a modern, more European copyright framework’, in some areas it is necessary to adapt and supplement the current Union copyright framework. This Directive provides for rules to adapt certain exceptions and limitations to digital and cross-border environments, as well as measures to facilitate certain licensing practices as regards the dissemination of out-of-commerce works and the online availability of audiovisual works on video-on-demand platforms with a view to ensuring wider access to content. In order to achieve a well-functioning marketplace for copyright, there should also be rules on rights in publications, on the use of works and other subject-matter by online service providers storing and giving access to user uploaded content and on the transparency of authors’ and performers’ contracts.


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In the fields of research, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the current Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 2001/29/EC, 96/9/EC and 2009/24/EC in these fields may negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, teaching and preservation of cultural heritage should be reassessed in the light of those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. For uses not covered by the exceptions or the limitation provided for in this Directive, the exceptions and limitations existing in Union law should continue to apply. Directives 96/9/EC and 2001/29/EC should be adapted.

The exceptions and the limitation set out in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. They can be applied only in certain special cases which do not conflict with the normal exploitation of the works or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholders.

The protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightholders under Union law. This protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and the limitation established in this Directive, which are particularly relevant in the online environment. Rightholders should have the opportunity to ensure this through voluntary measures. They should remain free to choose the format and the modalities to provide the beneficiaries of the exceptions and the limitation established in this Directive with the means to benefit from them provided that such means are appropriate. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC.


New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Those technologies allow researchers to process large amounts of information to gain new knowledge and discover new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing encourage innovation. However, in the Union, research organisations such as universities and research institutes are confronted with legal uncertainty as to the extent to which they can perform text and data mining of content. In certain instances, text and data mining may involve acts protected by copyright and/or by the sui generis database right, notably the reproduction of works or other subject-matter and/or the extraction of contents from a database. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders. Text and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation would be required.

Union law already provides certain exceptions and limitations covering uses for scientific research purposes which may apply to acts of text and data mining. However, those exceptions and limitations are optional and not fully adapted to the use of technologies in scientific research. Moreover, where researchers have lawful access to content, for example through subscriptions to publications or open access licences, the terms of the licences may exclude text and data mining. As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union's competitive position as a research area will suffer unless steps are taken to address the legal uncertainty for text and data mining.

This legal uncertainty should be addressed by providing for a mandatory exception to the right of reproduction and also to the right to prevent extraction from a database. The new exception should be without prejudice to the existing mandatory exception on temporary acts of reproduction laid down in Article 5(1) of Directive 2001/29, which should continue to apply to text and data mining techniques which do not involve the making of copies going beyond the scope of that exception. Research organisations should also benefit from the exception when they engage into public-private partnerships.

Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. Due to the diversity of such entities, it is important to have a common understanding of the beneficiaries of the exception. Despite different legal forms and structures, research organisations across Member States generally have in common that they act either on a not for profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission may, for example, be reflected through public funding or through provisions in national laws or public contracts. At the same time, organisations upon which commercial undertakings have a decisive influence...
allowing them to exercise control because of structural situations such as their quality of shareholders or members, which may result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.

(12) In view of a potentially high number of access requests to and downloads of their works or other subject-matter, rightholders should be allowed to apply measures where there is risk that the security and integrity of the system or databases where the works or other subject-matter are hosted would be jeopardised. Those measures should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception.

(13) There is no need to provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive given that in view of the nature and scope of the exception the harm should be minimal.

(14) Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public for the sole purpose of, among others, illustration for teaching. In addition, Articles 6(2)(b) and 9(b) of Directive 96/9/EC permit the use of a database and the extraction or re-utilization of a substantial part of its contents for the purpose of illustration for teaching. The scope of those exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and thereby at a distance. Moreover, the existing framework does not provide for a cross-border effect. This situation may hamper the development of digitally-supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject-matter in digital teaching activities, including online and across borders.

(15) While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should therefore benefit all educational establishments in primary, secondary, vocational and higher education to the extent they pursue their educational activity for a non-commercial purpose. The organisational structure and the means of funding of an educational establishment are not the decisive factors to determine the non-commercial nature of the activity.

(16) The exception or limitation should cover digital uses of works and other subject-matter such as the use of parts or extracts of works to support, enrich or complement the teaching, including the related learning activities. The use of the works or other subject-matter under the exception or limitation should be only in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations, and be limited to
what is necessary for the purpose of such activities. The exception or limitation should cover both uses through digital means in the classroom and online uses through the educational establishment's secure electronic network, the access to which should be protected, notably by authentication procedures. The exception or limitation should be understood as covering the specific accessibility needs of persons with a disability in the context of illustration for teaching.

(17) Different arrangements, based on the implementation of the exception provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject-matter. Such arrangements have usually been developed taking account of the needs of educational establishments and different levels of education. Whereas it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the modalities of implementation may differ from a Member State to another, to the extent they do not hamper the effective application of the exception or limitation or cross-border uses. This should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of adequate licences, covering at least the same uses as those allowed under the exception. This mechanism would, for example, allow giving precedence to licences for materials which are primarily intended for the educational market. In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should take concrete measures to ensure that licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching are easily available and that educational establishments are aware of the existence of such licensing schemes.

(18) An act of preservation may require a reproduction of a work or other subject-matter in the collection of a cultural heritage institution and consequently the authorisation of the relevant rightholders. Cultural heritage institutions are engaged in the preservation of their collections for future generations. Digital technologies offer new ways to preserve the heritage contained in those collections but they also create new challenges. In view of these new challenges, it is necessary to adapt the current legal framework by providing a mandatory exception to the right of reproduction in order to allow those acts of preservation.

(19) Different approaches in the Member States for acts of preservation by cultural heritage institutions hamper cross-border cooperation and the sharing of means of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.

(20) Member States should therefore be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports. Such an exception should allow for the making of copies by the appropriate preservation
tool, means or technology, in the required number and at any point in the life of a work or other subject-matter to the extent required in order to produce a copy for preservation purposes only.

(21) For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements.

(22) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter. However, the particular characteristics of the collections of out-of-commerce works mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use. It is therefore necessary to provide for measures to facilitate the licensing of rights in out-of-commerce works that are in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.

(23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism allowing for licences for out-of-commerce works to extend to the rights of rightholders that are not represented by the collective management organisation, in accordance to their legal traditions, practices or circumstances. Such mechanisms can include extended collective licensing and presumptions of representation.

(24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. That system includes in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions.

(25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including photographs, sound recordings and audiovisual works. In order to reflect the specificities of different categories of works and other subject-matter as regards modes of publication and distribution and to facilitate the usability of those mechanisms, specific requirements and procedures may have to be established by Member States for the practical application of those licensing mechanisms. It is appropriate that Member States consult rightholders, users and collective management organisations when doing so.
(26) For reasons of international comity, the licensing mechanisms for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to works or other subject-matter of third country nationals except when they are first published or, in the absence of publication, first broadcast in the territory of a Member State or, in the case of cinematographic or audiovisual works, to works of which the producer's headquarters or habitual residence is in a Member State.

(27) As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.

(28) Information regarding the future and ongoing use of out-of-commerce works and other subject-matter by cultural heritage institutions on the basis of the licensing mechanisms provided for in this Directive and the arrangements in place for all rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised. This is particularly important when uses take place across borders in the internal market. It is therefore appropriate to make provision for the creation of a single publicly accessible online portal for the Union to make such information available to the public for a reasonable period of time before the cross-border use takes place. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary measures, aiming at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the European portal making such information available.

(29) On-demand services have the potential to play a decisive role in the dissemination of European works across the European Union. However, agreements on the online exploitation of such works may face difficulties related to the licensing of rights. Such issues may, for instance, appear when the holder of the rights for a

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given territory is not interested in the online exploitation of the work or where there are issues linked to the windows of exploitation.

(30) To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. The body should meet with the parties and help with the negotiations by providing professional and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum.

(31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of press publications are facing problems in licensing the online use of their publications and recouping their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.

(32) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of digital uses. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications in respect of digital uses.

(33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. This protection does not extend to acts of hyperlinking when they do not constitute a communication to the public.

(34) The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as digital uses are concerned. They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.
(35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side.

(36) Publishers, including those of press publications, books or scientific publications, often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In this context, publishers make an investment with a view to the exploitation of the works contained in their publications and may in some instances be deprived of revenues where such works are used under exceptions or limitations such as the ones for private copying and reprography. In a number of Member States compensation for uses under those exceptions is shared between authors and publishers. In order to take account of this situation and improve legal certainty for all concerned parties, Member States should be allowed to determine that, when an author has transferred or licensed his rights to a publisher or otherwise contributes with his works to a publication and there are systems in place to compensate for the harm caused by an exception or limitation, publishers are entitled to claim a share of such compensation, whereas the burden on the publisher to substantiate his claim should not exceed what is required under the system in place.

(37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to copyright protected content uploaded by their users without the involvement of rightholders have flourished and have become main sources of access to content online. This affects rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.

(38) 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 and/or making available to the public, together with an act of reproduction, 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 Council34.

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the content supplied or promoting this content, irrespective of the nature of the means used therefor.

(38 bis) In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.

(39) Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the recognition of rightholders' content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.

(39bis) It must be reiterated that, both generally and in the light of the references made to Directive 2001/29/EC (Article 3) in this Directive, a work and/or other subject-matter is communicated to the public and/or made available to the public if a natural person or legal entity provides access to this work and/or other subject-matter to people outside the close circle of family and friends. This circle comprises family and close social acquaintances. In this respect, it is irrelevant whether the public is able to access the work and/or other subject-matter at the same place or in different places, or at the same time or different times.

(40) Certain rightholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightholders grant a licence or a transfer of rights in return for remuneration. As authors and performers tend to be in a weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.
When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States should consult all relevant stakeholders as that should help determine sector-specific requirements. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.

Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a remuneration adjustment mechanism for cases where the remuneration originally agreed under a licence or a transfer of rights is disproportionately low compared to the relevant revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. The assessment of the situation should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.

Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism.

The objectives of this Directive, namely the modernisation of certain aspects of the Union copyright framework to take account of technological developments and new channels of distribution of protected content in the internal market, cannot be sufficiently achieved by Member States but can rather, by reason of their scale, effects and cross-border dimension, be better achieved at Union level. Therefore, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.

Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directive
In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:


TITLE I
GENERAL PROVISIONS

Article 1
Subject matter and scope

1. This Directive lays down rules which aim at further harmonising the Union law applicable to copyright and related rights in the framework of the internal market, taking into account in particular digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations, on the facilitation of licences as well as rules aiming at ensuring a well-functioning marketplace for the exploitation of works and other subject-matter.


Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

1. ‘research organisation’ means a university, a research institute or any other organisation the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services:
   (a) on a non-for-profit basis or by reinvesting all the profits in its scientific research; or
   (b) pursuant to a public interest mission recognised by a Member State; in such a way that the access to the results generated by the scientific research cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon such organisation;

2. ‘text and data mining’ means any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations;

3. ‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution;

4. ‘press publication’ means a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.
TITLE II
MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT

Article 3
Text and data mining

1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.

2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.

3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

4. Member States shall encourage rightholders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3.

Article 4
Use of works and other subject-matter in digital and cross-border teaching activities

1. Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC and Article 11(1) of this Directive in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:

(a) takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff;

(b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

2. Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific types of works or other subject-matter, to the extent that adequate licences authorising the acts described in paragraph 1 are easily available in the market.

Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure appropriate availability and visibility
of the licences authorising the acts described in paragraph 1 for educational establishments.

3. The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation for the harm incurred by the rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.

**Article 5**

*Preservation of cultural heritage*

Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 11(1) of this Directive, permitting cultural heritage institutions, to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.

**Article 6**

*Common provisions*

Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title.
TITLE III
MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT

CHAPTER 1
Out-of-commerce works

Article 7
Use of out-of-commerce works by cultural heritage institutions

1. Member States shall provide that when a collective management organisation, on behalf of its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:

(a) the collective management organisation is, on the basis of mandates from rightholders, broadly representative of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence;
(c) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
(d) all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter.

2. A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.

Member States shall, in consultation with rightholders, collective management organisations and cultural heritage institutions, ensure that the requirements used to determine whether works and other subject-matter can be licensed in accordance with paragraph 1 do not extend beyond what is necessary and reasonable and do not preclude the possibility to determine the out-of-commerce status of a collection as a whole, when it is reasonable to presume that all works or other subject-matter in the collection are out of commerce.

3. Member States shall provide that appropriate publicity measures are taken regarding:

(a) the deeming of works or other subject-matter as out of commerce;
(e) the licence, and in particular its application to unrepresented rightholders;
(f) the possibility of rightholders to object, referred to in point (c) of paragraph 1;

including during a reasonable period of time before the works or other subject-matter are digitised, distributed, communicated to the public or made available.

4. Member States shall ensure that the licences referred to in paragraph 1 are sought from a collective management organisation that is representative for the Member State where:

(a) the works or phonograms were first published or, in the absence of publication, where they were first broadcast, except for cinematographic and audiovisual works;

(g) the producers of the works have their headquarters or habitual residence, for cinematographic and audiovisual works; or

(h) the cultural heritage institution is established, when a Member State or a third country could not be determined, after reasonable efforts, according to points (a) and (b).

5. Paragraphs 1, 2 and 3 shall not apply to the works or other subject-matter of third country nationals except where points (a) and (b) of paragraph 4 apply.

Article 8
Cross-border uses

1. Works or other subject-matter covered by a licence granted in accordance with Article 7 may be used by the cultural heritage institution in accordance with the terms of the licence in all Member States.

2. Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the possibility of rightholders to object referred to in Article 7(1)(c) are made publicly accessible in a single online portal for at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration of the licence.

3. The portal referred to in paragraph 2 shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

Article 9
Stakeholder dialogue

Member States shall ensure a regular dialogue between representative users' and rightholders' organisations, and any other relevant stakeholder organisations, to, on a sector-specific basis, foster the relevance and usability of the licensing mechanisms referred to in Article 7(1), ensure the effectiveness of the safeguards for rightholders
referred to in this Chapter, notably as regards publicity measures, and, where applicable, assist in the establishment of the requirements referred to in the second subparagraph of Article 7(2).

CHAPTER 2
Access to and availability of audiovisual works on video-on-demand platforms

Article 10
Negotiation mechanism

Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they may rely on the assistance of an impartial body with relevant experience. That body shall provide assistance with negotiation and help reach agreements.

Paragraph 1 does not apply to negotiations relating to protected works and/or other subject matter represented by entities which are subject to Directive 2014/26/EU. No later than [date mentioned in Article 21(1)] Member States shall notify to the Commission the body referred to in paragraph 1.
TITLE IV
MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

CHAPTER 1
Rights in publications

Article 11
Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.


4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

Article 12
Claims to fair compensation

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right.

CHAPTER 2
Certain uses of protected content by online services

Article 13
Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users

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.

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.

CHAPTER 3
Fair remuneration in contracts of authors and performers

Article 14
Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.

2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.

3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.

4. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU.
Article 15
Contract adjustment mechanism

Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.

Article 16
Dispute resolution mechanism

Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure.
TITLE V
FINAL PROVISIONS

Article 17
Amendments to other directives

1. Directive 96/9/EC is amended as follows:
   (a) In Article 6(2), point (b) is replaced by the following:

"(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [this Directive];"

   (c) In Article 9, point (b) is replaced by the following:

"(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [this Directive];"

2. Directive 2001/29/EC is amended as follows:
   (a) In Article 5(2), point (c) is replaced by the following:

"(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and the limitation provided for in Directive [this Directive];"

   (d) In Article 5(3), point (a) is replaced by the following:

"(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [this Directive];"

   (e) In Article 12(4), the following points are added:

"(e) to examine the impact of the transposition of Directive [this Directive] on the functioning of the internal market and to highlight any transposition difficulties;

   (f) to facilitate the exchange of information on the relevant developments in legislation and case law as well as on the practical application of the measures taken by Member States to implement Directive [this Directive];"
(g) to discuss any other questions arising from the application of Directive [this Directive]."

**Article 18**

*Application in time*

1. This Directive shall apply in respect of all works and other subject-matter which are protected by the Member States' legislation in the field of copyright on or after [the date mentioned in Article 21(1)].

2. The provisions of Article 11 shall also apply to press publications published before [the date mentioned in Article 21(1)].

3. This Directive shall apply without prejudice to any acts concluded and rights acquired before [the date mentioned in Article 21(1)].

**Article 19**

*Transitional provision*

Agreements for the licence or transfer of rights of authors and performers shall be subject to the transparency obligation in Article 14 as from [one year after the date mentioned in Article 21(1)].

**Article 20**

*Protection of personal data*

The processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC.

**Article 21**

*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [12 months after entry into force] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

**Article 22**

*Review*

1. No sooner than [five years after the date mentioned in Article 21(1)], the Commission shall carry out a review of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.
2. Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1.

Article 23
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 24
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
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

(Text with EEA relevance)

{SWD(2016) 301}
{SWD(2016) 302}
1. CONTEXT OF THE PROPOSAL

- Reasons for and objectives of the proposal

Digital technologies facilitate the distribution of and access to works and other protected subject matter, with 49% of European internet users accessing music, audiovisual content and games online.¹ Broadcasters and retransmission service providers are increasingly investing in the development of digital and online services for the distribution of radio and television programmes. The online offerings of broadcasters include notably simulcasting services (TV/radio channels which are transmitted online alongside traditional broadcasting by satellite, cable or, terrestrial), TV catch-up services² and podcasts. Despite the growing variety of online services, broadcasters’ programmes often remain unavailable online to European citizens living in other Member States. In addition, the variety of TV and radio channels from other Member States provided by retransmission services differs across the EU.

Broadcasting organisations transmit on a daily basis a high number of news, cultural, political, documentary or entertainment programmes that they license from others or produce themselves. These programmes incorporate a variety of protected content such as audiovisual, musical, literary or graphic works. This requires a complex clearance of rights with a multitude of right holders. Often, the rights need to be cleared in a short time-frame, in particular when preparing programmes such as news or current affairs. In order to make their services available across borders, broadcasting organisations need to have the required rights for the relevant territories and this increases the complexity of the rights’ clearance. For satellite broadcasting the clearance of rights has been facilitated by the application of the country of origin principle enshrined in the Satellite and Cable Directive (Directive 93/83/EEC), allowing broadcasters to clear the rights only in one Member State. That Directive does not apply when a broadcaster clears rights for its online services.

Operators of retransmission services, which aggregate a high number of TV and radio channels into packages, also face difficulties for acquiring all the rights necessary to retransmit the television and radio programmes of broadcasting organisations. The Satellite and Cable Directive provides for a system of mandatory collective management for retransmissions by cable of TV and radio broadcasts from other Member States. This system, facilitating the clearance of rights, does not extend to retransmission services provided by means other than cable over closed electronic communication networks, such as IPTV (TV/radio over closed circuit IP-based networks). Operators of such retransmission services therefore face a heavy rights clearing burden in order to be able to provide their services, in particular when they retransmit TV and radio broadcasts from other Member States.

This proposal aims to promote the cross-border provision of online services ancillary to broadcasts and to facilitate digital retransmissions over closed networks of TV and radio programmes originating in other Member States by adapting the Union legal framework. By


² The concept of ‘catch-up’ television, enabling consumers to view programmes at the own choice of timing, is generally based on clearance of the rights for programming within a limited window, typically 7 to 30 days after transmission.
addressing the difficulties related to the clearance of rights, it creates the conditions allowing broadcasters and operators of retransmission services to offer wider access to TV and radio programmes across the EU. As a result, this proposal will promote consumers' access to more TV and radio programmes originating in other Member States, both as concerns ancillary online services of broadcasting organisations and retransmission services. The proposal introduces a common approach in the Union while maintaining a high level of protection for right holders. In doing so, it contributes to the functioning of the internal market as an area without internal borders.

**Consistency with existing provisions in the policy area**

The Digital Single Market Strategy\(^3\) puts forward a range of initiatives in order to create an internal market for digital content and services. In December 2015, a first step was undertaken by the Commission with the proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market\(^4\). This proposal responds to one of the key objectives identified in the Digital Single Market Strategy: to enhance wider online access to TV and radio programmes by users across the EU. Promoting the cross-border provision of online services ancillary to broadcasts and facilitating digital retransmissions of TV and radio programmes originating in other Member States is a significant step that addresses a specific obstacle to cross-border access to broadcast content for the benefit of users.

This proposal is consistent with the legal instruments in the domain of copyright, in particular Directive 93/83/EEC, Directive 2001/29/EC, Directive 2006/115/EC and Directive 2014/26/EU. Those Directives, as well as this proposal, contribute to the functioning of the internal market, ensure a high level of protection for right holders and facilitate the clearance of rights.

This proposal also contributes to the improvement of the cross-border reach of audiovisual media services and hence complements Directive 2010/13/EU\(^5\).

**Consistency with other Union policies**

According to Article 167 of the Treaty on the Functioning of the European Union (TFEU), the Union shall take cultural aspects into account in its action under the Treaties. By facilitating access to TV and radio programmes, this proposal would enhance access to cultural content, news and information.

This proposal contributes to promoting the interests of consumers by promoting more access to TV and radio programmes from other Member States and thus is consistent with the EU policies in the field of consumer protection and Article 169 TFEU.

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2. **LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**
  
  The proposal for a Regulation is based on Article 114 TFEU. This Article confers on the EU the power to adopt measures which have as their object the establishment and functioning of the internal market. This includes the freedom to provide and to receive services. The EU has harmonised the rights which are relevant for the online dissemination of works and other protected subject matter as well as for the retransmission of TV and radio programmes (notably the rights of reproduction, communication to the public and making available) in Directive 2001/29.

  The present proposal for a Regulation concerns the facilitation of the clearance of rights for ancillary online services by broadcasting organisations by introducing a principle of country of origin, according to which the copyright relevant act takes place solely in the Member State where the broadcasting organisation is established. It also facilitates the clearance of rights for retransmission services provided over closed networks (other than cable), by introducing rules on mandatory collective management. The aim of the proposal is to take account of, inter alia, the changes in technology which necessitate adaptation of the previously harmonised legal framework.

  The proposed instrument is a regulation given the need to ensure that the rules achieve the objective in a uniform manner and are directly applicable.

- **Subsidiarity (for non-exclusive competence)**
  
  The issue addressed by this proposal, namely wider access to TV and radio programmes by citizens across the Union, is in essence of a cross-border nature. Only a Union instrument can establish a rule that applies the principle of the country of origin to cross-border transmissions of TV and radio programmes. Concerning the exercise of retransmission rights, only a Union instrument can remove the existing market fragmentation in the way rights are managed for digital retransmission services and thereby ensure legal certainty to retransmission operators. Nevertheless, certain specific provisions concerning the application of mandatory collective management to retransmission services provided over closed networks should be determined by Member States.

- **Proportionality**
  
  The proposal establishes enabling mechanisms in order to facilitate the clearance of copyright and related rights in relation to certain types of online transmissions and retransmissions over closed networks of TV and radio programmes. It is targeted and covers only specific segments of the market (ancillary online services of broadcasters and certain retransmission services provided by means of IPTV and other “closed” electronic communications networks) while other services (e.g. on-demand services not linked to a broadcast) are outside its scope. In addition, the proposal does not oblige broadcasting organisations to provide their online ancillary services across borders, nor does it oblige operators of retransmission services to offer programmes from other Member States. The proposal does not prevent either the exercise of the contractual freedom of the parties to limit the exploitation of the rights affected by the principle of country of origin done in compliance with Union law.

  Concerning the country of origin rule applicable for clearing rights for the broadcasters' ancillary online services, it only localises the relevant copyright acts for the purposes of exercising the rights (e.g. obtaining a licence). Therefore, the country of origin does not affect the localisation of the relevant copyright acts when rights have not been cleared (i.e. in the case of unauthorised transmissions).
As concerns the retransmission rights, the proposal only affects the exercise of the retransmission rights while leaving these rights intact. Moreover, the proposal covers retransmissions insofar as they concern TV and radio programmes originating in other Member States.

- Choice of the instrument
A regulation is directly applicable in Member States and therefore this instrument guarantees a uniform application of the rules across the Union and their entering into force at the same time. This would allow ensuring full legal certainty to service providers operating in different territories. The direct applicability of the provisions of this proposal would prevent legal fragmentation and provide a harmonised set of rules to facilitate the cross border provision of TV and radio programmes online and of the retransmission services.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS
- Ex-post evaluations/fitness checks of existing legislation
The Commission carried out an evaluation of Directive 93/83/EEC\(^6\) and in particular of the effectiveness and relevance of the principle of the country of origin as it applies to satellite transmissions and of the rules on mandatory collective management for cable retransmissions. The evaluation showed that these mechanisms have facilitated the clearance of copyright and related rights for cross-border satellite broadcasts and for the simultaneous retransmissions by cable of broadcasts from other Member States. It however pointed out that Directive 93/83/EEC - due to the technology-specific nature of its provisions - does not apply to the new digital technologies used for transmission and retransmission of TV and radio programmes that have emerged in recent years.

- Stakeholder consultations
A public consultation on the review of Directive 93/83/EEC was conducted from 24 August to 16 November 2015.\(^7\) It invited respondents to give feedback on the functioning of the rules related to the clearance of rights for satellite broadcasters and cable operators and to assess the possible need to extend these rules to online transmissions and to retransmissions by other means than cable. In addition, the Commission had extensive discussions with stakeholders (public and commercial broadcasters, telecommunications operators, right holders and collective management organisations (CMOs)) in 2015-2016 to discuss issues related to online transmissions and retransmissions of TV and radio programmes.

Consumers are generally in favour of a broad extension of the country of origin principle to cover all online services, even if some of them consider that this mechanism may not be sufficient to ensure cross-border access. All public service broadcasters as well as commercial radios call for the application of the country of origin principle to broadcast-related online services. By contrast, commercial broadcasters, right holders and CMOs express strong reservations on extending the application of the country of origin principle. They consider that any such extension would restrict their ability to license rights on a territorial basis.


Consumers, cable and telecommunication operators, public service broadcasters and the vast majority of CMOs are in favour of a possible extension of mandatory collective management to the simultaneous retransmissions of TV and radio programmes on platforms other than cable. Many CMOs and public service broadcasters as well as some cable and telecommunication operators insist that the extension should be limited to "closed environments" which function in a manner comparable to cable. Most right holders are against a possible extension of the mandatory collective management regime due to the potential disruptive effect on the markets. Commercial broadcasters also tend to oppose it.

The measures foreseen in this proposal take into account a number of concerns signaled by stakeholders, notably as regards the scope of extension of the principle of the country of origin (e.g. broadcasters' video-on-demand services are outside the scope and the intervention only relates to the clearance of rights that are necessary for the ancillary online services) and of the mechanism of mandatory collective management of rights (which is limited to closed networks).

- **Collection and use of expertise**

Legal\(^8\) and economic\(^9\) studies have been conducted on the application of EU copyright rules to the digital environment (in particular with regard to online transmissions and retransmissions in digital networks). In addition, a study has been carried out in 2015/2016 to support the evaluation of the Satellite and Cable Directive and the assessment of its possible extension.\(^{10}\)

- **Impact assessment**

An impact assessment was carried out for this proposal.\(^{11}\) On 22 July 2016, the Regulatory Scrutiny Board gave a positive opinion on the understanding that the impact assessment will be further improved.\(^{12}\) The final Impact Assessment takes on board the comments contained in that opinion.

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8 Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (see in particular the part on "retransmission of copyright-protected content in digital networks"): [http://ec.europa.eu/internal_market/copyright/studies/index_en.htm](http://ec.europa.eu/internal_market/copyright/studies/index_en.htm);

Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions: [http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf)

9 Economic Analysis of the Territoriality of the Making Available Right in the EU: [http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf)

10 Survey and data gathering to support the evaluation of the Satellite and Cable Directive 93/83/EEC and assessment of its possible extension, 2016 [Add reference when published].

11 Add link to IA and Executive Summary

12 Add link to RSB opinion
The impact assessment examines two sets of policy options, aimed at facilitating the clearance of rights (i) for the online transmissions of TV and radio programmes; and (ii) for digital retransmissions of TV and radio programmes.

As regards online transmissions of TV and radio programmes, three policy options were examined further to the baseline option. A non-legislative option (Option 1), consisting in promoting voluntary agreements to facilitate the clearing of rights for certain broadcasters' online services, was not retained as its outcome would be uncertain, depending on the stakeholders' willingness to license rights, and would not ensure a homogenous licensing regime. The application of the country of origin principle to online transmissions was examined through two legislative options: under Option 2, the scope of application was limited to broadcasters' online services which are ancillary to the initial broadcasts (notably simulcasting and catch-up services); under Option 3 the application was extended to online transmissions which are not linked to a broadcast (webcasting services). Option 2 would significantly reduce the transaction costs faced by broadcasters willing to make their transmissions available online and across borders. Option 3 would in principle extend these benefits to webcasters; however, considering that the webcasting market is still at a development stage and that online operators may easily relocate their establishment in the EU, it would also generate legal uncertainty for right holders and could lead to a lowering of the level of protection. Option 3 was therefore rejected. The application of the country of origin principle only to certain well-identified online services of broadcasters (Option 2) was considered more appropriate. By reducing the transaction costs related to cross-border transmissions, this option will open new opportunities for broadcasters to offer their online services across borders, in particular as concerns content which does not rely on territorial exclusivity. This option does not restrict right holders and broadcasters' possibility to continue licensing rights on a territorial basis, subject to the requirements of EU and national law.

As regards digital retransmissions of TV and radio programmes, two policy options were considered in addition to the baseline option. Under Option 1, the scope of application of mandatory collective management of rights was limited to IPTV retransmission services and other retransmission services provided over "closed" electronic communications networks, while under Option 2 it would also cover over-the-top retransmission services, as long as they are provided to a defined number of users. Although Option 2 would allow a wider range of retransmission services to benefit from reduced transaction costs for the clearance of rights, it would also entail risks of undermining right holders' exclusive online rights and distribution strategies, leading to a reduction of licensing revenues. Option 1 did not present such a risk, as most of the retransmission services provided over "closed" electronic communications networks rely on the established infrastructures located in a particular territory. Option 1 was chosen as the preferred option. It is expected to increase consumer choice in terms of retransmission services of TV and radio broadcasts from other Member States.

The proposal is expected to yield positive results in terms of benefits versus costs. Transaction costs associated with the clearance of rights should decrease, fostering better choice to consumers without disruptive effects on right holders. Furthermore, the proposal could generate new licensing opportunities for right holders and additional licensing revenues.

• Regulatory fitness and simplification

The proposal will reduce the transaction costs faced by TV and radio broadcasters as well as retransmission service providers and would therefore be positive for SMEs active in this area. It is also expected to be beneficial to right holders, in particular individual right holders, micro-companies and SMEs that do not have the capacity to manage individual licensing deals with a high number of service providers in different territories. Therefore, exemptions of micro-companies or mitigating measures in favor of SMEs have not been deemed necessary.
New technological developments have been carefully examined and taken into account in this proposal, which focuses on online transmissions and digital retransmissions of TV and radio programmes. Certain types of online transmission and retransmission services have been excluded from the scope of this proposal, mainly on the basis of the uncertainty linked to ongoing market developments and the nascent nature of certain services.

- **Fundamental rights**

By establishing the licensing regimes applicable to certain types of cross-border online transmissions and retransmissions over closed networks, the proposal will have a limited impact on copyright as a property right and on the freedom to conduct a business, protected under Articles 17 and 16 of the Charter of Fundamental Rights of the European Union. At the same time, the proposal will have a beneficial impact on the freedom of expression and information, protected under Article 11 of the Charter, as it will increase the cross-border provision and receipt of TV and radio programmes which originate in other Member States.

4. **BUDGETARY IMPLICATIONS**

The proposal has no impact on the European Union budget.

5. **OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The first data collection should take place when the Regulation enters into force in order to establish the baseline for future evaluations. The monitoring process would then focus on progress made in relation to the cross-border availability of TV and radio programmes, with data collection taking place every two to three years.

Pursuant to Article 6 of the proposal, the Commission will carry out a review of the Regulation and will present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. That report will include an assessment of the effects of the Regulation on the cross-border accessibility of ancillary online services. The review shall be conducted according to the Commission's Better Regulation Guidelines.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 defines the services covered by the measures (notably "ancillary online services" and "retransmission" services). These definitions will be applied in a uniform manner in the Union.

Article 2 establishes that the copyright acts relevant for the provision of an ancillary online service occur solely in the Member State where the broadcasting organisation is established. The notion of the "principal establishment" of a broadcasting organisation would be in accordance with Union law.

Articles 3 and 4 regulate the exercise of the right of retransmission covered by the proposal. They lay down rules that are similar to those laid down in Articles 9 and 10 of Directive 93/83/EC concerning cable retransmissions. Article 3 leaves certain discretion to Member States as in the case of cable retransmission under Directive 93/83/EC. Articles 3 and 4 include provisions on mandatory collective management of copyright and related rights relevant for retransmission, on legal presumptions of representation by collective management organisations and on the exercise of the cable retransmission right by broadcasting organisations.

Article 5 sets out transitional provisions.
Article 6 provides that the Commission shall carry out a review of the Regulation and present a report on its main findings. It obliges Member States to provide the Commission with necessary information for the preparation of that report.

Article 7 sets out the final provisions, namely the date of entry into force of the Regulation and the date from which the Regulation shall apply.
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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,\textsuperscript{13}

Having regard to the opinion of the Committee of the Regions,\textsuperscript{14}

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) In order to contribute to the functioning of the internal market, it is necessary to provide for wider dissemination of television and radio programmes originating in other Member States for the benefit of users across the Union by facilitating licensing of copyright and related rights in works and other protected subject-matter contained in broadcasts of such programmes. Indeed, television and radio programmes are important means of promoting cultural and linguistic diversity, social cohesion and access to information.

(1) The development of digital technologies and internet has transformed the distribution of and access to television and radio programmes. Users increasingly expect to have access to television and radio programmes both live and on-demand, using traditional channels such as satellite or cable and also through online services. Broadcasting organisations are therefore increasingly offering, in

\textsuperscript{13} OJ C […], […], p. […].

\textsuperscript{14} OJ C […], […], p. […].
addition to their own broadcasts of television and radio programmes, online services ancillary to their broadcast, such as simulcasting and catch-up services. Retransmission services operators, which aggregate broadcasts of television and radio programmes into packages and provide them to users simultaneously to the initial transmission of the broadcast, unaltered and unabridged, use various techniques of retransmission such as cable, satellite, digital terrestrial, closed circuit IP-based or mobile networks as well as the open internet. On the part of users, there is a growing demand for access to broadcasts of television and radio programmes not only originating in their Member State but also in other Member States of the Union, including from members of linguistic minorities of the Union as well as from persons who live in another Member State than their Member State of origin.

(2) A number of barriers hinder the provision of online services which are ancillary to broadcasts and the provision of retransmission services and thereby the free circulation of television and radio programmes within the Union. Broadcasting organisations transmit daily many hours of news, cultural, political, documentary or entertainment programmes. These programmes incorporate a variety of content such as audiovisual, musical, literary or graphic works, which is protected by copyright and/or related rights under Union law. That results in a complex process to clear rights from a multitude of right holders and for different categories of works and other protected subject matter. Often the rights need to be cleared in a short time-frame, in particular when preparing programmes such as news or current affairs. In order to make their online services available across borders, broadcasting organisations need to have the required rights to works and other protected subject matter for all the relevant territories which further increases the complexity of the rights' clearance.

(3) Operators of retransmission services, that normally offer multiple programmes which use a multitude of works and other protected subject matter included in the retransmitted television and radio programmes, have a very short time-frame for obtaining the necessary licences and hence also face a significant rights clearing burden. There is also a risk for right holders of having their works and other protected subject matter exploited without authorisation or payment of remuneration.


(5) Council Directive 93/83/EEC\(^{17}\) facilitates cross-border satellite broadcasting and retransmission by cable of television and radio programmes from other Member States of the Union. However, the provisions of that Directive on transmissions of broadcasting organisations are limited to satellite transmissions and therefore do not apply to online services ancillary to broadcast while the provisions concerning retransmissions of television and radio programmes from other Member States are limited to simultaneous, unaltered and unabridged retransmission by cable or microwave systems and do not extend to such retransmissions by means of other technologies.

(6) Therefore, cross-border provision of online services ancillary to broadcast and retransmissions of television and radio programmes originating in other Member States should be facilitated by adapting the legal framework on the exercise of copyright and related rights relevant for those activities.

(7) The ancillary online services covered by this Regulation are those services offered by broadcasting organisations which have a clear and subordinate relationship to the broadcast. They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast and services giving access, within a defined time period after the broadcast, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services). In addition, ancillary online services include services which give access to material which enriches or otherwise expands television and radio programmes broadcast by the broadcasting organisation, including by way of previewing, extending, supplementing or reviewing the relevant programme's content. The provision of access to individual works or other protected subject matter that have been incorporated in a television or radio programme should not be regarded as an ancillary online service. Similarly, the provision of access to works or other protected subject matter independently of broadcast, such as services giving access to individual musical or audiovisual works, music albums or videos, do not fall under the definition of ancillary online service.

(8) In order to facilitate the clearance of rights for the provision of ancillary online services across borders it is necessary to provide for the establishment of the country of origin principle as regards the exercise of copyright and related rights relevant for acts occurring in the course of the provision of, the access to or the use of an ancillary online service. That principle of country of origin should apply exclusively to the relationship between right holders (or entities representing right holders such as collective management organisations) and broadcasting organisations.


\(^{18}\) December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property OJ L 376, 27.12.2006, p. 28–35.
organisations and solely for the purpose of the provision of, the access to or the use of an ancillary online service. The principle of country of origin should not apply to any subsequent communication to the public or reproduction of content which is protected by copyright or related rights and which is contained in the ancillary online service.

(9) Since the provision of, the access to or the use of an ancillary online service is deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment, while de facto the ancillary online service can be provided across borders to other Member States, it is necessary to ensure that in arriving at the amount of the payment to be made for the rights in question, the parties should take into account all aspects of the ancillary online service such as the features of the service, the audience, including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used, and the language version.

(10) Through the principle of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law.

(11) Operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile and similar networks, provide services which are equivalent to those provided by operators of cable retransmission services when they retransmit simultaneously, in an unaltered and unabridged manner, for reception by the public, an initial transmission from another Member State of television or radio programmes, where this initial transmission is by wire or over the air, including by satellite but excluding online transmissions, and intended for reception by the public. They should therefore be within the scope of this Regulation and benefit from the mechanism introducing mandatory collective management of rights. Retransmission services which are offered on the open internet should be excluded from the scope of this Regulation as those services have different characteristics. They are not linked to any particular infrastructure and their ability to ensure a controlled environment is limited when compared for example to cable or closed circuit IP-based networks.

(12) In order to provide legal certainty to operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile or similar networks, and to overcome disparities in national law regarding such retransmission services, rules similar to those that apply to cable retransmission as defined in Directive 93/83/EEC should apply. The rules established in that Directive include the obligation to exercise the right to grant or refuse authorisation to an operator of a retransmission service through a collective management organisation. This is without prejudice to Directive 2014/26/EU18 and in particular to its provisions.

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concerning rights of right holders with regard to the choice of a collective management organisation.

(13) Any rights held by broadcasting organisations themselves in respect of their broadcasts, including rights in the content of the programmes, should be exempted from the mandatory collective management of rights applicable for retransmissions. Operators of retransmission services and broadcasting organisations generally have ongoing commercial relations and as a result the identity of broadcasting organisations is known to operators of retransmission services and hence the clearance of rights with broadcasting organisations is comparatively simple. Thus, to obtain the necessary licences from broadcasting organisations, operators of retransmission services do not face the same burden as they face to obtain licences from holders of rights in works and other protected subject matter included in the retransmitted television and radio programmes. Therefore, there is no need for the simplification of the licensing process with regard to rights held by broadcasting organisations.

(14) In order to prevent circumvention of the application of the country of origin principle through the extension of the duration of existing agreements concerning the exercise of copyright and related rights relevant for the provision of an ancillary online service as well as the access to or the use of an ancillary online service, it is necessary to apply the principle of country of origin also to existing agreements but with a transitional period.

(14Bis) Providers who offer services via cable networks, broadcasting systems using ultrashort waves, digital terrestrial networks, closed IP networks or via mobile or similar networks are also in a similar situation to that of cable retransmission service providers when they simultaneously distribute full and unaltered television or radio programmes to the public which are transmitted to them from another Member State through a private wired or wireless point-to-point line, including by satellite, to be received by the public, in such a way that the programme-carrying signals cannot be captured by the general public during the transmission. In such a scenario involving direct injection, they must therefore also be included in the scope of this Regulation and be covered by the system of mandatory collective rights management, with the exception of the rights held by the broadcasting organisations themselves, as set out under recital 14.

Broadcasting organisations should be not be covered by a mandatory collective management system. These broadcasting organisations however must obtain consent from the relevant rightholders for the single and indivisible acts of communication to the public and making available to the public, as defined by Directive 2001/29/EC (Article 3), that they perform with the service providers with whom they share joint responsibility. Indeed, the broadcasting organisations are generally aware of the identity of rightholders for the works and/or other

subject matter included in their programmes. Therefore, obtaining the required consent is relatively straightforward. Consequently, no simplification of the procedure for granting consent is required for the broadcasting organisations.

(15) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. Whilst there may be an interference with the exercise of the rights of right holders insofar as mandatory collective management is required for the exercise of the right of communication to the public with regard to retransmission services, it is necessary to prescribe such a condition in a targeted manner for specific services and in order to allow more widespread cross-border dissemination of television and radio programmes by facilitating the clearance of these rights.

(16) In order to achieve the objective of promoting the cross-border provision of ancillary online services and of facilitating retransmissions of television and radio programmes originating in other Member States, it is appropriate to adopt a Regulation, which directly applies in Member States. A Regulation is necessary in order to guarantee a uniform application of the rules across Member States and their entering into force at the same time with regard to all the concerned transmissions and retransmissions. The direct applicability of a Regulation reduces legal fragmentation and provides greater uniformity by introducing a harmonised set of rules which promote the free circulation of television and radio programmes originating in other Member States.

(17) A review of the Regulation should be undertaken after the Regulation has been in force for a period of time, in order to assess, among others, to what extent the cross-border provision of ancillary online services has increased to the benefit of European consumers and hence also to the benefit of improved cultural diversity in the Union.

(18) Since the objective of this Regulation, namely promoting the cross-border provision of ancillary online services and facilitating retransmissions of television and radio programmes originating in other Member States, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve its objective. As concerns the cross-border provision of ancillary online services, this Regulation establishes enabling mechanisms to facilitate the clearance of copyright and related rights. This Regulation does not oblige broadcasting organisations to provide such services across borders. Neither does this Regulation oblige operators of retransmission services to include in their services television or radio programmes originating in other Member States. This Regulation concerns only the exercise of certain retransmission rights to the extent necessary to simplify the licensing of copyright and related rights for such
services and only with regard to television and radio programmes originating in other Member States of the Union,

HAVE ADOPTED THIS REGULATION:

Article 1
Definitions

For the purpose of this Regulation, the following definitions shall apply:

(a) "ancillary online service" means an online service consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation as well as of any material produced by or for the broadcasting organisation which is ancillary to such broadcast;

(b) "retransmission" means any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC and other than retransmission provided over an internet access service as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council\(^\text{19}\), intended for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite but excluding online transmission, of television or radio programmes intended for the reception by the public, provided that such retransmission is made by a party other than the broadcasting organisation which made the initial transmission or under whose control and responsibility such transmission was made.

(c) ‘direct injection’ A two-step process in which broadcasting organisations transmit their programme-carrying signals to a distributor, to be received by the public. The transmission is performed using a private wired or wireless point-to-point line, or by satellite, in such a way that the programme-carrying signals cannot be captured by the general public during the transmission. Service providers then offer a full and unaltered version of these programmes to the public simultaneously, for the public to watch or listen to them via cable networks, broadcasting systems using ultrashort waves, digital terrestrial networks, closed IP networks or via mobile or similar networks.

Article 2
Application of the principle of ‘country of origin’ to ancillary online services

(1) The acts of communication to the public and of making available occurring when providing an ancillary online service by or under the control and responsibility of a broadcasting organisation as well as the acts of reproduction which are necessary for the provision of, the access to or the use of the ancillary online service shall, for the purposes of exercising copyright and related rights relevant for these acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.

(2) When fixing the amount of the payment to be made for the rights subject to the country of origin principle as set out in paragraph 1, the parties shall take into account all aspects of the ancillary online service such as the features of the ancillary online service, the audience, and the language version.

Article 3
Exercise of the rights in retransmission by right holders other than broadcasting organisations

(1) Holders of copyright and related rights other than broadcasting organisations may exercise their rights to grant or refuse the authorisation for a retransmission only through a collective management organisation.

(2) Where a right holder has not transferred the management of the right referred to in paragraph 1 to a collective management organisation, the collective management organisation which manages rights of the same category for the territory of the Member State for which the operator of the retransmission service seeks to clear rights for a retransmission shall be deemed to be mandated to manage the right on behalf of that right holder.

(3) Where more than one collective management organisation manages rights of that category for the territory of that Member State, the right holder shall be free to choose which of those collective management organisations is deemed to be mandated to manage his or her right.

(4) A right holder shall have the same rights and obligations resulting from the agreement between the operator of the retransmission service and the collective management organisation which is deemed to be mandated to manage his or her right as the right holders who have mandated that collective management organisation and shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the retransmission which includes his or her work or other protected subject matter.

(5) A Member State may provide that, where a right holder authorises the initial transmission within its territory of a work or other protected subject matter, the right holder shall be deemed to have agreed not to exercise his or her rights in retransmission on an individual basis but to exercise them in accordance with this Regulation.
Article 3bis
Exercising of rights as part of a direct injection by rightholders other than broadcasting organisations

Article 3 applies to service providers who, as part of a direct injection process, transmit programmes from broadcasting organisations originating from another Member State to the public for listening or viewing purposes. It does not however apply to broadcasting organisations. In the same way as the service providers with whom they are jointly responsible, these broadcasting organisations must obtain consent from the relevant rightholders for the single and indivisible acts of communication to the public and making available to the public that they perform, as defined by Directive 2001/29/EC (Article 3).

Article 4
Exercise of the rights in retransmission by broadcasting organisations

Article 3 shall not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other holders of copyright or by holders of related rights.

Article 5
Transitional provision

Agreements on the exercise of copyright and related rights relevant for the acts of communication to the public and the making available occurring in the course of provision of an ancillary online service as well as for the acts of reproduction which are necessary for the provision of, the access to or the use of an ancillary online service which are in force on [the date mentioned in Article 7(2), to be inserted by OPOCE] shall be subject to Article 2 as from [the date mentioned in Article 7(2) + 2 years, to be inserted by OPOCE] if they expire after that date.

Article 6
Review

(1) No later than [3 years after the date mentioned in Article 7(2) to be inserted by OPOCE], the Commission shall carry out a review of this Regulation and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.

(2) Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1.

Article 7
Final provisions

(1) This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
(2) It shall apply from [6 months following the day of its publication, to be inserted by OPOCE].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
## Appendix 5: Summary Table of CJEU Case Law regarding the Right of Communication to the Public

<table>
<thead>
<tr>
<th>Case</th>
<th>Type of exploitation</th>
<th>Directive</th>
<th>RCP</th>
<th>Key points</th>
</tr>
</thead>
</table>
| **SGAE** (Rafael Hoteles) 7 Dec 2006 C-306/05 | Retransmission of broadcast works in hotel rooms (musical works within television programmes) | 2001/29 Art. 3 (1) | Yes  | Act of communication: Distributing a signal through television sets.  
Public: indeterminate number of potential viewers - a fairly large number of persons with cumulative effects.  
New public (taken from the old Berne Convention Guide – superfluous condition?): The public which accesses works through "the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its clients.”  
Profit-making nature: condition of the act? (undecided) - established in the case in point. |
| **Organismos** 18 March 2010 C-136/09 | Retransmission of broadcast works in hotel rooms (Audiovisual works within television programmes) | 2001/29 Art. 3 (1) | Yes  | Act of communication: Intentionally making accessible the protected work.  
Interpretation of recital 27: “The mere provision of physical facilities (...) must be understood as the activity of selling or renting television sets by specialist companies ”. New public: Necessary condition.  
Defined (i) by reference to the public considered in the light of the original authorisation, (ii) (like SGAE) as those who access works through “the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its clients.” |
| **Premier League** (FAPL) 4 Oct. 2011 C-403/08, C-429/08 | Retransmission to pub clients of a televised programme (football matches) through a television set and loudspeakers | 2001/29 Art. 3 § 1 | Yes  | Call for unity and coherence in the EU’s legal system: “the concepts used by that body of directives [2001/29, 92/100, 2006/115] must have the same meaning, unless the European Union legislature has, in a specific legislative context, expressed a different intention.”  
Concept of communication: Should be understood “broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used.”  
Act of communication: “Intentionally transmitting broadcast works via a television screen and loudspeakers”.  
New public = “an additional public” not “considered by the authors when they authorised the broadcasting of their works”.  
Public not present at the place where the communication originates (rec. 23): when it is not “in direct physical contact with the actor or performer [of those works]”.  
Profit-making nature is not irrelevant. |
| **Airfield**  
13 Oct. 2011  
C-431/09 | Communication to the public by satellite - Satellite package distributor | 93/83  
Art. 1 (2)  
(a) | Yes | Unity and coherence in the EU’s legal system: 
Interpretation of Directive 93/83 “in the light of the rules and principles established by Directive 2001/29”. Act of communication: Triggering the communication or intervening during the communication to make the works accessible (to a new public). New public: public which was not taken into account by the authors of the protected works as part of an authorisation granted to another person - wider public. Singularity and attributable of the act of communication to the public by satellite: An indivisible act constituting a single communication to the public by the broadcaster and satellite package distributor together. Action representing “an autonomous service performed with the aim of making a profit”. |
| **Circul Globus**  
24 Nov. 2011  
C-283/10 | Circus performances - Public performance of musical works | 2001/29  
Rec. 23  
Art. 3 (1) | No | Public not present at the place where the communication originates (rec. 23): “exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work”. |
| **Del Corso (SCF)**  
15 March 2012  
C-135/10 | Retransmission of phonogram broadcasts in a dental practice (radio broadcasts containing phonograms) | 92/100  
Art. 8 (2) | Non | Introduction of the concept of ‘individualised assessment’: assessing each situation as a case in point in accordance with variable criteria. Act of communication: Intervening in an indispensable manner (‘indispensable role of the user’) and in full knowledge of the consequences of its action, to give access to the work. Public: indeterminate number = Persons in general/private group Fairly large number of persons: Addition of a de minimis threshold excluding groups of persons which are too small or insignificant. Limits on cumulative effects for the same work: “not only is it relevant to know how many persons have access to the same work at the same time but it is also necessary to know how many of them have access to it in succession.” Profit-making nature is all the more relevant to the right to remuneration - assumes that the public is receptive. |
| **PPL** | 15 March 2012  
C-162/10 | 1/ Retransmission of phonogram broadcasts in hotel rooms (television programmes containing phonograms)  
2/ Provision of phonograms and apparatus to play them on | 2006/115 Art. 8 (2) | Yes |
|---|---|---|---|---|

**Act of communication:** Distributing a broadcast signal.  
**Public:** Same criteria as Del Corso with the opposite result.  
**New public** (simple reminder of the concept under copyright): A public which was not “taken into account by the authors of the protected work when they authorised its use by communication to the original public”; “public which is distinct from and additional to (…)”  
**Profit-making nature:** reference to the “additional service” (comp. Premier League: “autonomous service”).  
1/ Provision of two elements making it possible to make the sounds or representations of sounds fixed in a phonogram audible (playing apparatus + phonogram media).

| **ITV** | 7 March 2013  
C-607/11 | Internet retransmission through streaming of works contained in a terrestrial television broadcast, by an organisation other than the original broadcaster | 2001/29 Art. 3 (1) | Yes |
|---|---|---|---|---|

**Intention of the legislator** as regards the RCP: “each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author”.  
**Act of communication:** Internet retransmission of a terrestrial television broadcast using a specific technical means which is different to that of the original communication.  
**Public:** Indeterminate number of potential recipients and fairly large number (unchanged) with cumulative effects: Number of persons who have access to the same work at the same time and successively (id., Del Corso).  
**New public:** Not required if the retransmission is made using a different specific technical means to that of the original communication.  
**Profit-making nature** does not determine conclusively the qualification of a retransmission as a ‘communication’, and has no influence on the above.
| **OSA**  
27 February  
2014  
C-351/12 | Retransmission of broadcast works in the bedrooms of a spa establishment (musical works within television programmes) | 2001/29 Art. 3 (1) and 5 | Yes | **Concept of communication:** Covers all transmission of protected works, irrespective of the technical means or process used (*id.*, Premier League).  
**Act of communication:** Intentionally transmitting protected works by intentionally distributing a signal through television or radio sets.  
**Public:** Indeterminate number of potential recipients and fairly large number (unchanged) with cumulative effects: number of persons who have access to the same work at the same time and successively (*id.*, Del Corso & ITV).  
**New public:** public not taken into account by the authors of the protected works when they authorised its use by communication to the original public (*id.*, Premier League & Airfield).  
This condition is fulfilled in the case of a spa establishment, which is an “organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its patients”, since without its “intervention, its patients would not, in principle, be able to enjoy the broadcast work” (*id.*, SGAE).  
**Principles of the Del Corso judgment cannot be transposed** as they relate to the right to remuneration rather than copyright.  
**No reference is made to the profit-making nature.** |
“every act of communication of a work to the public has to be authorised by the copyright holder”;
“the concept of communication to the public includes two cumulative criteria, namely an ‘act of communication’ of a work and the communication of that work to a ‘public’”.

**Act of communication:** “must be construed broadly (...) in order to ensure, in accordance with, inter alia, recitals 4 and 9 in the preamble to Directive 2001/29, a high level of protection for copyright holders”.

**Making available to the public** (i.e. the act of communication): **Offering** users of a website “direct access to works”.

**Public:** Indeterminate number of potential recipients and fairly large number (unchanged).

**New public** is required when the communication is made using the **same technical means**. Link: internet = same technical means.

New public = (i) a public which can only access works following the intervention of an organisation (id. SGAE); (ii) public not taken into account by the copyright holders when they authorised the initial communication (id., Premier League, Airfield, OSA).

If the works are freely-accessible on the target website (no ‘restrictive measures’), the public of the website on which the links are located is **not new**: its users are “potential recipients of the initial communication”, “being part of the public taken into account by the copyright holders when they authorised the initial communication”.

Transclusion has no bearing here. A Member State cannot establish a broader concept of the right of communication to the public.
| **C More**  
26 March 2015  
C-279/13 | Links enabling hockey matches to be viewed live by circumventing the pay system on the target website | 2001/29  
Art. 3 (2) (d)  
2006/115  
Rec. 16  
Art. 8 (3) | No | The act of making available to the public requires two cumulative conditions: “members of the public may access the protected work from a place and at a time individually chosen by them” - Not applicable to live online transmissions. Directive 2006/115, recital 16 allows Member States to provide for more far-reaching protection for broadcasting and communication to the public that that granted by Article 8 (3). Recital 20 of Directive 2001/29 upholds that option. |
| **SPA**  
14 July 2015  
C-151/15 | Retransmission of radio broadcasts containing musical and ‘musical-literary’ works in a public house, using a radio set connected to loudspeakers. | 2001/29  
Art. 3 (1) | Yes | Art. 3 (2) of Directive 2001/29 does not contest the extension of the exclusive right of broadcasting organisations under national rules to communications to the public which are not covered by the Directive. |

*Concept of communication*: covers “all transmission of protected works, irrespective of the technical means or process used (id. Premier League, OSA).  
*Act of communication*: “Intentionally transmitting broadcast protected works through a radio and loudspeakers. (id., Premier League).  
*New public* = Additional public which was not considered by the authors when they authorised the broadcasting of their works  
*Profit-making nature* is not irrelevant.
| **SBS**  
19 November 2015  
C-325/14 | Direct injection -  
Transmission by a broadcasting organisation of programme-carrying signals to its distributors. | 2001/29  
Art. 3 (1) | Non | **Act of communication:** “Covers all transmission of protected works, irrespective of the technical means or process used”.  
“Moreover, every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question”.  
**Public:** Indeterminate number of potential recipients and fairly large number (unchanged). Condition not satisfied in the event that the broadcasting organisation “transmits the programme-carrying signals to specified individual distributors without potential viewers being able to have access to those signals”, as there is no public but rather ‘specified individual professionals’.  
If the distributors’ action does not merely constitute a technical means, it is the broadcaster which performs the act of communication to the public.  
A single public and two acts of communication: Only the communication which reaches the public is taken into account.  
Assessment contradicts the Airfield judgment: ‘breaking up’ of the act of communication to the public as opposed to the unitary approach of the Airfield judgment (=a single indivisible act performed by two contributors). |
|---|---|---|---|---|
| **Reha Training**  
31 May 2016  
C-117/15 | Retransmission of television programmes containing works and copyright material on the premises of a rehabilitation centre | 2001/29  
Art. 3 (1)  
2006/115  
Art. 8 (2) | Yes | **Unification** of the concept of communication au public under copyright and related rights: assessed “in accordance with the same criteria” and which is given “the same meaning”.  
**Individualised assessment** (as in Del Corso and PPL): “several complementary criteria”, “not autonomous and (..) interdependent”, which may be “present to widely varying degrees”, and which must be applied “both individually and in their interaction with one another”.  
**Act of communication:** “Covers all transmission of protected works irrespective of the technical means or process used”.  
“Moreover, every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question”. (id. SBS)  
**Concept of the public** (id. Del Corso & PPL) |
‘indeterminate nature of the public’: ‘persons in general’, that is, not restricted to specific individuals belonging to a private group”.

Fairly large number of people: De minimis threshold excluding “groups of persons which are too small or insignificant”.

Cumulative effect: number of people having access to the same work at the same time and successively.

New public: (i) public not “taken into account by the authors of the protected works when they authorised their use by the communication to the original public”, (ii) and who access works by way of the “indispensable role of the user”, without whose intervention “those ‘new’ viewers are unable to enjoy the broadcast works, although physically within the broadcast’s catchment area”.

Target public: “the public which is the subject of the communication” “is not merely ‘caught’ by chance, but is targeted by their operators”.

Profit-making nature: Does not “determine conclusively [whether a transmission] is to be categorised as a ‘communication to the public’”, but “is not however irrelevant (...) in particular, for the purpose of determining any remuneration due”. Receptivity of the public: ‘may be relevant’ to assessing the profit-making nature.
<table>
<thead>
<tr>
<th>Hyperlinks providing access to photographs posted online without the consent of the rightholder</th>
<th>2001/29 Art. 3 (1)</th>
<th>Yes</th>
</tr>
</thead>
</table>

② **Hyperlink** providing access to a work posted online on the target website **with the authorisation** of the rightholder: id. Svensson, Bestwater.
③ **Hyperlink** providing access to a work posted online on the target website **without the authorisation** of the rightholder:

Takes into account the interests and **fundamental rights of users** (freedom of expression and of information) and the **general interest**.

**Act of communication**: Intervening “**in full knowledge of the consequences of its action, to give access to a protected work illegally posted on the internet to its customers**”.

**Profit-making nature**: Not irrelevant.

**Principle**: If the work is freely-accessible on the target website, the provision of the link is not a communication to the public.

**Exception**: communication to the public if the poster of the link knew or ought to have known that the work had been posted on the target website illegally, or if the link circumvents the restrictions taken by the aforesaid site to restrict access to its own subscribers. **Presumption**: If the link is posted for profit, there is a rebuttable presumption that the poster was aware of the illegal nature of the posting of the work on the target website.
Appendix 6: Detailed Analysis of CJEU Case Law

TEN YEARS OF CJEU CASE LAW ON THE RIGHT
OF COMMUNICATION TO THE PUBLIC
2006-2016
(with previous reference judgments)

PRIOR TO DIRECTIVE 2001/29

**CJEC 3 February 2000, Egeda, C-293/98** - Directive 93/83 (Satellite and Cable) Article 1(2) (a), Article 1(3) - Television sets installed in hotel rooms - Cable retransmission of broadcast programme-carrying signals containing protected audiovisual recordings - Application of national law

A hotel which performed cable retransmissions of satellite or terrestrial television programme-carrying signals refused to pay a fair one-off fee to a company managing the rights of audiovisual producers, as set out by Spanish law transposing Directive 93/83.

The hotel having claimed before the national court that there was no ‘communication to the public’ or ‘cable retransmission’ as defined by Article 1 of the aforementioned Directive 93/83, the court in question decided to refer the following question to the Court of Justice for a preliminary ruling:

“Is Article 1(2)(a) and (3) of Directive 93/83/EEC to be interpreted as meaning that the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel constitutes an “act of communication to the public” or “reception by the public”?"

The Court deems that the Directive “does not provide information to enable the Court to answer the question” asked, which should therefore be assessed in accordance with national law.

What is significant in this case, which was ruled upon before Directive 2001/29 was adopted, lies in the Opinion of Advocate General La Pergola, which was used as a reference for the examination of the SGAE case six years later.

Given that the question raised cannot be resolved on the basis of Directive 93/83, Mr La Pergola nevertheless attempts to enlighten the Spanish court by applying Article 11bis
(1) of the Berne Convention. The TRIPS Agreements to which the European Union is party make reference to this Convention.

Based on the old Guide to the Convention and Glossary from 1980 (the only one which existed at the time), the Advocate General’s analysis of the aforementioned Article of the Berne Convention, already contained the main criteria - and the main errors - which the Court would subsequently re-use.

The Advocate General’s initial observation is however accurate:

“As the Guide observes, 'So far as implementation [of Article 11bis (1)(2)] is concerned, we need to know if and how a mediator intervenes in the retransmission of the programme and performs an act of communication to the public” (paragraph 20).

The intervention of a third-party organisation is indeed the only condition determining the implementation of the exclusive right under which Article 11bis (1) (ii) pledges to the author the exclusive right of authorizing or prohibiting “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”; This condition is both necessary and sufficient.

Unfortunately, the accurate and promising start is followed by a series of errors.

1) Erroneous qualification of the facts and application of the wrong legislation

Mr Pergola deems that it is not Article 11bis (1) (ii) which should be applied, but Rather paragraph (iii) which applies to the public communication of a broadcast of the work “by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images”.

This assessment is based on the reasoning that “The retransmission of the broadcast work to the hotel guests is made technically possible by the fact that the hotel rooms are each equipped with a television set, that is, an 'instrument transmitting by sounds or images, analogous to a loudspeaker’” (paragraph 21).

And yet, this is a misinterpretation.

In fact, the transmission of broadcast works to the hotel guests is performed using signals (rather than sounds and images), through the hotel’s cable network. It is therefore a cable retransmission as governed by Article 11bis (ii).

If it had been a communication of sounds and images by “loudspeaker or any other analogous instrument” (in this case television sets), this communication would not have been attributed to the hotel, but rather its guests, the latter having triggered it when they switched on the television sets.

2) Invention of ex-nihilo criteria, and erroneous reference to the old Guide to the Berne Convention

The Advocate General invents the criterion which later becomes the ‘indispensable role of the user’ with no legislative basis, together with the concept of the ‘new public’ which he claims stems from the latter, and which the Court later transformed into the condition of the act of communication to the public.

Indeed, he emphasises the fact that if “the hotel guests [had not been given] access to the protected work”, these guests, “although physically within the satellite catchment area - would not have been able to enjoy the broadcast work in any other way: they therefore constitute, in this sense, a 'new' public that differs from the primary broadcast public” (paragraph 22).

This ‘new public’ concept is also referred to in the following passage, which cites the above-mentioned old Guide’s commentary on Article 11bis (1) (iii) regarding communication to the public by loudspeaker or any other analogous instrument:

However, under the Convention, the grant of a television broadcast licence to a broadcaster does not cover any other use of the work - for example, communication to the public of the transmitted programme via loudspeakers or analogous instruments (in this case via television) - by third parties, particularly if this is for profit. This form of communication enables a new public to be reached which differs from the public the author had in mind when he first authorised broadcast in the exercise of his own exclusive right. In effect, although by definition a broadcast can reach an unlimited number of people, when the author authorises this method of use for his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. If reception is for a larger audience, possibly for profit, a new section of the receiving public hears [or sees] the work and the communication of the programme via a loudspeaker (or analogous instrument) no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public (paragraph 20).

It is striking that this Opinion contains practically all of the substance of the Court’s future case law. The wording that Mr La Pergola borrows from
the old Guide to the Berne Convention are in fact repeated word-for-word by the CJEU. It even contains the criterion of the ‘indeterminate number of people’ used to define the public, as well as the objective of ‘profit’, which we will return to later on.

As for the new public, in the above passage it is described as the criterion which the author did not take into account when agreeing to the initial authorisation. This and the indispensable user criterion referred to previously together comprise the two criteria over which the Court has dithered throughout its successive judgments, applying either one or the other, or both cumulatively.

The Court has not even gone to the trouble of referring to the wording of Article 11bis (1), nor of attempting to understand it. It is clearly not governed by the old Guide to the Berne Convention, but rather by the Opinion of its Advocate General. This shows how an error made at the outset, even before Directive 2001/29 was adopted, was able to cast a shadow over ten years of case law.

3) Profit-making nature and economic importance of the new public: Criteria arrived at with a total disregard for the Berne Convention

The Advocate General’s final yet sizeable error was to recommend keeping the criteria of profit associated with the economic importance of the new public to define the act of communication to the public:

“What criterion do I therefore suggest that the Court should adopt in the matter before it to distinguish between communications that are to the public and those that are not? In my opinion, the Convention lays down the principle that the author must authorise all secondary use of the broadcast work if this gives rise to independent economic exploitation for financial profit by the person responsible and also relates to the economic importance of the new public (paragraph 22 above), which is the group of persons to whom the particular act of communication via the television is addressed” (paragraph 24).

Of course, finding any such confirmation of Mr La Pergola’s statements within the Berne Convention would be like searching for a needle in a haystack, given how far removed they are from the Convention’s principles.

Finally, “the economic importance of the new public” is of course a precursor to the future ‘fairly large number’ of potential recipients criterion, and may well also herald its remedial provision inspired by legal theory known as ‘spatial accumulation’, which the Court defines simply as ‘cumulative effects’.

In this case, it is perhaps the second matter I have raised (paragraph 24) that is hardest to prove. It could be argued that
the economic weight of the guests of a hotel room is so slight that they cannot constitute a 'new' public that differs from the primary transmission public. Consequently, the retransmission of the broadcast work by television does not have the economic importance necessary to constitute an independent act of communication. This rigid approach appears to be changing, however, under the influence of recent national court rulings that are based on the 'spatial accumulation' (räumliche Kumulation) view. This holds that all the clients in a hotel at a given time constitute the 'public' within the meaning and for the purpose of copyright. In other words, the 'spatial discontinuity' of the individuals involved, who constitute the circle of addressees to which the work is made accessible by the person responsible for each act of secondary use, is not large enough to negate the economic importance of the new public reached (if only potentially, in the sense of a mere legal possibility; see paragraph 22 above)" (paragraph 26).

Everything was therefore already in place.

The SGAE case came six years later, and also related to a cable retransmission of works within broadcast programmes in a Spanish hotel. In the meantime, the Guide to the Copyright and Related Rights Treaties administered by WIPO was published in 2003, comprising an in-depth analysis of the Berne Convention and a lexicon. However, both Advocate General Eleanor Sharpston and the Court disregarded this publication. Instead, Ms Sharpston refers broadly to the Egeda ‘case’ and to the “Advocate General La Pergola’s helpful analysis” (paragraph 23).

Without anticipating the judgment which is analysed below, there are two main observations to be made on the Opinion of the Advocate General.

The first is that Ms Sharpston avoids repeating the errors of her predecessor by basing her analysis on the correct text, i.e. sub-paragraph (ii) rather than (iii) of Article 11bis (1), as well as reiterating that this text originated from the 1948 revision of the Berne Convention. She also specifies that it enshrines the ‘purely functional’ criterion of the communication ‘by an organisation other than the original one’, and even highlights, based on the reference work of Sam Ricketson on the Berne Convention, that ‘the option of requiring a fresh authorisation wherever a retransmission ‘procured a fresh circle of listeners’ was deliberately rejected’ (paragraph 50).

The second observation is that, clearly troubled by the fact that this so far flawless reasoning has led her to deviate slightly from "Advocate General La Pergola’s helpful analysis", Ms Sharpston incomprehensibly cites the "deliberately rejected” criterion:

None the less, that [i.e. the fact that it is a rejected criterion] seems to be the essence of the provision’s effect. The WIPO Guide

moreover confirms that interpretation. It states, in the context of Article 11bis(1)(iii):

“Finally, the third case dealt with in [Article 11bis (1)] is that in which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

The Convention’s answer is “no”. Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1)(ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work.” (paragraph 50).

This incomprehensible U-turn in which an outdated Guide takes precedence over the wording of the Convention, and rejected legislation over adopted legislation, notwithstanding Sam Ricketson’s particularly logical opinion, takes us right back to square one with the original error committed by Mr La Pergola: i.e. the application of Article 11bis (1) (iii) which the cited commentary from the old Guide to the Berne Convention is dedicated to, and which does not apply in this case.

Therefore, both Advocate Generals were synonymous in citing the same error.
CJUE 2 June 2005, Mediakabel, C-89/04 - Directive 89/552 (Television without Frontiers) - Television broadcasting – Public: indeterminate number of potential viewers

In a case related to the interpretation of Directive 89/552 (Television without Frontiers) (1) (a), which states that ‘television broadcasting’ means “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public”, the CJEU stipulated that the ‘public’ referred to “an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously”, thus employing the same criterion used by the Advocate General in the Egeda case.

In this case, there was a distinction to be made between a television broadcasting service and an information society service, with the point at issue being whether the service operator needed to obtain a broadcasting permit from the Dutch Media Authority.

CJEU 14 July 2005, Lagardère, C-192/04 - Directives 92/100 (now 2006/115, rental right, lending right and related rights) and 93/83 (Satellite and Cable) - Equitable remuneration - Broadcasting of phonograms - Communication to the public by satellite (no) – Public: indeterminate number of potential viewers

The main dispute related to the equitable remuneration payable for the use of phonograms in the programmes of a broadcasting company established in France.

For technical reasons, and in order to cover all of the national territory, the process through which the programmes were ultimately broadcast to the public through terrestrial channels used a satellite and two terrestrial transmitters, one located in France and the other in Germany. In practical terms, the broadcaster transmitted the signals in an encoded form to the satellite. They were then received by the two terrestrial transmitters which retransmitted the programmes to the public, one on long wave and one on the frequency modulated (FM) band.

The French-language programmes broadcast by the transmitter located in Germany could be received within a very limited area of German territory. The issue at stake was whether equitable remuneration should be paid on a cumulative or alternating basis in France and/or in Germany.
The broadcaster maintained that the broadcast at issue constituted a communication to the public by a satellite which was located in France only, pursuant to Article 1 (2) (b) of the Satellite and Cable Directive 93/83.

The Court based its decision to reject this explanation on its belief that the conditions set out by Article 1 (2) (a) of the above-mentioned Directive defining the concept of communication to the public by satellite had not been satisfied, and in particular “the requirement that the programme-carrying signals are intended for reception by the public” (paragraph 34). Indeed, the encoded signals emanating from the satellite could “be received only by equipment available solely to professionals”, and not “using the equipment available to the general public” (paragraph 32). And yet, “a limited circle of persons who can receive the signals from the satellite only if they use professional equipment cannot be regarded as part of the public, given that the latter must be made up of an indeterminate number of potential listeners” (paragraph 31).

Directive 93/83 was therefore inapplicable and could not prevent royalties for the use of phonograms being controlled on a cumulative basis by both French and German law.

THE FOUNDING JUDGMENT

CJEU 7 December 2006, SGAE (Rafael Hoteles), C-306/05 - Directive 2001/29, Article 3 (1) - Television sets installed in hotel rooms - Cable retransmission of broadcast programme-carrying signals containing protected works - Communication to the public (yes)

The first question referred for a preliminary ruling by the national court summarised the dispute between the Spanish authors’ society SGAE and the operator of Hotel Rafael:

“Does the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public which is covered by the harmonisation of national laws protecting copyright provided for in Article 3 of Directive [2001/29]? ”

In order to respond to this question, the Court established communication to the public as an autonomous concept of EU law which should be given “an autonomous and uniform interpretation”, insofar as

3“The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.” - “For the purpose of this Directive, ‘communication to the public by satellite’ means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.”
Article 3 (1) of Directive 2001/29 “make[s] no express reference to the law of the Member States for the purpose of determining their meaning and scope” (paragraph 31).

It deems that, although the Directive provides no definition, its recital 23 sets out a broad interpretation which “is moreover essential to achieve the principal objective of that directive, which, as can be seen from its ninth and tenth recitals, is to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public (paragraph 36). This statement of principle is repeated in all subsequent rulings.

A quantitative approach to the concept of the public: Indeterminate and fairly large number of potential television viewers

The Court then aims to define the concept of the ‘public, and in its Mediatabel and Lagardère media law rulings it draws on the initial criterion under which: “the term ‘public’ refers to an indeterminate number of potential television viewers” (paragraph 37).

Secondly, it attempts to assess this concept quantitatively.

Concerning in this respect is the statement advocating ‘a general approach’, making it necessary “to take into account not only customers in hotel rooms, such customers alone being explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to make use of a television set installed there” (paragraph 38). Should we gauge from this that having television sets in the hotel’s communal areas (one of the charges levelled against the hotel) should have an influence on how the situation as regards television sets in hotel rooms is assessed? Would the guests in the rooms not be the same as those located in the hotel’s communal areas? In any case, this cryptic passage is not reflected in the remainder of the ruling, nor in the Court’s subsequent judgments.

More specifically, as suggested by the third question referred, the Court’s advice is “to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public” (paragraph 38). The Court adds that communicating works to such television viewers produces ‘cumulative effects’ which could “become very significant”, as “it matters little” that “the occupants of rooms (...), taken separately, (...) are of limited economic interest for the hotel” (paragraph 39).

At this stage of the judgment, the public is defined by two characteristics: The ‘indeterminate number’ and the ‘fairly large number’ of potential recipients of the communication. The case in point meets both of these characteristics.
The origins of the ‘new public’ criterion

Undoubtedly with a view to reinforcing its assessment, the Court notes “It should also be pointed out” that the disputed communication matches the scenario set out by Article 11bis (1)(ii) of the Berne Convention, as it is performed by “a broadcasting organisation other than the original one” (paragraph 40).

This observation is entirely accurate, and the Court could have justified its ruling based on this alone, as the aforementioned Article of the Berne Convention requires the author’s authorisation for “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”.

The scenario in question of a third-party retransmission of the original broadcast communication matches the communication at issue in the SGAE case. In this case, broadcasters issued television programme-carrying signals by satellite or by terrestrial means. The hotel received these signals (as a third-party organisation to the broadcasters) and retransmitted them to its guests through a cable network leading to the rooms in which the television sets were located.

Unfortunately, the Court does not stop there, and following the ruling, for reasons which are difficult to gauge, presides over the creation of a new condition, which it introduces despite the Berne Convention, the WIPO Treaties and Directive 2001/29 containing no reference thereto. According to the Court, the it is not sufficient for the communication to be performed to a public; it must also be performed to a ‘new public’.

An inaccurate statement is to blame for the shift towards the ‘new public’. The Court suggests that a communication performed by a ‘different organisation’ is by necessity aimed at a ‘different public’, in other words a ‘new public’.

“It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11bis(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.

This statement is incorrect as the secondary communication effected “by an organization other than the original one” which performed the primary communication, as defined by the above-mentioned Article of the Berne Convention, could very well be performed to the same public as the original communication, or to a section of the same public. It could also be performed to a different public, or to a public with some overlap in relation to the public to which the original communication was made.
These considerations relating to the public are in fact irrelevant as regards the right granted by Article 11bis (1) (ii) of the Berne Convention, and reason dictates that there is no causal link between the intervention of an ‘organization other than the original one’ and the identical or different nature of the public to which this organisation’s retransmission is addressed.

**A different organisation does not imply a different public** The Court’s statement to the contrary defies logic.

The Court bases its false assumption on the following three inaccurate points:

- The Court fails to refer to the text of Article 11bis (1) (ii) of the Berne Convention, which is clear to the point that any direction other than that provided by the legislation itself is fruitless. In other words, retransmission by another organisation is an act of communication to the public and is covered by an exclusive right;

- Instead of citing this legislation, it cites a commentary taken from an obsolete document, i.e. the WIPO 1978 Guide which in 2003 was replaced by a more complete guide prepared under scientific conditions, and having been discussed at length by expert committees before being adopted;

- The Court refers to a passage within this obsolete Guide which does not refer to the right at issue here from paragraph (ii) of the legislation (retransmission by another organisation), but to that set out by the following paragraph (iii) regarding communication by loudspeaker, as indicated by the following extract from the judgment:

> “As is explained in the Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author’s exclusive authorisation right” (paragraph 41).  

4 "Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (...) 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...”

The commentary which precedes the passage cited by the judgment also refers to this wording, confirming that the case in point is indeed that of paragraph (iii):

“11 bis. 11. Finally, the third case dealt with in this paragraph is that in which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public.”

If it was so determined to cite the old Guide, the Court could have at least referred to the commentaries which specifically cover Article 11bis (1) (ii), for example:

“So far as implementation of Article 11bis (1)(2) is concerned, we need to know if and how a mediator intervenes in the retransmission of the programme and performs an act of communication to the public”.

The recommendations of the 2003 WIPO Guide

Had the Court referred to the Guide to the Copyright and Related Rights Treaties administered by WIPO, published by WIPO in 2003, it would have found:

1 - In the first chapter, which analyses the substantive provisions of the Berne Convention, and under the Article 11 commentary, there is a definition of the term “public”:

“BC-11.4. The Convention does not provide a definition of the concept of “public”, either as an adjective or as a noun. It is, however, quite obvious that, as regards the adjective “public,” it is the opposite of the adjective “private” and, thus, what may not be characterized as “private” is supposed to be regarded “public.” “If “public” is used as a noun, it may similarly be regarded to be the contrary of the “private circle”; that is, those people who are beyond the private circle of the user. The definition of “public” in statutory law or through court decisions is left, in principle, to the countries of the Union. What has just been mentioned about the “public”-“private” antonyms must be taken into account, and it is, obviously, not allowed to artificially and arbitrarily reduce the scope of the concept of “public” and, through this, the coverage of rights where the public element is decisive. In any way, the dominant opinion seems to be that all uses should be regarded “public” and all acts directed “to the public” which go beyond the circle of a family and its close social acquaintances.”

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2- In the Glossary there is a definition of the right of communication to the public as defined by the Berne Convention:

“Communication to the public, right of -

1. In a narrower sense, the way it is applied in the Berne Convention, it means the transmission, by wire or by wireless means, of the images or sounds, or both, of a work or of an object of related rights, making it possible for the images and/or sounds to be perceived by persons outside the normal circle of a family and the closest social acquaintances of the family, at a place or places the distance of which from the place where the transmission is started is such that, without the transmission, the images or sounds, or both, would not be perceivable at the said place or places, irrespective of whether the said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times The actual reception of the transmitted program is generally not a condition for the completion of such an act and is not a part of it. (...)”

3- Also under chapter 1, under the Article 11bis commentary, is the following explanation on the criterion for applying the legislation:

“BC-11bis.14. The text of paragraph (l)(ii) is very clear in one aspect. The right provided for in it covers “any communication to the public by wire [...] of the broadcast of the work, when this communication is made by an organization other than the original one.” That is, the decisive criterion is that the communication is made by an organization other than the original one; if this is the case, the author or other owner of copyright has a right separate from the right to authorize the original act of broadcasting. There is no basis in the text of the Convention for which it would be justified at all to consider theories according to which “any” such communication only means “some,” in the sense that the quite frequent communications in a “direct reception zone” or “service zone” would not be covered.”

Had it referred to the up-to-date Guide, the Court could have made its task considerably easier and avoided its unfortunate meanderings. It was indeed clear that:

- The hotel guests did not form part of the hotel owner’s family and close social acquaintances,
- The hotel’s retransmission of the signal was performed by an ‘organization other’ that the original broadcasters of the initial communication.

The required and sufficient conditions had therefore been satisfied in order to easily point to the existence of an act of communication to the public.

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8 Ibid., Glossary, p.274-275.
9 Ibid., ch.1, p.80.
The Court’s error, which in this case leads to needless complexity, could have been put down to a superfluous observation.

The Court however pursued this line of reasoning, and was therefore led completely astray towards a total distortion of the Convention’s provisions.

**A garbled return to the ‘organization other than the original one’**

As reiterated above, the Court wrongly deduced that the ‘organization other than the original one’ would require a different ‘public’. It however uses a strange circular argument to return to the concept of the ‘organization other than the original one’ in order to define the different public, but with an unusually ‘contracted’ meaning.

This reasoning is based on the four proposals sets out under the same section of paragraph 42:

1. **“The clientele of a hotel forms such a new public”**.
2. **“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 original broadcast in the catchment area.”**
3. **“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.”**
4. **“In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.”**

The first is the statement that the Court aims to prove.

The second is a reference of Directive 2001/29, recital 27 according to which “The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.” The reference to the ‘catchment area’ is surprising insofar as the aforementioned commentary from the WIPO 2003 Guide on Article 11bis (1) stipulates that this should not be taken into account (CB-11 bis.14). It is also still difficult to see how this second proposal demonstrates that the public is ‘new’.

The third statement harks back to the Berne Convention’s ‘organization other than’, but with the Court’s additional condition of said organisation’s “full knowledge of the consequences of its action”.

Finally, the fourth proposal explains the ‘return’ link that the Court wishes to establish between the new public and the intervention of the other organisation. The new public is the public which would not be able to enjoy the broadcast work without the organisation’s intervention. This intervention should
therefore be indispensable, in accordance with the terms that the Court used in its subsequent rulings.

To summarise, the Court’s reasoning is based on the following: ‘other organisation’ ⇒ ‘new public’,

‘new public’ ⇐ organisation whose intervention is deliberate and indispensable.

It therefore logically follows that:

‘other organisation’ ⇐⇒ organisation whose intervention is deliberate and indispensable.

This bizarre game of ping pong between ‘the other organisation’ and the ‘new public’ ultimately restricts the right granted by the Berne Convention.

It should be reiterated that Article 11bis (1) of the Convention grants authors of literary and artistic works three separate rights, with the second of these rights consisting of the: “exclusive right of authorizing 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”.

This right is implemented solely due to the fact that a communication of the broadcast of the work is performed by an organization other than the original one. No other condition is required.

And yet, the Court reduces the scope of this right by making it dependent on two conditions:

- The other organization must act knowingly (“in full knowledge of the consequences of its action”);
- And its intervention must be conclusive in the granting of access to the protected work insofar as, without this intervention, the recipients of the communication “would not, in principle, be able to enjoy the broadcast work.”

This is a clear violation of the Berne Convention.

Even though this violation did not have an impact on this particular case, given that the solution is the same as the one which would have been arrived at had the legislation been applied accurately, it does have an adverse effect on the Court’s subsequent decisions.

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10 Guide to the Copyright and Related Rights Treaties administered by WIPO, aforem. Ch. 1, p.80.
The pursuit of profit

Taking into account the pursuit of profit to define an act of exploitation goes against all principles in this area, and is clearly not required either by the Berne Convention, by the WIPO Treaties or by Directive 2001/29.

Although it did not make a clear statement to the contrary, the Court highlights the fact that the profit-making nature has been established in this case:

“even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature in circumstances such as those in the main proceedings” (paragraph 44).

The wording used (“even taking the view that ...”) implies that the Court is in favour of the pursuit of profit being considered as a condition of a communication to the public.

The act of communication

The Court must define the hotel’s role in the communication of broadcast works to its customers, beyond the “mere provision of physical facilities for enabling or making a communication” - in this case, the installation of television sets in hotel rooms - which does not “in itself amount to communication” (to use the wording of Directive 2001/29, recital 27).

In line with the Opinion of its Advocate General and of the Commission, the Court holds that:

“while the mere provision of physical facilities does not as such amount to a communication within the meaning of Directive (...), the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.”

The act of communication (which is bizarrely referred to at the end of the judgment) therefore involves the distribution (understood in the sense of a ‘transmission’) of the signal, which the Court clarified in its next judgment.
CJEU 18 March 2010, Organismos (Order), C-136/09 - Directive 2001/29, Article 3(1) - Television sets installed in hotel rooms - Retransmission of broadcast programme-carrying signals containing protected works - Communication to the public (yes)

The parties to the main dispute are OSDD, a Greek collective management organisation for authors of theatrical and audiovisual works, vs. a company which operates a luxury hotel in which television sets are installed which are linked to the central aerial of the hotel, through which they receive signals for television channels.

The circumstances are therefore similar to the SGAE judgment. However, in the latter case, the Court stipulated that the hotel was retransmitting the programme-carrying signals through a cable network to television sets installed in its guests’ rooms, while in this case, the national court simply refers to television sets linked to a central aerial. However, it is difficult to see in practice how such a link could be made other than by cable.

Indeed, the national court was confused about the meaning of the SGAE judgment and its application to the case in point, given that:

- "the Court did not explain how the “mere provision of physical facilities for enabling or making a communication” differs from the “distribution of a signal to hotel guests through their television sets”",

- and "also failed to clarify the meaning of the concept of the “transmission of the broadcast work to that clientele using television sets”” (paragraph 27)

Therefore, it words its question referred for a preliminary ruling as follows:

“Does the hotel owner’s installation in hotel rooms of television sets and the connection of these television sets to the central aerial installed in the hotel, in the absence of any further action, mediation or intervention on the part of the hotel owner constitute a communication of the work to the public, as defined by Directive 2001/29, Article 3(1) […]? More specifically, in this case and in the light of the SGAE […] judgment [aforementioned], is there a distribution of a signal to guests located in hotel rooms using the television sets installed in these rooms, by way of the hotel owner’s technical intervention?”

This was therefore a request for a clarification of the concept of the ‘distribution of a signal’ which the Court used in the SGAE judgment to define the act of communication to the public
performed by the hotel, and to distinguish the hotel’s intervention from the ‘mere provision of physical facilities’ as defined by recital 27 of the Directive.

Here, the Court is no longer referring to the old Guide to the Berne Convention (or to that published in 2003), but to a part of the citation that it made in paragraph 41 of its SGAE judgment, by stating that: “when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme” (paragraph 37).

It stipulates that the new nature of the public targeted by any subsequent communication must be assessed in the light of the public considered by the author when he/she granted the original authorisation:

“Moreover, as per the Court [in the SGAE judgment], hotel customers form a new public in relation to the public which the author considered when authorising the broadcast of his/her work” (paragraph 38).

This criterion is however not the only one which must be considered when defining the ‘new public’, the necessity of which has been clearly stated by the Court.

As in the SGAE case, the Court in fact uses the medium of the organisation without whose deliberate intervention the hotel guests could not have accessed the works:

“Moreover, as per the Court, hotel customers form a new public in relation to the public which the author considered when authorising the broadcast of his/her work. 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 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 (aforementioned SGAE judgment, paragraph 42) (paragraph 38).

In the SGAE judgment, the ‘new public’ may be viewed as a superfluous criterion which the Court has added in order to strengthen its analysis in which it defines the act of communication to the public.

Yet here, it has undoubtedly emerged as a necessary condition for the purpose of defining ‘communication to the public’.

This ‘new public’ is therefore defined from two angles:

- Firstly, by reference to the public considered as part of the original authorisation,
- and secondly, (as in the SGAE case) by reference to the role of ‘the organisation’: The public is a new public if it is only able to access the work through the deliberate intervention of said organisation (“in full knowledge of the consequences of its action”) which is, in this case, the hotel.

It is clear that we are no longer dealing with the issue of the ‘organization other than the original one’ as defined by Article 11bis (1) of the Berne Convention, whose intervention alone is enough to define the act of communication to the public in the case of the retransmission of an initial broadcast.
The ‘organisation’ is no longer ‘other’ and has become completely autonomous to form a concept which is unique to the Court.

The Court answers the questions of the national court in the following way:

- Firstly, the "distribution of a signal using television sets" must be understood in a broad sense and without taking into consideration the technical configuration used to enable customers to access the works:

  “On the other hand, the distribution of a signal “using television sets” as set out under point 46 of the aforementioned SGAE judgment must be understood in a broad sense as any technical intervention by the hotel owner which enables the customer to receive the signal in his/her room and therefore to access the broadcast of the work, without taking into consideration the practical configuration of the equipment installed in his/her establishment.” (paragraph 41)

- Secondly, this intervention which constitutes an act of communication to the public can be distinguished from the "mere provision of physical facilities for enabling or making a communication" as defined by recital 27 of the Directive, on the grounds that the Directive does not cover the sale or hire of such facilities:

  "Therefore the mere provision of physical facilities, as set out under point 46 of the SGAE judgment, must be understood as simply the sale or hire of television sets by specialist companies. Based on this fact alone, such companies cannot be considered as having performed an act of communication to the public” (paragraph 40).

Finally, the act of communication appears to be defined as the act of “deliberately making accessible the protected work”:

  “It is clear from the foregoing, and in particular the term “transmission of the broadcast work [...] using television sets” that a hotel owner who installs television sets in its hotel rooms which are able to receive broadcast programmes is engaging in an act of communication to the public as defined by Directive 2001/29, as it deliberately makes accessible the protected work to the new public made up of its guests”. (paragraph 39)

CJEU 4 October 2011, Premier League (FAPL) C-403/08 and C-429/08 (joined cases)

Directive 2001/29, Article 3(1) - Retransmission of football matches in pubs - Act of communication to the public (yes)

The facts of the two joined cases are similar, and related to the use of foreign decoding devices by public houses to access Premier League fixtures. The managers of these establishments bought a card and a decoder box from a distributor which enabled them to receive a satellite channel broadcast in another Member State (in this case Greece), for which the subscription is less expensive than that offered by an English distributor. The cards were used in violation of the duties
imposed by broadcasters, which require that customers do not use these cards outside the relevant national territory.

The Football Association Premier League (FAPL), which runs the Premier League (the leading professional football league competition for football clubs in England), brought legal action against suppliers of satellite equipment and decoder cards, and against those running public houses which showed live Premier League fixtures by using a foreign decoding device.

As regards the concept of communication to the public (the case also raised a number of difficulties in other legal domains), one of the two national courts asked the Court if it must be interpreted “as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.”

The question was therefore sub-divided into three parts which were addressed by the Court in turn:

(a) Does Article 3(1) of the Directive cover communications by loudspeaker?

(b) Does the transmission at issue in this case constitute a communication to the public as defined by Article 3(1) of the Directive?

(c) If so, is it performed to a “public not present at the place where the communication originates” as defined by recital 23 of Directive 2001/29?

(a) The Advocate General gave a negative response to the first ‘sub-question’, and based on an interpretation of the preparatory work for the adoption of the Directive, deemed that the European legislature had refused to transpose Article 11bis (1) (iii) of the Berne Convention.

We recall that this legislation grants the authors of literary and artistic works the “exclusive right of authorizing (...) (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.”

The Court’s ruling contradicted the above.

It started by taking a detour via the concept of communication in the area of related rights, and observed that:

“it is apparent from Article 8(3) of the Directive [2006/115] and Articles 2(g) and 15 of the [WIPO] Treaty that such a concept includes ‘making the sounds or representations of sounds fixed in a phonogram audible to the public’ and that it encompasses broadcasting or ‘any communication to the public’” (paragraph 191).

It then refers to the aforementioned Article 11bis (1) of the Berne Convention, as well as the Explanatory Memorandum from the Proposal for Directive 2001/29 dated 10 December 1997, which covers public display on screen[11]:

[11] "The expression "communication to the public" of a work covers any means or process other than the distribution of physical copies. (...) If, at any point of a transmission or at the end of a transmission the work is communicated to the public, including through public display on screen, each such communication to the public requires authorization of the author. The notion of "communication to the public" has been used as in the acquis communautaire and the relevant international provisions, such of the Berne Convention and the WCT. As in the acquis communautaire, it is a matter for the national law to define "public.""
“More specifically, as Article 11bis(1)(iii) of the Berne Convention expressly indicates, that concept encompasses communication by loudspeaker or any other instrument transmitting, by signs, sounds or images, covering – in accordance with the explanatory memorandum accompanying the proposal for a copyright directive (COM(97) 628 final) – a means of communication such as display of the works on a screen” (paragraph 192).

It thereby concludes that “since the European Union legislature has not expressed a different intention as regards the interpretation of that concept in the Directive [2001/29], in particular in Article 3 thereof”, “the concept of communication must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used” (paragraph 193).

(b) The Court defines the communication to the public at issue first and foremost as an act of communication, by referring to the SGAE judgment from which it takes the concept of the ‘distribution of a signal’, while adding an element of intention which did not appear in SGAE to define the new public:

“The Court (...) has already held that a hotel proprietor carries out an act of communication when he gives his customers access to the broadcast works via television sets, by distributing in the hotel rooms, with full knowledge of the position, the signal received carrying the protected works” (paragraph 194).

In fact, the Court tends to overlaps the SGAE judgment and its Organismos Order. In the latter it proposed the concept of ‘intentionally making accessible’ which reappears in the above wording. The element of intention varies from ‘making accessible’ to ‘distributing a signal’.

Bizarrely, the following point only mentions that the act consists of ‘intentionally giving access’ to the works:

“(…) the proprietor of a public house intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers (...)” (paragraph 195).

While the conclusion opts for the concept of ‘intentional transmission’:

“Accordingly, it must be held that the proprietor of a public house effects a communication when he intentionally transmits broadcast works, via a television screen and speakers, to the customers present in that establishment” (paragraph 196).

As for the ‘new public’, it is clearly a necessary condition for defining the existence of an act of communication. As in the Organismos order, the concept is now interpreted without any reference whatsoever to the Berne Convention. It is defined as the public which rightholders did not take into account when they authorised the original communication:

“That said, in order for there to be a ‘communication to the public’ (…), it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public” (197)
Paragraph 199 states that this is an additional public to the one originally taken into account by the authors of the disputed works:

“That is so when the works broadcast are transmitted by the proprietor of a public house to the customers present in that establishment, because those customers constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works” (paragraph 199, also see paragraph 198).

(c) The Court has to verify that the communication was performed to a "public not present at the place where the communication originates" as defined by recital 23 of Directive 2001/29.

In order to do so, it begins by referring to the preparatory work for the Directive, from which it concludes that “this recital follows from the proposal of the European Parliament, which wished to specify, in the recital, that communication to the public within the meaning of that directive does not cover ‘direct representation or performance’” (paragraph 201).

Secondly, the Court suggests that said ‘direct representation or performance’ refers to the ‘public performance’ featured in Article 11(1) of the Berne Convention, which – according to the old Guide to the Berne Convention (1978) – is characterised by the “interpretation of the works before the public that is in direct physical contact with the actor or performer of those works” (paragraph 201).

And yet, the Court observes that “Such an element of direct physical contact is specifically absent in the case of transmission, in a place such as a public house, of a broadcast work via a television screen and speakers to the public which is present at the place of that transmission, but which is not present at the place where the communication originates within the meaning of recital 23 in the preamble to the Copyright Directive, that is to say, at the place of the representation or performance which is broadcast” (paragraph 203).

Note that the end of the above-mentioned sentence contains the key argument which provides an immediate solution. There is therefore no need to take a detour through the preparatory work for the Directive or an interpretation of the old Guide to the Berne Convention, which itself interprets Article 11(1) of said Convention. Pubs which retransmit football matches to their public(s) do not constitute the place where the communication originates.

12 Common position (EC) no. 48/2000, adopted by the Council on 28 September 2000 with a view to adopting this Directive (OJ C 344, p. 1): “12. With its amendment 13, the European Parliament had suggested, inter alia, that the term “private communication” in recital 16 (now recital 25) be replaced by "direct representation or performance". In its amended proposal, the Commission took on board this suggestion. The Council, however, considered that, in the absence of an accepted Community-wide definition thereof, these terms risked creating legal uncertainty. Therefore, in an attempt to delineate in a clear and positive manner which acts fall within the scope of the rights dealt with in Article 3, the Council preferred to delete these terms and to clarify the issue in recitals 23 and 24.”

13 Please note that, more than 8 years after WIPO’s 2003 Guide to the Treaties, the Court still refers the Guide published 33 years previously in 1978. The Court’s wording is not a faithful reproduction of the old Guide, which refers to “live performances given by actors and singers on the spot (...)."
Furthermore, the Court is referring to paragraph 44 of the SGAE judgment when it states “*that it is not irrelevant that a ‘communication’ (...) is of a profit-making nature*” (paragraph 204).\(^\text{14}\)

This is clearly defined by the fact that “*the proprietor transmits the broadcast works in his public house in order to benefit therefrom and that that transmission is liable to attract customers to whom the works transmitted are of interest. Therefore, “the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results”*” (paragraph 205).

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\(^{14}\) Which is not entirely accurate as, in the SGAE judgment, the Court was happy to observe that the profit-making nature had been established without taking a stance on the necessity of this criterion.
into an uninterrupted chain of communication leading to the satellite and down towards the earth.”

Paragraph (c) of the same legislative text stipulates that:

“If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent.”

The Court therefore set out four cumulative conditions so that each transmission in question, whether direct or indirect, could be considered as constituting “a single communication to the public by satellite”, and checked in turn that each condition was satisfied:

1. By transmitting programme-carrying signals to the distributor (an indirect transmission), and a fortiori by themselves beaming said signals up to the satellite (a direct transmission), broadcasters clearly introduced these signals into the “uninterrupted chain of communication” set out under paragraph (a) of the above-mentioned legislative text (paragraphs 53 to 55), under their own control and responsibility.

The first condition was therefore satisfied (paragraph 57).

In anticipation of its future developments on the attributability of the act of communication to the public, the Court observed (paragraph 56):

- that the "control" and the "responsibility" which the aforementioned legislation requires from broadcasters "relate[s] not to the communication as a whole, but only to the act of introducing programme-carrying signals",

- that "'no provision of that directive requires the power of control and responsibility as regards the whole of the communication to be exclusive'",

- and therefore, "there is nothing to prevent that power of control and that responsibility as regards the indirect or direct transmission of television programmes from being shared, where appropriate, with the satellite package provider".

2. As regards the condition of the “uninterrupted chain of communication leading to the satellite and down towards the earth” (third condition of paragraph (a) which the judgment puts in second place), the Court observes that the two transmission methods in question (direct and indirect) are “closed communications systems” “of which the satellite forms the central, essential and irreplaceable element” and that the intervention of the satellite package provider does not interrupt the chain of communication.

3. Furthermore, it was clear that the programme-carrying signals were indeed intended to be received by the public, i.e. Airfield’s subscribers:

“As regards the third condition, it is not in dispute that, from the moment when those signals are beamed up to the satellite, they are addressed to a public, namely the public in possession of a decoder card, supplied by Airfield” (paragraph 65).

Consequently, the programme-carrying signals emitted in the course of the direct and the indirect transmission of television programmes are
intended for reception by the public and such transmission thus satisfies the third condition, laid down in Article 1(2)(a) of Directive 93/83” (paragraph 67).

4. Finally, as regards the required condition under paragraph (c), the Court holds that even if the decoding devices were made available to the public by the satellite package provider rather than broadcaster, this does not mean that the broadcaster has not consented to this.

As the four required conditions had been satisfied, the Court concluded that each of the direct or indirect transmissions in question must “be regarded as constituting a single communication to the public by satellite and thus as indivisible” (paragraph 69).

That said, this indivisibility does not mean “that the intervention of the satellite package provider in that communication can occur without the authorisation of the right holders concerned” (paragraph 70).

At this stage of the judgment, one would expect the satellite package distributor’s role to be clarified.

The Court however returns to its initial statements on the basis of Directive 2001/29, in order to apply the criteria that it had developed within this context (specifically that of the new public).

Assessment in the context of Court case law based on Directive 2001/29

It should be noted that at the beginning of the consideration of the questions referred, the Court specified that: “in view of the requirements deriving from the unity and coherence of the legal order of the European Union” “the terms used by that directive must be interpreted in the light of the rules and principles established by other directives relating to intellectual property, such as, in particular, Directive 2001/29” (paragraph 44).

Citing the SGAE and Organismos cases, the Court states that “it follows from [its] case-law” that “such authorisation must be obtained in particular by a person who triggers such a communication or who intervenes when it is carried out, so that, by means of that communication, he makes the protected works accessible to a new public, that is to say, a public which was not taken into account by the authors of the protected works within the framework of an authorisation given to another person” (paragraph 72).

Returning to Directive 93/83, the Court introduces this concept of the ‘triggering’ of a communication to the public (which, regardless of what it says, did not appear in previous judgments) to identify the broadcasting organisation as the initial ‘stakeholder’ of the communication to the public by satellite:

In this context, it is to be observed that, in accordance with Article 1(2)(a) of Directive 93/83, a communication to the public by satellite, such as that at issue in the main proceedings, is triggered by the broadcasting organisation under whose control and responsibility the programme-carrying signals are introduced into the chain of communication leading to the satellite. Nor
is it in dispute that, as a general rule, that organisation thereby renders the protected works accessible to a new public. Consequently, it is required to obtain the authorisation provided for in Article 2 of Directive 93/83” (paragraph 75).

Note that the addition of this concept of ‘triggering’ is difficult to identify, given that the Court arrived at exactly the same conclusion based on the text of Directive 93/83 (i.e. the broadcaster performs the act of introducing the programme-carrying signals intended for reception by the public).

The Court then verifies that this communication to the public fully satisfies the condition of the new public as set out by its previous rulings:

“Nor is it in dispute that, as a general rule, that organisation [the broadcaster] thereby renders the protected works accessible to a new public. Consequently, it is required to obtain the authorisation provided for in Article 2 of Directive 93/83” (paragraph 75).

One would assume that the ‘new nature’ of the public receiving the communication by satellite is a result of the fact that broadcasters also provide a parallel broadcast of their programmes by traditional means, in such a way that the relevant transmissions “are therefore an addition to those means of broadcasting, with a view to expanding the circle of television viewers receiving the broadcasts concerned” (paragraphs 45 to 47).

The Court then defines the satellite package provider’s ‘intervention’ in the communication to the public by satellite, to explain the case for the provider having to obtain an additional authorisation to that granted to broadcasters:

“(…) a satellite package provider, first, encrypts the communication concerned or supplies access keys for the communication to the broadcasting organisations so that its subscribers can decode it and, second, provides the corresponding decoding devices to those subscribers, these operations thus enabling the link to be established between the communication introduced by the broadcasting organisation and those subscribers” (paragraph 78).

The Court however only takes into account this “intervention in the course of the satellite communication in question”, in the fact that it makes “the protected works accessible to a public which is additional to the public targeted by the broadcasting organisation concerned” (paragraph 79), and in that it “expands the circle of persons having access to the television programmes and enables a new public to have access to the works and other protected subject-matter” (paragraph 82).

In truth, such a statement is difficult to comprehend, unless the Court has not expressed itself correctly, and the “public targeted by the broadcasting organisation concerned” actually means the public targeted by the parallel terrestrial broadcasts performed by said broadcasting organisation.

Indeed, given that the Court rightly believes that broadcasters and satellite package providers together perform “a single communication to the public by satellite” which is “indivisible” (aforem. paragraph 69), it ought to follow that this single communication is aimed at one and the same public, which in this case comprises the satellite package distributor’s subscribers.
Finally, we note the reference to the profit-making nature of said distributor’s intervention which “amounts to the supply of an autonomous service performed with the aim of making a profit” (paragraph 80).

**CJEU 24 November 2011, Circul Globus, C-283/10** - Directive 2001/29, recital 23, Article 3 (1), scope - Public performance of musical works during circus performances - public in direct physical contact with the performer of those works - Communication to the public (no)

The case covered the live performance of musical works as part of circus performances, and questioned the scope of Directive 2001/29 as regards the different types of communication to the public.

The national court asked whether Article 3(1) of the Directive ought to be interpreted “as referring only to communication to a public which is not present at the place where the communication originates or also to any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work”.

In keeping with its Premier League judgment, the Court highlights that the European legislature’s intention, as highlighted in recital 23 ensuing from the preparatory work for the Directive, was that the harmonised right of communication to the public should not cover: ‘direct representation or performance’, a concept referring to that of ‘public performance’ which appears in Article 11(1) of the Berne Convention and encompasses interpretation of the works before the public that is in direct physical contact with the actor or performer of those works” (paragraph 35 of the judgment, which refers to paragraph 201 of the Premier League judgment).

And yet, in this case the Court holds that as the works were performed live, and the public was in direct physical contact with the performers, it was therefore present at the place where the communication originated, contrary to the requirement set out by recital 23 (paragraph 37).

In response to the national court’s question, the Court therefore holds that the Directive, and more specifically Article 3(1) of the latter, “must be interpreted as referring only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work.”
CJEU 15 March 2012, Del Corso (SCF), C-135/10 - Directive 92/100 (now 2006/115, rental right, lending right and related rights), Article 8(2) - equitable remuneration - Retransmission of phonograms broadcast by radio in a dental practice - Communication to the public (no)

The dispute in the main proceedings was between a collecting society for the rights of phonogram producers (SCF), and a dentist with a practice in Turin (Marco Del Corso), and related to the equitable remuneration sought by SCF for the broadcasting of radio programmes containing phonograms as background music within the dental practice.

The Court used this opportunity to introduce its concept of the “individualised assessment of the concept of communication to the public”, which in this case involved:

- Taking into account the fact that the right of communication to the public differs when interpreted under copyright or under the right to remuneration:
  - Copyright is "preventive in nature",
  - While the right to remuneration as set out by Directive 92/100, Article 8(2) is a "right which is compensatory in nature, which is not liable to be exercised before a phonogram published for commercial purposes, or a reproduction of such a phonogram, has been used for communication to the public by a user" (paragraph 75)

- And assessing each situation on its own merits ("the situation of a specific user and of all the persons to whom he communicates the protected phonograms"). Such an assessment allows it to draw on the criteria that it has developed in order to define the concept of communication to the public, and therefore to highlight specific criteria, vary their weighting and adapt them to the circumstances in order to achieve the desired result:

  “For the purposes of such an assessment, account must be taken of several complementary criteria, which are not autonomous and are interdependent. Consequently, they must be applied individually and in the light of their interaction with one another, given that in different specific situations, they may be met to varying degrees.

In the case in point, the Court used the following criteria:

- To define the act of communication: the “indispensable role of the user” who "intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers".

Here, the Court harks back to the criterion developed in the SGAE ruling to define the new public (rather than the act of communication which it had understood as the ‘distribution of a signal’).
To define the public:

**Transformation of the criterion of the ‘indeterminate number of potential recipients’: from ‘indeterminate number’ to ‘persons in general’**

Here, the criterion of the ‘indeterminate number of potential recipients’ taken from the Mediakabel and Lagardère judgments, and which was faithfully reproduced in the subsequent judgments, is transformed to “persons in general, that is, not restricted to specific individuals belonging to a private group”.

This change is made in reference to the obsolete and inaccurate definition of the concept of “public transmission (communication to the public)” included in the old WIPO 1980 Glossary (paragraph 85 of the judgment), which was replaced in 2003 by the *Guide to the Treaties* administered by WIPO.

**Criterion of ‘fairly large number of people’: addition of ‘de minimis threshold’ - limitation of cumulative effects for ‘the same work’**

The Court adds here that its quantitative assessment of the public (the ‘fairly large number of people’) requires a ‘certain de minimis threshold’ which excludes “groups of persons which are too small, or insignificant” (paragraph 86).

In its SGAE judgment, the Court had firstly considered that the indeterminate number of potential television viewers did not refer to the individual guests staying in each hotel room, but rather to the hotel customers as a whole, and secondly that it was important to take into account the fact that “usually, hotel customers quickly succeed each other”, with these ‘cumulative effects’ implying that “making the works available to such potential television viewers, (...) could become very significant in such a context” (paragraphs 38 and 39).

In the Del Corso case, the Court returns to this concept of ‘cumulative effects’ in reference to the SGAE judgment, but restricts it to a succession of persons having access to ‘the same work’. This assessment is surprising at the very least, given that radio broadcasts clearly do not have the same content throughout the day, which means that the number of patients to have access to the same work in succession is bound to be limited. This clarification therefore considerably restricts the number of patients succeeding each other over time which can be taken into account, as in most cases, only those who attend the dental practice at the same time will have access to the same works.

- **Taking into account the purpose of the communication to the public**: The **profit-making nature is ‘all the more’ relevant to the right to remuneration**

The Court deems that this criterion, which was described as ‘not irrelevant’ in the Premier League case (paragraph 204) under copyright law, takes on a far greater importance "in the case of the right to equitable remuneration provided for in Article 8(2) of directive 92/100, given its essentially financial nature" (paragraph 89).

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15 And not ‘public communication’ as paragraph 85 of the French version of the judgment indicates.
- **Target and receptive public:**

In a communication to the public which is of a profit-making nature, it is "thus understood that the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely ‘caught’ by chance" (paragraph 91).

**In applying this criteria structure to the case in point,** the Court rules that, although the dentist is indeed performing an act of communication due to his “deliberate intervention in the broadcasting of phonograms\(^\_1\)”, this act is not targeted at a public due to the fact that:

- The patients of a dental practice "generally form a very consistent group of persons", "and thus constitute a determinate circle of potential recipients, as other people do not, as a rule, have access to treatment by that dentist". Therefore, “they are not ‘persons in general’” (paragraph 95);

- The "number of persons" who can listen to the same phonogram "by way of background music" within the dental practice is “not large, indeed it is insignificant, given that the number of persons present in his practice at the same time is, in general, very limited", and "although there are a number of patients in succession, the fact remains that, as those patients attend one at a time, they do not generally hear the same phonograms, or the broadcast phonograms, in particular" (paragraph 96);

- The disputed ‘broadcasting’ is not of a profit-making nature as the dentist "who broadcasts phonograms\(^\_2\) to his patients, by way of background music" does not expect to increase his customer numbers or prices as a result. It therefore has no effect on income. The patients of a dental practice only visit to receive treatment; “They have access to certain phonograms by chance and without any active choice on their part”, and therefore “it cannot be presumed that the usual customers of a dentist are receptive as regards the broadcast in question” (paragraph 98).

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\(^\_1\)This expression is in fact incorrect given that in the case in point, the dental practice did not broadcast phonograms (as it is not a broadcaster) but rather retransmitted radio programmes containing phonograms, in other words the retransmission of phonogram broadcasts.

\(^\_2\)Sic. Same error: The dentist does not broadcast the phonograms.
In its questions referred for a preliminary ruling, the national court asked about the qualification of the act of communication to the public in the case of two of the hotel’s services:

- Firstly, the retransmission of programme-carrying signals containing phonograms through the hotel cable network to television sets in hotel rooms (a),
- The provision of playing apparatus and phonograms in hotel rooms "capable of being broadcast or heard by means of that apparatus"(b).

(a) The first scenario is exactly the same as in the SGAE and Organismos cases in terms of related rights (specifically the right to equitable remuneration as set out by Article 8(2) of Directive 2006/115).

This no doubt explains why the Court, despite reiterating the wording used in the Del Corso judgment under paragraph 31\(^{18}\) to confirm that the hotel operator had performed an act of communication under this area and under copyright, ultimately applied the objective criterion of the ‘distribution of a signal’ from the SGAE judgment. Indeed, it holds that:

“A hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is a ‘user’ making a ‘communication to the public’ of a phonogram which may be played in a broadcast for the purposes of Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.”

Despite references in paragraph 40 of the judgment\(^{19}\) to the operator’s ‘indispensable role’ and ‘deliberate intervention’, these concepts are absent from paragraph 47\(^{20}\), and from the above-mentioned provision. As a result, the Court uses different criteria in two judgments issued on the same day.

As regards the public, this time the Court applies the same criteria as in the Del Corso case, yet arrives at the opposite result.

For the purposes of the same ‘individualised assessment’, which requires “account (...) to be taken of several complementary criteria, which are not autonomous and are interdependent”,
which must be applied “individually and in their interaction with one another, given that they may, in different situations, be present to widely varying degrees” (paragraph 30 which refers to paragraph 79 of the Del Corso judgment), the Court rules that:

- "the guests of a hotel such as those at issue in the main proceedings, (...) constitute an indeterminate number of potential listeners, insofar as the access of those guests to the services of that establishment is the result of their own choice and is limited only by the capacity of the establishment in question. In such a situation they are thus ‘persons in general’” (paragraph 41).

- "As regards (...) the number of potential listeners (..), it must be observed that the Court has held that the guests of a hotel constitute a fairly large number of persons, such that they must be considered to be a public” (paragraph 42);

- "Finally, as regards the profit-making nature (..), it must be held that the guests of a hotel may be described as ‘targeted’ and ‘receptive’ (paragraph 43).

“Indeed, the action of the hotel by which it gives access to the broadcast work to its customers constitutes an additional service which has an influence on the hotel’s standing and, therefore, on the price of rooms (..). Moreover, it is likely to attract additional guests who are interested in that additional service (paragraph 44).

The differences in assessment between the Del Corso and PPL cases is therefore based on the following criteria:

- An indeterminate public constituting 'persons in general', as opposed to a pre-determined public belonging to a private group,
- and the profit-making nature or otherwise of the phonograms in question.

The condition of the new public, (which is not analysed in the Del Corso judgment given that the customers of a dental practice do not satisfy the pre-requisite of constituting a public) is defined in a conventional manner in the Organismos order as “a public which was not taken into account by the authors of the protected work when they authorised its use by the communication to the original public” (paragraph 45).

The Court stipulates that this condition “must also be taken into account in the context of the application of Article 8(2) of Directive 2006/115” (paragraph 50).

(b) As regards phonogram media and playing apparatus in hotel rooms, the Court holds that based on an interpretation under the WIPO Performances and Phonograms Treaty (WPPT), the concept of communication to the public as set out by Article 8(2) of Directive 2006/115 includes this "particular form of transmission" (paragraphs 58, 63 and 66).

Indeed, it points out that “Article 2(g) of the WPPT, concerning communication to the public and referring to Article 15 of the WPPT stipulates that such communication includes making the sounds or representations of sounds fixed in a phonogram audible to the public” (paragraph 59).

Consequently, “the concept of ‘communication to the public’ in Article 8(2) of Directive 2006/115 must be interpreted as meaning that it also includes
making the sounds or representations of sounds fixed in a phonogram audible to the public” (paragraph 60). The Court adds:

“Moreover, that finding is borne out by the wording itself of Article 8(2) of Directive 2006/115 which states that it concerns ‘any’ communication to the public, and thus all forms of communication which can be envisaged and carried out.” (paragraph 61);

“So, a hotel operator which provides in guest bedrooms apparatus other than a television or radio, and phonograms in a physical or digital format capable of being broadcast or heard by means of that apparatus, is providing the two elements making it possible to make the sounds or representations of sounds fixed in a phonogram audible to the public, that is to say, phonograms.” (paragraph 62);

“Consequently, that form of communication falls within the scope of Article 8(2) of Directive 2006/115 interpreted in the light of Articles 2(g) and 15 of the WPPT read together” (paragraph 63).

CJEU 7 March 2013, ITV C-607/11 - Directive 2001/29 Article 3(1) - Internet retransmission through streaming of works contained in a terrestrial television broadcast, by an organisation other than the original broadcaster - new public: not required if the retransmission is made using a different specific technical means to that of the original communication - right of communication to the public (yes)

Television channels which broadcast terrestrial programmes which can be freely accessed by British television viewers free-of-charge brought legal action against a company which retransmits these programmes live over the internet (live video streaming) to subscribers within the area of reception of the broadcast. This service is funded by advertisements which are shown in addition to those already contained in said programmes.

Unlike the cases which the Court had previously ruled on, the public was able to access the programmes either on a television set or on the internet. Therefore, the High Court of Justice raised the question referred for a preliminary ruling of whether the right of communication to the public would apply to a situation in which:

“A third party (that is to say, an organisation other than the original broadcaster) provides a service whereby individual subscribers within the intended area of reception of the broadcast who could lawfully receive the broadcast on a television receiver in their own homes may log on to the third party’s server and receive the content of the broadcast by means of an internet stream”.

Reading between the lines, the question appears to relate to the condition of the new public, which is patently absent in this case.

Before responding, the Court reiterates the following points:

- Firstly, pursuant to recital 23 of the Directive "that the author’s right of communication to the public covers any transmission or retransmission of a work to
the public not present at the place where the communication originates, by wire or wireless means, including broadcasting.”

- and secondly, pursuant to Article 3(3), “authorising the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications of those works to the public” (paragraph 23).

It thereby concludes that: “by regulating the situations in which a given work is put to multiple use, the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question” (paragraph 24), and adds that:

“Those findings are, moreover, supported by Articles 2 and 8 of Directive 93/83, which require fresh authorisation for a simultaneous, unaltered and unabridged retransmission by satellite or cable of an initial transmission of television or radio programmes containing protected works, even though those programmes may already be received in their catchment area by other technical means, such as by wireless means or terrestrial networks” (paragraph 25).

Based on the technical means of transmission of the works in question, notwithstanding the branch offered by the national court by insisting that the disputed retransmission was performed by a third-party organisation, the Court deemed that the act of communication was characterised by the fact that “the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication” (paragraph 26).

This same filter enables it to bypass its own new public criterion, which is no longer relevant given that there are two transmissions (a primary one and a secondary one), where “each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public” (paragraph 39).

The national court also questions the influence of the profit-making nature on the exploitation at issue. The Court responds by completely overlooking its Del Corso and PPL judgments (issued under related rights):

“In that connection, the Court has indeed held that it is not irrelevant that a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature (Football Association Premier League and Others, paragraph 204). However, it has acknowledged that a profit-making nature is not necessarily an essential condition for the existence of a communication to the public (see, to that effect, SGAE, paragraph 44)” (paragraph 42).

“Consequently, a profit-making nature does not determine conclusively whether a retransmission, such as that at issue in the main proceedings, is to be categorised as a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29” (paragraph 43).
“The answer to Question 2(b) is therefore that the answer to Question 1 is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is funded by advertising and is therefore of a profit-making nature” (paragraph 44).

**CJEU 27 February 2014, OSA, C-351/12 - Directive 2001/29, Article 3(1) - Retransmission of broadcast musical works in the bedrooms of a spa establishment - Right of communication to the public (yes)**

OSA, SACEM’s Czech counterpart, instituted proceedings against a spa establishment which broadcast musical works to its customers without authorisation, using television sets and radios installed in its bedrooms.

The spa cited an exception to the right of communication to the public laid down by Czech law for works broadcast in care or treatment establishments. The question of whether this law was compatible with European law was therefore raised.

The establishment also made reference to the Del Corso case in order to contest the existence of acts of communication to the public.

Using terms very similar to those used in the SGAE case, the Court ruled "there is an act of ‘communication to the public’ (...) when the operator of a spa establishment (...) gives its patients access to the broadcast works via television or radio sets by distributing in the patients’ rooms the signal carrying the protected works" (paragraph 24)

Its reasoning, based first and foremost on the act of communication, is influenced by both:

- The Premier League judgment:
  "the concept of ‘communication’ must be construed as referring to any transmission of the protected works, irrespective of the technical means or process used" (paragraph 25);
  “the operator (...) carries out a communication when it deliberately transmits protected works (...)” (beginning of paragraph 26),

- and by the SGAE judgment, but with an added element of intent:
  "(...) by intentionally distributing a signal through television or radio sets, in the rooms of the patients of that establishment" (continuation of paragraph 26).

The Court also takes into account the concept of the public, based on its two habitual criteria of the: ‘indeterminate number of potential recipients’ and ‘fairly large number of persons’ (paragraph 27).

This judgment sees a return to the remedial criterion of ‘cumulative effects’ used by the SGAE judgment for its quantitative assessment of the ‘fairly large’ number of people, but with the

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1 Translator’s note: SACEM is the French Society of Music Authors, Composers and Publishers
clarification introduced by the Del Corso judgment which limits the assessment to ‘the same work’:

“the cumulative effect of making the works available to potential recipients should be taken into account. It is in particular relevant in that respect to ascertain the number of persons who have access to the same work at the same time and successively” (paragraph 28).

The ‘new public’ is defined using wording taken from the Premier League judgment, thereby described as a “public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public” (paragraph 31).

As in the SGAE case, the Court defines it by referring to the conclusive intervention of the organisation (in this case the spa establishment) in giving access to the works. The establishment’s customers can be qualified as a new public given that, without this intervention, they could not have accessed the works.

“Like the guests of a hotel, the patients of a spa establishment constitute such a new public. The spa establishment is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its patients. In the absence of that intervention, its patients would not, in principle, be able to enjoy the broadcast work” (paragraph 32).

It also rejects any similarity to the background of the Del Corso (SCF) judgment, and clearly states that the principles taken from that judgment only apply to related rights as regards the right to remuneration, and therefore cannot be extended to copyright:

“In that respect, it suffices to note that the principles developed in SCF are not relevant in the present case, since SCF does not concern the copyright referred to in Article 3(1) of Directive 2001/29, but rather the right to remuneration of performers and producers of phonograms provided for in Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61)” (paragraph 35).

Note that the profit-making nature of the spa establishment’s use of the works is not alluded to. This criterion is entirely absent from the ruling.

After having defined the disputed acts of communication to the public, the Court concludes that as Czech law appears to be blatantly contrary to the Directive, none of the exceptions set out by Article 5 can be applied.
This is the first case related to hyperlinks (or ‘clickable links’ to echo the Court’s terminology) for press articles published with the consent of the journalists who wrote them, on a Swedish newspaper website from which they were freely accessible. The journalists instituted proceedings for infringement against an internet watch service provider which provided lists of links to its customers pointing to other websites, and in this case to the articles by the aforementioned journalists.

The national court asked the Court whether, in essence, “the provision, on a website, of clickable links to protected works available on another website” constituted an act of communication to the public “where, on that other site, the works concerned are freely accessible.”

The Court begins by confirming that, pursuant to Article 3(1) of the Directive, “every act of communication of a work to the public has to be authorised by the copyright holder”. It is therefore apparent that “that the concept of communication to the public includes two cumulative criteria, namely, an ‘act of communication’ of a work and the communication of that work to a ‘public’” (paragraphs 15 and 16).

The Court stipulates that the first legal component, i.e. the act of communication, “must be construed broadly (...), in order to ensure, in accordance with, inter alia, recitals 4 and 9 in the preamble to Directive 2001/29, a high level of protection for copyright holders” (paragraph 17, new statement despite the reference to the Premier League judgment).

In an implicit response to the operator of the website containing the links, which was supported by the Commission in its challenge of the existence of an act of communication on the grounds that it did not transmit the works, the Court reiterated that “for there to be an ‘act of communication’, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity” (paragraph 19).

And yet, “the provision, on a website, of clickable links to protected works (...) affords users of the first site direct access to those works” (paragraph 18), and must therefore “be considered to be ‘making available’ and, therefore, an ‘act of communication’” (paragraph 20).

As regards the second component related to the public, the Court holds that the criteria of the ‘indeterminate number of potential recipients’ and of the ‘fairly large number of persons’ have been fully satisfied in this case, given that the act of communication performed by the manager of the website on which the clickable links appear “is aimed at all potential users of the site managed by that person”, and therefore the communication has been performed ‘to a public’ (paragraphs 21 to 23).

However, the Court did not consider this public to be a new public (condition required in the case of the “same technical means of communication”), due to the fact that “access to the works on [the original] site
was not subject to any restrictive measures”, and that “all Internet users could therefore have free access to them” (paragraph 26).

The Court reached two conclusions based on the free access to the linked resources (i.e. the articles featured on the newspaper’s website):

- Given that the web users who visited the website listing the links to the articles "could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site", the intervention of the manager is not required (or ‘indispensable’ to use the term employed in the Del Corso and PPL judgments) in order to access the works. This alludes to the criterion taken from the SGAE judgment of the organisation which intervenes to give access to the works, without whose intervention a section of the public would not be able to access them, this section of the public thereby becoming the ‘new’ public;

- Therefore, “the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication” (paragraph 27).

The Court stipulates that the solution would be unaltered in the scenario in which the disputed links used a framing technique (which is not the case here), which is where the user views the work within the graphical environment of the website on which the link is located, rather than on the original website on which the linked resource is located, therefore causing the user to be unaware of having been transferred to another website. Indeed, in this particular scenario, the link still constitutes an act of communication which is not new.

As the Court's ruling was entirely based on the free access to works identified on the original website, it follows that the solution would be different in the opposite scenario of restricted access to website ‘subscribers only’ through ‘restrictive measures’ which the link ‘circumvents’. Indeed, in such cases, given that posting a link “constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public” (paragraph 31).

The Court adds that “This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders’ authorisation” (paragraph 31, a scenario which is actually rather implausible, given that if the resource is no longer available on the source site, it is difficult to see how the link could point to it).

Finally, in response to the national court’s final question, the Court predictably states that “Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision” (paragraph 41).
This judgment clearly indicates that as soon as it is posted on a website, the protection of a work is not guaranteed on principle alone, but on the condition that access to the website is subject to restrictive measures. Indeed, the Court states that if no such measures are in place, authors (or their successors) will be assumed to have given their consent to third party access to the work via hyperlinks from other websites.

Thus, in a dramatic reversal of principles, it is no longer the responsibility of the user to prove that he/she has authorisation to exploit the work, but instead it is the responsibility of the author to prove that he/she has made every effort to prevent such use. Even more restrictive is the opt-out system, as it does not allow the author to simply state that he/she has refused to allow exploitation, but must prove that he/she has imposed restrictive measures for this purpose.

The judgment does not tell us what form these measures should take, which will no doubt give rise to further questions referred for a preliminary ruling.

Paradoxically, the Court appears to be encouraging authors to restrict the broadcast of their works, which was certainly never the intention of the European legislature.

CJEU 21 October 2014, Bestwater (Order), C-348/13 - Directive 2001/29, Article 3(1) - Hyperlinks giving access to an advertising video which was supposed to be freely-accessible on the source website - Right of communication to the public (no)

The case related to an advertising video produced by a company which sells water filters. The video could be viewed on YouTube. A rival company provided access to it from its own website via a framing link.

The national court asked the Court about the consequences of using this framing technique in terms of the classification as a ‘communication to the public’. The Court had already answered this question in the Svensson case, hence it being issued as an Order here.

It should be noted that, as the Court reiterated in paragraph 4 of its judgment, the company which produced the advertising video maintained that this video had been posted on YouTube without its consent.

Although this represents a fundamental difference to the facts of the Svensson case, this does not seem to have been taken into account in the main proceedings. In any case, the national court did not mention it in its question referred for a preliminary ruling, such that the Court follows this approach and presents its reasoning as if the facts were similar to its previous judgment.
In summary of its case law since the ITV ruling, the Court states that “in order to be qualified as a ‘communication to the public’ as defined by Article 3(1) of Directive 2001/29, a protected work must be communicated using a specific technical means which is different to the means used previously or, failing this, the work must be communicated to a new public, in other words a public which the copyright holders had not already taken into account when they authorised the initial communication of their work to the public” (paragraph 14).

And yet, the Court holds that the act of communication based on the provision of the link providing access to the work on the source website “uses the same technical means as that already used to communicate this work on another website” (paragraph 15).

The condition of the new public was therefore required, but lacking as in the Svensson case, given that the video at issue was assumed to freely-accessible on YouTube with its producer’s consent:

“Indeed, given that the work is freely-available on the site to which the web link points, it must be assumed that when the copyright holders authorised this communication, they took into account all web users as the public” (paragraph 18).

Note the (intentional?) semantic shift between the Svensson and Bestwater judgments. In the former case, the Court essential holds that the website’s users are virtually included in the public covered by the original authorisation granted for the source website, while in this case, the public taken into account for the authorisation comprises ‘all web users’.

As regards the question raised by the national court, the Court concludes, as in the Svensson case, that framing has no impact in the light of the following definition:

“the ‘framing’ technique consists of dividing a website page into a number of frames, and displaying an item originating from another website inside one of the frames using ‘inline linking’, in order to conceal the original environment to which the item belongs from the website’s users” (paragraph 17).

CJEU 26 March 2015, C More, C-279/13 - Directive 2001/29, Article 3(2)(d) - Related right of broadcasters - Links allowing hockey matches to be viewed live by circumventing the pay system on the source website - Right of making available as defined by the Directive (no) - Option of a national regulation to extend the exclusive right of broadcasting organisations to communications to the public not covered by the Directive (yes)

An individual had posted links to his website enabling hockey matches broadcast on a pay-per-view website belonging to the C More television channel to be viewed live and free-of-charge. These links circumvented the pay system set up on the source website.
Although brought within the scope of copyright and related rights, the case focused on the area of related rights, with the Swedish trial judges ruling on appeal that “no part of the commentators’, cameramen’s or picture producers’ work on the broadcasts of the ice hockey matches, taken on its own merits or some or all of those parts taken together, reached the level of originality required for copyright protection” (paragraph 17).

The Swedish Supreme Court held that the national legislation on related rights was more comprehensive that that set out by Article 3(2) of Directive 2001/29, and asked the Court whether European Union legislation precluded the national legislation from “extending the exclusive right of the broadcasting organisations referred to in Article 3(2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute” (paragraphs 19 and 22).

The Court’s adopts a two-step approach in its reasoning, firstly by verifying that the right of making available to the public, as provided for by the Directive for broadcasting organisations, does not apply to the case in point (a), and then by holding that the Member States have the option to extend the protection granted to such organisations, under related rights, beyond the right provided by the Directive (b).

(a) After noting that " the concept of ‘making available to the public’ (...) forms part of the wider ‘communication to the public’", the Court states that, "to be classified as an act of ‘making available to the public’, within the meaning of [Article 3(2) of the Directive], an act must meet, cumulatively, both conditions set out in that provision, namely that members of the public may access the protected work from a place and at a time individually chosen by them"(paragraphs 24 and 25)

Please note that the above-mentioned Directive states:

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

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

And yet, the Court observes that “That is not the case of transmissions broadcast live on internet, such as those at issue in the main proceedings” (paragraph 27), given, as we understand it, that the public does not have a choice of when it accesses the programme when this programme is broadcast live.

One might add another argument, which neither the national court nor the Court made reference to, indicating that the aforementioned Article 3(2) would not apply to the case in point. The legislation in fact only covers the making available to the public of ‘fixations’ of broadcaster’s programmes, whereas in this case, the disputed link gave access to the live broadcast of the programme.
The disputed links were therefore not covered by a harmonised law.

This left the question which the national court had raised, i.e. Can national legislation grant protection in cases which are not governed by the Directive?

(b) The Court responds in the affirmative, and holds that Directive 2001/29 should be interpreted as “not precluding national legislation extending the exclusive right of the broadcasting organisations referred to in [Article 3(2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute, provided that such an extension does not undermine the protection of copyright”.

It highlights in this respect that “the EU legislature has harmonised copyright and related rights only in part”, with the objective sought by Directive 2001/29 being to harmonise “copyright and related rights as far as is necessary for the smooth functioning of the internal market”, rather than to “remove or prevent differences between the national legislations which do not adversely affect the functioning of the internal market” (paragraph 29).

It then observed that recital 16 of Directive 2006/11521 (formerly 92/100) enables Member States to provide greater protection that that granted by Article 8(3)22 of that Directive as regards broadcasting and communication to the public, and that Directive 2001/29, recital 2023 upholds this right.

Therefore, there is nothing to prevent Swedish legislation from enabling a broadcasting organisation to monitor the live transmission of its programmes on the web.

Please note that in its Playmedia judgment of 2 February 201624, the Paris Court of Appeal [Cour d'appel de Paris] referred to this C More judgment when it ruled, based on the non-harmonised right of broadcasting as set out by Article L.216-1 of the French Intellectual Property Code [code de la propriété intellectuelle], that an audiovisual communications company "is covered by the exclusive right to authorise the making available to the public of its programmes online and on demand, using deep links and the ‘framing’ technique".

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21 “Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.”

22 “Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.”

23 “This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC (...), and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.”

24 Paris Court of Appeal, division 5 - ch. 1, 2 February 2016, France Télévisions/Playmedia https://www.legalis.net/jurispudences/cour-dappel-de-paris-pole-5-ch-1-arret-du-2-fevrier-2016/
The dispute in the main proceedings was between a Portuguese copyright society (SPA) and the operators of a public house, “which used on its premises a radio linked to eight loudspeakers, which transmitted musical and ‘musical-literary’ works broadcast by a radio station to its customers” (paragraph 5).

As the Court had already ruled on similar circumstances in the Premier League case, it referred back to this case and found that the public house had indeed performed acts of communication, adding that the use of loudspeakers and amplifiers in no way changed the conclusion (paragraphs 13 to 17).

Unsurprisingly, it found that the communication covered “an indeterminate number of potential recipients” and “involved a fairly large number”, given that, “like the guests of a hotel, customers of a public house quickly succeed each other”, and therefore undoubtedly form a ‘public’ (paragraph 20).

This public is also a new public, as the customers of a public house “constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works” (paragraph 23).

Moreover, as in the Premier League case, the Court holds that this public, although “present at the place of transmission”, is not present “at the place where the communication originates” within the meaning of recital 23 of the Directive, “insofar as element of direct physical contact is absent in the case of transmission of a broadcast work via a television screen and speakers in a place such as a public house” (paragraph 24).

The profit-making nature, which had been absent from the Court’s copyright judgments since the Premier League case, returns as a criterion which is ‘not irrelevant’.

It is characterised in the case in point “insofar as the proprietor of a public house transmits the broadcast works in his establishment in order to benefit therefrom, and that that transmission is liable to attract customers to whom the works transmitted are of interest. Therefore, the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results” (paragraph 27).

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25 A reference was made to it in the Airfield judgment, through the concept of a “supply of an autonomous service performed with the aim of making a profit”, but not as a criterion for communication to the public.
In the *Airfield* case, the Court asked whether a satellite package distributor was performing an act of communication to the public (within the meaning of the ‘Satellite and Cable’ Directive interpreted in the light of Directive 2001/29), and if said distributor was therefore obliged to obtain an authorisation from the rightholders in addition to the authorisation already held by the broadcasters for communication to the public by satellite. Therefore, the national court asked if each transmission should be deemed to constitute “a single communication to the public by satellite or, on the contrary, whether each of them entails two independent communications” (paragraph 50).

In the SBS case, the question raised was to some extent a reflection of the above, as this time it related to the broadcaster’s activity and whether it needed to obtain authorisation in addition to that required of the distributors of its programmes.

In both cases, these programmes were transmitted through a two-step process, i.e. from the broadcaster to the distributor, and then from the distributor(s) to its/their subscriber public(s). In this type of process, which is known as ‘direct injection’, the public cannot access programmes during the initial transmission phase between the broadcaster and its/their distributors.

The *Airfield* case covered a single distributor operating via satellite, while the broadcaster in the SBS case had three distributors each operating via three different methods: satellite, cable and xDSL line.

This difference however had no impact on the questions raised, which in both cases related to the classification of one or several communications to the public.

Although both cases were ruled upon under two different directives (the first under the Satellite and Cable Directive 93/83, and the second under Directive 2001/29), this also has little significance, as the same concepts of ‘communication’ and the ‘public’ were considered in both cases. Moreover, in the *Airfield* case, the Court held that Directive 93/83 should be interpreted ‘in the light of’ Directive 2001/29.26

However, the Court’s rulings were diametrically opposed.

In the *Airfield* case, the act of communication performed by the broadcaster was not even challenged, and the Court simply found:

- That the act of communication ensued from the transmission of programme-carrying signals to the distributor (paragraphs 53 to 55),

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26 “in view of the requirements deriving from the unity and coherence of the legal order of the European Union”, “the terms used by (...) directive [93/83] must be interpreted in the light of the rules and principles established by other directives relating to intellectual property, such as, in particular, Directive 2001/29.” (paragraph 44).
- and that these programme-carrying signals were intended for reception by the public comprising said distributor’s subscribers:

“(…) it is not in dispute that, from the moment when those signals are beamed up to the satellite, they are addressed to a public, namely the public in possession of a decoder card, supplied by Airfield” (paragraph 65).

“Consequently, the programme-carrying signals emitted in the course of the direct and the indirect transmission of television programmes are intended for reception by the public and such transmission thus satisfies the third condition, laid down in Article 1(2)(a) of Directive 93/83” (paragraph 67).

It held that:

- Each of the transmissions at issue must “be regarded as constituting a single communication to the public by satellite and thus as indivisible” (paragraph 69),

- and that this single communication to the public was “triggered by the broadcasting organisation”, with the satellite package provider ‘intervening’ in the communication by "enabling the link to be established between the communication introduced by the broadcasting organisation and those subscribers”.

The result is, by necessity, that this single act of communication to the public is attributable jointly to the two organisations which perform it and invoke their joint responsibility, given that “there is nothing to prevent that power of control and that responsibility [of the broadcaster] as regards the indirect or direct transmission of television programmes from being shared, where appropriate, with the satellite package provider” paragraph 56).

In the SBS case, the Court also holds that the broadcaster is performing an act of communication by transmitting the programme-carrying signals to its distributors:

“In the circumstances of this case, it is apparent from the request for a preliminary ruling that the broadcasting organisation before the court in the main proceedings transmits programme-carrying signals to several signal distributors by satellite, cable or xDSL line, and, therefore, by different technical means or processes” (paragraph 18).

“It follow[s] that such transmissions, parallel or otherwise, must be considered to constitute ‘acts of communication’, within the meaning of Article 3(1) of Directive 2001/29” (paragraph 19).

27 “In this context, it is to be observed that, in accordance with Article 1(2)(a) of Directive 93/83, a communication to the public by satellite, such as that at issue in the main proceedings, is triggered by the broadcasting organisation under whose control and responsibility the programme-carrying signals are introduced into the chain of communication leading to the satellite” (paragraph 75),

28 “(…) a satellite package provider, first, encrypts the communication concerned or supplies access keys for the communication to the broadcasting organisations so that its subscribers can decode it and, second, provides the corresponding decoding devices to those subscribers, these operations thus enabling the link to be established between the communication introduced by the broadcasting organisation and those subscribers” (paragraph 78).
But unlike the *Airfield* case, it deems that this act is not addressed to a public, as the transmission of the programme-carrying signals is only made to “specified individual distributors without potential viewers being able to have access to those signals” (paragraph 22). Moreover, the Court believes that as these distributors are “specified individual professionals”, they cannot form a public within the meaning of Article 3(1) of Directive 2001/29.

This is a stark difference in comparison with the reasoning of the *Airfield* judgment, which analyses the whole process as a single and indivisible act of communication to the public, and therefore holds, as reiterated above, that the broadcaster’s transmission of programme-carrying signals to the satellite package distributor also, from the outset, covers the distributor’s subscribers.

There is no clear legal or factual consideration that could provide a basis for such contradictory rulings.

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**CJEU (Grand Chamber) 31 May 2016, Reha Training, C-117/15** - Directive 2001/29, Article 3(1) - Directive 2006/115 Article 8(2) (equitable remuneration) - Retransmission of broadcast works and subject-matter using television sets in a rehabilitation centre - Communication to the public (yes)

The case in the main proceedings, which falls within the scope of both copyright and related rights, concerned the retransmission of television programmes containing protected works, performances and phonograms, using television sets installed in waiting rooms and training rooms in a rehabilitation centre.

**Bringing together criteria for assessing the concept of communication to the public within the scope of copyright and related rights**

The national court firstly asked the Court whether the existence of a communication to the public should always be assessed according to the same criteria, in the context of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 2006/115.

The national court was of the opinion that the same criteria should be applied in both cases in order to determine the existence [or otherwise] of a communication to the public, but the *Del Corso* judgment had prevented it from ruling as such, given that the context of a dental practice as interpreted by the Court in its judgment was similar to a rehabilitation centre (paragraphs 15 to 18).

The Court responded as follows:

- Pursuant to recital 20 of Directive 2001/29 “Article 3(1) of Directive 2001/29 must be applied without prejudice to the application of Article 8(2) of Directive 2006/115” (paragraphs 25 to 27),

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29 "(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC, 92/100/EEC, 93/83/EEC, 93/98/EEC and 96/9/EC, and it develops those principles and rules and places them in the context of the information society. The provisions
- and, "given the requirements of unity and coherence of the European Union legal order, the concepts used by Directives 2001/29 and 2006/115 must have the same meaning, unless the EU legislature has, in a specific legislative context, expressed a different intention" (paragraph 28).

And yet, a comparison of the two legislative texts shows “that the concept of ‘communication to the public’ appearing in those provisions is used in contexts which are not the same and pursue objectives which, while similar, are however in part divergent”, “there is no evidence that the EU legislature wished to confer on the concept of ‘communication to the public’ a different meaning in the respective contexts of Directives 2001/29 and 2006/115” (paragraphs 29 and 31).

The Court therefore ruled, in a case covering not only copyright but also related rights, that the concept of communication to the public should be assessed “in accordance with the same criteria”, and must be given “the same meaning”, “in order to avoid, inter alia, contradictory and incompatible interpretations depending on the applicable provision” (paragraphs 33 and 34).

**Individualised assessment**

The national court and indeed the Advocate General attempted to summarise the criteria defined by the Court’s case law, which the national court was essentially asking the Court to validate. It also asked the Court if it intended to uphold its Del Corso case law. Before responding, the Court reaffirmed its general ‘individualised assessment’ rule which it had introduced in its Del Corso and PPL judgments. This rule governs the application of all of the criteria which the Court has developed:

“In that connection, the Court has already held that, in order to determine whether there has been a communication to the public, account has to be taken of several complementary criteria, which are not autonomous and are interdependent. Since those criteria may, in different situations, be present to widely varying degrees, they must be applied both individually and in their interaction with one another” (paragraph 35).

- Of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.”

30 “Is the question as to whether there is a “communication to the public” (...) always to be determined in accordance with the same criteria: (...)” (First question raised by the Cologne Regional Court).

31 “(...) does the Court of Justice uphold its case-law according to which no communication to the public takes place in the event of the radio broadcasting of protected phonograms to patients in a dental practice (...) or similar establishments?” (Fourth question referred for a preliminary ruling).
The act of communication

Based on the wording from its Svensson judgment which some commentators have described as tautological, the Court reiterates that “the concept of ‘communication to the public’ includes two cumulative criteria, namely, an ‘act of communication’ of a work and the communication of that work to a ‘public’” (paragraph 37).

The national court and the Advocate General both deduce, in their own ways, what they deem to be the Court’s case law. The national court offers an overarching definition, while the Advocate General lists the alternative criteria used by the Court in four points.

The national court’s definition is similar in content to point one of the Advocate General’s explanations. Both draw on the Del Corso and PPL judgments, combining the concept of ‘giving access’ (1) with deliberate intention (2) and the indispensable role of the user (3), which were all initially linked to these judgments:

Ruling of the Cologne Regional Court:

“a user acts, in full knowledge (2) of the consequences of its action, to provide access to the protected work (1) to third parties which the latter would not have without that user’s intervention (3)” (paragraph 19 of the ruling);

Opinion of Advocate General Yves Bot:

“With regard to the ‘act of communication’, emphasis must be placed on the indispensable role of the user (3), who must act intentionally (2). An act of communication is made where the user intervenes, in full knowledge of the consequences of its action, to give access (1) to the protected work to its clients. In this regard, the Court has pointed out that it is necessary that the intervention by the user is not just a technical means to ensure or improve reception of the original broadcast in the catchment area, but an act without which those customers are unable to enjoy the broadcast works, although physically within that area (3)” (paragraph 46 of the Opinion of the Advocate General).

The Advocate General then goes on to say that “Furthermore, the concept of ‘communication’ must be construed broadly as covering any transmission of a protected work, irrespective of the technical means or process used” (paragraph 47 of the Opinion of the Advocate General). This is the same wording as that used in the Premier League, OSA and SPA judgments.

Paragraph three refers to the concept of “intentionally distributing a signal” which was upheld in the OSA judgment:

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32 Until then, as previously indicated, the indispensable role of the user had been cited only to define the new public, and was not used to define the act of communication.

33 But not in the Premier League judgment, contrary to the Advocate General’s claim.
“In addition, the Court has already ruled that the operators of a public house, a hotel or a spa establishment perform an act of communication when they deliberately transmit protected works to their clientele, by intentionally distributing a signal through television or radio sets which they have installed in their establishment” (paragraph 48).

Finally, point four, which concludes Mr Bot’s observations, refers back to the link made in the Organismos order between giving access and deliberate intention (without the indispensable role of the user):

“Consequently, in accordance with the Court’s abovementioned case-law, there is no doubt, in my view, that Reha Training has, in full knowledge of the consequences of its action, made protected works accessible to the public formed by its patients and thus performed an ‘act of communication’” (paragraph 50).

The Court did not use any of the national court’s proposed definition, and only point 2 of the Advocate General’s observations.

Indeed, it deems that the act of communication:

“refers to any transmission of the protected works, irrespective of the technical means or process used” (paragraph 38), adding that, “Moreover, every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question” (paragraph 39).

The fact that these two statements (of which the second is taken from the ITV judgment) are linked is surprising, as they seem to represent a blatant contradiction: If the means or process of transmission is irrelevant, why then make a distinction between the transmissions or retransmissions which use a specific technical means?

The use of the second statement at this stage of the reasoning is equally surprising. Should one deduce from this that when a transmission uses a ‘specific technical means’, it does not have to target a public? We know that the ‘specific technical means’ provides an exemption from the condition of the ‘new public’ (ITV judgment), but it seems implausible that it would provide an exemption from the concept of a ‘public’ in general.

The wording of the judgment seems to become even more misguided, given that conversely, it means that every retransmission which uses the same technical means as the primary transmission would not, in principle, need to be authorised, which would lead to the absurd consequence of the right of communication to the public being exhausted on the basis of the technical means in question. This is a drastic contradiction of Article 3(3) of Directive 2001/2934, which prohibits any such exhaustion of this right.

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

As regards the concept of the public, the Court summarises the Del Corso and PPL criteria which were originally intended to be applied to related rights.

The conventional CJEU case law criterion of the ‘indeterminate number’ of potential recipients thereby becomes the ‘indeterminate nature of the public’, thereby defining the type of public rather than its number. As in its Del Corso judgment, the Court points out that the public must be comprised of “persons in general, that is, not restricted to specific individuals belonging to a private group” (paragraph 42).

Also taken from the Del Corso and PPL judgments is the ‘de minimis threshold’, which requires the number of people making up the public to be ‘fairly large’, and excludes “groups of persons which are too small, or insignificant” (paragraph 43).

Finally, the ‘cumulative effect’ is again limited to ‘the same work’:

It is in particular relevant in that respect to ascertain the number of persons who have access to the same work at the same time and successively” (paragraph 44).

The new public

The new public is unsurprisingly defined as the “public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public”, which has been the ‘standard’ meaning of the new public since the Organismos order.

The Court also adds the ‘indispensable role of the user’, without whose intervention “those ‘new’ viewers are unable to enjoy the broadcast works, although physically within the broadcast’s catchment area” (paragraph 46).

As in the Organismos order, the two criteria are therefore linked in order to define the new public.

The target public

In paragraph 91 of the Del Corso judgment, the Court stated, as regards the profit-making nature of a communication to the public, that it was “thus understood that the public which is the subject of the communication [was] both targeted by the user and receptive, in one way or another, to that communication, and not merely ‘caught’ by chance.”

In the Reha Training case, it disassociates ‘targeting’ from ‘receptivity’: The latter remains attached to the assessment of the profit-making nature, while ‘targeting’ appears to become a new characteristic of the public to whom the communication is addressed.
After separating out the criteria on which the existence of a communication to the public is based, but before addressing the final criterion of the profit-making nature, the Court states that:

“It is therefore understood that the public which is the subject of the communication in these establishments is not merely ‘caught’ by chance, but is targeted by their operators” (paragraph 48).

**Profit-making nature and receptivity of the public**

The Court reaffirms the necessity of this criterion but with one change: Even if it “does not determine conclusively whether a transmission is to be categorised as a ‘communication to the public’ (...), it is not however irrelevant, in particular, for the purpose of determining any remuneration due in respect of that transmission” (paragraph 49).

In reference to the Del Corso judgment, it stipulates that “It is in the latter context that the ‘receptivity’ of the public may be relevant” (paragraph 50).

As in the latter judgment, the receptivity of the public therefore constitutes a criterion for assessing the profit-making nature of the planned exploitation,

**Application to this case**

Determining which criteria the Court wants to include is one thing, but applying them to the case in point is clearly another. This is demonstrated by the fact that the deliberate nature of the transmission, which had disappeared from the list of criteria required in order to define an act of communication, reappears when it is applied to the facts of this case, with the act therefore being defined as follows:

“(…) the operator of a rehabilitation centre intentionally broadcasts protected works to its patients by means of television sets installed in several places in that establishment. Therefore, it must be held that such an operator carries out an act of communication” (paragraphs 55 and 56).

It is almost impossible to find a convincing argument to explain why (as requested by the national court), applying the same criteria to define the public and the new public should cause the public to be defined for a rehabilitation centre and refuted for a dental practice.

The judgment simply states that it “is apparent from the documents submitted to the Court”, as a basis on which to consider that “the body of patients of a rehabilitation centre, such as that at issue in the main proceedings” is comprised of “persons in general”.

The Court then holds that “the circle of persons constituted by those patients is not ‘too small or insignificant’”, because “those patients may enjoy works broadcast
at the same time in several places in the establishment." (paragraph 58). Yet how does the fact that the public is spread between several places (in this case, two waiting rooms and a training room) have any bearing on its quantity? How does this situation differ from that of a dental practice which has a waiting room and usually a number of treatment rooms? The Court does not explain this.

The Court reaches the conclusion that the public is a ‘new public’ by again simply stating that there is no evidence to suggest that the patients of a rehabilitation centre were taken into consideration when the making available of the works was originally authorised (paragraph 60).

Finally, as regards the profit-making nature of the communication, the Court emphasises that “the broadcasting of television programmes on television sets, in so far as it is intended to create a diversion for the patients of a rehabilitation centre, such as that at issue in the main proceedings, during their treatment or in the waiting time, constitutes the supply of additional services which, while not having any medical benefit, does have an impact on the establishment’s standing and attractiveness, thereby giving it a competitive advantage” (paragraph 63).

But yet again, how does this situation differ from broadcasting radio programmes to patients of a dental practice who perhaps also seek ‘diversion’? On what basis does the Court state, in paragraph 52 of its judgment, that “the patients of a dentist do not, as a general rule, give any importance to such a broadcast”? Is this based on personal experience? Have the rehabilitation centre’s patients been asked whether they watch the television specifically when performing their exercises under the guidance of a physiotherapist?

Evidently this assessment is purely arbitrary: It could hardly be otherwise based on the criteria which the Court uses.

CJEU 8 September 2016, GS Media, C-160/15 - Directive 2001/29, Article 3(1) - Hyperlinks giving access to photographs posted online without the rightholder’s consent - Right of communication to the public (yes)

In the Svensson and Bestwater cases, the Court had only ruled on the scenario in which a link pointed to a work which had originally been published on the source website (the website containing the file of the work) with the rightholder’s consent.

The solution to be applied to the opposite scenario in which a link pointed to a work posted illegally was therefore still uncertain.

Here, the Court took the opportunity to eliminate this uncertainty, in circumstances which showed a particular disregard by the link poster as regards the warnings issued by the rightholder.
The case related to nude photos of a Dutch reality TV star which were taken for a forthcoming issue of Playboy magazine.

GS Media operates a website which is very popular in the Netherlands and which provides ‘news, scandalous revelations and investigative journalism with lighthearted items and wacky nonsense’, and had posted a link on this website giving access to these photos which had been unlawfully posted on an Australian website. The Australian website removed the photos at the demand of the magazine publisher. GS Media, not wishing to comply with this demand, posted a new link to another website, which also in turn removed the photos at the publisher’s request. In the meantime, visitors to the GS Media forum had posted other links, which pointed to websites on which the disputed photos were still visible.

Deeming that it could not “be inferred with sufficient certainty” from the Svensson and Bestwater rulings “whether there is a ‘communication to the public’ if the work has in fact previously been published, but without the consent of the copyright holder”, the Supreme Court of the Netherlands raised the relevant question with the Court (paragraphs 21, 24 and 25).

Seeking a ‘fair balance’

After reiterating, as it does in every ruling, that recitals 9 and 10 of the Directive have the “objective (...) to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works”, from which “it follows that ‘communication to the public’ must be interpreted broadly, as recital 23 of the directive indeed expressly states” (paragraph 30), the Court immediately counteracts this observation with the following statement:

“At the same time, it follows from recitals 3 and 31 of Directive 2001/29 that the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’) and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest” (paragraph 31).

This objective of ‘fair balance’, although perfectly legitimate in principle, appears here to be completely biased. The European legislature achieves its perfect balance by respectively defining the rights and the exceptions and limitations which counteract these rights in the Directive, as set out in recital 31 cited by the Court. In other words, the Directive is the expression of this balance, and the judge is not entitled to question this.

This first citing of the ‘fundamental rights of users of protected objects’ and ‘the general interest’ in the Court’s judgments in all cases precedes an unanticipated solution.
Theoretically possible scenarios

Based on reason alone, there only seem to be two possible options to address the scenario raised by the national court.

(a) The first rather radical approach would be to follow the Advocate General’s observations, which would result in the Svensson case law being overturned.

In fact, Mr Wathelet was of the opinion that a link, although facilitating access to a work, does not make this work available to the public and therefore does not perform an act of communication given that, in theory, the work is already available to the public on the source website to which the link points:

“(…) I consider that hyperlinks which lead, even directly, to protected works do not ‘make available’ those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works. As the Portuguese Republic states in its observations, the act which constitutes the actual ‘making available’ was the action by the person who effected the initial communication” (paragraph 54).

Returning to the concept of the ‘indispensable role of the user’ who intervenes to provide access to a protected work or other subject-matter - which the Court generally uses to define the new public as that which, in the absence of that intervention, would not have had access to the work, but which it used in the Del Corso case to define the act of communication - Mr Wathelet observed that the role of the linkoster was not indispensable to accessing the work posted on the source website:

“Consequently, I consider that hyperlinks posted on a website which direct to works protected by copyright that are freely accessible on another website cannot be classified as an ‘act of communication’ within the meaning of Article 3(1) of Directive 2001/29 since the intervention of the operator of the website which posts the hyperlink, in this case GS Media, is not indispensable to the making available of the photographs in question to users, including those who visit the GeenStijl website” (paragraph 60).

Thus, there is no need to take into account the fact that the rightholders had not consented to the work being posted on the source website, as the case is made prior to this, at the stage of the act of communication (or, more specifically, the act of making available), which, according to the Advocate General, has not been defined.

This position was also supported by the German, Portuguese and Slovak governments, and by the Commission’s Legal Service.

(b) The second option involved the Court reaffirming its Svensson case law and conversely inferring from it that in the case of a work posted on a source website without the rightholder’s consent, creating a link which points to this work constitutes a communication to the public.
This solution appears logical as, in the absence of any authorisation issued to the source website, the rightholder could not, in theory and in the context of a non-existent authorisation, have taken into account the public of the website containing the link. In accordance with the Court’s guidelines, the communication made by the link would therefore by necessity be addressed to a ‘new public’.

The Court did not follow the Advocate General, and instead reaffirmed that the Svensson solution was still applicable to the scenario ruled upon in this judgment, in other words when the work appears on the source website with the rightholder’s authorisation:

“In that context, [the Court] noted that, given that the hyperlink and the website to which it refers give access to the protected work using the same technical means, namely the internet, such a link must be directed to a new public. Where that is not the case, in particular, due to the fact that the work is already freely available to all internet users on another website with the authorisation of the copyright holders, that act cannot be categorised as a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. Indeed, as soon as and as long as that work is freely available on the website to which the hyperlink allows access, it must be considered that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public” (paragraph 42);

“Accordingly, it cannot be inferred either from the judgment of 13 February 2014, Svensson and Others, (C-466/12, EU:C:2014:76) or from the order of 21 October 2014, BestWater International, (C 348/13, not published, EU:C:2014:2315) that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. Rather, those decisions confirm the importance of such consent under that provision, as the latter specifically provides that every act of communication of a work to the public is to be authorised by the copyright holder” (paragraph 43).

It is also important to read the reminder of the Svensson-Bestwater case law which appears later on in paragraph 52:

“However, if there is no new public, there will be no communication to the ‘public’ within the meaning of that provision in the event that, referred to in paragraphs 40 to 42 of the present judgment, the works to which those hyperlinks allow access have been made freely available on another website with the consent of the rightholder” (paragraph 52).

This paragraph may be cause for concern given that:

- Firstly, it is located after the developments which are specific to this case (work posted online without authorisation) and begins with the word ‘however’, as if it provided for an exception which would in some way write off the previous construction.
- Secondly, it refers to works which are available ‘on another website’ and not specifically on the source website to which the link points, which could lead to fears that it is sufficient for a work to be posted on any website with the rightholder’s
authorisation to then be freely communicated to the public from any other website.

It does however seem extremely unlikely that these concerns, which are the result of clumsy wording, could be founded.

Paragraph 52 in fact makes specific reference to paragraphs 40 to 42, in which the Court describes the rules resulting from the Svensson and Bestwater rulings, as reiterated above, and without making any changes.

In paragraph 42, the Court also stipulates that ‘the other website’, in the vocabulary that it uses, refers to “the website to which the hyperlink allows access”\(^{35}\), and therefore there is, in fact, no room for uncertainty.

\[\text{(c) Indeed - and this is the basis for the judgment’s unpredictable outcome - while reaffirming the Svensson-Bestwater solution, as reiterated above, in the scenario in which the work is located on the website to which the link points, with the authorisation of the rightholder, the Court does not however consider itself bound to apply the converse conclusion.}\]

In fact, it escapes the binary alternative by inventing a **third route** which one scarcely would have predicted.

**Individualised assessment**

Before introducing this ‘third route’, it is important to point out that this conceptual wizardry is justified by the ‘individualised assessment’ rule invented during the Del Corso judgment, which enables the Court to bend the legal concepts so that they fit the boundaries of the solution which the Court is seeking.\(^{36}\)

The Court observes:

- “that the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information” (paragraph 45),

- and that “it may be difficult, in particular for individuals who wish to post such links, to ascertain whether [the] website to which those links are expected to lead,

\(^{35}\) See the beginning of paragraph 42: “In that context, [the Court] noted that, given that the hyperlink and the website to which it refers” and, a few lines later: “as soon as and as long as that work is freely available on the website to which the hyperlink allows access”.

\(^{36}\) Individualised assessment might therefore be viewed as an ‘open’ simulation of the effects of the various possible legal grounds, in order to enable a choice to be made which leads to the solution which appears the most fitting in the eyes of the Court of Justice of the European Union judge, in the light of considerations which are not purely legal...This is not a judge’s conventional role...However it does prove that the Court of Justice does not view itself as a body which is tasked with applying a rule, but rather as an institution which creates ‘standards’ as it sees fit, under the guise of ‘interpretation’.
provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet” (paragraph 46).

According to the Court, the “individualised assessment of the existence of a ‘communication to the public’” would, in this case, require account to be taken of the fact that, when the person who posts the link “does not pursue a profit”, he/she “does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder” (paragraph 47).

The genuine, assumed or presumed knowledge of this unauthorised posting thus becomes the cornerstone of the ruling, and another condition of the communication to the public.

**The addition of a new condition: Knowledge of the illegal nature**

In order to provide a legal ‘cover’ for the solution and to make it appear consistent, the Court attempted to link it to statements contained in prior rulings.

It was impossible to insert the new condition on the concept of the public, as this has nothing to do with the knowledge of the illegal nature of the posting on the source website. The Court therefore made the addition at the stage of defining the act of communication.

In order to do so, it had to re-establish a definition which, unlike the Svensson judgment, did not attempt to interpret the act objectively (i.e. “offering users of a website “direct access to works”), but rather included a significant dimension of intent.

The Court found the correct wording in the Del Corso judgment: The act of communication was based on an intervention “in full knowledge of the consequences of its action, to give access to a work”. Five words simply needed to be added to achieve the desired wording: “(...) to give access to a work illegally posted on the internet”.

Another backwards step was also required. As the Court wished to use the concept of the ‘profit-making nature’, as indicated by paragraph 47 of the judgment, it had to be reinvested with its full effect, following a weakening of the concept in the Reha Training judgment where the criterion was no longer required in order to assess whether there was an act of communication to the public, but only “for the purpose of determining any remuneration”.

This is why, in paragraph 38, it states that “that it is relevant that a ‘communication’, within the meaning of Article 3(1) of Directive 2001/29, is of a profit-making nature”, together with a reference to the Premier League, Del Corso and PPL judgments.

The Court had thus laid all of the foundations enabling it to define, based on the new criterion of the knowledge of the illegal nature, a principle, an exception and a presumption, which constitute the
new system to be applied to links pointing to a work which has been illegally made available on the source website and is freely-available on that website.

**The new system**

(a) **The principle**: The provision of a link to a work which has been illegally made available on the source website and which is freely-accessible on that website is not an act of communication to the public:

“Indeed”, the link poster “does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet. In addition, where the work in question was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even the absence of that intervention”\(^\text{37}\) (paragraph 48).

(b) **The exception**: Should it be established that the link poster "knew or ought to have known" that the resource (the file of the work) had been illegally posted online on the target website, or if the link is able to "circumvent the restrictions" taken by said website "to restrict the public’s access to its own subscribers", "it is necessary to consider that the provision of that link constitutes a ‘communication to the public’":

“In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29” (paragraph 49).

“The same applies in the event that that link allows users of the website on which it is posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public’s access to its own subscribers, the posting of such a link then constituting a deliberate intervention without which those users could not benefit from the works broadcast” (paragraph 50).

(c) **The presumption**: When the posting of a hyperlink is carried out for profit “it must be presumed that the link was posted in full knowledge of the protected nature of the work or subject-matter and of the possible lack of consent to publication on the internet”. This presumption is rebuttable.

“Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that

\(^{37}\) Note the clumsiness of the second sentence. Indeed, it purely and simply rehashes the Advocate General’s argument in which he deduces that there is no act of communication to the public in the case (such as that in question) where the work is freely-accessible on the source website, whether with or without the rightholder’s authorisation, and, in the case of an illegal posting, whether or not the link poster is aware of such illegality. In other words, this sentence purely and simply shatters the Court’s construction.
posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29” (paragraph 51).

The Court deems that this construction “provides the high level of protection for authors sought by [that] directive” since they “may act not only against the initial publication of their work on a website, but also against any person posting for profit a hyperlink to the work illegally published on that website and, under the conditions set out in paragraphs 49 and 50 of the present judgment [i.e. subject to proof of the link poster’s knowledge of the illegal nature] against persons having posted such links without pursuing financial gain.

In the case in point, there is little doubt of the profit-making nature of the link published to the disputed photos on the website operated by GS Media, nor of this operator’s knowledge of the illegal nature of the posting of those photos.

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38 The reference to the ‘knowledge of the protected nature of that work’ is difficult to comprehend, and thankfully does not appear in the previous paragraphs of the judgment. One would dare to hope that it is simply an unfortunate slip of the pen and not an obligation for rightholders to prove the user’s knowledge of the protected nature of a work.
1) The Berne Convention is an indirect part of the legal order of the European Union

A) The EU is not a party to the Convention

Pursuant to Article 216 of the TFEU, “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”. This provision has served as a legal basis for the application and primacy of international conventions to secondary legislation. This legal basis was added to by another provision, i.e. Article 3(5) of the TEU. This Article enables a basis to be provided for the legal authority of international law, without taking the type of law into account, thereby exceeding the scope of Article 216 of the TFEU. Therefore, even though the Union is not a signatory of certain international commitments, it must observe those which are the general interest, specifically because they support peace and world security. Similarly, the Union must observe international custom.

And yet, the Berne Convention cannot be classified as the type of convention which supports world security. It should therefore not, in theory, have a legal effect on the order of the European Union. However, in the case of the Berne Convention this solution must be set aside, due to the indirect legal effect that it acquires through other international provisions.

A) The EU is indirectly bound by the Convention

Although not a signatory to the Berne Convention, it appears that the EU should still be bound to comply with it under the provisions of other conventions which are binding upon it. There are two conventions which form part of the legal order of the European Union and refer to the Berne Convention. The first of these is the WIPO Copyright Treaty (WCT), which was signed on 20 December 1996 and ratified on 14 December 2009. This Convention came into force on 14 March 2010. Article 1(4) of the WCT Treaty stipulates that: “Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention”. The second is the Marrakesh Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Article 9 of which specifies that “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto”. These conventions form part of the legal order of the European Union and

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1 CJEU, Gde ch., C-366/10, 21 December 2011, Air Transport Association of America et al., I-13755. The EU has the objective of contributing to “the strict observance and the development of international law” (Article 3 (5) TEU), and to promoting “respect for the principles of the United Nations Charter and international law” in the rest of the world (Article 21(1) para 1 TEU); it is subject to international law (Article 47 TEU).

2 This is the case for example for UN law. The EU is not a UN signatory but is Member States are: Kadi case.

3 CJEU, Gde ch., C-366/10, 21 December 2011, Air Transport Association of America et al., I-13755.

4 Same procedure for the WIPO Performances and Phonograms Treaty (WPPT).
must therefore be complied with by the European institutions and by any secondary legislation which they prepare\(^5\).

Therefore, the Berne Convention produces indirect effects within the Union, which also cover the Court of Justice\(^6\). These effects do not stem from the Convention itself, but from the international agreements which refer to it and which the Union has ratified. Therefore, the acquired authority of the Berne Convention stems from the authority which is specific to these conventions. And yet, due to the legal characteristics of these conventions, this authority appears to be limited in its current form.

II) The status of the Berne Convention is limited in the case of disputes

A) Rejection of direct effect

In addition to the legal authority in principle acquired by the conventions which duly enter into force in the Union’s legal order, there is the question of their effectiveness in the case of disputes. Indeed, the operative nature of international rules laid down in conventions depends on their characteristics and in particular their direct effect.

And yet, in the case of the conventions which refer to the Berne Convention, the Court seems to have ruled in favour of there being no direct effect. Firstly, the Marrakesh Agreement has the legal status of WTO law, and therefore has no direct effect. Therefore, it cannot be cited before the Court of Justice in order to challenge the legality of the European Union’s secondary legislation\(^7\). On the same basis, it is not possible to cite the incompatibility of an EU rule with certain WTO rules\(^8\). For the Court, the fact that the Dispute Settlement Body concluded that EU law and WTO law were incompatible has no impact on this solution, and the legal ground drawn from a violation of WTO law is therefore inoperative\(^9\). On the other hand, if there is no secondary legislation, national courts are free to rule on whether the TRIPS Agreements have a direct effect or not: They may therefore allow litigants to cite these Agreements against national provisions with no link to EU law\(^10\). The solution is also the same for the WIPO Performances and Phonograms Treaty (WPPT), the Court having rejected any direct effect. They cannot be cited in order to challenge an act under secondary legislation. In this case, only the interpretation would be enforceable\(^11\). Finally, as regards the WIPO Copyright Treaty (WCT), it is likely that the Court will continue to apply its own case law and reject any direct effect of this Treaty.

The rejection of the direct effect relativizes the authority which the international conventions usually have in the legal order, as these conventions no longer apply to disputes about legality, either before the Court of Justice or the national judge. From this standpoint, any liberties which the European institutions take as regards the Berne Convention when preparing and interpreting secondary legislation should not have any direct consequences. That said, even stripped of its direct effect, the Berne Convention should be able to acquire a relative legal scope and thus guide the Court of Justice’s interpretations.

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\(^5\) CJEC, 30 April 1974, *Haegeeman*, case 181/73.


\(^8\) CJEC, 1 March 2005, *Van Pary*, case C-377/02.


B) The existence of indirect legal effects.

1) Consistent interpretation

The consistent interpretation obligation seems to be able to deploy effects in both directions as regards the European institutions. Firstly, the Court of Justice must arrive at an interpretation of the secondary legislation which is compatible with international law (this requires a link which is simply compatible rather than strictly compliant). It was therefore able to rule that “Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community”\(^\text{12}\). Moreover, the recitals of Directive 2001/29 state that one of its objectives is indeed to implement the obligations which are set out by the international instruments for copyright and related rights protection. The Court appears to properly interpret the Directive, and in particular the concept of ‘communication to the public’ in the light of the Berne Convention. It even cites the ‘guide to the interpretation’ of this Convention\(^\text{13}\).

Secondly, this obligation also includes the duty of the European institutions not to hinder the Member States’ obligations within the meaning of the Convention\(^\text{14}\).

2) Compliance with the principle of effectiveness and the autonomy of EU law

For the Court of Justice, the consistent interpretation obligation is not absolute and must be set aside where the principle of the effectiveness of EU law so dictates. The primacy and autonomy of EU law explains this caution in applying case law. Therefore, for the Court of Justice, the provisions of secondary legislation must be interpreted in the light of international conventions only “as far as is possible”\(^\text{15}\). Thus, the Court remains in charge of its own interpretation, and can distance itself from the convention’s framework as required by the objectives of European policies and the acts which underpin these policies.

The Nils Svensson case which the CJEU ruled on on 13 February 2014 illustrates this point as regards the concept of ‘communication to the public’. The Court interprets this concept by rejecting Member States’ adoption of a broader definition that the one it had provided for Directive 2001/29, Article 3(1)\(^\text{16}\), deeming that this would adversely affect the functioning of the internal market. The Court dismisses the fact that Article 20 of the Berne Convention stipulates that signatory countries may enter into ‘special agreements’ between themselves, in order to grant copyright holders more extensive rights than those set out by the Convention. It states that “when such a convention allows, but does not require, a Member State to adopt a measure which appears to be contrary to European Union law, the Member State must refrain from adopting such a measure”\(^\text{17}\). The judge highlights the fact that the objective of Directive 2001/29 would inevitably be compromised if the

\(^{12}\) CJEC, 14 July 1998, Bettati, case C-341/95; CJEC, 7 December 2006, SGAE, case C-306/05.

\(^{13}\) CJEC, 7 December 2006, SGAE, case C-306/05, para 41: “As is explained in the Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention.”


\(^{15}\) CJEC, 17 April 2008, Peek & Cloppenburg, case C-456/06.


\(^{17}\) CJEU, 9 February 2012, Luksan, case C-277/10, para 62.
concept of communication to the public were extended to include as many activities as are covered by Article 3(1) of that Directive, and that therefore Member States must refrain from using the right granted to them by Article 20 of the Berne Convention. Article 3(1) of Directive 2001/29 must therefore reasonably be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.18

This case law is in no way unexpected: It simply confirms what the authors have cited on a number of occasions, that the Court considers international law to be subject to the rationale of EU law. When it is integrated into the European legal order, international law is partially ‘Europeanized’. This Europeanization of international law appears have a basis due to the autonomous nature of EU law.19 As would be the case for a national legal order, the legal order of the EU integrates national law based on its own rules. Thus, the primacy of EU primary legislation is affirmed. This primacy serves to explain, although not to justify, the Court of Justice’s freedom of interpretation which, in turn, restricts the role of the national judge.

III) The role of the national judge

A) The EU law standpoint: the duty of loyalty

Article 351 of the TFEU sets out the principle that the conventions entered into by one or several Member States on the one hand, or one or several third countries on the other, are not affected by the provisions of the treaties. From this standpoint, EU law observes international commitments made between States prior to their entry into the EEC which is now the EU. The EU does not hinder the enforcement of these commitments.

Yet typically, this principle is tempered in the name of the effectiveness of EU law. Indeed, Member States are bound by a duty of loyalty. Therefore, should conventions not be compatible with the treaties, Member States should use any appropriate means to eliminate such incompatibilities. This involves correcting any conflicts between the prior conventions and the Community acquis in order to uphold the latter.20 States should act, a priori, without waiting for any dispute scenarios to arise. Therefore, it would seem that the national judge must favour an interpretation of international conventions which is compatible with European policy objectives.

More generally, should a national court set aside the Court’s case law in order to opt for a different interpretation of the secondary legislation, it thereby exposes itself to potential sanctions under EU law. First of all, the Commission could lodge an appeal due to a case-law interpretation

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18 CJEU, 13 February 2014, Nils Svensson, case C-466/12, paras 37 to 41.
20 CJEU, 3 March 2009, Commission vs. Austria, case C-205/06: Failure to adopt appropriate measures to eliminate the incompatibilities with the EC Treaty of an agreement entered into with a third country; CJEU, 3 March 2009, Commission vs. Sweden, case C-249/06, Rec. I-01335: Failure to adopt appropriate measures to eliminate the incompatibilities with the EC Treaty of the bilateral agreements entered into with third countries prior to accession of the Member State to the European Union.
which contradicts EU law. Secondly, a claimant could invoke the State’s liability before the national courts due to a case-law interpretation which contradicts EU law.

B) The national law standpoint: the example of administrative case law

From the standpoint of the national judge, and more specifically the administrative judge, the case law appears to be ambivalent. It is testament to the pragmatic role of the national judge, who attempts to reconcile a number of potentially conflicting requirements. Therefore, on one hand in the case of a conflict between international conventions, EU law is granted special treatment. Indeed, the solution in principle for the linking of international conventions does not work in relation to EU law. This case law is commonly interpreted as the administrative judge’s attention to the effectiveness of EU law and the observance of the Court of Justice’s role.

On the other hand, the Council of State [Conseil d’Etat] has, on occasion, when subject to referral of the issue of a conflict of an administrative act for the transposition of a precise and unconditional Directive with an international convention to which the EU is not a signatory, had to verify this administrative act against the international convention in question. Therefore, it has indirectly verified the transposed Directive and risked blocking the transposition and the enforcement of European commitments. This solution is undoubtedly based on the judge’s wish to rule on the merits of the case while observing the conventions, thus expressly confirming the validity of the transposed French law.

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21 CJEC, 9 December 2003, Commission vs. Italy case C-129/00, Rec. I-14637.
23 EC Ass., 23 December 2011, Kandyrine, req. no. 303678.
24 EC, 6 December 2012, Air Algérie, req no. 347870.
Appendix 8: List of contributors and participants in plenary meetings

Without prejudice.
In alphabetical order.

I. Representatives of professional organisations

Debora Abramowicz – Société civile des producteurs de cinéma et de télévision (PROCIREP)
Catherine Almeras – Syndicat français des artistes-interprètes (SFA)
Antoine Autier – UFC-Que choisir
Laurence Ballet – Dalloz
Valérie Barthez – Centre Français d'exploitation du droit de Copie (CFC)
Maia Bensimon – Société des gens de lettres (SGDL)
Laurent Bérard-Quélin – Fédération nationale de la presse spécialisée (FNPS)
Cécile Bernardet – Union de la presse en région (UPR)
Marie Paule Biosse-Duplan – Union des producteurs de cinéma (UPC)
Boris Bizic – Fédération nationale de la presse spécialisée (FNPS)
Léa Boccara – NRJ Group
Caroline Bonin – Société des auteurs compositeurs et éditeurs de musique (SACEM)
Denis Bouchez – Syndicat de la Presse Quotidienne Nationale (SPQN)
Christian Bruneau – Fédération nationale de la presse spécialisée (FNPS)
Alexis Cathala – M6
Jean-Frank Cavanagh – Groupement français de l’industrie de l’information (GFII)
Julien Chouraqui – The French Publishers Association (SNE)
Karine Colin – Société civile des producteurs de phonogrammes en France (SPPF)
Sylvie Courbarien – France Télévision
Sébastien Courtois – M6
Angélique Dascier – Chambre syndicale de l’édition musicale (CSDEM)
Gérard Davoust – Société des auteurs compositeurs et éditeurs de musique (SACEM)
Liliane de Carvalho – Madrigall
Agnès Defaux – Société des auteurs des arts visuels et de l'image fixe (SAIF)
Thierry Desurmont – Société des auteurs compositeurs et éditeurs de musique (SACEM)
Marie De Vivies – Orange
Rama Diagne – Groupement des éditeurs de contenus et services en ligne (GESTE)
Louise Durand – Groupement des éditeurs de contenus et services en ligne (GESTE)
Vincent Dusaugey – M6
Valentin Dutrey – Orange
Daniel Edinger - SFR CGT
David El Sayegh – Société des auteurs compositeurs et éditeurs de musique (SACEM)
Guilhem Fenieys – UFC-Que choisir
Marie-Anne Ferry-Fall – ADAGP
Xavier Filliol – GESTE
Marie-Laure Franck – Syndicat des éditeurs de la presse magazine (SEPM)
Sébastien Frapier – TF1
Benoît Galopin – Société de perception et de distribution des droits des artistes-interprètes (SPEDIDAM)
Frédéric Goldsmith – Union des producteurs de cinéma (UPC)
Caroline Guenneteau – BeIN Sports
Laurent Guiraud-Le Maresquier – The French Publishers Association (SNE)
Anne-Charlotte Jeancard – Société pour l'Administration des droits des artistes et musiciens interprètes (ADAMI)
Alexandre Lasch – Syndicat national de l'édition phonographique (SNEP)
Guillaume Leblanc – Syndicat national de l'édition phonographique (SNEP)
Marie-Christine Leclerc-Senova – Société civile des auteurs multimedia (SCAM)
Philippine Leduc – Société des éditeurs et auteurs de musique (SEAM)
Nathalie Léger – France Télévisions
Jean-Marie Le Guen – FFTélécoms
Anthony Level – TF1
Maud Levrier-Grillard – Union de la presse en région (UPR)
Thierry Maillard – Société des Auteurs dans les Arts graphiques et plastiques (ADAGP)
Laurence Marcos – Société civile des producteurs phonographiques (SCPP)
Jean-Sébastien Mariez – BSA France
Philippe Masseron – Centre Français d'exploitation du droit de Copie (CFC)
Nathalie Martin – M6
Emmanuelle Mauger – Syndicat des producteurs indépendants (SPI)
Christine Nguyen – Canal +
Marie-Pierre Ombrédanne – Groupement des éditeurs de contenus et services en ligne (GESTE)
Samir Ouachtati – Syndicat de la Presse Quotidienne Nationale (SPQN)
Sabine Ozil – Syndicat de la Presse Quotidienne Nationale (SPQN)
Geoffroy Pelletier – Société des gens de lettres (SGDL)
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(SGDL) Isabelle Ramond-Bailly – Editis
Olivia Regnier – International Federation of the Phonographic Industry
(IFPI) Christian Roblin – Société Française des Intérêts des Auteurs de
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(SCAM)
Georges Sanerot – Association de la presse d’information politique et générale
(AIPG) Marie Sellier – Vivendi
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Yvon Thiec – Eurocinema
Hubert Tilliet – Société des auteurs et compositeurs dramatiques (SACD)
Idzard van der Puyl – Société civile des producteurs de cinéma et de télévision (PROCIREP)
Denis Verrey – Société de perception et de distribution des droits des artistes-interprètes
(SPEDIDAM)

II. Representatives of public institutions

Samuel Bonnaud-Le Roux – Ministry of Culture and Communication, General Secretariat
Emilie Cariou – Ministry of Culture and Communication, Office of the Minister
Harold Codant – Bibliothèque nationale de France (BnF)
Diego Colas – Ministry of Foreign Affairs and International Development, Vice-Directorate
for European Law and International Financial Law (WTO, Investment, Economic and
Monetary Union, Intellectual Property)
Blandine Cornevin – Agence du patrimoine immatériel de l'Etat (APIE)
Anne-Elisabeth Crédeville – High Council of Literary and Artistic Property [Conseil
supérieur de la propriété littéraire et artistique] (CSPLA) Jean-François Deburnot –
Institut national de l'audiovisuel (INA)
Laura Desille – Ministry of Culture and Communication, Directorate-General of Media and
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Chantal Devillers-Sigaud – Ministry of Culture and Communication, Directorate-General of
Artistic Creation
Joris Dumazer – General Secretariat for European Affairs
(SGAE)
Mariana Duqué – Ministry of Foreign Affairs and International Development
Anne-Sophie Etienne – Ministry of Culture and Communication, Directorate-General of Media
and Cultural Industries
Nicolas Georges – Ministry of Culture and Communication, Directorate-General of Media and Cultural Industries, Books and Reading Directorate
Rémi Gimazane – Ministry of Culture and Communication, Directorate-General of Media and Cultural Industries, Books and Reading Directorate
Jean-Baptiste Gourdin – Ministry of Culture and Communication, Directorate-General of Media and Cultural Industries
Sandrine Nedellec – Ministry of Culture and Communication, General Secretariat
Chantal Rubin – Ministry of the Economy and Finance
Julie Saint-Paul – Ministry of Justice

III. Academics

Valérie-Laure Benabou, Professor at Université Aix-Marseille
Brunessen Bertrand, Professor at Université Rennes 1
Pascal Kamina, Professor at Université de Franche-Comté
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