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by

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# What does the European Commission Make of the EU Copyright *Acquis* when it Pleads before the CJEU? The Legal Service's Observations in Digital/Online Cases

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☞ Communication to the public right; Copyright; Distribution; EU law; European Commission; Online services; References to European Court; Reproduction right

## Abstract

*This is the first study entirely devoted to analysing the content of the European Commission's observations in CJEU copyright referrals, with an emphasis on the online/digital dimension. It examines the Commission's view of the EU copyright *acquis* in relation to economic rights, exceptions and limitations and enforcement, and evaluates it in light of international and EU law. The observations have been sometimes consistent with case law, but this has not been so in a number of topical instances. This article suggests that all this signals an (unsuccessful) attempt on the side of the Commission to persuade the CJEU to depart from consolidated case law, justified more by policy considerations rather than a rigorous reading of the law and earlier jurisprudence.*

## Introduction

The process of harmonisation of Member States' copyright laws at, first, the European Community (EC) and, then, the European Union (EU) level began—embryonically and somewhat informally—in the late 1970s.<sup>1</sup> However, it was with the publication of the then EC Commission's 1988 Green Paper that an actual harmonisation discourse and policy in the area of copyright clearly emerged.<sup>2</sup> Policy and legislative initiatives have been mostly—though not only—supported by an internal market rationale. Over time, a number of directives aimed at reducing or removing certain differences in the copyright laws of EU Member States have been adopted, alongside a limited number of tightly focused regulations (see Annex 1).

In parallel with the process of EC/EU harmonisation, through the system of referrals for a preliminary ruling, the role of the Court of Justice of the European Union (CJEU) has also acquired increasing centrality.

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<sup>1</sup> In 1978 Adolf Dietz published a study on copyright harmonisation which he had prepared at the request of the then Commission of the European Communities: A. Dietz, *Copyright Law in the European Community* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978).

<sup>2</sup> Commission, "Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action" COM(88) 172 final.

Two factors have contributed to this: first, over one hundred referrals have been made over the past couple of decades; second, resulting CJEU decisions have gained in significance because they have helped shape and further harmonise the EU copyright framework.

Besides the parties to the main proceedings, art.23 of the CJEU Statute<sup>3</sup> allows *inter alia* the European Commission (*rectius*: the Legal Service of the European Commission) to intervene. At times, reference to the content of the Legal Service's observations is found in the Opinion of the appointed Advocate General (AG) in a certain case and/or (sporadically) in the resulting judgment. Unfortunately, however, there is no requirement for observations filed in CJEU referrals to be public.

From the references found in AG Opinions and CJEU judgments, the impression is that, rather than following the analysis proposed by the European Commission, the CJEU has actually disregarded it when answering the questions referred in a number of topical instances. In cases concerning digital and online issues, this has been notably so with regard to the construction of economic rights, in particular (and most significantly, as it will be explained further in what follows) the right of communication to the public under art.3 of Directive 2001/29<sup>4</sup> (the InfoSoc Directive). In light of the references to the European Commission's observations as found in a series of recent cases, the conclusion appears significantly different from earlier research, which has instead suggested that “[s]ubmissions by the Commission correlate highly with the Court's rulings”.<sup>5</sup>

## Aims, limitations and methodology

By reviewing the content of the European Commission's observations in CJEU copyright referrals in cases relating to the online/digital environment (see Annex 2 for a list of the observations considered), and by dividing the analysis by relevant area (economic rights and exceptions and limitations under, mostly, the InfoSoc Directive<sup>6</sup>, and enforcement), this study seeks to detect, first, whether there is any common thread in the Legal Service's approach to the construction of copyright under EU law, in particular whether there has been a tendency towards adopting a certain, recurring reading of copyright provisions. Secondly, the study considers the observations in light of international and EU provisions, as well as case law existing at the time of the relevant intervention, in order to assess the appropriateness of the conclusions reached therein, as well as whether a remark often made with regard to the CJEU—this being that the Court would pursue its own “agenda”<sup>7</sup>—can be also formulated in relation to the Legal Service of the European Commission. This study answers the latter in the affirmative. It is maintained that, with regard to the rights of distribution and communication to the public, the observations presented by the European Commission have failed to take into proper account the existing legal framework, as interpreted by the CJEU in a number of earlier decisions. However, in other cases, e.g. exhaustion of the right of distribution,

<sup>3</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Protocol (No.3) on the Statute of the Court of Justice of the European Union.

<sup>4</sup> Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10. See e.g. Opinion of AG Melchior Wathelet in *GS Media BV v Sanoma Media Netherlands BV* (C-160/15) EU:C:2016:644; [2017] 1 C.M.L.R. 30 (*GS Media AG*) at [25]; Opinion of AG Manuel Campos Sánchez-Bordona in *Stichting Brein v Wullems* (C-527/15) EU:C:2016:938; [2017] 3 C.M.L.R.30 at [32]; Opinion of AG Maciej Szpunar in *Stichting Brein v Ziggo BV and XS4All Internet BV* (C-610/15) EU:C:2017:99 (*Ziggo AG*) at [3].

<sup>5</sup> M. Favale, M. Kretschmer and P. Torremans, “Who is Steering the Jurisprudence of the European Court of Justice? The Influence of Member State Submissions on Copyright Law” (2 February 2018), p.25, *SSRN*, <https://ssrn.com/abstract=3116703> [Accessed 16 December 2019].

<sup>6</sup> Specific database issues and issues relating to related rights (with the exception of phonogram producers' right of reproduction in art.2(c) of the InfoSoc Directive) have been left out of the scope of the analysis.

<sup>7</sup> See e.g. J. Griffiths, “Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law” (2013) 38 E.L. Rev. 65.

the Commission has provided valuable and articulated guidance. It can thus be concluded that policy considerations—occasionally, yet visibly, in contrast with initiatives taken in parallel by the European Commission's own policy arm (the Copyright Unit)—appear to have informed the content of the observations of the Legal Service in a number of referrals.

This study focuses on referrals in cases with an online/digital dimension and/or in which the underlying technology has required consideration of the appropriate application of the existing legislative framework. For the purposes of this article, “digital” refers to situations in which protected subject-matter is, or the doing of relevant acts relates to subject-matter, in a digital (intangible) format. “Online”, in turn, refers to situations in which the doing of relevant acts relates to subject-matter available on the internet.

The cases selected are those concerning: the construction of economic rights in an online/digital context, with a particular emphasis on the rights of reproduction, distribution and communication to the public; exceptions and limitations as applied in online/digital contexts; enforcement, particularly with regard to injunctions against online intermediaries and jurisdiction in online cases. Other referrals have been also considered when the subject and/or the content of the observations would help place the Legal Service's approach within a broader context.

Individual requests to access observations in the referrals listed in the Annex 2 were filed in accordance with Regulation 1049/2001<sup>8</sup> in relation to documents not already available on <https://ec.europa.eu/> [Accessed 10 January 2020]. Access to observations in pending cases was denied on grounds of protection of court proceedings as per art.4(2) therein.

All observations were read in their original language version and analysed both on their own and in parallel with relevant AG Opinions and resulting CJEU decisions. The analysis that follows focuses, in particular: (1) on issues in respect of which the position endorsed by the European Commission substantially differs from the resulting CJEU decision; or (2) areas in which the CJEU has yet to rule substantially and for which the observations of the European Commission in past cases may prove particularly valuable.

## The construction of economic rights

The construction of economic rights in online/digital contexts must take into particular account the fact that directives such as the InfoSoc Directive contain measures of full harmonisation<sup>9</sup> and mandate a “high level of protection” (Recitals 4 and 9), while also requiring that a “fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter” (Recital 31) be safeguarded.

In its observations, the Legal Service itself has highlighted these points, though the resulting approach has not always been consistent. On the one hand, it has suggested a broad reading of rights like the right of reproduction, which has even exceeded the position eventually adopted by the CJEU. On the other hand, and in contrast with the Court, the Legal Service has been wary of proposing a broad construction of the rights of distribution (with regard to the inclusion of preparatory acts within its scope) and communication to the public.

<sup>8</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

<sup>9</sup> With specific regard to the rights of reproduction and communication to the public, see—most recently—*Funke Medien NRW GmbH v Bundesrepublik Deutschland* (C-469/17) EU:C:2019:623 (*Funke Medien*) at [37]–[38] and case law cited therein.

*The right of reproduction and the concept of reproduction “in part”—from the inclusion of “insignificant” parts to the exclusion of sampling*

Article 2 of the InfoSoc Directive provides a broad description—not a definition<sup>10</sup>—of reproduction as the right of, inter alia, authors to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or *in part* of their works. The referral in *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) (*Infopaq I*) concerned the notion of reproduction “in part”. The referring court heard a case brought by a professional association of newspaper publishers against a media monitoring and analysis business that provided its customers with unauthorised reproductions of extracts of 11 words from selected newspaper articles. The issue for that court to decide was whether the reproduction of such extracts should be considered as reproduction “in part”. In its decision, the CJEU answered this question by qualifying the concept of reproduction “in part”: there is such a reproduction, which falls under the control of *the author*,<sup>11</sup> only when what is reproduced is sufficiently original in the sense that it is its author’s own intellectual creation. The CJEU noted that the concept of reproduction is intended to cover a “work”.<sup>12</sup> This notion derives from the Berne Convention, which implies (the Convention does not provide a specific definition) that subject-matter is protected if it is sufficiently original in the sense that it is an intellectual creation.<sup>13</sup> The Court observed that EU legislature has provided a limited harmonisation of the standard of originality, which is understood as the “author’s own intellectual creation”. The InfoSoc Directive is based on the same principles of the directives which set forth such understanding of originality.<sup>14</sup> According to the Court, this would be evidenced by Recitals 4, 9 to 11 and 20 in the Preamble to the InfoSoc Directive. Hence, a work is protected under the InfoSoc Directive if it is original in the sense that it is its author’s own intellectual creation.<sup>15</sup>

In its observations, the Legal Service did not provide such qualification, and submitted that the correct reading of the notion of reproduction “in part” would be one that *also* encompasses the reproduction of an “insignificant” (*insignifiante*) part of a work. This means that acts of reproduction like those at issue in the background national proceedings would constitute restricted acts that fall within the scope of art.2(a) of the InfoSoc Directive.<sup>16</sup> The European Commission further argued that such conclusion would follow from both the concept of reproduction as also envisaged in the WIPO Copyright Treaty, including the

<sup>10</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) EU:C:2009:465 (*Infopaq I*) at [31].

<sup>11</sup> The emphasis indicates what is a different treatment of the right of reproduction as owned by authors as opposed to the right of reproduction as owned by phonogram producers. In *Pelham GmbH v Hütter and Schneider-Esleben* (C-476/17) EU:C:2019:624 (*Pelham*), the Grand Chamber ruled (at [29] and [31]) that “the reproduction by a user of a sound sample, even if very short, of a phonogram must, in principle, be regarded as a reproduction ‘in part’ of that phonogram within the meaning of the provision”, insofar as said sample is not “unrecognisable to the ear”. However, unlike AG Szpunar’s Opinion (Opinion of AG Maciej Szpunar in *Pelham* (C-476/17) EU:C:2018:1002 (*Pelham* AG), in particular at [29]–[33]), in which he reasoned that a different treatment of the right of reproduction should be undertaken, the CJEU judgment does not *expressly* tackle at what conditions phonogram producers have a right to control unauthorised reproductions of their phonograms, nor does it compare authors’ right of reproduction and phonogram producers’ right of reproduction.

<sup>12</sup> *Infopaq I* (C-5/08) EU:C:2009:465 at [33].

<sup>13</sup> For a clarification of the notion of “work” under EU copyright law, see *Levola Hengelo BV v Smilde Foods BV* (C-310/17) EU:C:2018:899 at [35]–[37].

<sup>14</sup> Directive 2009/24 on the legal protection of computer programs (codified version) [2009] OJ L111/16 (Software Directive) art.1(3); Directive 96/9 [1996] OJ L77/20 (Database Directive) art.3(1); Directive 2006/116 on the term of protection of copyright and certain related rights [2006] OJ L372/12 (Term Directive) art.6.

<sup>15</sup> *Infopaq I* (C-5/08) EU:C:2009:465 at [34]–[37]. For further elaboration on the notion of “author’s own intellectual creation”, see—most recently—*Funke Medien* (C-469/17) EU:C:2019:623 at [22]–[24], and *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* (C-683-17) EU:C:2019:721 at [30]–[31], and the case law cited therein.

<sup>16</sup> Observations in *Infopaq I* (C-5/08) EU:C:2009:465 at [18]–[19].

Agreed Statement concerning art.1(4) therein,<sup>17</sup> and the *travaux* to the InfoSoc Directive. When a broad definition was proposed of the exclusive right of reproduction, certain stakeholders were concerned that a definition of reproduction as the one proposed in art.2 would likely cause problems for intermediaries and users of digital technologies. It was in view of all this that it was decided, in the context of the negotiations relating to the InfoSoc Directive, to provide an exception to the exclusive right of reproduction, so to exempt (in art.5(1)) certain temporary acts of reproduction which constitute an integral and essential part of a technical process.<sup>18</sup>

The European Commission reiterated this position in the subsequent, follow-up referral in *Infopaq International A/S v Danske Dagblades Forening* (C-302/10) (*Infopaq II*), concerning whether an automated process consisting of the scanning of newspaper articles and their conversion into a digital file followed by electronic processing of that file (as done by the defendant in the background national proceedings) would qualify for the application of the exemption for temporary copies under art.5(1) of the InfoSoc Directive. Contrary to the subsequent CJEU decision,<sup>19</sup> the Legal Service answered in the negative, holding that such temporary acts of reproduction could not constitute an “incidental [and] an integral and essential part of a technological process” if they consist of scanning press articles in their entirety so that they are turned into digital data. Holding otherwise would also be contrary to the three-step test in art.5(5) of the InfoSoc Directive, notably the requirement that exceptions and limitations to copyright do not conflict with the “normal exploitation” of a work.<sup>20</sup>

The approach taken in both *Infopaq I* and *II* was qualified in subsequent cases, also with regard to the CJEU-mandated concept of originality.<sup>21</sup> In *SAS Institute Inc v World Programming Ltd* (C-406/10), the Legal Service submitted that the “author’s own intellectual creation” standard would set a higher threshold to protection than what had been traditionally envisaged in countries such as the United Kingdom (from where the referral originated), in which—prior to *Infopaq I*—originality was considered synonymous with sufficient skill, labour or effort.<sup>22</sup> Still in its observations in that case, the Legal Service (correctly) noted that from the decision in *Infopaq I* it follows that the test of infringement under EU law is not about a “substantial taking”<sup>23</sup>, but rather about the taking of a sufficiently original part.<sup>24</sup>

Despite all this, in a recent case, *Pelham GmbH v Hütter* (C-476/17) (*Pelham*), concerning the concept of reproduction—though in the context of the right of phonogram producers to control copying of their phonograms in accordance with art.2(c) of the InfoSoc Directive—the Legal Service advised the CJEU

<sup>17</sup> Observations in *Infopaq I* (C-5/08) EU:C:2009:465 at [19].

<sup>18</sup> Observations in *Infopaq I* (C-5/08) EU:C:2009:465 at [8]–[9].

<sup>19</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-302/10) EU:C:2012:16 (*Infopaq II*) at [29]–[39].

<sup>20</sup> Observations in *Infopaq II* (C-302/10) EU:C:2012:16 at [36]–[37].

<sup>21</sup> See observations in *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (C-393/09) EU:C:2010:816 at [33]–[34].

<sup>22</sup> Observations in *SAS Institute Inc v World Programming Ltd* (C-406/10) EU:C:2012:259; [2012] 3 C.M.L.R. 4 at [60]. See further E. Rosati, *Copyright and the Court of Justice of the European Union* (Oxford: Oxford University Press, 2019), pp.179–181.

<sup>23</sup> This is formally the test under s.16 of the UK Copyright, Designs and Patents Act 1988. Cf., however, the seminal (pre-*Infopaq I*) decision of the House of Lords in *Designer Guild Ltd v Russell Williams (Textiles) Ltd* [2000] UKHL 58 (Lord Millett): “Once the judge has found that the defendants’ design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of impression, for whether the part taken is substantial must be determined by its quality rather than its quantity. It depends upon its importance to the copyright work. It does not depend upon its importance to the defendants’ work, as I have already pointed out. The pirated part is considered on its own...” See further L. Bently, B. Sherman, D. Gangjee and P. Johnson, *Intellectual Property Law*, 5th edn (Oxford: Oxford University Press, 2018), pp.204–206.

<sup>24</sup> Observations in *SAS Institute* (C-406/10) EU:C:2012:259 at [112]–[113]. In the same sense, see observations in *Football Association Premier League Ltd v QC Leisure* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) EU:C:2011:631 at [114]. Also confirming this point with specific regard to UK law, see *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch) at [43].

to rule that the said provision should be interpreted as meaning that the unauthorised reproduction of an extract of a phonogram for the purpose of using it in another phonogram (sampling) does not infringe the exclusive right of the producer of the first phonogram to authorise or prohibit the reproduction of their phonogram. The Legal Service noted that the *Infopaq I* approach would not be applicable in the case at hand, owing to the different rationale underpinning related rights (protection of the investment) as opposed to copyright: the test for infringement should not be whether what has been taken is sufficiently original, but rather whether it is such as to threaten the economic investment of the related right holder, e.g. through reduced sales. While the reproduction of a phonogram in its entirety would threaten the investment made, the same would not be true in relation to the reproduction of “a (small) part of the phonogram” (*une (petite) partie du phonogramme*).<sup>25</sup> The stance of the Legal Service in *Pelham* is at odds with its own past assessment of international and EU provisions. Since in *Infopaq I* the Legal Service suggested that even the taking of an insignificant part would fall within the scope of art.2 of the InfoSoc Directive in relation to authors’ right of reproduction, the answer to the issue of unauthorised sampling should be even more so in a case concerning phonogram producers’ right of reproduction, also considering that neither international nor EU law sets the infringement threshold at the point where the investment made by the right holder is actually threatened. As AG Szpunar noted in his Opinion, unlike works of authorship, for phonograms protection is in fact granted irrespective of their originality. In the resulting judgment, the Grand Chamber did not expressly clarify under what conditions phonogram producers have a right to control reproductions of their phonograms in the first place. The Court avoided engaging in a comparison between the right of reproduction as applied to works of authorship and the right of reproduction as applied to phonograms. This way, it avoided tackling the implications of *Infopaq I* and subsequent case law, which—instead—AG Szpunar had considered in his Opinion.<sup>26</sup> However, the judgment appears to implicitly endorse the analysis of its AG, so that phonograms are protected irrespective of their originality and right holders’ right of reproduction is not subject to a de minimis threshold. This is the case, even if the Court adopted an odd distinction between samples recognisable to the ear (which the right of reproduction would cover) and samples unrecognisable to the ear (which the right of reproduction would not cover).<sup>27</sup> The Court did not clarify how such recognisability is to be assessed and from the perspective of whom.

### **The right of distribution—exclusion of preparatory acts and unavailability of “digital” exhaustion**

Similarly to other economic rights, the CJEU has also adopted a broad understanding of what qualifies as an act of distribution. The Court has clarified that, also in light of art.6(1) of the WIPO Copyright Treaty and arts 8 and 12 of the WIPO Performances and Phonograms Treaty, the right of distribution relates to the exclusive right of authorising the making available to the public of the original and copies of a work

<sup>25</sup> Observations in *Pelham* (C-476/17) EU:C:2019:624 at [14] and [17]–[19].

<sup>26</sup> *Pelham AG* (C-476/17) EU:C:2019:624 at [28]–[30].

<sup>27</sup> *Pelham* (C-476/17) EU:C:2019:624 at [31]–[39]. As discussed further in E. Rosati, “The CJEU *Pelham* decision: only recognizable samples as acts of reproduction?” (4 August 2019), *IPKat*, <https://ipkitten.blogspot.com/2019/08/the-pelham-decision-only-recognizable.html> [Accessed 16 December 2019], the reason why the distinction between recognisable and unrecognisable samples is unconvincing is twofold. First, in relation to both types of samples, there is the taking at the very outset of an extract from a third-party phonogram. Hence, in both cases there is the doing of a restricted act. In principle, this entails the need for a licence from the relevant right holder. It should not matter what the purpose of the use (non-transformative or transformative) is to determine whether there is a reproduction or not. Secondly, it is contradictory for the decision to hold in the first place that a non-recognisable sample is not an act of reproduction, and then conduct an assessment as to whether quotation sub art.5(3)(d) of the InfoSoc Directive would nonetheless apply. The consideration of exceptions and limitations should follow a finding of prima facie liability as resulting from the unauthorised doing of a restricted act: if the Court considered that an unrecognisable sample is not an act of reproduction, then there was no need to consider exceptions and limitations.

through sale or “other transfer of ownership”. The right should be intended as encompassing a series of acts going, *at the very least*, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public.<sup>28</sup> The CJEU had the opportunity to apply this conclusion expansively, holding that both unauthorised advertisements for sale<sup>29</sup> of and storage<sup>30</sup> with a view to sell protected subject-matter fall within the scope of art.4 of the InfoSoc Directive.

Unlike the right of communication to the public, the right of distribution is subject to exhaustion following the first lawful sale or other transfer of ownership of the original or copies of a work. A question that has arisen is whether exhaustion applies indistinctly to copies obtained through the transfer of ownership of physical objects and copies obtained as a result of authorised making available of a work. The CJEU had a chance to provide a specific response with regard to the InfoSoc Directive when it decided *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet BV, Tom Kabinet Holding BV and Tom Kabinet Uitgeverij BV* (C-263/18)<sup>31</sup> (*Tom Kabinet*), and had already answered this question in the affirmative in *UsedSoft GmbH v Oracle International Corp* (C-128/11) (*UsedSoft*) in relation to the Software Directive.<sup>32</sup>

In the observations filed by the European Commission, two points in particular stand out. On the one hand, the Legal Service has advocated against the inclusion within the right of distribution of preparatory acts. On the other hand, it has consistently submitted that exhaustion would only apply to the distribution of tangible copies of protected subject-matter.

### *Preparatory acts outside the scope of the right*

*Dimensione Direct Sales Srl v Knoll International SpA* (C-516/13) (*Dimensione Direct Sales*) was a referral made in the context of litigation brought by a company trading in furniture against another company in relation to the online advertisement for sale, by the latter, of items that would infringe copyright in furniture to which the former owned the copyright. There appeared to be no evidence of actual sales of the infringing products, so the background in this case differed from *Donner* (C-5/11) and *Blomqvist v Rolex SA* (C-98/13), in which actual acts of distribution had occurred. The referring court asked the CJEU to clarify whether the scope of the right of distribution would extend to activities such as those of the defendant in the background proceedings, it being inclined to opine that such an interpretation of art.4(1) of the InfoSoc Directive would indeed be possible. The national court considered that the earlier judgment in *Peek & Cloppenburg KG v Cassina SpA* (C-456/06)<sup>33</sup> would not preclude this conclusion: although in that case the CJEU had held that the concept of “distribution to the public” covers only acts which entail a transfer

<sup>28</sup> *Criminal Proceedings against Donner* (C-5/11) EU:C:2012:370 (*Donner*) at [26]; *Blomqvist v Rolex SA and Manufacture des Montres Rolex SA* (C-98/13) EU:C:2014:55 (*Blomqvist*) at [28].

<sup>29</sup> *Dimensione Direct Sales Srl v Knoll International SpA* (C-516/13) EU:C:2015:315 (*Dimensione Direct Sales*) at [27].

<sup>30</sup> *Criminal Proceedings against Syed* (C-572/17) EU:C:2018:1033 (*Syed*) at [30].

<sup>31</sup> The question of digital exhaustion under the InfoSoc Directive had been already raised in the referral in *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) EU:C:2016:856. However, both the Advocate General (Opinion of AG Maciej Szpunar in *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) EU:C:2016:459 at [82]) and the Court (*Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) EU:C:2016:856 (*Vereniging Openbare Bibliotheken*) at [73]) considered that an answer to such question would not be necessary in the case at hand, with the result that no response was provided. The Legal Service opined in the same sense in its observations: see at [62]–[63].

<sup>32</sup> *UsedSoft GmbH v Oracle International Corp* (C-128/11) EU:C:2012:407; [2012] 3 C.M.L.R. 44 (*UsedSoft*), subsequently confirmed in *Criminal Proceedings against Ranks* (C-166/15) EU:C:2016:762 (*Ranks*). In its observations in the latter, the European Commission advised the Court to rule that the Software Directive must be interpreted as meaning that the right holder's exclusive rights of reproduction and distribution are not infringed by the sale of back-up copies of computer programs.

<sup>33</sup> *Peek & Cloppenburg KG v Cassina SpA* (C-456/06) EU:C:2008:232 (*Peek & Cloppenburg*).



of ownership, the grounds that it adopted in this regard could not be interpreted as meaning that the right of distribution does not cover any act preparatory to such a transfer.<sup>34</sup>

In its observations, the European Commission submitted that the advertisement for sale of protected subject-matter may not be considered an act of distribution. Such a conclusion would follow from existing case law and would not be at odds with the need to guarantee a “high level of protection”.<sup>35</sup> In addition, in light of the principle of legal certainty, it would be “too vague a criterion” (*critère trop vague*) to consider a simple offer for sale as tantamount to distribution. In this sense, whether there is a distribution is something that must be assessed by employing “objective criteria” (*critères objectifs*).<sup>36</sup>

As mentioned, the CJEU held differently. Despite this, and similarly to what has happened in other areas, the Legal Service considered that the CJEU should not follow its holding in *Dimensione Direct Sales* when a new referral, *Criminal Proceedings against Syed* (C-572/17) (*Syed*), was made, concerning, once again, preparatory acts to an act of distribution. Although this referral asked whether the physical storage of infringing goods could fall within the scope of the right of distribution,<sup>37</sup> it is worth highlighting that—similarly to other areas (most notably the right of communication to the public)—the European Commission was concerned that the assessment of liability might be affected by considerations relating to the subjective state of the defendant. In its observations, it argued that *Dimensione Direct Sales* would suggest that goods stored at premises other than the defendant’s infringe the right holder’s right of distribution *only if* it is demonstrated that they are being offered for sale or advertised to consumers. That decision would not go as far as suggesting that goods held in storage could be assimilated to those actually offered for sale in a shop.<sup>38</sup> The European Commission proposed the CJEU to rule that no such assimilation would be possible without an undue scrutiny of the subjective intention of the defendant. Instead, a series of seemingly cumulative and objective criteria should be considered, including: the identity of the goods with others that are protected by copyright and displayed for sale in the shop; a physical, financial or administrative link between the warehouse and the shop; and the regular supply of the shop with goods from the warehouse.<sup>39</sup>

The CJEU did not follow the European Commission’s recommendations, nor did AG Campos Sánchez-Bordona, who highlighted how the intention to sell could be inferred from some products being offered in the shop and other similar products being located, in turn, in the warehouses. The AG also criticised the test proposed by the Commission, finding it “overly rigid”, “too formalistic”, and “shedding little light” on how a link (whether physical, financial or administrative) between shop and warehouse could be established. In sum, things would be much simpler than that which the European Commission considered: given the close link between the clothing that the defendant sold in his shop and the clothing which he stored in the warehouses, and also his status as a trader, “storage formed part of the series of acts leading to the sale. In summary, the right to prohibit or authorise distribution should be extended to those products, as a right inherent in the copyright”.<sup>40</sup> The holding of the AG and the Court appears correct, not only in light of earlier case law, but also on consideration of the level of protection afforded to, e.g., trade mark proprietors in identical situations to those at issue in *Syed*.<sup>41</sup>

<sup>34</sup> On the reasons for the referral provided by the *Bundesgerichtshof* in its order for reference, see Opinion of AG Pedro Cruz-Villalón in *Dimensione Direct Sales Srl v Knoll International SpA* EU:C:2014:2415 at [11]–[14].

<sup>35</sup> Observations in *Dimensione Direct Sales* (C-516/13) EU:C:2014:2415 at [8]–[10].

<sup>36</sup> Observations in *Dimensione Direct Sales* (C-516/13) EU:C:2014:2415 at [14].

<sup>37</sup> As such, *Syed* is not a case with a specific digital/online dimension.

<sup>38</sup> Observations in *Syed* (C-572/17) EU:C:2018:1033 at [10]–[11].

<sup>39</sup> Observations in *Syed* (C-572/17) EU:C:2018:1033 at [14].

<sup>40</sup> Opinion of AG Manuel Campos Sánchez-Bordona in *Criminal Proceedings against Syed* (C-572/17) EU:C:2018:796 at [59]–[60].

<sup>41</sup> See art.10(3)(b) of Directive 2015/2436 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1; and art.9(3)(b) of Regulation 2017/1001 on the European Union trade mark [2017] OJ L154/1.

### *Lack of “digital” exhaustion*

An issue in respect of which the European Commission has displayed an articulated reasoning is exhaustion or, rather, lack thereof in a digital context. The first opportunity for the CJEU to tackle the issue of exhaustion in relation to subject-matter in digital format arose in *UsedSoft*, a case concerning the Software—rather than the InfoSoc—Directive. This referral related to the conditions that must be satisfied so that the authorised downloading from the internet of a copy of a computer program gives rise to exhaustion of the right of distribution of that copy under art.4(2) of the Software Directive. In its decision, the CJEU held that this would be the case when the contractual relationship between the copyright holder and its customer is to be regarded as a “first sale”. Also a licensing agreement—despite its *nomen juris*—might be treated as a “sale”, insofar as the relevant conditions of a sale contract are satisfied.

In its observations, the Legal Service excluded, instead, that exhaustion would be even possible in relation to subject-matter in a digital format. In so doing, the Commission also considered exhaustion under art.4(2) of the InfoSoc Directive and explained why “digital” exhaustion is not allowed under either directive. On the one hand, art.4(1)(c) of the Software Directive refers to “any form of distribution to the public”; on the other hand, an interpretation based solely on that wording would fail to consider that the InfoSoc Directive contains a provision—art.3(1)—that is also applicable to computer programs. If the Software Directive had included online distributions, then the InfoSoc Directive did not change that. However, EU legislature “clearly” (*manifestement*) considered that this was not the case because, when it adopted the InfoSoc Directive, it deemed it necessary to introduce a right of communication to the public. In other words, the right of distribution—in both directives—is only concerned with analogue distribution, while the right of communication to the public concerns online distribution. This conclusion is supported by Recital 28 in the Preamble to the InfoSoc Directive and also art.4 therein, read in combination with art.8 of the WIPO Copyright Treaty and the Agreed Statements concerning arts 6 and 7 of the WIPO Copyright Treaty, the transposition of which into the EU legal order was one of the objectives underlying adoption of the InfoSoc Directive (Recital 15). This is further evidenced by consideration that, when the Software Directive was first adopted in 1991 (Directive 91/250<sup>42</sup>), the internet, insofar as what was at issue in *UsedSoft* is concerned, was “unknown” (*inconnu*) and not clearly understood. This is also a further reason why the InfoSoc Directive was introduced.<sup>43</sup> Accordingly, if art.4(1)(c) of the Software Directive does not apply to digital distribution, neither does the principle in art.4(2) therein.<sup>44</sup>

The European Commission confirmed this approach in a subsequent referral which, however, did not concern subject-matter in digital format: *Art & Allposters International BV v Stichting Pictoright (C-419/13) (Art & Allposters)*. The background national proceedings related, in fact, to the making and selling, by the defendant, of canvas realised through the transfer—thanks to a chemical process—of images reproduced in posters that it had lawfully acquired. The CJEU had been asked if art.4 of the InfoSoc Directive governs the answer to the question whether the right of distribution of the copyright holder may be exercised with regard to the reproduction of a copyright work which has been sold and delivered within the European Economic Area by or with the consent of the right holder, where that reproduction has subsequently undergone an alteration in respect of its form and is again brought into circulation in that form. Like AG Cruz Villalón in his Opinion, the CJEU also relied on the distinction between a work (*corpus mysticum*)

On this, see *Coty Germany GmbH v Amazon Services Europe Sàrl, Amazon FC Graben GmbH, Amazon Europe Core Sàrl and Amazon EU Sàrl (C-567/18)* (in progress), asking the CJEU whether a person who, on behalf of a third party, stores goods which infringe trade mark rights, without having knowledge of that infringement, stocks those goods for the purpose of offering them or putting them on the market, if it is not that person himself but rather the third party alone which intends to offer the goods or put them on the market.

<sup>42</sup> Council Directive 91/250 on the legal protection of computer programs [1991] OJ L122/42.

<sup>43</sup> Observations in *UsedSoft* (C-128/11) EU:C:2012:407 at [34].

<sup>44</sup> Observations in *UsedSoft* (C-128/11) EU:C:2012:407 at [46].

and its tangible support (*corpus mechanicum*) to conclude that exhaustion only applies to the latter. The Court identified the purpose of the right of distribution within art.4 of the InfoSoc Directive as being only to encompass a work or a tangible copy thereof. This would be so because art.4(2) refers to the first sale or other transfer of ownership of “that object”.<sup>45</sup> According to the CJEU, this conclusion could be inferred from Recital 28, in the sense that EU legislature, by using the terms “tangible article” and “that object”, intended to give authors control over the initial marketing in the EU of each tangible object incorporating their intellectual creation.<sup>46</sup> As such, exhaustion of the right of distribution would only apply to the tangible copy of a work. This interpretation would be supported by international law, notably the WIPO Copyright Treaty.

In its observations, the European Commission had reached the same conclusion, also noting that this is an area that is fully harmonised at the EU level, so that individual Member States cannot alter the EU exhaustion rules.<sup>47</sup> Exhaustion only applies to works “incorporated in a tangible object” (*incorporée à un bien matériel*). This is confirmed by: the wording of Recital 28 and art.4; legislative history concerning the drafting of the InfoSoc Directive; international law, notably the Agreed Statements to art.6 of the WIPO Copyright Treaty; CJEU case law<sup>48</sup>; and the aim of the InfoSoc Directive to provide an appropriate level of protection.<sup>49</sup>

As mentioned, in a recent case (*Tom Kabinet*), the CJEU was required to weigh on the issue of “digital” exhaustion under the InfoSoc Directive. This referral was made in the context of long-standing litigation concerning the activities of a business that trades in “second-hand” e-books. It sought clarification of the meaning of “any form of distribution to the public of the original of a work or a copy thereof by sale or otherwise” in art.4(1) of the InfoSoc Directive, in particular whether it encompasses the making available remotely, by means of downloading for use for an unlimited period of time, of an e-book by paying a price that the copyright holder receives as remuneration and which corresponds to the economic value of that copy of the work. The assessment provided by the European Commission in its observations in *UsedSoft* and *Art & Allposters International* appears correct from both an international and EU standpoint. Like AG Szpunar in his Opinion, the CJEU ruled the defendant's activity would not benefit from the exhaustion of the right distribution, in that it would qualify as an act of communication to the public, in respect of which exhaustion is expressly precluded by art.3(3) of the InfoSoc Directive.<sup>50</sup>

### **Communication/making available to the public—persistent misalignment regarding construction of the right and resulting liability**

The construction of the right of communication/making available to the public is admittedly the most significant development that has occurred in relation to online cases over the past few years, also due to the high number of referrals (over 20) made to the CJEU since the 2006 decision in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05) (*SGAE*).

The wording of art.3(1) of the InfoSoc Directive is derived from art.8 of the WIPO Copyright Treaty. Similarly to the concepts of “reproduction” in art.2 and “distribution” in art.4 of that directive, it defines neither the concept of “communication to the public” nor that of “making available to the public”. By

<sup>45</sup> *Art & Allposters International BV v Stichting Pictoright* (C-419/13) EU:C:2015:27 (*Art & Allposters*) at [34].

<sup>46</sup> *Art & Allposters* (C-419/13) EU:C:2015:27 at [37].

<sup>47</sup> Observations in *Art & Allposters* (C-419/13) EU:C:2015:27 at [65].

<sup>48</sup> Notably: *Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc. v Laserdisken* (C-61/97) EU:C:1998:422; *Peek & Cloppenburg*; and *Laserdisken ApS v Kulturministeriet* (C-479/04) EU:C:2006:549.

<sup>49</sup> Observations in *Art & Allposters* (C-419/13) EU:C:2015:27 at [50]–[57].

<sup>50</sup> *Tom Kabinet* (C-263/18) EU:C:2019:1111 at [72].

relying on international sources and a purpose-driven interpretation of the InfoSoc Directive as legislation aimed at guaranteeing a “high level of protection”, the CJEU has construed the right in art.3(1) broadly and in such a way as to encompass, in certain conditions, different types of acts, including the making available of TV and radio sets in a number of contexts,<sup>51</sup> linking to protected content,<sup>52</sup> the provision of certain types of set-up boxes,<sup>53</sup> indexing activities by a platform,<sup>54</sup> and cloud-based recording services.<sup>55</sup>

In its rich body of case law, the CJEU has consistently stated that the essential requirements of art.3(1) are an “act of communication”, directed to a “public”. In addition, the CJEU has highlighted the importance of considering additional criteria, *including* subjective ones, which are not autonomous and are interdependent, and may—in different situations—be present to widely varying degrees.<sup>56</sup>

As regards the concept of “act of communication”, case law is now solidly oriented in the sense of requiring the mere making available of a copyright work—not also its actual transmission<sup>57</sup>—in such a way that the persons forming the public may access it, irrespective of whether they avail themselves of such opportunity.<sup>58</sup> Although the making available of a work suffices, consideration must be taken of whether there has been also a necessary and deliberate intervention on the side of the user/defendant, without which third parties could not access the work at issue. More specifically, the user performs an act of communication when it intervenes—in full knowledge of the consequences of its action—to give access to a protected work to its customers. It does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the work.<sup>59</sup> Furthermore, the Court has considered that also an intervention, which *facilitates* access to unlicensed content that would be otherwise more difficult to locate, qualifies as an essential/indispensable (*incontournable*) intervention.<sup>60</sup>

<sup>51</sup> *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05) EU:C:2006:764 (SGAE); *OSA—Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* (C-351/12) EU:C:2014:110 (OSA); *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* (C-117/15) EU:C:2016:379 (Reha Training).

<sup>52</sup> *Svensson v Retriever Sverige AB* (C-466/12) EU:C:2014:76 (Svensson); *BestWater International GmbH v Mebes and Potsch* (C-348/13) EU:C:2014:2315 (BestWater); *GS Media BV v Sanoma Media Netherlands BV* (C-160/15) EU:C:2016:644 (GS Media).

<sup>53</sup> *Stichting Brein v Willems* (C-527/15) EU:C:2017:300 (Filmspeler).

<sup>54</sup> *Stichting Brein v Ziggo BV and XS4All Internet BV* (C-610/15) EU:C:2017:456 (Ziggo).

<sup>55</sup> *VCAST Ltd v RTI SpA* (C-265/16) EU:C:2017:913 (VCAST).

<sup>56</sup> *Società Consortile Fonografici (SCF) v Marco Del Corso* (C-135/10) EU:C:2012:140 (SCF) at [79]; *Phonographic Performance (Ireland) Ltd v Ireland and Attorney General* (C-162/10) EU:C:2012:141 (Phonographic Performance (Ireland)) at [30]; *Reha Training* (C-117/15) EU:C:2016:379 at [35]; *GS Media* (C-160/15) EU:C:2016:644 at [34]; *Filmspeler* (C-527/15) EU:C:2017:300 at [30]; and *Stichting Brein v Ziggo* (C-610/15) EU:C:2017:456 at [25].

<sup>57</sup> This appeared to be the case in: *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)* (C-283/10) EU:C:2011:772 at [40]; *Football Association Premier League v QC Leisure* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) EU:C:2011:631 (FAPL) at [190], [193], and [207]; *OSA* (C-351/12) EU:C:2014:110 at [25]; *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)* (C-325/14) EU:C:2015:764 (SBS Belgium) at [16]; and *Reha Training* (C-117/15) EU:C:2016:379 at [38].

<sup>58</sup> *SGAE* (C-306/05) EU:C:2006:764 at [43]; *Svensson* (C-466/12) EU:C:2014:76 at [27]; *Filmspeler* (C-527/15) EU:C:2017:300 at [36]; *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* (C-138/16) EU:C:2017:218 (AKM) at [20]; *Ziggo* (C-610/15) EU:C:2017:456 at [19]; *Land Nordrhein-Westfalen v Renckhoff* (C-161/17) EU:C:2018:634 (Renckhoff) at [20].

<sup>59</sup> *SGAE* (C-306/05) EU:C:2006:764 at [42]; *FAPL* (C-429/08) EU:C:2011:631 at [194]–[195]; *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) and *Airfield NV v Agicoa Belgium BVBA* (C-432/09) EU:C:2011:648 (Airfield) at [79]; *SCF* (C-135/10) EU:C:2012:140 at [82]; *Phonographic Performance (Ireland)* (C-162/10) EU:C:2012:141 at [31]; *Reha Training* (C-117/15) EU:C:2016:379 at [46]; *GS Media* (C-160/15) EU:C:2016:644 at [35]; *Filmspeler* (C-527/15) EU:C:2017:300 at [31]; *Ziggo* (C-610/15) EU:C:2017:456 at [26].

<sup>60</sup> See e.g. *Filmspeler* (C-527/15) EU:C:2017:300 at [41]; *Ziggo* (C-610/15) EU:C:2017:456 at [36].

The concept of “public”, which is the other key requirement for the application of art.3 of the InfoSoc Directive, is that of an indeterminate and fairly large (above *de minimis*) number of people.<sup>61</sup> In the case of a communication concerning the same works as those covered by the initial communication and made by the same technical means (e.g. the internet), the communication must be directed to a “new” public.<sup>62</sup>

As mentioned, in addition to the requirements of an act of communication directed to a public, the Court has also considered—from time to time—other non-autonomous and interdependent criteria (often of a subjective nature), necessary to undertake an individual assessment of the case at issue. Such criteria, whose application depends on the relevant circumstances, must be applied both individually and in their interaction with one another.<sup>63</sup> In *GS Media*, the Court considered both the “profit-making” character of the communication at issue and the knowledge, by the link provider, of the unlicensed character of the content linked to, in order to determine its potential liability for the posting of links to unlicensed content. With regard to the former, the Court adopted a rebuttable presumption that,

“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.”<sup>64</sup>

Turning to the latter, knowledge that the content linked to is unlicensed might be sufficient to establish *prima facie* liability also of link providers acting without a profit-making intention.<sup>65</sup> Reliance on subjective criteria has also occurred more recently, in relation to the primary liability of platform operators in relation to unauthorised acts of communication to the public done by users. In its 2017 judgment in *Ziggo*, the CJEU held that the operators of a platform that makes available to the public links to third-party uploaded copyright content and provides functions such as indexing, categorisation, deletion and filtering of content may be liable for copyright infringement, jointly with users of that platform. For a finding of liability, it is not required that the operators possess actual knowledge of the infringing character of the content uploaded by users. Such knowledge may be in fact also of a constructive type (“could not be unaware”).<sup>66</sup>

<sup>61</sup> *SGAE* (C-306/05) EU:C:2006:764 at [38]; *SCF* (C-135/10) EU:C:2012:140 at [84]; *Phonographic Performance (Ireland)* (C-162/10) EU:C:2012:141 at [33]; *ITV Broadcasting Ltd v TVCatchUp Ltd* (C-607/11) EU:C:2013:147 (*TVCatchUp I*) at [32]; *Svensson* (C-466/12) EU:C:2014:76 at [21]; *OSA* (C-351/12) EU:C:2014:110 at [27]; *Sociedade Portuguesa de Autores CRL v Ministério Público* (C-151/15) EU:C:2015:468 at [19]; *SBS Belgium* (C-325/14) EU:C:2015:764 at [21]; *GS Media* (C-160/15) EU:C:2016:644 at [36]; *Filmspeler* (C-527/15) EU:C:2017:300 at [45]; *AKM* (C-138/16) EU:C:2017:218 at [24]; *Ziggo* (C-610/15) EU:C:2017:456 at [27] and [42].

<sup>62</sup> *SGAE* (C-306/05) EU:C:2006:764 at [40] and [42]; *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai* (C-136/09) EU:C:2010:151 at [39]; *FAPL* (C-429/08) EU:C:2011:631 at [197]; *Airfield* (C-432/09) EU:C:2011:648 at [72]; *Svensson* (C-466/12) EU:C:2014:76 at [24]; *OSA* (C-351/12) EU:C:2014:110 at [31]; *Reha Training* (C-117/15) EU:C:2016:379 at [45]; *GS Media* (C-160/15) EU:C:2016:644 at [37]; *Filmspeler* (C-527/15) EU:C:2017:300 at [47]; *Ziggo* (C-610/15) EU:C:2017:456 at [28]; *Renckhoff* (C-161/17) EU:C:2018:634 at [24].

<sup>63</sup> *GS Media* (C-160/15) EU:C:2016:644 at [34], referring to *SCF* (C-135/10) EU:C:2012:140 at [79]; *Phonographic Performance (Ireland)* (C-162/10) EU:C:2012:141 at [30]; and *Reha Training* (C-117/15) EU:C:2016:379 at [35].

<sup>64</sup> *GS Media* (C-160/15) EU:C:2016:644 at [51].

<sup>65</sup> *GS Media* (C-160/15) EU:C:2016:644 at [49].

<sup>66</sup> *Ziggo* (C-610/15) EU:C:2017:456 at [45].

### *Main points of (reiterated) disagreement between the European Commission and the CJEU*

Five key points of departure from both pre-existing and subsequent CJEU decisions stand out in the European Commission's observations in online cases relating to the right of communication/making available to the public:

- First, the Legal Service has repeatedly insisted—until very recently<sup>67</sup>—on the need for an act of communication to entail an actual transmission/retransmission, not just the making available of protected subject-matter.<sup>68</sup>
- As a result, and as a second point, the Legal Service has reiterated on multiple occasions that linking to protected content would not fall within the scope of art.3 of the InfoSoc Directive.
- Thirdly, similarly to other economic rights (notably the right of distribution within art.4 of the InfoSoc Directive), the Legal Service has warned against and rejected the idea that subjective elements relating to the defendant's behaviour should be taken into account in the construction of primary/direct liability for copyright infringement, out of fear that this would unduly broaden the scope of the right. It has thus suggested that the CJEU hold that, to determine whether there is an act of communication to the public, only objective elements should be considered, not also subjective ones.
- In so doing, as a fourth point, the Legal Service has rejected the idea that facilitating third-party access to unlicensed content would qualify as an act of communication to the public. This would be so on consideration that the traditional distinction between (harmonised) primary/direct liability for copyright infringement and (unharmonised) secondary/accessory liability for copyright infringement would be otherwise blurred, if not even removed *tout court*.
- As a result, and as final point, the European Commission has advocated against the consideration of certain types of liability, e.g. that of platform operators, as primary/direct liability and suggested, instead, that the appropriate treatment would be under (unharmonised) national secondary/accessory liability regimes.

The points above will be elaborated further in what follows with regard to two situations that have dominated case law on communication/making available to the public over the internet: unauthorised linking to protected subject matter and facilitation of third-party infringements.

<sup>67</sup>In its observations in *Renckhoff* (C-161/17) EU:C:2018:634, the Legal Service acknowledged that a transmission is not required: see at [9]. It also advised the Court to rule that, in an instance like the one at issue in the background proceedings, the legal treatment should be different from *GS Media*. An approach like the one that the CJEU adopted in that case would lead to an exclusion of liability because the defendants pursued no profit and were unaware that the content reproduced and communicated was unlicensed. A different treatment would be also justified on consideration that the technical process at issue would be different from linking (the work was first copied on a server) and the rightholder had a different type of control on the relevant subject matter. In its recent observations in *Tom Kabinet*, the Legal Service also submitted that “the mere making available, that is to say, the fact of offering the copy for resale, constitutes the act of communication”: *Tom Kabinet AG* (C-263/18) EU:C:2019:697 at [42].

<sup>68</sup>See e.g. observations in: *Svensson* (C-466/12) EU:C:2014:76 at [16]–[23]; *C More Entertainment AB v Linus Sandberg* (C-279/13) EU:C:2015:199 at [12]; *Ziggo* (C-610/15) EU:C:2017:456 at [31]; *AKM* (C-138/16) EU:C:2017:218 at [15].

### *Unauthorised linking to protected content*

In its 2014 decision in *Svensson*, the CJEU ruled that, under certain conditions, the unauthorised provision of a clickable link to a work hosted on a third-party website falls within the scope of art.3(1) of the InfoSoc Directive. In its observations, the European Commission held that, for there to be an act of communication, a transmission or retransmission is required. This would follow from Recital 23 in the Preamble to this piece of legislation and existing case law.<sup>69</sup> It should be noted that the position endorsed by the European Commission at that time was not isolated.<sup>70</sup> However, as also the CJEU reiterated when it issued the resulting judgment, in line with the judgment in *SGAE*,

“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.”<sup>71</sup>

Indeed, the meaning of Recital 23 is *not* that art.3 requires an actual transmission of protected subject-matter. What is mandated is for the communication/making available at issue to be characterised by a distance element. In line with the concept of communication to the public in art.8 of the WIPO Copyright Treaty, the distance requirement serves to exclude from the scope of the right performing, recitation, or display of works for a public gathered simultaneously at a place.<sup>72</sup> It follows that the right in arts 8 of the WIPO Copyright Treaty and 3 of the InfoSoc Directive “applies irrespective of whether and how often the work is actually accessed”<sup>73</sup>

Despite the confirmation provided by the CJEU that simple accessibility suffices and that a link falls within the scope of art.3, the European Commission further advocated, in its observations in *C More Entertainment AB v Sandberg* (C-279/13), against the inclusion of linking within the scope of the making available right, submitting once again that a communication requires a transmission/retransmission.<sup>74</sup> Later on, the European Commission conceded that the provision of a link might be an act of communication (so that a transmission would not be required), but it would not be a communication to a “new” public. The latter is a condition that, albeit not entirely consistently,<sup>75</sup> the CJEU applies when the same protected subject-matter is made available both initially by, and by the defendant through the same technical means.<sup>76</sup>

<sup>69</sup> Observations in *Svensson* (C-466/12) EU:C:2014:76 at [17].

<sup>70</sup> See for instance European Copyright Society, *Opinion on the Reference to the CJEU in Case C466/12 Svensson* (15.02.2013), pp.2–4, <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/european-copyright-society-opinion-on-svensson-first-signatoriespaginatedv31.pdf>. See, *contra*, Association Littéraire et Artistique Internationale, *Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet* (16 September 2013), <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf> [Both accessed 17 December 2019].

<sup>71</sup> *Svensson* (C-466/12) EU:C:2014:76 at [19], referring to *SGAE* (C-306/05) EU:C:2006:764 at [43].

<sup>72</sup> S. von Lewinski and M. Walter, “Information Society Directive” in S. von Lewinski and M. Walter (eds), *European Copyright Law* (Oxford: Oxford University Press, 2010), §11.3.23. In the same sense, see also S. Bechtold, “Directive 2001/29/EC – on the harmonization of certain aspects of copyright and related rights in the information society (Information Society Directive)” in T. Dreier and P. B. Hugenholtz (eds), *Concise European Copyright Law*, 2nd edn (Alphen aan den Rijn: WoltersKluwer, 2016), p.442.

<sup>73</sup> P. Goldstein and B. Hugenholtz, *International Copyright*, 3rd edn (Oxford: Oxford University Press, 2013), p.336.

<sup>74</sup> Observations in *C More Entertainment AB v Linus Sandberg* (C-279/13) EU:C:2015:199 at [12].

<sup>75</sup> See e.g. *AKM* (C-138/16) EU:C:2017:218 at [26]–[27], suggesting that consideration of whether the communication at hand is addressed to a “new” public is required *also* when the specific technical means used is different.

<sup>76</sup> Cf. however what the European Commission submitted at [30] of its observations in *GS Media* referring to *TV CatchUp I* at [37]–[39] (emphasis in the original): “Il convient de partir du principe que la question du public nouveau ne se pose que lorsque les différents actes de communication à distinguer sont réalisés en *suivant un même mode technique*.” (“It must be assumed that the question of the new public does not only arise when the different acts of communication to be distinguished are carried out *with the same technical modality*.”)

According to the Commission, this would be so because the subject-matter linked to is already freely accessible on a third-party website and the public targeted by the said website would be already the generality of internet users.<sup>77</sup> The circumstance that such subject-matter is available without the right holder's consent would be irrelevant. First, it would not follow from *Svensson* that said circumstance plays a "decisive" (*déterminant*) role. Secondly, in *Svensson* the focus was allegedly on the "factual aspect" (*aspect factuel*) of access, not the "legal aspect" (*aspect juridique*) of accessibility. This point would be confirmed by the holding in *BestWater* (a case decided by means of an order and in respect of which the European Commission submitted no observations).<sup>78</sup> In this sense, knowledge of the link provider should be irrelevant for the construction of the right and a finding of liability: the assessment should be conducted on an "objective basis" (*appréciation sur une base objective*) and there should be no room for the consideration of "subjective elements" (*éléments subjectifs*).<sup>79</sup> Contrary to existing CJEU case law, facilitation should not be taken into account: either there is a circumvention of restrictions to access or there is not. The assessment, according to the European Commission, should be of a "black-and-white kind" (*appréciation de type noir ou blanc*): either the website is freely and directly accessible or it is not. There is no intermediate solution (*solution intermédiaire*).<sup>80</sup> Holding otherwise would have serious consequences and would unduly broaden the scope of the right. First, there would be several people who would be liable: this would be contrary to Recital 31 and the principle of fair balance.<sup>81</sup> Secondly, the distinction between primary and secondary liability would be blurred.<sup>82</sup>

The CJEU has not followed the approach repeatedly proposed by the European Commission. In the most recent judgment on linking under art.3(1) of the InfoSoc Directive, *GS Media*, the CJEU tackled expressly hyperlinking to unlicensed content (leaked *Playboy* pictures). The CJEU held that the provision of a hyperlink<sup>83</sup> to a copyright work that is freely accessible and was initially published without the right holder's consent on another website does not constitute a communication to the public, *insofar* as the person who posts that link does not seek financial gain and acts without knowledge that such work has been published without a licence from the relevant right holder. In any case, an individual assessment is required depending on the circumstances at issue. Several complementary criteria, which are not autonomous and are interdependent, and may—in different situations—be present to widely varying degrees, must thus be considered. Such criteria must be applied both individually and in their interaction with one another. One of such criteria is the indispensable role played by the user and the deliberate nature of its intervention: the user performs an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where—in the

<sup>77</sup> Observations in *GS Media* (C-160/15) EU:C:2016:644 at [34].

<sup>78</sup> Observations in *GS Media* (C-160/15) EU:C:2016:644 at [37]–[39]. The CJEU will have an opportunity to clarify whether contractual restrictions on linking can be imposed (as it appears correct, in light of existing CJEU case law and the fact that the right of communication to the public is not subject to exhaustion) when it decides *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* (C-392/19) (in progress), a referral concerning whether unauthorised framing and displaying of protected content lawfully hosted on a third-party website constitutes an act of communication to the public under art. 3(1) of the InfoSoc Directive, if this is done by circumventing measures against framing taken or introduced by the rightholder.

<sup>79</sup> Observations in *GS Media* (C-160/15) EU:C:2016:644 at [57].

<sup>80</sup> Observations in *GS Media* (C-160/15) EU:C:2016:644 at [61].

<sup>81</sup> Observations in *GS Media* (C-160/15) EU:C:2016:644 at [43]–[48].

<sup>82</sup> Observations in *GS Media* (C-160/15) EU:C:2016:644 at [42].

<sup>83</sup> It would appear that the same reasoning may be applied to other types of links. Cf., however, M. Leistner, "Copyright Law on the Internet in Need of Reform: Hyperlinks, Online Platforms and Aggregators" (2017) 12 J.I.P.L.P. 136, 138–139, submitting that not all links should be treated in the same way: the provider of a framed link should be under more than a merely minimal duty to check the lawfulness of the posted material.



absence of that intervention—its customers would not, in principle, be able to enjoy the work.<sup>84</sup> Other criteria include a communication using specific technical means, different from those previously used or, failing that, to a “new public” and the profit-making nature of the communication. According to the Court, it is in the light, in particular, of these criteria that a situation like that one at issue in the background proceedings should be assessed, while also considering the importance of the internet and freedom of expression and information and the role of hyperlinks in all this.<sup>85</sup>

### *Facilitation of third-party infringements*

Despite the string of CJEU judgments interpreting the notion of communication to the public over the internet, the European Commission has also insisted on a narrow reading of art.3 of the InfoSoc Directive in cases concerning participation in or facilitation of third-party infringements. In *Filmspelers*, the Legal Service considered that *GS Media* (in progress at that time) would be relevant and asked the CJEU to suspend the proceedings pending a decision in that referral.<sup>86</sup> It also reviewed the holding in *Svensson* and found it to be factually different, since in *Filmspelers* no links were provided: the contested activity of the defendant related to the sale of devices with pre-loaded links.<sup>87</sup> The Legal Service argued that this could not be regarded as falling within the scope of art.3 of the InfoSoc Directive, in that the right of communication to the public would be broad but not “unlimited” (*illimitée*).<sup>88</sup> First, facilitation could not be assimilated to an act of communication. Secondly, Recital 23 would pose limitations to what could be considered as an act of communication to the public, once again because it would seemingly entail a transmission/retransmission. Thirdly, what would be transmitted in the case at issue would be a device, not protected subject-matter. As such, Recital 27 and potentially art.6 of the directive would be relevant. Fourth, the InfoSoc Directive mandates a “fair balance” that weighs against an overly broad interpretation of communication to the public. Finally, any other interpretation would give rise to legal uncertainties.<sup>89</sup> Unsurprisingly, also considering earlier judgments, the CJEU went in a different direction when it decided the case.

Despite this further confirmation from the CJEU, the European Commission reiterated the same stance in its observations in *Ziggo*: it submitted that the operators of a platform like The Pirate Bay would be liable for no act of communication to the public. First, for there to be an act of communication the transmission/retransmission of a work would be required.<sup>90</sup> Secondly, the concept of communication to the public would be broad but not limitless and a fair balance of different rights and interests should be achieved. Furthermore, the principle of legal certainty must be also safeguarded.<sup>91</sup> Thirdly, facilitating third-party infringements could not be considered infringing per se. This would descend from a “contextual analysis” (*analyse contextuelle*) of art.3 of the Directive, in light of art.8(3) therein. The latter provision states that right holders may take action against intermediaries by seeking an injunction against them. However, art.3(1) would only apply to direct infringers.<sup>92</sup> The operators of the platform could not be held

<sup>84</sup> *GS Media* (C-160/15) EU:C:2016:644 at [33]–[35], also referring (at [34]) to: *SCF* (C-135/10) EU:C:2012:140 at [79]; *Phonographic Performance (Ireland)* (C-162/10) EU:C:2012:141 at [30]; and *Reha Training* (C-117/15) EU:C:2016:379 at [35].

<sup>85</sup> *GS Media* (C-160/15) EU:C:2016:644 at [36]–[39] and [45]. The subsequent interpretation and application of *GS Media* by national courts has however proved uncertain, as further discussed in Rosati, *Copyright and the Court of Justice of Justice of the European Union* (2019), pp.110–115.

<sup>86</sup> Observations in *Filmspelers* (C-527/15) EU:C:2017:300 at [20].

<sup>87</sup> Observations in *Filmspelers* (C-527/15) EU:C:2017:300 at [25].

<sup>88</sup> Observations in *Filmspelers* (C-527/15) EU:C:2017:300 at [27].

<sup>89</sup> Observations in *Filmspelers* (C-527/15) EU:C:2017:300 at [25]–[44].

<sup>90</sup> Observations in *Ziggo* (C-610/15) EU:C:2017:456 at [31].

<sup>91</sup> Observations in *Ziggo* (C-610/15) EU:C:2017:456 at [28].

<sup>92</sup> Observations in *Ziggo* (C-610/15) EU:C:2017:456 at [32].

liable for their users' activities, as this would not be something over which they exert any control. As such, the operators of The Pirate Bay could not be liable for acts of communication to the public, nor could they be the addressees of an injunction ex art. 8(1), since they are not primary infringers.<sup>93</sup> Again, the CJEU held differently: the operators of a platform that makes available to the public third-party uploaded copyright content and provides functions such as indexing, categorisation, deletion and filtering of content may be liable for copyright infringement, jointly with the users. For a finding of liability it is not required that the operators possess actual knowledge of the infringing character of the content uploaded by users, as knowledge may be, to say the *least*, also of a constructive kind ("could not be unaware").<sup>94</sup>

## The construction of exceptions and limitations in a digital/online context

The interpretation of the scope and the application of exceptions and limitations contained in the EU copyright *acquis*—notably art.5 of the InfoSoc Directive—in online/digital contexts has not been subject to many CJEU referrals so far, with the exclusion of temporary copies in art.5(1), private copying in art.5(2)(b), art.5(3)(n) with regard to libraries' digitisation activities and users' reproduction acts at dedicated terminals in a library<sup>95</sup>, and—very recently—quotation and news reporting in, respectively, art.5(3)(d) and (c) of the InfoSoc Directive. This said, over the past few years, the Court has also been given the opportunity to tackle other exceptions and limitations in art.5 (notably parody), which are also important for the construction of copyright over the internet.

### *Internet browsing covered by the Article 5(1) exemption*

In *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* (C-360/13), the CJEU had to consider whether the viewing of websites, where this involves copies of those sites being made on the user's computer screen and in the internet cache of that computer's hard disk, requires the authorisation of relevant right holders or whether, instead, it is an activity that falls within the exemption for temporary copies (art.5(1) of the InfoSoc Directive). The Court found the latter to be the correct response.<sup>96</sup>

In its Observations, the European Commission had also found this to be the case, on consideration—inter alia—that any acts of human intervention would be ancillary to the process of what otherwise occurs in a machine,<sup>97</sup> that the copies made would be transient,<sup>98</sup> and also because of earlier CJEU decisions (*Infopaq I and II*; and *Football Association Premier League Ltd v QC Leisure* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08)). The Legal Service added that, holding otherwise, would paralyse the functioning of the internet and be disproportionate when applied as a general rule.<sup>99</sup>

<sup>93</sup> Observations in *Ziggo* (C-610/15) EU:C:2017:456 at [38]–[40].

<sup>94</sup> *Ziggo* (C-610/15) EU:C:2017:456 at [45]. As argued elsewhere, from *Ziggo* at [46]–[47] it appears that—similarly to *GS Media*—also for platform operators knowledge might be simply presumed: see E. Rosati, "The CJEU Pirate Bay Judgment and its Impact on the Liability of Online Platforms" (2017) 39 E.I.P.R. 737, 743–744.

<sup>95</sup> In its observations in *Technische Universität Darmstadt v Eugen Ulmer KG* (C-117/13) EU:C:2017:456, the European Commission submitted that the InfoSoc Directive does not allow Member States to enable users of dedicated terminals in a library to print out on paper or to download onto a USB stick in part or in full the works made available there.

<sup>96</sup> *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* (C-360/13) EU:C:2014:1195 (*PRCA*) at [63].

<sup>97</sup> Observations in *PRCA* (C-360/13) EU:C:2014:1195 at [30].

<sup>98</sup> Observations in *PRCA* (C-360/13) EU:C:2014:1195 at [32].

<sup>99</sup> Observations in *PRCA* (C-360/13) EU:C:2014:1195 at [55].

*Private copying—scope of the exception*

In relation to private copying, the most significant issues on which the CJEU has had to rule relate to the scope of the exception in an online context and the understanding of the fair compensation requirement. *ACI Adam BV v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoedin* (C-435/12) required the CJEU to determine whether it would be compatible with EU law to envisage a national private copying exception which encompasses reproductions (internet downloads) from lawful and unlawful sources alike. Unsurprisingly, the CJEU answered in the negative, also considering the conditions set forth in the three-step test in art.5(5) of the InfoSoc Directive.<sup>100</sup> In its Observations, the European Commission had followed a similar reasoning and reached the same conclusion, also noting how the exceptions and limitations in art.5(1)–(4) are “inextricably linked” (*indissociablement liées*) to the conditions set forth in art.5(5)<sup>101</sup> and that holding otherwise would be at odds with the objective of guaranteeing a high level of protection.<sup>102</sup>

When a referral was made in *VCAST*, the opportunity arose for the CJEU to consider private copying in the context of cloud-based recording services of terrestrial TV programme broadcasts, which are also available irrespective of whether customers may lawfully access the programmes terrestrially. Both AG Szpunar and the Court rejected the idea that reproductions of this kind would be allowed under art.5(2)(b) of the InfoSoc Directive, it being clear that the provider of the cloud-based recording service would not just allow its customers to make copies of protected subject-matter, but also—and in the first place—make such content accessible to a public other than the one considered by the relevant right holder.<sup>103</sup> In its observations, however, the Legal Service did not tackle this aspect, and limited its analysis to observing how the private copying exception in principle applies to cloud-based recording activities and does not require that the device used for the making of copies belongs to the natural person, insofar as it is the user—as the European Commission considered it to be the case in that instance—who performs the act of reproduction.<sup>104</sup> As has occurred with respect to the liability of online platforms for the communication to the public, the Commission’s view is at odds with that adopted by the CJEU. The logical conclusion of the opinion expressed by the Legal Service (that the copies made by VCAST would be covered by art.5(2)(b)) is that the subsequent uses of those copies would not constitute a communication to the public. However, the *private* copying exception in art.5(2)(b) could not be extended to copies made and subsequently communicated to the *public*.

Another area in which uncertainties have arisen is that of private copying levies and fair compensation within art.5(2)(b) of the InfoSoc Directive. In line with the resulting CJEU judgment<sup>105</sup> in *Verwertungsgesellschaft Wort (VG Wort) v Kyocera* (C-457/11) and *Canon Deutschland GmbH* (C-458/11) and *Fujitsu Technology Solutions GmbH* (C-459/11) and *Hewlett-Packard GmbH (C-460/11) v Verwertungsgesellschaft Wort (VG Wort)*, the European Commission submitted that art.5(2)(b) of the InfoSoc Directive should be interpreted as meaning that the mere possibility of applying technological protection measures (TPMs) within the meaning of art.6 of that Directive does not preclude the application of a fair compensation requirement, insofar as no TPMs are actually implemented that would prevent the

<sup>100</sup> *ACI Adam BV v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoedin* (C-435/12) EU:C:2014:254 (*ACI Adam*) at [58].

<sup>101</sup> Observations in *ACI Adam* (C-435/12) EU:C:2014:254 at [36].

<sup>102</sup> Observations in *ACI Adam* (C-435/12) EU:C:2014:254 at [47].

<sup>103</sup> Opinion of AG Maciej Szpunar in *VCAST Ltd v RTI SpA* (C-265/16) EU:C:2017:649 at [56] and [69]–[70]; *VCAST* (C-265/16) EU:C:2017:913 at [49]–[54].

<sup>104</sup> Observations in *VCAST* (C-265/16) EU:C:2017:913, in particular at [31]–[33].

<sup>105</sup> *Verwertungsgesellschaft Wort (VG Wort) v Kyocera* (C-457/11); *Canon Deutschland GmbH* (C-458/11); *Fujitsu Technology Solutions GmbH* (C-459/11) and *Hewlett-Packard GmbH v Verwertungsgesellschaft Wort (VG Wort)* (C-460/11) EU:C:2013:426 at [58].

making of copies.<sup>106</sup> In *Amazon.com International Sales Inc v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH* (C-521/11), the Commission submitted that there must be a link between the amount of the compensation due and the likely use of the equipment to which the levy is applied. In this sense, the provision of a system of reimbursement would not be sufficient.<sup>107</sup> The CJEU held otherwise: as long as the right of reimbursement is effective and does not make it excessively difficult to repay the levy, there is no incompatibility with EU law.<sup>108</sup> In *Copydan Båndkopi v Nokia Danmark A/S* (C-463/12), the Legal Service advised the CJEU (which agreed<sup>109</sup>) to rule that private copying levies are due also in relation to multifunctional devices (e.g. mobile phones), insofar as one of the functions is copying and the harm caused to the right holder by the unauthorised making of copies is above *de minimis*.<sup>110</sup>

### *Quotation and news reporting, freedom of Member States, and fundamental rights*

Recently, the CJEU was asked to rule on the scope of the provisions in art.5(3)(d) and (c) of the InfoSoc Directive in an online context in *Spiegel Online GmbH v Volker Beck* (C-516/17) (*Spiegel Online*). This referral originated from litigation initiated by a German politician who had authored a work about “sexual acts of adults with children”. The publisher of this work had allegedly edited the manuscript without the author’s consent and the resulting publication was, according to the claimant, a distortion of his views. The original manuscript was found in an archive, and the claimant submitted it to several newspapers to demonstrate what he had actually written. Although he did not authorise publication of the manuscript or extracts thereof, he consented to newspapers linking to a statement that he had published on his own website. The publisher also released a press report on its own portal, in order to support its view that the original manuscripts had not been distorted. To this end, it included a link that allowed users to download both the original manuscript and the resulting publication. No link to the author’s website was provided. Following proceedings at first instance and on appeal, a referral was made to the CJEU, which asked *inter alia* about the scope of the exceptions for news reporting and quotation in a context of this kind, including with regard to EU Member States’ own freedom in transposing relevant provisions in the InfoSoc Directive. The CJEU ruled that neither exception is worded in such a way that Member States have no freedom whatsoever as regards national transposition thereof, although such freedom is “circumscribed in several regards”.<sup>111</sup> In any case, the catalogue of exceptions and limitations in art.5 of the InfoSoc Directive is exhaustive and that piece of EU legislation contains internal “mechanisms” that allow different rights and interests to be balanced.<sup>112</sup>

In line with the European Commission’s observations,<sup>113</sup> the Court concluded that individual Member States cannot derogate from an author’s exclusive rights, as found in arts 2 to 4 of the InfoSoc Directive, beyond what is allowed for in art.5 therein, not even by justifying such further derogations in light of the

<sup>106</sup> Observations in *VG Wort* (C-457/11) EU:C:2013:426 at [43]–[44].

<sup>107</sup> Observations in *Amazon.com International Sales Inc v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH* (C-521/11) EU:C:2013:515 at [35]–[36].

<sup>108</sup> *Amazon.com International Sales Inc v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH* (C-521/11) EU:C:2013:515 at [31].

<sup>109</sup> *Copydan Båndkopi v Nokia Danmark A/S* (C-463/12) EU:C:2015:144 (*Copydan Båndkopi*) at [26]–[29].

<sup>110</sup> Observations in *Copydan Båndkopi* (C-463/12) EU:C:2015:144 at [54].

<sup>111</sup> *Spiegel Online GmbH v Volker Beck* (C-516/17) EU:C:2019:625 (*Spiegel Online*) at [30]. In the same sense, see observations in *Funke Medien* (C-469/17) EU:C:2019:623 at [18].

<sup>112</sup> *Spiegel Online* (C-516/17) EU:C:2019:625 at [41] and [43]. In a similar sense, observations in *Funke Medien* (C-469/17) EU:C:2019:623 at [19]–[21], referring specifically to fundamental rights.

<sup>113</sup> Observations in *Spiegel Online* (C-516/17) EU:C:2019:625 at [6] and [23]–[24]. In the same sense, see also observations in *Funke Medien* (C-469/17) EU:C:2019:623 at [36]–[37] and *Pelham* (C-476/17) EU:C:2019:624 at [46].

fundamental rights and freedoms contained in the Charter of Fundamental Rights of the European Union.<sup>114</sup> In its observations, the Legal Service noted that an interpretation of the exception or limitation at hand that respects third-party fundamental rights informs in any event both the content and the scope of the exceptions and limitations in art.5(3) of the InfoSoc Directive.<sup>115</sup>

With specific regard to news reporting in art.5(3)(c), the Court stated that that provision requires: (1) an act of “reporting”, that is providing information (not necessarily in an analytical fashion) on a current event, and not merely announcing it<sup>116</sup>; (2) that the reporting relates to a current event, that is an event of informatory interest to the public; (3) that the source is indicated (unless this turn out to be impossible) and that the use of the protected work does not extend beyond the confines of what is necessary to achieve the informatory purpose.<sup>117</sup> Turning to art.5(3)(d), in *Spiegel Online* the Court limited itself to holding that a quotation may be made by including a hyperlink to the quoted work, insofar as this has been lawfully made available to the public.<sup>118</sup> The CJEU provided greater guidance on the requirements for a lawful quotation in *Pelham*, by holding that the essential characteristics of quotation in accordance with its meaning in everyday language are the use, by a person other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user. As such, the user of a protected work wishing to rely on the quotation exception must have the intention of entering into a “dialogue” with that work.<sup>119</sup>

### “Strict interpretation”, effectiveness, and the need for balance

As mentioned, over the past few years, the CJEU has also been given the opportunity to clarify quotation (art.5(3)(d) of the InfoSoc Directive), news reporting (art.5(3)(c) of the InfoSoc Directive), and parody (art.5(3)(k) of the InfoSoc Directive), though not necessarily always in digital/online contexts. It did so in its decisions in *Painer v Standard Verlags GmbH* (C-145/10) (*Painer*), *Deckmyn and Vrijheidsfonds VZW v Vandersteen* (C-201/13) (*Deckmyn*), and—recently—*Pelham, Funke Medien and Spiegel Online*.

Like the Court, in its observations in *Painer*, the Legal Service submitted that it is irrelevant whether a photographic work is quoted in the context of (unprotected) news of the day or a (protected) newspaper article. What matters is only if what is quoted is protected or not by copyright.<sup>120</sup> However, unlike the Court (which omitted touching upon such a point), the Legal Service also stated that: first, a quotation can be of a work in its entirety, insofar as the conditions laid down in the three-step test are satisfied<sup>121</sup>; second, a quotation cannot be for any purpose, as art.5(3)(d) provides a series of conditions for a quotation to be admissible. Indeed, the provision seems to envisage a “relatively restrictive” (*relativement restrictive*) field of application. It follows that a “voyeuristic hook” (*accroche voyeuriste*) would exclude application

<sup>114</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391; *Spiegel Online* (C-516/17) EU:C:2019:625 at [47] and [49]. Substantially in the same sense, see also *Funke Medien* (C-469/17) EU:C:2019:623 at [42]–[64].

<sup>115</sup> Observations in *Spiegel Online* (C-516/17) EU:C:2019:625 at [10].

<sup>116</sup> In its observations in *Funke Medien* (C-469/17) EU:C:2019:623 at [31], the Legal Service envisaged a looser threshold when it submitted that it is sufficient that the use is intended to disseminate information about a news event.

<sup>117</sup> *Spiegel Online* (C-516/17) EU:C:2019:625 at [66]–[68].

<sup>118</sup> *Spiegel Online* (C-516/17) EU:C:2019:625 at [80] and [86]. Substantially in line with this, see observations in *Spiegel Online* (C-469/17) EU:C:2019:623 at [34]–[35] (lacking a definition of quotation, what is required is at least the establishment of a substantive relationship between the citation and the original work: a link could perform this function).

<sup>119</sup> *Pelham* (C-476/17) EU:C:2019:624 at [71].

<sup>120</sup> Observations in *Painer v Standard Verlags GmbH* (C-145/10) EU:C:2011:798 at [74]. In the same sense, see *Painer* (C-145/10) EU:C:2011:798 at [137].

<sup>121</sup> Observations in *Painer v Standard Verlags GmbH* (C-145/10) EU:C:2011:798 at [67].

of the exception.<sup>122</sup> The position in relation to the latter point appears correct, also considering that freedom of expression is not limitless.<sup>123</sup> In any event, contrary to established CJEU case law according to which the provisions of a directive which derogate from a general principle established by EU legislation—as is the case of exceptions and limitations—must be interpreted strictly,<sup>124</sup> this conclusion would not follow from a requirement of strict interpretation. Neither specific rules nor the three-step test in art.5(5) impose this: what the law requires is not a “restrictive interpretation” (*interprétation restrictive*) of exceptions and limitations, but rather that a “fair balance” is achieved between the public interest to the “free use” (*libre utilisation*) of works and the need to protect the rights of copyright owners.<sup>125</sup>

Despite the position adopted in *Painer*, in its subsequent observations in *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau* (C-510/10) and *Deckmyn*, the Legal Service accepted that there is a “strict interpretation” requirement in relation to provisions that, like exceptions and limitations, depart from the general principle of high level of protection of copyright.<sup>126</sup> In the latter, in particular, the Legal Service stated that the protection afforded by the right of reproduction has a “broad scope” (*portée large*) and that, according to “consistent case law” (*jurisprudence constante*) of the CJEU, exceptions and limitations are subject to a “strict interpretation” (*interprétation stricte*) standard, which nonetheless should not deprive them of their *effet utile*.<sup>127</sup> In line with the resulting judgment, the Legal Service argued that the concept of “parody” (like that of “quotation”) is an autonomous concept of EU law, and entails an imitation aimed at producing humour or mockery.<sup>128</sup>

More recently, in its observations in *Funke Medien, Pelham* and *Spiegel Online*, the Legal Service referred to the need for exceptions and limitations to balance different fundamental rights,<sup>129</sup> noted that certain provisions in art.5(2) and (3) of the InfoSoc Directive (including art.5(3)(c) and (d)) provide “expressly for the need for such balancing” (*expressément la nécessité d'une telle mise en balance*),<sup>130</sup> and

<sup>122</sup> Observations in *Painer v Standard Verlags GmbH* (C-145/10) EU:C:2011:798 at [68]–[69].

<sup>123</sup> See also, *ex multis*, the decision of the European Court of Human Rights (ECtHR) in relation to art.10 of the European Convention on Human Rights in *Sekmadienis v Lithuania* (App.No.69317/14) 30 January 2018 at [72], holding that the interference with art.10 freedom complained of must be assessed by taking all circumstances into account, in order to determine “whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In the same sense, see also—more recently—*Magyar Jeti Zrt v Hungary* (App.No.11257/16) 4 December 2018 at [69].

<sup>124</sup> See, in general: *Criminal Proceedings against Kapper* (C-476/01) EU:C:2004:261 at [72]; *Commission v Spain* (C-36/05) EU:C:2006:672 at [31]. With specific regard to exceptions and limitations, see *Infopaq I* (C-302/10) EU:C:2012:16 at [57]; *FAPL* (C-429/08) EU:C:2011:631 at [162]; *Infopaq II* (C-302/10) EU:C:2012:16 at [27]; *ACI Adam* (C-435/12) EU:C:2014:254 at [22]; *PRCA* (C-360/13) EU:C:2014:1195 at [23]; *Deckmyn and Vrijheidsfonds VZW v Vandersteen* (C-201/13) EU:C:2014:213 (*Deckmyn*) at [22]; *Ranks* (C-166/15) EU:C:2016:762 at [42]; *AKM* (C-166/15) EU:C:2016:762 at [37]; *VCAST* (C-265/16) EU:C:2017:913 at [32]; *Funke Medien* (C-469/17) EU:C:2019:623 at [69]; and *Spiegel Online* (C-516/17) EU:C:2019:625 at [53].

<sup>125</sup> Observations in *Painer v Standard Verlags GmbH* (C-145/10) EU:C:2011:798 at [76]–[77], referring to Recitals 14 and 31 in the Preamble to the InfoSoc Directive.

<sup>126</sup> Observations in *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau* (C-510/10) EU:C:2012:244; [2012] C.M.L.R. 46 at [26]. Also referring to a “strict interpretation” requirement, see observations in *Pelham* (C-476/17) EU:C:2019:624 at [55] and *Spiegel Online* (C-516/17) EU:C:2019:625 at [13].

<sup>127</sup> Observations in *Deckmyn* (C-201/13) EU:C:2014:213 at [29] and [31]. Referring to the need to balance different fundamental rights, see observations in *Funke Medien* (C-469/17) EU:C:2019:623 at [27]; *Pelham* (C-476/17) EU:C:2019:624 at [55] and *Spiegel Online* (C-516/17) EU:C:2019:625 at [13]–[14].

<sup>128</sup> Observations in *Deckmyn* (C-201/13) EU:C:2014:213 at [45].

<sup>129</sup> In the same sense, see also observations in *Pelham* (C-476/17) EU:C:2019:624 at [37] and [50].

<sup>130</sup> Observations in *Funke Medien* (C-469/17) EU:C:2019:623 at [28]. In the same sense, see observations in *Spiegel Online* (C-516/17) EU:C:2019:625 at [17].

submitted that a “broad interpretation” (*interprétation large*) of exceptions and limitations, consistent with fundamental rights, finds support in the very wording of art.5(3).<sup>131</sup>

## Enforcement—injunctive against intermediaries and jurisdiction

In relation to injunctions against intermediaries, the position of the European Commission is mostly in line with relevant CJEU case law, including the broad understanding of who qualifies as an intermediary for the purpose of an injunction and the availability of filtering and blocking injunctions against intermediaries. However, the European Commission advocated against open-ended blocking injunctions, submitting that the content of the relevant order should be defined by the authority issuing it. In relation to jurisdiction in online cases, the European Commission warned against the adoption of accessibility as one of the criteria to establish jurisdiction.

### *Injunctions against intermediaries—availability and content of relevant orders*

In its observations in *L’Oréal SA v eBay International AG* (C-324/09) (*L’Oréal*) (a referral concerning—inter alia—injunctive under art.11 of Directive 2004/28<sup>132</sup> (the Enforcement Directive)), the Legal Service, in line with the CJEU’s subsequent decision, advised that the notion of “intermediary” “encompasses any operator who has objectively facilitated the infringement of an intellectual property right”.<sup>133</sup> The same was reiterated in *Tommy Hilfiger Licensing LLC v Delta Center a.s.* (C-494/15) (*Tommy Hilfiger*): the European Commission opined that the concept of “intermediary” is potentially broad and is not limited to the online dimension.<sup>134</sup>

Turning to the content of injunctions against intermediaries, in its observations in *L’Oréal*, the Legal Service considered that it is for Member States to determine the scope *ratione materiae* of an injunction, including—more specifically—whether “that order may extend to future acts of infringement” of the infringed intellectual property right. This interpretation would be supported by recital 45 in the Preamble to Directive 2000/31<sup>135</sup> (the E-commerce Directive), “according to which injunctions can in particular consist of orders by courts requiring the termination *or prevention* of any infringement”,<sup>136</sup> insofar as this does not entail a general monitoring obligation.<sup>137</sup>

With regard to injunctions that extend to future acts of infringement, that is filtering and blocking injunctions, the European Commission confirmed their availability under EU law in the copyright field. The referrals in *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL* (*SABAM*) (C-70/10) and *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA* (*SABAM*) *v Netlog NV* (C-360/10) sought clarification on the lawfulness of filtering injunctions. In both cases, the resulting CJEU judgments failed to provide broader guidance beyond the scope of the questions asked, which

<sup>131</sup> Observations in *Funke Medien* (C-469/17) EU:C:2019:623 at [32]. In substantially the same sense, see observations in *Pelham* (C-476/17) EU:C:2019:624 at [58].

<sup>132</sup> Corrigendum to Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L157, [2004] OJ L195/16 (Enforcement Directive).

<sup>133</sup> Observations in *L’Oréal SA v eBay International AG* (C-324/09) EU:C:2011:474 at [96].

<sup>134</sup> Observations in *Tommy Hilfiger Licensing LLC v Delta Center a.s.* (C-494/15) EU:C:2016:528 at [12]–[13]. Cf the observations in *Coöperatieve Vereniging SNB-REACT U.A. v Deepak Mehta* (C-521/17) EU:C:2018:639, in which the Legal Service adopted a narrow reading of what and who falls within the categories of information society service providers regulated in Directive 2000/31 (the E-commerce Directive), excluding that a service provider whose service consists in registering IP addresses could be classified as either a mere conduit, caching or hosting provider.

<sup>135</sup> Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-commerce Directive).

<sup>136</sup> Observations in *L’Oréal SA v eBay International AG* (C-324/09) EU:C:2011:474 at [97] (emphasis in the original).

<sup>137</sup> Observations in *L’Oréal SA v eBay International AG* (C-324/09) EU:C:2011:474 at [98].

concerned a specific type of filtering obligation. In its observations in both cases, however, the European Commission provided a more general assessment, and submitted that it would not be contrary to art.15 of the E-commerce Directive to impose on an intermediary an obligation to filter or block access to unlicensed content. With particular regard to the former, an injunction of this kind would not entail the loss of the intermediary's safe harbour because it would be neither an obligation to modify information nor would it amount to surveillance.<sup>138</sup> The Commission noted that the EU legislature has not only *not* prohibited the use of monitoring techniques, but it has actually “expressly encouraged” (*expressément encouragé*) the voluntary development and implementation thereof.<sup>139</sup> This is because the relevant provisions in the E-commerce Directive do not, as such, preclude a court from obliging an intermediary to create a filtering and blocking system to prevent infringement copyright.<sup>140</sup> The purpose of a filtering system is in fact not to require an intermediary to search actively facts or circumstances displaying unlawful activities, but only to undertake “their automatic blocking” (*seulement leur blocage automatique*).<sup>141</sup>

With specific regard to blocking injunctions, as mentioned, one notable difference in the assessment of the European Commission—compared with that of the Court—relates to the content of such injunctions. Similarly to AG Cruz Villalón's Opinion in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (C-314/12) (*Telekabel*)<sup>142</sup>, in its observations the Legal Service submitted that blocking injunctions would be allowed under EU law, but that an intermediary could not be simply given an “obligation of result” (*obligation de résultat*). This would be so on consideration that an order of this kind would prevent a national court from undertaking the necessary proportionality assessment and ultimately lead to a risk of overblocking.<sup>143</sup> The CJEU disregarded the AG Opinion, and ruled that it is for the intermediary targeted by the injunction to choose the measures necessary to comply with the result sought by such order, provided that the resulting measures are effective and do not unnecessarily deprive users of the possibility to access lawful information.<sup>144</sup>

Despite the outcome of *Telekabel*, the European Commission reiterated its position regarding the content of injunctions against intermediaries in its observations in *Tommy Hilfiger*. It noted that the “concrete measures” (*mesures concrètes*) that can be *imposed* would depend on the seriousness and magnitude of the infringement, the possibility of taking action directly against the infringer, the measures that the intermediary has already taken, the repercussions (practical, economic, financial, etc.) of the measures to be imposed on the intermediary, as well as procedural restrictions and safeguards.<sup>145</sup>

### *Jurisdiction in online infringement cases—rejection of the accessibility criterion*

Another area in which the CJEU has been asked to provide guidance is that of international jurisdiction in online infringement cases, with particular regard to the interpretation of the special rule in art.7(2) of

<sup>138</sup> Observations in *Scarlet Extended SA v SABAM* (C-70/10) EU:C:2011:771 at [54]–[61].

<sup>139</sup> Observations in *Scarlet Extended SA v SABAM* (C-70/10) EU:C:2011:771 at [55], referring to Recital 40 in the Preamble to the E-commerce Directive.

<sup>140</sup> Observations in *SABAM v Netlog NV* (C-360/10) EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [63].

<sup>141</sup> Observations in *SABAM v Netlog NV* (C-360/10) EU:C:2012:85 at [64].

<sup>142</sup> Opinion of AG Pedro Cruz-Villalón in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (C-314/12) EU:C:2013:781 at [87]–[90].

<sup>143</sup> Observations in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (C-314/12) EU:C:2014:192 at [30]–[32].

<sup>144</sup> *UPC Telekabel Wien v Constantin Film Verleih GmbH* (C-314/12) EU:C:2014:192 at [50]–[51].

<sup>145</sup> Observations in *Tommy Hilfiger Licensing v Delta Center a.s.* (C-494/15) EU:C:2016:528 at [34].



Regulation 1215/2012<sup>146</sup> (the Brussels I Regulation recast, formerly art.5(3) of Regulation 44/2001<sup>147</sup>). This provision states that, as an alternative to the general rule in art.4 therein, a person domiciled in a Member State may be sued in another Member State in the courts for the place where the harmful event occurred or may occur. In its case law, the CJEU has been consistent in holding that the place where the harmful event occurred or may occur is to be intended as either the place where the *damage* occurred or the place of the *event* giving rise to it, so that the defendant may be sued—at the option of the claimant—in the courts for either of those places.<sup>148</sup>

Determining the “place of the harmful event” in the case of an infringement carried out via the internet has proved challenging. The CJEU was given the opportunity to apply the special rule of jurisdiction in an online copyright context in *Pinckney v KDG Mediatech AG* (C-170/12) (*Pinckney*). Despite the reservations of AG Jääskinen,<sup>149</sup> the Court held that, to establish jurisdiction of the courts of a certain Member State, it is not required that the activity of the defendant is targeted at that territory: jurisdiction may be rooted with the courts located in the Member State in which the allegedly infringing content can be accessed. However, in such case, the court seized would be only competent to adjudicate on the damages suffered on that specific territory.<sup>150</sup> In its observations, the Legal Service “firmly” (*fermement*) objected to jurisdiction based on simple accessibility,<sup>151</sup> submitting that such criterion creates an “extremely broad jurisdiction” (*compétence extrêmement large*), so that all EU Member States would have such jurisdiction, and encourages forum-shopping.<sup>152</sup> A preferable criterion in a case like the one at issue would be, instead, a targeting approach.<sup>153</sup>

The CJEU confirmed accessibility as a valid criterion to establish jurisdiction in *Hi Hotel HCF Sàrl v Spoering* (C-387/12) and *Pez Hejduk v EnergieAgentur.NRW GmbH* (C-441/13) (*Hejduk*). In the latter, AG Cruz Villalón advocated against the approach adopted in *Pinckney*, on grounds that the factual background made that referral different, notably because the works at issue in *Hejduk* were not offered for sale.<sup>154</sup> As such, localising the damage would prove challenging. The AG concluded that, to comply with the objectives of the legislation at issue—notably the sound administration of justice—in cases where delocalised damage occurs on the internet, the best option is to exclude the possibility of suing in the courts of the State where the damage occurred and, instead, limiting jurisdiction, at least that based on art.7(2), to that of the courts of the State where the event giving rise to the damage occurred. In any case,

<sup>146</sup> Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (Brussels I Regulation recast).

<sup>147</sup> Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

<sup>148</sup> *Handelskwekerij G.J. Bier BV v Mines de potasse d’Alsace SA* (21-76) EU:C:1976:166 at [19]; *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* (C-68/93) EU:C:1995:61 at [20]–[21]; *Zuid-Chemie BV v Philippo’s Mineralenfabriek NV/SA* (C-189/08) EU:C:2009:475 at [23]; *eDate Advertising GmbH v X and Société MGN Ltd* (C-509/09 and C-161/10) EU:C:2011:685 at [41]; *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* (C-523/10) EU:C:2012:220 at [19]; *Melzer v MF Global UK Ltd* (C-228/11) EU:C:2013:305 at [25]; *Pinckney v KDG Mediatech AG* (C-170/12) EU:C:2013:635 (*Pinckney*) at [26]; *Kainz v Pantherwerke AG* (C-45/13) EU:C:2014:7 at [23]; *Hi Hotel HCF Sàrl v Spoering* (C-387/12) EU:C:2014:215 at [27]; *Coty Germany GmbH v First Note Perfumes NV* (C-360/12) EU:C:2014:1318 at [32]; *Pez Hejduk v EnergieAgentur.NRW GmbH* (C-441/13) EU:C:2015:28 (*Hejduk*) at [18].

<sup>149</sup> Opinion of AG Niilo Jääskinen in *Pinckney v KDG Mediatech AG* (C-170/12) EU:C:2013:400 at [68].

<sup>150</sup> *Pinckney* (C-170/12) EU:C:2013:635 at [44]–[47].

<sup>151</sup> Observations in *Pinckney* (C-170/12) EU:C:2013:635 at [72].

<sup>152</sup> Observations in *Pinckney* (C-170/12) EU:C:2013:635 at [76]. Cf., however, Opinion of AG Maciej Szpunar in *MS Neve Ltd, Barnett Waddingham Trustees and Crabtree v Heritage Audio SL and Arribas* (C-172/18) EU:C:2019:276 at [75], holding that “adopting the criterion of accessibility under Regulation No 1215/2012 does not lead to the risk of a multiplication of fora”.

<sup>153</sup> Observations in *Pinckney* (C-170/12) EU:C:2013:635 at [90].

<sup>154</sup> Opinion of AG Pedro Cruz Villalón in *Hejduk* (C-441/13) EU:C:2014:2212 (*Hejduk* AG) at [2]–[3].

this option would not exclude the jurisdiction of the courts of the Member State where the defendant is domiciled. Although in the majority of cases both criteria would lead to the same court, this might not always be so.<sup>155</sup>

Also the Legal Service suggested a solution similar to the one proposed by AG Cruz Villalón, on grounds that the applicant in a case like the one at issue would not be able to produce verifiable material, which precisely delimits the damage sustained in the Member State where proceedings have been brought. All this might entail the risk that any compensation awarded would exceed the limits of the seized court's jurisdiction. The result would be either that the applicant is denied the right to bring an action in a certain Member State, in view of the absence or low visibility of an infringement, or that the applicant is awarded compensation in respect of all the damage suffered, in view of the fact that it is impossible to segment the infringement territorially. The latter would be a solution which, in short, would be contrary to the holding in *Pinckney*.<sup>156</sup>

## Assessment of the interpretation of the *acquis* as proposed by the European Commission

There are two features of the Legal Service's observations in digital/online cases which are particularly striking: the first is the insistence, in a number of instances, on a reading of EU law provisions that would be even contrary to CJEU case law existing at the time of the referral. The second feature is the lack of acknowledgment by the Legal Service of case law, which would *not* support the proposed reading of relevant provisions of the EU copyright *acquis*, or—alternatively—the suggestion that the answer to the questions posed in a certain referral on issues for which guidance already existed at the CJEU level would not lie in such earlier case law, with the result that a different approach should be identified instead.

It is true that at the CJEU level there is no *formal* system of binding precedent. However, the very fact that the Court often refers to earlier decisions by using the phrase “it is settled case law” and that the Court issues an order, in lieu of a judgment, in cases that contain questions identical to those on which the Court has already ruled or the reply to which may be clearly deduced from existing case law, are indicative that earlier decisions have in fact a value which, if not akin to that of a binding precedent, is indeed close to that.<sup>157</sup>

### *Economic rights*

The observations of the European Commission in referrals concerning economic rights in a digital/online context present a number of common threads, including in relation to the construction of said rights and the criteria for liability of parties participating in or facilitating the commission of restricted acts. Despite the fact that existing CJEU case law had already addressed certain key aspects, e.g. the fact that a communication to the public does not necessarily require the transmission of protected subject matter, the European Commission repeatedly insisted on the need for a different approach be taken by the Court in subsequent decisions.

As Annex 2 shows, the identity of the Legal Service agents who represented the European Commission in the referrals considered has remained substantially consistent over time. The Rules of Procedure of the CJEU require parties to present their written and oral statements in the language of the case, which—for

<sup>155</sup> *Hejduk* AG (C-441/13) EU:C:2014:2212 at [42] and [45].

<sup>156</sup> Observations in *Hejduk v EnergieAgentur* (C-441/13) EU:C:2015:28 at [36].

<sup>157</sup> According to authoritative commentators (P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, 6th edn (Oxford: Oxford University Press, 2015), p.472) this system, which is now codified, was first initiated by the Court in its seminal decision in *Da Costa en Schaake NV v Netherlands Inland Revenue Administration* (28 to 30/62) EU:C:1963:6; [1963] C.M.L.R. 224.

referrals for a preliminary ruling—is the language of the referring court or tribunal.<sup>158</sup> To meet this requirement, the Legal Service, which has lawyers from all the Member States, pools knowledge of all the Member States’ legal systems and all the official languages.<sup>159</sup> In all this, Samnadda is the agent who has appeared the most, acting in nearly 75 per cent of the cases listed in Annex 2 (including all the communication to the public cases listed in the table below), followed by Wilman (nearly 26 per cent of the cases) and Scharf (nearly 24 per cent of the cases).

Overall, in certain topical instances (as the table below relating to the right of communication to the public shows<sup>160</sup>), the analysis of the Legal Service’s observations displays a substantially different understanding of the scope of copyright protection and an attempt, on the side of the European Commission, to persuade the CJEU to “depart” from its case law.

Inclusion of Relevant Act within the Scope of Article 3(1) of the Infosoc Directive?					
Case reference and date of CJEU judgment (chronological order)	Type of act	Legal Service’s observations	Legal Service agents	Opinion of appointed AG	CJEU judgment
<i>ITV Broadcasting Ltd v TVCatchUp Ltd</i> (C-607/11) (07.03.2013)	Provision of internet streaming service	Yes	Samnadda Wilman	N/A	Yes
<i>Svensson v Retriever Sverige AB</i> (C-466/12) (13.02.2014)	Linking to protected subject-matter	No	Samnadda Enegren	N/A	Yes
<i>GS Media BV v Sanoma Media Netherlands BV</i> (C-160/15) (08.09.2016)	Linking to protected subject-matter	No	Samnadda Scharf Wilman	No	Yes
<i>Stichting Brein v Willems</i> (C-527/15) (26.04.2017)	Facilitation of third-party unlicensed acts of communication to the public	No	Samnadda Scharf Wilman	Yes	Yes
<i>Stichting Brein v Ziggo BV</i> (C-610/15)	Facilitation of third-party unlicensed acts of communication to the public	No	Samnadda Scharf Wilman	Yes	Yes
<i>VCAST Ltd v RTI SpA</i> (C-265/16) (29.11.2017) <sup>161</sup>	Cloud-based recording service	No	Samnadda Malferrari	Yes	Yes
<i>Land Nordrhein-Westfalen v Renckhoff</i> (C-161/17) (07.08.2018)	Downloading and uploading of protected subject-matter	Yes	Samnadda Scharf	No	Yes

With particular regard to the right of communication to the public, there also appears to be a divide between the understanding that the Legal Service has had of this exclusive right and the initiatives adopted

<sup>158</sup> Rules of Procedure of the Court of Justice [2012] OJ L265/1 art.37(3).

<sup>159</sup> European Commission – Legal Service, “The Commission’s legal representative”, [https://ec.europa.eu/dgs/legal\\_service/agent\\_en.htm](https://ec.europa.eu/dgs/legal_service/agent_en.htm) [Accessed 17 December 2019].

<sup>160</sup> The table concerns specifically art.3(1) of the InfoSoc Directive. As a result, referrals like those in *C More Entertainment v Sandberg* (C-279/13) EU:C:2015:19 (concerning art.3(2) therein) are not included.

<sup>161</sup> The questions referred in in *VCAST* did not directly relate to the interpretation of art.3(1) of the InfoSoc Directive, but rather art.5(2)(b) therein.

in parallel by the European Commission's own policy arm, i.e. the Copyright Unit. The initial proposal of the European Commission for a Directive on copyright in the Digital Single Market<sup>162</sup> (DSM Directive) and its art.13 is a telling example, and so is the final text of the corresponding provision (art.17) in the adopted version of this recent piece of EU legislation (Directive 2019/790<sup>163</sup>). Read in combination with Recital 38 in the Preamble to the proposed directive, the original version of art.13 provided that, where a hosting provider stores and gives public access to "large amounts" of user-uploaded content (UUC), thereby performing an act of communication to the public within the meaning of art.3(1) of the InfoSoc Directive, it is obliged to conclude a licensing agreement with the relevant right holder(s), unless it is eligible for the safe harbour pursuant to art.14 of the E-commerce Directive. Irrespective of whether the safe harbour in art.14 of the E-commerce Directive applies, a provider that gives access to large amounts of works should take appropriate and proportionate measures to ensure protection of works or other subject-matter, also by implementing effective technologies. The assumption that the operators of UUC platforms would be directly/primarily responsible (and, thus potentially liable) for the doing of acts of communication to the public is at odds with the Legal Service's position over time, as advocated in a number of key referrals, including *Filmspelers* and *Ziggo* (as discussed above in section "Facilitation of third-party infringements"). However, it is substantially in line with CJEU case law on the right of communication to the public as developed so far, including with regard to the progressive relaxation of the notion of indispensable/essential intervention.<sup>164</sup> In all this, however, it should be noted that the Court has not yet had a chance to discuss specifically the implications of its case law (especially *Ziggo*) in relation to less egregious scenarios than *The Pirate Bay*.<sup>165</sup>

The final version of the provision the adoption of which was initially proposed by the European Commission (Copyright Unit) is contained in art.17 of the DSM Directive. It confirms that EU Member States shall provide that the particular type of host referred to as online content sharing service provider<sup>166</sup> (OCSSP) "performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users". In addition, unlike the original proposal, the limitation of liability in art.14 of the E-commerce Directive does not apply when an OCSSP performs an act of communication to the public (art.17(3)). The DSM Directive also contains a Recital in its Preamble—Recital 64—which states that the directive merely *clarifies* that OCSSPs perform an act of communication to the

<sup>162</sup> "Proposal for a Directive Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market" COM(2016) 0593 final – (2016) 0280 (COD).

<sup>163</sup> Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29 [2019] OJ L130/92.

<sup>164</sup> Despite the earlier Opinion of AG Wathelet, who had recommended the Court to exclude linking from the scope of copyright protection *tout court* (*GS Media AG* (C-160/15) EU:C:2016:644 at [57] and [60]), in *GS Media* the CJEU confirmed the broad understanding of intervention "incontournable", while also attempting a modulation of potentially resulting liability by considering other criteria (notably the knowledge of the unlicensed character of the content linked to and the profit-making motifs of the link providers): at [43] and [48]–[55]. The subsequent decisions in *Filmspelers* (C-527/15) EU:C:2017:300 at [41] and *Ziggo* (C-610/15) EU:C:2017:456 at [37] elaborated further on the notion of indispensable/essential intervention, and confirmed that "indispensability" should be intended as akin to facilitation.

<sup>165</sup> Four referrals are currently pending on issues relating to both direct/primary liability for the doing of copyright-restricted acts and the availability of the safe harbour in art.14 of the E-commerce Directive: they are: *LF v Google LLC, YouTube Inc and YouTube LLC, Google Germany GmbH* (C-682/18); *Elsevier Inc v Cyando AG* (C-683/18); *Stichting Brein v News-Service Europe BV* (C-442/19); and *Puls 4 TV GmbH & Co KG Media Quarter v YouTube LLC and Google Austria GmbH* (C-500/19).

<sup>166</sup> Article 2(6) of the DSM Directive defines an OCSSP as "a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes".

public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users.

### *Exceptions and limitations and enforcement*

Unlike what has been the case for certain economic rights, in the area of exceptions and limitations, there appears to have been a greater alignment between the Legal Service's observations and CJEU case law, as well as greater responsiveness on the side of the former towards adapting the content of its observations in light of case law issued over time. An example in this sense is the standard of "strict interpretation" of exceptions and limitations. In any case, it should be noted that, similarly to the European Commission, also the CJEU has considered the need not just to comply with the requirement of "strict interpretation", but also to ensure that exceptions and limitations are interpreted in such a way that their effectiveness (*effet utile*) is safeguarded and their purpose is observed.<sup>167</sup>

Turning to enforcement issues, the main point of misalignment between the Legal Service and the CJEU relates, as far as injunctions against intermediaries are concerned, is the content of the relevant orders: while the former advocated that a blocking injunction should specify the measures that the addressee of the injunction is required to adopt, the latter found that it would be for the addressee to identify and implement the measures needed to fulfil the objective of the injunction. In relation to jurisdiction, the European Commission's observations show a "firm" reluctance—as expressed in the observations in *Pinckney*—towards accepting the accessibility criterion as envisaged in that case and applying it also to other scenarios in subsequent referrals.

## **Conclusion**

In the field of copyright, the CJEU has created a system that, through a dialogue with national courts, has led to the progressive construction and refinement of a number of key concepts, without any drastic "departure" from earlier decisions. A number of factors have contributed to this. First, although the Court does not have specialist chambers or specialist expertise, as a matter of fact specialisation may be discerned in respect of various areas.<sup>168</sup> This has been possible both through the appointment, each time, of a Judge-Rapporteur from a narrow pool (with Jiří Malenovský acting as Judge-Rapporteur in over 50 per cent of the copyright referrals over the past 20 years) and that for certain issues the same AG has also been appointed, e.g. AGs Yves Bot in cases concerning the interpretation of the Software Directive<sup>169</sup> and Maciej Szpunar in relation to cases concerning the interplay between copyright and other fundamental rights.<sup>170</sup> Secondly, the Court has developed and relied on standards to interpret the EU *acquis*, and has done so consistently, even if all this has been at times more formal than substantial, in that the Court has referred to this objective to justify certain outcomes.<sup>171</sup> Thirdly, the Court has shown a statistically significant

<sup>167</sup> *FAPL* (C-429/08) EU:C:2011:631 at [162]–[163]; *Painer v Standard VerlagsGmbH* (C-145/10) EU:C:2011:798 at [133]; *Vereniging Openbare Bibliotheken* (C-174/15) EU:C:2016:856 at [50]. See also *Spiegel Online* (C-516/17) EU:C:2019:625 at [53] and [54], and *Funke Medien* (C-469/17) EU:C:2019:623 at [70], both expressly referring to exceptions and limitations as "rights" conferred on the users of works or of other subject-matter.

<sup>168</sup> In this sense, see also M. Favale, M. Kretschmer and P. Torremans, "Is there a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice" (2016) 79 M.L.R. 31.

<sup>169</sup> E.g. *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* (C-393/09) EU:C:2010:611; *SAS Institute Inc v World Programming Ltd* (C-406/10) EU:C:2011:787; and *UsedSoft GmbH v Oracle International Corp* (C-128/11) EU:C:2012:234.

<sup>170</sup> E.g. *Funke Medien* (C-469/17) EU:C:2019:623; *Pelham* (C-476/17) EU:C:2019:624; and *Spiegel Online* (C-516/17) EU:C:2019:625. See further Rosati, *Copyright and the Court of Justice* (2019), pp.31–34.

<sup>171</sup> Rosati, *Copyright and the Court of Justice* (2019), pp.37–72.

tendency towards endorsing the Opinion of the AG appointed in a certain case, when the AG proposed a broad reading of the scope of copyright protection.<sup>172</sup>

In all this, the Court has strengthened the harmonisation of EU Member States' copyright laws and has done so despite or—rather—because of a rather fragmentary EU legislative framework populated by thin provisions (would it be possible to understand what “communication to the public” entails solely by reading the text of art.3(1) of the InfoSoc Directive?). The Court's action has been informed by an overarching internal market goal, which has also been supported by awareness of how both unhelpful and contrary to the goals of EU harmonisation it would be to leave certain (formally unharmonised) issues to individual Member States to tackle.<sup>173</sup> Speaking of a harmonising “agenda” on the side of the Court should not, however, lead one to believe that harmonisation has been a goal per se. What the CJEU has done, instead, has been extracting and applying the primary rationale of EU integration in the area of copyright, by removing those differences that would amount to unjustified barriers to the free movement of copyright works and protected subject matter across the EU. This has been the case with regard to the construction of economic rights, exceptions and limitations, and enforcement tools alike. The result has been a profound impact of CJEU case law on individual EU Member States, up to the point that it seems possible to speak of a EU approach to copyright that has rendered the traditional dichotomy continental European *droit d'auteur*/common law copyright less acute than what was the case before the EC/EU harmonisation process began.

Also at the level of the Legal Service the approach has been consistent, possibly helped by the fact that agents appointed each time to represent the European Commission in CJEU proceedings have been selected from a narrow pool. Overall, the approach of the Legal Service to certain copyright issues has not significantly changed over time. On the one hand, this has made the content of the resulting observations somewhat predictable. On the other hand, all this has reflected a fundamental disagreement between the Legal Service and the Court *and* the Legal Service and the Copyright Unit. All this raises the question whether the Legal Service has limited itself to providing technical assistance to the Court or whether, instead, it has attempted to promote a different construction of EU copyright provisions and, in so doing, develop copyright policy principles in parallel (and on occasion in contrast) with the Copyright Unit. From the analysis of the observations filed in digital/online copyright cases, the latter appears to be the case. However, it is not clear what motivations have supported this course of action, considering the wording of international copyright provisions and the developments occurred over time at the level of CJEU case law and, as a result, the guidance provided by judgments existing at the time of the intervention. While it is true that the Legal Service is free to express its own views before the CJEU,<sup>174</sup> like the Copyright Unit, it is also under the direct authority of the President of the European Commission. Overall, despite a number of significant exceptions, the work—or, perhaps more aptly, the “agenda”—of the Legal Service in CJEU copyright referrals appears to have been guided by a policy-driven idea of what EU copyright *should* be

<sup>172</sup> Rosati, *Copyright and the Court of Justice* (2019), pp.32–36.

<sup>173</sup> This has been, for instance, the case of the direct/primary liability of platform operators. See *Ziggo AG* (C-610/15) EU:C:2017:99 at [3]: “The European Commission, whose opinion appears to me to be shared by the United Kingdom of Great Britain and Northern Ireland, contends that liability for sites of this type is a matter of copyright application, which can be resolved not at the level of EU law but under the domestic legal systems of the Member States. Such an approach would, however, mean that liability, and ultimately the scope of the copyright holders' rights, would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightholders within the single market. That is why the answer to the problems raised in the present case must, in my view, be sought rather in EU law.”

<sup>174</sup> *MyTravel Group Plc v Commission* (T-403/05) EU:T:2008:316 at [126]. See also the discussion in K. Lenaerts, “The Principle of Democracy in the Case Law of the European Court of Justice” (2013) 62 I.C.L.Q. 271, 304.

like, rather than a dialogue with existing CJEU jurisprudence and the acknowledgment of how EU copyright has *actually* developed over the past 20 years or so.

## Annex 1: Current EU copyright acquis (chronological order)

<p>Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15 (SatCab Directive), as amended by Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 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, and amending Council Directive 93/83/EEC [2019] OJ L130/82</p>
<p>Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (Database Directive)</p>
<p>Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive)</p>
<p>Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32 (Resale Right Directive)</p>
<p>Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L157, 30.04.2004) [2004] OJ L195/16 (Enforcement Directive)</p>
<p>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 (codified version) [2006] OJ L376/28 (Rental and Lending Rights Directive)</p>
<p>Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12 (Term Directive)</p>
<p>Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) [2009] OJ L111, 05.05.2009, 16–22 (Software Directive)</p>
<p>Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L265/1 (Performers and Sounds Recordings Term Directive)</p>
<p>Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5 (Orphan Works Directive)</p>
<p>Directive 2014/26/EU of the European Parliament and of the Council 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 [2014] OJ L84/72 (Collective Rights Management Directive)</p>
<p>Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 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 [2017] OJ L242/1 (Marrakesh Regulation)</p>
<p>Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses 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 and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6 (Marrakesh Directive)</p>
<p>Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1 (Portability Regulation)</p>
<p>Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 (DSM Directive)</p>

## Annex 2: Observations of the European Commission’s Legal Service considered

The table below displays in reverse chronological order the observations of the European Commission’s Legal Service used for this study, alongside the names of the agents who represented the Legal Service. Use of the symbol ♦ indicates cases that, while considered in the present analysis, did not specifically

relate to digital or online issues. Access to Observations in cases pending as of 6 September 2019 was refused.

Case	Date of the CJEU judgment	Legal Service Agents
<i>Spiegel Online GmbH v Volker Beck</i> (C-516/17)	29 July 2019	Samnadda Krämer Scharf
◆ <i>Pelham GmbH v Hütter and Schneider-Esleben</i> (C-476/17)	29 July 2019	Samnadda Scharf
<i>Funke Medien NRW GmbH v Bundesrepublik Deutschland</i> (C-469/17)	29 July 2019	Samnadda Krämer Scharf
◆ <i>Criminal proceedings against Syed</i> (C-572/17)	19 December 2018	Samnadda Simonsson
<i>Bastei Lübbe GmbH &amp; Co KG v Strotzer</i> (C-149/17)	18 October 2018	Scharf Wilman Wojcik
<i>Coöperatieve Vereniging SNB-REACT U.A. v Mehta</i> (C-521/17)	7 August 2018	Wilman Randvere
<i>Land Nordrhein-Westfalen v Renckhoff</i> (C-161/17)	7 August 2018	Samnadda Scharf
<i>VCAST Ltd v RTI SpA</i> (C-265/16)	29 November 2017	Samnadda Malferrari
<i>Stichting Brein v Ziggo BV and XS4All Internet BV</i> (C-610/15)	14 June 2017	Samnadda Scharf Wilman
<i>Stichting Brein v Wullems</i> (C-527/15)	26 April 2017	Samnadda Scharf Wilman
<i>Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH</i> (C-138/16)	16 March 2017	Samnadda Scharf
<i>ITV Broadcasting Ltd v TVCatchup Ltd</i> (C-275/15)	1 March 2017	Samnadda Scharf
<i>Vereniging Openbare Bibliotheken v Stichting Leenrecht</i> (C-174/15)	10 November 2016	Samnadda Scharf Wilman
<i>Tommy Hilfiger Licensing LLC v DELTA CENTER a.s.</i> (C-494/15)	7 June 2016	Wilman Nemecková
<i>Ranks and Vasiļevičs v Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra and Microsoft Corp</i> (C-166/15)	12 October 2016	Samnadda Sauka
<i>McFadden v Sony Music Entertainment Germany GmbH</i> (C-484/14)	15 September 2016	Wilman Wojcik
<i>GS Media BV v Sanoma Media Netherlands BV</i> (C-160/15)	8 September 2016	Samnadda Scharf Wilman
◆ <i>Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)</i> (C-117/15)	31 May 2016	Samnadda Scharf



Case	Date of the CJEU judgment	Legal Service Agents
<i>Dimensione Direct Sales Srl and Labianca v Knoll International SpA</i> (C-516/13)	13 May 2015	Samnadda Bulst
<i>C More Entertainment AB v Sandberg</i> (C-279/13)	26 March 2015	Samnadda Enegren
<i>Copydan Båndkopi v Nokia Danmark A/S</i> (C-463/12)	5 March 2015	Samnadda Støvlbæk
<i>Hejduk v EnergieAgentur.NRW GmbH</i> (C-441/13)	22 January 2015	Rouchaud-Joët Wilderspin
♦ <i>Art &amp; Allposters International BV v Stichting Pictoright</i> (C-419/13)	22 January 2015	Samnadda Wilman
<i>Technische Universität Darmstadt v Eugen Ulmer KG</i> (C-117/13)	11 September 2014	Samnadda Bulst
♦ <i>Deckmyn and Vrijheidsfonds VZW v Vandersteen</i> (C-201/13)	3 September 2014	Samnadda Wilman
<i>Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd</i> (C-360/13)	5 June 2014	Samnadda
<i>ACI Adam BV v Stichting de Thuis kopie and Stichting Onderhandelingen Thuis kopie vergoedin</i> (C-435/12)	10 April 2014	Samnadda Wilman
<i>Hi Hotel HCF Sàrl v Spoering</i> (C-387/12)	3 April 2014	Bogensberger Wilderspin
<i>UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH</i> (C-314/12)	27 March 2014	Samnadda Bulst
<i>Svensson v Retriever Sverige AB</i> (C-466/12)	13 February 2014	Samnadda Enegren
<i>Nintendo Co Ltd v PC Box Srl and 9Net Srl</i> (C-355/12)	23 January 2014	Samnadda Montaguti
<i>Pinckney v KDG Mediatech AG</i> (C-170/12)	3 October 2013	Rouchaud-Joët
<i>Amazon.com International Sales Inc v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH</i> (C-521/11)	11 July 2013	Samnadda Bulst
<i>Verwertungsgesellschaft Wort (VG Wort) v Kyocera</i> (C-457/11) and <i>Canon Deutschland GmbH</i> (C-458/11) and <i>Fujitsu Technology Solutions GmbH</i> (C-459/11) and <i>Hewlett-Packard GmbH</i> (C-460/11) v <i>Verwertungsgesellschaft Wort (VG Wort)</i>	27 June 2013	Samnadda Bulst
<i>ITV Broadcasting Ltd v TVCatchUp Ltd</i> (C-607/11)	7 March 2013	Samnadda Wilman
<i>UsedSoft GmbH v Oracle International Corp</i> (C-128/11)	3 July 2012	Samnadda Bulst
<i>SAS Institute Inc v World Programming Ltd</i> (C-406/10)	2 May 2012	Samnadda
<i>DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau</i> (C-510/10)	26 April 2012	Samnadda Støvlbæk
<i>Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV</i> (C-360/10)	16 February 2012	Samnadda Nijenhuis
<i>Infopaq International A/S v Danske Dagblades Forening</i> (C-302/10)	17 January 2012	Samnadda Støvlbæk
♦ <i>Painer v Standard Verlags GmbH</i> (C-145/10)	1 December 2011	Samnadda Grünheid

Case	Date of the CJEU judgment	Legal Service Agents
		Wilderspin
<i>Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)</i> (C-70/10)	24 November 2011	Samnadda Vrignon
♦ <i>Football Association Premier League Ltd v QC Leisure and (C-403/08) and Murphy v Media Protection Services Ltd (C-429/08)</i>	04 October 2011	Lewis Krämer Rogalski
<i>L'Oréal SA v eBay International AG</i> (C-324/09)	25 August 2011	Krämer
<i>Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury</i> (C-393/09)	22 December 2010	Krämer Ondrušek
<i>Infopaq International A/S v Danske Dagblades Forening</i> (C-5/08)	16 July 2009	Krämer Støvlbæk
♦ <i>Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA</i> (C-306/05)	7 December 2006	Vidal Puig Wils