

# ***GS Media* and its implications for the construction of the right of communication to the public within EU copyright architecture**

by Eleonora Rosati\*

## **Introduction**

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In its 2016 decision in *GS Media v Sanoma*<sup>1</sup> (*GS Media*) the Court of Justice of the European Union (CJEU) sought to clarify under what conditions the provision of a link to a work protected by copyright made available on a third-party website (where it is freely accessible) without a licence from the relevant rightholder falls within the scope of the right of communication to the public within Article 3(1) of Directive 2001/29/EC<sup>2</sup> (the InfoSoc Directive).

Derived from the making available right within Article 8 of the WIPO Copyright Treaty 1996 (WCT)<sup>3</sup>, Article 3(1) of the InfoSoc Directive mandates upon EU Member States to “provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

In its decision the CJEU held that whether linking to unlicensed content falls within or outside the scope of Article 3(1) of the InfoSoc Directive depends – crucially – on whether the link provider has a profit-making intention or knowledge of the unlicensed character of the work linked to.

It is arguable that *GS Media* has been hardly the last word on the relationship between linking and copyright, as well as the overall understanding and construction of the right of communication to the public, notably because the judgment has introduced further complexities and ambiguities into this area of the law.

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<sup>1</sup> *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:644, 8 September 2016.

<sup>2</sup> 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, OJ 2001, L 167, pp 10-19.

<sup>3</sup> On the concept of making available within Article 8 WCT, see MM Walter, ‘Article 3 Right of communication to the public of works and right of making available to the public of other subject-matter’, in MM Walter – S von Lewinski, *European copyright law – A commentary* (2010:OUP), pp 975-980.

## 1. Linking and copyright before *GS Media*

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In its seminal 2014 decision in *Svensson v Retriever Sverige*<sup>4</sup> (*Svensson*), the CJEU ruled that, at certain conditions, the provision of a hyperlink to a work hosted on a third-party website falls within the scope of copyright protection. More specifically, the court held that linking to protected content may be regarded as an act of communication to the public within Article 3(1) of the InfoSoc Directive. Qualification of linking as an act of communication to the public means that, when the link in question is provided without permission from the relevant rightholder, this activity could amount to a *prima facie*<sup>5</sup> copyright infringement.

The main question of the referring court, the Svea Court of Appeal (Sweden), in *Svensson* was whether the provision of a hyperlink to a work *lawfully* made available on a certain website where it is *freely* accessible is to be regarded as an act of communication to the public within Article 3(1) of the InfoSoc Directive.<sup>6</sup> This reference for a preliminary ruling had been made in the context of proceedings between a number of journalists and media monitoring provider Retriever Sverige, and concerned their request for compensation for the harm suffered as a result of the inclusion on the latter's website of hyperlinks redirecting users to press articles (in which the applicants held the copyright) freely accessible on the *Göteborgs-Posten* website.

In its decision the CJEU decision noted that the concept of communication to the public within Article 3(1) of the InfoSoc Directive includes two cumulative criteria: (1) an 'act of communication' of a work, (2) directed to a 'public'.<sup>7</sup> As regards the first condition, the court clarified that this concept must be construed broadly in order to ensure, in accordance with – *inter alia* – Recitals 4, 9 and 23 in the preamble to the InfoSoc Directive, a high level of protection for rightholders. The provision, on a website, of hyperlinks to protected works published without any access restrictions on another site affords users of the first site direct access to those works, and therefore amounts to an 'act of communication'. Turning to the second condition, ie that the communication is directed to a 'public', the CJEU recalled that the term 'public' refers to an indeterminate number of potential recipients and implies a fairly large number of persons.<sup>8</sup> However, an act of communication within Article 3(1) of the InfoSoc Directive requires that a communication concerning the same works as those covered by the initial communication and made by the same technical means (ie internet), must be also directed to a 'new' public. This is a public that was not

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<sup>4</sup> *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76.

<sup>5</sup> Whether the act in question amounts to an actual infringement depends on additional considerations, including: (1) whether the work at hand is protected by copyright in the first place, ie it is sufficiently original; and (2) the defendant can successfully invoke one or more copyright defences available under the applicable national copyright regime.

<sup>6</sup> Already answering potentially in the affirmative prior to the *Svensson* decision, see Walter, 'Article 3', *cit*, p 985.

<sup>7</sup> *Svensson*, [16], referring to *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147 (*TV Catch Up*), [21] and [31].

<sup>8</sup> *Svensson*, [21], referring to *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:479 (*SGAE*), [37]-[38], and *TV Catch Up*, [32].

taken into account by the relevant rightholder when he authorized the initial communication to the public.<sup>9</sup>

The CJEU concluded that the provision of a hyperlink to a work *lawfully* and *freely* accessible on a third-party website does not fall within the scope of Article 3(1) of the InfoSoc Directive. This is because the public targeted by the initial communication consists of all potential visitors to the site concerned. As such, the hyperlink would not communicate the work to a public not taken into account by the relevant rightholder at the time of authorizing the initial communication.<sup>10</sup>

The CJEU confirmed the approach taken in *Svensson* in the subsequent 2014 order in *BestWater International v Mebes and Potsch*<sup>11</sup> (*BestWater*), in which it indicated that the provision of a link to content that is freely accessible on a third-party website does not fall within the scope of Article 3(1) of the InfoSoc Directive. What remained uncertain after *Svensson* and *BestWater* was the treatment of linking to protected content available on a third-party website and first communicated without the consent of the relevant rightholder, ie unlicensed content. Logically, if one had followed the reasoning of the CJEU in *Svensson* fully, then linking of this kind would be *always* regarded as an act falling within the scope of Article 3(1) of the InfoSoc Directive. The relevant rightholder, in fact, would have no public in mind, since he had never authorized the making available of his work in the first place. Accordingly, linking to content of this kind should be regarded as an act of communication to a 'new public'. Yet, when the opportunity arose to address this particular scenario (in *GS Media*), Advocate General (AG) Wathelet<sup>12</sup> first and, then, the CJEU took a different direction.

Overall, the treatment of linking under EU copyright after the *Svensson* and *BestWater* decisions can be summarized as follows<sup>13</sup>:

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<sup>9</sup> *Svensson*, [24], recalling (by analogy): *SGAE* [40] and [42]; *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia*, C-136/09, EU:C:2010:151 (*Organismos Sillogikis Diacheirisis*), [38]; and *TV Catch Up*, [39].

<sup>10</sup> *Svensson*, [25]-[28].

<sup>11</sup> *BestWater International v Mebes and Potsch*, C-348/13, EU:C:2014:2315 (*BestWater*).

<sup>12</sup> Opinion of Advocate General Melchior Wathelet in *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:221 (Opinion).

<sup>13</sup> E Rosati, 'Do you need permission to link? Here's my table attempting a summary of recent CJEU case law' (11 October 2015) The IPKat, available at <http://ipkitten.blogspot.co.uk/2015/10/do-you-need-permission-to-link-heres-my.html>.

Accessibility of content	Content published with rightholder's consent	Act of communication to the public	Potential infringement
Freely accessible	Yes	No ( <i>Svensson</i> )	No
Not freely accessible, eg paywalled	Yes	Yes ( <i>BestWater</i> )	Yes
Freely accessible	No	?	?
Not freely accessible	No	Yes	Yes

## 2. *GS Media*

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### 2.1. Background

*GS Media* was a reference for a preliminary ruling from the Dutch Supreme Court. It had been made in the context of proceedings between Sanoma (the publisher of *Playboy* magazine) and *GS Media*, concerning the publication by the latter on a website (*GeenStijl*) that it operates of hyperlinks to other websites hosting unpublished photographs of Dutch TV personality Britt Dekker, that had been taken for a forthcoming issue of *Playboy*. In 2011 (prior to the publication of the *Playboy* issue in question) *GS Media* published a report with the title “[obscenity] leaked! Nude photos ... Dekker”. The report also included part of one of the photographs in the top left-hand corner. The report ended with the following words: “And now the link with the pics you’ve been waiting for. Whoever [obscenity] first, [obscenity] first. HERE. ...”. By clicking on a hyperlink, indicated by “HERE”, readers would be directed to an Australian data-storage website (*filefactory.com*), where the photographs appeared to be freely accessible.<sup>14</sup> By clicking on the following hyperlink, they could open a new window that contained the button “DOWNLOAD NOW”. By clicking on the button, the readers would open a file in zip format containing 11 files in PDF format, each of which contained one of the photographs. Despite Sanoma's demands, *GS Media* refused to remove the hyperlink in question. Although the photographs were eventually removed from the *filefactory.com* website, they were subsequently made available at another online location. *GS Media* published two further reports with new hyperlinks to Dekker's photographs.

Sanoma succeeded in its actions before the Amsterdam District Court and the Amsterdam Court of Appeal, although these courts considered different aspects. The former held that, by posting those hyperlinks, *GS Media*'s conduct had been unlawful because it encouraged visitors to *GeenStijl* to view the photographs unlawfully posted elsewhere and which, without those

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<sup>14</sup> AG Wathelet noted that whether this was the case was not entirely clear: see Opinion, [71].

hyperlinks, would have not been easy to find.<sup>15</sup> In contrast, the Court of Appeal held that, on the one hand, GS Media had infringed copyright by posting a cut-out of one of the photographs on the *GeenStijl* website but, on the other hand, had not made the photographs available to the public by posting the hyperlinks on its website.<sup>16</sup>

The decision of the Court of Appeal was appealed before the Supreme Court, which decided to stay the proceedings and refer the case to the CJEU for a preliminary ruling. As summarized by AG Wathelet in his Opinion, the referring court had sought guidance in relation to three main points. First, whether Article 3(1) of the InfoSoc Directive must be interpreted as meaning that the provision on a website of a hyperlink to another website operated by a third party, which is accessible to the general internet public and on which works protected by copyright are made available to the public, without the authorization of the copyright holder constitutes an act of communication to the public. Secondly, whether the fact that the person who posts the hyperlink to a website is or ought to be aware of the lack of consent by the copyright holder for the initial communication of the works on that website is important for the purpose of Article 3(1) of that directive. Thirdly, whether the fact that a hyperlink has facilitated access to the works in question is relevant in accordance with Article 3(1) of that directive.

## **2.2. The Opinion of AG Wathelet**

The AG noted at the outset that this reference had come in the wake of the CJEU judgments in *Svensson* and *BestWater*. He began his analysis by stressing that, whilst it is true that in *Svensson* the CJEU often referred to the rightholder's authorization to the initial communication, "no reference is made in the operative part to the issue of whether or not the copyright holder authorised the initial making available of the protected work."<sup>17</sup> Furthermore in *BestWater* the relevant work (a YouTube video) to which the link in question referred had not been even published with the authorization of the relevant rightholder. Yet, in accordance with its earlier decision in *Svensson*, in that case the CJEU ruled that Article 3(1) of the InfoSoc Directive had not been triggered. As a result, noted the AG, "the order in *BestWater* ... seems to indicate that the fact that the copyright holder did not authorise the initial communication to the public was not relevant for the purposes of Article 3(1)."<sup>18</sup>

The AG then reviewed the two relevant cumulative criteria under Article 3(1) of the InfoSoc Directive: (1) an 'act of communication' of a work, (2) directed to a 'public'. As regards the first condition (an 'act of communication'), the AG recalled that in *Svensson* the CJEU held that for there to be an 'act of communication', it is sufficient that a work is made available to a public in

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<sup>15</sup> *GS Media*, [17].

<sup>16</sup> *GS Media*, [18].

<sup>17</sup> Opinion, [39].

<sup>18</sup> Opinion, [41].

such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity. According to the AG this approach is not correct in relation to hyperlinks, because hyperlinks that lead, even directly, to protected works do not 'make available' those works to a public where the works are already freely accessible on another website but – rather – merely facilitate the finding of those works. In order to establish an act of communication, the intervention of the 'hyperlinker' must be vital or indispensable in order to benefit from or enjoy the relevant copyright work. Hyperlinks posted on a website that direct to copyright works freely accessible on another website cannot be classified as an 'act of communication': the intervention of the operator of the website that posts the hyperlinks is not indispensable to the making available of the works in question to users.

Lacking one of the two necessary conditions, ie an act of communication, the AG did not consider the second requirement under Article 3(1), ie that the communication is directed to a 'public'. He nonetheless noted that, in the absence of an act of communication within the meaning of Article 3(1), the hyperlinker's motives and the fact that he was or ought to have been aware that the initial communication of those photographs on the other websites has not been authorized by the relevant rightholder or also that the works in question have not been previously made available to the public with his consent are irrelevant. However, the AG considered that if a hyperlink makes it possible for users of the site on which it appears to circumvent restrictions, eg a paywall, put in place on third-party websites to limit access to protected works, the hyperlink in question constitutes an indispensable intervention without which those users could not enjoy the works. Accordingly, that intervention makes such works available to visitors of the website at issue and therefore constitutes an act of communication to a public that must be authorized by the relevant rightholder.

The AG also considered that no other circumstances should be taken into account when answering the question whether there is deemed to be a 'communication to the public' if, by means of a hyperlink, access is provided to a work for which authorization to the initial communication has not been obtained. More generally, the AG observed that linking should not fall within Article 3(1) of the InfoSoc Directive as a matter of policy, in order not to impair the development of the information society in Europe:

"It is a matter of common knowledge that the posting of hyperlinks by users is both systematic and necessary for the current internet architecture. While the circumstances at issue in the main proceedings are particularly obvious, I consider that, as a general rule, internet users are not aware and do not have the means to check whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder's consent. If users were at risk of proceedings for infringement of copyright under Article 3(1) of [the InfoSoc Directive] whenever they post a hyperlink to works freely accessible on another website, they would be much more

reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society. In my view, such interference in the functioning of the internet must be avoided."<sup>19</sup>

### 2.3. The CJEU decision

On 8 September 2016 the CJEU delivered a long-awaited 56-paragraph judgment, in which it held that the provision of a hyperlink to a copyright work that is freely accessible and was initially published without the rightholder's consent on another website does not constitute a 'communication to the public', as long 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 rightholder. More specifically,

"Article 3(1) of [the InfoSoc Directive] must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed."

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The CJEU began its analysis with a general discussion of the preventative nature of the right of communication to the public.<sup>21</sup> It mentioned the lack of a definition in the body of the InfoSoc Directive and, hence, the need to refer to the objectives pursued by this piece of EU legislation: high level of protection of authors<sup>22</sup>, but also a fair balance of contrasting rights and interests, as also protected by the Charter of Fundamental Rights of the European Union.<sup>23</sup>

The court then recalled that the concept of 'communication to the public' includes two cumulative criteria: (1) an 'act of communication' of a work and (2) the communication of that work to a 'public'.<sup>24</sup> This said, it noted how an individual assessment<sup>25</sup> is to be undertaken in specific

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<sup>19</sup> Opinion, [78]-[79].

<sup>20</sup> *GS Media*, [55]

<sup>21</sup> *GS Media*, [28]

<sup>22</sup> *GS Media*, [30]

<sup>23</sup> *GS Media*, [31].

<sup>24</sup> *GS Media*, [32], referring to *Svensson*, [16]; *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, C-325/14, EU:C:2015:764 (*SBS Belgium*), [15]; and *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)*, C-117/15, EU:C:2016:379 (*Reha Training*), [37]).

instances by considering several complementary criteria. These are not autonomous and are interdependent, and may, in different situations, be present to widely varying degrees. It follows that they must be applied both individually and in their interaction with one another.<sup>26</sup> One of such criteria is the indispensable role played by the user and the deliberate nature of his intervention: the user makes an act of communication when he intervenes, in full knowledge of the consequences of his action, to give access to a protected work to his customers, and does so, in particular, where, in the absence of that intervention, his customers would not, in principle, be able to enjoy the work.<sup>27</sup> Other criteria include: a communication using specific technical means<sup>28</sup>, different from those previously used or, failing that, to a 'new public'<sup>29</sup>; and the profit-making nature of the communication.<sup>30</sup> 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.<sup>31</sup>

Reviewing earlier case law, the CJEU noted how from neither *Svensson* nor *BestWater* it follows that "posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of 'communication to the public'".<sup>32</sup> While both decisions confirm the importance of the rightholder's consent under Article 3(1) of the InfoSoc Directive (due to the preventative nature of the right of communication to the public), from neither it can be inferred that, lacking the relevant rightholder's consent, a link would invariably amount to an unauthorized act of communication to the public.<sup>33</sup> In light of this conclusion, the court made two main observations. First, the internet is of particular importance to freedom of expression and of information, and hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in a network characterized by the very availability of immense amounts of information.<sup>34</sup> Secondly, it may be difficult, in particular for individuals

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<sup>25</sup> *GS Media*, [33].

<sup>26</sup> *GS Media*, [34], referring to: *Società Consortile Fonografici (SCF) v Marco Del Corso*, C-135/10, EU:C:2012:140 (*SCF*), [79]; *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*, C-162/10, EU:C:2012:141 (*PPI*), [30]; and *Reha Training*, [35].

<sup>27</sup> *GS Media*, [35].

<sup>28</sup> As noted by M Leistner, 'Copyright at the interface between EU law and national law: definition of "work" and "right of communication to the public"' (2015) 10(8) *JIPLP* 626, p 634, the definition of the same technical means has been rather generous in CJEU case law: for instance, on the internet all potential and different forms of communication appear to constitute the same technical means.

<sup>29</sup> *GS Media*, [36]-[37]. However, the post-*GS Media* decision in *Zürs.net Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH*, C-138/16, EU:C:2017:218 (*Zürs.net*) seems to suggest – at [26]-[27] – 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>30</sup> *GS Media*, [38].

<sup>31</sup> *GS Media*, [39].

<sup>32</sup> *GS Media*, [43].

<sup>33</sup> *GS Media*, [43].

<sup>34</sup> *GS Media*, [45].



who wish to post such links, to ascertain whether the website to which those links are expected to lead provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet. Checking is all the more difficult where those rights have been subject to sub-licenses. Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it.<sup>35</sup>

In order to determine whether the provision of a hyperlink to unlicensed content amounts to an act of communication to the public, the CJEU considered the complementary criteria mentioned above, notably the profit-making intention and the subjective state of mind of the 'hyperlinker'.<sup>36</sup> According to the court, when the provision of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, it is necessary to consider that such person is unaware that work had been published on the internet without the consent of the relevant rightholder. In other words, in such circumstances, the link provider does not intervene in full knowledge of the consequences of his conduct. Conversely, the provision of a hyperlink to protected content would amount to an act of communication to the public in the following situations. First, when the 'hyperlinker' knows or ought to have known that the hyperlink posted would provide access to a work unlawfully placed on the internet, for example owing to the fact that he was notified to this effect by the relevant rightholder.<sup>37</sup> Secondly, when the hyperlink at issue allows users of the website on which they are posted to circumvent the restrictions taken by the site where the protected work is posted in order to restrict the public's access to his own subscribers.<sup>38</sup> While the latter scenario appears to lead also to a finding of copyright infringement, the same may not be true also in relation to the former. In fact, as the CJEU explained at paragraph 53, liability of the 'hyperlinker' would follow not only from knowledge that the content linked to is unlicensed, but also from the impossibility to invoke successfully a defence allowed by Article 5(3) of the InfoSoc Directive and available under the applicable national copyright regime.<sup>39</sup>

The court also added a *presumptio iuris tantum*, ie rebuttable, 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>40</sup> In the case at hand, GeenStijl

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<sup>35</sup> *GS Media*, [46].

<sup>36</sup> *GS Media*, [47]-[48].

<sup>37</sup> *GS Media*, [49].

<sup>38</sup> *GS Media*, [50].

<sup>39</sup> *GS Media*, [53].

<sup>40</sup> *GS Media*, [51].

provided the hyperlinks for profit, yet knowing that the photos had been published without Sanoma's permission. The court concluded that a situation of this kind would be clearly one of *prima facie* copyright infringement<sup>41</sup>, although it failed to clarify whether the profit-making intention should relate to the provision of the link *per se* or, rather, the overall context in which the link is provided (on this point, see further below).

Overall, after *GS Media* the treatment of linking to copyright-protected content can be summarized as follows<sup>42</sup>:

Accessibility of content	Content published with rightholder's consent	Profit-making intention	Knowledge that content linked to is unlawful	Act of communication to the public	Potential infringement
Freely accessible	Yes	n/a	n/a	No ( <i>Svensson, GS Media</i> )	No
Not freely accessible	Yes	n/a	n/a	Yes ( <i>BestWater, GS Media</i> )	Yes
Freely accessible	No	No	No	No ( <i>GS Media</i> )	No
Freely accessible	No	No	Yes (eg because notified)	Yes ( <i>GS Media</i> )	Yes*
Freely accessible	No	Yes	Presumed (rebuttable presumption)	Yes ( <i>GS Media</i> )	Yes*
Not freely accessible	No	n/a	n/a	Yes	Yes

\*If rightholder notifies link provider (without prior knowledge of unlawfulness) that content linked to is unlawful and he refuses to remove the link, and exceptions in Article 5(3) InfoSoc Directive are inapplicable.

<sup>41</sup> *GS Media*, [54].

<sup>42</sup> E Rosati, 'Linking after *GS Media* ... in a table' (10 September 2016) The IPKat, available at <http://ipkitten.blogspot.co.uk/2016/09/linking-after-gs-media-in-table.html>.

### 3. Implications of the *GS Media* decision

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#### 3.1. From *Svensson* to *GS Media*: what has changed

AG Wathelet noted how the operative part of the *Svensson* judgment does not contain any reference to the element of consent, and suggested that consent is not crucial. He did so also by reference to the *BestWater* order. This interpretation is not convincing. From the *Svensson* judgment it is apparent that the CJEU placed a considerable emphasis on the relevance of rightholder's consent and the public he had in mind when he authorized the initial communication to the public of his work. As mentioned, the logical consequence of *Svensson* would have been to say that any time one links to a copyright work whose initial communication had not been authorized by the relevant rightholder, this act falls within the scope of Article 3(1) of the InfoSoc Directive. While this conclusion would have been correct in a case like *GS Media*, both AG Wathelet and the CJEU appeared to believe that it would have triggered unwanted consequences. First, this approach would have been hardly compatible with the idea of providing a fair balance of different interests, this being a concern taken into consideration with increasing frequency by the CJEU, especially in an online context.<sup>43</sup> Secondly, it would have been hardly workable in practice. This is because making sure that all the links provided *are and remain* (the content linked to and hosted on a third-party website can in fact change over time) to licensed content can prove a daunting – if at all possible – due diligence task. Online tools like SEO Tools Centre (<https://seotoolscentre.com/website-links-count-checker>) allow one to see how many links are provided, including to external websites, by URLs of interest. For instance, on 23 January 2017 the homepage of *Corriere della Sera* alone contained 347 links, over 50% (188) of which directed to third party-websites. *GS Media* suggests that, since *Corriere della Sera* is run for profit, there is a presumption that all the copyright content linked to has been confirmed to have been made available with the rightholders' consent.<sup>44</sup> How realistic is the fulfillment of such an obligation?

AG Wathelet suggested that linking – as matter of policy – should fall outside the scope of copyright. The CJEU did not go as far as that. Yet, the court also acknowledged the importance of hyperlinks to the functioning of the internet and, as far as the construction of the right of communication is concerned, agreed with the AG on the relevance of considering whether the defendant's intervention is indispensable.

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<sup>43</sup> See, eg, the pre-*GS Media* decisions in *Productores de Música de España (Promusicae) v Telefónica de España SAU*, C-275/06, EU:C:2008:54, [68]; and *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, C-314/12, EU:C:2014:192, [46]-[47]. On the overall interplay between copyright protection and the protection of other fundamental rights in CJEU jurisprudence, see J Griffiths, 'Constitutionalising or harmonising - the Court of Justice, the right to property and European copyright law' (2013) 38(1) ELR 65.

<sup>44</sup> This is in line with the approach taken by national courts in the immediate aftermath of the *GS Media* decision: see further below sub §3.2.3.

The main points of departure between the AG Opinion and the CJEU decision are essentially two: first, the confirmation by the latter that linking falls within the scope of copyright. Secondly, that the knowledge/intention of the link provider is a relevant element to the determination of potential liability for copyright infringement. The latter point is however problematic, both considering that primary copyright infringement is usually regarded as a strict liability tort in national copyright regimes (so that the defendant's state of mind is irrelevant<sup>45</sup>), and requiring one to check whether every link he posts is to copyright content made available with the rightholders' consent may prove – as explained above – excessively burdensome.

### **3.2. Construction of right of communication to the public**

#### **3.2.1. Notion of 'communication'**

The CJEU has had the opportunity to consider what amounts to a 'communication to the public' on several occasions.<sup>46</sup> Overall, the overarching consideration has been to ensure that the right within Article 3(1) of the InfoSoc Directive receives a broad interpretation, in line with the objective of the InfoSoc Directive to ensure a high level of protection. It is not entirely clear, however, who is to be intended as the beneficiary of such high level of protection: while Recital 24 in the preamble to the InfoSoc Directive refers, loosely, to "intellectual property", the CJEU has often indicated "authors" as those who should be guaranteed a high level of protection<sup>47</sup>, although in *Svensson* the reference was to "copyright holders".<sup>48</sup>

<sup>45</sup> See, eg, G Davies – N Caddick – G Harbottle, *Copinger and Skone James on copyright*, 16<sup>th</sup> edn (Sweet & Maxweel:2016), Vol I, pp 534-535 in relation to UK copyright.

<sup>46</sup> Relevant CJEU case law prior to *GS Media* consists of the following decisions (in chronological order): *SGAE; Organismos Sillogikis Diacheirisis; 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 (*Circul Globus București*); *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), EU:C:2011:631 (*FAPL*); *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*); *SCF; Phonographic Performance (Ireland) Limited v Ireland and Attorney General*, C-162/10, EU:C:2012:141 (*PPI*); *TV Catch Up; Svensson; OSA - Ochranný svaz autorský pro práva k dílům hudebním os v Léčebné lázně Mariánské Lázně as*, C-351/12, EU:C:2014:110 (*OSA*); *BestWater, C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199 (*C More*); *Sociedade Portuguesa de Autores CRL v Ministério Público and Others*, C-151/15, EU:C:2015:468 (*Sociedade Portuguesa de Autores*); *SBS Belgium*; and *Reha Training*. Following the *GS Media* decision, the CJEU issued its judgment in *Zürs.net*. Currently there are two references for a preliminary ruling pending before the CJEU: *Stichting Brein v Jack Frederik Wullems, acting under the name of Filmspeler*, C-527/15 (*Filmspeler*); and *Stichting Brein v Ziggo BV and XS4ALL Internet BV*, C/601/15 (*Ziggo*).

<sup>47</sup> *SGAE*, [36]; *FAPL*, [186]; *TV Catch Up*, [20]; *OSA*, [23]; *Sociedade Portuguesa de Autores* [12]; *SBS Belgium*, [14]; *GS Media*, [30]; *ITV Broadcasting Limited and Others v TVCatchup Limited (in administration) and Others*, C-275/15, EU:C:2017:144, [22].

<sup>48</sup> *Svensson*, [17]. While authors are usually the first owners of copyright in their works, this is not always the case (see, eg, section 11(2) of the UK Copyright, Designs and Patents Act 1988 in relation to works created in the course of employment). In addition, copyright can be subject to assignment: this means that the author of a work is not necessarily the owner of the relevant copyright.

Overall, relevant case on the right of communication to the public as not been always consistent, and this might have caused uncertainties regarding identification of the correct approach to linking.<sup>49</sup> On the one hand, there have been decisions that support the view that there is an act of communication to the public within Article 3(1) of the InfoSoc Directive where there is a *transmission* of the protected work at issue, irrespective of the technical means or process used.<sup>50</sup> On the other hand, there is a line of cases<sup>51</sup> that supports the idea that no transmission is required, because it is sufficient that a work is made available in such a way that the persons forming the public may access it, irrespective of whether they avail themselves of such opportunity. However, in those cases the CJEU has given consideration to whether there is an intervention on the side of the defendant to give access to the work at issue, without which third parties could not access the work.<sup>52</sup> As mentioned, it is arguable that CJEU's contrasting approaches to whether a communication requires an actual transmission or the mere making available of a work have been a cause of uncertainty. In this sense, it is sufficient to consider the diverging academic views emerged before and in the immediate aftermath of the *Svensson* decision<sup>53</sup>, as well as the contrasting approaches taken in *GS Media* by, respectively, the European Commission in its intervention (arguing – similarly to what it had previously done in *Svensson*<sup>54</sup> – for the need of a transmission)<sup>55</sup> and AG Wathelet and the CJEU (both concluding that the mere availability of a work suffices).<sup>56</sup>

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<sup>49</sup> Prior to the *Svensson* decision, academic opinions were divided regarding whether linking would fall within the scope of Article 3(1) of the InfoSoc Directive: arguing in the negative, see European Copyright Society, *Opinion on the reference to the CJEU in Case C-466/12 Svensson* (15 February 2013), available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/european-copyright-society-opinion-on-svensson-first-signatoriespaginatedv31.pdf>; arguing in the affirmative, see 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), available at <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>.

<sup>50</sup> *Circul Globus București*, [40]; *FAPL*, [190], [193], [207]; *OSA*, [25]; *SBS Belgium*, [16]; *Reha Training*, [38].

<sup>51</sup> *SGAE*, [43]; *Svensson*, [19]; *GS Media*, [27].

<sup>52</sup> *SGAE*, [42]; *FAPL*, [194]-[195]; *Airfield*, [79]; *SCF*, [82]; *PPI* [31]; *Reha Training*, [46]; *GS Media*, [22]. See also Opinion of Advocate General Manuel Campos Sánchez-Bordona in *Stichting Brein v Jack Frederik Wullems, acting under the name of Filmspeler*, C-527/15, EU:C:2016:938 (*Filmspeler* Opinion), [53]; and Opinion of Advocate General Maciej Szpunar in *Stichting Brein v Ziggo BV and XS4ALL Internet BV*, C-610/15, EU:C:2017:99 (*Ziggo* Opinion), [51] and [53].

<sup>53</sup> See above, sub fn 49. See also, arguing that communication to the public does not require an actual transmission, E Arezzo, 'Hyperlinks and making available right in the European Union - what future for the Internet after *Svensson*?' (2014) 45(5) IIC 524, p 532; T Headdon, 'An epilogue to *Svensson*: the same old new public and the worms that didn't turn' (2014) 9(8) JIPLP 662, p 663 (submitting that the argument that transmission is required to have an act of communication "is not entirely bullet-proof"); and P Mezei, 'Enter the matrix: the effects of CJEU case law on linking and streaming technologies' (2016) 11(10) JIPLP 778, p 786. Arguing that whether transmission is required is unclear in CJEU case law, see K Klafkowska-Waśniowska, 'Public communication right: towards the full harmonisation?' (2013) 35(12) EIPR 751, p 753.

<sup>54</sup> European Commission, *Observations Écrites dans l'affaire C-466/12 Nils Svensson, Pia Gadd, Sten Sjögren et Madeleine Sahlman, partie requérante contre Retriever AB, partie défenderesse*, Sj.j(2013)121732 JE/nd, 30 January 2013, [17].

<sup>55</sup> European Commission, *Observations Écrites dans l'affaire C-160/15 GS Media*, Sj.a(2015)3575767, 30 July 2015, [23]-[24].

<sup>56</sup> Opinion, [50]; *GS Media*, [27].

Besides consideration of whether transmission is required, the CJEU has also taken into account a number of additional criteria to determine whether the act at hand should be regarded as an act of communication. For instance, in the case of broadcasts, the court has given relevance to the fact of whether one merely provides physical facilities or not<sup>57</sup>; whether the transmission/re-transmission uses the same or different technical means<sup>58</sup>; and what the function of such technical means is.<sup>59</sup> In any case, it is apparent that – despite the clarifying efforts of the Grand Chamber of the CJEU in the 2016 *Reha Training* decision – the CJEU has considered different criteria from time to time, and no consistent approach seems to exist. *GS Media* provides the most recent example in this respect. While holding that a number of criteria additional to ‘an act of communication’ directed to a ‘public’ should be considered at different times and with different relevance, the CJEU gave a central role to consideration of the ‘profit-making’ character of the communication at issue. Similarly to *SGAE*<sup>60</sup>, in *Reha Training* the CJEU indicated that in some cases this criterion is relevant, yet not decisive.<sup>61</sup> In other cases, the court employed an even more nuanced tone, by stating that the profit-making nature of the communication at hand is “not irrelevant”.<sup>62</sup> Finally, in the most relevant decision prior to *GS Media*, ie *Svensson*, the CJEU did not even mention – let alone consider – it.

### 3.2.2. Notion of ‘public’

The understanding of ‘public’ in CJEU case law is that of an indeterminate and fairly large number of people.<sup>63</sup> The (much-criticized)<sup>64</sup> reliance on the ‘new public’ criterion in *Svensson* was not something new: the CJEU had referred to the need of considering whether the public that could access the work in question is one not taken into account by the rightholder when he authorized its

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<sup>57</sup> The mere provision of physical facilities does not amount to an act of communication to the public. However, the installation of such facilities may make the public access to copyright works technically possible, and thus fall within the scope of Article 3(1) of the InfoSoc Directive: see Recital 17 in the preamble to the InfoSoc Directive, and *SGAE*, [45]-[47].

<sup>58</sup> Each transmission or re-transmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question: *TV Catch Up*, [24]; *BestWater*, [14]; *SBS Belgium*, [17].

<sup>59</sup> A mere technical means to ensure or improve reception of the original transmission in its catchment area does not constitute a ‘communication’ within the meaning of Article 3(1) of the InfoSoc Directive: *SGAE*, [42]; *FAPL*, [194]; *Airfield*, [74], [79]; *TV Catch Up*, [28].

<sup>60</sup> *SGAE*, [44].

<sup>61</sup> *Reha Training*, [49], recalling *FAPL*, [204].

<sup>62</sup> Besides *SGAE* and *FAPL*, the profit-making intention of the defendant has been also considered in: *Airfield*, [80]; *SCF*, [88]-[89]; *PPI*, [36].

<sup>63</sup> *SGAE*, [38]; *SCF*, [84]; *PPI*, [33]; *TV Catch Up*, [32]; *Svensson*, [21]; *OSA*, [27]; *Sociedad Portuguesa de Autores*, [12]; *SBS Belgium*, [21]; *GS Media*, [36]. See also *Ziggo* Opinion, [39]. For an overview of CJEU’s understanding of ‘public’, see *Arezzo*, ‘Hyperlinks’, *cit*, pp 534-535.

<sup>64</sup> PB Hugenholtz – SC Van Velze, ‘Communication to a new public? Three reasons why EU copyright law can do without a “new public”’ (2016) 47(7) IIC 797.

initial communication also in earlier decisions, starting with *SGAE*<sup>65</sup>, and subsequently in *Organismos Sillogikis Diacheirisis*<sup>66</sup>, *FAPL*<sup>67</sup>, *Airfield*<sup>68</sup>, and *OSA*.<sup>69</sup> AG Maciej Szpunar also recently relied on the notion of 'new public' in his Opinion in *Ziggo*.<sup>70</sup>

As mentioned, application of this clearly 'psychological' dimension of the 'public' element would have led to the conclusion that, when considering linking to unlicensed content, by default there would be a 'new public', since the rightholder did not consider any public at all. While AG Wathelet focused on the act of 'communication' to rule out that Article 3(1) would come into consideration thus avoiding addressing the most controversial aspect of *Svensson* (the 'new public' criterion), the CJEU followed a different route but also failed to focus on this element of the *Svensson* construction of Article 3(1) of the InfoSoc Directive. This also served the CJEU to avoid addressing the argument – advanced by the Association Littéraire et Artistique Internationale (ALAI)<sup>71</sup> – that application of the 'new public' criterion would lead to an undue exhaustion of the right of communication to the public (contrary to Article 3(3) of the InfoSoc Directive). This argument stems from considerations that when a work is freely and lawfully accessible on a certain website, then the relevant rightholder would have his right to authorize further communications exhausted following the initial communication. In a similar sense, other commentators have advanced the view that the emphasis on the 'new public' in *Svensson* might have been prompted by economic considerations, notably that a rightholder should not be entitled to additional remuneration once he has realized the full economic value of his content, eg by making it available online.<sup>72</sup> In any case, even accepting the exhaustion argument, from a practical standpoint this conclusion would be correct in the limited scenario of hyperlinks to lawful content that is freely accessible on a certain website. However, it would not really apply to situations, eg embedded and framed links, in which – besides a communication to the public – there is also the reproduction of a copyright work; and, after *GS Media*, it would not apply to the scenario of linking to unlicensed content either.

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<sup>65</sup> For an articulate criticism, see Hugenholtz –Van Velze, 'Communication to a new public?', *cit*, pp 807-815.

<sup>66</sup> *SGAE*, [40]-[42].

<sup>67</sup> *Organismos Sillogikis Diacheirisis*, [38].

<sup>68</sup> *Airfield*, [72].

<sup>69</sup> *OSA*, [31]-[32].

<sup>70</sup> *Ziggo* Opinion, [40]-[42].

<sup>71</sup> Association Littéraire et Artistique Internationale, *Opinion proposed to the Executive Committee and adopted at its meeting, 17 September 2014 on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public* (17 September 2014), available at <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>, pp 14-16. In the same sense, also Hugenholtz –Van Velze, 'Communication to a new public?', *cit*.

<sup>72</sup> See J Axhamn, 'Internet linking and the notion of "new public"' (2014) 2 NIR 110, p 128.

### 3.2.3. Conclusion on the right of communication to the public post-GS Media

Even prior to the *GS Media* decision, it was apparent that in the CJEU construction of the right of communication to the public there was hardly a consistent pattern. As if different understandings of what amounts a ‘communication’ to the ‘public’ was not enough, the CJEU in *GS Media* (and – prior to this – in *Reha Training*<sup>73</sup>) stressed the importance of considering a number of additional criteria, that are “not autonomous and are interdependent”.<sup>74</sup> An example is the ‘profit-making’ nature of the communication at hand. In the linking context, this is now a central consideration. Yet, in *GS Media* the CJEU failed to provide guidance on how this criterion should be assessed<sup>75</sup>: should one consider whether the relevant link is provided with the intention to make a profit? Or should rather one consider the surrounding environment to the relevant link, eg whether it is provided on a website that is operated for profit?

Although both alternatives appear plausible, consideration of the context in which the relevant link is provided appears to be more in line with earlier CJEU case law. In both *SGAE* and *FAPL*, in fact, the CJEU considered that the profit-making nature of the communication was apparent from the fact that the defendants transmitted the relevant works in their own establishment (hotels and a public house, respectively) in order to benefit therefrom and to attract customers to whom the works transmitted are of interest.<sup>76</sup> Yet, the fact that the link at issue appears on a commercial website might result in the profit-making intention being present in the majority of cases and, with it, the presumption of knowledge. This risk is apparent from the early applications of the *GS Media* decision, in Sweden<sup>77</sup> and Germany<sup>78</sup> respectively. In both decisions, of the Attunda District Court and the Regional Court of Hamburg respectively, appeared to consider the profit-making intention of the defendants to subsist *ipso facto* because of the provision of links in the context of their commercial activities (media publications).<sup>79</sup>

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<sup>73</sup> *Reha Training*, [35].

<sup>74</sup> *GS Media*, [34].

<sup>75</sup> Also stressing the uncertainties raised by *GS Media*, and calling it a “particulièrement inquiétant” judgment, see P Sirinelli – JA Benazeraf – A Bensamoun, *Mission droit de communication au public – Rapport et propositions* (December 2016), available at <http://www.culturecommunication.gouv.fr/content/download/155161/1673386/version/4/file/Rapport%20+%20annexes%20droit%20de%20communication%20au%20public.pdf>, p 17.

<sup>76</sup> *SGAE*, [44]; *FAPL*, [205]-[206].

<sup>77</sup> *Rebecka Jonsson v Les Éditions de l’Avenir SA*, FT 11052-15 .

<sup>78</sup> LG Hamburg, 310 O 402/16.

<sup>79</sup> See further E Rosati, ‘Linking to unlicensed content: Swedish court applies *GS Media*’ (27 October 2016) The IPKat, available at <http://ipkitten.blogspot.co.uk/2016/10/linking-to-unlicensed-content-swedish.html>; N Malovic – P Haddad, ‘Again on the first post-*GS Media* national decision (17 November 2016) The IPKat, available at <http://ipkitten.blogspot.co.uk/2016/11/again-on-first-post-gs-media-national.html>; M Brüß, ‘CJEU *GS Media* decision finds its first application in Germany’ (9 December 2016) The 1709 Blog, available at <http://the1709blog.blogspot.co.uk/2016/12/cjeu-gs-media-decision-finds-its-first.html>; S Abrar, ‘*GS Media* finds its first application in Germany’ (12 December 2016) The IPKat, available at <http://ipkitten.blogspot.co.uk/2016/12/gs-media->



#### 4. New directions for the right of communication to the public? *Filmspeler*, *Ziggo*, and the draft DSM Directive

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Two cases are currently pending before the CJEU (*Filmspeler* and *Ziggo*) and will be relevant to the overall understanding and construction of Article 3(1) of the InfoSoc Directive. In both cases, the AG Opinions (by AG Manuel Campos Sánchez-Bordona and AG Maciej Szpunar, respectively) appear to suggest to some extent a substantial departure from *GS Media*, at least as far as the understanding of the right of communication to the public is concerned.

In his Opinion in *Filmspeler*<sup>80</sup> AG Campos Sánchez-Bordona proposed a construction of the right of communication to the public that diverges from the one adopted in *GS Media*, in the sense that the relevance of the 'indispensable intervention' criterion is scaled down in favour of a broader scope of the right. More specifically, AG Campos Sánchez-Bordona construed the notion of 'indispensable intervention' broadly and in a way that goes beyond a 'merely direct' indispensable intervention, as instead that CJEU had done in *GS Media* and, prior to that, *Reha Training*.

In his Opinion in *Ziggo* AG Szpunar broadened the scope of who is to be regarded as making an 'indispensable intervention'. According to the AG, while users of a peer-to-peer network like The Pirate Bay (TPB) deliberately make the works in their possession available to other users of the network,

"those works would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as TPB, which enable works to be found and accessed. The operators of those sites therefore arrange the system which enables users to access works that are made available by other users. Their role may therefore be regarded as necessary."<sup>81</sup>

By regarding the operators of TPB as making a necessary intervention together with the users of the site, the AG suggested that the understanding of 'indispensable intervention' is not limited to the user/uploader (as instead AG Wathelet suggested in *GS Media*), nor is to be intended as restricted to the actual initiator of the activities intended to communicate a copyright work to the public.

Finally, an expansive stance as regards the construction of the right of communication to the public appears also present at the policy level, notably in the recently proposed directive on

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finds-its-first-application-in.html; M Brüß, 'Hamburg court applies *GS Media* for the first time in Germany' (2017) 12(3) JIPLP 164.

<sup>80</sup> *Cit.*

<sup>81</sup> *Ziggo* Opinion, [50].

copyright in the Digital Single Market<sup>82</sup> (DSM Directive), which arguably appears to adopt a broader understanding of the right of communication. Among other things, the proposed DSM Directive – which the European Commission released in September 2016 – contains measures that intend to remedy to the alleged imbalance that exists in the online marketplace when it comes to rightholders seeking to license the rights and be remunerated for the online distribution of their works.<sup>83</sup> To this end, the draft directive proposes the introduction of a new neighbouring right over press publications (Article 11) and new obligations for hosting providers that give access to “large amounts of copyright protected works or other or other subject-matter uploaded by their users”<sup>84</sup> (Article 13).

The proposed press publishers’ right is of more limited relevance to the present discussion, as Recital 33 in the preamble clarifies that, as far as links to press publications are concerned, the scope of the right will not go as far as including links that – in a copyright sense – fall outside the scope of the right of communication to the public within Article 3(1) of the InfoSoc Directive. Of greater interest is the construction proposed *sub* Article 13. Read in conjunction with Recital 38 in the preamble to the proposed directive, this draft provision envisages that – unless the safe harbour *sub* Article 14 of Directive 2000/31<sup>85</sup> is applicable – where “information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders”.

In light of the construction of the right of communication to the public provided by the CJEU in *GS Media* (and, prior to that, in *Reha Training*), it may be questionable whether hosting providers as such can be deemed to perform acts of communication to the public when it comes to works uploaded by users of their services.<sup>86</sup> The reason, as also explained elsewhere<sup>87</sup>, is that the ‘indispensable intervention’ considered by the CJEU is not the one of the hosting intermediary, but rather the user of its services. This conclusion is in line with what both the Portuguese

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<sup>82</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593.

<sup>83</sup> DSM Directive, p 3.

<sup>84</sup> DSM Directive, Recital 38.

<sup>85</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000, L 178, 1-16.

<sup>86</sup> See, *contra*, Association Littéraire et Artistique Internationale, *Resolution on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected materials are made available by electronic means* (18 February 2017), available at <http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf>, holding that “[t]he affirmation by recital 38 of the Proposal for a Directive on copyright in the Digital Single Market that information society services which make works accessible to the public could be regarded as committing an act of communication to the public merely applies the solutions advocated by international instruments”.

<sup>87</sup> E Rosati, ‘Why a reform of hosting providers’ safe harbour is unnecessary under EU copyright law’ (2016) 38(11) EIPR 668, pp 673-675.

Government<sup>88</sup> and the European Commission (Legal Service) argued when intervening in *GS Media* and – more recently as far as the latter is concerned – in *Filmspeler*.<sup>89</sup> Yet, if the CJEU eventually followed AG Campos Sánchez-Bordona when deciding *Filmspeler* and AG Szpunar when deciding *Ziggo* (thus embracing a broader understanding of what amounts to an ‘indispensable intervention’), then the construction proposed by the Commission (specifically: the Copyright Unit within DG CONNECT) would be more plausible, also considering that the proposed DSM Directive does not contain a definition of what is to be regarded as an act of communication to the public.

## Conclusion

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The CJEU decision in *GS Media* marks a departure or, at least, signals a re-thinking of the understanding of the right of communication in the context of linking to copyright-protected content, as first provided in *Svensson*. Mindful of the importance of links to the overall functioning of the internet, as well as the need to provide an appropriate balance of different interests, the CJEU attempted to mitigate the harsh consequences that a rigorous application of *Svensson* would have had. In doing so, the court vested criteria so far only sporadically considered, eg the profit-making intention of the defendant, with a central role. It also introduced an element that in most Member States’ is not present as far as primary liability for copyright infringement is concerned, ie the knowledge by the defendant of the unlicensed character of the content linked to. As far as the construction of the right of communication to the public in cases other than linking is concerned, similarly to *Reha Training*, *GS Media* regards the ‘indispensable intervention’ of the defendant as a central element: in doing so, the CJEU appeared to construe the notion of indispensability strictly.

In their Opinions in *Filmspeler* and *Ziggo*, AG Campos Sánchez-Bordona and AG Szpunar, respectively, proposed a broader construction of the notion of ‘indispensability’. While the impact of *Filmspeler* might be somewhat reduced by the highly specific factual context from which this CJEU reference originated (multimedia players with pre-installed hyperlinks to websites that, without the authorization of the copyright holder, offer unrestricted access to copyright-protected works, eg films, series and live programmes), the implications of *Ziggo* promise to be more far-reaching. If the CJEU followed its AGs in both cases (particularly in *Ziggo*), then the relevance of *GS Media* could be scaled down, both as far as the understanding of Article 3(1) is concerned and the type of defendants that might be regarded as committing acts of communication to the public. In this sense, not only users, but also online intermediaries – read: hosting providers – could be regarded as primarily liable for copyright infringement in relation to user-uploaded

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<sup>88</sup> See Opinion, [23]-[24].

<sup>89</sup> See *Filmspeler* Opinion, [32]-[34].

materials that infringe third-party rights, in line with the construction of Article 13 of the draft DSM Directive as proposed by the European Commission.

Ultimately the discussion above suggests that the concept of 'communication to the public' has been undergoing an evolution. The next frontier for Article 3(1) of the InfoSoc Directive appears to be not just a determination of *what* amounts to an act of communication to the public, but also *who* makes an act of communication to the public. The latter in particular is the next question for the CJEU to tackle, and also poses significant – and not entirely worked out – challenges to EU policy- and law-making.