**The CJEU *Pirate Bay* judgment**

**and its impact on the liability of online platforms**

*by Eleonora Rosati*[[1]](#footnote-1)\*

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*In its 2017 judgment in* The Pirate Bay (C-610/15) *the CJEU developed further its construction of the right of communication to the public within Article 3(1) of Directive 2001/29 (the InfoSoc Directive), and clarified under what conditions the operators of an unlicensed online platform are potentially liable for copyright infringement. The Court held that the operators of a platform that makes available to the public third-party uploaded copyright content and provides functions such as indexing, categorization, deletion and filtering of content may be liable for copyright infringement, jointly with users of the 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.*

*The decision encompasses different types of platforms and operators with different degrees of knowledge of the character – lawful or unlawful – of the content made available therein. It calls into consideration the relationship between liability for (harmonized) primary copyright infringement and (unharmonized) secondary copyright infringement. In relation to the current EU policy discussion of the so called ‘value gap proposal’, the judgment reinforces the position of the European Commission, especially the basic idea that the making available, by a hosting provider, of third-party uploaded copyright content may fall within the scope of the right of communication to the public. The Court’s reasoning also prompts a reflection as to whether a hosting provider that is primarily responsible for acts of communication to the public is actually eligible for the safe harbour within Article 14 of Directive 2000/31 (the E-Commerce Directive).*

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**Introduction**

In its 2017 judgment in *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15[[2]](#endnote-1)

(‘*The Pirate Bay*’ or ‘*Pirate Bay*’) the Court of Justice of the European Union (‘CJEU’) developed further its construction of the right of communication to the public within Article 3(1) of Directive 2001/29[[3]](#endnote-2) (‘InfoSoc Directive’), and clarified under what conditions the operators of an unlicensed online file-sharing platform are liable for copyright infringement.

The CJEU judgment builds upon the earlier Opinion of Advocate General (‘AG’) Maciej Szpunar in the same case[[4]](#endnote-3), yet goes beyond it. This is notably so with regard to the consideration of the subjective element (knowledge) of the operators of an online platform making available copyright content. Unlike AG Szpunar, the Court did not refer liability only to situations in which the operators of an online platform have acquired *actual* knowledge of third-party infringements, but also included situations of *constructive* knowledge (‘could not be unaware’) and, possibly, even situations in which knowledge is to be *presumed*.

Overall, the CJEU decision is not limited to egregious scenarios like the one of The Pirate Bay[[5]](#endnote-4): the Court’s findings are applicable to different types of online platforms, as well as operators with different degrees of knowledge of infringements committed by users of their services.

The judgment is expected to have substantial implications for future cases (including at the level of individual Member States[[6]](#endnote-5)), and prompts a broader reflection on issues such as the interplay between primary and secondary liability for copyright infringement, applicability of the safe harbour regime within Directive 2000/31[[7]](#endnote-6) (‘E-Commerce Directive’), as well as the current EU copyright reform debate. With particular regard to the latter, lacking a definition of what is to be intended as an ‘act of communication to the public’ in the context of the proposed Directive on copyright in the Digital Single Market[[8]](#endnote-7) and the draft provision contained in Article 13 therein (so called ‘value gap proposal’), the outcome of the case confirms – from the point of view of EU law – the correctness of the European Commission’s assessment that certain online platforms should be regarded as primarily responsible for acts of communication to the public.

This contribution is structured as follows. The first part reviews relevant CJEU case law on the right of communication to the public, and outlines its overall evolution until the *Pirate Bay* judgment. The second part discusses the *Pirate Bay* case, and highlights how – on the one hand – the CJEU judgment goes beyond the AG Opinion and – on the other hand – builds upon previous case law. The third part assesses the possible effects of the decision, notably with regard to the distinction between primary and secondary liability, exemptions/limitations of liability for information society service providers (‘providers’), and current EU policy discussion.

The CJEU analysis serves to inform the response to the question of *who* is to be regarded as making acts of communication to the public. While confirming a certain alignment between case law evolution and EU copyright policy discourse, the outcome of the case suggests that the CJEU may be heading even further than what policy and law makers are currently discussing in the framework of the ‘value gap proposal’. In particular, a possible reading of *The Pirate Bay* is that the CJEU did not mention the safe harbour regime in the context of its analysis in that this would be only applicable to situations where just users of the service of a provider are primarily responsible for infringing acts, not also scenarios in which (as it was the case here) it is the platform operators themselves that are primarily responsible for such acts.

# 1. The right of communication to the public in the InfoSoc Directive and CJEU case law until *The Pirate Bay*

At the international level the right of communication to the public received its first formulation in Article 11*bis* of the Berne Convention, as first adopted in 1928 and subsequently revised with the Brussels Act 1948.[[9]](#endnote-8) The WIPO Copyright Treaty 1996 (‘WCT’) supplemented the Berne Convention[[10]](#endnote-9), and introduced the concept of ‘making available to the public’.[[11]](#endnote-10)

The wording of Article 3(1) of the InfoSoc Directive is derived from Article 8 WCT.[[12]](#endnote-11) However, Article 3(1) of the InfoSoc Directive does not define the concept of ‘communication to the public’. This provision, in fact, only states that EU “Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

Lacking a definition of the notion of ‘communication to the public’, the CJEU has sought to determine the meaning and scope of this concept in light of the objectives pursued by the InfoSoc Directive, notably to ensure a high level of protection of intellectual property (Recital 24) and for authors.[[13]](#endnote-12)

In its rich body of case law on Article 3(1) of the InfoSoc Directive (at the time of writing, the Court has issued nearly twenty decisions[[14]](#endnote-13)), the CJEU has consistently stated that the essential requirements of Article 3(1) are an ‘act of communication’, directed to a ‘public’. In addition, the CJEU has also highlighted the importance of considering additional criteria which are not autonomous and are interdependent, and may – in different situations – be present to widely varying degrees. Such criteria must be applied both individually and in their interaction with one another.[[15]](#endnote-14)

## 1.1. Requirements and criteria under Article 3(1) of the InfoSoc Directive[[16]](#endnote-15)

Starting from the understanding of ‘public’, this is an indeterminate and fairly large (above *de minimis*) number of people.[[17]](#endnote-16) 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. internet), the communication must be directed to a ‘new’ public. This is a public which was not taken into account by the relevant rightholder when it authorized the initial communication to the public.[[18]](#endnote-17)

With regard to the notion of ‘act of communication’, case law appears now solidly oriented in the sense of requiring the mere making available of a copyright work – not also its actual transmission[[19]](#endnote-18) – in such a way that the persons forming the public may access it, irrespective of whether they avail themselves of such opportunity.[[20]](#endnote-19) In cases where the CJEU has held the making available of a work sufficient, the Court has however indicated the need to consider whether there is 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 makes 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 absence of that intervention, its customers would not, in principle, be able to enjoy the work.[[21]](#endnote-20)

With particular regard to the notion of indispensability of one’s own intervention, in its 2017 decision in *Filmspeler*, the CJEU held that the concept of ‘communication to the public’ must be intended as covering the sale of a multimedia player on which there are pre-installed add-ons, available on the internet, containing hyperlinks to freely accessible websites on which copyright works have been made available to the public without the consent of the rightholders. The Court held that an intervention like the one of the provider of a multimedia player is to be regarded as *facilitating* access to unlicensed content that would be otherwise more difficult to locate. Accordingly, an intervention of this kind falls within the scope of Article 3(1) of the InfoSoc Directive.

Another criterion considered by the CJEU is whether the user/defendant merely provides physical facilities or not. While the mere provision of physical facilities does not amount to an act of communication to the public (Recital 27), 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.[[22]](#endnote-21)

In the recent *GS Media* decision (a case concerning the treatment of linking to unlicensed content) the Court, among other things, relied on the ‘profit-making’ character of the communication at issue to determine potential liability of the ‘hyperlinker’ for the posting of links to unlicensed content. 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."[[23]](#endnote-22) The operation of this presumption was confirmed in the subsequent *Filmspeler* judgment.[[24]](#endnote-23)

## 1.2. The notions of ‘indispensable intervention’ and ‘profit’

The most recent CJEU decisions have focused in particular on the criteria of ‘indispensable intervention’ of the user/defendant, and referred to the user’s profit-making intention. Both are crucial to understand in what sense the decision in the *The Pirate Bay* should not be seen as a departure of the CJEU from its earlier case law.

With regard to ‘indispensable intervention’, over time the CJEU has dismissed attempts to interpret this criterion narrowly. A clear example is *GS Media*. In his Opinion in that case AG Melchior Wathelet had excluded *tout court* that the unauthorized provision of a link to a copyright work – whether published with the consent of the rightholder or not – could be classified as an act of communication to the public. This would be so on consideration that, 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.[[25]](#endnote-24)

The CJEU rejected this construction of the indispensability of the user’s role. In order to modulate the various options within the framework of *prima facie* liability (determination of actual liability requires the undertaking of other considerations, including applicability of any exceptions/limitations), the Court preferred to take into account other criteria instead – including the profit-making intention of the user and its knowledge of the unlicensed character of the content linked to – rather than to exclude that the provision of a link to a protected work would just fall outside the scope of Article 3(1) of the InfoSoc Directive.

The subsequent decision in *Filmspeler* elaborates further on the notion of indispensable intervention. Substantially confirming the Opinion of AG Manuel Campos Sánchez-Bordona, who had called “reductionist”[[26]](#endnote-25) the view that the case at hand would relate to the mere provision of physical facilities for enabling or making a communication, the CJEU rejected that an indispensable intervention is limited to a ‘merely direct' indispensable intervention. The Court held that that an intervention enabling a direct link to be established between those who make available infringing works and users of such works, “is quite different from the mere provision of physical facilities, referred to in recital 27 of [the InfoSoc Directive].”[[27]](#endnote-26) Such an intervention – made “with full knowledge of the consequences” of such a conduct[[28]](#endnote-27) – facilitates access to unlicensed content that would be otherwise more difficult to locate.

With regard to the notion of ‘profit-making intention’, as discussed more at length elsewhere[[29]](#endnote-28), it might not be self-evident whether the presence of a profit-making intention should be assessed in relation to the specific act of communication at hand, or the broader context in which such act is performed. Although both alternatives may be plausible, consideration of the context in which the relevant link is provided is more in line with existing CJEU case law, both preceding and following *GS Media*. In *SGAE*, *FAPL*, and *Reha Training*, in fact, the Court 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, a public house, and a rehabilitation centre, respectively) in order to benefit therefrom and attract customers to whom the works transmitted are of interest.[[30]](#endnote-29) In *Filmspeler*, the CJEU identified the profit-making intention of the defendant in the circumstance that the relevant multimedia player “is supplied with a view to making a profit, the price for the multimedia player being paid in particular to obtain direct access to protected works available on streaming websites without the consent of the copyright holders.”[[31]](#endnote-30)

The more recent decision in *The Pirate Bay* substantially consolidates the CJEU position regarding the broad construction of the notion of ‘indispensable intervention’, as well as the relevance of the profit-making intention – also to be intended broadly – of the user/defendant.

# 2. The *Pirate Bay* judgment as an evolution and consolidation of earlier case law

This reference for a preliminary ruling from the Dutch Supreme Court arose in the context of litigation between Dutch anti-piracy foundation Stichting Brein and two internet access providers, Ziggo and XS4ALL, over the application, by the former, for an order that would require the latter to block access for their customers to the website of The Pirate Bay.

An engine for peer-to-peer (‘P2P’) file-sharing, The Pirate Bay does not host any protected works. However, The Pirate Bay operates a system by means of which metadata on protected works which is present on the users’ computers is indexed and categorized for users, so that the users can trace, upload and download the protected works on the basis thereof. It is estimated that the near totality (90% to 95%) of the files shared on the network of The Pirate Bay contain copyright works distributed unlawfully.[[32]](#endnote-31)

Upheld at first instance, Stichting Brein’s application was dismissed on appeal. This was so on consideration that it would be the users of The Pirate Bay – rather than the platform operators – to be responsible for copyright infringements. In addition the blocking order sought was found disproportionate to the aim pursued, this being effective copyright protection.

The decision was appealed to the Supreme Court, which decided to stay the proceedings and seek guidance from the CJEU on whether the operators of a website like The Pirate Bay are to be regarded as making acts of communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.

## 2.1. The AG Opinion

In his Opinion on 8 February 2017 AG Szpunar answered this question in the affirmative, further to three preliminary caveats.

First, he dismissed the submission of the European Commission (Legal Service) that a case like the one at issue would be best addressed under national liability regimes, i.e. as a matter of (unharmonized) secondary rather than (harmonized) primary liability. An option of this kind would be unhelpful: depending “on the very divergent solutions adopted under the different national legal systems […] 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 […] be sought rather in EU law.”[[33]](#endnote-32)

Secondly, the AG marked a distinction between the present case and what at the time of the Opinion was the most immediate ‘precedent’[[34]](#endnote-33), i.e. *GS Media*. This served the AG to avoid having to follow a particular aspect of this judgment, i.e. the presumption of knowledge of the unlicensed character of the content communicated by the user/defendant, as triggered by its profit-making intention.[[35]](#endnote-34) To achieve this objective, the AG submitted that the *Pirate Bay* case would be different from *GS Media* (and *Svensson*), in the sense that it would not relate to a secondary communication (this being the provision of a link) of protected content already made available on a third-party site, but rather primary communication of copyright works.[[36]](#endnote-35)

Thirdly, the AG stressed the significance of considering the substance of the acts at issue, rather than their technical background. This would be necessary to avoid that “technical development far outstrips legislative or judicial procedures, at the risk of rendering obsolete, even before they have been adopted, legal solutions based on a given technological status quo.”[[37]](#endnote-36) Considering the qualification of the *role* of operators of websites like The Pirate Bay would also serve to deliver solutions that find application in different contexts.

Holding that there is no issue regarding the making of acts of communication in the case of works shared on a P2P network[[38]](#endnote-37), AG Szpunar noted that the real question posed by the Dutch court was *who* is responsible for such acts.[[39]](#endnote-38) He concluded that users intentionally make available works in their possession to other users of the Pirate Bay network; hence their acts should be regarded as falling within the scope of Article 3(1).[[40]](#endnote-39)

As regards the operators of The Pirate Bay, the AG relied on the criterion of the essential role of the user originating the communication and the deliberate nature of its intervention. The AG recalled that such “player makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, and does so in particular where without that intervention its customers would not, in principle, be able to enjoy the broadcast work.”[[41]](#endnote-40)

While regarding the role of the operators as “necessary”[[42]](#endnote-41), the AG also considered whether liability could subsist in relation to a subject that – like the operators of The Pirate Bay – merely indexes the metadata relating to works that are offered for sharing by users of the P2P network, and has in principle no influence over the appearance of a given work on that network.[[43]](#endnote-42)

According to the AG liability cannot arise in the case in which the intermediary at issue is unaware that a certain work has been made available without the copyright owner’s consent or if – once it has been made aware of the illegality – it acts in good faith to rectify the matter.[[44]](#endnote-43) It follows that liability could be only found “from the moment [when] that operator has knowledge of the fact that making available took place in breach of copyright and does not take action to render access to the work in question impossible”.[[45]](#endnote-44)

In this part of the Opinion it is apparent why AG Szpunar had inserted the caveat that the case at hand would be different from *GS Media*. The AG, in fact, rejected that knowledge is to be presumed in the case of the operator of a for-profit platform. This was so out of fear that the application of such a presumption would result in the imposition of a general monitoring obligation.[[46]](#endnote-45) Although the AG did not expressly refer to it in this part of the Opinion, what he had in mind is the body of provisions in the E-Commerce Directive that concern exemptions/limitations from liability for providers (so called safe harbours, referred elsewhere in the Opinion[[47]](#endnote-46)), as well as the provision in Article 15 therein which excludes that Member States may impose on providers general obligations to monitor the information which they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity.

## 2.2. The CJEU decision

The CJEU substantially followed the AG in his analysis of the right of communication to the public with, however, three significant points of divergence.

First, the CJEU judgment does not include any references to the E-Commerce Directive and the safe harbour regime envisaged therein. Secondly, to determine the liability of the platform operators, the Court did not limit the applicability of its findings to situations of ‘actual’ knowledge by the defendants of the unlicensed character of the works made available through their platform. Thirdly (and likely linked to the previous point) the Court did not ‘distinguish’[[48]](#endnote-47) the present case from earlier decisions, notably *GS Media*. All these aspects – as it will be explained further below – are key to appreciate the implications of the judgment.

The Court began its analysis by referring to the preventive character of the right of communication to the public[[49]](#endnote-48) and the need to ensure a high level of copyright protection, in line with the objectives pursued by the EU legislature at the time of adopting the InfoSoc Directive.[[50]](#endnote-49) The CJEU then noted how the concept of communication to the public requires an individual assessment that depends on the circumstances at issue.[[51]](#endnote-50)

The right is composed of two necessary elements – an ‘act of communication’ (which does not require the actual transmission of the work in question)[[52]](#endnote-51) directed to a ‘public’[[53]](#endnote-52) –, and is informed by several complementary criteria which are not autonomous and are interdependent.[[54]](#endnote-53) As also noted by the AG, these include both the indispensable role played by the user/defendant[[55]](#endnote-54) and the profit-making nature of the communication at hand.[[56]](#endnote-55)

The CJEU observed that from earlier case law, notably the decisions on linking (*Svensson*, *BestWater*, *GS Media*)[[57]](#endnote-56) and the more recent *Filmspeler* judgment[[58]](#endnote-57), it follows that “as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29.”[[59]](#endnote-58)

The Court agreed with the AG that in the case at hand there is no dispute that acts of communication to the public are being made[[60]](#endnote-59), and are directed to a ‘public’ (a ‘new public’).[[61]](#endnote-60) The point was however to determine whether the platform operators could be responsible for them.

Considering the first requirement in Article 3(1), i.e. the need for an ‘act of communication’, the Court acknowledged that the works made available to the users of The Pirate Bay are placed online on that platform not by the platform operators but by users.[[62]](#endnote-61) However, the operators of The Pirate Bay “by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.”[[63]](#endnote-62)

As regards the requirement of full knowledge of the relevant facts, this is satisfied by consideration of how the Pirate Bay operators index torrent files so to allow users of the platform to locate those works and share them within the context of a P2P network.[[64]](#endnote-63) Without such intervention, “the works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex.”[[65]](#endnote-64)

The Court also dismissed the argument that the Pirate Bay operators could be regarded as providing mere physical facilities for enabling or making a communication, thus falling outside the scope of Article 3(1). The undertaking by the Pirate Bay operators of indexing, categorization, deletion, or filtering activities rules out any assimilation to the mere provision of facilities within the meaning of Recital 27.[[66]](#endnote-65) The making available and management of an online sharing platform must be therefore considered an act of communication for the purposes of Article 3(1).[[67]](#endnote-66)

Turning to the requirement that the communication at hand must be directed to a ‘new public’, i.e. a public not taken into account by the copyright holders when they authorized the initial communication, the CJEU concluded that also this requirement is met. The court referred to the fact that the Pirate Bay operators “were informed” that their platform provides access to works published without authorization of the relevant rightholders.[[68]](#endnote-67)

However, the CJEU did not limit liability to situations of actual knowledge (as instead the AG had done): it also included knowledge (‘could not be unaware’) and arguably more. In relation to constructive knowledge, the Court observed how the Pirate Bay operators

“*could not be unaware* that this platform provides access to works published without the consent of the rightholders, given that, as expressly highlighted by the referring court, a very large number of torrent files on the online sharing platform [The Pirate Bay] relate to works published without the consent of the rightholders. In those circumstances, it must be held that there is communication to a ‘new public’” (emphasis added).[[69]](#endnote-68)

Liability based on ‘constructive’ knowledge echoes – though the Court did not mention it – the reasoning in the *eBay* decision, notably the part in which the CJEU had suggested that the safe harbour within Article 14 of the E-Commerce Directive would not apply to “an information society service [which is] aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31.”[[70]](#endnote-69)

The Court could have limited liability to situations of actual or constructive knowledge (as per the ‘diligent economic operator’ criterion). Some initial commentators have in fact submitted that the judgment is silent regarding scenarios other than those in which the defendant has actual or constructive knowledge of third-party infringements. [[71]](#endnote-70)

However, if this was the case, it would be difficult to understand the meaning of paragraphs 46 and 47 of the judgment, in which the CJEU referred to the profit-making intention of the defendants and seemingly linked that to a finding of *prima facie* liability:

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

[47] Therefore, it must be held that the making available and management of an online sharing platform, such as that at issue in the main proceedings, constitutes a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29.”

Although it did not refer explicitly to it, the Court had *GS Media* in mind (the judge rapporteur was the same in both cases: Marko Ilešič), when it appeared to link together the making available and management of an online sharing platform, the profit-making intention of their operators, and *prima facie* liability under Article 3(1).

In particular, the relevant part of the *GS Media* judgment is paragraphs 47 to 54. Like in that case, in *The Pirate Bay* the CJEU implied that the operator of an online platform that does so “with the purpose of obtaining profit therefrom” (paragraph 46 of *The Pirate Bay*) can be expected to have undertaken all “the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.” (paragraph 51 of *GS Media*).

This interpretation finds support in two additional considerations.

The first one is that the reasoning of the Court follows extensively *Filmspeler* (also here the judge rapporteur was Marko Ilešič). In particular, the Court referred with approval to paragraph 50 of the *Filmspeler* judgment, in which the CJEU had concluded that both the indispensable intervention of the defendant/user and its profit-making intention would lead to a finding of liability under Article 3(1) of the InfoSoc Directive. As mentioned above, in *Filmspeler* the CJEU confirmed the validity and application of the *GS Media* presumption of knowledge.

The second consideration is that ‘knowledge’ must not be intended in a subjective sense, i.e. as actual awareness of third-party infringements by the platform operators, but rather – in line with earlier CJEU case law – as knowledge and acceptance of the possible consequences of one’s own conduct.

Hence, it is not convincing to suggest that the *Pirate Bay* decision is silent regarding the treatment of situations in which the operators of an online platform that makes available third-party uploaded content have no actual knowledge of the unlawful character of the content thus made available, but nonetheless pursue a profit. On the contrary, *The Pirate Bay* decision follows the same reasoning of the earlier CJEU decisions in *GS Media* and *Filmspeler*: a profit-making intention on the side of the defendant may be sufficient to trigger a rebuttable presumption of knowledge, by the defendant, of the character – licensed or not – of the content communicated through its platform.

# 3. After *The Pirate Bay*

The analysis undertaken by the CJEU in *The Pirate Bay* suggests a number of fundamental points.

First, an ‘intervention’ for the purpose of determining what amounts to an act of communication merely requires the making of acts of indexing, categorization, deletion, or filtering of content. It appears that it is also irrelevant whether such activities are carried out manually or automatically, e.g. algorithmically: it is sufficient that a system is put in place to perform such activities. With specific reference to the case of The Pirate Bay, its operators have admitted in the past that the activities indicated by the CJEU as indicative of an ‘intervention’ for the purpose of application of Article 3(1) of the InfoSoc Directive are carried out automatically.[[72]](#endnote-71)

Secondly, in line with *GS Media*, ‘knowledge’ (of the unlawful character of the works made available) for the purpose of determining whether the communication at hand entails a *prima facie* liability under Article 3(1) of the InfoSoc Directive may be actual, constructive, but arguably

also presumed in the case of operators of for-profit platforms. In this sense the *Pirate Bay* judgment may be seen as not departing – but rather building upon – earlier case law, including the recent decisions in *GS Media* and *Filmspeler*.

There are additional aspects of the judgment that deserve consideration, and will likely attract further commentary. The first is the interplay between primary and secondary liability for copyright infringement. The second is the impact that the *Pirate Bay* decision might have on the understanding and application of the safe harbours within the E-commerce Directive. The final aspect relates to the policy debate currently unfolding at the EU level, notably to what has come to be known as the ‘value gap proposal’.

## 3.1. Primary and secondary liability

While EU legislature has harmonized the conditions for primary liability, the existence of and conditions for a finding of liability as a secondary infringer have been left to the legal systems of individual Member States.[[73]](#endnote-72)

It has been argued that, by introducing a knowledge requirement within the scope of primary liability, the CJEU has blurred the distinction between what has been traditionally regarded as a strict liability tort (primary infringement) and liability informed by the defendant’s subjective state of actual or constructive knowledge (secondary infringement).[[74]](#endnote-73)

This argument has merit from a formal standpoint, and may result in practical uncertainties for those EU jurisdictions with a secondary liability regime, notably liability by authorization.[[75]](#endnote-74) One might for instance recall that in the UK the High Court of England and Wales held the operators of The Pirate Bay liable as accessories for users’ infringements.[[76]](#endnote-75) As explained by Arnold and Davies[[77]](#endnote-76) liability by authorization is composed of a conduct element and a mental element. As regards the latter, this must be intended as requiring demonstration of a sufficient degree of knowledge by the defendant of the circumstances and of the acts committed (or about to be committed) by the primary infringer. Further to the CJEU decision in *The Pirate Bay* situations like the one examined by the CJEU should be assessed by national courts under the lens of primary – rather than secondary – liability.[[78]](#endnote-77)

In any case, the CJEU has referred to ‘knowledge’ in the context of Article 3(1) of the InfoSoc Directive since its first decision on this matter, the 2006 judgment in *SGAE*. In that case the Court had been asked to determine whether the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public within Article 3(1) of the InfoSoc Directive. Answering in the affirmative, the CJEU held that the intervention of the hotel is one that – in full knowledge of the consequences of its action – gives access to protected works to its customers.[[79]](#endnote-78)

## 3.2. Impact on the safe harbour regime

Turning to consideration of the relationship between liability under the InfoSoc Directive and applicability of the E-commerce Directive safe harbours, while the former is without prejudice to the provisions of the latter (Recitals 16 and 20 of the InfoSoc Directive), confirmation that the operators of an online platform may be jointly liable with users for copyright infringement might have an impact on the applicability of Articles 12 to 14 of the E-Commerce Directive.

By proposing the adoption of the E-commerce Directive, the European Commission sought to clarify the responsibility of providers for transmitting and storing information at the request of third parties, that is when providers act as mere intermediaries. As stated by an internal study of the Organisation for Economic Co-operation and Development (OECD),

“The implicit meaning of the word intermediary is that it is located between or among two or more parties, and although they help in the transmission/dissemination process, intermediaries do not initiate decisions to disseminate the content, products or services that transverse their networks or servers. A proposed definition of ‘Internet intermediaries’ is the following: Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.”[[80]](#endnote-79)

All this suggests that the insulation[[81]](#endnote-80) provided by the safe harbour regime is not applicable to a provider that goes beyond its passive role of intermediary.[[82]](#endnote-81) This conclusion is supported by both textual references to the wording of the E-Commerce Directive and CJEU case law.[[83]](#endnote-82) Besides the general wording of Recital 42 in the preamble to the E-Commerce Directive, for mere conduit and caching providers it is Recital 44 that explicitly excludes the applicability of the safe harbours in case of direct infringements in collaboration with the recipients of their services. For hosting providers it is fair to assume that the same regime applies. The safe harbour relates to possible liability of a hosting provider on a secondary basis for third-party infringements, not direct infringements by the provider (Recital 46 and Article 14(2)).

Some scholars suggest a different reading of the E-Commerce Directive (notably Recital 42) and relevant CJEU case law, holding that, on the one hand, the safe harbour regime cannot be invoked by providers in relation to their own content (i.e. in case in which they act as editors/publishers) but, on the other hand, the safe harbour protection remains available for third-party content.[[84]](#endnote-83) In this sense, the safe harbours would apply irrespective of the form of liability.[[85]](#endnote-84) In the present case, this position seems to be the one adopted by AG Szpunar in his Opinion.[[86]](#endnote-85)

Even if one regarded this interpretation as the correct one, the Court seemingly took a different direction. First, it omitted any reference to the E-Commerce Directive and, secondly, went beyond AG Szpunar as far as the hypotheses of liability are concerned. Lack of references to the E-commerce Directive may suggest, on the one hand, that the exemptions/limitations from liability envisaged in the latter would not be applicable in case of primary infringement by platform operators and, on the other hand, that the CJEU did not deem this problematic.

As explained, in fact, the CJEU excluded that liability for unauthorized acts of communication to the public would only arise in case of actual knowledge. The Court held that liability would also arise in case of constructive knowledge and – potentially – also in cases in which knowledge is presumed in a *GS Media* sense, i.e. when the platform at issue is operated for profit. In the latter scenario one might wonder to what extent there might be the risk, highlighted by Advocate General Szpunar in his Opinion, that a presumption of knowledge and, hence, *prima facie* liability would result in “imposing on operators of indexing sites of peer-to-peer networks, which normally operate for profit, a general obligation to monitor the indexed content.”[[87]](#endnote-86)

In its most recent decision in this regard, *Mc Fadden*, the CJEU confirmed that a measure that would consist of monitoring all of the information transmitted” must be excluded from the outset as contrary to Article 15(1) of Directive 2000/31”.[[88]](#endnote-87) This conclusion is in line with the seminal decision in *eBay.*[[89]](#endnote-88)

Further clarity on this point may be required. A possible solution may be however to interpret the presumption imposed by the CJEU in *GS Media* as part of a broader obligation to conform to the behaviour of the ‘diligent economic operator’. In this sense, operators of platforms with a profit-making intention would have an *ex ante* reasonable duty of care and be subject to an *ex post* notice-and-takedown system[[90]](#endnote-89), which would also include an obligation to prevent infringements of the same kind, e.g. by means of re-uploads of the same content.[[91]](#endnote-90)

## 3.3. The ‘value gap proposal’

Within the framework of its Digital Single Market Strategy, as first unveiled in mid-2015[[92]](#endnote-91), in the final part of 2016 the European Commission issued a proposal for a directive on copyright in the Digital Single Market.

The draft DSM Directive includes a provision intended to remedy what has come to be known as ‘value gap’. The underlying idea is that the EU liability regime for hosting providers envisaged by Article 14 of the E-commerce Directive would be invoked and applied also in situations in which the relevant conditions would not be met, i.e. in the case of hosting providers that are not merely passive. This would make it difficult – if not impossible – for copyright holders to conclude licensing agreements (whether *tout court* or with appropriate remuneration clauses) with relevant hosting providers.[[93]](#endnote-92)

Entitled ‘Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users’, Article 13 of the proposed DSM Directive provides that:

1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.
2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.
3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

Read in combination with Recital 38 in the preamble to the proposed directive[[94]](#endnote-93), what the so called ‘value gap proposal’ envisages is that, where a hosting provider stores and provides public access to large amounts of user-uploaded works[[95]](#endnote-94), thereby performing an act of communication to the public within the meaning of Article 3(1) of the InfoSoc Directive, it is obliged to conclude a licensing agreement with the relevant rightholder(s), unless it is eligible for the application of the safe harbour pursuant to Article 14 of the E-commerce Directive. Irrespective of whether the safe harbour in Article 14 of the E-commerce Directive applies, the provider that provides access to large amounts of works should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies.

As clarified by Recital 38, to determine the applicability of the safe harbour protection in Article 14 of the E-commerce Directive, “it is necessary to verify whether the service provider plays an active role, including by optimizing the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.” Such wording suggests that even the use of automatic optimization techniques, e.g. algorithmic optimization, would be sufficient to remove the safe harbour protection within Article 14 of the E-Commerce Directive.

The European Commission’s value gap proposal has been discussed at length in academic circles, particularly with reference to the relationship between the proposal and existing EU legislation (notably the E-Commerce Directive).

A crucial and relatively overlooked aspect of the proposal relates to one of its basic concepts, this being when and in what sense a hosting provider is deemed to perform an act of communication to the public. The proposed directive does not include a definition of what is to be regarded as an act of communication, and Recital 38 laconically states that hosting providers would make an act of communication to the public for the purpose of Article 13 in that, by storing and providing access to user-uploaded content, they would go beyond the mere provision of physical facilities.

Although the rationale underlying the European Commission’s proposal seems rooted within earlier CJEU case law, the *Pirate Bay* decision has definitely aligned case law to policy action, and might have even gone further than the latter.

The European Commission’s proposal states in fact (Recital 38) that the obligation of a hosting provider to conclude an agreement with relevant rightholders would not arise in cases in which Article 14 of the E-commerce Directive applies. Further to the *Pirate Bay* decision this limitation might not have reason to exist: in fact, in a situation in which the operators of a platform are directly responsible for unauthorized acts of communication to the public, the safe harbour within Article of the E-commerce Directive would be arguably inapplicable.

If this reading was correct, then the consequences of the *Pirate Bay* decision would be more far-reaching than what the European Commission envisaged and proposed in its draft Article 13: a hosting provider whose activities fall within the scope of Article 3(1) of the InfoSoc Directive would be always obliged to conclude licensing agreements with relevant rightholders.[[96]](#endnote-95)

# Findings

With its *Pirate Bay* decision the CJEU has not only clarified further *what* amounts to an act of communication to the public within Article 3(1) of the InfoSoc Directive, but also *who* is responsible for it. To achieve this result, the Court: first, excluded that activities consisting of indexing, categorizing, filtering and deleting relevant files containing copyright content could be regarded as akin to the mere provision of physical facilities; and, secondly, relied on the notion of ‘indispensable intervention’ to conclude that operators of an online platform with full knowledge of the consequences of their action could be regarded as primarily liable for unauthorized acts of communication to the public.

Partly distancing itself from the Opinion of AG Szpunar, the Court also dismissed the idea that potential liability under Article 3(1) would be limited to situations in which the operators of an online platform are actually aware of third-party infringements, e.g. because notified to this end by relevant rightholders. The decision, instead, includes among the hypotheses of responsibility also situations in which the platform operators have constructive knowledge of third-party infringements.

In addition, unlike the AG Opinion, the CJEU did not mark a departure from its earlier decisions in *GS Media* and *Filmspeler*. This may suggest that the rebuttable presumption of knowledge that in *GS Media* the Court deemed applicable to a user/defendant that pursues a profit would also apply in the case of online platforms operated for profit.

Overall the *Pirate Bay* decision encompasses different types of platforms and operators with different degrees of knowledge of the character – lawful or unlawful – of the content made available therein. In this sense, for the applicability of Article 3(1) of the InfoSoc Directive knowledge must be intended, not as a subjective state of the defendant but rather as acceptance by the user/defendant of the possible consequences of its conduct.

The *Pirate Bay* decision also prompts a deeper reflection on the relationship between primary and secondary liability, as well as between the InfoSoc Directive and the safe harbour regime within the E-Commerce Directive. In particular, it may be questioned whether the operators of an online platform that were deemed primarily responsible, jointly with users of their service, for unauthorized acts of communication to the public could invoke the protections within Articles 12 to 14 of the E-commerce Directive.

With regard to the current policy discussion, notably the ‘value gap proposal’ within Article 13 of the proposed DSM Directive, the *Pirate Bay* decision demonstrates the alignment between CJEU case law and policy action on the side of the European Commission, especially with regard to the basic idea that the making available, by a hosting provider, of third-party uploaded copyright content, may fall within the scope of Article 3(1) of the InfoSoc Directive.

Unlike the *Pirate Bay* decision, however, Article 13 in the draft DSM Directive contains express references to Article 14 of the E-commerce Directive. Among other things, Recital 38 and Article 13 of the draft DSM Directive exclude that hosting providers that fall within the scope of application of Article 14 of the E-Commerce Directive would need to conclude licensing agreements with relevant rightholders. However, if one accepts that – at certain conditions – a hosting provider may be regarded as primarily responsible for unauthorized acts of communication to the public, then the obligation to conclude licensing agreements would arise as a natural consequence thereof, being in this respect irrelevant any reference to the safe harbour regime.

**Notes**

1. \* Associate Professor in Intellectual Property Law (University of Southampton). This study was prepared at the request of the International Federation of the Phonographic Industry (IFPI), but the views and opinions expressed are only those of the Author. Email: eleonora@e-lawnora.com. [↑](#footnote-ref-1)
2. *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:456 (‘*The Pirate Bay*’, or ‘*Pirate Bay*’) [↑](#endnote-ref-1)
3. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ, L 167, pp 10-19. [↑](#endnote-ref-2)
4. Opinion of Advocate General Maciej Szpunar in *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:99 (*The Pirate Bay* AG Opinion). [↑](#endnote-ref-3)
5. As the High Court of England and Wales (Arnold J) noted in its decision in *Dramatico Entertainment Ltd and Others v British Sky Broadcasting Ltd and Others* [2012] EWHC 268 (Ch) (20 February 2012) (‘*Dramatico*’), para 78, the “name – The Pirate Bay – and associated pirate ship logo are clearly a reference to the popular terminology applied to online copyright infringement: online piracy.” [↑](#endnote-ref-4)
6. Courts in different Member States have generally refrained from holding that providers like hosting platforms could be primarily liable for third-party copyright infringements, although liability has been established on different grounds: see, *ex multis*, the recent decisions of: District Court of Turin, *Delta TV Programs srl v Google Inc and YouTube* *LLC*, 7 April 2017, 1928/2017 (Italy); Court of Appeal of Hamburg, 1 July 2015, 5 U 87/12, and District Court of Munich I, 30 June 2015, 33 O 9639/14 (Germany). See further S Stalla-Bourdillon and Others, **‘**An academic perspective on the copyright reform**’** (2017) 33(13) *CSLR* 3. [↑](#endnote-ref-5)
7. 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, pp 1-16. [↑](#endnote-ref-6)
8. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593. [↑](#endnote-ref-7)
9. See World Intellectual Property Organization, *Guide to copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms* (2003), BC-11*bis*.1. [↑](#endnote-ref-8)
10. Article 1(4) WCT mandates compliance with Articles 1 to 21 of and the Appendix to the Berne Convention. [↑](#endnote-ref-9)
11. 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), 975-980. [↑](#endnote-ref-10)
12. EU legislature transposed the WIPO Internet Treaties 1996 (WCT and WIPO Performances and Phonograms Treaty into the EU legal order by adopting the InfoSoc Directive: see Recital 15 in the preamble thereof. [↑](#endnote-ref-11)
13. Specifically referring to the need to ensure a high level of protection for authors, see: *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:479 (‘*SGAE*’), para 36; *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*’), para 186; *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147 (‘*TV Catch Up*’), para 20; *OSA - Ochranný svaz autorský pro práva k dílům hudebním os v Léčebné lázně Mariánské Lázně as*, C-351/12, EU:C:2014:110 (‘*OSA*’), para 23; *Sociedade Portuguesa de Autores CRL v Ministério Público and Others*, C-151/15, EU:C:2015:468 (‘*Sociedade Portuguesa de Autores*’),para 12; *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, C‑325/14, EU:C:2015:764 (‘*SBS Belgium*’), para 14; *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:644 (‘*GS Media*’), para 30; *Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler*, C-527/15, EU:C:2017:300 (‘*Filmspeler*’), para 27; *The Pirate Bay*, para 22. [↑](#endnote-ref-12)
14. They are (in chronological order): *SGAE*; *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*’); *Circul Globus Bucureşti (Circ & Variete Globus Bucureşti) v Uniunea Compozitorilor şi Muzicologilor din România - Asociaţia pentru Drepturi de Autor (UCMR - ADA)*, C-283/10, EU:C:2011:772 (‘*Circul Globus Bucureşti*’*)*; *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*’); *Società Consortile Fonografici (SCF) v Marco Del Corso*, C‑135/10, EU:C:2012:140 (‘*SCF*’); *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*, C-162/10, EU:C:2012:141 (‘*PPI*’); *TV Catch Up*; *Nils Svensson and Others v Retriever Sverige AB*, C-466/12 (‘*Svensson*’), EU:C:2014:76; *OSA*; *BestWater International v Mebes and Potsch*, C-348/13, EU:C:2014:2315 (‘*BestWater*’); *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199; *Sociedade Portuguesa de Autores*; *SBS Belgium*; *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*’); *GS Media*; *Filmspeler*; *Zürs.net Staatlich genehmigte Gesellschaft der Autoren,Komponisten und Musikverlegerregistrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH*, C-138/16, EU:C:2017:218 (‘*Zürs.net*’); and *The Pirate Bay*. [↑](#endnote-ref-13)
15. *SCF,* para 79; *PPI*, para 30; and *Reha Training*, para 35; *GS Media*, para 34; *Filmspeler*, para 30; *The Pirate Bay*, para 25. [↑](#endnote-ref-14)
16. This part builds upon E Rosati, ‘*GS Media* and its implications for the construction of the right of communication to the public within EU copyright architecture’ (forthcoming) CMLRev, §3.2. [↑](#endnote-ref-15)
17. *SGAE*, para 38; *SCF*, para 84; *PPI*, para 33; *TV Catch Up*, para 32; *Svensson*, para 21; *OSA*, para 27; *Sociedad Portoguesa de Autores*, para 19; *SBS Belgium*, para 21; *GS Media*, para 36; *Filmspeler*, para 45; *Zürs.net*, para 24; *The Pirate Bay*, paras 27 and 42. [↑](#endnote-ref-16)
18. *SGAE* paras. 40 and 42; *Organismos Sillogikis*, para 39; *FAPL*, para 197, *Airfield*, para 72; *OSA*, para 31; *Svensson*, para 24; *Reha Training*, para 45; *GS Media*, para 37; *Filmspeler*, para 47; *The Pirate Bay*, para 28. But cf *Zürs.net*, seeminglysuggesting – at paras 26 and 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. [↑](#endnote-ref-17)
19. This appeared to be the case in: *Circul Globus Bucureşti*, para 40; *FAPL*, paras. 190, 193, and 207; *OSA*, para 25; *SBS Belgium*, para. 16; *Reha Training*, para 38. [↑](#endnote-ref-18)
20. *SGAE*, para 43; *Svensson*, para 19; *GS Media*, para 27; *Filmspeler*, para 36, *Zürs.net*, para 20; *The Pirate Bay*, para 19. [↑](#endnote-ref-19)
21. *SGAE*, para 42; *FAPL*, paras. 194 and 195; *Airfield*, para 79; *SCF*, para 82; *PPI*, para 31; *Reha Training*, para 46; *GS Media*, para 35; *Filmspeler*, para 31; *The Pirate Bay*, para 26. [↑](#endnote-ref-20)
22. *SGAE*, paras. 45 to 47. [↑](#endnote-ref-21)
23. *GS Media*, para 51. [↑](#endnote-ref-22)
24. *Filmspeler*, paras 49 and 51. [↑](#endnote-ref-23)
25. Opinion of Advocate General Melchior Wathelet in *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:221, paras 57 to 60. [↑](#endnote-ref-24)
26. 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, para 49. [↑](#endnote-ref-25)
27. *Filmspeler*, para 41. [↑](#endnote-ref-26)
28. *Ibid*. [↑](#endnote-ref-27)
29. Rosati, *GS Media*, *cit*, §3.2.3. In a similar sense, see also B Clark – J Dickinson, ‘Theseus and the labyrinth? An overview of "communication to the public" under EU copyright law: after *Reha Training* and *GS Media*where are we now and where do we go from here?’ (2017) 39(5) EIPR 265, pp 269-270. Submitting instead that the profit-making intention of the ‘hyperlinker’ is to be appreciated with regard to the particular act of hyperlinking, see T Rendas, ‘How Playboy photos compromised EU copyright law: the *GS Media* judgment’ (2017) J Internet L 11, p 14. [↑](#endnote-ref-28)
30. *SGAE*, para 44; *FAPL*, paras 205-206; *Reha Training* , paras 63-64. [↑](#endnote-ref-29)
31. *Filmspeler*, para 51. [↑](#endnote-ref-30)
32. *The Pirate Bay* AG Opinion, para 23. [↑](#endnote-ref-31)
33. *The Pirate Bay* AG Opinion, para 3. [↑](#endnote-ref-32)
34. There is no formal system of precedent (*stare decisis*) at the level of the CJEU: see A Arnull, *The European Union and its Court of Justice* (Oxford University Press:1999), p 529, explaining that there was the fear that a system of binding precedent would have been inappropriate in what was meant to be a court of first and last resort, many of whose decisions could have been overcome only by amending the treaties, thus implying the agreement of and ratification by all the Member States. See also E Rosati, *Originality in EU copyright – Full harmonization through case law* (Edward Elgar:2013), pp 100-101. [↑](#endnote-ref-33)
35. *The Pirate Bay* AG Opinion, para 52. [↑](#endnote-ref-34)
36. *The Pirate Bay* AG Opinion, para 4. [↑](#endnote-ref-35)
37. *The Pirate Bay* AG Opinion, para 25. [↑](#endnote-ref-36)
38. *The Pirate Bay* AG Opinion, paras 44-45. [↑](#endnote-ref-37)
39. *The Pirate Bay* AG Opinion, para 48. [↑](#endnote-ref-38)
40. *The Pirate Bay* AG Opinion para 49. [↑](#endnote-ref-39)
41. *The Pirate Bay* AG Opinion, para 37. [↑](#endnote-ref-40)
42. *The Pirate Bay* AG Opinion, para 50. [↑](#endnote-ref-41)
43. *The Pirate Bay* AG Opinion, para 51. [↑](#endnote-ref-42)
44. *Ibid*. [↑](#endnote-ref-43)
45. *Ibid*. [↑](#endnote-ref-44)
46. *The Pirate Bay* AG Opinion, para 52. [↑](#endnote-ref-45)
47. *The Pirate Bay* AG Opinion, in particular paras 67-69. [↑](#endnote-ref-46)
48. As explained above sub fn 33, at the CJEU level there is no system of binding precedent (*stare decisis*). [↑](#endnote-ref-47)
49. *The Pirate Bay*, para 20. [↑](#endnote-ref-48)
50. *The Pirate Bay*, para 21. [↑](#endnote-ref-49)
51. *The Pirate Bay*, para 22. [↑](#endnote-ref-50)
52. *The Pirate Bay*, para 31. [↑](#endnote-ref-51)
53. *The Pirate Bay*, para 24. [↑](#endnote-ref-52)
54. *The Pirate Bay*, para 25. [↑](#endnote-ref-53)
55. *The Pirate Bay*, para 26. [↑](#endnote-ref-54)
56. *The Pirate Bay*, para 29. [↑](#endnote-ref-55)
57. *The Pirate Bay*, para 32. [↑](#endnote-ref-56)
58. *The Pirate Bay*, para 33. [↑](#endnote-ref-57)
59. *The Pirate Bay*, para 34. [↑](#endnote-ref-58)
60. *The Pirate Bay*, para 35. [↑](#endnote-ref-59)
61. *The Pirate Bay*, paras 40-44. [↑](#endnote-ref-60)
62. *The Pirate Bay*, para 36. [↑](#endnote-ref-61)
63. *The Pirate Bay*, para 37. [↑](#endnote-ref-62)
64. *The Pirate Bay*, para 36. [↑](#endnote-ref-63)
65. *Ibid*. [↑](#endnote-ref-64)
66. *The Pirate Bay*, para 38. [↑](#endnote-ref-65)
67. *The Pirate Bay*, para 39 [↑](#endnote-ref-66)
68. *The Pirate Bay*, para 45. [↑](#endnote-ref-67)
69. *Ibid*. [↑](#endnote-ref-68)
70. *L’Oréal SA and Others v eBay International AG and Others*, C-324/09, EU:C:2011:474 (‘*eBay*’), para 120. [↑](#endnote-ref-69)
71. European Digital Media Association (EDiMA), ‘CJEU reaffirms that knowledge and intention are essential components of an act of communication to the public’ (26 June 2017), available at http://www.europeandigitalmediaassociation.org/pdfs/latest\_news/The%20Pirate%20Bay.pdf; C de Cock, ‘The CJEU *Pirate Bay* decision and the censorship filter’ (29 June 2017) CopyBuzz, available at http://copybuzz.com/analysis/cjeu-pirate-bay-decision-censorship-filter/; C Angelopoulos, ‘CJEU Decision on *Ziggo*: The Pirate Bay communicates works to the public’ (30 June 2017), Kluwer Copyright Blog, available at http://kluwercopyrightblog.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/; [↑](#endnote-ref-70)
72. During relevant criminal proceedings in the Stockholm District Court, one of the Pirate Bay co-founders, Gottfrid Svartholm Warg, expressly stated that unused torrent files are removed through an automatic process (Stockholm District Court, B 13301-06, 17 April 2009). [↑](#endnote-ref-71)
73. As recalled by GF Frosio, ‘From horizontal to vertical: an intermediary liability earthquake in Europe’ (2017) 12(7) JIPLP 565, 570, in the majority of EU jurisdictions, secondary liability is subject to highly demanding conditions that are derived from miscellaneous doctrines of tort law, such as the doctrines of joint tortfeasance, authorization, inducement, common design, contributory liability, vicarious liability or extra-contractual liability. [↑](#endnote-ref-72)
74. Angelopoulos, ‘CJEU Decision on *Ziggo*’, *cit*. [↑](#endnote-ref-73)
75. As noted by GB Dinwoodie, ‘A comparative analysis of the secondary liability of online service providers’ in GB Dinwoodie (ed), *Secondary liability of internet service providers* (Springer:2017), p 8, the concept of ‘authorization’ in this context is such as to establish “an act of *nominally* primary liability that clearly maps in substance to conventional forms of secondary or joint tortfeasor liability.” [↑](#endnote-ref-74)
76. *Dramatico*. [↑](#endnote-ref-75)
77. R Arnold – PS Davies, ‘Accessory liability for intellectual property infringement: the case of authorisation’ (2017) 133(Jul) LQR 442, p 465. [↑](#endnote-ref-76)
78. See also C Angelopoulos, *European intermediary liability in copyright. A tort-based analysis*(Wolters Kluwer:2016)**,** §2.1.3, explaining that secondary liability will only come into play where an intermediary is not already primarily liable for the same infringement. In the same sense, see also, Dinwoodie, ‘A comparative analysis’, *cit*, p 13. [↑](#endnote-ref-77)
79. *SGAE*, para 42. [↑](#endnote-ref-78)
80. K Perset, *The economic and social role of intermediaries* (2010), available at https://www.oecd.org/internet/ieconomy/44949023.pdf, p 9. [↑](#endnote-ref-79)
81. Discussing the nature of the E-Commerce Directive safe harbours and referring to them as “insulat[ing] from the effects of *prima facie* liability”, see J Riordan, *The liability of internet intermediaries* (Oxford University Press:2016), §12.11. [↑](#endnote-ref-80)
82. Although outside the scope of the present contribution, a similar trend towards a greater responsibilization of providers can be also found in recent decisions of the European Court of Human Rights. See *Delfi AS v Estonia*, App No 64569/09, 16 June 2015, and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, App No 22947/13, 2 February 2016, both suggesting that in certain situations the mere provision of a notice-and-takedown system may be insufficient. [↑](#endnote-ref-81)
83. *eBay*, para 113, referring to *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08)*, Google France SARL v Viaticum SA and Luteciel SARL* (C-237/08) *and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08), EU:C:2010:159 (‘*Google France*’), paras 114 and 120. Still in *Google France*, the CJEU noted that In that regard, it follows from recital 42 in the preamble to Directive 2000/31 that “the exemptions from liability established in [the E-Commerce D]irective cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.” (para 113). [↑](#endnote-ref-82)
84. M Husovec, *Injunctions against intermediaries in the European Union: accountable but not liable?* (CUP:forthcoming), Chapter 4, para 4.1., also referring for support to *Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others*, C-291/13, EU:C:2014:2209, and *eBay*. [↑](#endnote-ref-83)
85. In this sense, see Riordan, *The liability*, *cit*, §§12.01 and 12.37. [↑](#endnote-ref-84)
86. In the same sense, see M Husovec, *Injunctions against intermediaries*, *cit*, Chapter 4, para 4.1. [↑](#endnote-ref-85)
87. *The Pirate Bay* AG Opinion, para 52. [↑](#endnote-ref-86)
88. *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, C-484/14, EU:C:2016:689, para 87. [↑](#endnote-ref-87)
89. *eBay,* para 139. [↑](#endnote-ref-88)
90. In this sense, M Leistner, ‘Closing the book on the hyperlinks: brief outline of the CJEU's case law and proposal for European legislative reform’ (2017) 39(6) EIPR 327, p 331. [↑](#endnote-ref-89)
91. Albeit in the different context of intermediary injunctions, the CJEU has already clarified that requiring a provider to take measures which contribute, not just to bringing to an end existing infringements, but also preventing further infringements of that kind are compatible with Article 15(1) of the E-Commerce Directive as long as the relevant order is effective, proportionate, dissuasive and does not create barriers to legitimate trade: *eBay*, paras 139 and 144. [↑](#endnote-ref-90)
92. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final. [↑](#endnote-ref-91)
93. See further, amongst others, European Commission, *Synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy* (25 May 2016), available at https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries, §3.6.1. [↑](#endnote-ref-92)
94. Recital 38 states that: “Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council. In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor. In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.” [↑](#endnote-ref-93)
95. The draft DSM Directive does not contain a definition of what is to be intended as “large amounts of copyright protected works or other subject-matter” uploaded by users of hosting providers’ services. [↑](#endnote-ref-94)
96. Following the release of the European Commission’s proposal for a DSM Directive, the discussion moved to the European Parliament, where MEP Therese Comodini Cachia was appointed rapporteur on behalf of the Committee on Legal Affairs. On 10 March 2017 a first draft of her report on the proposed DSM Directive was released. The draft report takes a substantially identical position to the European Commission, in the part in which it does not provide a definition of what is to be regarded as an ‘act of communication to the public’ by a hosting provider. In mid-2016 MEP Comodini Cachia announced that she was renouncing her role at the European Parliament, and MEP Axel Voss was appointed new rapporteur on the proposed DSM Directive. [↑](#endnote-ref-95)