**Linking and copyright: easier at last? First national applications of the CJEU *GS Media* judgment**

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

# Abstract

Since its 2006 decision in *SGAE*, C-306/05, the Court of Justice of the European Union (CJEU) has been asked to clarify the appropriate construction of the right of communication to the public under Article 3(1) of Directive 2001/29 (InfoSoc Directive) in multiple occasions. When the opportunity first arose – in *Svensson and Others*, C-466/12 – to tackle the relationship between linking to protected content and Article 3(1) of the InfoSoc Directive, the resulting judgment proved unsatisfactory. In particular, what remained uncertain was the treatment of linking to *unlicensed* content. In *GS Media*, C-160/15 the Court finally addressed this scenario. Although this judgment was arguably more articulated than the one in *Svensson and Others*, C-566/12, it was not less ambiguous. The first national decisions issued in the aftermath of the ruling in *GS Media*, C-160/15 are a demonstration of all this: national applications show diverging approaches to the interpretation of relevant CJEU case law or resistance *tout court*.

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# 1. The right of communication to the public

The right of communication to the public under Article 3(1) of Directive 2001/29[[2]](#footnote-2) (InfoSoc Directive) has been subject to a significant number of referrals since the first ruling in 2006 in *SGAE*, C-306/05.[[3]](#footnote-3) By relying on international sources and a purpose-driven interpretation of the InfoSoc Directive, the Court of Justice of the European Union (CJEU) has construed this exclusive right broadly and in such a way as to encompass, subject to a number of conditions, different types of acts, including the making available of TV sets in certain contexts, linking to protected content, the provision of certain types of set-up boxes, indexing activities by a platform, and cloud-based recording services.[[4]](#footnote-4)

At the international level the right of communication to the public received its first formulation in Article 11*bis* of the Berne Convention, as adopted in 1928 and later revised with the Brussels Act 1948.[[5]](#footnote-5) The WIPO Copyright Treaty supplemented the Berne Convention[[6]](#footnote-6), and introduced the concept of ‘making available to the public’.[[7]](#footnote-7)

The wording of Article 3(1) of the InfoSoc Directive is derived from Article 8 of the WIPO Copyright Treaty. 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 ensuring a high level of protection of intellectual property (Recital 24) and for authors. In its rich body of case law on Article 3(1), the Court 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.[[8]](#footnote-8)

## 1.1. Requirements and criteria under Article 3(1) of the InfoSoc Directive[[9]](#footnote-9)

Starting from ‘public’, this is a concept that has not been straightforward to comprehend, also because the relevant understanding may change depending on the context.[[10]](#footnote-10) In general terms, the notion of ‘public’ is that of an indeterminate and fairly large (above *de minimis*) number of people.[[11]](#footnote-11) In the case of a communication concerning the same works as those covered by the initial communication and made by the same technical means (eg internet), the communication must be directed to a ‘new’ public. Derived from the interpretation given by the 1978 WIPO Guide to the Berne Convention of Article 11*bis*(1)(iii) of the Berne Convention as first employed by Advocate General (AG) La Pergola in his Opinion in *EGEDA*, C-293/98[[12]](#footnote-12), the ‘new public’ that is relevant to the establishment of Article 3(1) applicability is the public which was not taken into account by the relevant rightholder when they authorized the initial communication to the public.[[13]](#footnote-13)

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[[14]](#footnote-14) – in such a way that the persons forming the public may access it, irrespective of whether they avail themselves of such opportunity.[[15]](#footnote-15) 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, their customers would not, in principle, be able to enjoy the work.[[16]](#footnote-16) With particular regard to the notion of indispensability of one’s own intervention, the Court has recently clarified that an intervention which *facilitates* access to unlicensed content that would be otherwise more difficult to locate qualifies as an ‘indispensable intervention’.[[17]](#footnote-17) Over time the CJEU has indeed dismissed attempts to interpret this criterion narrowly. A clear example is *GS Media*, C-160/15. In his Opinion in that case AG 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.[[18]](#footnote-18)

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.[[19]](#footnote-19)

In addition to the requirements of an act of communication directed to a public, the Court has also considered – from time to time – other non-autonomous and interdependent criteria (having no clear textual basis), necessary to undertake an individual assessment of the case at issue. Such criteria may, in different situations, be present to widely varying degrees. They must be applied both individually and in their interaction with one another.[[20]](#footnote-20) In *GS Media*, C-160/15 the Court, among other things, relied in particular 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. Prior to *GS Media*, C-160/15, the profit-making character of the communication at issue had not been given the centrality that it did instead acquire in that case: in *Reha Training*, C-117/15, for instance, the Grand Chamber of the CJEU considered that this criterion, while not irrelevant, would not be however decisive.[[21]](#footnote-21) In *GS Media*, C-160/15, instead, 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.’[[22]](#footnote-22) Overall, in the context of communication to the public by linking, the Court deemed it necessary to move towards an assessment in which the subjective element is decisive for determining *prima facie* liability.[[23]](#footnote-23)

The operation of this presumption was confirmed in the subsequent ruling in *Stichting Brein*, C-527/15.[[24]](#footnote-24) As discussed more at length elsewhere, 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 (see also below, *sub* §2.3). 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*, C-160/15.[[25]](#footnote-25) In *SGAE*, C-306/05, *Football Association Premier League and Others*, C-403/08 and C-429/08, and *Reha Training*, C-117/15, in fact, the Court considered that the profit-making nature of the communication would be 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.[[26]](#footnote-26) In *Stichiting Brein*, C-527/15, 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.’[[27]](#footnote-27)

# 2. Communication to the public and linking

## 2.1. *Svensson and Others*, C-466/12

In its 2014 decision in*Svensson and Others*, C-466/12 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, 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, *prima facie*, to copyright infringement. Whether the act in question is an actual infringement depends on additional considerations, including whether the work at hand is protected by copyright in the first place, and whether the defendant may successfully invoke one or more copyright defences available under the applicable national copyright regime.

The main question of the referring court, the Svea Court of Appeal (Sweden), 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. This reference for a preliminary ruling had been made in the context of proceedings between a number of journalists and media monitoring provider Retriever, 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: an ‘act of communication’ of a work, directed to a ‘public’.[[28]](#footnote-28) As regards the first condition, the Court arguably paid lip-service to the requirement that the concept of ‘communication to the public’ 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’.[[29]](#footnote-29)

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.[[30]](#footnote-30) 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 taken into account by the relevant rightholder when they authorized the initial communication to the public.[[31]](#footnote-31)

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.[[32]](#footnote-32) If there is no ‘new’ public, then there is no infringing act: in this sense, the requirement that the public targeted by the act of linking be new means overcoming something that, on the side of the relevant rightholder, may be regarded as an implied licence. Of course, this argument holds true if the content made available online and linked to has been published with the consent of the relevant rightholder.[[33]](#footnote-33) The CJEU itself framed the ‘new public’ requirement within a licensing perspective. In *Soulier and Doke*, C-310/15, referring to its earlier decision in *Svensson and Others*, C-466/12, it held in fact that

in a situation in which an author had given prior, explicit and unreserved authorisation to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public.[[34]](#footnote-34)

According to some commentators, consideration of the ‘new public’ requirement would be based on an incorrect interpretation of international law, and would result in an undue (cf Article 3(3) of the InfoSoc Directive) exhaustion of the right of communication to the public.[[35]](#footnote-35)

## 2.2. *BestWater*, C-348/13

The Court confirmed the approach taken in *Svensson and Others*, C-466/12 in the subsequent 2014 order in *BestWater*, C-348/13 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. In that case the Court failed to address the fact that the content linked to and embedded on the defendant’s page had been uploaded on YouTube without the authorization of the relevant copyright holder. Hence, even after *BestWater*, C-348/13 it remained unclear what 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, would be.[[36]](#footnote-36) Logically, if one followed the reasoning of the CJEU in *Svensson* alone and 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 and, for linking that involves embedding/framing, also issues of reproduction – which the CJEU has not yet addressed – would come into consideration. The relevant rightholder, in fact, would have had no public in mind, since they never authorized the making available of their work in the first place. Accordingly, linking to content of this kind should be always regarded as an act of communication to a ‘new public’. Yet, when the opportunity arose to address this particular scenario, AG Watheletfirst and, then, the CJEU took a different direction.[[37]](#footnote-37)

## 2.3. *GS Media*, C-160/15

This case originated as a reference for a preliminary ruling from the Dutch Supreme Court. It had been made in the context of proceedings between the publisher of *Playboy* magazine and GS Media, concerning the publication by the latter on a website that it operated (GeenStijl) 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 containing a hyperlink to an Australian data-storage website, where the photographs appeared to be freely accessible and available for download.[[38]](#footnote-38) As explained by AG Wathelet, the report carried the title ‘[obscenity] leaked! Nude photos ... Dekker’. The report, which also included part of one of the photographs in the top left-hand corner, 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 were directed to an Australian data-storage website called Filefactory.com. 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 opened a file in zip format containing 11 files in pdf format, each of which contained one of the photographs.[[39]](#footnote-39)

Despite Sanoma's demands, GS Media refused to remove the hyperlink in question. Although the photographs were eventually deleted on 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 hyperlinks, would have not been easy to find. In contrast, the appellate court held that, on the one hand, GS Media had infringed copyright by posting a cut-out of one of the photographs on the its own website but, on the other hand, had not made the photographs available to the public by posting the hyperlinks on its website.[[40]](#footnote-40)

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 asking whether: 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; 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 InfoSoc Directive;  the fact that a hyperlink has facilitated access to the works in question is relevant in accordance with Article 3(1).

The CJEU held that the provision of a hyperlink (but it would appear that the same reasoning may be applied to other types of links[[41]](#footnote-41)) 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.

The CJEU began its analysis with a general discussion of the preventative nature of the right of communication to the public.[[42]](#footnote-42) 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, but also a fair balance of contrasting rights and interests, as also protected by the Charter of Fundamental Rights of the European Union[[43]](#footnote-43) (EU Charter). Having recalled the requirement under Article 3(1) of the InfoSoc Directive[[44]](#footnote-44), it noted how an individual assessment is to be undertaken in specific instances by considering several complementary criteria. These are not autonomous and are interdependent, and may, in different situations, be present to widely varying degrees. They must be applied both individually and in their interaction with one another. One of such criteria is the indispensable role played by the user and the deliberate nature of its intervention: the user 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.[[45]](#footnote-45) Other criteria include: a communication using specific technical means[[46]](#footnote-46), different from those previously used or, failing that, to a ‘new public’ and the profit-making nature of the communication. According to the court it is in the light, in particular, of these criteria that a situation like that one at issue in the background proceedings should be assessed.[[47]](#footnote-47) Reviewing earlier case law, the CJEU noted how from this it could not be inferred that, lacking the relevant rightholder’s consent, a link would invariably amount to an unauthorized act of communication to the public.[[48]](#footnote-48)

In light of this conclusion, the court made two 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. Second, it may be difficult, in particular for individuals who wish to post such links, to ascertain whether the website to which those links are expected to lead 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-licences. 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.

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’.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 such 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 their 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 it was notified to this effect by the relevant rightholder. Second, 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 its own subscribers.[[49]](#footnote-49) 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.[[50]](#footnote-50)

The court also added a *presumptio* *iuris tantum*, ie rebuttable:

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.[[51]](#footnote-51)

In the case at hand, the defendant provided the hyperlinks for profit, yet knowing that the photos had been published without the copyright holders’ permission. The Court found that a situation of this kind would be clearly one of *prima facie* copyright infringement[[52]](#footnote-52), 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. 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, as detailed above *sub* §1.1, consideration of the context in which the relevant link is provided appears to be more in line with earlier CJEU case law.

Following the CJEU decision in *GS Media*, C-160/15 the legal treatment of linking under Article 3(1) of the InfoSoc Directive is summarized in the table below[[53]](#footnote-53):

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **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 (*Svensson*, *GS Media*) | No |
| Not freely accessible | Yes | n/a | n/a | Yes (*BestWater*, *GS Media*) | Yes |
| Freely accessible | No | No | No | No (*GS Media*) | No |
| Freely accessible | No | No | Yes (eg because notified) | Yes (*GS Media*) | Yes\* |
| Freely accessible | No | Yes | Presumed (rebuttable presumption) | Yes (*GS Media*) | 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 and limitations in Article 5(3) of the InfoSoc Directive are inapplicable.

# 3. Linking after *GS Media*, C-160/15 before national courts

With regard to linking, national applications demonstrate diverging approaches to the interpretation of relevant CJEU case law or resistance *tout court*. This has been particularly the case of the presumption of knowledge for for-profit link providers, as envisaged in *GS Media*, C-160/15: should the profit-making intention be referred to the act of linking as such (as the Athens Court of Appeal held in 2017[[54]](#footnote-54)) or, rather, the context in which the link is provided?

## 3.1 Sweden

The first national court to apply this CJEU decision was the Attunda District Court (Sweden) in 2016.[[55]](#footnote-55) In 2012 the claimant realized a video that was subsequently uploaded by a third party on YouTube without her authorization. The defendant embedded the video on its own website in the context of an article describing the content of the incident portrayed in the video. In her action the claimant submitted that the defendant had infringed copyright in her video by both embedding it and publishing a frozen still of the video on its website. Considering whether the provision of an embedded link to content whose publication on a third-party site has not been authorized would amount to a copyright infringement, the Attunda court found that the *GS Media* presumption relates to the context in which the link is provided. In the case at issue it was apparent that the defendant’s press publication had published the link to the claimant’s YouTube video with the intention of pursuing a profit. According to the court, the defendant had not been able to demonstrate that it had no knowledge of the unlicensed character of the video embedded on its website. Hence, it was found to have infringed the claimant’s copyright by linking to the YouTube video without the claimant’s permission.

## 3.2 Germany

Following Sweden, still in 2016, it was the turn of the Regional Court of Hamburg (Germany) to provide a first application (by means of an interim decision[[56]](#footnote-56)) of *GS Media*, C-160/15. In that case the German court reasoned along lines similar to the Attunda court in Sweden, holding that the presumption of knowledge refers to for-profit contexts, rather than individual links provided with a profit-making intention.

Despite a similar approach being followed also in the Czech Republic[[57]](#footnote-57), subsequent decisions in Germany have however appeared to take a rather different direction. So, in its 2017 decision concerning copyright content displayed on Google Images by means of thumbnails[[58]](#footnote-58), Germany’s Federal Court of Justice dismissed the action that the operator of a photography website had brought against Google and its search engine. The former operated a website that included a restricted (password-protected) area to which customers could only access upon payment of a fee. Some of the photographs hosted in the restricted area were re-uploaded unlawfully by customers onto freely accessible websites. Relevant thumbnails were subsequently indexed on Google Images from such freely accessible sites. According to the claimant, by indexing and displaying thumbnails of the photographs to which it owns the copyright, Google had infringed its own exclusive right of communication to the public pursuant to the right of communication to the public within §15(2) of the German Copyright Act (Urheberrechtsgesetz – UrhG).

The Federal Court of Justice held that Google had not infringed the claimant’s copyrights by displaying thumbnails of and links to photographs publicly available on the internet without the rightholder’s consent. To reach this conclusion the court considered that in *GS Media*, C-160/15 the CJEU had stressed the importance of the internet to freedom of expression and of information: hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterized by the availability of immense amounts of information. Although *GS Media*, C-160/15 envisages a presumption of knowledge for for-profit link providers, such a presumption would not apply to search engines and for links displayed by search engines, because of the particular importance of these subjects to the functioning of the internet. Accordingly, the provider of a search function cannot be expected to check the lawfulness of the images automatically retrieved from publicly accessible websites. An approach critical of CJEU linking case law may be also discerned in two further cases decided by German courts.

In a case concerning liability of the operator of a product search engine, the Regional Court of Hamburg ruled that the simple linking of a work hosted on a third-party site by way of 'framing' does not constitute an act of communication to the public.[[59]](#footnote-59) The decision originated in the context of proceedings brought against the operator of a product search engine which listed furniture and home accessories for sale by the operator of a website on which it offered photos and products displayed by photographs (to which it owned the rights) depicting a pug dog named Loulou. The claimant discovered that the defendant's website displayed among the various results also a listing for a cushion (available for sale on Amazon) that reproduced – without his permission – one of its photographs. He submitted that, by displaying this result, the defendant had made unauthorized acts of making available and communication to the public.

The Hamburg court dismissed the action, holding that the simple linking of a work hosted on a third-party site by way of 'framing' does not constitute an act of making available to the public within §19a UrhG. The only provision that might come into consideration would thus be the 'unnamed' right of communication to the public within §15(2) UrhG. To determine whether that would be actually the case, the court deemed it necessary to review relevant CJEU case law on Article 3(1) of the InfoSoc Directive. The court excluded that there would be a communication to the public in the case at issue. Although the requirement of the 'new public' was met, the act at issue would not take place with the indispensable intervention of the defendant. According to the court, the defendant in this case – although operating for a profit – had neither positive knowledge of the unlawfulness of the offer displayed through its search engine, nor could it have acquired knowledge of the offer’s unlawfulness in a reasonable way.

The links displayed were created through a completely automated process and the relevant offers were not subject to any editing or other manual control. Hence, it could not be assumed that the defendant had knowledge that the offer at issue incorporated content that would infringe the claimant's rights. In addition, upon becoming aware of the unlawfulness of the listing, the defendant promptly removed it. Considering that the defendant's databank contains 50 million offers, it would be unreasonable to expect that every single link be checked beforehand. In the event of (several) completely automated processes, the *GS Media* presumption could not apply in relation to each and every link. Referring to the Opinion of AG Szpunar in *Stichting Brein*, C-610/15[[60]](#footnote-60), the court concluded that holding otherwise would extend liability to every imaginable far-removed contribution due to negligible lack of knowledge and, therefore, on the basis of merely fictitious intention. This would be also contrary to Article 16 of the EU Charter.

The Regional Court of Hamburg also decided another case in 2017 in which issues of linking and copyright protection were at issue.[[61]](#footnote-61) It held that there is no act of communication to the public within §§ 15(2) UrhG and 19a UrhG if a person who links to protected content without the relevant rightholder’s permission is unaware that such content is unlawful. Even if the link provider has a profit-making intention, there should be no presumption that they had awareness that the content linked to was unlawful if they operate in a context in which it would be unreasonable to expect that checks be performed to ensure that the content linked to is (and remains) lawful. In the case at issue, the defendant’s linking activities were performed algorithmically and, similarly to the other decision, also in this instance the infringing content (again a product allegedly reproducing a photograph depicting pug dog Loulou) linked to was available on Amazon.de. The defendant had no actual awareness that the content linked to was unlawful, nor was its unlawful nature recognizable at the outset. A relevant aspect was also the fact that, to be able to offer products for sale on Amazon, merchants have to agree to the platform’s terms of use, including declaring that they own the copyright to the images displayed.

In its decision the Hamburg court held that the *GS Media* presumption of knowledge cannot be considered as indistinctly applicable: instead, it should be only relevant in situations in which the link provider/defendant may be *expected* to carry out the necessary checks to determine the status – lawful or unlawful – of the content linked to. The court acknowledged that *GS Media*, C-160/15 mandates a generally applicable presumption for links posted out of profit. However, a conclusion of this kind would contradict what is stated at paragraph 34 of *GS Media*, C-160/15 itself, ie that the assessment of whether a link provider can be liable under Article 3(1) of the InfoSoc Directive must be individualized and take account of several complementary criteria that may, in different situations, be present to widely varying degrees. In a case like the one at issue, it would be therefore ‘unreasonable’ and ‘economically unjustifiable’ to expect that the defendant carries out such checks in relation to each and every content (automatically) linked to, including content hosted on a platform like Amazon. The defendant’s business model – including the fact that the content is not ‘incorporated’ to look as the defendant’s own content – is such that no specific searches for unlawfulness can be expected. Holding otherwise would not only be unreasonable, but also amount to an undue compression of the fundamental freedom to conduct a business, pursuant to Article 16 of the EU Charter.

# Conclusion: clarity still needed

In the aftermath of the CJEU decision in *GS Media*, C-160/15 it appears that, on the one hand, courts have adopted different approaches to the presumption of knowledge envisaged by the CJEU in its ruling and, on the other hand, the scope of application of CJEU case law has not been considered devoid of difficulties. This has been particularly the case of German courts: the decisions discussed above show how courts in that EU Member State, instead of holding the presumption rebutted in the specific instance considered (as it appears to be the approach required under *GS Media*, C-160/15), held against its applicability *tout court,* on grounds of reasonableness and by placing significant emphasis on the fundamental rights dimension. Fears that the relationship between copyright protection and freedom to conduct a business might be unbalanced in favour of the former were acutely felt. This – together with considerations relating to the proper construction of the right of communication to the public, including the requirement of an individualized assessment – arguably prompted the courts to depart from what a strict application of *GS Media*, C-160/15 would instead require.

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1. \* Associate Professor in Intellectual Property Law at the University of Southampton. Email: eleonora@e-lawnora.com [↑](#footnote-ref-1)
2. 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, 22.06.2001, 10–19. [↑](#footnote-ref-2)
3. They are (in chronological order, as of August 2018): CJEU, *SGAE*, Case C-306/05, Judgment of 7 December 2006; CJEU, *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, Case C-136/09, Judgment of 18 March 2010; CJEU, *Circul Globus Bucureşti*, Case C-283/10, Judgment of 24 November 2011; CJEU, *Football Association Premier League and Others*, Joined Cases C-403/08 and C-429/08, Judgment of 4 October 2011; CJEU, *Airfield and Canal Digitaal*, C-431/09, Judgment of 13 October 2011; CJEU, *SCF*, Case C-135/10, Judgment of 15 March 2012; CJEU, *Phonographic Performance (Ireland)*, Case C-162/10, Judgment of 15 March 2012; CJEU, *ITV Broadcasting*, Case C-607/11, Judgment of 7 March 2013; CJEU, *Svensson and Others*, Case C-466/12, Judgment of 13 February 2014; CJEU, *OSA*, Case C-351/12, Judgment of 27 February 2014; CJEU, *BestWater*, C-348/13, Judgment of 21 October 2014; CJEU, *C More Entertainment*, C-279/13, Judgment of 26 March 2015; CJEU, *Sociedade Portuguesa de Autores CRL*, Case C-151/15, Judgment of 14 July 2015; CJEU, *SBS Belgium*, C-325/14, Judgment of 19 November 2015;CJEU, *Reha Training*, Case C‑117/15, Judgment of 31 May 2016; CJEU, *GS Media*, Case C-160/15, Judgment of 8 September 2016; CJEU, *AKM*, Case C-138/16, Judgment of 16 March 2017; CJEU, *Stichting Brein*, Case C-527/15, Judgment of 26 April 2017; CJEU, *Stichting Brein*, Case C-610/15, Judgment of 14 June 2017; CJEU, *VCAST*, Case C-265/16, Judgment of 29 November 2017; and CJEU, *Renckhoff*, Case C-161/17, Judgment of 7 August 2018. [↑](#footnote-ref-3)
4. According to some commentators, rather than a unified concept of communication to the public, in its case law the CJEU has created specific *sui generis* groups of communication to the public cases: see Clark and Tozzi (2016), p. 717. [↑](#footnote-ref-4)
5. World Intellectual Property Organization (2003), BC-11*bis*.1. [↑](#footnote-ref-5)
6. Article 1(4) of the WIPO Copyright Treaty mandates compliance with Articles 1 to 21 of and the Appendix to the Berne Convention. [↑](#footnote-ref-6)
7. On the concept of making available within Article 8 of the WIPO Copyright Treaty, see Walter (2010), p. 975-980. [↑](#footnote-ref-7)
8. *SCF*, par. 79; *Phonographic Performance (Ireland)*, par. 30; *Reha Training*, par. 35; *GS Media*, par. 34; *Stichting Brein*, C-527/15, par. 30; *Stichting Brein*, C-610/15, par. 25. [↑](#footnote-ref-8)
9. This part builds upon Rosati (2017a), p. 1233-1238 and Rosati (2017b), p. 737 ff. [↑](#footnote-ref-9)
10. Karapapa (2017), p. 66. [↑](#footnote-ref-10)
11. *SGAE*, par. 38; *SCF*, par. 84; *Phonographic Performance (Ireland)*, par. 33; *ITV Broadcasting*, par. 32; *Svensson and Others*, par. 21; *OSA*, par. 27; *Sociedade Portuguesa de Autores CRL*, par. 19; *SBS Belgium*, par. 21; *GS Media*, par. 36; *Stichting Brein*, C-527/15, par. 45; *AKM*, par. 24; *Stichting Brein*, C-610/15, par. 27 and 42. [↑](#footnote-ref-11)
12. Opinion of Advocate General Antonio Mario La Pergola in *EGEDA*, C-293/98, EU:C:1999:403, par. 20. See further Hugenholtz and Van Velze (2016), p. 802-803. [↑](#footnote-ref-12)
13. *SGAE*, par. 40 and 42; *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, par. 39; *Football Association Premier League and Others*, par. 197, *Airfield and Canal Digitaal*, par. 72; *Svensson and Others*, par. 24; *OSA*, par. 31; *Reha Training*, par. 45; *GS Media*, par. 37; *Stichting Brein*, C-527/15, par. 47; *Stichting Brein*, C-610/15, par. 28; *Renckhoff*, par. 24. But cf *AKM*, par. 26-27, suggesting that consideration of whether the communication at hand is addressed to a ‘new public’ is required *also* when the specific technical means used is different. On whether terms and conditions of use of a certain website might be relevant to determine whether the public targeted by the defendant’s link is ‘new’, see (arguing in the negative) McBride (2017), p. 275-277. [↑](#footnote-ref-13)
14. This appeared to be the case in: *Circul Globus Bucureşti*, par. 40; *Football Association Premier League and Others*, par. 190, 193, and 207; *OSA*, par. 25; *SBS Belgium*, par. 16; and *Reha Training*, par. 38. [↑](#footnote-ref-14)
15. *SGAE*, par. 43; *Svensson and Others*, par. 19; *GS Media*, par. 27; *Stichting Brein*, C-527/15, par. 36, *AKM*, par. 20; *Stichting Brein*, C-610/15, par. 19; *Renckhoff*, par. 20. On the accessibility criterion, see (critically) Koo (2018), p. 545-546. [↑](#footnote-ref-15)
16. *SGAE*, par. 42; *Football Association Premier League and Others*, par. 194 and 195; *Airfield and Canal Digitaal*, par. 79; *SCF*, par. 82; *Phonographic Performance (Ireland)*, par. 31; *Reha Training*, par. 46; *GS Media*, par. 35; *Stichting Brein*, C-527/15, par. 31; *Stichting Brein*, C-610/15, par. 26. [↑](#footnote-ref-16)
17. *Stichting Brein*, C-527/15, par. 41; *Stichting Brein*, C-610/15, par. 26. [↑](#footnote-ref-17)
18. Opinion of Advocate General Melchior Wathelet in *GS Media*, C-160/15, EU:C:2016:221, par. 57 to 60. [↑](#footnote-ref-18)
19. *SGAE*, par. 45 to 47. [↑](#footnote-ref-19)
20. *GS Media*, par. 34, referring to: *SCF*, par. 79; *Phonographic Performance (Ireland)*, par. 30; and *Reha Training*, par. 35. [↑](#footnote-ref-20)
21. *Reha Training*, par. 49, referring to: *ITV Broadcasting and Others*, par. 43; and *Football Association Premier League and Others*, par. 204. Commenting favourably on the consideration of the profit-making character of the communication at issue, see Mysoor (2013), p. 182. [↑](#footnote-ref-21)
22. *GS Media*, par. 51. [↑](#footnote-ref-22)
23. On this, see (critically) Synodinou (2017), p. 735. [↑](#footnote-ref-23)
24. *Stichting Brein*, C-527/15, par. 49 and 51. [↑](#footnote-ref-24)
25. Rosati (2017a), p. 1237-1238. In a similar sense, see also Clark and Dickinson (2017), p. 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 Rendas (2017), p. 14. [↑](#footnote-ref-25)
26. *SGAE*, par. 44; *Football Association Premier League and Others*, par. 205-206; *Reha Training*, par. 63-64. [↑](#footnote-ref-26)
27. *Stichting Brein*, C-527/15, par. 51. [↑](#footnote-ref-27)
28. *Svensson and Others*, par. 16, referring to *ITV Broadcasting*, par. 21 and 31. [↑](#footnote-ref-28)
29. In its opinion prior to the CJEU judgment, the European Copyright Society had held the view that linking could not qualify as an act of communication to the public, also on consideration that a transmission of a work – as opposed to its mere accessibility – would be required under Article 3(1) of the InfoSoc Directive: see European Copyright Society (2013). See, *contra*, Association Littéraire et Artistique Internationale (2013). [↑](#footnote-ref-29)
30. *Svensson and Others*, par. 21, referring to*SGAE*, par. 37-38, and *ITV Broadcasting*, C-607/11, par. 32. [↑](#footnote-ref-30)
31. *Svensson and Others*, par. 24, recalling (by analogy): *SGAE*, par. 40 and 42; *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, par. 38; and *ITV Broadcasting*, par. 39. [↑](#footnote-ref-31)
32. *Svensson and Others*, par. 25-28. [↑](#footnote-ref-32)
33. See Arezzo (2014), p. 543, and Ginsburg (2014). [↑](#footnote-ref-33)
34. CJEU, *Soulier and Doke*, Case C-301/15, Judgment of 16 November 2016, par. 36. [↑](#footnote-ref-34)
35. Association Littéraire et Artistique Internationale (2014), p. 2. See also Rosén (2016), p. 341-347, holding that the CJEU approach in *Svensson and Others*, C-466/12 would be incompatible with international law and EU directives. [↑](#footnote-ref-35)
36. Also outlining the interpretative doubts left by the decisions in *Svensson and Others*, C-466/12 and *BestWater*, C-348/13, see Leistner (2015), p. 636. [↑](#footnote-ref-36)
37. In their analysis Ginsburg and Budiardjo (2018), p. 169-170, submit that post-*Svensson* case law might have reduced the centrality of the ‘new public’ criterion. [↑](#footnote-ref-37)
38. AG Wathelet noted that whether this was the case was not entirely clear: Opinion of Advocate General Melchior Wathelet in *GS Media*, C-160/15, EU:C:2016:221, par. 71. [↑](#footnote-ref-38)
39. *Ibid*, par. 10. [↑](#footnote-ref-39)
40. *GS Media*, par. 17-18. [↑](#footnote-ref-40)
41. But cf. Leistner (2017), p. 138-139, holding that not all links should be treated the same, in that the provider of a framed link should be under more than a merely minimal duty to check the lawfulness of the posted material. [↑](#footnote-ref-41)
42. *GS Media*, par. 28. [↑](#footnote-ref-42)
43. Charter of Fundamental Rights of the European Union, C 364, 18.12.2000, 1-22. [↑](#footnote-ref-43)
44. *Ibid*, par. 30-32, referring to *Svensson and Others*, par. 16; *SBS Belgium*, par. 15; and *Reha Training*, par. 37. [↑](#footnote-ref-44)
45. *GS Media*, par. 33-35, also referring (par. 34) to: *SCF*, par. 79; *Phonographic Performance (Ireland)*, par. 30; and *Reha Training*, par. 35. [↑](#footnote-ref-45)
46. As noted by Leistner (2015), 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. [↑](#footnote-ref-46)
47. *GS Media*, par. 36-39. [↑](#footnote-ref-47)
48. *Ibid,* par. 43. [↑](#footnote-ref-48)
49. *Ibid*, par. 46-50. [↑](#footnote-ref-49)
50. *Ibid*, par. 53. [↑](#footnote-ref-50)
51. *Ibid*, par. 51. [↑](#footnote-ref-51)
52. *Ibid*, par. 54. [↑](#footnote-ref-52)
53. This table was first published in Rosati (2016). [↑](#footnote-ref-53)
54. Court of Appeal of Athens, decision No 1909/2017 (18thsection), on which see Chiou (2017). [↑](#footnote-ref-54)
55. Attunda Tingsrätt, *Jonsson v Les Éditions de l’Avenir SA*, FT 11052-15, 13.10.2016, on which see Malovic and Haddad (2017), p. 89-90. [↑](#footnote-ref-55)
56. LG Hamburg, 310 O 402/16, on which see Brüß (2016) and Abrar (2016). [↑](#footnote-ref-56)
57. District Court for Prague 4, 33 T 54/2016, on which see Vivoda (2017), p. 363-364. [↑](#footnote-ref-57)
58. Bundesgerichtshof, I ZR 11/16 - *Preview III*. [↑](#footnote-ref-58)
59. LG Hamburg, 308 O 151/17. [↑](#footnote-ref-59)
60. Opinion of Advocate General Maciej Szpunar in *Stichting Brein*, C-610/15, EU:C:2017:99. [↑](#footnote-ref-60)
61. LG Hamburg, 310 O 117/17. [↑](#footnote-ref-61)