

Communication to the Public or Accessory Liability? Is the CJEU using Communication to the Public to Harmonise Accessory Liability across the EU?

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☞ Communication to the public right; EU law; Hyperlinks; Online infringement; Retransmission; Streaming media

EU copyright law on communication to the public continues to be in a state of flux as digital technologies and methods of distributing and consuming content continue to develop. The CJEU takes a flexible solution-focused approach when deciding this issue, but has failed to provide a consistent approach. The “new public” condition continues to be a challenge, and criteria such as knowledge and profit have also been incorporated into the test. Is this an attempt by the CJEU to harmonise accessory liability across the EU in the field of communication to the public?

EU copyright law on communication to the public continues to be in a state of flux as digital technologies and methods of distributing and consuming content continue to develop. The Court of Justice of the EU (CJEU) has adopted a flexible solution-focused approach when deciding issues of communication to the public, but has thereby failed to provide a consistent approach. The “new public” condition continues to be a challenge, and criteria such as knowledge and profit have also been

incorporated into the test. This appears to be partly an attempt by the CJEU to harmonise accessory liability across the EU in the field of communication to the public, or to introduce a new infringement of “knowingly sharing infringing content online”.

Changing criteria for a communication to the public

Under art.3 of Directive 2001/29¹ (the InfoSoc Directive), Member States need to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. It is clear from EU case law² and the InfoSoc Directive³ that communication to the public should be given a broad interpretation, and that the principal objective is to establish a high level of protection for authors.⁴ It is also clear from art.3 that communication to the public involves two cumulative criteria⁵:

- (i) an act of communication.
- (ii) to the public, which has been interpreted as an indeterminate number of potential recipients and implies a fairly large number of persons.⁶

There is, however, no further definition of communication to the public in the legislation and so the meaning and scope of the concept must be determined in light of the objectives pursued by the InfoSoc Directive and the context in which the provision being interpreted is set.⁷ Accordingly, a multi-factorial test has been adopted, which requires the court to take account of several complementary criteria, which are not autonomous and are interdependent⁸:

- the indispensable intervention played by the user and the deliberate nature of its intervention;
- communication to a “new public”; and
- the profit-making nature of the communication.

Because the concept of communication to the public requires an individual assessment,⁹ these criteria come into consideration differently in different scenarios.¹⁰ The aim of this is no doubt to give the CJEU some flexibility in reaching the right outcome in different factual

¹ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/16.

² *Reha Training v GEMA* (C-117/15) EU:C:2016:379, [2016] 3 C.M.L.R. 40 at [36]; *GS Media BV v Sanoma Media Netherlands BV* (C-160/15) EU:C:2016:644, [2017] 1 C.M.L.R. 30 at [30]; *ITV Studios v TVCatchup* (C-607/11) EU:C:2013:147, [2013] 3 C.M.L.R. at [20].

³ InfoSoc Directive, Recital 23.

⁴ *Stichting Brein v Ziggo BV* (C-610/15) EU:C: 2017: 456; [2017] E.C.D.R. 19 at [22].

⁵ *Reha Training* EU:C:2016:379, [2016] 3 C.M.L.R. 40 at [37]; *GS Media* EU:C:2016:644, [2017] 1 C.M.L.R. 30 at [32]; *SBS Belgium NV v SABAM* (C-325/14) EU:C:2015:764, [2015] Bus. L.R. 1558 at [15].

⁶ *SGAE v Rafael Hoteles* (C-306/05) EU:C:2006:764; [2007] Bus. L.R. 521 at [38].

⁷ *Stichting Brein v Wullems t/a Filmspelers* (C-527/15) EU:C:2017: 300, [2017] 3 C.M.L.R. 30 at [26]; and *Ziggo* EU:C:2017: 456, [2017] E.C.D.R. 19 at [21].

⁸ *Reha Training* EU:C:2016:379, [2016] 3 C.M.L.R. 40 at [34]; *Filmspelers* EU:C:2017: 300, [2017] 3 C.M.L.R. 30 at [30]; *Ziggo* EU:C: 2017: 456, [2017] E.C.D.R. 19 at [25].

⁹ *Ziggo* EU:C: 2017: 456, [2017] E.C.D.R. 19 at [23]; and *Filmspelers* EU:C:2017: 300, [2017] 3 C.M.L.R. 30 at [28]. and the case law cited.

¹⁰ *Reha Training* EU:C:2016:379, [2016] 3 C.M.L.R. 40 at [35]; *GS Media* EU:C:2016:644, [2017] 1 C.M.L.R. 30 at [34].

circumstances. However, applying the criteria differently in different contexts has led to a problematic inconsistency in the construction of art.3, and this leads to overall uncertainty. For example, in *Reha Training*, *FA Premier League* and *TV Catchup*,¹¹ cases concerning retransmission of TV broadcasts,¹² it was stated that the profit-making nature of a broadcast was irrelevant or not determinative for liability, although it was relevant for the purpose of determining any remuneration due in respect of the transmission. Conversely, in the *GS Media* case¹³ concerning hyperlinking to unauthorised content on the internet, the profit-making intention of the alleged infringer was a key factor. In *Filmspelers*,¹⁴ and confirmed in *Ziggo*,¹⁵ the court made an unhelpful comment that the profit-making nature of the communication is indeed “not irrelevant”.

There have also been inconsistent ECJ rulings on whether a communication to the public requires a transmission or whether it is sufficient that the work is made available.¹⁶ The CJEU in *Svensson*¹⁷ and *Rafael Hoteles*¹⁸ did not require an actual transmission if the work was made available to a public in such a way that the persons forming the public could access it, irrespective of whether *they availed themselves of that opportunity*. In contrast, the CJEU in *Reha Training*,¹⁹ *FA Premier League*²⁰ and *SBS Belgium*²¹ placed great emphasis on there being a transmission of the protected works. This was also the case in *VCAST*,²² which confirmed that the making available of copies of TV programmes saved in the cloud must be authorised by the copyright holder.

In balancing these factors, the weight given to each of these criteria has also fluctuated. Earlier cases appeared to concentrate on the issue of whether there was a communication to a “new public”.²³ However, more recently, the court has placed greater emphasis on the user’s deliberate intervention and indispensable role²⁴ and in the most recent cases²⁵ the court emphasised *above all* the essential or indispensable role played by the operator and the deliberate nature of his intervention.

Why does the communication need to be to a “new public”?

One further problem with CJEU case law on communication to the public is that the CJEU insists on applying the “new public” requirement, even though there is no basis for it in the legislation. Article 3(1), on its face, contemplates that the copyright authors are to have control over any communication to the public of their works. This is also the case in art.11 of the Berne Convention²⁶ and art.11*bis* of the Berne Convention gives control over all communications to the public when made by an organisation other than the original one.

The “new public” criterion was first mentioned in the *Rafael Hoteles* case,²⁷ in relation to cable retransmissions in hotel rooms. There was a mention²⁸ that the communication in those particular proceedings constituted, according to the Berne Convention art.11*bis*(1)(ii), a communication made by an organisation other than the original one. The court then stated that “such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is to a new public”. As such, the ECJ seems to have given a “new public” as an example of where there is a communication by an organisation other than the original one but this has somehow turned into a separate requirement that the retransmission should be to a “new public”, divorced from the provisions of the Berne Convention. Article 11*bis* of the Berne Convention expressly states that a rebroadcast requires the author’s authorisation, and Recital 23 of the InfoSoc Directive specifically states that the right of communication to the public covers transmission and retransmission. If another organisation rebroadcasts to the same public, that should still require authorisation.

Problems with hyperlinking and the “new public” requirement

In *TV Catchup*,²⁹ the CJEU came to a pragmatic correction of the new public criterion, in relation to internet streaming: there was no need for the communication to

¹¹ *Reha Training* EU:C:2016:379, [2016] 3 C.M.L.R. 40 at [49]–[50]; *FA Premier League v QC Leisure* (C-403/08) EU:C:2011:631, [2012] 1 C.M.L.R. 29 at [204]; *TV Catchup* EU:C:2013:147, [2013] 3 C.M.L.R. at [43].

¹² In a rehab centre, to customers in a public house, and via “live” internet streaming respectively.

¹³ *GS Media* EU:C:2016:644, [2017] 1 C.M.L.R. 30 at [51].

¹⁴ *Filmspelers* EU:C:2017: 300, [2017] 3 C.M.L.R. 30 at [34].

¹⁵ *Ziggo* EU:C: 2017: 456; [2017] E.C.D.R. 19 at [29].

¹⁶ The European Copyright Society advocated that a work must be transmitted in order to have an act of communication: Opinion on the Reference to the ECJ in Case C-466/12 *Svensson* (15 February 2013). However, the ALAI disagreed: *Report and opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet* (13 September 2013).

¹⁷ *Svensson v Retriever Sverige AB* (C-466/12) EU:C:2014:76; [2014] 3 C.M.L.R. 4 at [19].

¹⁸ *Rafael Hoteles* EU:C:2006:764; [2007] Bus. L.R. 521 at [43].

¹⁹ *Reha Training* EU:C:2016:379; [2016] 3 C.M.L.R. 40 at [38]: “every transmission or retransmission of a work”.

²⁰ *FA Premier League* EU:C:2011:631; [2012] 1 C.M.L.R. 29 at [193].

²¹ *SBS Belgium* EU:C:2015:764; [2015] Bus. L.R. 1558 at [16]: “any transmission of the protected works ...”.

²² *VCAST Ltd v RTI SpA* (C-265/16) EU: C:2017: 913; [2018] E.C.D.R. 5 at [42].

²³ *Rafael Hoteles* EU:C:2006:764, [2007] Bus. L.R. 521; and *Svensson* EU:C:2014:76, [2014] 3 C.M.L.R. 4.

²⁴ *GS Media* EU:C:2016:644; [2017] 1 C.M.L.R. 30 at [35].

²⁵ *Filmspelers* EU:C:2017: 300, [2017] 3 C.M.L.R. 30 at [31]; and *Ziggo* EU:C: 2017: 456, [2017] E.C.D.R. 19 at [26].

²⁶ Berne Convention for the protection of literary and artistic works, amended on 28 September 1979.

²⁷ *Rafael Hoteles* EU:C:2006:764; [2007] Bus. L.R. 521 at [41].

²⁸ *Rafael Hoteles* EU:C:2006:764; [2007] Bus. L.R. 521 at [40] and [41].

²⁹ *TV Catchup* EU:C:2013:147; [2013] 3 C.M.L.R. at [39].

be directed at a new public if the work was retransmitted using different technical means. Unfortunately, by doing so, the court only reinforced the need to satisfy the “new public” requirement in other circumstances. Accordingly, in *Svensson*,³⁰ the ECJ insisted on applying the “new public” criterion to hyperlinking on the internet. It ruled that hyperlinking to third-party content that is freely accessible on the internet with the consent of the right holder is not a communication to the public because, where a work is transmitted by the same technical means as the initial communication, there is a need for the work to be communicated to a “new public”.³¹ This position was confirmed in *Bestwater*,³² in relation to framed or embedded material.

One consequence of introducing a “new public” requirement in this way for hyperlinking cases is that the communication to the public right becomes exhausted. Once an owner has placed the work on the internet without restrictions, it is accessible to any internet user around the world, so there can never be a “new public” and the communication to the public right cannot be invoked. This is contrary to art.3(3) of the InfoSoc Directive, which expressly states that the communication to the public right is not to be exhausted by virtue of a communication of the works.

The *Svensson* ruling caused concern because it could have allowed users to link to all freely available internet content, regardless of its legitimacy, which would have a negative effect on IP protection. In turn, this could have encouraged the use of more access restrictions such as pay walls to prevent online works being considered “freely accessible”, which would have a negative impact on the proper functioning of the internet.

GS Media*—the CJEU incorporates subjective criteria into communication to the public in order to mitigate the effects of *Svensson

The CJEU had an opportunity to rectify these issues in *GS Media*, a case about hyperlinking to copyright protected photographs that had been leaked on to the internet without the owner’s permission. However, the court declined to say expressly that *Svensson* was wrong, and confirmed that the “new public” requirement was applicable in hyperlinking cases because the hyperlink and the original website use the same technical means.³³ Instead, the court confirmed that an individual assessment of a number of interdependent criteria had to be made on the facts of each case, and there could be a communication to the public if: (1) the person knew or ought to have known that the hyperlink he posted provided access to a

work illegally placed on the internet; or (2) the link circumvented access restrictions. If the hyperlink is posted for profit, the operator is presumed to have carried out “necessary checks” so has a rebuttable presumption of knowledge. This is akin to constructive knowledge for commercial operators who are assumed to have the means to carry out the necessary checks as to the legitimacy of linked content. As such the CJEU has created a notice and takedown regime in relation to hyperlinking as well as an *ex ante* duty of care for those using hyperlinks for commercial purposes.

The *GS Media* ruling was clearly an attempt by the CJEU to mitigate some of the harsh consequences of *Svensson* and to strike a balance between the protection of copyright and the free workings of the internet. The distribution of pirated content on the internet is a huge issue for copyright owners, and the CJEU’s desire to find liability for companies who blatantly profit from it is admirable. It is the CJEU’s method in reaching this decision that is questionable. The CJEU has used “knowledge” and “profit-making intention” criteria in its determination of communication to the public in order to draw a pragmatic distinction between innocent internet users and those who profit from the secondary distribution of unauthorised copyright works. These subjective criteria allow the court to come up with a results-oriented finding in the circumstances of the case, dependent on whether the activities of the infringer are deemed objectionable or not. However, subjective concepts such as knowledge (direct or constructive), profit-making and intention should have no place in communication to the public. There is nothing to support these criteria in art.3(1) of the InfoSoc Directive, and it is traditionally considered to be a strict liability primary copyright infringement. By introducing these elements into communication to the public, the CJEU appears to have downgraded a primary copyright infringement into something more akin to unfair competition or tortious practice, where the defendant is only liable if it knowingly acted wrongly.

Admittedly, the CJEU in *GS Media* is not the first court to introduce concepts of knowledge and material intervention into these types of considerations. *Kitchin J* in *Twentieth Century Fox v Newzbin*³⁴ ruled that the operator of the Newzbin website, which indexed the contents of Usenet but did not provide or upload any files,³⁵ was not providing a passive service but was liable for communication to the public because it had “intervened in a highly material way” to make the infringing films available to a new audience. Moreover, it had provided the service in full knowledge of the consequences of its actions.³⁶ Mr Justice Arnold followed in *EMI v BskyB*,³⁷ stating that peer to peer file-sharing

³⁰ *Svensson* EU:C:2014:76; [2014] 3 C.M.L.R. 4 at [24] and [31].

³¹ *Svensson* EU:C:2014:76; [2014] 3 C.M.L.R. 4 at [24].

³² *BestWater International v Mebes* (C-348/13) EU:C:2014:2315 at [15].

³³ *Svensson* EU:C:2014:76; [2014] 3 C.M.L.R. 4 at [42].

³⁴ *Twentieth Century Fox v Newzbin* [2010] EWHC 608 (Ch); [2010] E.C.C. 13.

³⁵ See *Newzbin* [2010] EWHC 608 (Ch); [2010] E.C.C. 13 at [19] and [20].

³⁶ *Newzbin* [2010] EWHC 608 (Ch); [2010] E.C.C. 13 at [125].

³⁷ *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); [2013] Bus. L.R. 884 at [45] and [47].

operators were communicating to the public because they intervened in full knowledge of the consequences of their actions to give others access to copyright works. The CJEU also mentioned these concepts in *Rafael Hoteles*³⁸:

“[T]he hotel ... *intervenes, in full knowledge* of the consequences of its action, to give access to the protected work to its customers. In the absence of the *intervention*, its customers ... would not, in principle, be able to enjoy the broadcast work.”

Nevertheless, the CJEU in *GS Media* has gone further and elevated these concepts into mandatory elements of the multi-factorial test for a primary copyright infringement, despite having no support in the InfoSoc Directive.

Was there another way?

Another possible way of getting to the same result in *GS Media* might have been to restrict communication to the public to material intervention in the actual transmission. This was the position advocated by the European Copyright Society before *Svensson*³⁹ and by Advocate General Wathelet, who thought that linking should not be an act of communication because it does not make anything available: it just facilitates the finding of the work that someone else has made available.⁴⁰ This position is also supported by Recital 23 of the InfoSoc Directive, which says that the right of communication to the public should cover any transmission and retransmission of the work but no other acts.⁴¹

Any liability for linking activities could then be left to accessory liability. This is the likely position in the US where there is no specific right of communication or making available to the public but there is contributory liability if an operator has knowledge and makes a material contribution to the infringement of another. This still provides a takedown and notice regime for hyperlinking but without the dangers of primary copyright liability.

The major problem with that approach is the lack of harmonisation in relation to accessory liability across the EU. It remains a matter for national law and is not available in some Member States. As such, many of the judges in the CJEU, as well as the parties and legal representatives, are unfamiliar with the concept and may have inadvertently merged it into the issue of primary infringement.

Is the CJEU merging communication to the public with accessory liability?

The *Filmspeler* case

In *Stichting Brein v Filmspeler*⁴² the CJEU recently expanded the concept of communication to the public to cover the sale of multi-media players pre-installed with add-ons containing hyperlinks to websites, which hosted unauthorised copyright material. This was not the provision of mere physical facilities for enabling a communication, which Recital 27 of the InfoSoc Directive says cannot be a communication to the public. The court emphasised⁴³ that the players were sold in full knowledge that the hyperlinks gave access to illegally published works and this was clearly done in order to make a profit. The seller provided an *intervention* (but not an indispensable intervention) that provided a significant means to enable a link to be established between the copyright infringing servers and the user. Without that intervention the users would find it difficult to benefit from copyright-protected works. This again incorporates knowledge and profit-making intention into a consideration of communication to the public.

This ruling gives a broad and pragmatic interpretation of communication to the public, stretching it to cover not only the posting of hyperlinks on a website but also the sale of multimedia players installed with hyperlinks. Moreover, it also now incorporates hyperlinks that facilitate users to access infringing material even if the seller's intervention was not crucial. To a UK lawyer, this is even an extension of accessory liability, where mere facilitation of an infringement is deemed insufficient.⁴⁴

The *Pirate Bay* case

Most recently, in *Stichting Brein v Ziggo*,⁴⁵ the CJEU determined that communication to the public covers operators such as The Pirate Bay (TPB) that make available and manage a sharing platform, which indexes metadata relating to protected works and the provision of a search engine, which allows users to locate and share them in a peer to peer network. Szpunar in his Opinion⁴⁶ added that this liability applied if the operator was aware that material was being made available on the network without the consent of the copyright holder and takes no action to prevent access. The CJEU did not specifically include these elements in its answer to the referred question, but stated⁴⁷ that it can be inferred from the case law that, as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with

³⁸ *Rafael Hoteles* EU:C:2006:764; [2007] Bus. L.R. 521 at [41] (emphasis added).

³⁹ Opinion of the European Copyright Society (15 February 2013).

⁴⁰ Opinion of A.G. at [54].

⁴¹ Recital 23 implies that making available is a separate act that should be dealt with under art.3(2).

⁴² *Filmspeler* EU:C:2017: 300, [2017] 3 C.M.L.R. 30 at [50] and [51].

⁴³ *Filmspeler* EU:C:2017: 300, [2017] 3 C.M.L.R. 30 at [50] and [51].

⁴⁴ *CBS Songs v Amstrad Consumer Electronics Plc* [1988] R.P.C. 567 HL.

⁴⁵ *Stichting Brein v Ziggo BV* EU:C: 2017: 456; [2017] E.C.D.R. 19.

⁴⁶ Opinion of A.G. Szpunar in *Stichting Brein* EU:C:2017:99; [2017] E.C.D.R. 13 at [85]

⁴⁷ *Stichting Brein v Ziggo BV* EU:C: 2017: 456; [2017] E.C.D.R. 19 at [34].

access to protected works is liable to constitute an “act of communication”. The CJEU has, however, avoided including any sort of knowledge presumption in these circumstances, presumably because of the hosting defence and prohibition on general monitoring contained within the E-Commerce Directive.⁴⁸

The Advocate General (A.G.) specifically acknowledged that TPB is only an intermediary because it does not make the works available itself: it is not involved in any uploading or downloading of the materials (which is done by a network of users) and the works are transmitted from the users’ computers. However, the A.G. thought that, from the moment the operator has actual knowledge of a breach of copyright and takes no action, its conduct is an intentional act that expressly allows the continued and illegal making available of that work. The AG again placed a big emphasis on the deliberate nature of TPB’s intervention and its role in arranging the system,⁴⁹ such that, without TPB, the network would be more complex and less efficient. The CJEU⁵⁰ also accepted that the works were placed online by the users. However, TPB did not escape liability because they made available and managed the online sharing platform and intervened with full knowledge of the consequences of their conduct to provide access to the content by indexing the files which allowed the user to locate the works and share them on the peer-to-peer network. As such, it played an essential role in making the works available⁵¹. It confirmed⁵² that TPB cannot be considered to be making a “mere provision” of physical facilities under Recital 27 but instead plays an essential role by indexing and cataloguing works and deleting obsolete and faulty content.

Again, this reasoning makes operators of peer-to-peer networks such as TPB liable for primary copyright infringement, even though they do not host the material themselves and facilitate access to copyright infringing works made available by others. In this way, the CJEU seems to be equating communicating to the public with knowingly assisting others to share unauthorised online content.

There are two separate issues that both the Advocate General and CJEU appear to be conflating: (1) whether there is a communication to the public; and (2) if so, who is liable? Arnold J in *EMI v BskyB*⁵³ specifically thought that it was possible that more than one person might be involved in an act of communication to the public, i.e. the operators, who provide the specific mechanism, and the users, who provide the actual content. Unfortunately, the A.G. and CJEU have not fully differentiated the role of each participant in the alleged communication. Instead the A.G. specifically says⁵⁴ that TPB should be considered

“simultaneously and jointly with the users of the network, as originating the making available to the public”. That appears to be a statement of accessory liability and not a statement regarding communication to the public. Similarly, the CJEU appears to be saying that knowingly managing facilities, which play an essential role in allowing users to share unauthorised content, is a communication to the public. This appears much closer to accessory liability than strict copyright infringement.

In the UK case regarding the blocking injunction against TPB, *Dramatico Entertainment v BskyB*,⁵⁵ the court did not expressly rule on whether TPB was communicating to the public, instead holding it liable as a joint tortfeasor or for authorising the infringements of its users. The CJEU cannot, however, follow this line of reasoning because it has no jurisdiction over questions of accessory liability. Instead, the A.G. specifically advocates a harmonised answer across the EU and tries to create this by extending the scope of communication to the public to incorporate those who knowingly assist in another’s communication.

It is unlikely that many would fault the practical outcome of the CJEU ruling in finding a business like TPB liable, particularly because it confirms the high level of protection for right holders that is envisaged by EU law. This mirrors the approach taken by the European Commission in its Digital Single Market strategy, which includes proposals for online platforms to do more to tackle online infringements in order address the “value gap” and to help the creative industry reap the rewards of its work. Copyright owners will also welcome the decision as it continues the trend of broadening the scope of communication to the public where the infringers’ conduct is considered objectionable enough. However, the result appears to be an attempt by the CJEU to harmonise accessory liability across the EU and/or overcome a gap in liability for “knowingly sharing infringing content online” by shoehorning knowledge and other subjective criteria into communication to the public. In this respect the CJEU is not interpreting the existing legislation but overstepping the mark and inventing its own law.

What is next?

A more appropriate method of achieving an EU approach to this issue would be revised legislation, introducing a harmonised approach to accessory liability and/or a new infringement of knowingly sharing infringing content online. Unfortunately, it is unlikely that the EU will legislate in this way in the near future. We therefore appear to have ended up with a judge-made principle of accessory liability squeezed into communication to the

⁴⁸ Directive on E-Commerce 2000/31 arts 14 and 51.

⁴⁹ Opinion of A.G. Szpunar in *Stichting Brein* EU:C:2017:99; [2017] E.C.D.R. 13 at [50].

⁵⁰ Opinion of A.G. Szpunar in *Stichting Brein* EU:C:2017:99; [2017] E.C.D.R. 13 at [36].

⁵¹ Opinion of A.G. Szpunar in *Stichting Brein* EU:C:2017:99; [2017] E.C.D.R. 13 at [37].

⁵² Opinion of A.G. Szpunar in *Stichting Brein* EU:C:2017:99; [2017] E.C.D.R. 13 at [38].

⁵³ Opinion of A.G. Szpunar in *Stichting Brein* EU:C:2017:99; [2017] E.C.D.R. 13 at [46].

⁵⁴ Opinion of A.G. Szpunar in *Stichting Brein* EU:C:2017:99; [2017] E.C.D.R. 13 at [53].

⁵⁵ *Dramatico Entertainment v BskyB* [2012] EWHC 268 (Ch).

public without the backing of any written law. The CJEU remains committed to the *GS Media* criteria in relation to communication to the public, and it is probably too late to adopt a more logical approach.

We wait to see how this applies in other scenarios and how it interplays with the E-Commerce Directive safe harbours. For example, might other online platforms be liable for communicating to the public if they know that their platform is being used to share infringing material? This seems to go further than the current position under the E-Commerce Directive, which provides platforms with a safe harbour if they remove specific instances of infringement once they have actual knowledge. In this context, it is very likely that we will continue to see further cases on *who* can be held responsible for a communication to the public in the future.

A final note on Brexit

While the specific mechanisms of Brexit remain unclear, the current intention is that the EU Withdrawal Act will implement all EU legislation into UK law as at the date of Brexit and that existing CJEU decisions will have the same status as Supreme Court judgments until they are specifically overturned.⁵⁶ This means that the English courts will still be bound by *GS Media*, *Filmspeler* and *Ziggo*, and any further CJEU decisions on the matter until the date of Brexit, and, even after that, these rulings could only be overturned by the Supreme Court. Consequently, it is likely that copyright law in the UK and the EU27 will still be grappling with the controversial concept of communication to the public and the CJEU's interpretation of it for some time to come.

⁵⁶“Legislating for the UK’s withdrawal from the EU”, Government White Paper (March 2017).