



The right of communication to the public in recent CJEU case law and the role of the 'new public'

Eleonora Rosati

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Article 3(1) of Directive 2001/29 (InfoSoc Directive)

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.

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The making of the right

Criteria

High level of protection!

An 'act of communication': transmission or simple accessibility?

- Indispensable intervention (full knowledge)

A 'public': indeterminate number of people above de minimis threshold

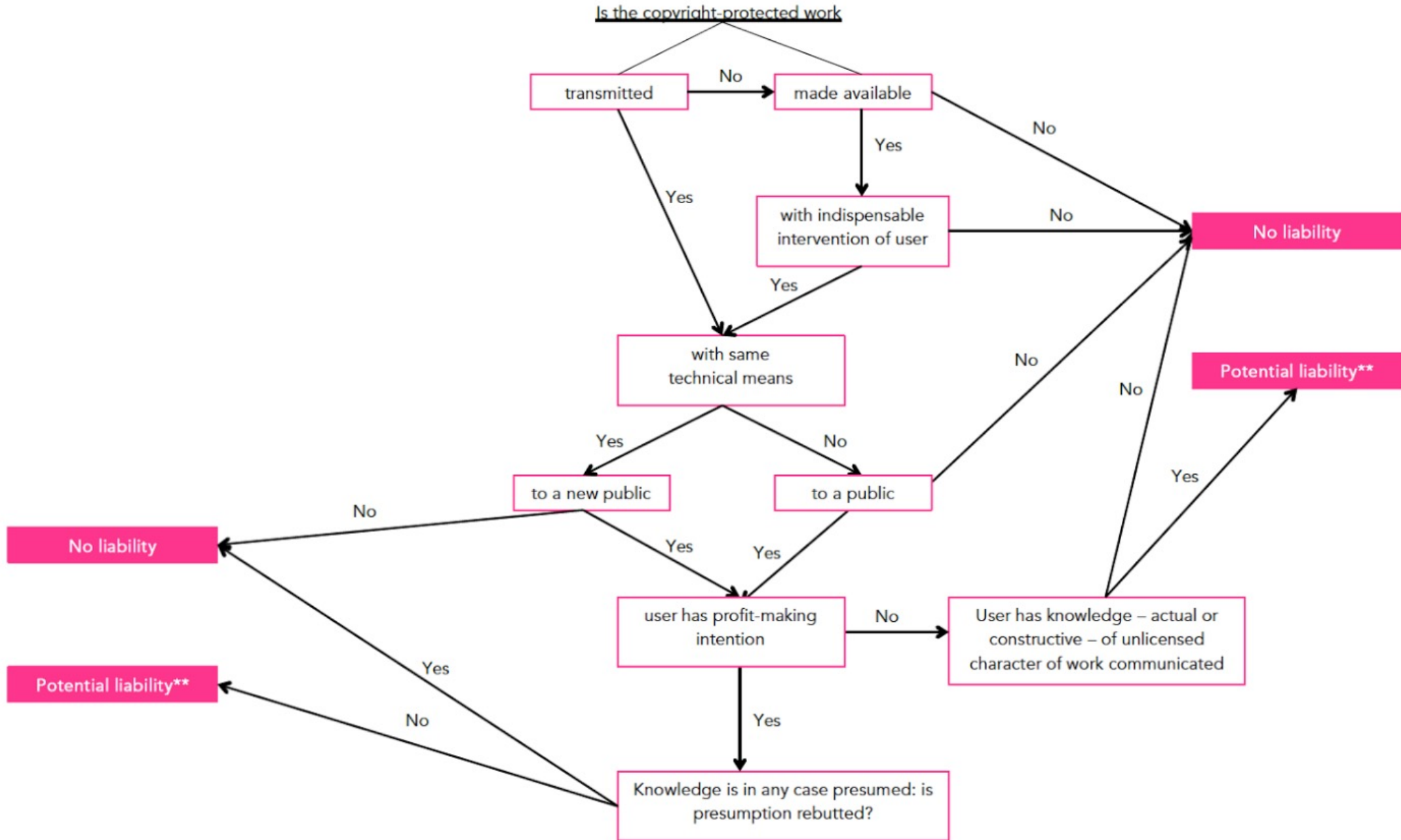
- Technical means; 'new public'

Access from place and at a time individually chosen

Other, non-autonomous, interdependent criteria

- Profit-making intention
- Knowledge

Right of communication to the public – Potential liability under Article 3(1) InfoSoc Directive*





TV and radio sets



Cloud-based
recording services



Linking to
protected content



... and liability of
platform operators

Over 20 CJEU referrals in 20 years

The role of the 'new public'

Public not taken into account by the relevant rightholder when they authorized the initial communication



Origin

- 1978 Guide to Berne Convention in relation to Article 11(1)bis(iii), to distinguish between performance of a broadcast to private circle and public performance
 - In a nutshell: has the user exceeded the scope of the licence?
- 1999: AG La Pergola speaks of 'new public' in *EGEDA* (CJEU doesn't)
- 2003 Guide does not speak of 'new public': the focus is on who does the communication
- 2006: AG Sharpston speaks of 'new public' in *SGAE*; CJEU does too
- The rest is history!

Use: *What for?*

Group 1 (broadcasting and public performance cases)

- *Consequence* of “independent economic exploitation”: insubstantial role

Group 2 (technical means-focused cases, starting with *TVCatchUp*)

- Misunderstood and used *instrumentally*: focus on public instead of act of communication

Group 3 (linking cases)

- *Substantial* but unhelpful

Group 4 (*Renckhoff* and *Tom Kabinet*)

- *Unnecessary* and *misleading* (follows from Group 2)

In sum

- Except for linking cases, role has not been determinative of whether the activity at issue does indeed qualify as an act of communication to the public
- Removing 'new public' *tout court* would be however both difficult and unrealistic as an expectation

Moving away from the 'new public'?



- *Renkchoff*: "public targeted by the original communication was all potential visitors to the website concerned"
- AG Szpunar in *VG Bild-Kunst*: "the legal fiction that all (actual and potential) internet users are targeted whenever a protected work is made freely available to the public on the internet is similarly no longer tenable in the context of hyperlinks."
- CJEU: ...

Looking into the
(immediate) future
of the right of
communication to
the public:

Top 3 issues

The pending *YouTube/Cyando*
joined cases and the nature
of Article 17 of the DSM
Directive

Doubts also arise in non-
internet cases ... and the
(re-)discovery of recital
27

The role, type and scope of consent

Linking after *VG Bild-Kunst*, C-392/19

Technical accessibility of content	Content published with rightholder's consent	Contractual restrictions on linking	Profit-making intention	Knowledge that content linked to is unlawful	Act of communication to the public	Potential infringement
Freely accessible	Yes	No	n/a	n/a	No (<i>Svensson, GS Media, VG Bild-Kunst</i>)	No
Freely accessible	Yes	Yes, but without effective technological measures	n/a	n/a	No (<i>Svensson, GS Media, VG Bild-Kunst</i>)	No
Freely accessible	Yes	Yes, with effective technological measures	n/a	n/a	Yes (<i>Svensson, GS Media, VG Bild-Kunst</i>)	Yes*
Not freely accessible	Yes	n/a	n/a	n/a	Yes (<i>BestWater, GS Media</i>)	Yes
Freely accessible	No	n/a	No	No	No (<i>GS Media</i>)	No
Freely accessible	No	n/a	No	Yes (eg because notified)	Yes (<i>GS Media</i>)	Yes**
Freely accessible	No	n/a	Yes	Presumed (rebuttable presumption)	Yes (<i>GS Media</i>)	Yes**
Not freely accessible	No	n/a	n/a	n/a	Yes	Yes

*This is without prejudice to the application of available exceptions and limitations under, e.g., Article 5 of the InfoSoc Directive. Please note that some EU and national copyright exceptions also prevent contractual override.

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

Conclusion

- Still working to join all the dots
- Fair balance
- Know your boundaries!



Thanks for your attention!

eleonora.rosati@juridicum.su.se

@eLAWnora