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

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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.
The making of the right
Criteria

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

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

- Is the copyright-protected work transmitted or made available with indispensable intervention of user?
  - Yes: with same technical means
    - Yes: to a new public
      - No: Potential liability**
      - Yes: No liability
    - No: Potential liability**
  - No: to a public
    - Yes: User has profit-making intention
      - Yes: User has knowledge – actual or constructive – of unlicensed character of work communicated
        - Yes: is presumption rebutted?
          - Yes: No liability
          - No: Potential liability**
        - No: No liability
    - No: No liability
Over 20 CJEU referrals in 20 years

TV and radio sets  Cloud-based recording services  Linking to protected content  ... and liability of platform operators
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

<table>
<thead>
<tr>
<th>Technical accessibility of content</th>
<th>Content published with rightholder’s consent</th>
<th>Contractual restrictions on linking</th>
<th>Profit-making intention</th>
<th>Knowledge that content linked to is unlawful</th>
<th>Act of communication to the public</th>
<th>Potential infringement</th>
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</thead>
<tbody>
<tr>
<td>Freely accessible</td>
<td>Yes</td>
<td>No</td>
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<td>No (Svensson, GS Media, VG Bild-Kunst)</td>
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<td>Yes, but without effective technological measures</td>
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<td>Yes (eg because notified)</td>
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<td>n/a</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

*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!

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