

Direct copyright liability as regulation of hosting platforms for the copyright-infringing content uploaded by their users: *Quo vadis?*

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Abstract

The potential direct liability of hosting platforms such as YouTube and Dailymotion which provide the technical conditions for their users to upload and share copyright-protected content for the infringement of the right of communication to the public (CTTP) in Article 3(1) Directive 2001/29/EC (and pre-Directive 790/2019) represents one of the most complex and controversial aspects of current European Union (EU) copyright law. The test in Article 3(1) is opaque and may even support opposing conclusions on the matter. Doctrinally, the appropriateness of Article 3(1) to regulate hosting platforms is shaky as it is unclear how the regulation of platforms via Article 3(1) may reflect the balance of interests of rightsholders, of platforms, and internet users. Hosting platforms facilitate both the legal and illegal sharing of copyright content indiscriminately and in an automated fashion. When legal content is shared through their service, hosting platforms play an important role in facilitating the exercise of user's freedom to send and receive information safeguarded by Article 11 of the EU Charter of Fundamental Rights.

The potential application of direct copyright liability to hosting platforms, including the spectre of damages, may chill technical innovation in the area. Some platforms may even close and the opportunities for internet users to share legal content reduce as a result. To address these issues, this article analyses the three alternatives for limiting the responsibility of hosting platforms under Article 3(1). The article first analyses the complex test for CTTP under Article 3(1). To balance the application of liability, Alternative 1 explores the option of integrating a 'duty of care' element conditioned by a standard of proportionality within the test for CTTP. Alternative 2 challenges the notion that direct responsibility may be attributed to operators of hosting platforms. It analyses, but ultimately dismisses, the situation where host providers may be considered as mere providers of facilities for enabling communication. Alternative 3 advances a novel application of the test under Article 3(1) which shows that operators of certain hosting

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platforms do not engage in acts of “communication” of the illegal copyright material uploaded by their users. The purpose of the paper is to bring attention to particular possible constructions of hosting platform liability and their broader implications.

A. Introduction

The sharing of content on the internet is ubiquitous. Hosting platforms such as YouTube, Dailymotion and VMEVO enable their users to store and share all kinds of videos, from a recording of a lecture to a video spoiler from a Hollywood film. The spectre of copyright infringement often appears. For example, a YouTube user’s uploads that consists of gameplays of the video game Fortnite were removed from the platform because of copyright infringement and the user was subjected to an injunction.¹ The rights of reproduction in Article 2 and communication to the public (CTTP) in Article 3 of Directive 2001/29/EC² (InfoSoc) are preventative so that any use of copyright works by third parties requires the rightsholder’s authorisation.³ A user’s act of uploading content that includes copyrighted works to a platform’s server may breach the reproduction right in Article 2. In addition, the release – that is the sharing of that content to the online audience – may constitute the making available aspect of the CTTP right in Article 3(1). Infringement occurs if the rightsholder’s consent is not obtained in advance and none of the exceptions and limitations in the list in Article 5 apply. While the *prima facie* copyright liability of internet users is often easy to establish, enforcement is more problematic. On the internet, individuals’ identities can easily be cloaked in anonymity. It is difficult and economically unrewarding for rightsholders to identify and pursue copyright-infringing internet users. It also makes for poor business practice to alienate infringing internet users as infringers are also consumers of copyright-protected content.⁴

A more rewarding approach may be to address internet users’ infringement via the hosting platforms that store uploaded and facilitate the sharing of content, including that which may

¹ Ernesto Van Der Sar, “YouTuber ‘Golden Modz’ Settles Lawsuit Over Fortnite Cheats” (TorrentFreak, 19 March 2019) <<https://torrentfreak.com/youtuber-golden-modz-settles-lawsuit-over-fortnite-cheats-190319/>> accessed 25 April 2020.

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 (InfoSoc Directive) [2001] OJ L167/10.

³ *Soulier v Ministre de la Culture et de la Communication* (C-301/15) EU:C:2016:536 [2016] 7 WLUK 126 at [33].

⁴ J.P. Quintais and J. Poort, “The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement” (2019) 34 *American University International Law Review* 807, 820.

infringe copyright. There are several typologies of hosting platforms. One provides video sharing services, as for YouTube or Dailymotion. They store and index uploaded content, provide search facilities, categorise uploaded content and supply automatic preference-based recommendations to users. A related type includes social media sites such as Facebook and Instagram that enable the storage and sharing of pictures and short videos. Both types generate advertising revenue from the uploaded content.

Another type of hosting platform is represented by cyberlockers, also known as file hosting services. Examples are RapidShare or FilesAnywhere which offer free storage and file-sharing services for all types of data. Unlike video sharing services, content uploaded on cyberlockers is not categorised and a search function is not provided. Instead, for each file uploaded a download link is made and sent to the uploading user. The link can be shared on other websites such as blogs, forums or “link collector” websites. Download speeds are limited for those with free accounts and unlimited for paid subscriptions. Some cyberlockers offer an incentive for users to upload desirable content.⁵

The operators of these hosting platforms do not check the content that is uploaded by users and lack any specific knowledge of copyright-infringing content and specify in their terms and conditions that no infringing content should be uploaded. Video sharing and social media platforms also filter their networks and remove copyright-infringing content.

Article 3(1) InfoSoc sets out a general exclusive right of CTTP for authors to “authorise or prohibit any CTTP of their works”. The *travaux préparatoires* of the InfoSoc Directive identifies two objectives of the right: to permit new exploitations of works and to ensure that rightsholders are satisfactorily protected.⁶ Using this right, the Court of Justice of the European Union has regulated situations where developments in technologies or new uses of existing technologies have led to the exploitation of works in a manner unforeseen by the rightsholders.

⁵ Opinion of Advocate General Saugmandsgaard Øe in *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH and C-683/18 Elsevier Inc. v Cyando Ag (YouTube/Cyando) (YouTube/Cyando)* (Joined C-682/18 and C-683/18) EU:C:2020:586 at [31].

⁶ Commission, “Green Paper on Copyright and Related Rights in the Information Society,” COM (1995) 382 final, 65.

Whether hosting platforms perform copyright exploitation under Article 3(1) is a matter currently pending in front of the CJEU in the joined *YouTube/Cyando* referrals.⁷

Hosting platforms may foster the exercise of freedom of expression and information. Both the CJEU and the European Court of Human Rights (ECtHR) have recognised the importance of the internet for freedom of expression and information, safeguarded by Article 10 of the Charter of Fundamental Rights and Article 11 of the European Convention on Human Rights (ECHR).⁸ The ECtHR found that YouTube is a platform that enables information of specific interest to be broadcast, particularly on political and social matters, and citizen journalism to emerge.⁹ The ECtHR, in a case involving the temporary shutdown of a website following accusations of criminal copyright breach, observed that Article 10 ECHR guarantees freedom of expression to “everyone” and applies “not only to the content of information but also to the means of dissemination since any restriction imposed on the latter necessarily interferes with the right to receive and impart information”.¹⁰

The application of a strict liability standard for hosting platforms under Article 3(1) would increase copyright protection and could generate massive financial liability. This may have a chilling effect on technological innovation in the area and foster monopolies.¹¹ The problem is that the rules triggered in response to hosting platforms such as YouTube would apply to all types of hosting platforms irrespective of size or financial position or the level of innovation involved in the provision of their service. When only the big players are in the position to pay damages or to enter into licenses for the uploaded illegal content, smaller platform providers in weaker positions may close down. The problem is further compounded by the potential unavailability of a licence that platforms can pay for and that covers all the infringing content uploaded by users.¹² A reduction in the number of such platforms may in turn reduce the

⁷ *YouTube/Cyando* EU:C:2020:586.

⁸ *GS Media BV v Sanoma Media Netherlands BV (GS Media)* (C-160/15) EU:C:2016:644 [2017] C.E.C. 442 at [45]; *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), nos. 3002/03; and 23676/03 (ECHR 2009) at [27] and *Ahmet Yildirim v. Turkey*, no. 3111/10 (ECHR 2012) at [48].

⁹ *Cengiz v Turkey* App. No 48226/10; 14027/11 (ECHR 2015).

¹⁰ *Case of Pendov v. Bulgaria* App. No. 44229/11 (ECHR 2020) at [53].

¹¹ For the US perspective on peer-2-peer technology see *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) at [960].

¹² M. Leistner, “Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators” (2017) 12(2) *Journal of Intellectual Property Law & Practice* 136, 144.

avenues of internet users to engage in legal exchanges of information and engage in public debate on matters of general interest.

This article shows that potential direct liability of those hosting platforms that provide the automatic technical setup for their users to upload and share content, including copyright-infringing content, while having only general knowledge that infringing content may be uploaded may be curbed under Article 3(1) InfoSoc. This article first untangles the complex web of elements that form the test for CTTTP under Article 3(1). Against this background, Sections C to E discuss the various interpretations of the CTTTP right to curb the potential liability of certain host providers.

Section C offers a new perspective on the proposal that the regulation of hosting providers may be achieved via the application of a duty under Article 3(1) for platforms to remove copyright-infringing content on their network. This is set out as Alternative 1. Although various options exist to impose such a duty, such an imposition may create incentives for the overenthusiastic removal of content, hence safeguards to this are paramount.

Section D analyses the proposition of AG Saugmandsgaard Øe in the *YouTube/Cyando* referral which sees hosting platforms such as YouTube and Cyando excluded from the scope of the CTTTP right as they may engage in an activity covered by Recital 27 InfoSoc which states that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication”.¹³ The section, set out as Alternative 2 in this article, concludes that the scope of Recital 27 may not be wide enough to accommodate the activities of hosting intermediaries. Instead, Section E advances Alternative 3 which is a novel application of the CTTTP test which shows that certain hosting platforms may not be seen to perform an act of “communication” as certain hosts do not perform “an intervention in full knowledge of the consequences”.

This article only analyses the situation of potential copyright infringement by hosting platforms under Article 3(1) and pre-Directive 790/2019 (DSMD).¹⁴ Certain host providers such as YouTube and Dailymotion may be covered by the concept of online content-sharing service

¹³ Opinion of Advocate General Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [86]-[89].

¹⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

providers (OCSSP) in Article 17 DSMD which states that OCSSPs are liable for CTPP unless they conclude licences or comply with prescribed measures.¹⁵ This article is limited to the CTPP right in Article 3(1) InfoSoc, as the legality of the regime under Article 17 DSMD is pending before the CJEU.¹⁶ Should Article 17 be struck out, the CTPP right in Article 3(1) alone would remain relevant to host providers. The relationship between the CTPP right in Article 17 DSMS and the CTPP right in Article 3(1) InfoSoc is also not yet fully clarified and is an entirely different topic already covered by other authors.¹⁷

B. The controversial contours of the legal test under Article 3(1) InfoSoc

Article 3(1) implements Article 8 of the WIPO Copyright Treaty.¹⁸ It introduces a general exclusive right which enables authors to authorise or prohibit:

...any CTPP 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.

Although the wording “any” indicates the broad scope of the right, the text of the Article does not specify what activities fall within the remit of the right. Only limited clarification is available in Recitals 23 and 27. Recital 23 excludes communications to those present at the place where the communication originates such as public representation and performance, communications that involve only physical proximity, where the transmission of the work is missing.¹⁹ Recital 27 limits the scope of the right by excluding the mere provision of physical facilities for enabling or making a communication.²⁰

¹⁵ DSMD Article 17(1) Article and Article (4)(b) and (c) DSMD.

¹⁶ *Republic of Poland v European Parliament and Council of the European Union* (C 410/19).

¹⁷ M. Husovec and J.P. Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms” (September 2014) < <https://ssrn.com/abstract=3463011> > accessed 30 September 2020.

¹⁸ Adopted 20 December 1996 (entered into force 6 March 2002) 2186 UNTS 121.

¹⁹ *Football Association Premier League Ltd v QC Leisure* (C-403/08) EU:C:2011:631 [2011] ECDR 11 at [201]-[203].

²⁰ It is unclear who would qualify as a purely technical intermediary. For an explanation, see M. van Eechoud, P. B. Hugenholtz, S. van Gompel, L. Guibault, N. Helberger, *Harmonising European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) 125.

The Article 3(1) definition was expected to “stand the test of changing technology”.²¹ The architects of the Directive foresaw that the communication right, including “making available”, and the other rights, would take on other “characteristics” and that it would be necessary to “adjust” them as a result.²² The CJEU has been instrumental in carving the offline and online dimensions of the CTTTP right. The methodology of the CJEU in applying Article 3(1) InfoSoc is key to the application of the right. To determine the existence of an act under Article 3(1) under a specific set of facts, the CJEU follows an individual assessment.²³ The same methodology applies to identify the user under that provision.²⁴ Following the individual assessment, two cumulative elements must be met: an “act of communication” which is directed to “a public”.²⁵ The analysis is supplemented by other criteria which include: “the indispensable role” of the user; the “deliberate” nature of their “intervention”; “in full knowledge of the consequences of [their] actions”; “the new public”; and the “for-profit” nature of the communication.²⁶ These criteria are complementary, interdependent, are not autonomous, are present in “widely varying degrees” and are applied both individually and in combination with each other.²⁷ The test was applied to various technical scenarios such as the transmission or retransmission of signals²⁸ and broadcasts;²⁹ the transmission of broadcasts by

²¹ Opinion of the Economic and Social Committee on the “Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society” OJ C 407 (28.12.1998) at [3.5]

²² See Commission, “Green Paper on Copyright and Related Rights in the Information Society” 17, COM (1995) 382 final at [34].

²³ *Reha Training v GEMA* (C-117/15) ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [35] and [44]; *Phonographic Performance (Ireland) Ltd v Ireland and Others* (C-162/10) EU:C:2012:141 [2012] Bus LR D113 at [30].

²⁴ *SCF* EU:C:2012:140 [2012] ECDR 16 at [76] and [78]; *Phonographic Performance* EU:C:2012:141 [2012] 2 CM.LR. 29 at [28].

²⁵ *ITV Studios Ltd* EU:C:2013:147 [2013] Bus LR 1020 at [21] and [31]; *Nils Svensson* EU:C:2014:76 [2014] WLR(D) 67 at [16]; when one criterion is not met there is no CTTTP *Reha Training* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [45].

²⁶ *Ibid* at [64].

²⁷ *Ibid* at [35]; *SBS Belgium* EU:C:2015:764 [2016] ECDR 3 at [15] and case law cited there; *Phonographic* EU:C:2012:141 [2012] 2 CM.LR. 29 at [30].

²⁸ *Sociedad General de Autores y Editores de Espana (SGAE) v Rafael Hoteles SL (SGAE)* (C-306/05) EU:C:2006:764 [2007] Bus LR 52; *Ochranný svaz autorský pro práva k dílům hudebním, os (OSA) v Léčebné lázně Mariánské Lázně as* (C-351/12) EU:C:2014:110 [2014] [2014] 2 WLUK 931.

²⁹ *FAPL* EU:C:2011:631 [2011] ECDR 11; *SCF* EU:C:2012:140 [2012] ECDR 16; *Reha Training* EU:C:2016:379 [2016] 3 CMLR 40; *Autoren, Komponisten und Musikverlegerregistrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* (C-138/16) EU:C:2017:218 [2017] MR 75.

direct injection;³⁰ the online retransmission of broadcasts;³¹ the hyperlinking to legal³² or illegal content;³³ the embedding of legal content; the provision of cloud time-shifting service;³⁴ the sale of a media player that gives access to illegal copies;³⁵ the management of an online platform that indexes peer-2-peer torrents;³⁶ and the reposting of a work already online with consent freely and for free.³⁷

I. The CTTTP elements applicable to facilitators of access to illegal copyright content which may be relevant to hosting platforms

One way to organise the extensive CJEU case law on CTTTP is to split between cases where the original communication or making-available of works is made with the rightsholder's consent and cases where the original communication is made without. The latter category includes the case law on facilitation of access to illegal copies of works in *GS Media*,³⁸ *Filmspeler*³⁹ and *TPB*.⁴⁰ In *GS Media*, the CJEU found that hyperlinking to protected works freely available on a third-party website where they had been published without consent can fall within the scope of Article 3(1). Liability occurs when such a link-provider knew or should have known of the unauthorised nature of the linked content or when the link is provided for financial gain, the knowledge of the unauthorised nature of the linked content is presumed and the link-provider does not rebut the presumption by conducting the "necessary checks".⁴¹ In *Filmspeler*, the sale of a media device customised with links that give access to content published without rightsholder consent fell within the scope of Article 3(1).⁴² In *The Pirate Bay* (TPB), the CJEU found that the management and operation of the TPB platform used by users to store and share

³⁰ *SBS Belgium* EU:C:2015:764 [2015] WLR(D) 466.

³¹ *ITV Studios Ltd* EU:C:2013:147 [2013] Bus LR 1020.

³² *Nils Svensson* EU:C:2014:76 [2014] WLR(D) 67; *GS Media BV* (C-160/15) EU:C:2016:644 [2017] C.E.C. 442.

³³ *BestWater International GmbH v Mebes* (C-348/13) EU:C:2014:2315; [2014] 10 WLUK 615.

³⁴ *VCAST Ltd v RTI SpA* (C-265/16) EU:C:2017:913 [2017] 11 WLUK 694; [2018] 2 CMLR 12.

³⁵ *Filmspeler* EU:C:2017:300 [2017] Bus LR 1816.

³⁶ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237.

³⁷ *Land Nordrhein-Westfalen v Renckhoff* EU:C:2018:634 [2018] Bus LR 1815; [2018] 8 WLUK 56.

³⁸ *GS Media* EU:C:2016:644 [2017] C.E.C. 442.

³⁹ *Stichting Brein v Jack Frederik Wullems (Filmspeler)* EU:C:2017:300 [2017] Bus LR 1816.

⁴⁰ *Stichting Brein v Ziggo BV, XS4ALL Internet BV (Ziggo)* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237.

⁴¹ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [49] and [51].

⁴² *Filmspeler* EU:C:2017:300 [2017] Bus LR 1816.

torrent files necessary for P2P file sharing is an act of CTTIP within the meaning of Article 3(1).⁴³

Hosting providers generally do not originate the copyright-infringing material uploaded and shared on their servers and, therefore, but they still increase the risk of copyright infringement because they provide the technical structures for their users to upload and share all types of content.⁴⁴ thus potentially court the realm of application of the CTTIP case law on facilitation of access to illegal copies of works under Article 3(1).

II. The expansion of the “act of making available” to activities that facilitate access to works

An act of communication online requires two aspects: an objective act of making available protected works by “any technical means of communication”⁴⁵ and the “indispensable” “intervention” “in full knowledge of the consequences of its action”⁴⁶ to give access to the works to other users who would otherwise not be able to enjoy the works, or for whom accessing them would be more complex. By way of example, an act of making available covers on-demand communications such as connection to a server from which works may be accessed individually by members of the public at their will.⁴⁷ The making available right is also triggered by the possibility of access: it is “sufficient to make works available (for example, by transferring a work to an electronic bulletin board)”⁴⁸ The notion of making available in Article 3(1) is expressed in technically neutral terms.⁴⁹ The focus on technical neutrality is

⁴³ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237.

⁴⁴ As hosting providers do not originate the stored copyright infringing content, they should not be placed under strict liability

⁴⁵ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [34].

⁴⁶ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [35]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [36].

⁴⁷ Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (Oxford University Press 2015) point 7.8.26.

⁴⁸ WIPO, “Report of the Seventh Session of the Committee of Experts on a Possible Protocol to the Berne Convention” (Geneva, 22-24 May 1996) WIPO Doc BCP/CE/VII/4-INR/ CE/VI/4, 4.<www.wipo.int/mdocsarchives/BCP_CE_VII_INR_CE_VI/BCP_CE_VII_4_INR_CE_VI_4_S.pdf> accessed 23 January 2016; see also *Nils Svensson et al v Retriever Sverige AB* (C-422/12) EU:C:2014:76 [2014] WLR(D) 67 at [19]; *Stichting Brein v Wullems (t/a Filmpeleer)* (C-527/15) EU:C:2017:300 [2017] Bus LR 1816 at [20] and the case-law cited; *Land Nordrhein-Westfalen v Renckhoff* (C-161/17) EU:C:2018:634 [2018] Bus LR 1815 at [29].

⁴⁹ WIPO, “Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference” (10 December 1996) WIPO CRNR/DC/4 at [10.14]; Mihaly Ficsor, “The Spring 1997 Horace S. Manges Lecture—Copyright for the Digital Era: The WIPO “Internet” Treaties” (1997) 21 Colum JL & Arts 197, 210.

described by Advocate General (AG) Trstenjak in *SCF* as “the functional approach” which “emphasises the aim of adequate protection of authors, irrespective of the technical details”⁵⁰ and which may lead to the enlargement of the right. Yet, the disregard of technical details appears to be only rhetoric. For example, if the technical nature of the underlying acts that make copyright-protected works available are irrelevant, then it is unclear why it is necessary to check whether an act amounts to the “mere provision of physical facilities” and is therefore excluded from the meaning of a relevant “communication”.⁵¹

At the heart of the CJEU’s jurisprudence on “making available” is the finding that the provision of access to works amounts to an act of “communication”, which is introduced in *Svensson*, a case on hyperlinking to material made available online freely and for free and with rightsholder’s consent.⁵² In *Svensson*, the CJEU relies on the access theory to justify the existence of an objective act of making available. The “access theory, defines an act of making available as the provision of direct access to protected works.⁵³ This proposition is arguable, since hyperlinks only facilitate access to works stored somewhere else, direct access is provided by the person who initially makes the work available online.⁵⁴ The access theory is however perpetuated in the *GS Media* and *Filmspelers* decisions.⁵⁵ In *Filmspelers*, the provision of access was technically complex. The device:

...enable[d], in view of the add-ons pre-installed on it, access via structured menus to links that those add-ons which, when activated by the remote control of that multimedia player, offer its users direct access to protected works without the consent of the copyright holders.⁵⁶

The *Filmspelers* decision clarifies that direct access describes the users’ experience in accessing the works. In other words, the indirect provision of access from a technical perspective can qualify as “direct access” when access to works is perceived directly by users on their screens.

⁵⁰ See Advocate General Trstenjak in *Societa Consortile Fonografici (SCF) v Del Corso* (C-135/10) EU:C:2012:140 [2012] ECDR 16 at [102]. The functional approach is contrasted by AG Trstenjak with the “technical approach” which considers technical details.

⁵¹ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [38].

⁵² *Nils Svensson* EU:C:2014:76 [2014] WLR(D) 67 at [20].

⁵³ *Ibid* at [18].

⁵⁴ S. Dusollier, “Les Hyperliens en Droit d’Auteur Européen: Quand tout Deviant Communication” (2014) 54 *Revue du Droit des Technologies de l’Information* 49, 57.

⁵⁵ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [35]; *Filmspelers* EU:C:2017:300 [2017] Bus LR 1816 at [48].

⁵⁶ *Filmspelers* EU:C:2017:300 [2017] Bus LR 1816 at [48], see also Arnold J in *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch) at [34].

In the *TPB* decision, the CJEU removes the “direct access” requirement in the situation of an online platform that enables internet users to locate torrent files in a Peer-2-Peer network and the platform is specifically designed for copyright infringement. The CJEU changed the focus from the objective act of communication and placed the onus on the mental state of the entity which performs a CTTT. *TPB* re-interprets *Svensson*, *GS Media*, and *Filmspelers* to introduce the rule that:

...any act which provides access to works by a user acting with full knowledge of the relevant facts, is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29.⁵⁷

In the case of hosting platforms, it is indubitable that access is given to the content uploaded by the platform’s users. Following *TPB*, the relevant question is who is legally responsible for the provision of access to works hosted on the platforms: the platforms operators or the uploading users, or both?

1. The “indispensable intervention of the user who acts in full knowledge of the consequences”

In the case law on facilitation of access to illegal copies of works, the CJEU emphasises “the indispensable role played by the user and the deliberate nature of his intervention”.⁵⁸ This criterion was first introduced in the *SGAE* decision in 2006 and subsequent case law application suggests that it serves as a causation test to identify who is a “user” responsible for the act of CTTT under the CTTT test.⁵⁹ In cases of the facilitation of access to illegal copies of works, causation is “central” to the assessment.⁶⁰ The intervention aspect establishes the factual cause, observable due to the use of contra-factual inference “in the absence of [which], those customers would not be able to enjoy the broadcast work, or would be able to do so only with difficulty”.⁶¹ An intervention needs to be “indispensable” or “essential”, terms of different intensity which are sometimes used interchangeably and are assessed within the confines of

⁵⁷ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; at [34].

⁵⁸ *Filmspelers* EU:C:2017:300 [2017] Bus LR 1816 at [31]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; at [26].

⁵⁹ *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [42]; see also the user mentioned in *SCF* EU:C:2012:140 [2012] ECDR 16 at [75].

⁶⁰ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [35]; *Filmspelers* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [31]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [26].

⁶¹ *Filmspelers* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [41]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [26].

the factual context of the case.⁶² In particular, an act can be essential to the provision of access to a work even when there are other technical means online to access it.⁶³

The indispensable intervention by the user is “deliberate” and performed “in full knowledge of the consequences of his action, to give his customers access to a protected work”. This may mean that the user intended to cause the consequences, and the user is not acting in error or from a lack of understanding.⁶⁴ This *means rea* serves to establish who is legally responsible for the provision of access to copyright-infringing works and may sometimes overlap with ‘knowledge’ in the context of the ‘new public’ element discussed below.⁶⁵

In cases of facilitation of access to illegal copies of works, the standard of intention is obscured. Although Mr. Wullems in *Filmspeler* and the operators in *TPB* intervene with intention to give access to illegal copies of works, the language of the decisions point to various standards of knowledge. The *Filmspeler* decision appears to refer to Mr Wullems’s knowledge that he installs “add-ons that specifically enable purchasers to have access to protected works published — without the consent of the copyright holders of those works”, without having knowledge of specific copies of works being made available.⁶⁶ This suggests that Mr. Wullems has only general knowledge that access is given to illegal copies of works. Although not mentioned in the decision, it is reasonable to assume however that Mr Wullems would also have a degree of knowledge of the specific illegal copies of works made available via the add-ons as he would have needed to test the hyperlinks leading to those works are working before shipping the customised device. In *TPB*, the level of knowledge required in the “intervention in full knowledge” implies specificity, as the operators check if works are included in the categories and perform other editorial checks.⁶⁷ The intervention in full knowledge element

⁶² *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [26] and [37].

⁶³ J. C. Ginsburg, “The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on *Brein v. Filmspeler* [C-527/15] (2017) and *Brein v. Ziggo* [C-610/15] (2017)” Columbia Law and Economics Working Paper No. 572, Columbia Public Law & Legal Theory Paper #557, 4-5.

⁶⁴ See for example “[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not “intend” the consequences or that the act was not “aimed” at the person who, it is known, will suffer them”. *Bourgoin SA v Minister of Agriculture* [1986] 1 QB 716, 777. FAPL EU:C:2011:631 [2011] ECDR 11 at [196]; *Reha Training* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [48].

⁶⁵ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [48]-[51];

⁶⁶ *Filmspeler* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [41].

⁶⁷ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [38]. See also J. C. Ginsburg and L.A. Budiardjo, “Liability for Providing Hyperlinks to Infringing Content” (2018) 41 Colum JL & Arts 153, 167.

will be elaborated on in Alternative 3 which will detail based on existing case law as an avenue which shows that hosting platforms operators do not engage in a copyright relevant “intervention in full knowledge of the consequences”.

III. The “public” and the “new public”

Following the test for CTTTP, once an act of communication is established, the next step is to assess whether the communication is aimed at “a public”, which is an indeterminate number of people that can access the communication.⁶⁸ The public is assessed cumulatively, according to the number of people that can access the work in succession.⁶⁹ As a *de minimis*, groups of people that are too small or insignificant are excluded. Both purchasers of a device that give access to illegal works and the users of TPB amount to “a public”.⁷⁰

It is not enough for a work to be communicated to a given public, as the public must be “new”. The notion of the “new public” was transplanted from the 1978 World Intellectual Property Organisation Guide by AG La Pergola in the *EGEDA* case in the context of the CTTTP right in the SatCab Directive.⁷¹ The notion is subsequently adopted by the CJEU in the context of Article 3(1) in 2006 in the *SGAE* decision.⁷² Since then, the application of the “new public” element in CTTTP is controversial, not only because the notion of “new public” lacks basis in binding legal texts but also because the application of the “new public” is protean.⁷³ For example, in the situation where the act of communication takes place via a “new technical

⁶⁸ *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [38]; *SCF* EU:C:2012:140 [2012] ECDR 16 at [84]; *ITV Studios Ltd* EU:C:2013:147 [2013] Bus LR 1020 at [32]; *OSA* EU:C:2014:110 [2014] 2 WLUK 931 at [27]; *SBS Belgium* EU:C:2015:764 [2015] WLR(D) 466 at [22]; *Reha Training v GEMA* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [41]; *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [36].

⁶⁹ *Phonographic Performance* EU:C:2012:141 [2012] 2 CMLR. 29 at [35]; *OSA* EU:C:2014:110 [2014] at [28]; *Reha Training* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [43] and the case-law cited; *Filmspeler* EU:C:2017:300 at [44];

⁷⁰ *Ibid* at [45]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [42].

⁷¹ Opinion AG La Pergola in *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)* (C-293/98) EU:C:2000:66 [2000] ECRI-629 at [12]; Claude Masouyé, ‘Guide to the Berne Convention for the Protection of Literary and Artistic Works’ (Published by the World Intellectual Property Organisation, Geneva 1978) 71.

⁷² *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [42].

⁷³ ALAI Executive Committee, “Opinion on the criterion ‘New Public’, developed by the Court of Justice of the European Union (CJEU), put in the context of making available and CTTTP”, proposed to the Executive Committee and adopted at its meeting, 17 September 2014 (ALAI 2014); Bernt P Hugenholtz and Sam van Velze, “Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a ‘New Public’” (2016) 47(7) *IIC* 797, 808.

means” there is an irrebuttable presumption of a “new public”.⁷⁴ When the communication is done via the same technical means, such as the internet, the “new public” test needs to be satisfied.⁷⁵

The new public test assesses whether the communication of copyright works targets “a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public”.⁷⁶ A limitation to the literal application of this test appears in cases where access is given to illegal copies of works: if there is no consent for the original communication, it is not clear how it can be assessed if the secondary communication targets a different public to the one the rightsholder had in mind when consenting to the initial communication. The CJEU avoids this conundrum by recognising that there is no public taken into account by the rightsholder where infringing copies of works are communicated:⁷⁷ “[t]he same finding” (that the authors’ consent to the making available has included all internet users as the public and thus there is no new public) cannot be deduced “from those judgments failing such an authorisation”. In these cases, the “new public” is assumed and the CJEU assesses whether the user knows that their intervention “provides access to works published without authorisation of the rightsholders”.⁷⁸

IV. Knowledge

In cases of facilitation of access to illegal copies of works, the knowledge of the user also modulates the responsibility of the entity which communicates to a “new public”. The considerations over knowledge balance the strict application of the “new public” test which would lead an automatic finding of “new public” which is a disproportionate result for the users involved in the communication of works and for third parties.⁷⁹

The application of the knowledge in the context of the “new public” is fraught with uncertainty. Under the banner of knowledge, the language in the decisions oscillates between various

⁷⁴ M. Cock and B. Van Asbroeck, “Le Critere du ‘Public Nouveau’ dans la Jurisprudence Recent de la Cour de Justice” (2015) 4 IRDI 259, 276.

⁷⁵ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [28].

⁷⁶ *FAPL* EU:C:2011:631 [2011] ECDR 11 at [197].

⁷⁷ *Filmspelers* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [48].

⁷⁸ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [45].

⁷⁹ A. Ohly, “The broad concept of ‘CTTP’ in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?” (2018) 13(8) *Journal of Intellectual Property Law & Practice* 664, 673.

standards. In *GS Media*, the CJEU introduced a test of actual and constructive knowledge – whether the link-provider knew or ought to have known that the image freely available on a third-party site to which they link was not published with the rightholder’s consent.⁸⁰ The knowledge of the hyperlink-provider needs to relate to specific works made available without consent. The CJEU held that when the link-provider knows or ought to have known that the link at issue provides access to a copyright-infringing work, such a link may fall under the scope of Article 3(1).⁸¹ When the link is provided for-profit or financial gain, the link-provider ought to have known that the link leads to illegal copies of a work, hence there is a rebuttable presumption of knowledge because the link-provider is expected to carry out all “necessary checks” to ensure that the work has not been published without consent.⁸² Acts of linking to works for financial gain thus impose a duty on the link-provider to ascertain whether the work is licensed or not.⁸³ The scope of the duty is a source of academic debate which will be explored below.⁸⁴

In the subsequent *Filmspeler* and *TPB* decisions, the CJEU also refers to the profit-making nature of the activities, suggesting the application of a presumption of knowledge as in *GS Media*.⁸⁵ Yet, the CJEU the decisions confusingly also refer to other forms of *mens rea*. It is clear from advertisements and other statements by the seller of the *Filmspeler* device and operators of TPB that they intended to enable access to illegal copies of works.⁸⁶ In *TPB*, the site operators “could not be unaware” that the platform provided access to illegal copies of works given the high number of torrents on the platform.⁸⁷ This points to a standard of constructive and general knowledge that access is given to copyright-infringing works. Overall, the references to various constructions of knowledge in those situations arising wherein the user clearly intends the infringement obfuscates the very assessment of the mental state required with the “new public”. Standards such as actual and constructive knowledge also steer

⁸⁰ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [47].

⁸¹ *Ibid* at [49].

⁸² *Ibid* at [51].

⁸³ B. Hanuz, ‘Linking to unauthorised content after the CJEU *GS Media* decision’ (2016) 11(2) *Journal of Intellectual Property Law and Practice* 879, 880.

⁸⁴ P. Savola, ‘EU Copyright Liability for Internet Linking’ (2017) 8 *JIPITEC* 139.

⁸⁵ *Filmspeler* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [51]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [46].

⁸⁶ *Filmspeler* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [50].

⁸⁷ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [45].

the CTTTP test in a direction that overlaps with unharmonised national notions of indirect and criminal liability as these doctrines also consider the mental state of the infringer.⁸⁸ It remains to be seen if those doctrines will be displaced by the CJEU decisions on CTTTP and facilitation of access to illegal copies of works.

V. “For-profit”- a non-essential element with important implications

Finally, the “for-profit” element is considered “not irrelevant” for the existence of an act of CTTTP.⁸⁹ Yet profit plays an important role in setting the scope of liability as *GS Media* links profit with the presumption of knowledge and the corresponding duty of care. In the case of hyperlinking to illegal copies of works, it is unclear if the posting of a link carried out “for-profit” which is connected to the presumption of knowledge refers to direct profits gained from the act of linking or the general operation of the website.⁹⁰ In *GS Media*, as the hyperlink provider the *GeenStijl* newspaper could financially benefit directly from hyperlinking the leaked Playboy images of the Dutch starlet, it is advanced that a connection should be necessary between the act of hyperlinking to illegal content and the profit made which triggers a presumption of knowledge.⁹¹ Yet in many situations, it may not be possible in practice to show a connection between the hyperlink and profits made by the hyperlink-provider.

In *Filmspeler*, the sale and offer for sale of the customised media device were considered to be “for-profit”. In *TPB*, the CJEU referred to the significant advertising revenue gained by the platform.⁹² Although not clearly specified by the CJEU these references to “for profit” invite the inference that the presumption of knowledge that access is given to illegal copies of works

⁸⁸ J. C. Ginsburg, “The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on *Brein v. Filmspeler* [C-527/15] (2017) and *Brein v. Ziggo*” (2017) 7. [C-610/15] (2017) Columbia Law and Economics Working Paper 572, Columbia Public Law & Legal Theory Paper #557, 2-3.

⁸⁹ *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [44]; *FAPL* EU:C:2011:631 [2011] ECDR 11 at [204]; *ITV Studios* EU:C:2013:147 [2013] Bus LR 1020 at [42]-[43]; *Reha Training* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [49]; *Filmspeler* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [34]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [28].

⁹⁰ T. E. Synodinou, “Decoding the Kodi box: to link or not to link? The findings of the court in the decision—a confirmation of recent case law” (2017) 39(12) *European Intellectual Property Review* 733,735.

⁹¹ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [54].

⁹² *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [46].

applies to platforms.⁹³ The link between profit and the presumption of knowledge underlies the application of duties of care to hosting platforms under Alternative 1 below.

C. Alternative 1: Hosting platforms and duties of care under Article 3(1)

The complex CTTTP test analysed above may be applied to hosting platforms in several configurations, some reaching opposing solutions that generate differing consequences for rightsholders, platforms, technical innovation and the freedom of expression and information of the internet users active on these platforms. In this paper, possible interpretations are offered in Sections C-E. Under a first interpretation, the liability of hosting platforms that provide technical tools for users to upload content may be constructed based on joint tortfeasance. In EU CTTTP case law, joint tortfeasance was first applied by the CJEU in *Airfield*, a case concerning satellite broadcasting.⁹⁴ A single indivisible act of communication of TV content to subscribers may be legally attributed both to the broadcasting organisation that supplies the signal carrying copyright works and to the satellite package provider that gives subscribers access to works being indispensable to making those works available to the public and is not a mere provider of facilities.⁹⁵ In *TPB*, the users and the operators of TPB together engaged in a single act of CTTTP infringement which could be split between the users and operators of TPB platform. The users originated the torrent files that led to copyright files stored on the nodes of the peer-2-peer network. Then, the *TPB* operators intervened “with full knowledge of the consequences of their conduct, to provide access to protected works”⁹⁶ by indexing torrent files which enabled users to locate works in the context of a P2P network, therefore playing an essential role in making the works available. On this basis, in *TPB* Advocate General Szpunar argued that platform operators should be simultaneously and jointly liable with the users of the

⁹³ E. Rosati, “The CJEU Pirate Bay judgment and its impact on the liability of online platform” (2017) 39(12) *European Intellectual Property Review* 737, 745

⁹⁴ *Airfield and Canal Digitaal v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) and *Airfield NV v Agicoa Belgium BVBA (Airfield)* (C-432/09) EU:C:2011:157 [2012] ECDR 3. In the context of the CTTTP, the legal construction where a single act of CTTTP may be performed jointly by two parties originates from French 1970s copyright literature. For example C. Masouyé, “The place of copyright in the use of space satellites” (1972) 72 *Revue Internationale de Droit d’Auteur* 26, cited in S. Voudsen, ‘Airfield, Intermediaries and the Rescue of EU Copyright Law’ (2012) 4 *I.P.Q.* 311, 321.

⁹⁵ On joint responsibility see also Advocate General Jääskinen in *Airfield* (C-432/09) EU:C:2011:157 [2012] ECDR 3. at [87].

⁹⁶ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [36]- [37].

network making available the works shared.⁹⁷ The CJEU decision appears to endorse this view of CTTTP.⁹⁸

Hosting platforms may represent a borderline situation as the platforms perform a socially desirable role, but at the same time provide the technical tools for users to upload and share content, some of it copyright-infringing, but without themselves encouraging copyright infringement.⁹⁹ When the provision of the technical conditions for users to upload and share content may be seen as an act of CTTTP, to avoid joint liability with their users, a limitation on liability via a duty of care to conduct “necessary checks” of the uploaded content could be imposed.¹⁰⁰ Such an option is available if the decisions in *GS Media*, *Filmspeler* and *TPB* harbinger a duty of care within the CTTTP right which may be applicable to hosting platforms.¹⁰¹ It may be argued that hosting platforms gain advertising or other revenue, therefore a “for profit” element exists to the operation of these services, which may justify the application of a duty of care. Alternative 1 thus explores the application and limits of a duty of care under Article 3(1) to limit the liability of hosting platforms under the same provision.

With hosting platforms, experts argue that the scope of the duty of care should be moderated by a standard of reasonableness assessed case-by-case.¹⁰² Under an objective test, the extent of the duty would depend on the type of hosting provider and the provider’s propensity for infringement, the commercial nature of the activity, and what measures are reasonable in the circumstances.¹⁰³ The size of the provider and its financial resources should also be taken into

⁹⁷ Opinion of Advocate General Szpunar, *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [53].

⁹⁸ E. Rosati, “The CJEU Pirate Bay judgment and its impact on the liability of online platform” (2017) *European Intellectual Property Review* 737,745.

⁹⁹ M. Leistner, “Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators” (2017) 12(2) *Journal of Intellectual Property Law & Practice* 136, 144.

¹⁰⁰ A. Ohly, “The broad concept of ‘CTTP’ in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?” (2018) 13(8) *Journal of Intellectual Property Law & Practice* 664, 672.

¹⁰¹ A. Metzger and M. Senftleben “Comment on the Implementation of Article 17 CDSM Directive” (2020) *European Copyright Society* p.4. <https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-article-17-cdsm.pdf> accessed 328 January 2020. Accessed 28 April 2020.

¹⁰² E. Rosati, ‘The CJEU Pirate Bay judgment and its impact on the liability of online platform’ (2017) 39(12) *European Intellectual Property Review* 737, 746; C. Angelopoulos and J.P. Quintais, “Fixing Copyright Reform A Better Solution to Online Infringement” (2019) 10 *JIPITEC* 147 para 1, para 55; Ohly (n 103) 673.

¹⁰³ A. Ohly, “The broad concept of ‘CTTP’ in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?” (2018) 13(8) *Journal of Intellectual Property Law & Practice* 664, 673; for a variety of criteria under German law see also J. B. Nordemann, ‘Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach’ (2011) 2(1) *JIPITEC* 37, 37.

account. Reasonableness would also prevent the imposition of measures that are technically impossible for the host.¹⁰⁴

The standard of reasonableness resembles a proportionality assessment. In the case law on injunctions against intermediaries whose services are used for copyright infringement in Article 8(3) InfoSoc and the corresponding provision in the third sentence of Article 11 of the Enforcement Directive, the Court sought to establish a “fair balance” between the protection of copyright and the protection of the fundamental rights of individuals affected by such measures.¹⁰⁵ In *L’Oreal v eBay* the CJEU held that the measures taken should be “sufficiently dissuasive, but avoid creating barriers to legitimate trade, and offer safeguards against their abuse”.¹⁰⁶ In assessing what is proportionate, courts would have to balance the effect of the duty of care on rightsholders and platforms and the interests of internet users.

Rightsholders’ copyright as intellectual property is protected under Article 17(2) of the EU Charter of Fundamental Rights. Yet that protection is not inviolable nor absolute, as the CJEU repeatedly found that the protection of copyright needs to be balanced against other fundamental rights.¹⁰⁷ Given that legal content is also shared via hosting platforms, these benefit from the right to conduct business set out in Article 16 of the Charter of Fundamental Rights.¹⁰⁸ This involves the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it.¹⁰⁹ An infringement of the freedom of a hosting service provider to conduct its business would take place if the provider has to install a complicated, costly, permanent filtering system at its own expense.¹¹⁰

¹⁰⁴ *YouTube*, District Court of Munich (5 U 87/12) at [61] stating that a word filter is within YouTube’s technical ability and does not endanger the business model.

¹⁰⁵ *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (Netlog)* (C-360/10) ECLI:EU:C:2012:85 [2012] 2 CMLR 18 at [43].

¹⁰⁶ *L’Oreal SA v eBay International AG* (C-324/09) EU:C:2011:474; [2012] Bus LR 1369; [2011] 7 WLUK 313 at [144].

¹⁰⁷ *Netlog* ECLI:EU:C:2012:85 [2012] 2 CMLR 18 at [42].

¹⁰⁸ See also *Scarlet Extended v Société Belge des Auteurs Compositeurs et Editeurs* (C-70/10) EU:C:2011:771 [2011] E.C.R. I-11959 paras 44-49.

¹⁰⁹ *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (C-314/12) EU:C:2014:192 [2014] Bus LR 541 at [49].

¹¹⁰ *Netlog* ECLI:EU:C:2012:85 [2012] 2 CMLR 18 at [46].

The interests of internet users are also protected by law. Internet users benefit from protection against infringements of their right to protection of their data provided under Article 8 of the EU Charter of Fundamental Rights. Anti-copyright infringement measures that involve the identification, systematic analysis and processing of information connected with users' profiles created on social media platforms amounts to use of protected data as information regarding user profiles is personal data as it allows users to be identified.¹¹¹ Users have additional rights provided by the exceptions and limitations to copyright protection under Article 5 InfoSoc. In *Panier*, the CJEU held that the quotation exception in Article 5(3)(d) reflects users' exercise of the fundamental right to freedom of expression which in that case gained precedence over the rights of authors.¹¹² In *Deckmyn*, the exception for caricature, parody, or pastiche in Article 5(3)(k) InfoSoc fosters the exercise of freedoms of expression for their beneficiaries.¹¹³ The CJEU recently recognised in *Funke Medien* and *Spiegel Online* that the exceptions and limitations in Article 5 InfoSoc "confer rights on the users of works or of other subject matter".¹¹⁴ Therefore the application of the duty of care would have to respect the fundamental rights of users and the application of exceptions and limitations under Article 5 InfoSoc.

Various possibilities exist to tailor a potential duty of care for hosting platforms under Article 3(1) that balances all these rights to various degrees. Under the duty of care, Ohly argues that at least a duty to take-down copyright infringements following a notification from rightsholders may be available.¹¹⁵ This duty could be extended to an obligation to block the same infringing content from resurfacing on the platform. The duty of care could also be extended to include equivalent infringements from those notified by the rightsholders from resurfacing provided that the notion of equivalent infringements is interpreted strictly.¹¹⁶ Removal obligations may be triggered once the provider gains "awareness", the behaviour expected may be that of a "diligent economic operator" as in the *L'Oréal v eBay* decision on the application of the hosting

¹¹¹ Ibid at [49].

¹¹² *Painer v Standard Verlags GmbH* (C-145/10) ECLI:EU:C:2011:798 [2011] ECDR 13 at [135].

¹¹³ *Deckmyn v Vandersteen* (C-201/13) EU:C:2014:2132 [2014] Bus LR 1368 at [27], *Pelham GmbH v Hutter* (C-476/17) EU:C:2019:624 [2019] Bus LR 2159 at [60].

¹¹⁴ *Funke Medien NRW GmbH v Germany* (C-469/17) EU:C:2019:623 [2020] 1 W.L.R. 1573 at [70]; *Spiegel Online GmbH v Beck* (C-516/17) EU:C:2019:625 [2019] Bus LR 2787 at [54].

¹¹⁵A. Ohly, "The broad concept of 'CTTP' in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?" (2018) 13(8) *Journal of Intellectual Property Law & Practice* 664, 673.

¹¹⁶ J.P. Quintais, G. Frosio, S. van Gompel, P. B. Hugenholtz, M. Husovec, B. J. Jütte, M. Senftleben, "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics" (2020) 10 *JIPITEC* 277 at para 24.

limitation in Article 14 Directive 2000/3 (E-Commerce Directive).¹¹⁷ Finally, the duty of care may also include the application of preventative mechanisms to ensure that no copyright-infringing content surfaces on the platform. The following sections will address aspects of a duty of care that involve the duty to check content before it appears live on the platform and obligations as to notice and take-down and stay-down.

I. The duty to check content before it appears live on the platform is illegal

Some argue that the activity of YouTube, which organises search results into categories and rankings and recommends videos to its users based on user preferences may be similar to the activity performed by the operators of The Pirate Bay (TPB) where the CJEU had held that such operators “rank, they categorise, they display overviews and they recommend”.¹¹⁸ YouTube acts with constructive knowledge which can be presumed based on advertising revenue generated from user uploads or with the general knowledge that copyright-infringing content may be uploaded to the website.¹¹⁹ If hosting providers such as YouTube may be seen as analogous to blatant infringers such as TPB operators, this justifies the expectation that these hosting providers are under a stringent duty of care to check the content. Rightsholders argue that a high level of copyright protection as provided under Recitals 4 and 9 InfoSoc may be ensured only when the duty to check applicable to hosts providers to check the legality of content *before* it is uploaded.¹²⁰

The argument that host providers such as YouTube and Cyando can be legally expected to proactively check for copyright infringement content before it is uploaded on the platforms and without the need for rightsholder cooperation in identifying the copyright-infringing content was convincingly rejected by AG Saugmandsgaard Øe in his Opinion in the *YouTube/Cyando* referral. The AG opposes the analogy between YouTube and TPB on the basis that, in the case of YouTube, technical features such as searching and indexing do not show the operator’s intention to infringe copyright.¹²¹ He also rejected the presumption of knowledge as introduced

¹¹⁷ E. Rosati, ‘The CJEU Pirate Bay judgment and its impact on the liability of online platform’ (2017) 39(12) *European Intellectual Property Review* 737, 746.

¹¹⁸ International Literary and Artistic Association, Opinion in respect of some questions for preliminary ruling by the CJEU in case C-682/18 (YouTube) (25 February 2019) 5 <<https://www.alai.org/en/assets/files/resolutions/190225-opinion-youtube-en.pdf>> accessed 01 March 2019.

¹¹⁹ Ibid.

¹²⁰ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [238].

¹²¹ Ibid at [125].

in *GS Media* as it is only applicable to acts of hyperlinking and overall is unfit for hosting platforms such as YouTube and Cyando.¹²² This was because, in *GS Media*, the website operator posted the link himself, and hence had specific knowledge of the linked content. In the case of platforms such as YouTube and Cyando, this presumption is unworkable as it would entail the assumption that host provider who generates profit has both knowledge of the files stored on its servers by its users and awareness of whether or not they are illegal, thus requiring the operator to perform the “necessary checks”.

If the presumption of knowledge in *GS Media* could be applied to host providers such as YouTube, it would have the effect of creating an *ex-ante* obligation to monitor uploaded content. As AG Saugmandsgaard Øe points out, such an obligation would amount to imposing a general obligation to monitor the information it stores and to actively seek illegal acts or circumstances indicating illegality by, for example, monitoring all files provided by the users of the platform before they are adopted. This outcome is barred by Article 15(1) of E-Commerce Directive which prohibits Member States from imposing general monitoring obligations on providers covered by liability exemptions in Articles 12-14 of the Directive.¹²³ General monitoring refers to the active monitoring of all data of each of the platforms’ users to prevent any future infringement of intellectual-property rights.¹²⁴ Hosting platforms such as YouTube may be argued to perform the function of host providers as per the definition of a host in Article 14 E-Commerce Directive which refers to information society services which provide, amongst other activities, the transmission or storage of information supplied by a recipient of the service.¹²⁵ Therefore, the prohibition on general monitoring applies to hosting platforms such as YouTube.

AG Saugmandsgaard Øe also found that an obligation on hosting platforms to pre-emptively check the content their users intend to publish “would introduce a serious risk of undermining” the fundamental rights of the platforms to conduct business as set in Article 16 of the Charter,

¹²² Ibid at [113] and footnote 102.

¹²³ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [112]-[115].

¹²⁴ *Netlog* ECLI:EU:C:2012:85 [2012] 2 CMLR 18 at [26] and [34].

¹²⁵ CJEU held that online social media sites Netlog and Facebook, are hosts within the meaning of Article 14 E-Commerce Directive in relation to content uploaded by users see *Netlog* ECLI:EU:C:2012:85 [2012] 2 CMLR 18 at [27] and *Eva Glawischnig-Piesczek v Facebook Ireland* (C-18/18) EU:C:2019:821 [2020] 1 W.L.R. 2030 at [22].

the right of users to receive and impart information under Article 11 and the freedom of the arts under Article 13 when users upload their creations.¹²⁶ Implementation of such a measure where platforms manually check content would also be impossible to achieve given the vast amount of content uploaded. Platforms would also be tempted to err on the side of caution and over-remove content to avoid liability.¹²⁷ The implementation of such preventive checks at the point of upload by filtering would also infringe users' fundamental rights as filters are imperfect at distinguishing copyright-infringing from non-infringing content.¹²⁸ However, as the obligation to check content before it appears live on the platform breaches EU law, less intrusive measures may be possible under the duty of care approach.

II. A duty of care to remove specific content may be available under EU law

Article 14(1) of the E-Commerce Directive places hosting platforms under an obligation to remove specific illegal content once they have actual knowledge of its existence. An analogous obligation may be included within the scope of the duty of care under Article 3(1) InfoSoc Directive. Such an obligation to remove content may generate tension with the application of exceptions and limitations in Article 5 InfoSoc Directive. When operators of hosting platforms need to remove a specific piece of infringing content following notification from rightsholders, the notification should state the work which is infringed, the exclusive rights or licences the notifier has over the work and a reasonable explanation as to why no copyright exception is applicable.¹²⁹ In the case of notifications that concern blatantly infringing content, for example, a video containing a Netflix show episode, the reliability of rightsholders' assessment over the illegality of the content is straightforward. Problems begin in borderline situations where exceptions and limitations in Article 5(3) InfoSoc may apply. Arguably, most relevant exceptions and limitations in relation to uses of works on hosting platforms may be Article 5(3)(d) concerning quotations, Article 5(3)(k) concerning parodies and Article 5(3)(i) concerning the incidental inclusion of a work or other subject matter in other material. Copyright holders may not possess the requisite legal knowledge to make an informed assessment regarding the legal status of the work's use. Rightsholders are not a homogenous

¹²⁶ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [240]-[241].

¹²⁷ *Ibid* at [242].

¹²⁸ *Ibid* at [243].

¹²⁹ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [190].

group and whereas some such as Hollywood studios have extensive legal advice, individual rightsholders cannot be assumed to understand the intricacies raised by the application of copyright exceptions and limitations. All rightsholders may also be tempted to err on the side of caution in their assessments.

Instead, hosting platforms may be required to employ trained staff that assesses the accuracy of the rightsholders' notifications regarding specific infringing content made available on hosting platforms.¹³⁰ Given that millions of bits of content are uploaded on hosting platforms' servers daily, the expense of checking all notifications raises operations costs, hence the legality of this obligation is not clear. Under EU law, the costs of copyright enforcement borne by a platform are relevant to the proportionality of a measure. The CJEU has held that measures imposed on an intermediary can restrict the free use of their resources because it obliges them to take measures which may represent a significant cost, have a considerable effect on their activities or require difficult and complex technical solutions.¹³¹ The platforms' freedom to conduct a business enshrined in Article 16 of the Charter is, however, only impaired when "the very substance" of that freedom is affected.¹³² This does not take place when the intermediary has the flexibility to put place measures that are "best adapted" to the provider's resources and abilities and are compatible with other challenges raised in its other activities.¹³³ The use of trained staff to assess the validity of a copyright notice does not seem out of line with the daily operations of many hosts who already have to employ staff to assess the illegality of other types of content such as terrorist communications, hate speech, and other indecent communications. However, given the volumes of data involved, and the potential for notifications, the assessment of each rightsholder notification by a human reviewer may be too onerous in practice.

One cost-effective way to automatically remove content on notification by rightsholders is via automated systems, such as YouTube's ContentID. The disadvantage is that such tools may remove content that would normally be covered by an exception or limitation. A well-known example is the YouTube takedown of a copyright lecture by Professor William Fisher of

¹³⁰ J. B. Nordemann, "Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach" (2011) 2(1) JIPITEC 37, 41.

¹³¹ *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (C-314/12) [2014] Bus LR 541 at [50].

¹³² *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (C-314/12) [2014] Bus LR 541 at [51].

¹³³ *Ibid* at [52].

Harvard. The lecture contains snippets of various sound recordings to demonstrate a point on compulsory licencing, and this use of sound recordings may be exempt by the fair use doctrine in the US.¹³⁴ Most problematic is the safeguard of mechanically non-verifiable exceptions. In particular, the application of exceptions such as for caricature, parody or pastiche in Article 5(3)(k) InfoSoc requires a degree of legal sophistication which cannot easily be programmed into a filter. Any accidental removal of exempt uses may, in theory, be mitigated by the provision of a complaint and redress mechanism for internet users. Should a work be taken down which is covered by the exception, the user could appeal.¹³⁵

The effectiveness of such a complaint and redress system is also questionable. Data from internet user counterclaims against the takedown of content reveals that few appeal. Google's Transparency Report shows that between January and March 2020, a total of 6,111,008 videos were automatically removed from YouTube, of which 165,941 were appealed and subjected to human review and 41,059 subsequently reinstated.¹³⁶ Although the Report is not specific to copyright takedowns, the information therein is still revealing. Given that very few users appeal takedowns, the implication is that the availability of complaints and redress mechanisms in practice largely serves to support the legitimacy of automatic notice and takedown procedures.

One way to safeguard the application of exceptions and limitations in Article 5(3) InfoSoc Directive may be seen in the definition of "specific content" in *Glawischnig-Piesczek*, a defamation case, where the CJEU found that Article 15(1) E-Commerce Directive allows an injunction that requires Facebook to remove and monitor specific content declared illegal in court.¹³⁷ Under the terms of that injunction, Facebook has to remove content identical to that deemed illegal; content which is equivalent to it or block access to it, and the injunction can have an effect worldwide.¹³⁸ The definition of a "specific" case is interesting for our purposes. In *Glawischnig-Piesczek*, the CJEU found that a "specific case" may consist of a particular

¹³⁴ M. Mansink, "Sony Music Issues Takedown On Copyright Lecture About Music Copyrights By Harvard Law Professor" (Torrent Freak 2016) < <https://www.techdirt.com/articles/20160214/08293233599/sony-music-issues-takedown-copyright-lecture-about-music-copyrights-harvard-law-professor.shtml> > accessed 02 May 2020.

¹³⁵ The CJEU has previously provided for a redress system for internet users in the case of blocking injunctions. See *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (C-314/12) EU:C:2014:192 [2014] Bus LR 541.

¹³⁶ Google Transparency Report, "Appeals" < <https://transparencyreport.google.com/youtube-policy/appeals?hl=en> > accessed June 2 2020.

¹³⁷ *Eva Glawischnig-Piesczek* EU:C:2019:821 [2020] 1 W.L.R. 2030

¹³⁸ *Ibid* at [37]- [38] and [50].

piece of information stored by the host provider at the request of a certain user of its platform, the content of which was examined and assessed by a court having jurisdiction in the Member State, which, following its assessment, declared it to be illegal.¹³⁹ This approach could be followed in the area of copyright in a situation where the duty of care would also cover borderline situations where exceptions and limitations in Article 5(3) InfoSoc may apply. The application of the duty could be conditioned on rightsholder's submitting to the platform a court's decision which identifies an infringement and hence the non-application of a specific exception. By subjecting the application of the duty of care to a court finding of infringement in the underlying uploaded material the scope for the removal of content covered by exceptions and limitations is largely mitigated.¹⁴⁰

Again, there are limitations to this approach. Court proceedings are expensive, slow, and impractical for rightsholders therefore not suitable for high volume infringements. In addition, due to the territorial application of copyright, a finding of infringement in one Member State does not apply cross-border. The list of exceptions in Article 5(3) InfoSoc is also optional, and an exempted use in one EU Member State may not be exempted in the next, therefore rightsholders would have to know where to bring proceedings. Yet these drawbacks may be mitigated by the fact that the bulk of infringement consists of identical copies of copyright-protected works.¹⁴¹ Therefore subjecting the removal of suspected and borderline infringement cases to court scrutiny may not detract substantially from the efficacy of the duty of care. Rightsholders would go to court only when they felt they had a real case against a specific use, which would reduce the potential for opportunistic takedown requests. This approach would also allow for the sharing of information between users of these platforms whilst protecting against the most serious offences. The reduction of copyright enforcement efficacy would be offset by fundamental rights gained by users and platforms.

¹³⁹ Ibid at [35].

¹⁴⁰ J. Urban and others, "Notice and Takedown in Everyday Practice" (2017) 41 UC Berkeley School of Law 41.

¹⁴¹ J. B. Nordemann, "Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach" (2011) 2(1) JIPITEC 37, 41.

III. A duty of care to include the stay-down of identical infringements may be available under EU law

A stay-down duty would require hosting platforms after receiving notice from rightsholders regarding copyright infringements to remove the content and take measures to ensure that it does not resurface on the platform.¹⁴² This measure appears in line with EU law in *L'Oréal v eBay* where the CJEU allowed for the imposition of measures aimed at preventing “further infringements of that kind”.¹⁴³

Fulfilment of the duty of care in this context once again requires the application of content recognition technology such as filtering, as the manual removal of re-appearing infringing content is near-impossible.¹⁴⁴ The application of these technologies to prevent copyright infringements from resurfacing raises the emergence of general monitoring prohibited by Article 15(1) E-Commerce Directive. In *SABAM and Netlog*, the CJEU rejected the collecting society SABAM's injunction which required the social media site Netlog to install a filtering system that monitored its servers for copyright infringement in musical, cinematographic or audiovisual works stored by Netlog's users. The monitoring was to be applied to all users for an unlimited period as a preventative mechanism and at the expense of the platform.¹⁴⁵ However, Recital 47 E-Commerce Directive states that monitoring duties in specific cases are legal. For example, when the provider would have to prevent the reposting of illegal copies of specific works on the providers' network. Yet the line between general monitoring and monitoring in specific cases is not a clear one. In particular, when rights holders request the stay-down of numerous specific titles the cumulation of specific works amounts to general monitoring.¹⁴⁶ Further clarification regarding the line between monitoring in specific cases and general monitoring is necessary.

¹⁴² Angelopoulos and S. Smet, “Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability” (2016) 8(2) JML 266, 287-288.

¹⁴³ *L'Oréal SA v eBay International AG* (C-324/09) EU:C:2011:474; [2012] Bus LR 1369; [2011] 7 WLUK 313 at [127].

¹⁴⁴ European Commission, “Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online, Towards an enhanced responsibility of online platforms” COM (2017) 555 final, p.19. Content recognition technology, such as YouTube's Content ID or Audible Magic compares uploaded content with a database of copyrighted works to identify matches.

¹⁴⁵ *SABAM* (EU:C:2012:85) [2012] 2 CMLR 18 at [26] and [62].

¹⁴⁶ M. Senfleben, “Bermuda Triangle: licensing, filtering and privileging user-generated content under the new Directive on copyright in the digital single market” (2019) 41(8) EIPR 480, 484.

IV. Additional systemic advantages and disadvantages of a harmonising the liability of hosting platforms via duty of care in the context of Article 3(1)

The duty of care approach may introduce a conditional responsibility regime within the scope of Article 3(1). This might become be a balanced solution as the fulfilment of the duty of care would remove the application of direct liability. The duty of care solution supports the Digital Single Market as it provides a unified solution to the longstanding difficulties of reconciling the liability of hosting platforms for copyright-infringing content uploaded by users at the national level. By bringing the activities of hosting platforms under the scope of the exclusive right under Article 3(1), they come within the scope of the EU’s harmonisation mandate.¹⁴⁷ According to the AG in *TPB*, the discrepancies in national approaches “undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightsholders within the single market”.¹⁴⁸

From the perspective of rightsholders, applying a liability standard based on duties of care is that it involves a negligence standard. Normally, the subsistence of the exclusive right of CTPP requires an act which amounts to a use of the work. The violation of certain standards of conduct relating to the duty of care are performance-based aspects and have never before been linked to the elements of an exclusive right. The European Copyright Society considers this a “remarkable deviation from the traditional way of tailoring exclusive rights”.¹⁴⁹ The duty of care applied for the CTPP right in Article 3(1) may be perceived as watered-down once subject to a strict standard.

From the perspective of internet users, another problem is that the duty of care approach where hosting platforms work to reduce the availability of copyright-infringing content on their servers privatises copyright enforcement and may open the gates for private censorship. Were the duty of care to be placed within the scope of Article 3(1), a breach would expose platforms to primary liability and damages for their failure to act against copyright-infringing uploads,

¹⁴⁷ On maximum harmonisation see also J. Koo, *The Right of CTPP in EU Copyright Law* (Hart Publishing 2019) 138.

¹⁴⁸ Advocate General Szpunar, *Ziggo* EU:C:2017:456 [2017] Bus LR 1899.

¹⁴⁹ A. Metzger and M. Senftleben ‘Comment on the Implementation of Article 17 CDSM Directive’ (2020) European Copyright Society, 4 < <https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-article-17-cdsm.pdf>> accessed 03 May 2020.

with potentially expensive consequences. This would incentive platforms to remove or block content at the merest suspicion of copyright infringement and the potential effects on freedom of expression and information under Article 11 of the Charter are clear. Over-zealousness enforcement would increase the likelihood that non-copyright-infringing content would be removed or blocked, including content covered by exceptions and limitations. Caution, therefore, should be exercised when setting the scope of the duty of care and safeguards for users should become paramount.

D. Alternative 2: May hosting platforms be exempt from joint liability for communicating works to the public via Recital 27 InfoSoc?

A separate interpretation sees the activities of hosting platforms as the provision of “physical facilities” as per Recital 27 InfoSoc Directive, with the consequence that the platforms are not performing an act of communication and therefore not open to duties of care within the context of Article 3(1).¹⁵⁰ Recital 27 states that “[t]he mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive”. In CJEU jurisprudence on CTPP, the mere provision of facilities as in Recital 27 InfoSoc, is set out as the opposite to an intervention “in full knowledge of the consequences of its action, to give access to the protected work to its customers” required for an act of “communication”.¹⁵¹ Although Recital 27 is not an element of the test for CTPP in Article 3(1), it was explained by AG Sharpson in *SGAE* that the recital acts as an “unequivocal” limitation to the establishment of an act of communication which is a requirement for CTPP liability¹⁵²

Although the wording “physical facilities” suggests an application limited to the provision of technical equipment, there is a suggestion in the literature that Recital 27 may also apply to certain intermediaries.¹⁵³ This point has also been raised at the national level, in particular in the Netherlands in the case of a supplier of Usenet services.¹⁵⁴ At CJEU level, the only

¹⁵⁰ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [68]-[88].

¹⁵¹ *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [40] and [42]; *FAPL* EU:C:2011:631 [2011] ECDR 11 at [194]; *Reha Training* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [46].

¹⁵² Advocate General Sharpson in *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [27].

¹⁵³ K. Koelman and P. B. Hugenholtz, “Online Service Provider Liability for Copyright Infringement” (1999) WIPO Workshop on Service Provider Liability, World Intellectual Property Organisation, 13; Pamela Samuelson, “Regulating Technology Through Copyright Law: A Comparative Perspective” (2020) 42(4) EIPR 214, 215.

¹⁵⁴ *News-Service Europe B.V. (NSE)*, Court of Appeal of Amsterdam, ECLI:NL:GHAMS:2014:3435 at [3.3.2]–[3.3.3].

indication that Recital 27 may apply to hosting platforms appears in *TPB* where the CJEU invokes Recital 27 to justify the existence of an “intervention in full knowledge” by the operators of the P2P sharing platform.¹⁵⁵ If Recital 27 only applies to physical carriers of data, then it is a *non sequitur* that an online platform may be a provider of facilities, unless recourse to Recital 27 is only cosmetic to reinforce the idea that TPB operators were engaging in a copyright relevant intervention.

The opinion of AG AG Saugmandsgaard Øe in the *YouTube/Cyando* referral makes a strong case for the application of Recital 27 to hosting platforms. The AG explains that any CTPP involves a chain of interventions by several players in different capacities and to different degrees. In that chain, a distinction needs to be drawn between operators of the platforms performing an “active intervention” in the content uploaded by users, which contributes to the operators’ primary liability under Article 3(1), and the provision of physical facilities under Recital 27. YouTube and Cyando were seen as mere providers of physical facilities under Recital 27. The intervention by the operators of hosting platforms is limited to the provision of “server space” or “an electronic communication service”, activities considered to fall within the application of Recital 27.¹⁵⁶ This is the most expansive application of Recital 27 at the CJEU level.

I. An active intervention

In the view of AG AG Saugmandsgaard Øe in *YouTube/Cyando*, the entity which performs an act of communication (as opposed to a provider of facilities) “is the one who voluntarily intervenes to transmit works to an audience so that, in the absence of its intervention, that audience would not be able to enjoy it”, thus playing an essential role.¹⁵⁷ This includes the person who decides to transmit the work to an audience and who actively initiates the communication, such as the internet users of the services.¹⁵⁸ To perform an act of communication, “a service provider goes beyond the role of intermediary when he intervenes actively in the ‘CTTP’ of works”. An active intermediary “selects the content transmitted, determines it in some other way or presents it to a public in such a way that it appears to be his

¹⁵⁵ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [38].

¹⁵⁶ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [74] and [80] and footnote 46.

¹⁵⁷ *Ibid* at [72].

¹⁵⁸ *Ibid* at [73] and [77].

own”. Here, the reasoning of AG Saugmandsgaard Øe draws a parallel between active intervention and liability for “making content one’s own” which applies to content providers in Germany.¹⁵⁹ An active intermediary can also be a provider engaging in a “subsequent use of that “communication”, by retransmitting it to a “new public” or according to a “different technical mode”. In all these situations the provider does not merely provide installations but plays an essential role by voluntarily communicating works to an audience.¹⁶⁰ An active intermediary is communicating jointly with the users that provide the illegal content.

II. Recital 27 and hosting platforms

Intermediary providers whose services are used to carry out a CTPP following the instructions of their users do not decide on their own initiative to transmit the works supplied to an audience are thus covered by Recital 27.¹⁶¹ YouTube/Cyando do not perform an active intervention in the content provided and are hence covered by Recital 27. Firstly, the AG Saugmandsgaard Øe finds that it is the platforms’ users who play an indispensable role as they decide to make works available via the platforms by choosing the adequate option in the context of YouTube and by sharing online the download links in the case of Uploaded.¹⁶² Internet users perform an intervention without which platforms could not transmit the works or users could not enjoy the same works.¹⁶³ Secondly, due to the automated nature of the uploading system, the platforms do not determine the content uploaded and are not engaging in a selection of the uploaded works.¹⁶⁴ The control exercised *a posteriori*, for example, to react further to a notification cannot amount to a selection of content *a fortiori*.¹⁶⁵ *Ex post* control over certain content can also not reflect the choice of the operators to communicate that content.¹⁶⁶ Thirdly, there is no subsequent use of the works by the platforms to a new public or according to a different technical means, as at issue, there is only one communication initiated by the users.¹⁶⁷

¹⁵⁹ Ibid footnote 49.

¹⁶⁰ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [75].

¹⁶¹ Ibid at [74].

¹⁶² Ibid at [77].

¹⁶³ Ibid at [77].

¹⁶⁴ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [78].

¹⁶⁵ Ibid footnote 59.

¹⁶⁶ Ibid at [78].

¹⁶⁷ Ibid at [79].

In addition to these points, AG Saugmandsgaard Øe also refutes the argument put forward by the rightsholders that the structuring of user-uploaded content, integrating that content into a viewing interface, indexing the content in categories, the provision of a search function which processes search results and the classification of content are relevant to a finding of CTTTP.¹⁶⁸ He argues that the structuring of content uploaded by users does not preclude the conclusion that Recital 27 applies as there is nothing in the Recital to suggest that provision of facilities needs to be “simple”; a degree of sophistication is allowed to facilitate its use. These activities are designed to optimise access and facilitate the platform’s use, and this does not amount to an active intervention in the CTTTP initiated by the users.¹⁶⁹

The AG differentiates between optimising access to the uploaded content and optimising the uploaded content itself:

The fact that a platform such as YouTube has a standard viewing interface does not, in my view, lead to the conclusion that its operator presents the content to the public in such a way that it appears to be its own, provided that this interface indicates, for each video, which user has posted it.¹⁷⁰

In relation to Cyando, the argument cannot apply as the platform did not structure the content stored by its users, and that a third-party site acted as link collections are irrelevant to the legal status of the upload platform.¹⁷¹

Recommended videos such as by YouTube are automatically generated based on previous views and do not reflect the operator’s decision to communicate works.¹⁷² The stipulation in the general conditions of use of the platform, that each user grants YouTube a free non-exclusive worldwide license for the uploaded videos does not show that the operators are actively involved in the content, as the stipulation applies automatically to all content uploaded.¹⁷³ This would not be the case if the operators of the platforms re-used the content.

Finally, the remuneration received by YouTube via advertising revenue or by Cyando by subscription revenue does not affect the conclusion that they are not providers of facilities

¹⁶⁸ Ibid at [81].

¹⁶⁹ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [82].

¹⁷⁰ Ibid at [83].

¹⁷¹ Ibid footnote 61.

¹⁷² Ibid at [84].

¹⁷³ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [85].

within the meaning of Recital 27.¹⁷⁴ Following the decision in *Reha Training*, the AG opined that the for-profit element is not relevant to the existence of a CTPP. The AG also opined that the for-profit nature of a provision of facility enabling a communication does not cancel the application of Recital 27.¹⁷⁵ Secondly, he argued that the link between profits and the attractiveness of uploaded content does not lead to a finding of CTPP, as it is the users who decide what content is uploaded.

The AG largely drew on case law which advances a distinction between an active and passive service provider as developed in the CJEU Article 14 E-Commerce. For example, in *Google France*, it was the user of the service who chose the trademark signs as keywords, not the search engine provider itself, who was passive.¹⁷⁶ Similarly, in *L'Oréal v eBay* the user of the marketplace published the sale offers consisting of trademark-infringing goods.¹⁷⁷ Following the *L'Oréal v E-Bay* decision, the AG was not persuaded that structuring the presentation of the offerings and indexing and the provision of a search function was relevant, hence should not be relevant in the case of CTPP.¹⁷⁸ The AG, therefore, found that operators of YouTube and Cyando were not directly liable under Article 3(1), but may attract secondary liability at the national level.

III. The scope of Recital 27 InfoSoc is not sufficiently wide to limit the direct liability of intermediaries

It is not clear cut that Recital 27 is best placed to constrict the liability under Article 3(1) of hosting platforms such as YouTube and Cyando. The legislative history, wording and CJEU case law application of Recital 27 suggest that the inclusion of intermediaries such as YouTube and Cyando within the scope of that recital is strained. When the InfoSoc Directive was being drafted, hosting platforms were unheard-of. Recital 27 InfoSoc implements phrase 1 of the Agreed Statement on Article 8 of the World Copyright Treaty (WCT) which states that: “It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty

¹⁷⁴ Ibid at [86].

¹⁷⁵ Ibid at [87].

¹⁷⁶ Ibid at [89].

¹⁷⁷ AG Henrick Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [90].

¹⁷⁸ Ibid at [91].

or the Berne Convention”.¹⁷⁹ The Agreed Statement is “intended to clarify the issue of liability of service and access providers in digital networks like the Internet”.¹⁸⁰ It was introduced following intensive lobbying by non-governmental organisations representing internet service providers (ISPs) and telecommunication companies. These parties sought to obtain some guarantee concerning liability limitations for infringement committed by their users on their networks.¹⁸¹ The Statement clarifies that there is no direct liability for entities covered by it, with contributory and vicarious liability still available at the national level.¹⁸² It reflects the idea of Basic Proposal I of 1996 Note on Article 10 WCT (which subsequently became Article 8 WCT). The Basic Proposal extends the right of CTRP to making available right of works and it is explained that “what counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals”.¹⁸³ This is understood as providers who sell cables or computers or devices for online communications.¹⁸⁴

The Statement is implemented in the EU by Recital 27 InfoSoc. The ethos of that recital was expressed by AG Trstenjak in *SCF*: “persons who provide players, but do not at the same time control access to copyright works, do not make any communication to the public”.¹⁸⁵ Examples of activities that may be covered by Recital 27 that have filtered through the CJEU case law include the sale of TV sets and the mere installation of TV sets without the distribution of signals;¹⁸⁶ placing a computer with an internet connection at the disposal of the public in a cybercafé or library;¹⁸⁷ the sale or rental of televisions or radios; or where an ISP merely

¹⁷⁹ WIPO Copyright Treaty (WCT) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty at footnote 8 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_226.pdf> accessed 21 June 2018; Agreed Statement with Art. 8 of the WIPO Copyright Treaty, WIPO document CRNR/DC/96 (23 December 1996).

¹⁸⁰ WIPO, *Intellectual Property Handbook: Policy, Law and Use* (WIPO 2004) 272.

¹⁸¹ M. Ficsor, *The Law of Copyright and the Internet* (Oxford University Press 2002) 509.

¹⁸² M. Ficsor, “Copyright for the Digital Era: The WIPO Internet Treaties” (1997) 21(3-4) *Columbia-VLA Journal of Law & Arts* 197, 214.

¹⁸³ Basic Proposal for the Substantive Provisions of the Treaty on certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference CRNR/DC/4 note 10.10.

¹⁸⁴ J. Reinbothe and S. von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (Oxford University Press 2015) point 7.8.43.

¹⁸⁵ Advocate General Trstenjak in *SCF* EU:C:2012:140 [2012] ECDR 16 at [95].

¹⁸⁶ *Ibid* at [95]; *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Acropolis Hotel and Rousin AE* (C-136/09) EU: C: 2010: 151 [2010] ECRI-37 at [40]; Case C-136/09 *Sillogikis* para 40 -check; *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [46].

¹⁸⁷ Advocate General Kokott in *FAPL* EU:C:2011:631 [2011] ECDR 11 at [204]; Advocate General Trstenjak in *Phonographic Performance* EU:C:2012:141 [2012] 2 CM.LR. 29 at [164].

provides access to the internet.¹⁸⁸ These parties are too removed from the chain of causation to attract responsibility for communications to the public.

Recourse to Recital 27 in CJEU judgements on CTTTP largely serves to reinforce by contrast the existence of an intervention in full knowledge by a user.¹⁸⁹ A technical act falling under Recital 27 also has the role to maintain “the quality of the reception in the signal catchment area” for an audience covered by the initial authorisation of the rightsholder.¹⁹⁰

The CJEU has only twice limited the application of CTTTP in Article 3(1) by recourse to Recital 27, which has received strict interpretation. This is unsurprising given the wording “mere” and “in itself” in Recital 27. In *SBS Belgium*, the Court held that direct injection transmissions by broadcasting organisations to distributors of signals who give access to subscribers to those broadcasts are not a CTTTP performed by the broadcasting organisation but by the distributors who may transmit signals via decoders or other transmission technologies.¹⁹¹ Yet in some cases, responsibility for transmissions by direct injection is not carried out by distributors when they are not independent of the broadcasters, and their intervention is purely technical; it is just a means to improve the reception of the broadcast.¹⁹² These distributors could be ISPs involved in the distribution of broadcasts communicated by broadcasting organisations.¹⁹³ In *Stim*, a car rental company offering short-term rental of cars equipped with radio receivers, was not intervening in full knowledge of the consequences of its action to give their customers access to a protected work.¹⁹⁴ Recital 27 applies as there is no “additional intervention” from the car hiring company which makes it possible to receive via the radios pre-installed in the vehicle

¹⁸⁸ Ibid at [164]. Indeed, in Belgium, the Court of First Instance of Brussels found internet access providers to fall within the scope of Recital 27 see *Etat Belge v SABAM* (13/12839/A) Bruxelles Court of First Instance (2015) at [51].

¹⁸⁹ See for example *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [42]; *FAPL* para 194; *ITV Studios Ltd* EU:C:2013:147 [2013] Bus LR 1020 at [30].

¹⁹⁰ *SGAE* EU:C:2006:764 [2007] Bus LR 52 at [42].

¹⁹¹ The “direct injection” of signals represents a technology to transmit broadcast signals directly to distributors without those signals being accessible to the public until they have been supplied by the distributor to its subscribers see *SBS Belgium* EU:C:2015:764 [2015] WLR(D) 466 at [7] and [34].

¹⁹² Ibid at [32].

¹⁹³ The *SBS Belgium* decision was codified in Directive 2019/789 of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJL 130.

¹⁹⁴ *Foreningen Svenska Tonsattares Internationella Musikbyrå upa (Stim) v Fleetmanager Sweden AB* (C-753/18) EU:C:2020:268 [2020] 4 WLUK 20 at [32]- [34].

the terrestrial broadcasts available in the area where the vehicle is located.¹⁹⁵ In both *SBS Belgium* and *Stim*, the entity potentially covered by Recital 27 acts as a mere carrier in the strict sense for the works communicated by the broadcasting organisation. This suggests that the application of Recital 27 requires that the interference with the content of the communications transmitted needs to be kept to a minimum.

Services such as YouTube and Cyando go beyond the minimum level of involvement specified by CJEU case law in *SBS Belgium* and *Stim*. Hosting platforms automatically structure, categorise and provide recommendations in the case of YouTube, and Cyando provides automatic access links to the uploaded content. Although these processes are automated, they nevertheless foster a closer contact with the individual works uploaded by the platforms' users than the degree of contact that providers covered by Recital 27 such as ISPs apply. Although ISPs automatically engage with the data that is uploaded by users on their networks, for example by routinely filtering the internet for spam or blocking access to illicit sites, the nature of their involvement is different from that of hosting platforms. The EU has taken note of different levels of interaction with the data transmitted by the various information society services. The E-Commerce Directive specifies in Articles 12-14 a graduated system of exemptions from liability at the national level for internet intermediaries that qualify. The application of the limitation from liability at national level of hosting services that store content provided by their users (such as hosting platforms) is predicated upon an additional condition which requires hosts to expeditiously remove or disable access to illegal content uploaded by their users on their networks upon gaining actual knowledge or awareness that illegal content is available therein.¹⁹⁶ Such a condition does not exist in the case of the liability limitation in Article 12 applicable to mere conduits such as internet access providers. The reason for this difference in legal treatment between hosts and mere conduits is "based on providers' degree of involvement with the content transmitted and their scope for monitoring content."¹⁹⁷ Abstracting the role of hosting platforms with the content uploaded by their users to that of a mere provider of facilities would stretch the purpose and CJEU application of Recital 27. This does not mean that hosting platforms are liable for an act under Article 3(1), rather, Alternative

¹⁹⁵ *SBS Belgium* EU:C:2015:764 [2015] WLR(D) 466 at [33].

¹⁹⁶ Recital 26, Article 14(1)(b) E-Commerce Directive.

¹⁹⁷ Opinion of the Economic and Social Committee on the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, 1999 O.J. (C 169) at 4.11.1.

3 below will show that the limitation to the liability of hosting platforms paper may be achievable within the range of the test for CTTIP itself.

E. Alternative 3: Hosting platforms do not intervene in full knowledge to give access to copyright-infringing copies of works

The interpretation advanced under this alternative departs from the opinion of AG Øe that the intervention of YouTube and Cyando in the communication initiated by their users amounts to “the mere provision of facilities” as per Recital 27. Instead, it advances a new alternative of application of the CTTIP test under which operators of certain hosting platforms that provide the technical conditions for internet users to upload content are not performing an act of communication for the purposes of Article 3(1) InfoSoc Directive. Although content is made available by users via these platforms, that act may only be attributed to users that upload content. Under the evaluation advanced in this section, the operators of certain hosting platforms do not act “in full knowledge of the consequences of his conduct to give customers access to a work illegally posted on the internet”.¹⁹⁸ Hence, there is no need to look further at whether the platform operators communicate to a new public and corresponding knowledge element.

I. Platform operators may not perform a copyright relevant “intervention” in “full knowledge” with the copyright-infringing content uploaded by their users

The CJEU has emphasised the essential role played by the user who intervenes, in full knowledge of the facts, to give the public access to protected subject matter,¹⁹⁹ but the notion of “intervention” in CJEU jurisprudence on CTTIP remains undefined. The Court has repeatedly described a copyright-relevant intervention with adverbs such as “indispensable” or “essential” implying that, in the absence of that intervention, the public can access the works only with difficulty.²⁰⁰ At first sight, any intervention in the chain of causation which leads to accessing copyright content may be seen as “indispensable” or “essential” the ISP that supplies internet to TPB servers is performing an indispensable intervention, bar Recital 27, but a close

¹⁹⁸ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [47]-[48].

¹⁹⁹ *Reha Training* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [46]; *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [36]; *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [26].

²⁰⁰ *Ibid* at [26].

look at the application of the “intervention in full knowledge” element across CTTTP case law reveals various thresholds for copyright-relevant intervention.

2. Hyperlinking case law

Control over the provision of access to works by manually triggering that access is the essence of an intervention in hyperlinking cases. In *Svensson*, an intervention was held to take place when the hyperlink “allow[ed] users of the website on which it is [manually] posted [by the user] to circumvent the restrictions taken by the site where the protected work is posted to restrict the public’s access to its own subscribers”²⁰¹ In *GS Media*, the provision of a hyperlink amounted to a deliberate intervention when the link-provider acts with the requisite knowledge or is placed under the presumption of knowledge and does not conduct the necessary checks.²⁰² The CJEU states that:

...rightsholders, in all cases, have the possibility of informing such persons [i.e. hyperlink-providers] of the illegal nature of the publication of their work on the internet and of taking action against them if they refuse to remove that link.²⁰³

Although in *GS Media* the onus was on knowledge, it is only because the link-provider controlled access to the work in the first place via the link that the CJEU recommended the takedown of the link as a viable course of action. In *Filmspeler*, Mr Wullems:

“with full knowledge of the consequences of [its] conduct, pre-installs onto the ‘Filmspeler’ multimedia player that he markets add-ons that specifically enable purchasers to have access to protected works published – without the consent of the copyright holders of those works – on streaming websites and enable those purchasers to watch those works on their television screens”²⁰⁴

In other words, Mr. Wullems took control over access to the illegal copies of works by customising its device with hyperlink-carrying add-ons which it then sold as a service that facilitated direct access to those works.

3. Case law on a joint act of CTTTP

In the case law on a joint act of CTTTP performed two players, there is an additional layer to an intervention in the supply of works initiated by third parties. It can be seen from the decisions

²⁰¹ *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [50], *Nils Svensson* EU:C:2014:76 [2014] WLR(D) 67 at [27] and [31].

²⁰² *GS Media* EU:C:2016:644 [2017] C.E.C. 442 at [49]-[51].

²⁰³ *Ibid* at [53].

²⁰⁴ *Filmspeler* EU:C:2017:300 [2017] Bus LR 1816; [2017] 4 WLUK 447 at [41].

in *Airfield* and *TPB* that in addition to the personal involvement of the operators in triggering access to the works supplied by a third party, the operators exercised decision making over the content provided in their own service and for-profit. In *Airfield*, the CJEU found that the activities by Airfield, satellite television provider which sold a package of satellite channels that can be accessed by subscribers using a satellite decoder, amounted to an intervention in the signal supplied by a broadcast organisation. The intervention targeted a “new public” as its action to encrypt the signals or supply access keys created a link between the broadcast organisation and the subscribers.²⁰⁵ This act did not ensure or improve reception but made works available to an additional public than the public originally envisaged by the rightsholder.²⁰⁶ Airfield also bundled several channels from different broadcasting organisations into a new audio-visual product, deciding on the composition of the package created.²⁰⁷ This largely follows the opinion of AG Jääskinen that the broadcasting organisations lost control of the operations following Airfield’s intervention.²⁰⁸ Furthermore, Airfield had the discretion to include or not the television programmes in its service.²⁰⁹

With peer-2-peer file sharing, TPB jointly with their users provided access to unauthorised copies of works in a peer-2-peer network. The operators intervened by making available the platform that indexed and provided a search engine for the torrents leading to illegal works, thus playing an essential role in the file-sharing.²¹⁰ They also “indexe[d] torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by the users of that sharing platform “with the goal of aiding users to find the files”.²¹¹ This way the administrators controlled access to the illegal copies of works on the network as they provided the technical structures to access them and checked “to ensure that a work has been placed in the appropriate category. In addition, those operators delete obsolete or faulty torrent files and actively filter some content”.²¹² When the operators delete obsolete or faulty torrents, they personally exercised content control over the uploaded torrent files. These aspects also

²⁰⁵ *Airfield* (C-432/09) EU:C:2011:157 [2012] ECDR 3. At [78].

²⁰⁶ *Ibid* at [79].

²⁰⁷ *Ibid* at [81].

²⁰⁸ Opinion of Advocate General Jääskinen in *Airfield* (C-432/09) EU:C:2011:157 [2012] ECDR 3 at [87] and [88].

²⁰⁹ *Ibid* at [87].

²¹⁰ *Ziggo* EU:C:2017:456 [2017] Bus LR 1899; [2017] 6 WLUK 237 at [36]-[37].

²¹¹ *Ibid* at [38].

²¹² *Ibid* at [36].

contributed towards identifying the *mens rea* to give access to illegal copies of works. The operators must have acquired some specific knowledge from personally curating the categories and from being involved in the deletion of files.

Considering CJEU case law on a joint act of CTTTP, the activities of hosting platforms such as YouTube that provide the technical conditions for users to upload and share licenced and unlicensed content by indexing, providing a search engine, automatically categorising contents and providing recommendations but without the platform operators exercising choice over the copyrighted content uploaded and made available, do not amount to a copyright-relevant intervention in the communication. The platforms do not match the level of intervention achieved on a joint CTTTP. In *Airfield*, the operators exercised choice over what content was supplied. In *TPB*, in addition to the provision of the platforms, the operators were personally involved in curating the files. When hosting platforms provide an automatic upload process, “and without material being seen in advance or controlled by the operator”,²¹³ the intervention is technical and does not involve decision-making by the operators over the individual uploaded content. In the case of YouTube, the classification of uploaded videos is done automatically based on the information provided by the user. Video recommendations are made via an algorithm using machine learning and recommendations are provided on objective factors which do not include considerations over the legal nature of the content.²¹⁴ The operators are not personally involved with curation of the uploaded content and therefore do not intervene within the meaning of existing case law.

In the case of cyberlockers such as Cyando, a hyperlink is issued automatically to a user when that user uploads content. In this case, the control over the access to the work is exercised by the platform user who decides to make the link public to other users on designated link sites. The intervention in full knowledge may be attributed to the internet user who uploads content and manually shares the hyperlink with third parties. Consequently, the providers of

²¹³ *YouTube* (C-682/18) Summary of the request for a preliminary ruling, question 1.

²¹⁴ P. Covington, J. Adams, and E. Sargin, “Deep Neural Networks for YouTube Recommendations” (Proceedings of the 10th ACM Conference on Recommender Systems, 2016)

<http://static.googleusercontent.com/media/research.google.com/en//pubs/archive/45530.pdf> accessed 18 September 2020;

cyberlockers may also not be placed under the presumption of knowledge and require conducting the “necessary checks”.²¹⁵

II. Operators of hosting platforms may lack the requisite knowledge that they provide access to illegal content of works

In *Filmspeler* and *TPB*, the providers acted with intention to give access to illegal content and boasted about the infringing purpose of their services. The standard of intention is also in line with the standard embraced by the Grand Chamber of the CJEU in *Reha Training* at this point of the CTTTP analysis.²¹⁶ With hosting platforms such as YouTube, the use of automatic processes and lack of involvement of operators led to the conclusion that the operators only have general knowledge that copyright infringing content is hosted and shared on the platform. Hosting providers’ operators do not act with intention to give access to illegal content

Should anything less than the intention to give access to illegal copies be acceptable, then the CJEU will have to clarify which knowledge standard is applicable. AG Szpunar, in *TPB*, advised against the application of a presumption of knowledge to peer-2-peer indexing platforms as this may lead to a general obligation to monitor indexed content.²¹⁷ The same argument was extended by AG Saugmandsgaard Øe in *YouTube/Cyando*.²¹⁸ Although not binding on the CJEU, at the national level the liability of hosting platforms based on general knowledge of infringement has been rejected.²¹⁹ In this case, a standard of specific knowledge may be more appropriate and potentially in line with one of the CJEU knowledge inferences in *TPB* decision. This could be coupled with a standard of actual knowledge acquired following a notification from the rightsholder. If the platform does not take down the content in question, it may be seen to have intended to facilitate access to it by omitting to remove it.

Rightsholders may argue that Alternative 3 does not deliver the high level of protection required by Recitals 9 and 10 InfoSoc and does not help the purposes of the Digital Single Market. However, they are not left empty-handed. Rightsholders can also apply for injunctions against hosting platforms under Article 8(3) InfoSoc and the third sentence of Article 11

²¹⁵ See also João Pedro Quintais, “Untangling the hyperlinking web: In search of the online right of CTTTP” (2018) 21 *The Journal of World Intellectual Property* 385, 410.

²¹⁶ *Reha Training* ECLI:EU:C:2016:379 [2016] 3 CMLR 40 at [48].

²¹⁷ Advocate General Szpunar, *Ziggo* EU:C:2017:456 [2017] Bus LR 1899 at [52].

²¹⁸ AG Henrik Saugmandsgaard Øe in *YouTube/Cyando* EU:C:2020:586 at [115].

²¹⁹ See for example, *YouTube* (29 U 2798/15) Higher Regional Court of München at [53].

Directive 2004/48 (the Enforcement Directive). In particular, hosting platforms may be held to certain obligations concerning infringing content along the lines of the measures discussed under the duty of care approach discussed in Alternative 1.²²⁰ Rightsholders may also apply under their right to information in Article 8(2)(a) of the Intellectual Property Enforcement Directive (2004/48)²²¹ to request information from hosting platforms regarding the identity of platform users who infringe.²²² Unharmonised forms of secondary liability or equivalent may also be available at the national level.

F. Conclusions

The question of whether hosting platforms that provide the technical tools for users to upload infringing material amounts to a relevant use by the platforms under Article 3(1) may be answered in several ways. This article opposes a broad application of the CTTTP test to hosting providers based on strict liability. In this case, the sledgehammer of liability for damages may have longstanding implications for technological innovation in the area. Ultimately, only the big providers would be able to pay the damages and ensuing licence, therefore entrenching pre-existing dominant positions in the area. Internet users would also miss out on opportunities to engage in online information exchanges.

The solutions proposed in this article analyse three interpretations of the communication right in Article 3(1) which would achieve a nuanced outcome more in line with the fair balance objectives of Recital 31 InfoSoc. The duty of care approach in Alternative 1 provides a solution based on a conditional liability for hosting platforms. This way hosting platforms that oblige are saved from paying damages. The flip side is that a regulatory regime based on duties of care moves copyright away from its property rights status and closer to torts such as unlawful completion. Considering the dynamic evolution of the internet and the flexible nature of the CTTTP elements as developed in case law, it is possible to envisage other possibilities. Alternative 2 considers but ultimately dismisses a solution to hosting provider liability based

²²⁰ *YouTube* (C-682/18) Summary of the request for a preliminary ruling at [21]-[23].

²²¹ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004).

²²² Most recently see *Constantin Film Verleih GmbH v YouTube LLC and Google Inc.* (C-264/19) EU:C:2020:261 finding that the term “addresses” in Article 8(2) Directive 2004/48 should be given its usual meaning, i.e. postal address but member states have the option for fuller information may be available if a fair balance is struck between the fundamental rights involved and is in line with the principle of proportionality.

on Recital 27. Instead, Alternative 3 clarifies that in some situations hosting platforms do not perform an act of CTPP as they may not be engaging in an “intervention in full knowledge of the consequences to give access to illegal copies” element of the test. This means that some hosting platforms may not perform a copyright relevant act of “communication” to the public.

The direct infringement copyright claims against hosting platforms come at a time when technology has come of age and is no longer seen as deserving of special protection. The eyes of the world are on the EU and the overall resolution achieved in the case of hosting platforms. Other jurisdictions are seeking to address the legal status of such online platforms. Across the Atlantic, the US is contemplating such a review and the Copyright Office’s Section 512 Digital Millennium Copyright Act study recommends that the US should wait and learn from developments in the EU.²²³

The ideas discussed in this paper may also be relevant for a future UK approach to hosting-platform liability for infringing content after Brexit as the UK is moving away from the EU and will not implement the DSMD:

“We shall see how the copyright directive is implemented and how the various enforcement regimes within it will work, but of course it is not possible for us to remain part of it, because we will not accept the jurisdiction of the CJEU in these matters”.²²⁴

A void may appear in the regulation of hosting platforms in the UK, and it remains to be seen to what extent the UK may take inspiration from its (former) European brethren.

²²³ United States Copyright Office, Section 512 of Title 17: A Report on the Register of Copyrights. (May 2020) <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> accessed 22 May 2020.

²²⁴ “Copyright directive and Brexit” (After Brexit, Tech policy throughout the Brexit process 08 July 2020) <https://afterbrexit.tech/digital-single-market/copyright-directive/> accessed 09 July 2020.