Communication to the public

Master’s Thesis in Commercial and Tax Law (Copyright law)
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Abstract

The intellectual property concept of ‘communication to the public’ in Article 3(1) of the InfoSoc Directive is a current issue within the EU, as the means of communication increase all the time due to the fast development of the information society. Accordingly, the CJEU has more than occasionally been instructed to rule upon this provision, as the Member States of the EU are unconfident as to how it should be interpreted. The poor guidance provided for in the preamble of the InfoSoc Directive in terms of how to construe the provision does probably contribute to this confusion.

Article 3(1) of the InfoSoc Directive has been subject to disputes as concerns different means of communication, that is to say broadcasting, live performances, streaming and hyperlinking. Broadcasting and streaming are generally considered as communications within the meaning of the provision whereas live performances and hyperlinking have been deemed as falling outside the scope. More in detail, the most important criteria of a ‘communication to the public’ - laid down by the CJEU – suggest that the concept should be interpreted broadly, covering all transmissions and retransmissions where equipment facilitates for communications of signs, sounds or images, regardless of the means used and the nature of the place for the communication. A public refers to an indeterminate but fairly high number of people – considering the potential number rather than the exact number – not present at the place where the communication originates.

The gap between the wording of Article 3(1) of the InfoSoc Directive and the developments carried out by the CJEU is considered troublesome since it decreases the legal certainty of the provision. A future recasting of these matters should thus contemplate the possibility to integrate the criteria laid down by the CJEU into the law.
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Abbreviations

CJEU – Court of Justice of the European Union
EU – European Union
Commission – European Commission
WIPO – World Intellectual Property Organisation
I Introduction

1.1 Preface

Communications are common elements of the everyday life. For instance, this specific thesis illustrates a communication carried out in written form. However, most people usually do not reflect over their communication habits, which is rational due to the freedom of speech.\(^1\) Furthermore, we live in an information society, meaning that the means of communication increase all the time.\(^2\)

Whereas the information society on one hand stimulates an efficient flow of information, it does on the other hand challenge the intended purposes of copyright.\(^3\) This is troublesome since authors seek for sufficient protection in order for them to uphold their intellectual creation.\(^4\) Typically, an intellectual property work involves a purpose of making economic profit, why its author has an interest in being assigned with an exclusive right to authorise or preclude any communications of the work to the public.\(^5\) Since the information society is in constant progress, it is particularly important to establish flexible and harmonised legal frameworks in order for it to be functional.\(^6\)

In 1996, the European Commission (Commission) specifically pointed out the right of ‘communication to the public’ as being one of the most crucial legislative actions necessary to encourage the trade of copyright goods and services as well as the competition within the European Union (EU).\(^7\)

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\(^1\) The extent of the freedom of speech varies from country to country but is for instance expressed in Art. 19 of The Universal Declaration of Human Rights.


\(^3\) Ibid.


\(^7\) Commission, “Follow-up to the Green Paper on Copyright and Related Rights in the Information Society” (Brussels, November 20, 1996), COM(96) 568 final, Summary, para. 5.
In 2001, five years after the request of the Commission, a legislative measure arrived in terms of the InfoSoc Directive. It aims to respond to economic actualities such as new methods of utilisation. The preamble of the InfoSoc Directive states that harmonisation is necessary in order to achieve similar protection and legal consistency as well as promoting the free movement of services within the EU. Considering the statement of the Commission in 1996, The InfoSoc Directive’s incorporation of a provision – regulating the right of ‘communication to the public’ – did not take anyone by surprise.

The right of ‘communication to the public’ is expressed in Article 3 of the InfoSoc Directive. In particular, Article 3(1) settles the basis of the concept, as it describes the authors’ scope of protection:

“Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

The provision sheds light on the sharp balance between the rights of communication versus protection for works. This sharp balance, in combination with the fast development of the information society, seems to cause confusion as to what the wording actually governs and how it should be interpreted. Since the provision does not provide for an exhaustive list of the means of communication it intends to cover, the Court of Justice of the European Union (CJEU) has more than occasionally been instructed to rule upon Article 3(1) of the InfoSoc Directive. The concrete meaning of the notion ‘communication to the public’ thus seems to be rather unclear to the national courts of the Member States of the EU.

Such a theory is moreover supported by the fact that neither Article 3(1) of the InfoSoc Directive in itself nor the preamble of the InfoSoc Directive provide for comprehensive

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9 Recital 5 InfoSoc Directive.


11 Art. 3(1) InfoSoc Directive.

12 See for instance Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd [2013] and Case C-466/12, Nils Svensson and Others v Retriever Sverige AB [2014]. See also chapter 4 Examination: Case law for a thorough examination of relevant case decisions.
guidance as to how the provision should be construed. However, the preamble of the InfoSoc Directive at least suggests that the authors’ exclusive right of communication should be interpreted broadly.\(^{13}\)

Accordingly, the reason for studying Article 3(1) of the InfoSoc Directive is to examine whether the Court, through its case decisions, discloses more guidance on the subject. The subject matter is interesting from several perspectives, not only from the outlook of the national courts of the Member States. As hinted above, the members of the information society strive for a broad right of communication whereas authors seek to ensure that their field of protection is sufficient. Once upon a time, the Irish dramatist George Bernard Shaw found an illustrative way to describe the complexity of communication rather accurately, namely that “the single biggest problem in communication is the illusion that it has taken place”.\(^{14}\)

### 1.2 Purpose and delimitation

The purpose of this thesis is to study the intellectual property concept of ‘communication to the public’ as expressed in Article 3(1) of the InfoSoc Directive. The aim is to:

- Study which means of communication do fall and do not fall within the scope of Article 3(1) of the InfoSoc Directive.

- Examine how Article 3(1) of the InfoSoc Directive should be interpreted, in other words lay down the criteria of the provision.

- Investigate if the current formulation of Article 3(1) of the InfoSoc Directive is legally certain or if it calls for adjustments. If adjustments are considered necessary, appropriate solutions are deliberated.

This thesis concentrates on the concept as expressed in Article 3(1) of the InfoSoc Directive. Accordingly, the thesis disregards national rules on the concept, such as the optional exceptions and limitations the Member States may provide for in their national legislation.\(^ {15}\) Such a delimitation is eligible for two reasons. First, a directive is binding upon the Member States, to which it is addressed, as to the result to be achieved, meaning that

\(^{13}\) Recital 23 InfoSoc Directive.


\(^{15}\) Art. 5 InfoSoc Directive.
the concept may not be identical but at least similar in all the Member States of the EU.\textsuperscript{16} Secondly, the extent of this thesis makes it difficult to investigate the concept in each country. Moreover, this thesis excludes special legislation as may exist for certain means of communication, since such a research would go beyond the scope of this thesis. However, according to the international dimension of copyright law, this thesis includes some neighbouring legislation to the InfoSoc Directive, if that legislation is of relevance for the purpose of this thesis.\textsuperscript{17}

\subsection{Material and method}

As this thesis concentrates on Article 3(1) of the InfoSoc Directive, that legal document forms the foundation of this thesis. A directive is one of several legislative acts within the framework of the EU law. Thus, a brief description of the essential elements of the EU law is eligible.

First, it is important to notice the differences between primary, secondary and supplementary law. The primary law mainly consists of the founding Treaties – the Treaty on the EU (TEU)\textsuperscript{18} and the Treaty on the Functioning of the EU (TFEU)\textsuperscript{19}. These treaties set the distribution of competences within the EU and determine the powers of the European institutions. The primary law lays down the basis for the secondary law, which consists of unilateral acts and agreements. The unilateral acts are mainly listed in Article 288 of the TFEU (regulations, directives, decisions, opinions and recommendations) but also consist of other acts, such as communications, white and green papers. The supplementary law consists of case law, international law and general principles of law.\textsuperscript{20} When applying the different legal sources on this thesis, the different legal value of the material is considered. Accordingly, primary law is considered in the first hand followed by secondary law and ultimately supplementary law.


\textsuperscript{17} As described in chapter 2 \textit{International and EU copyright law}, the InfoSoc Directive is a result of an internationalisation of copyright law.


The doctrine does not belong in any of the categories above but is nevertheless useful to enhance the understanding of the EU law sources as described above.21 Another purpose for applying the doctrine is to provide for different views of different scholars, in order to broaden the approach to the subject.

The chapters 2-3 of this thesis are of descriptive nature, why a descriptive approach is used in order to promote a proper understanding of the subject. Accordingly, the approach used for the introductory chapters seeks to reduce the occurrence of subjectivity. The main source of material used for chapters 2-3 is secondary law, as it is the closest source of law in relation to the InfoSoc Directive in itself as well as provides for the preparatory works of it. However, due to the internationalisation of copyright law, these chapters consider supplementary law as well since the InfoSoc Directive in some respects is related to international law.22 Finally, the doctrine is utilised in order to promote the understanding of the subject.

Chapter 4 is of investigative character, as it involves an examination of the case law, in other words supplementary law. This chapter is partly descriptive, such as the description of the circumstances of the case decisions, partly analytical, since the interpretation of the precedents involves subjective reasoning. By doing a study of the case law, it is possible to understand how the CJEU interprets the concept of ‘communication to the public’ and assess its legal certainty. This is important since the CJEU is the final interpreter of the EU law.23 In terms of the election of the case law, certain emphasis is given to cases clearly related to the concept of ‘communication to the public’ in Article 3(1) of the InfoSoc Directive, without excluding cases providing for guidance as to how that provision should be interpreted. Additionally, the examination incorporates the doctrine, in order to put the case decisions in light of the opinions of several scholars.

The questions raised under chapter 1.2 Purpose and delimitation are of analytical character, why the chapters 5-6 are answered with a problem-oriented approach in mind. In this thesis, a problem-oriented method refers to the identification of the issues raised by the foregoing examination and their relation to the purpose of this thesis. Accordingly, these

21 Ibid.
22 See chapter 2.1.1 The international dimension of copyright law.
chapters involve personal opinions and suggestions.

### 1.4 Outline

The outline of this thesis is as follows:

*Chapter 1: Introduction (this chapter)*

This chapter establishes the background, the purpose and delimitation, the material and method and the outline of the thesis and sets the cornerstones of the entire thesis.

*Chapter 2: International and EU copyright law*

The second chapter describes the international and the EU elements of copyright law as well as explains how the EU copyright law in some respects actually is a result of international copyright law.

*Chapter 3: Communication to the public*

The third chapter deals with the core of this thesis, that is to say the right of ‘communication to the public’. Besides presenting the concept as it is expressed in the InfoSoc Directive, its occurrence in neighbouring legal sources is also deliberated.

*Chapter 4: Examination: Case law*

The fourth chapter provides for relevant case decisions from the CJEU as well as opinions from the doctrine.

*Chapter 5: Final remarks*

The fifth chapter seeks to analyse the questions raised under chapter 1.2 *Purpose and delimitation*.

*Chapter 6: Conclusion*

The sixth and final chapter provides for a summary of the most important conclusions made from the analysis.

### 1.5 Terminology

This thesis refers to the *InfoSoc Directive*, which in most contexts is the common abbreviation used for referring to the directive in question. Another common name of the directive is the *Copyright Directive*. This short chapter just aims to clarify that these different names all
refer to the same legal act. The reader should therefore bear in mind that, when reading about this subject in other contexts, the authors of those publications might refer to the directive in another way.
2 International and EU copyright law

2.1 International copyright law

2.1.1 The international dimension of copyright law

The regional and national aspects of copyright law are essential since most regions and countries have their own legislation as to the subject matter of copyright law. However, it is important to recognise the international legal sources, as there is an international dimension of copyright law. Multilateral agreements are namely important to come around the – in terms of copyright law – fundamental principle of territoriality. That principle means that national legislation reaches no further than its borders. Without multilateral agreements, it is hard for authors of a certain country to ensure that the protection of their works is valid on a global scale. Due to the simplicity of distributing works globally via different types of media platforms, the need for copyright protection is global rather than national. International copyright law therefore aims to harmonise copyright regimes around the world.

The next subchapter provides for a short introduction to three of the most essential international elements of copyright law, that is to say the Berne Convention, the Universal Copyright Convention and the WIPO Treaties.

2.1.2 International legal acts

The Berne Convention is perhaps the most notable multilateral copyright agreement. As of January 15, 2014, as many as 167 countries have ratified the Berne Convention. These

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25 Ibid.

26 Ibid.


28 Universal Copyright Convention of 6 September 1952, Geneva (in the following referred to as: Universal Copyright Convention).

29 WIPO Copyright Treaty (adopted in Geneva on December 20, 1996) (in the following referred to as: WIPO Copyright Treaty) and WIPO Performance and Phonograms Treaty (adopted in Geneva on December 20, 1996) (in the following referred to as: WIPO Performance and Phonograms Treaty).

countries form a union in respect of authors’ protection of literary and artistic works.\footnote{Art. 1 Berne Convention.} Another important copyright agreement is the Universal Copyright Convention, since it regulates copyright relations between participating countries and non-participating countries of the Berne Convention. The Universal Copyright Convention is independent in relation to the Berne Convention but if conflicts occur between those acts, the latter one prevails.\footnote{Art. XVII Universal Copyright Convention. See also Goldstein, Paul & Hugenholtz, P. Bernt, *International copyright: principles, law, and practice*, op. cit., pp. 50-51.}

The last revision of the Berne Convention took place in Paris 1971. Despite the revision, some issues remained unsolved and in 1989, the World Intellectual Property Organisation (WIPO) Governing Bodies consequently decided to prepare a potential legal act addressing the issues not governed by the Berne Convention as well as the problem of digital exploitation of copyrighted works.\footnote{Goldstein, Paul & Hugenholtz, P. Bernt, *International copyright: principles, law, and practice*, op. cit., p. 46.} Seven years later – in other words in 1996 – representatives of about 120 countries agreed upon the WIPO Treaties, that is to say the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty.\footnote{Ibid.} When studying legal sources related to the InfoSoc Directive, the WIPO Copyright Treaty is probably the most important one since the InfoSoc Directive actually aimed to implement the rules provided for in that treaty into the EU law.\footnote{Recital 15 InfoSoc Directive.} The next chapter further explains the relationship between these legal acts.

### 2.2 EU copyright law

#### 2.2.1 Arrangements of the EU

The work of harmonisation within the EU as regards copyright law became visible in 1988 in shape of a Green Paper\footnote{Commission, "Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action" (Brussels, June 7, 1988), COM(88) 172 final.}, dealing with issues of copyright and the challenges of technology. The Green Paper initiated the foundation of several directives during the 1990s, cov-
erring subjects such as computer programs\textsuperscript{37}, rental and lending rights\textsuperscript{38}, term of protection\textsuperscript{39}, satellite broadcasting and cable retransmission\textsuperscript{40} and the protection of databases\textsuperscript{41}.

Eventually, the Commission grasped that the competitiveness within the EU depended on technological progress as well as the establishment of a common information area, why it issued a new Green Paper\textsuperscript{42} in 1995. In that publication, the Commission held that the special characteristics of the digital environment – allowing communications and copying of large volumes of data – require a sufficient and harmonised degree of protection for the authors.\textsuperscript{43}

As a follow-up to the Green Paper of 1995, the Commission published another communication on the subject in 1996.\textsuperscript{44} It highlighted the four most important legislative actions necessary to promote the trade of copyright goods and services as well as the competition within the EU – the reproduction right, the communication to the public right, the protection of integrity of technological identification and protection arrangements and the distribution right.\textsuperscript{45}

Simultaneously, the members of the WIPO undertook negotiations upon multilateral agreements on the intellectual property area. As said above, the discussions resulted in two treaties. The Commission found it appropriate to sign the treaties on behalf of the EU and justified its action by claiming that the challenges confronted required agreements on an international level. The signing of the treaties brought an obligation to implement the inter-

\begin{itemize}
\item \textsuperscript{38} Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
\item \textsuperscript{40} Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
\item \textsuperscript{42} Commission, "Copyright and Related Rights in the Information Society" (Brussels, July 19, 1995), COM(95) 382 final.
\item \textsuperscript{43} Ibid., Summary, para. 2.
\item \textsuperscript{44} Commission, “Follow-up to the Green Paper on Copyright and Related Rights in the Information Society” (Brussels, November 20, 1996), COM(96) 568 final.
\item \textsuperscript{45} Ibid., Summary, para. 5.
\end{itemize}
national rules provided for in those treaties into the EU law. Accordingly, the contents of the InfoSoc Directive reflect the ingredients of the WIPO Copyright Treaty. The concept of ‘communication to the public’ thus has an international dimension, which is important to keep in mind even though this thesis concentrates on the concept within the framework of the EU law.

2.2.2 The InfoSoc Directive

A proposal released in 1997 outlined the cornerstones of the InfoSoc Directive and resulted four years later in the adoption of it. The InfoSoc Directive aims to promote the four freedoms within the EU by harmonising certain pieces of copyright and associated rights within the information society. Moreover, the InfoSoc Directive seeks to respond to the rapid technological development in the information society by adapting already existing law on the copyright area. In terms of protection, the InfoSoc Directive strives after a high level of protection as it pursues promotion of intellectual creation. Finally, the preamble of The InfoSoc Directive confirms the importance of considering the WIPO Treaties when harmonising the EU copyright law.

The InfoSoc Directive consists of fifteen articles divided into four chapters. The first chapter describes the objective and the scope of the InfoSoc Directive. The second chapter deals with rights and exceptions. The third chapter settles the protection of technological measures and rights-management information. Ultimately, the fourth chapter determines the common provisions. The right of ‘communication to the public’ is governed by Arti-

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49 The four freedoms are the free movement of people, goods, services and capital. See [http://ec.europa.eu/internal_market/top_layer/index_en.htm](http://ec.europa.eu/internal_market/top_layer/index_en.htm) (visited: 2014-02-05).

50 Recital 3 InfoSoc Directive.

51 Recital 5 InfoSoc Directive.


54 See the different chapter titles in the InfoSoc Directive.
Article 3(1) in the second chapter of the InfoSoc Directive. The next chapter provides for a more concrete description of the concept.

2.3 Summary

This chapter illustrated the relation between international and regional copyright law. The Berne Convention, the Universal Copyright Convention and the WIPO Treaties are recognised as three of the most prominent international legal sources. The WIPO Treaties are wider than the Berne Convention as they address more issues and take the digital use of copyright protected works into account. The Commission signed the WIPO Treaties on behalf of the EU as it was of the opinion that the challenges confronted required actions taken on an international level. The InfoSoc Directive is therefore a result of the Commission’s signing of the WIPO Treaties, namely an obligation to implement the rules provided for in those treaties into the EU law.

In 1996, the Commission stressed the right of ‘communication to the public’ as being one of the most important legislative action necessary to promote the trade of copyright goods and services as well as the competition within the EU. The first step towards the concept of ‘communication to the public’ as expressed in Article 3(1) of the InfoSoc Directive was therefore underway. The next chapter goes more into detail on the concept.
3 Communication to the public

3.1 Definition of the concept

The concept of ‘communication to the public’ is not new. In fact, even relatively old documents – such as the Berne Convention and the Universal Copyright Convention – deal with the matter.\(^55\) This short chapter aims to introduce the concept by clarifying that it is subject to discrepancy in terms of definition in different sources of legislation. For instance, the Berne Convention itemises the concept by dividing it into different rights, such as rights of public performance, recitation and broadcasting.\(^56\) Contrariwise, The Universal Copyright Convention applies a broader, more general definition to the right of ‘communication to the public’, meaning that the term is not divided into different rights. Comparing national legislation also discloses different approaches.\(^57\) Accordingly, it is important to recall that the concept of ‘communication to the public’ lacks a universal definition.

3.2 The concept under international treaties

The WIPO Copyright Treaty deserves credit for fully introducing the right of ‘communication to the public’, although older treaties also deal with the concept as said above.\(^58\) Whereas the Berne Convention provides authors of dramatic, musical, literary, artistic and cinematographic works with exclusive rights of authorising the use of their works, the WIPO Copyright Treaty is broader and seeks to fill the gaps left by the Berne Convention.\(^59\)

In contrast to the Berne Convention, the WIPO Copyright Treaty concretises the right of ‘communication to the public’ by extending its scope. The WIPO Copyright Treaty defines the concept as:

\begin{quote}
‘Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy
\end{quote}


\(^{56}\) Ibid.

\(^{57}\) Ibid.

\(^{58}\) Ibid.

\(^{59}\) Arts. 11, 11bis and 11ter Berne Convention. See also Mysoor, Porna, Unpacking the right of communication to the public: a closer look at international and EU copyright law, Intellectual Property Quarterly, Issue 2, 2013, p. 168.
the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

The most prominent diversion as to the wording of the concept in the Berne Convention respectively the WIPO Copyright Treaty is that the latter includes the ‘making available’-expression. It aims to cover so-called on-demand digital transmissions. Finally, it should be noticed that the provision of the WIPO Copyright Treaty does not seek to infringe upon the rights governed by the Berne Convention.

### 3.3 The concept under the InfoSoc Directive

As said above, the Commission signed the WIPO Copyright Treaty on behalf of the EU and thus undertook an obligation to implement and harmonise the international standards provided for in the WIPO Copyright Treaty. Consequently, the InfoSoc Directive and other legislative measures arose. Regarding the concept of ‘communication to the public’, Article 3(1) of the InfoSoc Directive is the provision reflecting the corresponding one of the WIPO Copyright Treaty. Since Article 3(1) of the InfoSoc Directive constitutes a cornerstone of this thesis, it is propitious to cite the article in its entirety.

Article 3(1) of the InfoSoc Directive:

> “Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

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60 Art. 8 WIPO Copyright Treaty.


62 Art. 8 WIPO Copyright Treaty.


65 Besides Art. 3(1), the InfoSoc Directive also consists of Art. 3(2) and Art. 3(3) but they are not within the scope of this thesis and are therefore not considered.

66 Art. 3(1) InfoSoc Directive.
Comparing Article 3(1) of the InfoSoc Directive with the corresponding rule of the WIPO Copyright Treaty discloses the intimate relation between them. Albeit Article 3(1) of the InfoSoc Directive settle the foundation of the concept, it does not provide for much guidance as to how it should be interpreted. However, the preamble of the InfoSoc Directive seeks to enhance the understanding of the provision. It states that the authors’ exclusive right of ‘communication to the public’ should be interpreted broadly, including all communications to the public not present at the place where the communication originates.\(^{67}\)

Moreover, the preamble suggests that the purpose of the right is to cover wired or wireless acts of transmissional or retransmissional nature, including broadcasting. Any other acts are not supposed to be covered by the right.\(^{68}\) In addition, only providing the physical prerequisites facilitating for a ‘communication to the public’ does not constitute a communication within the meaning of the InfoSoc Directive.\(^{69}\)

### 3.4 Summary

This chapter highlighted the right of ‘communication to the public’, in other words the core of this thesis. Although the concept lacks a universal definition, it is a result of international negotiations, resulting primarily in the WIPO Copyright Treaty and secondarily in the InfoSoc Directive. Thus, in order to understand Article 3(1) of the InfoSoc Directive, a consideration of the underlying treaties is necessary.

Article 3(1) of the InfoSoc Directive lays down the legal basis of the concept but does not provide for much guidance as to how the concept should be interpreted. However, the preamble of the InfoSoc Directive at least stresses that the authors’ exclusive right of communication to the public should be interpreted broadly.

As the description of the concept in the InfoSoc Directive is poor, the examination goes on by searching for guidance in the case law, which are the contents of the next chapter.

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\(^{67}\) Recital 23 InfoSoc Directive.

\(^{68}\) Ibid.

\(^{69}\) Recital 27 InfoSoc Directive.
4 Examination: Case law

4.1 Broadcasting in “private” places

4.1.1 Case C-306/05, SGAE v Rafael Hoteles SA

This chapter deliberates广播ings carried out in “private” places, namely in premises where the number of audience is limited. Briefly, broadcasting refers to the distribution of a signal over a widespread area without precise direction.\(^70\) First out is Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles S.A.*\(^71\)

In that case, an organisation responsible for the management of intellectual property in Spain took action against a Spanish hotel, claiming that the hotel’s installation of television sets in its bedrooms facilitated for distribution of certain works for which it was responsible. Accordingly, the organisation invoked that the actions of the hotel amounted to a ‘communication to the public’.\(^72\) The national court in Spain thus mainly searched for answer as to whether the supplying of signals through television sets in hotel rooms corresponds to ‘communication to the public’ within the meaning of Article 3(1) of the InfoSoc Directive. Secondly, the national court wondered if the mere installation of television sets in itself corresponds to such an act and finally, if the private nature of a hotel room prevents it from facilitating for such an act.\(^73\)

The CJEU begun its argumentation by confirming that the InfoSoc Directive does not explicitly define the notion ‘communication to the public’ but at least states it should be interpreted broadly.\(^74\) However, this does not mean that the Member States are free to define the concept by themselves. The Court namely held that the interpretation must be carried out autonomously as well as identically throughout the whole EU.\(^75\) Thus, when interpreting a provision of the EU law, there is a need for consideration as to the wording, the


\(^{71}\) Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles S.A* [2006] (in the following referred to as: Case C-306/05, *SGAE v Rafael Hoteles S.A*).

\(^{72}\) C-306/05, op. cit., para. 20 and 21.

\(^{73}\) C-306/05, op. cit., para. 32 and 48.

\(^{74}\) C-306/05, op. cit., para. 33 and 36.

\(^{75}\) C-306/05, op. cit., para. 31.
framework in which it occurs, the general purposes of the legal act providing for the provision in question and relevant international law.\textsuperscript{76}

Having the foregoing in mind, and by referring to earlier cases\textsuperscript{77}, the CJEU initiated its interpretation of the concept by concluding that the word ‘public’ refers to an unspecified number of possible television viewers.\textsuperscript{78} As concerns hotels, the Court argued that the number of possible television viewers should involve more people than the ones present in the hotel rooms. The main reason for that is the chance of the hotel having television sets installed in other areas on the hotel than the bedrooms, meaning that people not present in the bedrooms also can enjoy works distributed through those television sets. Secondly, it is usually a big circulation of people in a hotel, resulting in a fairly high number of potential viewers. The Court found the fairly high number of potential viewers important, as a public normally involves a large number of people.\textsuperscript{79}

Moreover, the CJEU stated – according to the Berne Convention – that the actions of the hotel constitute a communication directed to a ‘new public’, as that public is new in relation to the original public of the original communication.\textsuperscript{80} In this respect, it is irrelevant that some hotel guests might not use the television sets, as the critical point is if a work is made available to the public, not if the public actually enjoys the work.\textsuperscript{81} Accordingly, the CJEU found that the supplying of signals through television sets directed to customers in hotel rooms corresponds to ‘communication to the public’ within the meaning of Article 3(1) of the InfoSoc Directive. It does not even matter what method is used to transmit the signal.\textsuperscript{82} As to the question whether the mere installation of television sets in hotel rooms constitute such an act, the Court held – in accordance with the preamble of the InfoSoc

\begin{itemize}
\item \textsuperscript{76} C-306/05, op. cit., para. 34 and 35.
\item \textsuperscript{77} Case C-89/04, Mediakabel BV v Commissariaat voor de Media [2005] and Case C-192/04, Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVT L) [2005].
\item \textsuperscript{78} C-306/05, op. cit., para. 37.
\item \textsuperscript{79} C-306/05, op. cit., para. 38 and 39.
\item \textsuperscript{80} C-306/05, op. cit., para. 40 and 42.
\item \textsuperscript{81} C-306/05, op. cit., para. 43.
\item \textsuperscript{82} C-306/05, op. cit., para. 47.
\end{itemize}
Directive – that only providing the physical prerequisites facilitating for a ‘communication to the public’ does in itself not constitute such an act.\textsuperscript{83}

The third and final question concerned the private nature of hotel rooms. According to the CJEU, it follows from the wording as well as the purpose of Article 3(1) of the InfoSoc Directive that the place of the communication is unimportant.\textsuperscript{84} The Court argued that the authors’ exclusive right of ‘communication to the public’ would be meaningless if the provision excluded communications carried out in private spots.\textsuperscript{85} Consequently, the CJEU answered that the private nature of a hotel room does not preclude a communication inside it to be considered directed to the public.\textsuperscript{86}

\textbf{4.1.2 Case C-135/10, SCF v Marco Del Corso}

Another interesting case very similar in terms of the previous case is Case C-135/10, \textit{Società Consortile Fonografici (SCF) v Marco Del Corso}\textsuperscript{87}. It does not in fact relate explicitly to Article 3(1) of the InfoSoc Directive but to a neighbouring provision. However, as a breakdown of the argumentation of the CJEU discloses some interesting details, the case is of relevance even in this rather concentrated thesis.

The case concerned a dispute between an intellectual property agency and a private dental practice in Italy.\textsuperscript{88} The agency gathered and allocated the royalties of its allied phonogram producers.\textsuperscript{89} The musical works (phonograms) of those producers were subject to broadcasting within the premises of the dental practice. Accordingly, the agency claimed that such broadcasting infringed on the national copyright law and arose an obligation to pay compensation to the producers.\textsuperscript{90} The dental practice remonstrated that the national copyright law did not cover the current situation, as it distributed the phonograms through radio, implying that the radio broadcaster should be the party obligated to pay compensation.

\textsuperscript{83} C-306/05, op. cit., para. 45 and 47.
\textsuperscript{84} C-306/05, op. cit., para. 50.
\textsuperscript{85} C-306/05, op. cit., para. 51.
\textsuperscript{86} C-306/05, op. cit., para. 54.
\textsuperscript{87} Case C-135/10, \textit{Società Consortile Fonografici (SCF) v Marco Del Corso} [2012] (in the following referred to as: Case C-135/10, \textit{SCF v Marco del Corso}).
\textsuperscript{88} C-135/10, op. cit., para. 2.
\textsuperscript{89} C-135/10, op. cit., para. 28.
\textsuperscript{90} C-135/10, op. cit., para. 30.
The dental practice also argued that the national copyright law only covered communications carried out in public places, suggesting that the private character of its practice means it is not within the framework of the law. The national court in Italy decided to refer the dispute to the CJEU and thus asked if a ‘communication to the public’ as expressed in Article 8(2) of Directive 92/100 – observe it is not a question concerning Article 3(1) of the InfoSoc Directive – is at issue when a private dental practice makes phonograms available to its customers by means of broadcasting. The national court also questioned if such a communication gives the phonogram producers a right to compensation.

The CJEU started by clarifying that the right of ‘communication to the public’ is a concept present in several legislative acts. However, as concerns Article 8(2) of Directive 92/100 and Article 3(1) of the InfoSoc Directive, the Court stressed that they – although being similar – are subject to diversions. Hence, there is reason to believe that the CJEU made a completely independent assessment of the current circumstances. Surprisingly, it choose to apply precedents laid down in former cases clearly related to just Article 3(1) of the InfoSoc Directive. Accordingly, this case is valuable to consider even in this rather concentrated thesis.

First, the Court discussed the crucial role of the transmitting party. The customers would not be able to enjoy the works without the transmission performed by the party at question. Secondly, the CJEU developed the word ‘public’. As already laid down in Case C-306/05, SGAE v Rafael Hoteles S.A, the criterion refers to an unspecified number of people. In the current case, the Court sought to develop the understanding of the criterion and did so by turning to the WIPO glossary, in which the word is defined as meaning:

91 C-135/10, op. cit., para. 31 and 32.
93 C-135/10, op. cit., para. 64.
94 C-135/10, op. cit., para. 70.
95 C-135/10, op. cit., para. 74.
96 C-135/10, op. cit., para. 81.
97 C-135/10, op. cit., para. 82.
“making a work … perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group.”

However, it is important to bear in mind that the definitions provided for by the WIPO glossary are not legally binding. Moreover, as concerns the requirement of a ‘fairly large number of people’, it seeks to settle a de minimis level. Accordingly, the number of people cannot be too small or negligible. Finally, the Court again stressed the importance of taking the succession of people into account, when determining the number of people utilising the works distributed.

The final decision of the case is now going to be deliberated briefly. The Court declared that customers of a private dental practice are not ‘persons in general’ as suggested by the WIPO glossary, since they form a limited group of audience. In addition, the occurrence of customers in succession is irrelevant in this case, as they probably enjoy different works when listening to a radio. The Court also discussed the objectives of the customers. The main reason for them to visit a dental practice is not to enjoy phonograms but to get dental cure. Consequently, the Court ruled that Article 8(2) of Directive 92/100 does not preclude a private dental practice to broadcast phonogram works in its premises, meaning that the phonogram producers are not entitled to compensation in such cases.

4.1.3 Comments

Case C-306/05, SGAE v Rafael Hoteles S/A sheds light on the interpretation of the word ‘public’, a key component of the concept of ‘communication to the public’. Prior to the decision, the guidance in terms of understanding the criterion was poor. The Commission meant that the Member States were free to interpret the word, since it had not been clearly

98 C-135/10, op. cit., para. 85. Observe that the court paid attention to the definition in C-306/05, op. cit., para. 64 as well. However, it did in that case discuss it in the passing while it is given particular attention in the current case.

99 Ibid.

100 C-135/10, op. cit., para. 86.

101 C-135/10, op. cit., para. 87.

102 C-135/10, op. cit., para. 95.

103 C-135/10, op. cit., para. 96.

104 C-135/10, op. cit., para. 98.

105 C-135/10, op. cit., para. 102.
defined in the EU law.\textsuperscript{106} However, the CJEU took another direction as it stated that, if a provision of the EU law not refers promptly to the legislation of the Member States, the requirement for a harmonised practice of the EU law and the principle of equality means that the word should be interpreted in an autonomous and identical manner throughout the EU.\textsuperscript{107}

Accordingly, the Court referred to earlier cases and held that the ‘public’ component refers to an indeterminate but fairly high number of potential viewers. The interpretation of the term is perhaps the most important conclusion given by the case. Moreover, the CJEU concluded that the technique used for communications is irrelevant and so is the private nature of hotel rooms. Because of this, Case C-306/05, \textit{SGAE v Rafael Hoteles S.A} is described as setting a standard for the interpretation of the concept of ‘communication to the public’.\textsuperscript{108}

Scholars argue – based on the Court’s argumentation – that the subject matter of making economic profit purposes is important when deciding if a communication is directed to the public.\textsuperscript{109} Such a reasoning may be justifiable since the preamble of the InfoSoc Directive expresses the necessity of a high level of protection in order for authors to achieve proper rewards for the use of their works.\textsuperscript{110} However, the Court does not give the impression of deeming it as an absolute necessary requirement according to the decision in Case C-306/05, \textit{SGAE v Rafael Hoteles S.A}.\textsuperscript{111}

To sum up Case C-135/10, \textit{SCF v Marco del Corso}, the Court discussed the indispensable role of the party transmitting the work. Without the intervention of the dental practice, no communication could have taken place. This was the case in Case C-306/05, \textit{SGAE v Rafael Hoteles S.A} as well, where the hotel’s intervention facilitated for the ‘communication to

\begin{itemize}
\item \textsuperscript{106} Commission, \textit{“COMMISSION STAFF WORKING PAPER on the review of the EC legal framework in the field of copyright and related rights”}, (Brussels, July, 19, 2004), SEC(2004) 995, p. 15.
\item \textsuperscript{107} The court did so by referring to Case C-245/00, \textit{Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)} [2003], para. 23.
\item \textsuperscript{110} Recital 9 and 10 InfoSoc Directive.
\item \textsuperscript{111} C-306/05, op. cit., para. 44. See also Klafkowska-Waniowska, Katarzyna, \textit{Public communication right: towards the full harmonization?}, European Intellectual Property Review, 35(12), 2013, pp. 754-755.
\end{itemize}
the public’. The CJEU also improved the understanding of the word ‘public’ by suggesting that the number of people cannot be too small or negligible. Although the case does not refer explicitly to Article 3(1) of the InfoSoc Directive, this reasoning can most likely be applied on proceedings touching that provision, since the CJEU elaborated these parts of the judgment in harmony with Article 3(1) of the InfoSoc Directive.

However, the outcome of Case C-135/10, SCF v Marco del Corso did not follow Case C-306/05, SGAE v Rafael Hoteles SA. The Court namely found that the broadcasting of the phonograms within the premises of the dental practice was not directed to a public, emphasising that such broadcasting is not part of the dental treatment experience. In contrast to the reasoning above, the CJEU did not elaborate the final precedent in an apparent conjunction with Article 3(1) of the InfoSoc Directive. Accordingly, a more careful approach is advisable in terms of applying the precedent on Article 3(1) of the InfoSoc Directive issues.

4.2 Broadcasting in “public” places

4.2.1 Joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd

Whereas the previous chapter examined broadcasts carried out in “private” places, this chapter deals with broadcasts communicated in “public” places. The joined cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) illustrate this situation accurately. These cases are comprehensive and comprise several legal questions. Due to the concentration of this thesis, only the circumstances and questions related to the concept of ‘communication to the public’ are elaborated.

The claimant in the dispute was an organisation responsible for the highest professional football league in England, The Premier League. The organisation established the broadcasting rights to the football matches. Some restaurants and bars in England started to

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112 Joined cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) [2011] (in the following referred to as: Joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd).

113 Joined cases C-403/08 and C-429/08, op. cit., para. 30.

114 Joined cases C-403/08 and C-429/08, op. cit., para. 31.
use foreign decoding devices from a foreign broadcaster in order to display the football matches. The organisation found this to be harmful since such activities interfere with the exclusive rights given to certain companies in England and the economic profit of those rights.\textsuperscript{115} As concerns Article 3(1) of the InfoSoc Directive, the national court questioned if the concept of ‘communication to the public’ includes transmissions of broadcasted works through television screens and speakers, directed to customers present in public premises.\textsuperscript{116}

The CJEU commenced its argumentation by emphasising the objectives of the InfoSoc Directive, for instance to ensure that the protection of works is of satisfaction to the authors. Accordingly, the objectives suggest a broad interpretation of the expression ‘communication to the public’, as also is explicitly stated in the preamble of the InfoSoc Directive.\textsuperscript{117} According to the CJEU, the reason for such a broad protection is that other directives on the intellectual property area put forward similar principles and provisions.\textsuperscript{118} Since the EU law is supposed to be uniform, it is essential to apply the same interpretation when possible.\textsuperscript{119} However, the Court also stated that consideration to international law is necessary, in particular the Berne Convention and the WIPO Copyright Treaty.\textsuperscript{120}

After these preliminary considerations, the Court went on to elaborate the word ‘communication’. Neighbouring legal acts to the InfoSoc Directive suggest that the word means “making the sounds or representations of sounds fixed in a phonogram audible to the public”, including broadcasting and other communications to the public.\textsuperscript{121} More precisely, a communication takes place where speakers or similar equipment facilitate for transmission of signs, sounds or images – showing works on a screen included.\textsuperscript{122} Accordingly, the ‘communication’ crite-

\begin{itemize}
\item \textsuperscript{115} Joined cases C-403/08 and C-429/08, op. cit., para. 43.
\item \textsuperscript{116} Joined cases C-403/08 and C-429/08, op. cit., para 183.
\item \textsuperscript{117} Joined cases C-403/08 and C-429/08, op. cit., para. 186.
\item \textsuperscript{118} Joined cases C-403/08 and C-429/08, op. cit., para. 187.
\item \textsuperscript{119} Joined cases C-403/08 and C-429/08, op. cit., para. 188.
\item \textsuperscript{120} Joined cases C-403/08 and C-429/08, op. cit., para. 189.
\item \textsuperscript{121} Joined cases C-403/08 and C-429/08, op. cit., para. 191. The neighbouring legal acts referred to by the CJEU are Art. 8(3) of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and Arts. 2(g) and 15 WIPO Performance and Phonograms Treaty.
\item \textsuperscript{122} Joined cases C-403/08 and C-429/08, op. cit., para. 192. When discussing this, the CJEU supports its argumentation by referring to Art. 11bis(1)(iii) Berne Convention.
\end{itemize}
rion should be interpreted broadly, covering all transmissions of protected works regardless of the means used. The Court also emphasised the clear similarities between these cases and Case C-306/05, *SGAE v Rafael Hoteles SA*, implying that the interpretation should be the same. Hence, if owners of public premises purposely communicate broadcasted works through television screens and speakers to customers present in the premises, it corresponds to a communication.

Further on, the Court discussed the ‘public’ criterion. A work communicated as described above must be communicated to a ‘new public’, not initially considered by the authors, in order for it to be within the meaning of Article 3(1) of the InfoSoc Directive. Customers present in a public house fulfill that requirement, since the author of the work in question did not take them into account when approving the use of the work. Moreover, the communication must be directed to a public not present at the place where the communication originates, according to the preamble of the InfoSoc Directive. Since the situation at hand lacks physical and direct contact between the performer and the customers at the public house, this requirement is fulfilled.

Finally, the Court – again in line with Case C-306/05, *SGAE v Rafael Hoteles SA* – decided that the subject matter of economic profit should be part of the total assessment. In this case, the CJEU found that the communication in question might result in economic profit since the communication has impact on the number of customers.

The Court ultimately concluded that Article 3(1) of the InfoSoc Directive covers transmissions of broadcasted works, through television screens and speakers, to customers present in public premises.

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123 Joined cases C-403/08 and C-429/08, op. cit., para. 193.
124 Joined cases C-403/08 and C-429/08, op. cit., para. 195.
125 Joined cases C-403/08 and C-429/08, op. cit., para. 196.
126 Joined cases C-403/08 and C-429/08, op. cit., para. 197.
127 Joined cases C-403/08 and C-429/08, op. cit., para. 199.
128 Joined cases C-403/08 and C-429/08, op. cit., para. 200.
129 Joined cases C-403/08 and C-429/08, op. cit., para. 203.
130 Joined cases C-403/08 and C-429/08, op. cit., para. 204.
131 Joined cases C-403/08 and C-429/08, op. cit., para. 205 and 206.
4.2.2 Comments

The joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd are important from several perspectives. First, the Court expressed the necessity to consider international law when deciding cases, particularly the Berne Convention and the WIPO Copyright Treaty. Secondly, it decided that the word ‘communication’ should be interpreted broadly, covering all transmissions of protected works, regardless of the means used for the transmissions. Thirdly, it clarified that the meaning of the word ‘public’ refers to a ‘new public’, not considered by the authors when carrying out the original communication. Albeit this requirement was discussed in Case C-306/05, SGAE v Rafael Hoteles SA as well, this case clearly confirms it should be part of the entire assessment. Finally, the subject matter of economic profit was once again part of the examination – albeit it according to the judgment – still seems unclear whether that condition is cumulative.

In its drafting procedure, the Court assessed the meanings of ‘communication’ and ‘public’ separately, as well as referred to Case C-306/05, SGAE v Rafael Hoteles SA. This routing is in conflict with the opinion\textsuperscript{132} of The Advocate General, who deliberated the concept in its full context.\textsuperscript{133} She also meant that the circumstances in the joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd could not be compared with the corresponding ones in Case C-306/05, SGAE v Rafael Hoteles SA.\textsuperscript{134} In particular, she pointed out that the communicated signal at issue in the former case was directed to only one receiver whereas the signal in the latter case was directed to several receivers, namely the television sets in the hotel rooms.\textsuperscript{135} Accordingly, the Court took a different view from the Advocate General.

Considering the judgment, some scholars suggest that the Court seeks to avoid reflections over the relation between the source of the communication and the public, since it only

\textsuperscript{132} Joined cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) [2011], Opinion of AG Kokott.

\textsuperscript{133} Ibid. See the drafting procedure carried out by AG Kokott.

\textsuperscript{134} Ibid., para. 142.

\textsuperscript{135} Ibid., para. 146.
emphasises the nature of the receiving public. Consequently, it attaches little importance to the distance between the source of the communication and the public. This is confirmed by the outcome of the case – communications directed to a public not considered by the right holders fulfil the criterion of a ‘new public’. Such communications call for authorisation, which had not been acquired by the restaurant and bar proprietors at issue in the case.

Some scholars also question why the Court found it necessary to consider the Berne Convention when deciding the case. In particular, it was observed that the objective of the InfoSoc Directive is to correspond solely to the WIPO Copyright Treaty, thereby excluding the Berne Convention.

4.3 Broadcasting of graphic user interfaces

4.3.1 Case C-393/09, BSA v Ministerstvo kultury

Case C-393/09, Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury refers to the use of graphic user interfaces. A graphic user interface is a software facilitating interaction between a computer and a user. It enables executions of miscellaneous tasks by using a pointing device, such as a mouse, instead of typing commands.

The parties in dispute in the case were on one hand a software security association and on the other hand the Ministry of Culture in the Czech Republic. The software security association applied for approval of its joint administration of software copyrights. The Ministry of Culture neither accepted that application nor the subsequent appealing, due to

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136 Wood, Adrian, The CJEU’s ruling in the Premier League pub TV cases – the final whistle beckons: joined cases Football Association Premier League Ltd v QC Leisure (C-403/08) and Murphy v Media Protection Services Ltd (C-429/08), European Intellectual Property Review, 34(3), 2012, p. 206.

137 Ibid.


139 Ibid.

140 Case C-393/09, Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury [2010] (in the following referred to as: Case C-393/09, BSA v Ministerstvo kultury).


142 C-393/09, op. cit., para. 2.

143 C-393/09, op. cit., para. 15.
its interpretation of the national copyright law, mainly suggesting that only the software
codes could be protected, not the graphic user interfaces.\textsuperscript{144} The software security association invoked that the graphic user interfaces are the components actually facilitating for the
interaction with the software, why copyright protection is necessary.\textsuperscript{145}

The circumstances in the case mainly refer to the question as to whether a graphic user in-
terface can obtain copyright protection under the Council Directive 91/250/EEC\textsuperscript{146}. However, as concerns Article 3(1) of the InfoSoc Directive, the national court also raised a
question as to whether a television broadcasting of a graphic user interface constitutes a
‘communication to the public’.\textsuperscript{147} Due to the concentration of this thesis, an examination of
the CJEU’s reasoning of the latter question follows below.

The CJEU initiated its argumentation by referring to the preamble of the InfoSoc Di-
rective, stating that the right of ‘communication to the public’ should be interpreted broad-
ly.\textsuperscript{148} As concerns television broadcasting of works, the Court laid down that such broad-
casting generally constitute a ‘communication to the public’.\textsuperscript{149} As regards the material be-
ing subject to dispute in this specific case, that is to say graphic user interfaces, they are ca-
pable of being sufficiently original in order for them to achieve copyright protection.\textsuperscript{150}

Having this established, there is reason to believe that the Court deemed the television
broadcasting of graphic user interfaces as being a ‘communication to the public’ clearly in-
fringing upon the exclusive rights of the authors. However, the CJEU took another direc-
tion as it held that the public receives the broadcasting of the graphic user interfaces pas-
sively.\textsuperscript{151} Accordingly, the public have no chance to utilise the software in itself. Only the
actual user of the software is enabled to control the program, meaning that the receiving
public cannot enjoy the crucial component of the interface, namely the interaction between

\textsuperscript{144} C-393/09, op. cit., para. 16 and 19.
\textsuperscript{145} C-393/09, op. cit., para. 20.
\textsuperscript{147} C-393/09, op. cit., para. 52.
\textsuperscript{148} C-393/09, op. cit., para. 54.
\textsuperscript{149} C-393/09, op. cit., para. 55.
\textsuperscript{150} C-393/09, op. cit., para. 56.
\textsuperscript{151} C-393/09, op. cit., para. 57.
the software and the user.\textsuperscript{152} Therefore, the Court concluded that graphic user interfaces communicated through television broadcastings do not cause ‘communication to the public’ issues as expressed in Article 3(1) of the InfoSoc Directive.\textsuperscript{153}

\textbf{4.3.2 Comments}

In this case, the Court applied a principle never laid down before. It held that the recipients of a communicated work must be able to interact or in some way control the work, in order for the communication to fall within the meaning of Article 3(1) of the InfoSoc Directive.

The decision has been subject to criticism, mainly as to how the Court outlined its route to its decision.\textsuperscript{154} Some scholars question why the CJEU attaches importance to the fact that the public receives the contents passively.\textsuperscript{155} According to them, Article 3(1) of the InfoSoc Directive should not require any functionality of the communication carried out, in order for it to be applicable.\textsuperscript{156} Thus, they question why a communication of a graphic user interface must be interactive, in order for it to fall within the scope.\textsuperscript{157} If a graphic user interface can obtain copyright protection if it has sufficient originality – in other words design – the communication of such a work should be valuable enough to protect, even if it is not possible to interact with the software.\textsuperscript{158} However, it does not seem to be clear whether this ‘functionality’ requirement should be applied on other communications as well.

Moreover, theories are put forward as to why the Court judged as it did.\textsuperscript{159} Perhaps the purpose of the decision was to lead the EU law into a new road. This is supported by the

\begin{itemize}
\item \textsuperscript{152} Ibid.
\item \textsuperscript{153} C-393/09, op. cit., para. 58.
\item \textsuperscript{155} Ibid.
\item \textsuperscript{156} Ibid.
\item \textsuperscript{157} Smith, Leigh J, \textit{Whether copyright protects the graphic user interface of a computer programme}, op. cit., p. 72. See also Neophytou, John Peter, \textit{Copyright for graphical user interfaces}, op. cit., p. 437.
\item \textsuperscript{158} Menčl, Jakub, \textit{When the Court of Justice interferes with interfaces}, op. cit., p. 93.
\item \textsuperscript{159} Vousden, Stephen, \textit{Protecting GUIs in EU law: Bezpečnostní Softwarova Asociace}, op. cit., p. 735.
\end{itemize}
innovative drafting procedure, that is to say the short and stringent technique used when writing the final answer of the decision.\textsuperscript{160} The surprising route of the CJEU is also described as novel. In this respect, the surprising route refers to the Court’s sudden move in its reasoning as described above. This can be an indication of a disagreeing Court.\textsuperscript{161} Finally, a question have been raised regarding the legal background to the ‘functionality’ requirement, referring to the necessity of the public receiving the communication actively in order for it to be actionable. A theory on this subject matter suggests that it could be a result of the Court wanting to secure a free flow of information, as is important in the event of declaring for instance election results.\textsuperscript{162}

4.4 Live performances

4.4.1 Case C-283/10, Circul Globus București v UCMR - ADA

This section concentrates on the relation between Article 3(1) of the InfoSoc Directive and live performances. When deliberating this issue, Case C-283/10, Circul Globus București (Circ & Variete Globus București) v Uninunea Compozitorilor și Muzicologilor din România - Asociația pentru Drepturi de Autor (UCMR - ADA)\textsuperscript{163} from Romania is particularly helpful.

In Romania, a dispute arose between a music copyright organisation and a circus and cabaret organisation. When performing, the circus distributed certain musical works without having the right licenses to do so and without paying the levies to the copyright organisation.\textsuperscript{164} The copyright organisation found this to be inconsistent in relation to the national law in Romania and thus brought the matter to a national court.\textsuperscript{165} The circus asserted that it had settled agreements with the authors of the musical works as well as paid them a reasonable sum of money. Hence, it meant that the copyright organisation was not entitled to take any action.\textsuperscript{166} In the national proceedings, the main issue subject to discussion was

\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid.
\textsuperscript{163} Case C-283/10, Circul Globus București (Circ & Variete Globus București) v Uninunea Compozitorilor și Muzicologilor din România - Asociația pentru Drepturi de Autor (UCMR - ADA) [2011] (in the following referred to as: Case C-283/10, Circul Globus București v UCMR – ADA).
\textsuperscript{164} C-283/10, op. cit., para. 13 and 14.
\textsuperscript{165} C-283/10, op. cit., para. 15.
\textsuperscript{166} C-283/10, op. cit., para. 16.
how the InfoSoc Directive should be interpreted, eventually resulting in a reference to the CJEU.\textsuperscript{167} The national court sought guidance as to whether Article 3(1) of the InfoSoc Directive only covers communications to a public not present at the place where the communication originates or also communications performed directly at a place available to the public.\textsuperscript{168}

The CJEU primarily underlined some factors established in previous cases, namely the absence of a definition of a ‘communication to the public’, the procedure for interpreting such unclear provisions and the application of a broad interpretation of the concept.\textsuperscript{169} Thereafter, the Court shed light on the joined cases C-403/08 and C-429/08, \textit{FAPL and Others v QC Leisure and Others} and \textit{Karen Murphy v Media Protection Services Ltd}, in which the Court clarified that the concept of ‘communication to the public’ excludes direct representation or performance.\textsuperscript{170} Accordingly, the concept covers all communication to the public not present at the location where the communication arises.\textsuperscript{171} When analysing the circumstances at hand, the Court found that the performances carried out under the management of the circus give rise to direct physical contact with the public. Accordingly, the public is present at the place where the communication originates.\textsuperscript{172}

Ultimately, the Court stated that the InfoSoc Directive does not intend to protect conventional means of communication, such as live performances.\textsuperscript{173} This statement is supported by the preamble of the InfoSoc Directive, stating that the purpose of the concept of ‘communication to the public’ is to cover wired or wireless acts of transmissional or retransmissional nature, including broadcasting. Any other acts are not supposed to be covered, meaning that live performances fall outside the scope.\textsuperscript{174} Consequently, the CJEU de-

\textsuperscript{167} C-283/10, op. cit., para. 19, 20 and 21.
\textsuperscript{168} C-283/10, op. cit., para 30.
\textsuperscript{169} C-283/10, op. cit., para. 31, 32 and 33.
\textsuperscript{170} C-283/10, op. cit., para. 35.
\textsuperscript{171} C-283/10, op. cit., para. 36.
\textsuperscript{172} C-283/10, op. cit., para. 37.
\textsuperscript{173} C-283/10, op. cit., para. 39.
\textsuperscript{174} C-283/10, op. cit., para. 40. The CJEU especially stresses the third and fourth sentences of Recital 23 InfoSoc Directive.
ceded that Article 3(1) of the InfoSoc Directive does only cover communications to a public not present at the place where the communication originates.\textsuperscript{175}

\subsection*{4.4.2 Comments}

This case confirms that the concept of ‘communication to the public’ excludes live performances, in other words communications involving direct physical contact between the performers and the public. This is in conjunction with the preamble of the InfoSoc Directive, suggesting that only wired or wireless communications carried out by means of a transmission or retransmission fall within the scope of Article 3(1) of the InfoSoc Directive. Accordingly, the notion of ‘communication to the public’ refers to electronic transmissions or retransmissions.

In contrast to Case C-393/09, \textit{BSA v Ministerstvo kultury}, in which the judgment confronted criticism, this was a predictable decision. However, scholars have considered the case as being important, since it in conjunction with the joined cases C-403/08 and C-429/08, \textit{FAPL and Others v QC Leisure and Others} and \textit{Karen Murphy v Media Protection Services Ltd} confirms that Article 3(1) of the InfoSoc Directive does not cover physical direct communications but only technological communications.\textsuperscript{176}

\subsection*{4.5 Streaming}

\subsubsection*{4.5.1 Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd}

This chapter deals with the subject matter of streaming, which is a method facilitating for continuous playback of multimedia, without the prerequisite of downloading the material.\textsuperscript{177} The CJEU has tackled the issue in Case C-607/11, \textit{ITV Broadcasting Ltd and Others v TV Catch Up Ltd}\textsuperscript{178}.

\textsuperscript{175} C-283/10, op. cit., para. 41.

\textsuperscript{176} See Molloy, Brian, \textit{Circus’s live musical performance was not a “communication to the public” for the purposes of the Copyright Directive}, Entertainment Law Review, 23(3), 2012, p. 70. See also Mysoor, Porna, \textit{Unpacking the right of communication to the public: a closer look at international and EU copyright law}, op. cit., p. 174.

\textsuperscript{177} \url{http://www.businessdictionary.com/definition/streaming-media.html} (visited: 2014-04-08).

\textsuperscript{178} Case C-607/11, \textit{ITV Broadcasting Ltd and Others v TV Catch Up Ltd} [2013].
In that case, a company in the United Kingdom offered television broadcasting services to customers resident within that country. The customers achieved access to the broadcasting services by using the Internet. However – in order to consume the contents online – the customers were required to hold valid television licences and reside within the borders of the United Kingdom. Accordingly, these customers were able to utilise the original broadcast signal without the intervention of the broadcasting company, by using their own television sets or computers in their own households. However, the copyright owners of the original broadcast signals claimed that the services of the broadcasting company constituted a breach of the national copyright law in the United Kingdom. The copyright owners argued that the services of the broadcasting company corresponded to a ‘communication to the public’ and thus infringed on their exclusive right. The national court asked for interpretation as to whether Article 3(1) of the InfoSoc Directive includes retransmissions of works encompassed in terrestrial television broadcasts if the retransmissions:

(a) are performed by another party than the original broadcaster and,
(b) are available to customers for streaming online on that party’s server,
(c) under the condition that the customers are resident within the area of the reception as concerns the terrestrial television broadcasts and that they legitimately may acquire the broadcast on a television receiver.

The national court also asked if the answer to the question above is affected by the fact that:

(a) the services of the broadcasting company are financed through commercials and thus have a profit-making purpose or,
(b) a party competing with the original broadcaster performs the retransmissions.

The Court first declared that it follows by the purpose of the EU law that an author’s exclusive right to authorise a work encompasses every transmission or retransmission of that work. Consequently, if there are multiple communications, each of them require a separate

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179 C-607/11, op. cit., para. 9 and 10.
180 C-607/11, op. cit., para. 17.
181 C-607/11, op. cit., para. 16.
182 C-607/11, op. cit., para. 19.
183 C-607/11, op. cit., para. 41 and 45.
authorisation, given that they use different specific technical means.\textsuperscript{184} In the current case, streaming is such a specific method facilitating for a retransmission of the original communication. Accordingly, such a communication requires an authorisation and is therefore within the framework of Article 3(1) of the InfoSoc Directive.\textsuperscript{185} However, taking technical measures just to secure or improve the original communication does not constitute a ‘communication to the public’.\textsuperscript{186} The critical point in this specific case is that the broadcasting company’s streaming service is rather different from the corresponding service of the original broadcaster. Thus, the services of the broadcasting company go beyond the securing and improving purposes.\textsuperscript{187}

The CJEU went on to elaborate if the communication was directed to a ‘public’. As laid down in Case C-306/05, \textit{SGAE v Rafael Hoteles SA}, the word refers to an indeterminate but fairly high number of people, including customers who can consume the work at a later stage.\textsuperscript{188} In the case at issue, each customer has a personal account on the broadcasting company’s webpage, from which it is possible to stream the contents provided for. However, this system does not preclude a high number of customers to log on to the webpage simultaneously, given that they live in the United Kingdom and have valid television licenses.\textsuperscript{189} Accordingly, the Court found the criterion of an ‘indeterminate but fairly high number of people’ to be fulfilled.\textsuperscript{190}

In the joined cases C-403/08 and C-429/08, \textit{FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd}, the Court established the requirement of there being a ‘new public’ receiving the communication. The issue in the current case was the fact that the customers were able to enjoy the contents provided for online by using their own television sets, as they were required to hold valid television licences.\textsuperscript{191} However, the Court asserted that the circumstances in these two cases differ. The joined cases C-403/08

\textsuperscript{184} C-607/11, op. cit., para. 24 and 25.
\textsuperscript{185} C-607/11, op. cit., para. 26.
\textsuperscript{186} C-607/11, op. cit., para. 28.
\textsuperscript{187} C-607/11, op. cit., para. 30.
\textsuperscript{188} C-607/11, op. cit., para. 32 and 33.
\textsuperscript{189} C-607/11, op. cit., para. 34 and 35.
\textsuperscript{190} C-607/11, op. cit., para. 36.
\textsuperscript{191} C-607/11, op. cit., para. 37.
and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd concerned a party intervening purposely by facilitating for a broadcast of the original broadcast to a new public, not taken into account by the right holders.\textsuperscript{192} Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd deals with transmissions of works included in a terrestrial broadcast by means of streaming. Since the Court already pointed out that each communication requires separate authorisations – given that they use different certain technical means – the ‘new public’ criterion is irrelevant in the case at hand. Therefore, the retransmission performed by the broadcasting company should have been subject to authorisation by the original broadcaster.\textsuperscript{193} Accordingly, the Court concluded that Article 3(1) of the InfoSoc Directive involves situations where a party different from the original broadcaster performs a retransmission of a work encompassed in a terrestrial television broadcast by means of streaming, even if the customers can enjoy the same work by using their own television sets.\textsuperscript{194}

Moreover, the national court asked if the answer to the previous question is affected by the fact that the services of the broadcasting company are financed through commercials and thus have a profit-making purpose. The Court declared that even though the profit-making purpose is relevant, it is not an absolute requirement for a communication to be within the meaning of Article 3(1) of the InfoSoc Directive.\textsuperscript{195} Finally, the CJEU answered the question raised by the national court as to whether the first question is affected by the fact that the party performing the retransmissions is competing with the original broadcaster. The Court answered that question rather clearly by stating that neither the InfoSoc Directive nor the case law of the CJEU attaches importance to competition situations. Accordingly, it does not change the answer to the first question.\textsuperscript{196}

\textbf{4.5.2 Comments}

This judgment clarifies that streaming is an action considered as a ‘communication to the public’ within the meaning of Article 3(1) of the InfoSoc Directive, at least under the assumption that the circumstances are in conjunction with those in the present case. The

\textsuperscript{192} C-607/11, op. cit., para. 38.
\textsuperscript{193} C-607/11, op. cit., para. 39.
\textsuperscript{194} C-607/11, op. cit., para. 40.
\textsuperscript{195} C-607/11, op. cit., para. 42 and 43.
\textsuperscript{196} C-607/11, op. cit., para. 46 and 47.
Court also explained that all transmissions and retransmissions require an authorisation by the author, given that they use different certain technical means. In this case, the Court found the performance of the secondary communication different from the original one, meaning that both those communications called for authorisations by the authors. Thus, it was not necessary to consider the criterion of a ‘new public’ as was done in the joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd. Those cases namely concerned a secondary communication using the same technical method as the original one. Finally, this decision established that neither profit-making purposes nor the subject matter of competition affect the final answer as to whether a communication falls within the scope of Article 3(1) of the InfoSoc Directive. In earlier cases, the importance of the profit-making purpose has been rather unclear. The clarification provided for in this case was therefore eagerly awaited.

On these points, scholars suggest that the decision was foreseeable and they are rather satisfied with the Court’s stringent approach when answering the questions. The practical importance of the judgment is that streaming companies must acquire authorisation from the right holder in order to lawfully distribute the works of the right holder online.

4.6 Hyperlinking

4.6.1 Case C-466/12, Nils Svensson and Others v Retriever Sverige AB

This chapter covers hyperlinking, which at the time of this thesis, is the latest ‘communication to the public’ issue subject to discussion. Hyperlinking refers to the possibility to navigate between different documents and webpages. A hyperlink can be utilised by using for instance a pointing device and is normally formed by text or graphic elements. In terms of this thesis, the issue is whether hyperlinking corresponds to a ‘communication to the public’ within the meaning of Article 3(1) of the InfoSoc Directive.


198 See Curry, Josephine, ‘Communication to the public’ and online retransmission of programmes, Journal of Intellectual Property Law & Practice, 8(8), 2013, p. 596. See also Montagnon, Rachel, “Live” streaming of TV content to recipients licensed to receive the original broadcast infringes the communication to the public rights of copyright owners, Entertainment Law Review, 24(4), 2013, pp. 151-152.

199 Ibid.

Such a question arose in Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, originated in Sweden. The background to the case was the publication of articles, written by several different journalists, on the webpage of a daily newspaper. Those articles were available to the public without restrictions. Another webpage ran by a company completely independent to the newspaper – provided as a media monitoring service – clickable links to the articles in question and other articles on other webpages as well. According to the journalists, it was not clear enough to the ones clicking on the links that they were transferred to another webpage – namely the one of the newspaper – in order to read the articles. Moreover, they argued that the company providing the links had interfered with their right to make the works available to the public. As regards the transfer to the webpage of the newspaper, the company providing the links invoked that this was obvious to the users. As concerns the alleged infringement, it argued that providing links to articles available to anyone on the original webpage is not an action constituting a ‘communication to the public’.

The national court in Sweden referred to the CJEU as to the question whether Article 3(1) of the InfoSoc Directive covers the providing of clickable links to protected works, freely reachable on another webpage. Additionally, the national court asked if it is possible for a Member State of the EU to provide right holders with a scope of protection more broad than is explicitly expressed in Article 3(1) of the InfoSoc Directive.

The CJEU started its argumentation by clarifying that Article 3(1) of the InfoSoc Directive provides for two cumulative requirements. First, there must be a ‘communication’ of a work. Secondly, that communication must be directed to a ‘public’. When interpreting the requirement of a communication, a wide approach is necessary, as laid down in the joined cases C-403/08 and C-429/08, *FAPL and Others v QC Leisure and Others and Karen*.

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201 Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB* [2014].

202 C-466/12, op. cit., para. 8.

203 C-466/12, op. cit., para. 9.

204 C-466/12, op. cit., para. 8.

205 C-466/12, op. cit., para. 12.

206 C-466/12, op. cit., para. 14.

207 C-466/12, op. cit., para. 33.

208 C-466/12, op. cit., para. 16.
Murphy v Media Protection Services Ltd. 209 This is also confirmed by Case C-306/05, SGAE v Rafael Hoteles S.A, which states that it is sufficient that the public may utilise the works, not that they actually do it.210 Having the foregoing in mind, the Court quickly concluded that the providing of clickable links to protected works constitutes a ‘communication’ as expressed in Article 3(1) of the InfoSoc Directive.211 The Court went on to discuss the requirement of a ‘public’. Again, it referred to Case C-306/05, SGAE v Rafael Hoteles S.A, which states that the word refers to an indeterminate but fairly high number of people.212 Without giving a thorough explanation, the Court simply decided that the communication of the company providing the links fulfils that criterion and therefore is directed to a public.213

However, as laid down in the joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd and Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd, a communication using the same technical method as the original communication must fulfil the criterion of a ‘new public’. In the current case, the technical methods are the same in both communications, why the CJEU had to determine whether the secondary communication was directed to a new public.214 As the works at issue in the case were freely accessible without restrictions on the webpage of the newspaper, they were available to anyone connected to the Internet.215 Accordingly, the visitors to the webpage of the company providing the links compose potential recipients of the original communication as well, meaning that they are not a new public calling for authorisation by the right holders.216 Having this concluded, the Court found it pointless to consider the fact that the ones clicking on the links perhaps did not realise that they were being transferred to another webpage. However, the Court stated, in an enlightening purpose, that such a circumstance does by no means change the assessment.217 Before an-

209 C-466/12, op. cit., para. 17.
210 C-466/12, op. cit., para. 19.
211 C-466/12, op. cit., para. 20.
212 C-466/12, op. cit., para. 21.
213 C-466/12, op. cit., para. 22 and 23.
214 C-466/12, op. cit., para. 24.
215 C-466/12, op. cit., para. 26.
216 C-466/12, op. cit., para. 27 and 28.
217 C-466/12, op. cit., para. 30.
swering the first question in its entirety, the CJEU implied that the outcome of the case could be different if the company providing for links facilitated for access to material of restrictive art, as might be the case with for instance subscription webpages. In such a case, everyone bypassing that restrictive system, counts as being part of a ‘new public’. However, the Court finally decided that Article 3(1) of the InfoSoc Directive does not cover the providing of clickable links to protected works, freely reachable on another webpage.

The second question concerned the question as to if Member States are free to provide the right holders with a broader scope of protection than Article 3(1) of the InfoSoc Directive does. In this respect, the CJEU referred to the preamble of the InfoSoc Directive, which promotes the objective of eliminating legislative diversities. If the Member States were free to apply a broader protection, that objective would be undermined. Accordingly, such a decision could harm the internal market within the EU. The Court thus answered the second question negatively, suggesting that Member States are not allowed to apply a broader scope of protection to the right holders than is explicitly expressed in Article 3(1) of the InfoSoc Directive.

4.6.2 Comments

The CJEU established that hyperlinking in itself is a ‘communication’ within the meaning of Article 3(1) of the InfoSoc Directive. However, when the hyperlink points at freely unrestrictive material, there is no ‘new public’, as required when the secondary communication uses the same technical means as the original one. Accordingly, Article 3(1) of the InfoSoc allows such hyperlinking. On the contrary, the same provision prevents hyperlinking if the material to which the hyperlink addresses calls for certain measures to access that material, such as subscribing requirements. The foregoing reasoning is applicable even in situations where the user believes that the material in question is part of the webpage providing for the link to the original webpage. Finally, the Court precluded the Member States of the EU to extend the scope of protection provided for in Article 3(1) of the InfoSoc Directive.

218 C-466/12, op. cit., para. 31.
219 C-466/12, op. cit., para. 32.
220 C-466/12, op. cit., para. 34 and 35.
221 C-466/12, op. cit., para. 36.
222 C-466/12, op. cit., para. 41.
Scholars appreciate that the decision clarifies some issues on the hyperlinking area, as it is a current subject. Prior to the decision, the European Copyright Society put forward a rather straightforward opinion. It held that if hyperlinking constitutes a ‘communication to the public’, it would harm the functionality of the Internet, as no one could post a hyperlink without obtaining a proper authorisation. In its paper, the association considered such a system to be absurd. Therefore, there is reason to believe that it is satisfied with the outcome of the case, as well as owners to webpages should be. The doctrine suggests that the judgment may result in more restrictions and paywalls on the Internet, as right holders want to ensure that their works are protected.

However, there are yet some issues seeking for answers. The doctrine has for instance highlighted a question as to who should be held accountable for unsuccessful anti-circumvention measures – the webpage providing for links or the right holders? It also seems unclear what ‘freely accessible’ in fact means.

The future is likely to enhance the understanding of hyperlinking as two upcoming cases – also touching the subject matter of hyperlinking – are to be decided by the Court. These cases are Case C-279/13, C More Entertainment AB v Linus Sandberg and Case C-348/13, BestWater International GmbH v Michael Mebes, Stefan Potsch. It remains to be seen how the

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224 The European Copyright Society is an independent association founded in 2012, consisting of several researchers that deliberate over issues concerning copyright law within the EU. At the time of this thesis, the association does not seem to provide for a webpage. Some brief information can however be found on: [http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf](http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf) (visited: 2014-04-08).


226 Ibid.


229 Case C-279/13, Request for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 22 May 2013 – *C More Entertainment AB v Linus Sandberg*.

230 Case C-348/13, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 June 2013 – *BestWater International GmbH v Michael Mebes, Stefan Potsch*. 

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Court decides these cases but it would be surprising if they do not follow the outcome of the current case.
5 Final remarks

5.1 Communications inside and outside the scope

This section aims to analyse the situations deliberated in the previous chapter, in other words discuss which communications fall and do not fall within the scope of Article 3(1) of the InfoSoc Directive.

Broadcasting is an action clearly deemed as a ‘communication’ within the meaning of Article 3(1) of the InfoSoc Directive. The CJEU came to this conclusion in all case decisions related to broadcasting. However, this does not mean that every broadcasting constitutes a ‘communication to the public’. The Court namely found that broadcasting of graphic user interfaces as well as broadcasting of phonograms within the premises of a dental practice are lawful. The Court allowed broadcasting of graphic user interfaces since the receiving public could not enjoy the essential element of the work, that is to say the interaction with the computer program. In accordance with the opinions of several scholars, this could be considered remarkable. Article 3(1) of the InfoSoc Directive does not provide for such an ‘enjoyment’ or ‘functionality’ requirement. Additionally, if the Court concludes that a graphic user interface can obtain copyright protection if having sufficient originality in terms of design, it is for that reason possible to be of enjoyment to the public. However, the Court failed already when it went beyond the scope of only assessing the concept of ‘communication to the public’, as the ‘functionality’ criterion lacks legal support.

As concerns the broadcasting of phonograms within the premises of a private dental practice, the Court decided that it does not constitute a ‘communication to the public’, suggesting that such broadcasting is subsidiary in relation to the main purpose of visiting a dental practice, that is to say get dental treatment. The case in question, Case C-135/10, SCF v Marco del Corso, does not refer explicitly to Article 3(1) of the InfoSoc Directive but is nevertheless interesting. The Court namely referred to that provision in its reasoning, as well as applied principles laid down in Case C-306/05, SGAE v Rafael Hoteles SA, which is clearly related to that provision. Accordingly, the decision can serve and has served as guidance even in cases reflecting over Article 3(1) of the InfoSoc Directive. However, some degree of caution is advisable when applying the case due to its special circumstances.
It could be deliberated whether it is as apparent as the Court finds it, that the listening to music is in no way part of getting dental treatment. Providing for music in dental practices and other similar places could be a measure for reducing possible anxiety among the customers.

In the two other cases concerning broadcasting, Case C-306/05, *SGAE v Rafael Hoteles S.A* and the joined cases C-403/08 and C-429/08, *EAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, the Court found a ‘communication to the public’ within the meaning of Article 3(1) of the InfoSoc Directive. Although a television broadcast takes place in a hotel room – which is rather private in relation to other premises – such a broadcast falls within the scope. However, it can be argued – in accordance with Case C-135/10, *SCF v Marco del Corso* – that the watching on television is subsidiary in relation to the main purpose of visiting a hotel, namely use its premises for overnight stay. In Case C-135/10, *SCF v Marco del Corso*, the Court also held that the customers to the dental practice were likely to enjoy different works when listening to a radio. It could be argued that this hypothesis could be applied on hotel customers enjoying works on television sets within the premises of the hotel as well. It can in any case be questioned why the CJEU did not discuss these issues at all when deciding Case C-306/05, *SGAE v Rafael Hoteles S.A*.

Not surprisingly, the Court concluded that television broadcasting performed in a public property cause ‘communication to the public’ issues as expressed in Article 3(1) of the InfoSoc Directive. What is more surprising is that the Advocate General proposed another outcome, which would have been seriously harmful to the right holders, as their exclusive rights would have lost their purposes.

Live performances are distinct from the other communications because of their special nature. Live performances refer to direct representations or performances, directed to a public present at the place where the communication originates. Accordingly, live performances entail direct physical contact between the performers and the public. As Article 3(1) of the InfoSoc Directive only aims to cover communications carried out to a public not present at the place where the communication originates – live performances are not part of the scope. It could be considered a bit surprising that Case C-283/10, *Circul Globus Bucuresti v UCMR - ADA* even found its way to the CJEU. The InfoSoc Directive does admittedly not provide for much guidance as to how the concept of ‘communication to the public’ should be interpreted but at least states that it refers to wired or wireless acts.
of transmissional or retransmissional nature. Accordingly, carrying out any other acts does not infringe upon the exclusive rights of the right holders. Thus, the outcome of the case was rather predictable.

According to Case C-607/11, *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, companies providing for streaming services must acquire authorisations from the right holders to ensure that they are not interfering with Article 3(1) of the InfoSoc Directive. Streaming is rather special since it normally distributes the material in another way than the original communication of the material does – compare for instance streaming with television broadcasting. Being such a specific method or, as the Court phrased it – performing a transmission or retransmission by new technical means in relation to the original one – means that this new communication must be authorised by the right holders. Accordingly, streaming companies must obtain authorisation even in cases where their services are directed to the same customers as the original communication, given that the methods for distributing the material differ.

The Court’s finding on streaming is probably a good decision for right holders in their effort to stop Internet piracy. Streaming is popular because it, in contrast to downloading, provides for the contents instantly and does not require much storage space. Due to the simplicity of streaming, the authors have reason to be satisfied with being entitled to take action against anyone infringing upon their exclusive rights.

The final issue subject to deliberation in this thesis, as well as the most recent matter brought to the CJEU, is related to hyperlinking. Hyperlinking differs a bit from the other communication methods, as almost anyone can undertake it. Accordingly, the ruling provided for by the Court in Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB* should be of certain interest to the public. Given the decision, the public does not have to worry when posting hyperlinks pointing at freely reachable material. In such cases, no breach of Article 3(1) of the InfoSoc Directive arises. In this respect, it does not matter whether the person clicking on the link realises he is being transferred to another webpage. Much more complicated is the scenario where a hyperlink points at restrictive material. In such cases, everyone bypassing those restrictive measures by clicking on the link reckons as being part of a ‘new public’. Accordingly, such hyperlinking is most likely subject to fall within the scope of Article 3(1) of the InfoSoc Directive, why authorisation is required.

The outcome in Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB* is confusing. It
is on one hand good to see the Court not preventing hyperlinks pointing at freely accessible material, since such a decision would interfere with the functionality of the Internet. For instance, many people use social media webpages, on which they frequently post hyperlinks. Accordingly, it would be improper to categorise them all as being criminal all of a sudden.

However, it is on the other hand peculiar that the Court stated that it does not matter whether the person clicking on the link grasps he is being transferred to another webpage. Consequently, a webpage owner can post hyperlinks on his webpage and purposely make it look like that the contents provided for by the hyperlinks are part of that webpage, by using for instance embedded links. It could be argued that such dishonest behaviour should be actionable. It does in any case challenge the objectives of copyright protection.

5.2 The interpretation of the provision

The first question necessary to answer is who should be responsible for the interpretation of Article 3(1) of the InfoSoc Directive. The reason for bringing this issue to light is that it, before being clarified, has been subject to disagreements. Before Case C-306/05, *SGAE v Rafael Hoteles S.A.*, the Commission held that the Member States were free to interpret the concept of ‘communication to the public’ by themselves, since it had not been clearly defined in the EU law. However, the CJEU disagreed as it stated that Article 3(1) of the InfoSoc Directive must be interpreted autonomously and identically throughout the whole EU. Accordingly, the interpretation should involve consideration as to the wording of the provision, the context in which it occurs, the overall aims of the InfoSoc Directive and relevant international law. Consequently, the Member States are not free to interpret the right of ‘communication to the public’ by themselves, since the interpretation must be similar in the whole EU. Also, the Member States are not allowed to provide for a broader scope of protection to the authors than is explicitly expressed in Article 3(1) of the InfoSoc Directive, according to Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*. If a dispute arises and the Member States are unsure how to resolve it, it should refer the case to the CJEU, the body responsible for the final interpretation of the EU law.

With reference to international law, the introduction of this thesis described that copyright law is in many respects international rather than regional or national. The implementation of the InfoSoc Directive pictures this, as it seeks to reflect the WIPO Copyright Treaty. The internationalisation of copyright law is not only a fact but also a criterion calling for ac-
tual consideration when interpreting copyright law. This thesis has namely pointed out that the CJEU considers international legal acts when interpreting Article 3(1) of the InfoSoc Directive. Accordingly, in order to understand and interpret the concept of ‘communication to the public’ properly, consideration to international legislation is necessary – in particular the WIPO Copyright Treaty and the Berne Convention.

While it is good to see the interpretation of the concept recognising international legal acts and thereby seeking for harmonisation, it can be discussed whether such consideration actually helps the interpretation of the concept. As said above, and disclosed when comparing them, Article 3(1) of the InfoSoc Directive is perhaps not identical, but at least similar to the corresponding provision of the WIPO Copyright Treaty. Thus, it can be questioned whether the wording of the provision in the WIPO Copyright Treaty improves the understanding of the concept as expressed in Article 3(1) of the InfoSoc Directive. However, in Case C-135/10, SCF v Marco del Corso, the Court turned to the WIPO Glossary, trying to clarify the meaning of the word ‘public’. This indicates that – even if the provision providing for the right of ‘communication to the public’ in the WIPO Copyright Treaty does not enhance the understanding of Article 3(1) of the InfoSoc Directive – sources related to the WIPO Copyright Treaty can be valuable. It is though important to bear in mind that the contents of the WIPO Glossary are not legally binding.

Having the foregoing in mind, the analysis goes on to determine how the interpretation of the expression ‘communication to the public’ should be carried out. In Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, the Court confirmed that Article 3(1) of the InfoSoc Directive provides for two cumulative requirements, namely the action of a ‘communication’, which must be directed to a ‘public’. When determining if a ‘communication to the public’ falls within the scope of Article 3(1) of the InfoSoc Directive, it is not necessary to assess the concept in its full context. In the joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd, the Court namely discussed the two requirements separately. Accordingly, they are independently deliberated in the below.

The requirement of a ‘communication’ is to be interpreted broadly, covering all transmissions and retransmissions where certain equipment facilitates for communications of signs, sounds or images. This principle was established in the joined cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd. In this respect, it does not matter how the communication is carried out, since the
means used are irrelevant, according to Case C-306/05, *SGAE v Rafael Hoteles S.A.* However, any performances giving rise to physical direct contact with the public fall outside the scope. Thus, live performances are excluded, as laid down in Case C-283/10, *Circul Globus București v UCMR - ADA*. The preamble of the InfoSoc Directive serves as the legal source to this exclusion. It namely states that the sole objective of the right of ‘communication to the public’ is to govern wired or wireless transmissions or retransmissions. This decision does in conjunction with the one in Case C-283/10, *Circul Globus București v UCMR - ADA* indicate that the communication more or less must be electronic. In most cases, the Court also stressed the importance of a party actually intervening in order to facilitate for a communication. Without the intervention of for instance the hotel in Case C-306/05, *SGAE v Rafael Hoteles S.A.* no communications would have been able to be carried out to the guests in the hotel rooms.

In Case C-607/11, *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, the CJEU settled that every single communication requires an authorisation of the right holder at issue. This requirement is connected to the requirement of a ‘new public’, which is discussed more in depth later on in this section.

The guidelines laid out above in terms of how the word ‘communication’ should be interpreted are if not definite, at least very important. What is more unclear is the requirement of the communication to be ‘functional’, that is to say the necessity of the receiving public to enjoy the work in some way. The CJEU provided for this criterion in Case C-393/09, *BSA v Ministerstvo kultury*, as it held that the receiving public impossibly could enjoy the crucial element of a computer program, namely the possibility to interact with it. It is not established whether this is a cumulative requirement necessary for all means of communication and what legal source the Court applied when judging. As the criterion has not been discussed in the other cases, the criterion is most likely non-cumulative, meaning it is not an absolute requirement of the concept of ‘communication to the public’. Consequently, it seems like the Court invented this criterion in its reasoning in Case C-393/09, *BSA v Ministerstvo kultury*, in order to find such a conclusion as it did. Obviously, this gives rise to legal uncertainty, which is subject to a more thorough discussion under chapter 5.3 *The provision in light of a legal certainty point of view.*

It cannot be argued that the Court discussed a ‘functionality’ requirement also in Case C-135/10, *SCF v Marco del Corso*, even though the cases are a bit similar. In that case, broadcasting of phonograms were considered as not being part of getting dental care. The differ-
ence between these cases is the fact that the receiving public – in Case C-135/10, *SCF v Marco del Corso* – actually could enjoy the communicated works in its entirety. In Case C-393/09, *BSA v Ministerstvo kultury*, the public could not enjoy all features of the communicated work.

Finally, this thesis has recognised a criterion frequently discussed by the Court, namely the possible event of a ‘communication to the public’ entailing an economic profit-making purpose. Whereas the CJEU has deemed the criterion as being valuable when doing an assessment of a certain situation, it is not an absolute requirement for a communication to fall within the meaning of Article 3(1) of the InfoSoc Directive. This clarification was settled in Case C-607/11, *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*. The same case also decided that potential direct competition between the party performing the original communication and the party performing the secondary communication does not alter the assessment.

The second pillar of the concept of Article 3(1) of the InfoSoc Directive is the direction of the communication, namely the requirement of it being carried out to a ‘public’. The word refers to an indeterminate but fairly high number of people. Accordingly, the number cannot be too small or negligible. These elaborations derive from Case C-306/05, *SGAE v Rafael Hoteles S.A* and Case C-135/10, *SCF v Marco del Corso*. When determining the number of people, it is important to calculate the potential number of the public rather than the exact number. The reasoning of the CJEU in Case C-306/05, *SGAE v Rafael Hoteles S.A* illustrates such a practice. In that case, the Court took the feature of succession into account. Consequently, albeit the number of people receiving a work simultaneously in a hotel room is limited, the number can be high due the probability of subsequent guests receiving the work at a later stage. Because of this, it does not matter whether a place is of private character when determining if a situation falls within the scope of Article 3(1) of the InfoSoc Directive. Hence, communications carried out within the premises of hotel rooms and other spots of private nature are not excluded from the scope, since the place of the communication is irrelevant.

Furthermore, the preamble of the InfoSoc Directive lays down a criterion stating that – for a communication to be within the meaning of Article 3(1) of the InfoSoc Directive – it must be question about a communication directed to a public not present at the place where the communication originates. Accordingly, if the receiving public is present at the place where the communication originates, it falls outside the scope.
This criterion should not be confused with the one of a ‘new public’. The latter criterion means that – if the secondary communication uses the same technical means as the original communication – the secondary communication must be directed to a new public. This criterion refers to a public not taken into account by the right holders when authorising the original communication, in order for the communication to be within the meaning of Article 3(1) of the InfoSoc Directive.

Case C-466/12, Nils Svensson and Others v Retriever Sverige AB and Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd illustrate this criterion rather pedagogically. As the secondary communication used the same technical means as the original communication in Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, the secondary communication had to be directed to a ‘new public’. Since the original communication was available without restrictions, the receivers of the secondary communication formed possible receivers of the original communication as well. Hence, since the criterion of a ‘new public’ was not fulfilled, no ‘communication to the public’ as expressed in Article 3(1) of the InfoSoc Directive was at hand. In Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd, the secondary communication used different means in relation to the original communication. As every single communication calls for an authorisation by the right holder – both the original and the secondary communication must be authorised. Consequently, there was no need to examine the criterion of a ‘new public’ in that case.

However, questions still exist as to whether what happens if for instance a webpage provides for restrictive access to its material but fails to uphold those measures. Are there a ‘new public’ in those situations or not? At the time of this thesis, the CJEU is expected to clarify the meaning of the criterion in the upcoming Case C-279/13, C More Entertainment AB v Linus Sandberg and Case C-348/13, BestWater International GmbH v Michael Mebes, Stefan Potsch.

5.3 The provision in light of a legal certainty point of view

A preliminary observation calling for consideration when discussing the issue of legal certainty is the fast development of the information society. This is particularly important to deliberate when reflecting over a provision ruling upon the use of different technical means. In this thesis, several means of communication have been examined, namely broadcasting, live performances, streaming and hyperlinking. Due to the fast development of the information society, more methods are likely to arrive in the future. Accordingly, such a
development adventures the legal certainty of Article 3(1) of the InfoSoc Directive. At the time of this thesis, the provision is more than ten years old, indicating that it might be time to revise it. However, the current formulation of Article 3(1) of the InfoSoc Directive is rather short and expressed in a general manner. Hence, such a formulation allows some degree of technological progress, since it is not limited to cover some certain technical means. Therefore, the fast development of the information society does in itself not call for an immediate revision of Article 3(1) of the InfoSoc Directive.

More alarming is the drafting procedure of the CJEU, which gives rise to confusion. In some cases, the Court lays down new criteria not established in Article 3(1) of the InfoSoc Directive. Some of the criteria, such as the requirement of the receiving public to be a ‘new public’, are part of the total assessment in most cases whereas other criteria, such as the communication to be ‘functional’, only occur exceptionally. Admittedly, the formulation of Article 3(1) of the InfoSoc Directive is short and does not provide for much guidance as to how it should be construed. In fact, the Court more or less has to go beyond the wording of the actual formulation of the provision. However, such a drafting procedure jeopardises the foreseeability of the provision, making it hard to predict what constitutes a ‘communication to the public’.

Especially problematic is the situation in which the CJEU puts forward a condition but fails to declare its importance, which was the case with the ‘profit-making purpose’ criterion. The Court introduced such a condition in 2006 in Case C-306/05, SGAE v Rafael Hoteler SA but did not elaborate its importance until seven years later, when Case C-607/11, ITV Broadcasting Ltd and Others v TV Catch Up Ltd was decided. Even more problematic is the case where the CJEU fails to refer to a legal source when applying a criterion, which was the case with the ‘functionality’ criterion, laid down in Case C-393/09, BSA v Ministerstvo kultury. If the Court applies principles without referring to any legal source, it could be an indication that the Court itself is not satisfied with the current formulation of Article 3(1) of the InfoSoc Directive. However, this should in no way affect its judgments.

Instead of going beyond the scope and thereby decreasing the legal certainty, the effort should be concentrated on trying to recast the legislation in such a way that it more properly fits with the outcomes of the case law. The previous chapter illustrated that the interpretation of Article 3(1) of the InfoSoc Directive is comprehensive. Obviously, it would be almost impossible to create a provision that fully enlightens how the concept should be interpreted, due to the extensive development of the CJEU. Such a thorough adjustment
would also harm the unlimited phrasing of the provision as of today – which as said above – endures some degree of technological developments.

A more appropriate way to carry out the recasting of the copyright law of the EU is to incorporate the guidance provided for by the Court into the preamble of the future directive amending the InfoSoc Directive. At the time of this thesis, there is no amendment proposal on the table but due to the problems displayed, it would be adequate to execute the recasting as soon as possible.

By incorporating the case law criteria into the preamble, it is possible to preserve the future-friendly feature of the provision as well as increasing the foreseeability of the concept of ‘communication to the public’. The disputes concerning Article 3(1) of the InfoSoc Directive do frequently involve parties that most likely lack experience as to how to gather and construe judicial sources. This is a result of the development of the information society, meaning that almost all people communicate in one way or another. From a legal certainty perspective, it would be preferable to provide for the interpretation guidance in one single document, namely in the preamble of a future directive. The guidance provided for by the current preamble of InfoSoc Directive is poor and for that reason, it would be appropriate to enrich it. Perhaps is the Court’s far-reaching development of the criteria a reaction to that poor guidance.

Finally, the Court is keen on referring to the preamble when deciding cases. Accordingly, it serves as an appropriate legal source and such a solution would most likely be of satisfaction to the Court. Hopefully, it would reduce the possibility of the CJEU going beyond the scope of the provision.
6 Conclusion

The first objective of this thesis was to lay down which means of communication do fall and do not fall within the meaning of Article 3(1) of the InfoSoc Directive. The conclusion in terms of this question is that television broadcasting in private and public properties and streaming fall within the scope whereas broadcasting of graphic user interfaces, live performances and hyperlinking fall outside the scope. Hyperlinking can, however, be considered as being covered by Article 3(1) of the InfoSoc Directive, if the links point at restrictive material.

The second aim of this thesis was to establish the criteria of the concept of ‘communication to the public’ as expressed in Article 3(1) of the InfoSoc Directive. The concept shall be interpreted broadly and similarly throughout the EU, meaning that the Member States are not allowed to make their own constructions. When assessing if a situation is covered by the provision, the criteria of a ‘communication’ and a ‘public’ are to be evaluated separately. The ‘communication’ criterion shall be interpreted broadly, covering all transmissions and retransmissions where equipment facilitates for communications of signs, sounds or images – regardless of the technique used. Ultimately, the place of the communication is irrelevant. The ‘public’ criterion refers to an indeterminate but fairly high number of people, calculated with reference to the potential number rather than the exact number. For a situation to fall within the meaning of Article 3(1) of the InfoSoc Directive, the public cannot be present at the place where the communication originates. Also, if the secondary communication uses the same technical means as the original one, the secondary communication must be directed to a ‘new public’, meaning a public not taken into account by the right holders when authorising the original communication. Finally, the assessment should consider if the communication entails a purpose of making profit, although that condition is not cumulative.

The third and final intention of this thesis was to discuss the legal certainty of Article 3(1) of the InfoSoc Directive. In this respect, the conclusion is that a future recast of the InfoSoc Directive should consider the far-reaching development of the CJEU. The guidance provided for in the current preamble of the InfoSoc Directive is poor – why it from a legal certainty point of view – would be a good idea to incorporate the developed criteria laid down by the Court into the preamble of a future directive. Such a solution would increase the foreseeability of the provision.
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