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The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on Brein v. Filmspelers [C-527/15] (2017) and Brein v. Ziggo [C-610/15] (2017)

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The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on *Brein v. Filmspelers* [C-527/15] (2017) and *Brein v. Ziggo* [C-610/15] (2017)

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Abstract

After a series of decisions in which the Court of Justice of the European Union appeared to be cutting back on the application of the right of communication to the public with respect to the provision of hyperlinks, the Court's most recent decisions in *Brein v. Filmspelers* (C-527/15) and *Brein v. Ziggo* (C-610/15) concerning, respectively, sale of a device pre-loaded with hyperlinks to illegal streaming sites, and The Pirate Bay BitTorrent platform, indicate instead that the Court's prior caselaw was in fact gradually advancing toward a European harmonization of the law on derivative liability (i.e., liability in the second degree) for violation of the right of communication to the public. These two most recent decisions have now achieved that harmonization. Moreover, harmonization was necessary given both the lack of uniformity regarding secondary liability across the national laws of the member states, and the growing economic importance of furnishing the means to access infringing sources (without serving as the initial source of the infringing communication).

This article will first briefly review of the facts of the cases. It then will examine how the Court's reasoning results in a European law of communication to the public that reaches actors who do not originate illicit communications, but who knowingly facilitate them (I). Next, the analysis will show that the harmonized law of derivative liability can be considered the flip side of the law of non-liability for "the storage of information provided by a recipient of the service, . . . for the information stored at the request of a recipient of the service" already harmonized by art. 14 of the eCommerce directive 2000/31 (II). The article concludes with a brief postscript evoking some comparisons with U.S. copyright law.

Like the phoenix rising from its ashes, the right of communication to the public in the EU¹ now spreads wings newly widened by the Court's most recent decisions in *Brein v.*

* Thanks to Maitre Yves Gaubiac and to Professors Alain Strowel and Edouard Treppoz for their analyses of the cases. Thanks as well for research assistance to Luke Budiardjo and Nathalie Russell, both Columbia Law School class of 2018.

¹ Set out in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, art. 3, Official Journal L 167, 22/06/2001 P. 0010 – 0019.

Filmspelers (C-527/15)² and *Brein v. Ziggo* (C-610/15),³ following a series of CJEU decisions that had appeared to be clipping back the right's application. The Court's prior decisions in *Svensson* (C-466/12)⁴ (2014) and *GS Media* (C-160/15)⁵ (2016), concerning liability for hyperlinking, had imposed conditions on the right that limited its capacity to reach actors lower down the chain of internet communications relative to the initiators of those communications. In *Svensson*, a case concerning unauthorized hyperlinks directing users to the (authorized) site of the communication's origin, the Court applied a requirement that the communication reach a "new public" not contemplated by the rightholder when it authorized the initial communication. Because the Court determined that all internet users constituted the same "public," at least when the originating site did not limit access to the content, the "new public" criterion effectively excluded links to unrestricted websites from the scope of the communication-to-the-public right. In *GS Media*, which involved the provision of links to an unlawful source, the Court imposed an additional, and subjective, criterion of knowledge of the illicit character of the targeted site. In both cases, copyright scholars have criticized the Court's reasoning.⁶ Nonetheless, the latter condition in particular, however debatable, avoids a potentially oppressive application of copyright to the great majority of internet users who are unaware that the sites to which they may be supplying links are illicit.

After *Svensson* and *GS Media*, it appeared that in the case of secondary communications, the Court of Justice, by imposing a knowledge criterion, was calling into question the nature of the communication to the public right (and therefore of copyright in general). After all, proof of a violation of a "true" property right does not require the rightholder to establish that the defendant knew that he was violating an exclusive right. Now, in light of the decisions in *Filmspelers* and *Ziggo*, one may suggest that the Court was in fact gradually advancing toward a European harmonization of the law on derivative liability (i.e., liability in the second degree) for

² Case C-527/15, *Stichting Brein v. Filmspelers* (26 Apr. 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=190142&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=106260>

³ Case C-610/15, *Stichting Brein v. Ziggo BV* (14 June 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=191707&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=106100>

⁴ Case C-466/12, *Svensson v. Sverige* (13 Feb. 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=95141>

⁵ Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV* (8 Sept. 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=95141>

⁶ See, e.g., Pierre Sirinelli, Alexandra Bensamoun, Josée-Anne Benazeraf, *Le droit de communication au public*, *Revue Internationale du droit d'auteur* 207 (janvier 2017); Mattias Leistner, *Closing the Book on Hyperlinks: A Brief Outline of the CJEU's Caselaw and Proposal for European Legislative Reform* 39 *EIPR* 327 (2017); P. B. Hugenholtz et S. C. van Velze, *Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a 'New Public'*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811777 (19 July 2016); Association Littéraire et Artistique Internationale (ALAI), *New Public Report and Opinion*, <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>; ALAI, *Opinion of ALAI's Executive Committee on the Right of communication to the public; the Advocate General's Opinions in Filmspelers Case C-527/15 and Ziggo Case C-610/15*, <http://www.alai.org/en/assets/files/resolutions/170327-opinion-filmspelers-ziggo.pdf>.

violation of the right of communication to the public.⁷ These two most recent decisions have now achieved that harmonization. Moreover, harmonization was necessary given both the lack of uniformity regarding secondary liability across the national laws of the member states,⁸ and the growing economic importance of furnishing the means to access infringing sources (without serving as the initial source of the infringing communication).⁹

First, we will briefly review of the facts of the cases. We will then examine how the Court's reasoning results in a European law of communication to the public that reaches actors who do not originate illicit communications, but who knowingly facilitate them (I). Next, we will show that the harmonized law of derivative liability can be considered the flip side of the law of *non*-liability for "the storage of information provided by a recipient of the service, . . . for the information stored at the request of a recipient of the service" already harmonized by art. 14 of the eCommerce directive 2000/31 (II). We will conclude with a brief postscript evoking some comparisons with U.S. copyright law.

I. Harmonization of the law of communication to the public as applied to the facilitation of infringement

Both cases concerned facilitation of illicit communications to the public: in *Filmspeler* through the sale of a device which connected to a television screen and which was supplied with hyperlinks pointing to illicit internet streaming sites, and in *Ziggo* through the services of The Pirate Bay (TPB), a P2P BitTorrent indexation site that enabled internet users to locate audiovisual works in the hard disks of other participants in the P2P network and to make unauthorized copies.¹⁰ In both cases, the Court distinguished between an act of communication

⁷ Cf. Alain Strowel, Note on *Svensson*, A&M 2014/3-4 pages 224, 232 (raising the question of a "complete harmonization of the right of communication to the public.").

⁸ See the Conclusions of Advocate General Szpunar in *Ziggo*, point 3:

The European Commission, whose opinion appears to me to be shared by the United Kingdom of Great Britain and Northern Ireland, contends that liability for sites of this type is a matter of copyright application, which can be resolved not at the level of EU law but under the domestic legal systems of the Member States. Such an approach would, however, mean that liability, and ultimately the scope of the copyright holders' rights, would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightholders within the single market. That is why the answer to the problems raised in the present case must, in my view, be sought rather in EU law.

See also, Birgit Clark and Julia Dickenson, *Theseus and the Labyrinth? An Overview of "Communication to the Public" Under EU Copyright Law*, 39 EIPR 265, 277 (2017) (adverting to "real challenges of not having a common conception of secondary liability within the EU legal framework").

⁹ See, e.g., Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM (2016) 593 final (14/09/2016), recitals 37-39. See also, *L'Oréal v. eBay*, C-324/09 (2011) (online auctions platform bringing together buyers and sellers of counterfeit perfumes); *Google France v. Vuitton*, C-236/08 à C-238/08 (2010) (AdWords, links to sites selling infringing imitations of Vuitton bags).

¹⁰ *Ziggo* concerned a request under art. 8 of the InfoSoc Directive 2001/29 to direct an access provider to block access to The Pirate Bay website. Article 8, titled "Sanctions and remedies", provides, at paragraph 3:

Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Ziggo, as an access provider, was an intermediary within the scope of art. 8, and its services were used by The Pirate Bay, but it was necessary to establish that TPB was violating the right of communication to the public.

to the public and “[t]he mere provision of physical facilities for enabling or making a communication [which] does not in itself amount to communication within the meaning of this Directive.”¹¹ In both cases, the decisions turned on the characterization of an act of communication, all subsequent elements of a secondary communication to the public having been established: that the communication was made to (1) a “public” composed of an indeterminate but fairly large number of recipients; (2) a “new public” not taken into account by the rightowner when it initially communicated the work to the public (defendants in both cases were facilitating access to infringing locations, thus the rightowner did not envision a “public” accessing the work from those locations) and (3) defendants’ knowledge of the illicit character of the source of the communication (websites in *Filmspeler*; “sharing” files of the P2P network’s participants in *Ziggo*). Moreover, as we will see, the Court’s analysis of the act of communication emphasizes each defendants’ knowledge that it was facilitating infringement; this emphasis renders redundant the Court’s subsequent analysis of each defendants’ knowledge in connection with the “new public” criterion. This redundancy reveals that with respect to facilitation of infringements committed by third-party sources, the “new public” criterion adds nothing to the analysis and should be abandoned.

The “new public” criterion – which lacks legal basis in the international copyright treaties¹² – allowed the Court in *Svensson* to avoid the consequences that would have flowed from its determination that the act of “making available” covered by the InfoSoc Directive art. 3 does not require a completed communication, but merely the offer of access to works of authorship (points 19, 20). The “new public” criterion protected all those who supplied links (of any kind, including framing links) to a site authorized by the copyright owner, whom the Court deemed to have taken all internet users into account at the time of the first unrestricted posting of the work to the site. But, as the Court recognized in *Filmspeler*, the notion of an accounted-for public makes no sense when the source toward which the links point is illicit.¹³ Nonetheless, the risk of finding a vast number of internet users to be copyright infringers led the Court in *GS Media* (points 44-48) to seek a “fair balance” (point 44) that enabled it to engraft onto the “new public” requirement an additional criterion of knowledge that the linked-to content was infringing. By contrast, in *Filmspeler* and *Ziggo*, by transposing the knowledge criterion to the first stage of the analysis, in order to determine whether, as a result of the “deliberate character of [its] intervention” (*Ziggo*, point 26), the defendant had committed an act of communication in the first place, the Court achieved the balance sought in *GS Media*. Inquiry into defendant’s deliberate intervention allows the court to distinguish the unconscious acts of simple internet users, without requiring recourse to the increasingly complex concept of a “new public” in order to avoid undesirable consequences.

In *Filmspeler* the Court evoked the “essential role” of the person who effects an act of communication, together with that person’s intentional intervention, in making a protected work accessible.¹⁴ But “essential” does not mean “indispensable.” In fact, even if the purchasers of

¹¹ Recital 27 of Directive 2001/29.

¹² See ALAI Opinion *supra*.

¹³ See *Filmspeler* para 48: “However, the same finding cannot be deduced from those judgments failing such an authorisation.”

¹⁴ See *Filmspeler* para 31: “Amongst those criteria, the Court has emphasised, above all, the essential role played by the user. The user makes an act of communication when he intervenes, in full knowledge of the consequences of his

the Filmspeler set top box could have obtained unauthorized access to the works by other means, the knowing facilitation of access sufficed for the commission of an act of communication (as opposed to the simple furnishing of the means to make a communication). The Court emphasized that the defendant had loaded his media player with links to illicit sites “with full knowledge of the consequences of his conduct.”¹⁵ Because the pre-installed links, once activated by the multimedia player’s users, “offer its users direct access to protected works without the consent of the copyright holders,” the Court ruled that supplying the device “must be regarded as an act of communication within the meaning of Article 3(1) of Directive 2001/29.”¹⁶

As for the “new public” criterion, after citing its decision in *GS Media* (point 49), the Court simply observed (point 50): “In the present case, it is common ground that the sale of the ‘filmerspeler’ multimedia player was made in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on that player gave access to works published illegally on the internet.”¹⁷

In *Ziggo*, the Court reinforced *Filmspeler*’s lesson: those who knowingly facilitate unauthorized access to protected works play an “essential role” in their communication, and therefore themselves commit an act of communication.¹⁸ As in *Filmspeler*, the Court emphasized

action, to give access to a protected work to his customers and does so, in particular, where, *in the absence of that intervention, his customers would not, in principle, be able to enjoy the broadcast work* (see, to that effect, judgments of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraph 46, and of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, paragraph 35 and the case-law cited).” (emphasis supplied).

¹⁵ See *Filmspeler* para 41: “In the same way, it must be held that the present case does not concern a situation of the ‘mere’ provision of physical facilities for enabling or making a communication. As the Advocate General noted in paragraphs 53 and 54 of his opinion, Mr. Wullems, *with full knowledge of the consequences of his conduct*, pre-installs onto the ‘filmerspeler’ multimedia player that he markets add-ons that specifically enable purchasers to have access to protected works published — without the consent of the copyright holders of those works — on streaming websites and enable those purchasers to watch those works on their television screens (see, by analogy, judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 42). *That intervention enabling a direct link to be established between websites broadcasting counterfeit works and purchasers of the multimedia player, without which the purchasers would find it difficult to benefit from those protected works*, is quite different from the mere provision of physical facilities, referred to in recital 27 of Directive 2001/29. In that regard, it is clear from the observations presented to the Court that the streaming websites at issue in the main proceedings *are not readily identifiable by the public* and the majority of them change frequently.” (Emphasis supplied)

¹⁶ See *Filmspeler* para 42: “Consequently, it must be held that the provision of a multimedia player such as that at issue in the main proceedings enables, in view of the add-ons pre-installed on it, access via structured menus to links that those add-ons which, when activated by the remote control of that multimedia player, *offer its users direct access to protected works* without the consent of the copyright holders and must be regarded as an act of communication within the meaning of Article 3(1) of Directive 2001/29.” (Emphasis supplied)

¹⁷ In the same paragraph, the Court also observes that *Filmspeler*’s conduct justified the presumption of knowledge which, per *GS Media*, flows from the lucrative character of the link: “As was noted in paragraph 18 above, the advertising of that multimedia player specifically stated that it made it possible, in particular, to watch on a television screen, freely and easily, audiovisual material available on the internet without the consent of the copyright holders.”

¹⁸ See *Ziggo* para 36--39: “[T]he fact remains that those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, *with full knowledge of the consequences of their conduct*, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network. In this respect, as the Advocate General stated, in essence, in point 50 of his Opinion, without the aforementioned operators making such a platform available and managing it, the works *could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex*.

that TPB's administrators "intervene, with full knowledge of the consequences of their conduct, to provide access to protected works." TPB's intervention consisted of "indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network." The index "classif[ies] the works under different categories, based on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform's operators checking to ensure that a work has been placed in the appropriate category. In addition, those operators delete obsolete or faulty torrent files and actively filter some content." By classifying the works, TPB's administrators must have been aware that protected works were at issue, as the Court later pointed out.¹⁹ Without that intervention, "the works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex." We again observe that, to commit an act of communication, it suffices to facilitate an access that nonetheless could otherwise, albeit less easily, have been obtained.

As for the element of knowledge tied to the "new public" criterion, the Court reiterated the facts that led it to reject the characterization of TPB as a mere furnisher of means. In fact, TPB's administrators had been alerted that they were facilitating access to infringing content. Far from purging its index, TPB instead incited its users to make copies. Given that "a very large number of torrent files on the online sharing platform TPB relate to works published without the consent of the rightholders," TPB "could not be unaware" that its platform was providing access to infringing copies.²⁰ Curiously, although TPB was a profit-seeking venture, the Court, albeit generally observing that such a goal "is not irrelevant," (point 29) did not apply the rebuttable presumption of knowledge announced in *GS Media* (points 49 to 51) and reiterated in *Filmspeler*

The view must therefore be taken that the operators of the online sharing platform TPB, by making that platform available and managing it, *provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.*

Finally, the operators of the online sharing platform TPB cannot be considered to be making a 'mere provision' of physical facilities for enabling or making a communication, within the meaning of recital 27 of Directive 2001/29. It is clear from the order for reference that that platform indexes torrent files *in such a way that the works to which the torrent files refer may be easily located and downloaded by the users* of that sharing platform. Moreover, it is clear from the observations submitted to the Court that, in addition to a search engine, the online sharing platform TPB offers an index classifying the works under different categories, based on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform's operators checking to ensure that a work has been placed in the appropriate category. In addition, those operators delete obsolete or faulty torrent files and actively filter some content.

In the light of the foregoing, the making available and management of an online sharing platform, such as that at issue in the main proceedings, must be considered to be an act of communication for the purposes of Article 3(1) of Directive 2001/29." (Emphasis supplied)

¹⁹ See point 45, *infra*.

²⁰ See *Ziggo* para 45: "In the present case, it is apparent from the observations submitted to the Court, first, that the operators of the online sharing platform TPB were informed that this platform, which they make available to users and manage, provides access to works published without authorisation of the rightholders and, second, that the *same operators expressly display, on blogs and forums available on that platform, their purpose to make protected works available to the users, and encourage the latter to make copies of those works.* In any event, it is clear from the order for reference that the operators of the online sharing platform TPB *could not be unaware that this platform provides access to works published without the consent of the rightholders,* given that, as expressly highlighted by the referring court, *a very large number of torrent files on the online sharing platform TPB relate to works published without the consent of the rightholders.* In those circumstances, it must be held that there is communication to a 'new public' (see, to that effect, judgment of 26 April 2017, *Stichting Brein*, C-527/15, EU:C:2017:300, paragraph 50)." (Emphasis supplied)

(point 49) relative to those who furnish hyperlinks for profit-making purposes. Nonetheless, in *Ziggo*, because it was so clear that TPB was acting in full knowledge of the illicit nature of the communications that it was facilitating, there was no need to resort to a presumption.

The analyses of knowledge with respect to facilitation of the act of communication, and of knowledge respecting the “new public” criterion may differ to some extent. On the one hand, the facts that led to characterizing TPB as engaging in an act of communication (rather than simply supplying devices or services) indicated that TPB knew with specificity which works were at issue (or at least implied a level of knowledge allowing it to classify those works by category). On the other hand, in the context of the “new public” criterion, the Court stressed that TPB “could not have been unaware” of the infringing nature of the Torrent files; this statement appears to require only a general knowledge of the infringing activities of the P2P network’s participants.

The level of specificity of knowledge required to determine whether one who facilitates an act of communication herself commits such an act is important. The higher the level of specificity, the harder it will be to prove that the intermediary, including a commercial actor, engages in an act of communication. Because the question of “who commits” a copyright-implicating act comes at the outset of the analysis, there will be no inquiry into the level of knowledge required for the assessment of whether the communication was made to a “new public” if the court finds the defendant not to have committed an act of communication in the first place. For example, it may be easier to prove that the facilitator of an infringing act generally knew that the site toward which it was directing internet users contained infringing content, than to show that the facilitator knew precisely what works users would find on the site. Moreover, a requirement of specific knowledge of particular infringements invites avoidance of liability through automation, so that only the “bot” and not the person who designed the bot would “know” to which works the facilitator enables access. The Court’s statements in *Ziggo* regarding the level of knowledge are inconsistent, as we have seen. *Filmspeler*, however, supports the interpretation that a general knowledge of infringement will suffice, because the facts evoked by the Court concern the illicit character of the sites toward which the links directed the device’s users, without stating that the supplier of the device knew specifically which films the linked-to sites offered.²¹

Ziggo did not concern hyperlinking but rather the furnishing of other means to access infringing copies of works. One may therefore conclude that the Court has generalized the analysis of who commits an act of communication beyond the context of hyperlinks in order to establish harmonized norms of liability for facilitation of infringement that result in the direct liability of the facilitator for violation of the right of communication to the public. In other words, the Court has practically harmonized the “very divergent solutions” to the doctrine of derivative liability adopted by different EU member states, now ensuring that the standard applicable to a claim of facilitation of infringement of the right of communication to the public will be the same across all EU member states.²² Indeed, in the context of the facilitator of a violation of the right of communication to the public committed by the initial infringer, a requirement of knowledge

²¹ See *Filmspeler* para 16: “On that player, Mr Wullems installed an open source software, which makes it possible to play files through a user-friendly interface via structured menus, and integrated into it, without alteration, add-ons available on the internet, created by third parties, some of which specifically link to websites on which protected works are made available to internet users without the consent of the copyright holders.”

²² See the Conclusions of Advocate General Szpunar in *Ziggo*, supra, at point 3.

can clarify the “role of the user” and thus allow the judge to determine when a facilitator should itself be held liable for its own act of communication to the public. It is the facilitator’s “deliberate intervention” (*GS Media* point 50; *Ziggo*, point 26) for the purpose of making the infringing work more accessible to the public that renders the intermediary liable for an illicit communication. By contrast, when the facilitator has not taken an action “aimed directly at enabling purchasers to access copyright-protected works on the internet without the consent of right holders” (*Filmspeler*, Conclusions of Advocate General Sánchez Bordona, point 50), it has not played a “decisive role” in the illicit communication. Hence the affirmation in Advocate General Szpunar’s conclusions in *Ziggo* that “the decisive role in the communication to the public of a given work cannot be attributed to [the defendant] if it is unaware that the work has been made available illegally” (point 51). “Deliberate intervention” and “decisive role” imply an element of knowledge when liability for an act of communication to the public is based on a re-communication rather than on an initial illicit communication.²³

One might object that this analysis appears to conflate a deliberate act with an intention to promote copyright infringement. An intermediary might knowingly decide to facilitate access to a work, or to a site containing works, without necessarily knowing that the access is illicit. Nonetheless, in the case of access training on a particular work, one can assume that if the work is a well-known film or recorded musical composition, the facilitator will be able to recognize the title and realize that it identifies a protected work whose availability on the target site was not authorized.²⁴ The same analysis pertains to a site containing many protected works. By contrast, it would be more difficult to infer bad intent when the work or the targeted site do not enjoy the same celebrity as the works at issue in *Filmspeler* and *Ziggo*.

In light of this caselaw, it is appropriate to synthesize the harmonized criteria that undergird a violation of the right of communication to the public. We will distinguish criteria applicable to any communication, initial as well as by retransmission or facilitation, from criteria applicable to retransmissions or facilitations of access to an initial communication.

Criteria applicable to all communications to the public by making available

There must be an act of communication, including by making available (offering access to works): “it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity” (*Svensson* point 19).

That act of communication must be made to the public: “The concept of the ‘public’ refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people” (*Filmspeler*, point 32).

²³ The Court should in fact have been inquiring into whether there was a new *communication* (when it is made by one who did not make the initial communication), rather than whether there is a new *public*, see Berne Convention, art. 11bis; ALAI Opinion, *supra*.

²⁴ Cf. *EMI Christian Group v. MP3.com*, 844 F.3d 79, 93 (2nd Cir. 2016) (reasonable jury could find that sharing platform should have been aware that there were no authorized MP3 files either of recordings from major labels issued before 2007, or of any songs by the Beatles).

The commercial nature of the communication may be taken into account: “the profit-making nature of a communication, within the meaning of Article 3(1) of Directive 2001/29, is not irrelevant” (*Filmspeler*, point 34; *Ziggo*, point 29). Indeed, one may assume that one who seeks economic benefit from an act of communication will not limit the intended recipients to a sole circle of family and social acquaintance.

Criteria specific to the intermediaries who facilitate unauthorized access to works

The “essential,” “decisive,” or “deliberate” role of the intermediary (*Filmspeler*, point 49; *Ziggo*, point 26), “in full knowledge of the consequences of his action” – that is, knowing that it is facilitating infringement (*Filmspeler*, point 31; *Ziggo*, points 26, 34) – is what distinguishes the commission of an act of communication from the simple supplying of means. This role may be performed by one whose intervention makes works more easily accessible, even when members of the public might have obtained access by other means (*Filmspeler*, point 41; *Ziggo*, point 36).

Is the “new public” still a relevant criterion?

When an intermediary, through the same means of communication, facilitates *access to a work from a legal source to which the public has unrestricted access*, application of the “new public” criterion will preclude the characterization of the intervention as an act of communication (*Svensson*, points 24-28).

By contrast, this criterion does not apply if the intermediary employs a different technical means of communication (*GS Media*, point 37), even if the initial source of the communication is lawful (*TV Catchup*, C-607/11 (2013), point 39).

The application of the “new public” criterion in *Svensson* assumes that the source to which access is facilitated is legal (*GS Media*, point 43) or that the intermediary is not circumventing an access restriction applied by the source website (*GS Media*, point 50).

The illegality of the source does not, however, necessarily result in rejecting the “new public” criterion, but instead adds to that criterion a further consideration: the intermediary’s knowledge of the illegality of the source (*GS Media*, points 44-49). This knowledge is presumed when the intermediary acts with a profit motive (*GS Media*, point 51).

But in order for the person who facilitates access to a communication initially emanating from an illegal source to be considered to have committed an act of communication (rather than a simple furnishing of means), he must have acted “in full knowledge of the consequences of his action.” Knowledge of the illicit activity that characterizes the “new public” under *GS Media* will already have been taken into account at the first stage of the analysis, according to *Filmspeler* and *Ziggo*. Hence the doubts about the pertinence of the “new public” criterion in the case of intermediaries who furnish unauthorized access to works.

It is now appropriate to consider the relationship between the harmonized European law of the liability of facilitators of access to illicit works or sources, and the harmonized European law of the *non*-liability of facilitators of unauthorized access established by the EU eCommerce Directive 2000/31.²⁵

II. *Filmspeler* and *Ziggo*: The flip side of the coin of art. 14 of the eCommerce Directive?

While the European law of liability for facilitation of infringement by enabling access to third-party infringing communications was not harmonized before *Filmspeler* and *Ziggo*, the same is not true of the criteria for *non*-liability of certain intermediaries who facilitate access to third-party infringements. When the intermediary provides a service “that consists of the storage of information provided by a recipient of the service . . . the service provider is not liable for the information stored at the request of a recipient of the service” provided that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent. . . .²⁶

One will recognize a certain parallelism between the conditions for a violation of the right of communication to the public by facilitation, and those of the non-liability of service providers covered by the eCommerce Directive. In both cases, the lack of knowledge of the illicit activity excludes liability. But the Directive sets out only the conditions of *non*-liability; it was up to the EU member States to draw the negative inference, and to decide whether (or not) effective knowledge resulted in the liability of those who facilitate access to infringing content. The CJEU has now filled this gap by taking on the task of assessing the liability of facilitators, not only for “information society services” covered by the Directive, but also for any internet intermediary. For it is not certain that every internet actor provides a service “that consists of the storage of information provided by a recipient of the service.” The Court has ruled that an indexing service could be covered by art. 14,²⁷ but it does not follow that the provision of individual links by an actor who is not a search engine corresponds to the criteria of art. 14, particularly if the defendant itself supplied the links (rather than hosted a platform to which others posted links).

By putting the facilitator’s knowledge up front in the analysis, the Court has procedurally anticipated the criteria of the eCommerce Directive, but has also extended them to intermediaries

²⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal L 178 , 17/07/2000 P. 0001 – 0016

For a different view of the relationship between the CJEU’s recent caselaw and the eCommerce Directive, see Eleonora Rosati, THE CJEU Pirate Bay judgment and its impact on the liability of online platforms, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591 (forthcoming EIPR 2017)

²⁶ Directive 2000/31, art. 14. These conditions of non-liability do not include an obligation “actively” to seek out infringing content. On the contrary, according to art. 15, “Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

²⁷ See *Google France*, supra.

who do not qualify to invoke the Directive. For example, Filmspelers would not be an “information society service” because it was selling physical devices (set top boxes). And even if it could have been considered a service provider, the links it loaded onto the media player were not “information stored at the request of a recipient of the service,” that is, by Filmspelers’ customers, but were furnished by the service itself. Nonetheless, its liability will depend on the assessment of its level of knowledge, just as its non-liability would have depended on the same assessment if it had qualified for the immunity established by the eCommerce Directive.

There is one difference in the analyses regarding the placement of the burden of proof. Because art. 14 of the eCommerce Directive sets out an exception, the beneficiary should bear the burden of proving compliance with its conditions. By contrast, when the question of knowledge becomes part of the case in chief, the rightholder bears the burden of establishing every element of the claim, including that the defendant acted with knowledge that it was facilitating infringement. That said, the rebuttable presumption that the Court imposed on commercial actors in the context of the “new public” analysis in *GS Media* could also apply to the analysis of the deliberate intervention of the intermediary in the commission of an act of communication. In that case, profit-seeking defendants will be required to prove their lack of knowledge. As a result, commercial actors will receive the same treatment under the analysis of liability for facilitation of infringing communications as under the analysis of non-liability of “information society services” covered by the eCommerce Directive.

Given the debate in the EU over whether art. 14 of the eCommerce Directive has resulted in a “value gap” that allows service providers, such as YouTube, to benefit from the commercial value of works of authorship without paying the rightholders,²⁸ one might inquire whether the effective transposition of the non-liability criteria from art. 14 to the analysis of the reach of the right of communication to the public under art. 3 of the InfoSoc Directive will further weaken that right. But basing the liability of facilitators of infringement on the concept of knowledge derived from art. 14 could in fact increase the predictability of the analysis of that liability. Indeed, looking at the facts in *Filmspelers* and *Ziggo* in the light of art. 14 and the CJEU’s caselaw interpreting the eCommerce directive, notably in *Google France v. Vuitton*, C- 236/08 and C- 238/08 (2008), and *L’Oréal v. eBay*, C- 324/09 (2011), the same results would obtain, but with additional elements available to evaluate the defendants’ knowledge.

Google France and *L’Oréal* were trademark infringement cases involving in the first case the AdWords service, and in the second an online auction platform. Because the eCommerce Directive is transversal, the CJEU’s caselaw illuminates (non) liability for copyright infringement as well. In both cases, the courts assessed whether the service played “an active role of such a kind as to give it knowledge of, or control over, the data stored.”²⁹ The notion of “an active role” resembles the “deliberate intervention” that characterizes the commission of an act of communication by facilitation. By contrast, “if the role played by that service is neutral, in the

²⁸ See, e.g., Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM (2016) 593 final (14/09/2016), recitals 37-39; ALAI, *Resolution Value Gap*, <http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf>

²⁹ *Google France* point 120; *L’Oréal* point 113.

sense that its conduct is merely technical, automatic and passive,” that neutrality indicates “a lack of knowledge or control of the data which it stores.”³⁰ In applying these considerations to Pirate Bay and Filmspelers, it becomes clear that the contributions of these actors were far from “neutral.” For example, the Court pointed out that the administrators of the Pirate Bay “expressly display, on blogs and forums available on that platform, their purpose to make protected works available to the users, and encourage the latter to make copies of those works.”³¹

The neutrality required by the eCommerce Directive art. 14 caselaw resembles the notion of “making a mere provision of physical facilities for enabling or making a communication” that characterizes an act that will not be considered an act of communication under the caselaw on liability for facilitation of infringement of the right of communication to the public. Thus, in *Filmspelers*, the Court detailed the acts of the defendant that constituted “communications.” The device allowed “a direct link to be established between websites broadcasting counterfeit works and purchasers of the multimedia player, without which the purchasers would find it difficult to benefit from those protected works, [this] is quite different from the mere provision of physical facilities.”³² In other words, *Filmspelers* “optimized” access to infringing content; that optimization, like the promotion of unlawful access, is an act whose lack of neutrality the Court emphasized in its eCommerce Directive caselaw.³³

One should also recall that, according to art. 14, the knowledge that precludes immunity from liability is not only specific knowledge of the unlawful activity, but also “knowledge of facts or circumstances from which the infringing activity or information is apparent.” The latter type of knowledge appears to correspond to the knowledge attributed to the administrators of The Pirate Bay: given that “a very large number of torrent files on the online sharing platform TPB relate to works published without the consent of the rightholders,” they “could not be unaware”³⁴ that the files were infringing.

One might object that the symmetry between liability for facilitation of illicit communications and the Court’s interpretation of the art. 14 eCommerce Directive criteria is imperfect because the former presumes the knowledge of commercial actors, while no similar presumptions accompany art. 14. One might buttress the objection with the observation that one of the objectives of the eCommerce Directive was to protect “information society services” from liability for their users’ unlawful acts, even though many of those services operate for

³⁰ *Google France* point 114.

³¹ *Ziggo* point 45. The administrators had also “indexe[d] torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by the users of that sharing platform” with the goal of aiding users to find the files. *Id.* point 38. Cf. *L’Oréal* point 116: “Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.”

³² *Filmspelers* point 41.

³³ See *L’Oréal*, point 116, *supra*.

³⁴ *Ziggo* point 45.

profit.³⁵ But the critique is ill-founded. It overlooks the role of a rebuttable presumption of knowledge, which reverses the burden of proof and requires the commercial defendant to prove that it acted without knowledge of ensuing infringements. Moreover, because art. 14 derogates from the liability the services could otherwise incur, the services should bear the burden of conforming their conduct to the exception. To the extent there is a disparity in treatment between the showing of an infringement case-in-chief, and the showing required to claim the immunity from liability, it favors non-commercial actors, for to establish their liability for infringement of the right of communication to the public, the rightholder will need to prove their knowledge of the illicit character of the source to which they facilitate access. By contrast, had art. 14 applied, the service, whether or not for-profit, would have to prove its lack of knowledge. Because art. 14 imposes an exception, its analysis comes after the prima facie case. If at the outset the absence of a presumption of knowledge would lead a court to decline to rule that a non-commercial defendant violated the right of communication to the public, then the court will never get to the question of whether the defendant satisfied the criteria for application of the exception.

Postscript: Comparison with U.S. law on derivative liability for copyright infringement

Under U.S. copyright law, facilitation of infringement, particularly by supplying the means to violate the rights of reproduction or public performance, may engage the actor's indirect liability. A direct infringer is only the person who makes the copy or who engages in a public performance. But courts' refusal to treat acts of facilitation as direct violations of copyright do not entail the consequences that led the CJEU to characterize knowing facilitation as a direct act of communication to the public. That is because the law of derivative liability for copyright infringement has already been harmonized at the federal level; albeit based in the common law, secondary liability for copyright infringement is a matter of federal law rather than of the laws of the 50 states.

There are two principal kinds of derivative liability in U.S. copyright law: contributory infringement and vicarious liability. Both kinds are judge-made constructions built from general common-law tort principles.³⁶ Based on well-established caselaw, a contributory infringer is "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another."³⁷ Vicarious liability arises from "profiting from direct infringement while declining to exercise a right to stop or limit it."³⁸ One can observe a certain kinship with the European concept of the intermediary's "active role" in facilitating infringement. Indeed, in one of the few U.S. cases to apply contributory infringement analysis to the furnishing of hyperlinks, the court declared that "knowingly [selling] access to [and] sending hyperlinks that

³⁵ See, e.g., Directive 2000/31, recital 2.

³⁶ See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

³⁷ *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971)

³⁸ *MGM v. Grokster*, 545 U.S. 913 (2005). See also *Perfect10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007) (Google would be vicariously liable if the plaintiff copyright owners of images found through Google Image Search could prove that Google preserved "the right and ability to prevent or limit the infringing activities" of its users, and that Google derived "a direct financial benefit from these activities.").

permit others to download protected materials would plainly amount to conduct that encourages or assists [infringement].”³⁹

Liability for inducement of infringement is a variant of contributory infringement, whose elements the U.S. Supreme Court detailed in a case involving the liability of operators of P2P platforms: (i) “[e]vidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use” e.g. “aiming to satisfy a known source of demand for copyright infringement,” (ii) failing to attempt to “diminish the infringing activity,” and (iii) building a business model that is structured around infringing use.⁴⁰ In a similar case to *Ziggo*, concerning inducement liability of the operator of a BitTorrent “tracker” platform, the 9th Circuit Court of Appeals ruled that the defendant had “active[ly] encourage[ed] the uploading of [infringing] torrent files,” “acted with a purpose to cause copyright violations by the use of” its service, “took no steps to . . . diminish the infringing activity,” and ran a business model based on benefitting from infringing activity.⁴¹ One significant difference between liability for supplying the means to infringe (through traditional contributory or vicarious liability) and liability for inducement concerns the level of required knowledge. While U.S. courts have demanded a showing of specific knowledge regarding the works whose infringement the defendant facilitated,⁴² in the case of inducement, by contrast, U.S. courts have ruled that proof of intent to promote infringement sufficed to make out the violation, without requiring that the defendant knew precisely which works would be infringed.⁴³

³⁹ Pearson Educ. v. Ishayev, 963 F.Supp.2d 239 (SDNY 2013).

⁴⁰ MGM v. Grokster, supra.

⁴¹ Columbia Pictures Indus. v. Fung, 710 F.3d 1020 (9th Cir. 2013).

⁴² See, e.g., Sony Corp. Of America v. Universal City Studios, Inc., 464 U.S. 417 (1984); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2004).

⁴³ See, e.g., Grokster, supra.

There is a fairly extensive U.S. caselaw concerning non-liability under section 512(c) of the Copyright Act, the U.S. equivalent of art. 14 of the eCommerce Directive, but its examination here would exceed the space allowed for this contribution. For further analysis see, e.g., Annemarie Bridy, *Three Notice Failures in Copyright Law*, Symposium: Notice and Notice Failure in Intellectual Property Law, 96 B.U.L. Rev. 777 (2016); Donald P. Harris, *Time to Reboot? DMCA 2.0*, 47 Ariz. St. L.J. 801 (2015); Fiona Finlay-Hunt, *Aimster, Grokster, and Viacom's Vision of Knowledge in the New Digital Millennium*, 2013 Colum. Bus. L. Rev. 906 (2013); Peter Menell, *Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of Viacom v. YouTube and UMG Recordings v. Shelter Capital Partners*, <https://law.stanford.edu/publications/judicial-regulation-of-digital-copyright-windfalls/> (3 May 2012); Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act*, in Irini Stamatoudi, ed., *COPYRIGHT ENFORCEMENT IN CYBERSPACE* (Kluwer 2011) http://sr.nellco.org/columbia_pllt/9192; R. Anthony Reese, *The Relationship between the ISP Safe Harbors and the Ordinary Rules of Copyright Liability*, 32 Colum. J. L. & the Arts (2009).