

The Right of Communication to the Public in EU Copyright Law

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Journey from *Rafael Hoteles* to *Renckhoff*: Exploring the EU Right of Communication to the Public

I. Introduction

The development of the communication to the public right under European Union (EU) copyright law has been fragmentary at the legislative level by virtue of comprising several subject-matter-specific rights. There is a communication to the public right for: satellite broadcasting under the Satellite and Cable Retransmission Directive,¹ related subject-matter under the Rental and Lending Right Directive,² databases under the Database Directive,³ and copyright works under the Information Society Directive (ISD).⁴ However, the concept of ‘communication to the public’ remains undefined in these Directives. Consequently, the development of the right has been achieved through the case law of the Court of Justice of the European Union (CJEU). Nevertheless, aspects of the communication to the public right’s development are contentious and uncertain.⁵ As such, this chapter will examine the development of the communication to the public right under EU copyright law.

Section II articulates the scope of the communication to the public right. Included in this discussion is a narrative of the development of the right, with

¹ 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 [Satellite and Cable Retransmission Directive] [1993] OJ L248/15, 6.10.1993.

² 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, codified in: Directive 2006/11/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 [Rental and Lending Right Directive] [1992] OJ L346/61, 27.11.1992. The codified Directive will be referred to unless otherwise noted.

³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [Database Directive] [1996] OJ L77/20, 27.3.1996.

⁴ 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 [Information Society Directive] [2001] OJ L167/10, 22.6.2001.

⁵ Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework* (COM(2015) 626 final, 2015) 9.

particular emphasis on the CJEU's rationale for that development and the criteria required to establish infringement. As such, the relevant Directives and the case law from *Rafael Hoteles*⁶ to *Renckhoff*⁷ will be examined. Section III then addresses the legal reasoning underlying the decision-making of the CJEU with regard to the right of communication to the public. It will be highlighted that three factors primarily guide the development of the CJEU's case law, the maximal protection approach, the harmonisation agenda and the economic influence.

II. Making Sense of the EU Communication to the Public Right

The concept of 'communication to the public' under EU copyright law can be found in four different Directives. Article 2 of the Satellite and Cable Retransmission Directive provides an exclusive right of communication to the public by satellite broadcast.⁸ Article 8 of the Rental and Lending Right Directive has three subject-matter-specific rights. Performers are granted an exclusive right of communication to the public in their performances (Article 8(1)). Broadcasting organisations are afforded an exclusive right of communication to the public for the broadcasting and re-broadcasting of their broadcasts, but only where the broadcast is made accessible to the public for an entrance fee (Article 8(3)). By contrast, phonogram owners are provided with a compulsory licensing mechanism to remunerate the communication to the public of their phonograms, in lieu of an exclusive right (Article 8(2)).⁹ Article 5(d) of the Database Directive grants a right of communication, display or performance to the public. Lastly, Article 3(1) of the ISD provides an exclusive right of communication to the public, including the making available of copyright works.¹⁰ The 'making available' aspect is also extended to related subject-matter under Article 3(2).¹¹

Despite these four sources, 'communication to the public' remains undefined. Although the recitals of these Directives provide limited guidance on the scope and operation of the rights provided, the burden has fallen on the CJEU to interpret and develop the right. As a result, the right of communication to the public has been developed in a piecemeal manner that leads to concerns about its

⁶ Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECLI:EU:C:2006:764.

⁷ Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] ECLI:EU:C:2018:634.

⁸ This provision conforms with the scope of protection provided in Article 11bis of the Berne Convention for the Protection of Literary and Artistic Works 1971.

⁹ The provisions under Article 8 are based on Articles 7(1)(a), 12 and 13(d) of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 [Rome Convention].

¹⁰ Article 3(1) is based on Article 8 of the WIPO Copyright Treaty 1996.

¹¹ Article 3(2) is based on Articles 10 and 14 of the WIPO Performances and Phonograms Treaty.

coherence and, moreover, its state of harmonisation (or lack thereof). Furthermore, the lack of guidance and the complexity of the communication to the public right has resulted in numerous referrals to the CJEU from various Member States, concerning different aspects of the right. This has provided the CJEU with the opportunity to clarify the scope and operation of the right. Before highlighting the individual problems with the right, it is important to demonstrate how the right developed. The narrative will comprise discussion on the criteria of the communication to the public right, the consistency of the concept across Directives and the rationales for the development of the right.

A. The Criteria for Establishing Communication to the Public

The communication to the public right must be analysed in two phases.¹² The first phase concerns the initial interpretation of the right pre-*Svensson*,¹³ characterised by traditional analogue thinking, given that the reasoning used in the cases focused on traditional modes of broadcasting and retransmission.¹⁴ The second phase or the Internet phase began with *Svensson* and is distinguishable because of its Internet context. Post-*Svensson*, the criteria for finding infringement of the right of communication to the public underwent several significant changes. As such the movement from *Rafael Hoteles* to *Renckhoff* will be explored, with the development of the criteria for the communication to the public right central to the discussion.

(i) *The First Phase – Rafael Hoteles and the Pre-Svensson Broadcasting and Retransmission Cases*

The starting point for the communication to the public right's development must be attributed to *Rafael Hoteles*.¹⁵ This was the first time¹⁶ the CJEU

¹²The division of the two phases are not strictly chronological because there are some cases concerning traditional retransmission or reception in public interspersed with the 'making available' cases concerning the Internet.

¹³Case C-466/12 *Svensson and others v Retriever Sverige AB* [2014] ECLI:EU:C:2014:76.

¹⁴This is demonstrated in Case C-607/11 *ITV Broadcasting Ltd and others v TVCatchup Ltd* [2013] ECLI:EU:C:2013:147 where the Internet retransmission of television broadcasts was treated in a similar manner to traditional and satellite rebroadcasting.

¹⁵*Rafael Hoteles* has been described as the fundamental judgment on which the communication to the public right was constructed – F Brison and S Depreeuw, 'The right of 'communication to the public' in the European Union' in P Torremans (ed), *Research Handbook on Copyright Law*, 2nd edn (Edward Elgar Publishing Ltd, 2017) 119 and PB Hugenholtz and S Van Velze, 'Communication to a new public? Three reasons why EU copyright law can do without a "new public"' (2016) 47(7) *International Review of Intellectual Property and Competition Law (IIC)* 797, 804.

¹⁶F Rizzuto, 'The European Union law concept of communication to the public and the protection of copyright in electronic transmissions' (2012) 18(6) *Computer and Telecommunications Law Review* 179, 180.

substantively addressed the communication to the public right.¹⁷ *Rafael Hoteles* was concerned with the cable retransmission of a centrally received broadcast to the private rooms of a hotel. The question for the Court was whether cable retransmission of a broadcast amounted to an act of communication to the public under Article 3(1) of the ISD. In looking at the concept of communication to the public, the CJEU stated that the right must be given an autonomous and uniform interpretation throughout the EU. This means that the right should be interpreted independently of the laws of the Member States and should be interpreted and applied consistently across Member States.¹⁸ This reasoning is consistent with the EU's harmonisation agenda for copyright law. Additionally, the Court held that the right should be interpreted consistently with the international copyright treaties (in this case the Berne Convention)¹⁹ and be construed broadly, so as to establish a high level of protection for copyright law.²⁰ These initial guidelines set the tone for how the CJEU thought the communication to the public right should be interpreted and applied; that is, in a broad manner, but consistent with international copyright obligations and in pursuit of a harmonised approach among Member States.²¹ The viability of the broad interpretation will be discussed in Chapter three, section II.

Additional to the interpretive guidance, the CJEU in *Rafael Hoteles* provided the initial criteria for identifying an act of communication to the public. In order to establish communication to the public, there must be an act of 'communication' made to a 'public'. Furthermore, where the act is a retransmission or reception in public, there must be a 'new public'. The CJEU also noted that the profit-making nature of the communication is a relevant consideration. These criteria formed the initial approach for determining communication to the public infringement. With the exception of one addition in *ITV Broadcasting*, the initial criteria remained the same until *Svensson* and the beginning of the Internet cases that will be discussed in the second phase in section II.A.(ii).

The Court in *Rafael Hoteles* did not assess whether there was a 'communication', but instead assumed that the act of cable retransmission was an act of 'communication'.²² Despite this, a definition for 'communication' can be inferred from two aspects of the *Rafael Hoteles* decision. The first inference of a definition can be drawn from the CJEU's approach to establishing a 'new public'. It was

¹⁷ Prior to *Rafael Hoteles*, there was one other case which concerned the communication to the public right. However, that case was dismissed without any substantive discussion of the right because the Article 2 communication to the public right under the Satellite and Cable Retransmission Directive did not cover retransmissions of broadcasts to hotel rooms (only communication to the public by satellite was covered) – Case C-293/98 *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)* [2000] ECLI:EU:C:2000:66, paras 25–29.

¹⁸ *SGAE v Rafael Hoteles* [2006] para 31.

¹⁹ *ibid* para 35.

²⁰ *ibid* para 36. Also see Recital 23 of the ISD.

²¹ These interpretive guidelines have been reiterated in all the CJEU's communication to the public cases.

²² *SGAE v Rafael Hoteles* [2006] para 40.

stated that: ‘the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers.’²³ In other words, an act of communication to the public involves a knowing intervention to provide access to protected works to the ‘public’.²⁴ However, this definition is problematic because the CJEU conflated the concept of ‘communication’ with the means of establishing a ‘new public’.²⁵ The other possible definition found in *Rafael Hoteles* can be attributed to the statement: ‘for there to be a communication to the public it is sufficient that the work is made available to the public in such a way that the persons forming the public may access it.’²⁶

It was not until *FAPL v QC Leisure* that the CJEU expressly defined the term ‘communication’. In this case, the showing of a broadcasted football match was held to be an act of ‘communication’, thus bringing acts of reception in public within the scope of the communication to the public right.²⁷ However, the CJEU, in making this finding, provided two definitions for ‘communication’. It firstly stated that a ‘communication’ was ‘any transmission of the protected works, irrespective of the technical means or process used.’²⁸ It then went on to state in the next paragraph that ‘a hotel proprietor carries out an act of communication when he gives his customers access’,²⁹ thus conflating the transmission and access approaches in the retransmission context. Subsequent to *FAPL v QC Leisure*, the CJEU has alternated between the use of the access and transmission approaches in defining ‘communication’. For example, the CJEU in *Circul Globus Bucuresti* furthered the transmission approach by holding that the right of communication to the public ‘does not cover any activity which does not involve a ‘transmission’ or a ‘retransmission’ of a work.’³⁰ Then in *SCF v Marco del Corso* the CJEU reverted to

²³ *ibid* para 42.

²⁴ This wording was expressly used to define ‘communication’ in Cases C-403/08 and C-429/08 *Football Association Premier League (FAPL) and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd* [2011] ECLI:EU:C:2011:631, para 194.

²⁵ The intervention approach has been followed in: Case C-135/10 *Societa Consortile Fonografici (SCF) v Marco del Corso* [2012] ECLI:EU:C:2012:140, para 82 and Case C-162/10 *Phonographic Performance (Ireland) Ltd (PPL) v Ireland* [2012] ECLI:EU:C:2012:141, para 31.

²⁶ *SGAE v Rafael Hoteles* [2006] para 43. This approach was cited and followed in *Svensson* [2014] para 19. Given the language used, it has been cited as evidence that the CJEU intended to apply the access approach to interpret communication to the public. This will be addressed where the access approach is discussed in defining the term ‘communication’ in Chapter 3, section III.

²⁷ *FAPL v QC Leisure* [2011] paras 191–96.

²⁸ *ibid* para 193.

²⁹ *ibid* para 194.

³⁰ Case C-283/10 *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)* [2011] ECLI:EU:C:2011:772, para 40. The transmission approach was also followed in: *ITV v TVCatchup* [2013] para 23, Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s.* [2014] ECLI:EU:C:2014:110, para 25, Case C-151/15 *Portuguese Society of Authors CRL (SPA) v Ministerio Público and others* [2015] ECLI:EU:C:2015:468, para 11, Case C-325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)* [2016] ECLI:EU:C:2015:764, para 16, Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* [2016] ECLI:EU:C:2016:379, para 38 and Case C-265/16 *VCAST Ltd v RTI SpA* [2017] ECLI:EU:C:2017:913, para 42.

the ‘intervention to provide access’ approach.³¹ Therefore, it can be seen that the term ‘communication’ has been subjected to divergent definitions ranging from the narrow transmission approach to the wider intervention or access approaches. Thus, it is necessary that the concept of ‘communication’ is clarified and as such, the issue will be discussed in Chapter three, section III.

The other central criterion, ‘public’, was explored in *Rafael Hoteles*. The CJEU held that ‘the term “public” refers to an indeterminate number of potential ... viewers.’³² With this definition in mind, the CJEU went on to establish that the determination of ‘public’ includes a cumulative account of potential viewers so that the private nature of hotel rooms did not prevent the finding of a ‘public.’³³ This basic definition of ‘public’ was later expanded in *SCF v Marco del Corso* to read: ‘the term “public” ... refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons.’³⁴ In addition, to fulfilling the ‘public’ requirement, the CJEU in *Rafael Hoteles* also required that the act of cable retransmission be made to a ‘new public’, given that it involved a communication made by a ‘broadcasting organisation other than the original one’. This is because cable retransmission is not an act for simple reception; rather, it is an independent act for an audience larger than that intended by the initial broadcaster.³⁵ The ‘new public’ criterion was defined as a ‘public different from the public at which the original act of communication of the work is directed.’³⁶ In the case of *Rafael Hoteles*, there was a ‘new public’ because the customers of the hotel would not have been able to enjoy the broadcasts without the intervention of the hotel. Therefore, all acts of retransmission must be made to a ‘new public’. However, Chapter three, section VI will debate the appropriateness of the ‘new public’ criterion.

Notwithstanding the ‘new public’ criterion, the CJEU in *ITV v TVCatchup* developed an exception to the rule requiring a ‘new public’ where a retransmission is made. *ITV v TVCatchup* was the first case concerning the communication to the public right and the Internet. It involved the near simultaneous Internet retransmission of free-to-air broadcasts. However, instead of applying the ‘new public’ criterion as in the previous retransmission cases of *Rafael Hoteles*,³⁷ *Airfield v SABAM*³⁸ and *PPL v Ireland*,³⁹ the CJEU distinguished Internet

³¹ *SCF v Marco del Corso* [2012] para 82.

³² *SGAE v Rafael Hoteles* [2006] para 37 applying Case C-89/04 *Mediakabel BV v Commissariaat voor de Media* [2005] ECLI:EU:C:2005:348, para 30 and Case C-192/04 *Lagardere Active Broadcast v Societe pour la perception de la remuneration equitable (SPRE), Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* [2005] ECLI:EU:C:2005:475, para 31.

³³ *SGAE v Rafael Hoteles* [2006] paras 38 and 54.

³⁴ *SCF v Marco del Corso* [2012] para 84.

³⁵ *SGAE v Rafael Hoteles* [2006] paras 40–41.

³⁶ *ibid* para 40.

³⁷ *SGAE v Rafael Hoteles* [2006] paras 40–42.

³⁸ Cases C-431/09 and C-432/09 *Airfield NV and another v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) and Airfield NV v Agicoa Belgium BVBA* [2011] ECLI:EU:C:2011:648, paras 72–77.

³⁹ *PPL v Ireland* [2012] paras 49–51.

retransmission on the ground of being a 'specific technical means different from that of the original communication'.⁴⁰ Hence, Internet retransmission was treated as a separate act requiring fresh authorisation regardless of the fact that the retransmission contains content that is already freely available via ordinary broadcasts. Thus, *ITV v TVCatchup* made a significant addition to the initial criteria established in *Rafael Hoteles*.

Lastly, the CJEU stated that the profit-making nature of the act is a relevant consideration in establishing that there is a communication to the public, although not an essential requirement.⁴¹ However, the CJEU did not elaborate on the 'for profit' requirement. Given the preceding discussion, to establish an act of communication to the public, it is now required that there is an act of 'communication' made to a 'public'. If the act is a retransmission or subsequent communication, the retransmission must be made to a 'new public' unless the retransmission is done through a different technical means to the initial communication.⁴² If this is the case, fresh authorisation will be required because the subsequent act is treated as completely different to the original broadcast, rather than a mere retransmission.⁴³ Therefore, the unauthorised Internet retransmission of a free-to-air broadcast will require additional authorisation, separate from the permission granted concerning the initial broadcasting of the work regardless of the public reached by the Internet retransmission. By contrast, liability for an unauthorised act of satellite retransmission of a free-to-air broadcast will depend on the 'new public' criterion, because satellite broadcasting and ordinary terrestrial broadcasting are treated as the same technical means.⁴⁴ Therefore, separate authorisation will not be required if the terrestrial or satellite retransmission is made to the same public as the initial broadcast.

Regardless of the amendment introduced by *ITV v TVCatchup*, the initial criteria for the communication to the public right introduced in *Rafael Hoteles* largely remained unchanged until the dawn of the Internet cases concerning the communication to the public right, beginning with *Svensson*. Notwithstanding the developments in *Svensson* that will be discussed in the next subsection, the application of the criteria from *Rafael Hoteles* in relation to traditional broadcasting and retransmission cases remained largely the same.⁴⁵ However, it is uncertain in the aftermath of *GS Media*,⁴⁶ *Filmspelers*⁴⁷ and *Ziggo*⁴⁸ whether this will remain the case

⁴⁰ *ITV v TVCatchup* [2013] paras 26 and 39.

⁴¹ *SGAE v Rafael Hoteles* [2006] para 44.

⁴² The different technical means criterion will be analysed in part 3.5.

⁴³ See M Makeen, 'The Controversy of Simultaneous Cable Retransmission to Hotel Rooms Under International and European Copyright Laws' (2010) 57 *Journal of the Copyright Society of USA* 59, 67.

⁴⁴ *Airfield v SABAM* [2011].

⁴⁵ See: *SBS v SABAM* [2015], *PSA v Ministerio Público* [2015] and *Reha Training* [2016].

⁴⁶ Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others* [2016] ECLI:EU:C:2016:644.

⁴⁷ Case C-527/15 *Stichting Brein v Jack Frederik Wullems (also trading under the name Filmspelers)* [2017] ECLI:EU:C:2017:300.

⁴⁸ Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV* [2017] ECLI:EU:C:2017:456.

given that the two most recent retransmission cases did not substantively address the criteria of the communication to the public framework.⁴⁹

(ii) *The Second Phase – Svensson and the Internet Cases*

The communication to the public cases addressing the Internet and its accompanying technologies have constantly pushed the boundaries of the communication to the public right. Beginning with the decision in *ITV v TVCatchup*, the scope, interpretation and application of the communication to the public right has had to adapt and evolve in order to accommodate the Internet. Whereas the introduction of ‘specific technical means’ in *ITV v TVCatchup* qualified the need to prove the ‘new public’ criterion,⁵⁰ the changes required in *Svensson* and beyond affect the core of the exclusive right. While the *ITV v TVCatchup* decision was important, its facts were still rooted in the traditional concept of retransmission. By contrast, the post-*Svensson* cases concerned the making available aspect of the communication to the public right under Article 3(1) of the Information Society Directive, which had not been previously addressed by the CJEU.

The new phase of communication to the public case law that began with *Svensson* was followed by the significant cases of: *Bestwater*,⁵¹ *GS Media*, *Filmspelers*, *Ziggo*, *VCAST* and *Renckhoff*. In these cases, four significant issues were addressed: the perceived adoption of the access approach for the making available aspect, the maximal harmonisation of the communication to the public right, the operation of the ‘new public’ criterion on the Internet and the requirement of ‘for profit’ and/or ‘knowledge’.⁵² In looking at the CJEU’s decision in *Svensson* and how it was followed in *Bestwater*, *GS Media*, *Filmspelers* and *Ziggo*, it can be said that the access approach was adopted as the means by which to interpret ‘communication’ for Internet technologies and the making available aspect. Moreover, from *Ziggo* it appears that the access approach has been widened to include any act that makes sharing works less complex.⁵³ However, the recent *VCAST* decision has cast doubt on this with the use of the transmission approach in relation to the streaming of data from the cloud.

⁴⁹ Case C-641/15 *Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH* [2017] ECLI:EU:C:2017:131 and Case C-138/16 *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* [2017] ECLI:EU:C:2017:218.

⁵⁰ This is supported by the language used in *GS Media* [2016] para 37.

⁵¹ Case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch* [2014] ECLI:EU:C:2014:2315.

⁵² Peguera argued that *Svensson* opened the door to a re-conceptualisation of the communication to the public right – M Peguera, ‘Hyperlinking under the lens of the revamped right of communication to the public’ (2018) 34(5) *Computer Law & Security Review* 1099, 1100.

⁵³ *Ziggo* [2017] para 36. Also see G Dimita, ‘The WIPO right of making available’ in P Torremans (ed), *Research Handbook on Copyright Law*, 2nd edn (Edward Elgar Publishing Ltd, 2017) 160.

As for the maximal harmonisation of the right, the CJEU, in answering the fourth question in *Svensson*, concluded that the communication to the public right under Article 3(1) cannot be construed to include activities not referred to in the provision, so as to provide right holders with a wider scope of protection.⁵⁴ This effectively means that the scope of the communication to the public right is maximally harmonised so that Member States cannot create legislative differences with regards to the communication to the public right. The reason provided for this finding was to ensure the proper functioning of the internal market. However, this decision is undermined by the ever-expanding interpretation of ‘communication’ because courts, including the CJEU, have been able to widen the scope of the communication to the public right to include acts/technologies that should not come within the scope of the right. Thus, what does not constitute communication to the public is constantly shrinking.⁵⁵ This will be further discussed in Chapter three, section III.

With regard to the use of the ‘new public’ criterion on the Internet, the decision in *Svensson* exposed its shortcomings.⁵⁶ It was held that the ability to freely access the work on the Internet without the use of the hyperlink complained of meant that there was no ‘new public’.⁵⁷ Consequently, it raised the possibility that where a work is made freely accessible online, the communication to the public right will be exhausted.⁵⁸ Furthermore, the CJEU in *Svensson* did not articulate whether the holding only applied to works made freely available with authorisation. Thus, the certainty of the communication to the public right was severely undermined. Although this latter issue was addressed in *GS Media*, the subsequent cases of *Ziggo* and *Renckhoff* have exposed inconsistencies in the determination of what constitutes a ‘new public’.

A further conflict was also created between analogue and digital copyright works, where the right to communicate analogue works would not be subject to such exhaustion. To give a comparable example, the unauthorised retransmission/reception in public of a broadcasted work would amount to copyright infringement even if the initial broadcast was accessible. This is because in the absence of the act of retransmission, those users even though within the service zone of the initial broadcast, would not be able to enjoy the broadcast, but for the intervention of the re-broadcaster.⁵⁹ As such, there is no exhaustion of the

⁵⁴ *Svensson* [2014] paras 34–37.

⁵⁵ *Dimita* in *Torremans* (2017) 160.

⁵⁶ Rosén argued that *Svensson* was the trigger for the problems concerning the ‘new public’ criterion – J Rosén, ‘How Much Communication to the Public is ‘Communication to the Public?’ in I Stamatouidi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International BV, 2016) 331–32.

⁵⁷ *Svensson* [2014] paras 25–27.

⁵⁸ This was followed in *Bestwater* [2014] para 19. See Rosén in *Stamatouidi* (2016) 337, P Mezei, ‘Enter the matrix: the effects of CJEU case law on linking and streaming technologies’ (2016) 11(10) *Journal of Intellectual Property Law & Practice (JIPLP)* 778, 789 and U Furgal, ‘Ancillary right for press publishers: an alternative answer to the linking conundrum?’ (2018) 13(9) *JIPLP* 700, 703.

⁵⁹ See *SGAE v Rafael Hoteles* [2006] paras 40–42.

communication to the public right in relation to acts of broadcasting or retransmission. However, it must be noted that the use of the ‘new public’ criterion in any capacity is questionable and will be discussed in Chapter three, section VI.

Subsequent to the potential exhaustion of the communication to the public right on the Internet, the CJEU attempted to remedy the situation in *GS Media* by clarifying that only works made freely available online with the consent of the author would preclude a finding of communication to the public by virtue of having no ‘new public.’⁶⁰ Therefore, the ruling in *Svensson* and the potential for exhaustion of the communication to the public right would not apply if the defendant made the work available on the Internet without authorisation, regardless of whether the work was freely available.⁶¹ In simpler form, a ‘new public’ will arise where the right holder’s permission does not extend to the subsequent act of communication.⁶² The CJEU in *GS Media* also went a step further by introducing a more stringent *application* of the largely ignored ‘for profit’ criterion.⁶³ Prior to *GS Media*, the ‘for profit’ criterion was intermittently mentioned and, moreover, had little or no bearing on the decision-making of the CJEU.⁶⁴ The ‘for profit’ criterion was first mentioned in *Rafael Hoteles* where it was stated that the profitability of the communication was not a necessary condition for establishing an act of communication to the public.⁶⁵ However, in its next appearance, the CJEU adopted a different approach to the ‘for profit’ criterion, stating that the profit-making nature of a communication is not an irrelevant consideration.⁶⁶

The uncertainty surrounding the role of the ‘for profit’ criterion was perpetuated by the CJEU’s arbitrary use and definition of ‘for profit’. In *Marco del Corso* – the only instance in which the ‘for profit’ criterion was afforded notable use prior to *GS Media* – the CJEU held that the retransmission of radio broadcasts in a waiting room was not a profit-making activity, as it did not affect the earnings of the dentist in question.⁶⁷ Consequent to this, a finding of no communication to the public was delivered.⁶⁸ It is important to note this decision because it was the first retransmission case where the CJEU held no communication to the public and interestingly the only case where the ‘communication’ was held to be not for profit.

⁶⁰ *GS Media* [2016] paras 41–42.

⁶¹ *ibid* para 43.

⁶² Hugenholtz and Van Velze (2016) 809–10.

⁶³ Given the radical changes introduced in *GS Media*, Dimita has argued that *GS Media* effectively overruled *Svensson* and the pre-existing communication to the public case law – Dimita in Torremans (2017) 156. Likewise, Peguera described *GS Media* as a significant departure from the established communication to the public framework – Peguera (2018) 9.

⁶⁴ *Rafael Hoteles* [2006] para 44, *FAPL v QC Leisure* [2011] para 204, *SCF v Marco del Corso* [2012] paras 88 and 97–99, *PPL v Ireland* [2012] para 36, *ITV v TVCatchup* [2013] paras 42–44 and *Reha Training* [2016] paras 49 and 63–64.

⁶⁵ *Rafael Hoteles* [2006] para 44.

⁶⁶ *FAPL v QC Leisure* [2011] para 204.

⁶⁷ *SCF v Marco del Corso* [2012] para 97.

⁶⁸ *ibid* paras 99–100.

This would suggest that there was a necessary connection between ‘for profit’ and the establishment of ‘communication’ and/or ‘communication to the public’.⁶⁹

Despite the holding in *Marco del Corso*, the CJEU continued its inconsistent approach to ‘for profit’, reverting to the notion that the ‘for profit’ criterion does not conclusively determine whether there is an act of communication to the public in *ITV v TVCatchup*.⁷⁰ Subsequent to this, the CJEU in *Reha Training* made an attempt to reconcile the conflict by stating in a non-committal and fence-sitting manner that ‘for profit’ is not conclusive, but also not irrelevant.⁷¹ However, in *GS Media* the CJEU radically changed its approach by placing an increased emphasis on ‘for profit’ and moreover, linking it with the newly introduced ‘knowledge’ criterion.⁷² In *GS Media*, the CJEU held that where a person shares a hyperlink without pursuing a profit, in the absence of actual knowledge that the work being hyperlinked to is unauthorised, it is presumed that the person ‘does not know and cannot reasonably know, that the work has been published on the Internet without the consent of the copyright holder.’⁷³ By contrast, where a person shares a hyperlink to an unauthorised work for profit, it is presumed that they know or ought to have known that the hyperlink provides access to an unauthorised work.⁷⁴ In the absence of such actual or presumed knowledge, it cannot be said that the hyperlinker intervenes with full knowledge of the consequences of his actions to provide access to the work.⁷⁵ In other words, in the absence of knowledge, there is no act of ‘communication’ and consequently no communication to the public. The CJEU, by applying this logic in *GS Media*, effectively linked the determination of ‘communication’ with the ‘for profit’ and ‘knowledge’ criteria. The desirability of this annexation will be discussed in Chapter three, section VII.

More than the linking of ‘communication’ to the ‘for profit’ and ‘knowledge’ criteria, the introduction of a ‘knowledge’ criterion is questionable because primary copyright infringement has traditionally never had a knowledge requirement. Knowledge has been specifically reserved as an element of secondary liability.⁷⁶ Thus, the line between primary and secondary liability has been blurred by the CJEU.⁷⁷ Notwithstanding this, the ‘knowledge’ requirement was accepted and furthered in *Filmspelers*⁷⁸ and *Ziggo*.⁷⁹ From the structure of the judgments in

⁶⁹ *ibid* para 90.

⁷⁰ *ITV v TVCatchup* [2013] paras 42–44.

⁷¹ *Reha Training* [2016] 49.

⁷² *GS Media* [2016] paras 47–48 and 51.

⁷³ *ibid* para 47.

⁷⁴ *ibid* paras 49–51. Note, this presumption is rebuttable.

⁷⁵ *ibid* paras 47–48.

⁷⁶ Chapter 3, section VII will address the desirability of the ‘knowledge’ criterion.

⁷⁷ A Strowel, ‘Reconstructing the Reproduction and Communication to the Public Rights: How to Align Copyright with Its Fundamentals’ in PB Hugenholtz (ed), *Copyright Reconstructed: Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic and Technological and Economic Change* (Kluwer Law International BV, 2018) 239 and Peguera (2018) 2.

⁷⁸ *Filmspelers* [2017] paras 49–51.

⁷⁹ *Ziggo* [2017] paras 45–46.

GS Media, *Filmspeler* and *Ziggo*, the ‘knowledge’ criterion has, in effect, become the decisive criterion in determining whether there is an actionable communication to the public.⁸⁰ Thus, the ‘for profit’ and ‘knowledge’ criteria have not only been annexed to the determination of ‘communication’ but have become an integral aspect of the communication to the public framework.

In the aftermath of the communication to the public cases concerning the Internet, the criteria for establishing an infringement of the Article 3(1) right of communication to the public has markedly changed. The new emphasis on ‘for profit’ and the introduction of a ‘knowledge’ criterion were a significant departure from the pre-*Svensson* case law.

(iii) *Communication to the Public at a Crossroad*

With the development of the communication to the public right from *Rafael Hoteles* to *VCAST*, several notable problems have arisen, which will be addressed in Chapter three. In addition to these individual problems, there are some more holistic issues that need to be articulated, including: the impact of the post-*Svensson* cases on the overall communication to the public framework, the reconciliation of the communication to the public right across Directives and the legal reasoning underlying the CJEU’s communication to the public decisions.

B. The Current Test to Establish ‘Communication to the Public’

In the aftermath of the post-*Svensson* Internet cases, it is not certain what impact the introduction of the ‘knowledge’ criterion and the increased emphasis on ‘for profit’ will have on the traditional communication to the public right’s framework. This is because none of the post-*GS Media* retransmission or ‘reception in public’ cases discussed the issue of ‘for profit’ or ‘knowledge’. *Hettegger Hotel* was concerned with whether a cable retransmission to hotel rooms was an infringement of Article 8(3) of the Rental and Lending Right Directive, the emphasis being on whether the hotel room’s rental fee was an entrance fee.⁸¹ Similarly in *AKM*, the CJEU did not have to make a finding on whether there was an act of communication to the public, since it was accepted that there was no communication to the public.⁸² Instead, the case focused on the applicability of an exception to the communication to the public right at the domestic level.⁸³

⁸⁰ See *GS Media* [2016] para 51, *Filmspeler* [2017] paras 50–52 and *Ziggo* [2017] paras 45–47.

⁸¹ *Hettegger Hotel* [2017] paras 21–25.

⁸² *AKM* [2017] paras 28–30.

⁸³ *ibid* para 31.