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**Master's Thesis
Liability for Internet Links: EU Copyright Law Approach**

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Vilnius
2020

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	3
INTRODUCTION	4
CHAPTER I. DEFINING LINKS	7
1.1. Concept and basic functions of Hyperlinks.....	7
1.2. Types of Hyperlinks	9
CHAPTER II. LEGISLATIVE BACKGROUND.....	11
2.1. The EU law on the Liability of Hyperlinks.....	11
2.1.1. Concept of “communication to the public”. Interpretation of the concept by the CJEU.....	13
2.1.2. The CJEU rulings on Hyperlink cases.....	20
2.2. The United States’ approach to liability of Hyperlinks.....	25
2.3. Ukrainian law on the Internet Links.....	28
CHAPTER III. HYPERLINKING ISSUES WITH RESPRCT TO INTERMEDIARIES.....	33
3.1. Liability regime for Internet Intermediaries. New Copyright Directive	33
3.2. The Future of Safe Harbour provisions in the DSM	38
CONCLUSIONS AND PROPOSALS	46
LIST OF REFERENCES	49
SUMMARY	54

LIST OF ABBREVIATIONS

CJEU – The Court of Justice of the European Union;

WCT – WIPO Copyright Treaty;

HTML - Hypertext Markup Language;

DSM - Directive in the Digital Single Market;

TPB - The Pirate Bay case;

BGH - Bundesgerichtshof (Germany's Federal Court of Justice);

OCSSP - Online Content-Sharing Service Providers.

INTRODUCTION

The Online environment is developing with such a force that you simply can't ban or control it. The Internet has become one of the most transformative and fast-growing technologies. The Digital World gave rise to various concerns from the government and scholars as to should the Internet be regulated and if so, to what extent. This question is still undecided on a legislative level. Although, certain regulations of specific aspects in online environment already exist on the EU level. One such thing is Internet linking.

Hyperlinks are the essence of the Internet and thus turn to be a quite sensitive issue as well. This technique has become a very useful feature of many web sites. The main idea of hyperlink is to be an effective and simple tool to deliver information and services to its users and to the public. Yet, the act of hyperlinking to an original webpage may present an additional array of liability concerns for the publisher of the link. Since the link redirects the user to a different type of content, such as a newspaper article, picture or video the risk of liability might occur in a copyright field. Fairly often content can be published illegally on the Internet and here lies the main problem. However, according to the developed practice by the CJEU linking to unauthorised work will not be considered copyright infringement if such work is already freely available on the Internet.

The relevance of this topic can be explained by the fast changes in online environment. With more and more different techniques existing to deliver and to give access to information, it is more challenging for the legislator to regulate the liability for copyright infringements. In this case, both theory and practice in a form of case law will play an important part. The recently passed New Copyright Directive can be considered as a sort of novelty of the work, as it will study the new liability regime of online intermediaries with respect to hosting and providing access to a copyright infringing content.

Motivating factor for choosing this topic for my research was a deep interest in copyright field. Internet is a completely different environment from one that we used to see on the territory of law, the regulation of which is not the same. That brings a good opportunity to study copyright law regime on the Internet, along with approaches of other countries to a similar issue.

The aim of the research paper is to examine the liability of internet links in the European Union and to determine particular situations when the provision of hyperlink may be considered a copyright infringement, and actions that will not amount to violation of authors' rights. In the digital age, businesses, news gatherers, service providers and other Internet users provide hyperlinks to a various content for commercial or profit-making gain. In this way, it is important to be aware of all potential risks of being held liable for infringement and to take reasonable measures in order to avoid so.

As the main objectives, the present work will focus on the concept of "communication to the public". It will also investigate the key criteria of the aforementioned concept that have been developed by the wide practice of the European Court of Justice with respect to hyperlinks.

The research paper aims to perform the following tasks:

- To introduce the technique of hyperlinking and its ways of application;
- To consider the risks of potential copyright infringement based on the EU law and the practise of the CJEU, comparing this approach with foreign regimes (the USA, Ukraine);
- To study the relevant case law to discover the concept of "communication to the public" and its application by the court;
- To highlight the main cases (situations) that consist or exclude the violation of copyright;
- To examine the liability of intermediaries and figure out the changes to the "safe harbour" provisions brought by the New Copyright Directive.

For the purpose of my research, I apply logical analyses for describing the main elements of the concept of "communication to the public". Comparative method was used to for comparison of different approaches towards the regulation of hyperlinks. In order to analyse all elements of "communication to the public", as the inseparable parts of copyright liability for hyperlinking, the method of systematic analysis was applied.

The first chapter is devoted to the Internet links themselves. It defines the structure and the basic function of hyperlinks and describes the main types of the links, indicating different operating mechanism.

The central question of the second chapter is the legislative background of the hyperlinking issue on the EU level. It examines the communication to the public based on the rulings of the CJEU and summarises the outcome of the most essential hyperlinking cases. The Sub-chapters will introduce the approach of the United States and Ukraine towards Internet links.

Chapter three of my paper focuses on the specifics in Intermediaries' liability for hosting and providing access to a copyright infringing content that are committed by the third parties. It also gives an overview of the future of the "safe harbour" provisions in the newly adopted Directive in the Digital Single Market and the main changes with the previous regime.

The main sources used for this paper are the reviewed EU Directives, numerous of the CJEU case law, and the statutory law of the United States and Republic of Ukraine on the Copyrights.

CHAPTER I. DEFINING LINKS

1.1. Concept and basic functions of Hyperlinks

World Wide Web is the collection of web pages which are linked to each other directly or indirectly. Linking is the most important feature of the Internet, that allows users from any part of the world to directly refer from on website to the information, stored on another website, simply by clicking on an icon or a text, called “hyperlink”. In simple words, hyperlinks (also referred to as “link”) are connections, which make possible access from one web resource to another.¹

Indeed, without hyperlinks, it would be difficult and burdensome for users to find the necessary information among the innumerable number of websites available online. Links have not so many functions, basically just one – connecting different web pages without using the URL for every page on the Internet. The Cambridge Dictionary defines hyperlink simply as a connection that allows you to move easily between two computer documents or two pages on the Internet.²

Still, any enterprise, even smaller ones, uses the Internet and websites to increase its commercial value and gain more potential customers. For the purpose of describing and promoting the products and services, it is common for businesses to insert hyperlinks on webpages driving users to contents available in external websites.

So, how do they work on practice? To answer this question, I will go deeper into the technical aspect of Internet links in this chapter of my paper.

Hyperlink consist of an “anchor” - the thing you see on a page, which you actually click on. Most of the time, the anchor is text. But sometimes it could also be an image, button or icon. The linked page, is called the hyper reference. It is very similar to the word reference that you put in research paper when you have to make reference a source material. But this particular one is called “hyper” because you can actually follow the reference to see the document being referred to. Such hyper reference can contain various

¹ TSOUTSANIS, A. *Why Copyright and Linking can Tango*. Journal of Intellectual Property law & Practice, vol. 9, No 6, April 2014, p. 496.

² Cambridge Dictionary Online t: <https://dictionary.cambridge.org/dictionary/english/hyperlink> [reviewed on 29 September 2019]. Available a

materials in a form of graphic files, pictures, videos on the linking website, often create confusion among Internet users regarding the actual origin of the content.³

Analysing the concept of hyperlinks, we should bear in mind that it is not the same as hypertext. Both the terms hypertext and hyperlink are intertwined but they are very different. There are millions of web pages available on the internet. These pages are connected to each other. Hypertext and hyperlink are two terms related to internet and web pages. Hypertext is a text with reference to some other text that users can access quickly.⁴ Such references are called hyperlinks. A hyperlink points to another document or a specific section in the documents. In short, hypertext is hyperlinked text, and hyperlinks are hypertext links, and unlike hyperlinks, hypertext contains only hyperlinked text.

Hypertext system uses HTML (Hypertext Markup Language) in order to conceive pages to be published on the Web. HTML is a computer language giving instructions to a browser (such as Google Chrome or Microsoft Internet Explorer) in such a way that it can correctly interpret the information sent to it. The Web's system of communication is also based on two other features: HTTP (Hyper Text Transfer Protocol), thanks to which several computers can communicate with one another and seek information on a distant server, and URL (Uniform Resource Locator), which is the document's address based on the "www" model and using the domain name.⁵

Hypertext is a term that was first used by Ted Nelson in 1965, and was outlined in his book "Literary Machines" which referred to it as 'non-sequential text fragments that are linked together with hotspots called hypertext links.'⁶ As originally stated by Nelson, hypertext documents are connected together through the hyperlinks, which are embedded in the text of the hypertext document.

Thus, the function of a hyperlink is to transfer the visitor to another hypertext document such as a web page, a picture or a specific part of a web page. This function can be activated automatically or by clicking on the pointer. To be sure, not only

³ STROWEL, A., IDE, N. *Liability with Regard to Hyperlinks*. Columbia - VLA Journal of Law & the Arts, vol. 24, Issue 4, 2000-2001, p. 131.

⁴ LITHMEE. *Difference between Hypertext and Hyperlink*. PEDIAA, 2 July 2018. [reviewed on 30 September 2019]. Available at: <https://pediaa.com/difference-between-hypertext-and-hyperlink/>

⁵ Ibid., p. 103.

⁶ NELSON, T.H. *Literary Machines*. 93.1. CA: Mindful Press, 1982, p. 11.

entrepreneurs show appreciation to the role of hyperlinks, for example, a renowned commentator on copyright law Alain Strowel argues that “without hyperlinks the World Wide Web (WWW) would not be so compelling,” since hyperlinks assist users in finding relevant information within a great capacity of data, posted online, in easy and convenient way, thus their “eradication” would undermine the real value of the Internet.⁷

1.2. Types of Hyperlinks

The linking techniques may be categorized into certain common four groups: surface linking (or simple hyperlink), deep linking, framing, and in-line or embedded linking. The surface or simple link, which is the most popular hyperlink, transfers users from the web page of one site (the linking site) to the homepage of another site (the linked site), which is displayed on the user’s screen in its original form. In contrast to the simple hyperlink, a deep link, bypassing the homepage of the linked website, directly transfers users to the interior pages of that website. With the embedded type of hyperlinking a content, such as an image, a graphic, a logo, etc., from another web page (belonging to the same or another site) can be inserted in a web page without leaving the page of the linking site. Framing, as well as embedded link, displays content integrated from another website and represents it in the form of the graphic files, pictures, videos on the linking website.⁸

Hyperlinks can also be distinguished by the reference to the extent to which the origin of the linked material is visible. For instance, a surface link refers to the linked site’s homepage, while a deep link connects to an interior page of the linked site. In the case of a frame link, users are not necessarily informed of the address of the linked page, which may be another page on the same website or a page on a totally different site.⁹ While clicking on an embedded link, the user does not usually realize that the hypertext document displayed on his or her screen comes from another site.

Therefore, the main difference between these four basic types of links is that simple hyperlinks and deep links enable users to “transfer” from one website to another but framed and in-line links operate in opposite way, retrieving content from the server of

⁷ STROWEL, A., IDE, N. *Liability with Regard to Hyperlinks*. Columbia - VLA Journal of Law & the Arts, vol. 24, Issue 4, 2000-2001, p. 72.

⁸ Ibid., p. 105.

⁹ Ibid., p. 107.

another website, while the user stays on the same (linking) website (embedded links) or while the linking website is still visible (framing).¹⁰

Nevertheless, different types of links can be provided and in certain circumstances, they might be used in a way that may violate copyright, trademarks, and / or unfair competition laws.

¹⁰ TSOUTSANIS, A. *Why Copyright and Linking can Tango*. Journal of Intellectual Property law & Practice, vol. 9, No 6, April 2014, p. 497.

CHAPTER II. LEGISLATIVE BACKGROUND

2.1. The EU law on the Liability of Hyperlinks

Notwithstanding the global digital growth, the copyright aspects of linking have been subject to many controversies. On the one hand, linking continues to be an excellent example of end-user conduct in the information society because it allows use all the functions of the Internet effectively and fast. On the other hand, it is susceptible to grant access to content with a custom path even without the prior consent of the entitled parties.¹¹

These two opposite opinions have always been contradicting each other. People of IT professions or the ones who study computer science will more likely to vote that there's no violation of rights in hyperlinking. Reasoning that hyperlinking to a webpage should be no more infringement than giving a web address in paper form, as it would be shown in a newspaper article. Giving users access to a web address is like providing a library user with the location of a book already in the library. The address itself is pure information, and it is not protected by copyright or by any other intellectual property right. Tim Berners-Lee, who is also known as a creator of WWW, once said: 'A normal link is an incitement to copy the linked document in a way which infringes copyright'. This is a serious misunderstanding. The ability to refer to a document (or a person or anything else) is, in general a fundamental right of free speech to the same extent that speech is free. Making the reference with a hypertext link is more efficient but changes nothing else".¹²

Law usually operates on the principle of territoriality and is bounded to national sovereigns, while the Internet doesn't respect territorial binds. The transnational nature of the Internet, therefore, seems to make it difficult for governments to enforce their rules. Nations, however, will have good reasons to want their rules to be enforced — even online For Lawrence Lessig, who is a lawyer by profession, this will ultimately lead to a situation where “many laws rule” — where Internet services will have to adapt to various

¹¹ MEZEI, P. *Enter the Matrix: The Effects of the CJEU's Case Law on Linking and Streaming Technologies*. Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, October 2016, p. 877.

¹² BERNERS-LEE, T. *Axioms of Web Architecture - Links and Law: Myths*. April 1997. [reviewed on 02 October 2019]. Available at: <http://www.w3.org/DesignIssues/LinkMyths.html>.

local values and legislation.¹³ He points that there would be no nation that has no speech it wishes to regulate on the Internet and every nation will have something it wants to control. Those things, however, will be different, nation to nation.¹⁴

Despite different thoughts existing among scholars, lawyers or computer technicians towards whether there is a risk of infringement by providing hyperlinks, it is undoubtedly true that linking rises some concerns from unfair competition, trademark and especially copyright protection. Indeed, the fact that several notable illicit services are based on some forms of linking makes it clear that hyperlinks shall be discussed carefully.

The main point of linking in all of its forms is that the service providers do not reproduce the content accessible at the other end of the path. In practice, the infringement of the economic right of reproduction is excluded.¹⁵ Instead, the possibility of intervention into the legal category of communication to the public, as well as its subcategory known as making available to the public, may arise. In this respect, numbers of rulings have been encountered in the jurisprudence of the European Union from the past few decades. This research will mainly focus on the EU practice, comparing it to the laws of other countries on this subject, as the core question will be examined in the light of the concept of “communication to the public”.

Because hyperlinks enable users to access content residing on the Internet, the act of providing a hyperlink can be considered as a form of making works available to the public.

One of the first references to the abovementioned concept has been introduced into the international legal framework by the World Intellectual Property Organization (WIPO) in Copyright Treaty of 1996. It should be mentioned that the right of communication to the public generally has roots from the Berne Convention, which divides it into discrete (separate) rights including rights of public performance, broadcasting and recitation.¹⁶ Article 8 of the WIPO Copyright Treaty (hereinafter referred to as - WCT) brought more details to this, stating that “authors of literary and

¹³ LESSIG, L. *Code and Other Laws of Cyberspace: Version 2.0*. Basic Books, 2006.

¹⁴Ibid., p. 38.

¹⁵ MEZEI, P. *Enter the Matrix: The Effects of the CJEU's Case Law on Linking and Streaming Technologies*. Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil, October 2016, p. 900.

¹⁶ 9 September 1886. Berne Convention for the protection of Literary and Artistic Works.

artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at time individually chosen by them.”¹⁷

However, several older international treaties also deal with the concept of ‘communication to the public’, but with slightly different approach. Unlike WCT and Berne Convention, the Universal Copyright Convention, also known as Geneva Convention, gives broader interpretation of the right to the use a copyright-protected content through intangible means as a general right to communicate the work publicly, thus not dividing the concept of “communication to the public” into different rights.¹⁸

The most modern versions of this concept have been introduced by the WCT and the InfoSoc Directive. Even though the last legal act concentrates more on the related rights, the Directive recognises an exclusive right to authorise or prohibit the making available to the public and such related rights as distribution, reproduction, etc.¹⁹

It should be clarified that the above-mentioned provision refers not only to the concept of communication to the public but also determines a distinct right of making available to the public in order to cover new forms of digital transmissions of copyright-protected works, including on-demand services.²⁰

2.1.1. Concept of “communication to the public”. Interpretation of the concept by the CJEU

Before answering the question, whether we are at risk of infringement for providing a hyperlink to a content stored on a different webpage, primarily it is essential to examine the concept of “communication to the public” based on its interpretation by the Court of Justice of the European Union (hereinafter referred to as - CJEU), simultaneously studying the relevant case law on this subject.

Under the EU copyright law, the right of communication to the public is protected under the Information Society Directive. Article 3 of this document provides authors with

¹⁷ 20 December 1996. World Intellectual Property Organization. WIPO Copyright Treaty (WTC).

¹⁸ 6 September 1952. Universal Copyright Convention (Revised in Paris, July 1971).

¹⁹ European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc).

²⁰ Ibid., recital n. 25.

an exclusive right to protect against traditional means of communication to the public, such as broadcasting and rebroadcasting, cable transmission and retransmission, internet retransmission, as well as the making available of works on demand.²¹ Communication to the public right covers many popular ways in which a copyrighted work may be used or disseminated and should be understood in a broad sense covering all communication to the public not present at the place where the communication originates.²² In addition, the preamble provides that the right should cover only such acts as ‘transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.’ But, in the same time, the InfoSoc Directive states that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication.²³

Thus, the EU legislation provides quite a broad definition of communication to the public right, which means that it is up to the Member States to determine, on case-by-case basis, whether the right was infringed within the meaning of the above-mentioned provisions. Of course, the Member States are not granted a full discretion to determine such right, they must still consider the wording, context, objectives of the legal rules and moreover, the EU law must be interpreted in such a way as to be consistent with relevant International law.²⁴ Otherwise, if the Member States fail to comply with the regulation, they would have to refer to the CJEU judgments in order to properly interpret and understand the meaning of the relevant exclusive right of the copyright owner.

The purpose of the InfoSoc Directive is to harmonise the legal framework on copyright and related rights, by increasing legal certainty and while providing for a high level of protection of intellectual property.²⁵ This aim can be achieved, *inter alia*, by harmonization of the “communication to the public” right.²⁶ Therefore, the need for a uniform application of European Union law require that the terms of a provision of European Union law, which makes no express reference to the law of the Member States

²¹ Ibid., Art. 3.

²² Ibid., recital n. 23.

²³ Ibid., recital n. 25.

²⁴ European Court of Justice. 7 December 2006. Judgement *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA* C-306/05, EU: C:2006:764.

²⁵ European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), recital 4.

²⁶ Ibid., recital 23.

for the purpose of determining its meaning and scope, shall normally be given an independent and uniform interpretation throughout the European Union.²⁷

Meanwhile, violation of the right to communication to the public and copyright accordingly can be ascertained if all criteria, which were developed by the CJEU, are applicable to any communication and determined in any particular case.

To determine the right to communication, which further may lead to liability for providing a hyperlink, certain criteria must be identified in the case:

1. Act of communication to the public (making available);
2. “New public”;
3. Technical means;
4. Profit-making nature of communication

In its rich body of case law on Article 3(1) of the InfoSoc Directive, the CJEU has consistently stated that the essential requirements of Article 3(1) are an act of communication, directed to a public.

Given concept “communication to the public” is not precisely defined in the Directive, so the reliance must be placed on the decisions of the Court of Justice of the European Union. The InfoSoc gives us an understanding that this right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates, covering any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.²⁸ Consequently, the act of communication amounts to the act of making available. The following conclusion was firstly reached in *Svensson v. Retriever Sverige* case. The Court of Justice found that 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.²⁹

²⁷ European Court of Justice. 3 July 2012. Judgement *UsedSoft GmbH v. Oracle International Corp.* C-128/11, EU:C:2012:407.

²⁸ European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), recital n. 23.

²⁹ European Court of Justice. 13 February 2014. Judgement *Nils Svensson and Others v Retriever Sverige AB* C-466/12, EU:C:2014:76.

Later, the CJEU reaffirmed this interpretation in the *SGAE v. Rafael Hoteles* holding that ‘it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive that customers who have not switched on the television have not actually had access to the works.’³⁰ In this case the court also established the basic framework in which to determine infringement of the communication to the public right. It was stated in the judgement that there must be an act of communication made to a public and if the act in question is a recommunication or subsequent communication of the original communication, then it must be made to a “new public”.³¹

The interpretation of ‘public was broadly given in the *Stichting Brein* case (also known as ‘*The Pirate Ba*’ case). According to the court’s judgement the concept of the ‘public’ refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people.³²

Following the above mentioned interpretations, it may be concluded that the right of communication covers an act of transmission of the copyright protected work by wire or wireless means to the public and includes an act of “intervention” that makes the content available to the public in such a way that the persons forming that public may access the work.

The next criterion of ‘communication to the public’ is a notion of “new public”. The term ‘public’ itself was interpreted in a number of cases of the Court of Justice, where it found that the term ‘public’ relates to an indeterminate, but a fairly large number of potential viewers.³³

Except from the requirement that the copyright-protected work must be made available “to a public”, the CJEU expressly stressed, in various judgments, that in order to establish an infringement of the right of the communication to the public the work must be made available to a ‘new public’.³⁴ Broader description to this notion was given in *FA Premier*

³⁰ European Court of Justice. 7 December 2006. Judgement *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA* C-306/05, EU: C:2006:764, par. 43.

³¹ *Ibid.*, paras. 37-42.

³² European Court of Justice. 14 June 2017. Judgement *Stichting Brein v Ziggo BV* C-610/15, EU:C:2017:456.

³³ Case C-306/05, *SGAE*, para 37-38.

³⁴ European Court of Justice. 7 December 2006. Judgement *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA* C-306/05, EU: C:2006:764, para 40-43.

League case. The Court defined that in order for there to be a ‘communication to the public’ it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public that was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public.³⁵

Creating a clickable link which can redirect a user to a protected work or service constitutes an act of making available to the internet public and, as such, an act of communication to the public. The great attention to the term ‘new public’ with regard to hyperlinks was paid in *Svensson case*. Here, referring to the case law, the Court of Justice emphasised the importance of the ‘new public’ to determine the act of communication and thus, to confirm the infringement of copyright. According to the Court’s opinion, those links were not directed at a new public, since the press articles had already been freely available to the public on the original website.

The Court found that the initial communication targeted all potential Internet users as the access to the Göteborgs-Posten website was not subject to any restrictions.³⁶ Accordingly, hyperlinks did not make the articles accessible by a ‘new public’ and therefore didn’t require Retriever Sverige to obtain the journalists’ consent. The Court went on to explain that if the link allowed users to bypass restrictions designed to limit access to a protected work to, for example, a website’s subscribers, those users would be a ‘new public’ which was not taken into account by the copyright holders when they authorised the initial communication.³⁷

The key element of the decision is that the links were provided to works which had already been publicly available to all Internet users. Where the content being linked to is not freely available, for instance, it is hosted on a website requiring a subscription, the website that has provided the link would more likely be found committing communication to a new public and, therefore, liable for copyright infringement. Accordingly, the initial source with the copyrighted content has to be subject to some restrictions to prevent communication to the ‘new public’.

With regard to the communication public the technical means requirement shall also be considered. This concept was expanded by the European Court of Justice in the *ITV v TV*

³⁵ European Court of Justice. 4 October 2011. Judgement *FA Premier League Ltd v QC Leisure & Others* C-403/08, EU:C:2011:631, para 197.

³⁶ European Court of Justice. 13 February 2014. Judgement *Nils Svensson and Others v Retriever Sverige AB* C-466/12, EU:C:2014:76, para 26.

³⁷ *Ibid.*, para 31.

Catchup case. TV CatchUp was offering access to all of the free-to-air UK channels, including broadcasters' channels and all BBC channels, to any subscriber who signed up for the service on its website. In order to determine the act of 'communication' the CJEU went on to distinguish the present case from those earlier cases. It held that in previous similar cases, the Court was examining a situation in which an operator had made accessible the original broadcast containing protected works by its deliberate intervention, meaning that the original broadcast was communicated to the new public which was not considered by the authors concerned when they authorised the broadcast in question.³⁸ The CJEU also held that since there were two separate transmissions, using two technical conditions, each must be authorised individually and separately by the authors concerned. Consequently, there was no need to deal with the requirement of a new public (which is relevant only in the single transmission situation in the earlier cases).³⁹

The CJEU, hence, satisfied that TVC's actions did constitute a communication to the public of the broadcasters' copyright works and also brought another criterion to the case law with regard to 'communication' in Online environment. The Court stated that 'retransmission must be considered to be a 'communication' within the meaning of Article 3(1) of Directive 2001/29 if the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication'.⁴⁰

The last aspect of the communication to the public right relates to the profit-making nature of the communication. The Court has made it clear that the profit-making nature of the communication in question is, at least for some cases, not irrelevant the use of hyperlinks. For instance in the *Marco Del Corso case*⁴¹, the Court found that the broadcasting of phonograms to the patients, in the dental clinic, did not constitute communication to the public. Simply, the private dental practice was not of a profit-making nature because the dentist could not reasonably expect a rise in the number of patients because of that broadcast alone or increase the price of the treatment.⁴²

³⁸ European Court of Justice. 7 March 2013. Judgement *ITV Broadcasting Ltd and Others v TVCatchUp Ltd* C-607/11, EU:C:2013:147, para.38.

³⁹ *Ibid.*, para.39.

⁴⁰ *Ibid.*, para.26.

⁴¹ European Court of Justice. 15 March 2012. Judgement *Società Consortile Fonografici (SCF) v. Marco Del Corso* C-135/10, EU:C:2012:140.

⁴² *Ibid.*, para 97.

In contrast, we can look at *Rafael Hoteles*. To give some background of the case, a hotel operator distributed TV broadcasts to television sets in guests' bedrooms. The Court noted that while the mere provision of physical facilities (i.e. at TV) does not as such amount to communication, the hotel operator intervened, in full knowledge of the consequences of its actions, to give access to protected works.⁴³ Absent that intervention, the Court noted, guests would not, in principle, be able to enjoy those broadcasts. Further, the Court examined that the hotel's communication was for profit because it was an additional service which has an influence on the hotel's standing and, therefore, on the price of its rooms.⁴⁴

In spite of the fact that the CJEU generally recognises that a profit-making nature of communication is not a decisive factor for the establishment of a communication to the public within the meaning of InfoSoc Directive, it seems that some EU's national courts willingly examine this condition in linking cases.⁴⁵ Thereby, it may be concluded that the profit-making nature of communication of copyrighted works becomes essential only if it is made directly for the purpose of gaining profit by such communication.

The CJEU has also stressed the importance of considering additional aspects which are not autonomous and are interdependent, and may – in different cases – be present to widely varying degrees. In addition to the abovementioned requirements the 'deliberate intervention' shall be examined as well. In few cases it was held that the act of communication to the public may involve an 'intentional intervention', which must be authorized by the copyright holder, particularly the CJEU stated that the key question in differentiating between 'mere provision' and 'communication is whether there is an intervention by an organization, in full knowledge of the consequences of its action, to give access to the protected work to its users.⁴⁶ If so, it amounts to the act of communication.

Nonetheless, the criteria of 'deliberate intervention' doesn't apply universally to all types of Online environment. Thereby, in *The Pirate Bay case* the court concluded that the intermediary in question – the peer-to-peer file-sharing website communicates works to the public. In the process, it has influenced the definition of direct copyright infringement in EU

⁴³ European Court of Justice. 7 December 2006. Judgement *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA* C-306/05, EU: C:2006:764, para 42.

⁴⁴ *Ibid.*, para 44.

⁴⁵ GINSBURG, J.C., BUDIARDJO, A. *Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives*. Columbia Law School Scholarship Archive, 2017, p. 170.

⁴⁶ European Court of Justice. 7 December 2006. Judgement *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA* C-306/05, EU: C:2006:764, para 42; *Marco Del Corso Case*, para 82.

law and the range of actors which may be said to be engaging in it. The Pirate Bay (hereinafter referred to as - TPB) was a sharing platform that allowed its users to download a media file from multiple other users' computers simultaneously. Following the existed case law, the Court pointed on that works were, by means of TPB's website, being made available to the public. The relevant issue instead was who was actually responsible for this act: the platform operators or its users? It was confirmed during the proceeding that the work was placed on the platform not by TPB itself, but by its users. Nevertheless, the management of an online sharing platform (Indexing torrent files, classifying the works under different categories) amounts to an intervention to provide access to protected works in full knowledge of the consequences.⁴⁷ In support of this conclusion it was mentioned that, absent TPB, it would be either impossible or more difficult for the users to share the work online.

This case has led down extremely important implication to the online sharing platforms, causing some uncertainties linked to the type of knowledge required. In its judgment, the CJEU expressed no preference either way, but instead simply limited itself to making reference to a collection of evidence that seem to indicate both actual knowledge (e.g. notification of infringement) and constructive knowledge (e.g. the large number of torrent files).⁴⁸

Such wise, after studying all abovementioned criteria, it becomes obvious that this "scheme" is far from being uniform and it cannot be applied to all cases involving potential copyright infringement. Thus, it consists a number of precedents that the Court often refers to while resolving alike cases.

2.1.2. The CJEU rulings on Hyperlink cases

In this sub-chapter I will summarise the most relevant and fundamental rulings held by the CJEU in the cases involving violation or potential violation of the copyright in relation to hyperlinking, as well as some pending cases, and define similarities and differences among those cases.

In 2014, the CJEU explored the copyright aspects of hyperlinks and embedding in two essential preliminary rulings. The first decision was rendered in the *Svensson case*. To recall,

⁴⁷ European Court of Justice. 14 June 2017. Judgement *Stichting Brein v Ziggo BV* C-610/15, EU:C:2017:456, para. 47, 38.

⁴⁸ ANGELOPOULOS, C. *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*. CIPIL, University of Cambridge, 2017. [reviewed on 12 October 2019]. Available at: <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>

the facts of the case were summarised by the Court of Justice as follows: 'the applicants in the main proceedings, all journalists, wrote press articles that were published in the Göteborgs-Posten newspaper and on the Göteborgs-Posten website.'⁴⁹ Retriever Sverige operates a website that provides its clients, according to their needs, with lists of clickable Internet links to articles published by other websites. It was already known to the court that those articles were freely accessible on the Göteborgs-Posten newspaper website'.⁵⁰ According to the applicants' statements, if a client clicks on one of those links, it is not apparent to him that he has been redirected to another site in order to access the work in which he is interested. ⁵¹

The main question referred to the CJEU by the Swedish Supreme Court was whether it constitutes an infringement of the right of communication to the public if a person publishes a link on its own website in a way that a content located on another website is made available to the public.⁵² Observing all abovementioned elements of the "communication to the public" according to the InfoSoc Directive the ruling was that links do not infringe copyright as long as the material is "freely accessible" on another website. Therefore the CJEU affirmed that the provision, on a website, of clickable links to protected works available on another website constitutes an act of communication to the public⁵³, however, it was stressed that "making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a 'new public'⁵⁴. Since the content on the Göteborgs-Posten website wasn't subject to any restrictions, all the users of other sites to whom the works at issue have been communicated by means of a clickable link shall be considered as potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.⁵⁵

Consequently, based on the preliminary ruling, no authorisation by the rightholders is deemed necessary in case of hyperlinking, since it is carried out with the same technical

⁴⁹ European Court of Justice. 13 February 2014. Judgement *Nils Svensson and Others v Retriever Sverige AB* C-466/12, EU:C:2014:76.

⁵⁰Ibid., para 8.

⁵¹ Ibid.

⁵² Ibid., 13.

⁵³ Ibid., para 14.

⁵⁴ Ibid., para 30.

⁵⁵ Ibid., para 25-27.

means and at the same time does not involve the communication of such works to a new public. What means there was no copyright infringement in this case.

Shortly, the Court came up with the “precedent” that providing hyperlinks to copyright protected content to which access is restricted and which allow those access restrictions to be circumvented will be copyright infringement, and so unlawful.

Another request for preliminary ruling was rendered in the *BestWater case*. The two-minute commercial video of a German company (BestWater International GmbH) specialising in the production and sale of water filtration systems was posted on YouTube, without the company’s prior permission. Defendants argued that a competitor of the plaintiff who actually embedded the relevant YouTube video on their own website. As to watch the video, internet users needed to click on a link which then began to play it by retrieving the video from the YouTube server.⁵⁶

The question by the referring court seems to be in line with the CJEU’s previous jurisprudence. Accordingly, ‘embedding a third-party’s copyright-protected work made available to the public on a third-party’s Internet site into a person’s own website constitute a communication of the work to the public within the meaning of Article 3(1) of Directive 2001/29/EC even if the work is not being communicated to a new public and the communication is not the result of a specific technological process distinct from that of the initial communication?’⁵⁷

Finally, the court ruled that embedding a copyright-protected work on a website through framing technology cannot be considered communication to the public according to Art. 3(1) of the InfoSoc Directive, as long as the copyright protected work is not communicated to a new public nor communicated by technical means that differ from the technical means of the initial communication.⁵⁸

In this case, however, there is one key difference comparing to the facts of *Svensson* – the clip was uploaded on YouTube without the author’s consent. It is strange that the Court

⁵⁶ SCHUETZE, B. *Bestwater: CJEU embeds decision on framed content in order*. *lower Copyright Blog*, 3 November 2014. [reviewed on 12 October 2019]. Available at: <http://copyrightblog.kluweriplaw.com/2014/11/03/bestwater-cjeu-embeds-decision-on-framed-content-in-order/>

⁵⁷ European Court of Justice. 21 October 2014. Order *BestWater International GmbH v Michael Mebes and Stefan Potsch* C-348/13, EU:C:2014:2315, para 11.

⁵⁸ SCHUETZE, B. *Bestwater: CJEU embeds decision on framed content in order*. *lower Copyright Blog*, 3 November 2014. [reviewed on 12 October 2019]. Available at: <http://copyrightblog.kluweriplaw.com/2014/11/03/bestwater-cjeu-embeds-decision-on-framed-content-in-order/>

recognised, but did not confirm, the BestWater's claim that it had not authorised the clip to be uploaded on YouTube, although this fact should have been taken into account when considering 'new public'. There are reasonable doubts here, because it is difficult to imagine that the court simply considered that the illegality of the first download of the original content is completely inappropriate.

Another recent judgement regarding hyperlink was rendered by CJEU is the *GS Media* case, which actually involved unauthorised content.

GS Media runs a website on which it had posted a link that referred users to unpublished nude photos of a Dutch celebrity on another website. The publisher of Playboy, who owned the rights to those pictures, sued for copyright infringement, claiming that GS Media had made a communication to the public of the pictures within the meaning of Article 3(1) by posting the links on its website.⁵⁹ The Question referred to the CJEU was whether and in what possible circumstances, the fact of posting a hyperlink to protected works on a webpage, freely accessible on another website, without the consent of the copyright holder, constitutes a "communication to the public" within the meaning of Article 3(1) of the Directive?⁶⁰

The court found there is such a communication if the person posting a hyperlink knew or ought to have known that the work was unlawfully publicised.⁶¹ This knowledge is presumed if the person posting the link does it for financial gain.⁶² Rendering the decision in the abovementioned case, the CJEU interpreted *Svensson* as intending to refer only to the posting of hyperlinks to works which had been made freely available on another website with the consent of the copyright holder. Here, the pictures had been leaked without the photographer or Sonoma's consent.

This case is important for global publishers because the court also came up with of the presumption of knowledge that now applies to commercial websites. If no profit is pursued, the CJEU held, it is necessary to take into account that such a person does not know and

⁵⁹ European Court of Justice. 08 September 2016. *Judgement GS Media BV v Sanoma Media Netherlands BV and Others C-160/15*, EU:C:2016:644.

⁶⁰ *Ibid.*, para 25.

⁶¹ *Ibid.*, 49.

⁶² *Ibid.*, para 55.

cannot reasonably know that the work was initially posted without the copyright holder's consent, unless evidence exists to the contrary.⁶³

Nevertheless, where the hyperlink is provided for making profit, it can be expected that the person who posted such a link carries out the necessary measures to ensure the work was not illegally published in the first place. One way or another, providing a hyperlink with a full knowledge of the protected nature of the work and the possible lack of consent to publication by the copyright holder, makes it a "communication to the public" within the meaning of Article 3(1) of the InfoSoc Directive.⁶⁴

Notwithstanding the certain uncertainty created by previous rulings of the Court of Justice of the European Union, it is possible to summarise a few particular situations that may lead to a copyright infringement caused by hyperlinking and which are not considered as violation of those rights:

- providing hyperlinks to copyright content to which access is restricted and which allows those access restrictions to be circumvented will be considered a copyright infringement (*Svensson case*). For instance, where the content is on a webpage with subscription, providing a hyperlink which allows non-subscribers to access the same content will be a violation of copyright;
- making a hyperlink to freely available copyright content posted on the Internet with the copyright owner's consent will never be copyright infringement and so can be done freely (*Svensson, Bestwater*);
- linking to unauthorised content that is available elsewhere legally will not consist a copyright infringement (*Svensson, Bestwater*);
- providing hyperlinks to a content freely posted on the Internet without the copyright owner's consent will amount to copyright infringement where the hyperlink is provided "in pursuit of financial gain". This is unless the hyperlink provider can show that he had no knowledge about the fact that linked to content was illegally published (*GS media*).

⁶³ Ibid., para 47-49.

⁶⁴ Ibid., para 51.

- However, there will be no copyright infringement if the hyperlink is not provided “for financial gain” unless the hyperlink provider knew or ought reasonably to have known that the linked to content was illegally published (*GS media*).

These rulings are beneficial for copyright owners. However, anyone providing hyperlinks in business or with the profit-making nature needs to keep in mind the risk of liability for copyright infringement. To minimise such risk, it is reasonable for hyperlink providers to take practical measures to establish that the content they are linking to has been made available with the prior consent of the copyright holder.

2.2. The United States’ approach to liability of Hyperlinks

Looking into the legislation and courts’ practice of various countries you may find different solutions to similar questions. In this section, I will make a comparative analysis on the most relevant aspects concerning the liability of hyperlinks in the European Union and in the United States of America.

To start with the statutory basis, in the United States, rather than a ‘communication to the public,’ Section 106 of the Copyright Act (hereinafter referred to as – “Act”) grants copyright holders six other rights, including public performance, public display, reproduction, and distribution.⁶⁵ Section 101 of the Act defines public performance right as ‘the right to transmit or otherwise communicate a performance ... of the work ... to the public ... whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times.’⁶⁶

The statutory wording is neutral towards defining all means of direct and secondary communications of performances or displays of works. Under U.S. case law on hyperlinking, however, the mere provision of a link—a connection between the source of the material and the viewer—doesn’t itself result in a direct infringement claim.

In order to govern the treatment of hyperlinks under the Copyright Act the U.S case law came up with the so called “server test”. The Court of Appeals for the Ninth Circuit, while deciding on the *Perfect 10 v. Amazon case* in 2007, adopted the special test and several U.S. courts since then have followed it. Under the “server test” the owner of a computer that does not store and serve electronic information to a user is not displaying (or distributing)

⁶⁵ The United States Code. Title 17 Copyright Act. US Copyright Office, 1976, § 106.

⁶⁶ *Ibid.*, § 101.

that information, even if such owner in-line links to or frames the electronic information.⁶⁷ Therefore, only a server that actually stored the photographs and served that electronic information directly to the user (‘i.e., physically sending ones and zeroes over the Internet to the user’s browser’) could infringe the copyright holder’s rights.⁶⁸

In *Perfect 10 v. Amazon*, a copyright holder sued Google for copyright infringement, claiming that Google had infringed its copyrighted images by storing “thumbnail” copies of those images on Google servers, which were then presented to Google Image Search users in a list of search results, and presenting Google Image Search users with full-size versions of the images when those users clicked on a thumbnail image presented in the search results.⁶⁹ Google on its side argued that the creation of thumbnail images allowing its users to easily search for images constituted fair use.

On appeal, the Ninth Circuit upheld the district court's decision that the hyperlinks were not infringing on Perfect 10's copyright. The court also confirmed that including an in-line link is not the same as hosting the material itself. So in the case of framing, while it may ‘appear’ that Google was hosting infringing material, it was only hosting a link to the material which the browser interpreted should appear in a certain way.⁷⁰

The Perfect 10 basically precluded the argument that, under U.S. law, the provision of a link could constitute an act of direct copyright infringement. The Ninth Circuit’s reasoning in this case was relied on to ban direct infringement claims for instances of inline linking and framing. U.S. courts instead characterize the provision of hyperlinks of any form as the facilitation of a user’s access to infringing works, which “raises only secondary liability issues.”⁷¹

There was one recent case pending before the U.S. Court of Appeals for the Second Circuit, where it was rejected to apply for the ‘server test’ for copyright infringement. Such refusal was made in the *Goldman v. Breitbart News Network, LLC case*. The case involves a

⁶⁷ United States Court of Appeals for the Ninth Circuit. 15 November 2006, Judgement *Perfect 10 v. Amazon case* (amended 3 December 2007) No. 06-55877. LEXIS 42341, 416 F. Supp. 2d 828, 843–45.

⁶⁸ GINSBURG, J.C., BUDIARDJO, A. *Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives*. Columbia Law School Scholarship Archive, 2017, p 177.

⁶⁹ United States Court of Appeals for the Ninth Circuit. 15 November 2006, Judgement *Perfect 10 v. Amazon case* (amended 3 December 2007) No. 06-55877. LEXIS 42341, 508 F.3d at 1155–56.

⁷⁰ SCHULTS, J. *P10 v. Google: Public Interests Prevails in Digital Copyright Showdown*. Electronic Frontier Foundation: Deeplinks Blog, 2007. [reviewed on 26 October 2019]. Available at: <https://www.eff.org/deeplinks/2007/05/p10-v-google-public-interest-prevails-digital-copyright-showdown>.

⁷¹ *Perfect 10 v. Amazon*, 508 F.3d at 1161.

claim of copyright infringement by a photographer Justin Goldman who had taken a picture of famous football players for the New England Patriots and then uploaded the photos to the photographer's Snapchat story. The photo went viral, spreading on various social media platforms, including Twitter. Eventually, the tweets containing the image was used by the local news publishers and media websites, that wrote a articles, embedding the tweets containing the photo of the football players.⁷² The key point here is that none of the defendant websites copied or stored the photo on their own servers, but just made the content with a photo visible using the Twitter's embed tool.

The defendants argued, that, under the server test, they could not be held liable for infringement for images stored on a third-party's server. The court, however, disagreed and rejected the application of the server Test, stating that the Ninth Circuit's decision in *Perfect 10* involved connections between three parties — end users, third-party servers hosting copyrighted material, and search engines that did not themselves host copyrighted material but that linked end users to the third-party servers that did host copyrighted material — and the “server test” was a test to distinguish between the hosting third-party servers and the non-hosting search engines.⁷³

In the end, the court declined defendants' request to apply the server test on two ground. First, the court saw nothing in either the text or legislative history of the Copyright Act suggesting that physical possession of an image is a necessary element to its display for purposes of the Act.⁷⁴ Second, the factual distinctions from *Perfect 10* judgment relied upon by the plaintiff includes the fact that in the present set of facts the user took no action to 'display the image' and hence the assistance provided by the search engines such as Google, whereby the user navigates from webpage to webpage,⁷⁵ is not the same as opening up a favourite website to find a full image awaiting the user, regardless of whether he or she asked for it, looked for it or clicked on it.

Based on that, the Ninth Circuit appears to continue following the Server Test while the law in the Second Circuit is still uncertain whether to apply this test to every similar case pending before the court.

⁷² United States Court of Appeals for the Ninth Circuit. 15 February 2018. Judgement *Goldman v. Breitbart News Network, LLC* Case No.17-CV-03144.

⁷³ *Ibid.*, p.23.

⁷⁴ *Ibid.*, p.20.

⁷⁵ *Ibid.*, p.23.

As a result, it seems the same concerns of knowledge, incentive, and intent are in the background of both the U.S. and EU approaches, although they result in different decisions. Comparative analysis of two different legal systems makes it obvious that posting a hyperlink is more likely to result in an infringement claim in the EU, whilst it would not in the USA considering similar facts. The US approach bases on the fact that there can be no claims for using hyperlinks because hyperlinking does not itself involve a violation of the Copyright Act, since no copying is involved, and the user of the link is automatically transferred to the particular genuine web page of the original author.

2.3. Ukrainian law on the Internet Links

Being a Ukrainian I would like to make a short comparative analyse of the legislation and approaches towards copyright in liability of hyperlinks.

It is worth mentioning that liability for the violation of Copyrights is provided for in a various legislative acts. For instance, the Code of Administrative Offenses contains norms on the following copyright infringement in the field of copyright: illegal use of copyrighted works; illegal distribution of copies of audiovisual works, phonograms, videograms, computer programs, databases; violations of the terms and conditions governing the termination of copyright and / or related rights infringements using the Internet; provision of deliberately misleading information in applications for the termination of copyright and (or) related rights made using the Internet.⁷⁶ In turn, the Criminal Code of Ukraine provides for criminal penalties for infringement of copyright and related rights, where such actions caused a significant pecuniary loss.⁷⁷

Copyright lawyer in Ukraine hasn't been a popular specialisation in a legal field until recent eight or ten years. The regulatory definition to the term "hyperlink" in the Ukrainian legislation has emerged relatively recently, when the Parliament passed the law improving online copyright protection in 2017. Article 1 of the Law of Ukraine "On Copyright and Related rights" was added with the provision defining the Hyperlink as

⁷⁶ Code of Administrative Offences of Republic of Ukraine. *Vidomosti Verkhovnoyi Rady Ukrayiny (VVR)*, 7 December 1984, № 8073-X.

⁷⁷ Criminal Code of Republic of Ukraine. *Vidomosti Verkhovnoyi Rady (VVR)*, 01 September 2001, No 25-26, Art. 176.

“an Internet record formalized in accordance with the address of the website or a part of the website (webpage, data, etc.).”⁷⁸

In order to answer the question whether the act of providing hyperlink constitutes the infringement of copyright under the Ukrainian law we shall figure out if it is considered as “the use of work” and if it means communication to the public⁷⁹, as we have proceed in situation with the EU.

If we refer back to the WIPO Copyright Treaty, which was joined was by Ukraine in 2001, it states that ”authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”.⁸⁰

The Law “On Copyright and Related Rights” has a provision similar to this one, stating that “the exclusive right of an author (or other copyright holder) to allow or prohibit the use of a work by other persons shall entitle him to allow or prohibit... general notification of the public of his works in such a manner that its representatives can access the works at any place and at any time at their own discretion”.⁸¹ The Resolution of the Plenum of the Supreme Court of Ukraine explains that publication of work in the Internet, in a form accessible to the public is considered as reproduction of work.⁸² Thereby, if we again refer to the Copyright Law, “reproduction” means “manufacturing of one or more specimens of a work, videogram, phonogram in any material form, as well as recording thereof for temporary or permanent storage in electronic (including digital), optical or other computer-readable form”.⁸³ At this point we can make a short conclusion that publication of work in the Internet dose constitute both communication to the public and reproduction of work, and though such actions

⁷⁸ Law of Ukraine Republic “On Copyright and Related rights”. *Vidomosti Verkhovnoyi Rady Ukrayiny (VVR)*, 1994, No. 13, p. 64, 23 February1993, №3792-XII.

⁷⁹ ZEROV, K. *Hyperlinks in the system of regulation and copyright protection to works posted on the Internet*. Theory and Practice of Intellectual Property, №4, 20156 ISSN 2308-0361, p.30

⁸⁰ 20 December 1996. World Intellectual Property Organization. WIPO Copyright Treaty (WTC), Art.8.

⁸¹ Law of Ukraine Republic “On Copyright and Related rights”. *Vidomosti Verkhovnoyi Rady Ukrayiny (VVR)*, 1994, No. 13, p. 64, 23 February1993, №3792-XII, Art.15 (3).

⁸² Resolution of the Plenum of the Supreme Court of Ukraine, №12, 17 October 2012, p.46.

⁸³ Law of Ukraine Republic “On Copyright and Related rights”. *Vidomosti Verkhovnoyi Rady Ukrayiny (VVR)*, 1994, No. 13, p. 64, 23 February1993, №3792-XII, Art.1

require an authorization from the author (or the person holding the copyrights to a particular work).

However, in the literature you can find an opposite opinion. From the technical point of view, these technologies do not create a copy or a derivative work, but only send it to an existing one, that only make it easier to gain access to it and they are not considered themselves subject to legal protection, although they include references to a copyrighted work.⁸⁴

Ukrainian case law has not developed a unified approach to the use of works on the Internet yet. Unified Register of Court Decisions of Ukraine consist very few cases on violation of copyrights and related rights. And it is reasonable, since it is much more effective to ask for a compensation as a mechanism of protection your rights, instead of asking for damages. Usually people claim for one-time compensation. After all, in order to obtain the compensation, it is enough just to prove the fact of the violation of copyrights, it is not required to prove damages suffered by the plaintiff as a result of infringement of copyright and (or) related rights as well as to calculate the proceeds received by the defendant from the use of counterfeit copies of such work.

The case law on the issue is not that significant and demonstrative mainly because of the fact that copyright holders chose not to go to the court for protection of their rights. Initiating court proceedings or submitting complaints to law enforcement bodies tend to make the process of combating online infringement unnecessarily complicated, long and costly. Thus, they prefer to deal with this issue by written complaints.

Previously, Ukrainian legislation did not provide for any specific procedures on dealing with online infringement. Typically, copyright holders used to apply in writing to the infringing parties or to the website owners, if they have found information potentially violating their rights, to terminate the copyright infringement. However, such written appeals were largely unsuccessful and the rightholders were forced to go to court. To date, a relatively new way of copyright protection has been introduced for those cases where the infringement occurs using the Internet. As a matter of fact, these are the same

⁸⁴ ZEROV, K. *Hyperlinks in the system of regulation and copyright protection to works posted on the Internet*. Theory and Practice of Intellectual Property, №4, 2015 ISSN 2308-0361, p.30.

requirements of the rightholders for termination of the infringement, but the form of the application, the procedure of submission and consideration are now clearly regulated.

The situation changed in April 2017 when the new Law “On State Support of Cinematography” entered into force, amending the Law “On Copyright and Related Rights”. According to the new law, copyright owners can combat online copyright infringement by directly addressing website or webpage owners and/or Internet service providers, who, in turn, have to block the infringing material related to the use of certain works protected by copyright law, namely audiovisual and music works, computer programs, videograms, phonograms and broadcast programs.⁸⁵ The written complaint shall be sent to owner of the webpage, along with its copy to the service provider that is responsible for hosting the relevant webpage.

The complaint mentioned in the act shall contain: applicant’s personal and contact information; name and a type of work towards which copyrights were violated; substantiated proves that the applicant owns copyrights to this work; hyperlink to the digital content hosted or otherwise used on a webpage.⁸⁶

The owner of the infringing webpage has twenty-four hours, after receiving the abovementioned complaint, to remove the content from his Internet source or send a denial of claim and notify the service provider about such. The key amendment that was introduced by this legislation the responsibility of the website owner that he can face for the ignorance of the complaint. Before this provision copyright holders’ complaint could have easily been left unresolved, however, in a view of Article 52-1 of the Law “On State Support of Cinematography”, consideration of the written complaint is binding, and the applicant shall receive the response, even if such complaint is refused to be satisfied by the owner of the webpage.

The new Law plays an important part for improving Ukraine’s position in the Special 301 Report, that provides a list of countries where an inadequate intellectual property protection laws constitute trade barriers to U.S. companies and products. The report says that many Ukrainian website operators with knowledge of infringing material

⁸⁵ Law of Ukraine Republic “On State Support of Cinematography”. *Vidomosti Verkhovnoyi Rady Ukrayiny (VVR)*, 2017, №20, p.240. 26 April 2017, №1977-VIII.

⁸⁶ *Ibid.*, Art 52-1.

on their sites do not respond to notice and takedown requests.⁸⁷ This report, though, admits the signing of the aforesaid law as a significant step to address the problem of online piracy, which, among other things, establishes criminal penalties for illegal camrecording and clarifies the availability of penalties for online piracy.⁸⁸

It is obvious that Ukrainian practice is drastically different with respect to hyperlinking issues, comparing to other countries. Even though providing an active link to a content from the other website may amount to copyright infringement from the legal point of view, and even being aware of the absolutely legitimate right to claim protection of their exclusive rights through the court, copyright owners doesn't seem to use it. One of the reasons for that might be the pricing and time consuming factor of court proceedings. People doesn't want to get involved in litigation and in the end spend more money than they can obtain for compensation of damages after winning the case.

Considering this fact, it is still unfortunate to admit an apparent failure of Ukraine to implement an effective system to combat copyright infringements in online environment, at least at this stage.

Looking at the experience of other countries in the field of protection of copyrights, there is no doubt that Ukraine needs strengthened IP protections to meet its obligations to the European Union under the Agreement on Deep and Comprehensive Free Trade Area, which was signed on 27 June 2014 as part of the larger Association Agreement between the EU and Ukraine. And like many other developing countries Ukraine has some problems with enforcement of the intellectual property rights, especially when it comes to the swiftly changing digital environment and the Internet as its driving force.

⁸⁷ The United States 2017 Special 301 Report. Office of the United States Trade Representative, [reviewed on 05 November 2019]. Available at: <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>.

⁸⁸ Ibid., p.50.

CHAPTER III. HYPERLINKING ISSUES WITH RESPECT TO INTERMEDIARIES

3.1. Liability regime for Internet Intermediaries. New Copyright Directive

Since the drastic spread of online platforms, press publishers have been experiencing significant declines in revenues and circulation. Research shows that fewer and fewer people read print newspapers, and young people who once could be expected to become newspaper readers as they matured, long ago stopped making that transition.⁸⁹

In today's digital area much of the news are accessed through various online platforms. Traditionally, the news is created by press publishers, however, nowadays they are communicated via online platforms serving as intermediaries by aggregating and producing excerpts or allowing people to share links, often with images and headlines or excerpts from such articles. These platforms often satisfy readers' need for information without readers getting to the webpage of the publisher, without, therefore, the publisher being able to monetise the attention of those readers.⁹⁰ Here we have a similar issue, arising with respect to copyrights and liability for online service providers for infringement carried out by their users. In this chapter I will focus on the rights of intermediaries and compatibility of the E-Commerce Directive with the current regime brought by the New Copyright Directive.

For the past twenty years liability of online intermediaries for infringing content of their users has been regulated by the Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (hereinafter referred to as - E-Commerce Directive).⁹¹ The Directive aims to ensure free movement of information society services among Member States, achieving this goal in two ways. First, by removing legal obstacles hampering the development of electronic commerce within the internal market. At the same time, it also aims to enhance legal certainty ensuring consumer confidence towards electronic commerce. The Directive identifies the development of electronic commerce as a crucial factor for economic

⁸⁹ BIRD, E. *The Future of Journalism in the Digital Environment*. 10(3) Journalism, 2009. p. 293.

⁹⁰ MICOVA, S, B., HEMPEL, F., JACQUES, S. *Protecting Europe's content production from US giants*. Journal of Media Law, Vol.10, 11 March 2019. p. 227.

⁹¹ European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

growth and innovation by European companies, which would in turn enhance the competitiveness of European industries.⁹²

E-Commerce Directive has also provided the so-called “safe harbour” provision for service providers, exempting them from liability for illegal content published by the third party. Under the Article 15 Member States shall not impose a general obligation on providers to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.⁹³

The liability regime included two main concerns of EU policy makers that were prevalent for the moment when the Directive was drafted. On the one hand, there was the concern that if intermediaries were to be held liable for third party content on similar grounds as ‘publishers,’ this could dissuade service providers from entering the market.⁹⁴ On the other hand, the European Commission recognized the role that online intermediaries could play in limiting illegal online content and, through that, improve public trust and confidence in the Internet as a safe space for economic activity.⁹⁵

The Directive provides liability exemptions for three groups of Internet intermediaries, depending on the type of service they provide: mere conduit, caching, or hosting. In order to benefit from the exemptions, providers of such services have to comply with specific conditions for each group.

In cases of ‘mere conduit’ service provider is not liable for the information transmitted by a recipient on the following conditions:

- a) provider doesn’t initiate the transmission;
- b) does not select the receiver of the transmission; and
- c) does not select or modify the information contained in the transmission.⁹⁶

⁹² Ibid., recital 2.

⁹³ Ibid., Art.15.

⁹⁴ OECD. *The Role of Internet Intermediaries In Advancing Public Policy Objectives*, Part II, 22 June 2011, p. 12.

⁹⁵ Ibid.

⁹⁶ 8 June 2000. European Parliament and Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Art. 12.

As to ‘caching’, the service provider is not liable for the automatic, intermediate and temporary storage of that information, on condition that:

- a) the provider does not modify the information;
- b) the provider complies with conditions on access to the information;
- c) the provider complies with rules regarding the updating of the information;
- d) the provider does not interfere with the lawful use of technology to obtain data on the use of the information; and
- e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.⁹⁷

According to article 14(1), a hosting service provider shall not be liable for the information stored on the condition that:

- a) The provider is not aware of the facts or circumstances from which the illegal activity or information is apparent – with regard to civil claims for damages, and he does not have actual knowledge of the illegal activity or information – with regard to other claims; or
- b) The provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.⁹⁸

The last requirement for immunity in this Article is also known as “notice and take down” mechanism. Notice and take down (NTD) is a mechanism where an Internet intermediary is called upon directly by a private entity (individual, company, rights holders’ organization, etc.) through a notice to remove or disable access to information due to its illegal or infringing character.⁹⁹ The online service provider may be obliged to

⁹⁷ Ibid., Art 13.

⁹⁸ Ibid., Art.14.

⁹⁹ KUCZERAWY, A. *EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU Intermediary Liability Regime*. Fundamental Rights Protection Online: The Future Regulation of Intermediaries, 2019. p.5.

take down of its own accord recurring user-posted links to infringing sources, ensuring that it doesn't host any unauthorised content.

The Intermediary is entitled to respond to the rightholder's claim but, generally, is not obliged to search for infringing content or activities on his own. Following the "notice and takedown regime", which has operated until now, a considerable burden is borne by rights holders. They themselves must search for, locate, and notify platforms about instances of infringement. This situation reflects another provision which is crucial for the limited liability regime for third party content. Article 15 of the same Directive states that Member States may not impose on providers of intermediary services (i.e. mere conduit, caching or hosting) a general obligation to monitor information they transmit or store. The same provision provides that they cannot introduce a general obligation to actively look for facts or circumstances indicating illegal activity.¹⁰⁰

There is a certain rationale behind the prohibition of general monitoring of content. Indeed, Indeed, intermediary actively seeking illegal activities might no longer be considered neutral and passive in nature. Moreover, a general monitoring obligation could lead to censorship and consequently have a negative impact on freedom of expression.¹⁰¹ Even though the Member States are not allowed to introduce any regulation in their legislation that would require intermediaries to monitor the information they store or transmit, it doesn't mean that the service providers cannot take up such activities on their own initiative. Most service providers in the EU do perform certain monitoring activities in order to maintain a "civilized" environment on their service and to keep it safe from potential attacks or other vulnerabilities.

Altogether the "safe harbour" provisions delivered by the E-Commerce Directive meant that Internet intermediaries, performing mere conduit, caching and hosting can exempt from liability for third parties' unlawful conduct as long as they are not involved with the information transmitted, or, in the case of hosting services, do not have

¹⁰⁰ 8 June 2000. European Parliament and Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Art. 15.

¹⁰¹ KUCZERAWY, A. *EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU Intermediary Liability Regime*. Fundamental Rights Protection Online: The Future Regulation of Intermediaries, 2019. p. 5.

knowledge or awareness of the illegal activities and, if acquired, promptly act to stop them.

It is beyond doubt that this regime has some considerable benefits for both intermediaries and copyright holders. It is less problematic to detect and remove an instance of straight piracy than to detect a transformative use which might benefit from a fair dealing exception, such as a parody or review. The law is also balanced to require that rights holders consider exceptions and limitations to copyright before issuing a takedown request. Therefore, users who feel that their use is ‘fair’ may issue a counter-notice, although empirical research shows this feature has been under-used.¹⁰²

The ‘safe harbour’ provision became a key argument in a famous *Google France case*,¹⁰³ bringing victory to the world known intermediary. The conflict arose between the French group Louis Vuitton Malletier SA (LV) as claimant and Google Inc. and its French subsidiary Google France SARL (Google) as defendant. In 2003, Vuitton detected that if internet users typed his trademark terms into Google’s search engine, they would be directed to websites selling imitations of Vuitton’s products, under the heading of ‘sponsored links’. Thus, Vuitton brought a proceeding against Google, attempting to ascertain that it had infringed Vuitton's trademarks.

This decision was widely considered a victory for Google. With regard to the responsibility of key words advertisers, the ECJ stated that a trademark owner might not oppose the use of a sign identical with the mark unless such a use causes detriment to any of the functions of the mark.¹⁰⁴ Although it may not be precluded that the laws of some EU Members provide for certain intermediary liability of the service provider, Google is basically free to accept requests for keyword- references by its clients.¹⁰⁵

When the activities of the intermediary are merely of a ‘technical, passive and automatic nature’, this points to a lack of knowledge or awareness.¹⁰⁶ As a result of the

¹⁰² ERICKSON, K. *The EU copyright directive creates new legal uncertainties*. [reviewed on 14 November 2019]. Available at: <https://blogs.lse.ac.uk/businessreview/2019/04/06/the-eu-copyright-directive-creates-new-legal-uncertainties/>

¹⁰³ European Court of Justice. 23 March 2010. Judgment *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* C-236/08, EU: C:2010:159.

¹⁰⁴ *Ibid.*, para. 76.

¹⁰⁵ OBERSTEINER, T. *Google v, Louis Vuitton – A Case Study*. GRIN Verlag, 2011. [reviewed on 14 November 2019]. Available at: <https://www.grin.com/document/170737>.

¹⁰⁶ European Court of Justice. 23 March 2010. Judgment *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* C-236/08, EU: C:2010:159, para. 113.

ruling, the provisions of Article 15 of the Directive are reaffirmed and advertisers are required to independently assess the likelihood of confusion before placing the ad.

3.2. The Future of Safe Harbour provisions in the DSM

While the E-Commerce Directive's regime of safe harbours remains in principle intact for some of the service providers, the context in which it applies in relation to online intermediaries is changed by a new directive on copyright in the Digital Single Market (hereinafter referred to as - DSM).¹⁰⁷

Adopted in April 2019 the New Copyright Directive changes the intermediary liability and moves Europe in a different direction from the current global standard. The most disputed feature of the Directive is the legal regime for Online Content-Sharing Service Providers (hereinafter referred to as - OCSSP). DSM has brought a definition according to which online content-sharing service provider means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.¹⁰⁸ It concerns internet platforms like YouTube, Instagram, etc.

Not taking all the details in account, Article 17 of the Directive roughly limits the safe harbour of the E-Commerce Directive. It imposes an obligation on the OCSSPs to obtain a license from a rights holder for all works uploaded by their users and for which they do not have authorisation, in order to communicate to the public or make works available to the public.¹⁰⁹ Consequently, this article expressly determines the activity of such service providers as 'communication to the public'. Moreover, unlike the provisions of the E-Commerce Directive, OCSSPs are expressly deemed liable for unauthorized protected content available on their platforms unless a copyright exception or a liability limitation applies. Basically, it means that safe harbour is no longer applicable to those providers for the purposes of copyright.

However, OCSSPs are granted a new safe harbour exempting them from liability which notably are based on the principles derived from the E-Commerce Directive. In

¹⁰⁷ European Parliament and Council Directive 2019/790 EC of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM).

¹⁰⁸ Ibid., Art 2.

¹⁰⁹ Ibid., Art. 17 (1).

case the online content-sharing provider fails to obtain an authorisation for the particular content, it may avoid liability if he can demonstrate each of the following three conditions:

- a) it has made best efforts to obtain such authorisation;
- b) that, in its absence, it has made best efforts to ensure the unavailability of specific works for which the rightholders have provided the service providers with the relevant and necessary information (so-called “upload filters”); and
- c) it has acted expeditiously to remove the content upon receiving a substantiated notice from the rightholders.¹¹⁰

Hence, this is an outright limitation of the scope of the E-Commerce Directive, which is surprising, as the DSM chose not to amend it.

Additionally, the first paragraph of Article 17(7) aims to ensure that the co-operation between OCSSPs and rightholders in a form of licence agreements, does not result in the prevention of the availability of content uploaded by users which does not infringe copyright or related rights.¹¹¹ To narrow the interpretation of this article, the cooperation between rightholders and OCSSPs is only prevented from rendering unavailable content which has been created on the basis of two limitations: a) quotation, criticism, review; b) for the purpose of caricature, parody or pastiche. Still, this part arises some sort of confusion among scholars and copyright experts. It does not guarantee the availability of the content which otherwise may be made available on the basis of other limitations, such as Article 5(3)(i) of the InfoSoc Directive which permits the incidental inclusion of a work or other subject matter in other material,¹¹² as an optional clause that can be allowed by the Member States. This awkward balancing also appears to be consistent with recital 70, which states that users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche.¹¹³ It is important to note that comparing to the

¹¹⁰ Ibid., Art. 17 (4).

¹¹¹ Ibid., Art. 17 (7).

¹¹² European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), Art. 5(3).

¹¹³ SZKALEJ, K. The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part I. [reviewed on 18 November 2019]. Available at:

InfoSoc Directive there is a change in in legal qualification, since the exceptions given in the Article 17(7) of DSM Directive become mandatory in the context of their application.

Yet, the new Copyright Directive recognises that some sort of limitation of liability is in order, since, after all, the content is not uploaded by the provider but by its users,¹¹⁴ but the conditions for the safe harbour in DSM Directive have almost nothing similar with those laid down in the E-Commerce Directive, particularly regarding monitoring obligations.

One major difference is that, according to DSM, OCSSPs are liable in the first place, whereas the E-Commerce safe harbours didn't not mean the provider would necessarily be liable if it fails to meet the requirements. Second, unlike the E-Commerce Directive, which forbids general monitoring obligations, the DSM provides for active monitoring as one of the main conditions to exempt from liability. This monitoring scheme is supposed to assist in detecting infringing content for which right holders have provided adequate information.¹¹⁵ Nevertheless, it is arguably general monitoring. High standards of professional diligence, required within article 17(4) mean an intensive use of advanced content recognition technology. Though the review should be general, since it is not about removing content, it's about preventing its availability, which arguably requires checking out all uploads to make sure that not a single piece of infringing content informed by right holders makes its way to the platform.¹¹⁶

The Directive's next controversial component again concerns the same article. It requires online platforms to filter or remove copyrighted material from their websites. It is sometimes interpreted as 'meme ban'.

Currently, platforms such as YouTube aren't responsible for copyright violations, although they must remove that content upon receiving a claim from the rights holders (Notice and take down mechanism). New article, however, states that any website that

<http://copyrightblog.kluweriplaw.com/2019/10/29/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-i/>; DSM Directive, recital 70.

¹¹⁴ DSM Directive, recital 66.

¹¹⁵ Ibid., Art. 17(8).

¹¹⁶ PEGUERA, M. *The New Copyright Directive: Online Content-Sharing Service Providers lose eCommerce Directive immunity and are forced to monitor content uploaded by users* (Article 17). [reviewed on 18 November 2019]. Available at: <http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-ecommerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/>

hosts large amounts of user-generated content are responsible for taking down that content if it infringes on copyright, even without request from the rightholder. But the technical implementation of this provision is not that simple, considering the huge amount of data that online platforms like Facebook or YouTube have to process in order to fulfil that obligation.

The Council position, therefore, foresees that online content sharing service providers are primarily liable for copyright infringements by their users, unless measures are taken to prevent infringements from occurring.¹¹⁷ In order to successfully do so, they would have to engage in general monitoring of content, resulting in upload filtering.

The previous versions of Article 17 (previously – art. 13) were explicit online service expecting providers to implement ‘copyright filters’ that would examine every uploaded content to see if anything in it was similar to items in a database of known copyrighted works, and block the upload if they found anything too similar. According to Article 13 of the Proposal, in the absence of authorisation by rightholders, online content sharing service providers shall not be liable for acts of communication to the public or making available to the public when they demonstrate that they have made best efforts to prevent the availability of specific works or other subject matter by implementing effective and proportionate measures to prevent the availability on its services of the specific works or other subject matter identified by rightholders.¹¹⁸

The reason why this article is sometimes named the ‘meme ban’ is that there is no clarity whether memes, that are often based on copyrighted images, will be illegal under the new law. Proponents of the legislation argue that memes are protected as parodies and so aren’t required to be removed under this directive, but others support the idea that filters won’t be able to distinguish between memes and other copyrighted material so they’d end up being caught in the crossfire anyway.¹¹⁹

Article 17(9) seems to cause a risk of broad filtering and over-blocking as well. Under the first sub-paragraph OCSSPs must implement ‘effective and expeditious’

¹¹⁷ SENFTLEBEN, M. *Content censorship and Council carelessness – Why the Parliament must safeguard the open, participative web 2.0*. Tijdschrift voor auteurs-, media- en informatierecht 2018/4, p. 140.

¹¹⁸ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market of 14 September 2016 - Consolidated Presidency Compromise Proposal, 2016/0280 (COD).

¹¹⁹ REYNOLDS, M. *What is Article 13? The EU's divisive new copyright plan explained*. [reviewed on 14 November 2019]. Available at: <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>

complaint and redress mechanisms for users in the event of disputes over the disabling of access to, or the removal of, uploaded content.¹²⁰ This clause imposes obligations on both rightholders and service providers. On the one hand, rightholders that request the disabling or removal of content must ‘duly justify’ their requests. On the other hand, OCSSPs that administer complaint and redress mechanisms must: (i) process submitted complaints ‘without undue delay’; and (ii) subject decisions to disable or remove content to human review.¹²¹

The wording of this Article leaves considerable discretion for the Member States when implementing this procedural safeguards in the national law. There is a common thought among European academics that when applying preventive measures in paragraphs (4)(b) and (c) are applied Member States should, to the extent possible, limit their application to cases of prima facie copyright infringement, especially if they can lead to filtering and blocking of uploaded content before it is made available to the public.¹²² Here, prima facie infringements are seen as upload of protected material that is identical or equivalent to the ‘relevant and necessary information’ previously provided by the rightholders to OCSSPs, including information previously considered infringing. This proposal, according to the scholars, respects the mandatory nature and fundamental rights justification of the user rights/freedoms in paragraph (7); and it has the best chance to comply with the prohibition of a general monitoring obligation in paragraph.¹²³

That is why the DSM Directive sounds quite controversial. Despite the long negotiations, it establishes general monitoring obligations for online service providers whose users share content online and imposes larger responsibility for such intermediaries in battling copyright infringement. By changing the balance of intermediary liability, the EU has rejected the legal certainty and process of 20 years of NTD mechanism, instead opting for a disorderly regime where innovation will be riskier

¹²⁰ European Parliament and Council Directive 2019/790 EC of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM), Art. 17(9).

¹²¹ Ibid.

¹²² QUINTAIS, L., FROSIO, G., HUGENHOLTS, P.B. *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics*. November 2019. reviewed on 14 November 2019]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484968&download=yes

¹²³ Ibid.

and the one with the quickest filters is likely to prevail.¹²⁴ In addition to all already mentioned uncertainties, the safe harbour provisions, that were beneficial to most intermediaries, have been taken out of the scope of the New Copyright Directive

These all creates problematic issues from the perspective of the existing legal framework, in particular the E-Commerce Directive. Rather than designing an instrument in compliance with the existing *acquis*, EU policy makers attempt to change the status quo and re-invent the rules of online content sharing in the EU.¹²⁵ Nonetheless, the Directive will be transposed, and some of the nuances can be clarified by the Member States or by the guidance of the Commission.

So what about YouTube? To finish this chapter, I will try to examine the currently pending case in the CJEU and how the newly adopted DSM Directive matters for the resolution of this case.

To give a short background, this case concerns a music producer and co-owner of a music publishing house as a plaintiff, and YouTube, the online video sharing platform. The dispute arose in November 2008 after videos were uploaded to YouTube that infringed the plaintiff's copyright. The plaintiff asked for those videos to be removed, which YouTube granted. However, shortly after the initial takedown of the videos, some videos reappeared on the platform, leading to lawsuits and eventually BGH has referred to the CJEU.¹²⁶

Most notably, with the first question, the Court of Justice is asked whether an online video sharing platform, such as YouTube, performs an act of communication to the public within the meaning of Article 3 Information Society Directive when its users upload copyright infringing content to its platform.¹²⁷ EU countries have until June 2021 to transpose the New Copyright directive.

¹²⁴ ERICKSON, K. *The EU copyright directive creates new legal uncertainties*. [reviewed on 14 November 2019]. Available at: <https://blogs.lse.ac.uk/businessreview/2019/04/06/the-eu-copyright-directive-creates-new-legal-uncertainties/>

¹²⁵ KUCZERAWY, A. *EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU Intermediary Liability Regime*. Fundamental Rights Protection Online: The Future Regulation of Intermediaries, 2019. p. 20.

¹²⁶ European Court of Justice. 06 November 2018. Request for a preliminary ruling *LF v Google LLC, YouTube Inc.* C-682/18.

¹²⁷ *Ibid.*

Since the case was brought to Luxembourg by Germany's Federal Court of Justice (Bundesgerichtshof, hereinafter referred to as - BGH), EU has adopted the abovementioned controversial copyright reform. Under the new legislation, platforms such as YouTube do perform an act of communication to the public, giving the public access to copyright protected works.¹²⁸ Thereby, this Article of the DSM Directive might not bring much of a notion to the issue. The subject is clarified recital, where it's said that "online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users."¹²⁹ Consequently, online content-sharing service providers should obtain an authorisation, including via a licensing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content".¹³⁰ Accordingly, Article 17 would not change the law as it already exists under the InfoSoc Directive *and* case-law: it would merely clarify it.

During the last hearing on this case, in November 2019, the European Commission clarified the correlation between the new and old legislation, stating that "The New Copyright Directive's Article 17 is *lex specialis* to Article 3 of the Infosoc Directive. It also takes precedence over Article 14 of the E-Commerce Directive, which remains applicable outside the DSM".¹³¹

The further impact on YouTube is that user-uploaded content platforms are now liable for the copyrighted material they post if they have entered into licensing agreements with the copyright holders. Nevertheless, they are not legally responsible for unlicensed content if they show their "best efforts" to cooperate with rights holders and track down copyright infringing material. In the pending case, the Commission has

¹²⁸ European Parliament and Council Directive 2019/790 EC of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM), Art. 17(1).

¹²⁹ *Ibid.*, recital 64.

¹³⁰ *Ibid.*

¹³¹ The official report is not available at the time of writing this sub-chapter. This statement is based on the tweet of Laura Kayali, published on 26 November 2019, who was present during the hearing. [reviewed on 26 November 2019]. Available at: <https://twitter.com/LauKaya>

reported that the purpose of this legislation is that “Licensing agreements should be fair and keep a reasonable balance between both parties: rights holders and platforms”.¹³²

So, the present issue would be whether the YouTube has acted in its ‘best effort’ to cooperate and remove the infringing content and the meaning of “best efforts” would be the key battleground in this and all future copyright cases.

In this way, even if the CJEU’s decision in this case is not based on the Directive on Copyright in the Digital Single Market, it is not out of the question that the court will take into account the legislation expressed by the Directive. The question of liability of platforms will continue to be an exciting one even after the CJEU has decided and the Directive has been transposed.¹³³

To summarise, it is worth saying that Article 17 of the Digital Single Market Directive is anything but controversy-free. While practically “killing” the safe harbour provisions of intermediaries in the E-Commerce Directive, it also imposes additional obligations on online content providers and tends to directly require the use of monitoring and filtering technologies. Critics have raised two major concerns about this amendment. First, it will likely further entrench the market power of the leading platforms who can afford to develop filtering technologies such as YouTube’s Content ID, and deter the entry of any new content into the online content sharing market. Second, it will undermine user privacy and free speech interests, leading to blockages of many parodies, remixes, fan fiction, and other creative reuses of copyrighted works that would, if examined by a neutral observer, be deemed non-infringing.¹³⁴

Yet the perspective of bearing direct liability for the infringing activities of users will likely cause online intermediaries to be overly cautious about what their users can upload and thus fresh content will be uploaded less often. In its final version New Copyright Directive gives copyright enforcement priority over the interests of users in information privacy and fundamental freedoms.

¹³² Ibid.

¹³³ BUCHNER, B. *Liability of Online Platforms: Will the ECJ Finally Rein in YouTube?* [reviewed on 26 November 2019]. Available at: <http://www.medialawinternational.com/germanyarticle.html>

¹³⁴ SAMUELSON, P. *The EU’s Controversial Digital Single Market Directive – Part I.* [reviewed on 26 November 2019]. Available at: <http://copyrightblog.kluweriplaw.com/2018/07/10/eus-controversial-digital-single-market-directive-part-proposed-internet-content-filtering-mandate-controversial/>

CONCLUSIONS AND PROPOSALS

Copyright protection in the digital era poses many new challenges due to rapid changes in the online world. Today issues of piracy and infringement of rights raise concerns surrounding the enforcement of legal measures for the protection of copyrights. Taking into account particular aims of every chapter stated in the Introduction thereto, and bearing in mind the scope of the legal framework and court practice analysed, the general conclusions and recommendations of the present theses may be summarized as follows:

(i) The technological advances of Internet links (hyperlinks) enable a person to access another document or any web page on the Internet with one click of a button. It allows the user to jump somewhere else on the Web, within a document or set of documents, without the need to remember the URL for every page on the Internet. There are various types of hyperlinks that differ on the mechanism of redirecting the user to a linked content. From the simple links that can send from the web page of one site to the homepage of another site, to deep linking that directly transfers users to the interior pages of that website. Framing, as well as embedded link, displays contents of one website while it is framed by information from another site, similar to the ‘picture-in-picture’ feature offered on some televisions.

(ii) The EU law on the liability of hyperlinks is prescribed in the Parliament and Council Directives and WIPO international treaties. But the main role is given to the case law developed by the Court of Justice with respect of the InfoSoc Directive. The court practise has established a number of mandatory criteria, that are needed to be present in a particular case in order to constitute an act of communication of a party providing a link to copyrighted content. As such, the CJEU may rule the ones action may amount to an infringement of author’s rights if the posting of Internet link constitutes an act of communication applying the criteria of ‘new public’, deliberate intervention, profit-making nature of the act, and tacking into account technical means for doing so.

(iii) Studying and analysing all the relevant case law on the subject it is possible to summarise the EU approach to a liability for Internet links. Generally, linking or framing to an authorised content will not amount to a copyright infringement, as well as

the act of providing a hyperlink to a content that had already been freely and legally available elsewhere. Nonetheless, if you proceed the same act with a content that isn't available on the other webpage legally, and if it's done for profit, this all might be considered a violation of the copyrights of the author. Despite the widespread practice in such cases this rules are not uniform and cannot be applicable to any case that concerns hyperlinking. All cases enjoy the examination anew of all facts in the CJEU.

(iv) Looking at the example of other countries towards resolving disputes that concerns hyperlinks there is a noticeable difference between the approach of the USA and the EU. It is quite clear that posting a hyperlink is more likely result in an infringement within the EU. On the contrary, the research on the practise of the USA tells there can be no claims for using hyperlinks because hyperlinking does not itself involve a violation of the Copyright Act. Simply, there is no deception in what is happening. As Ukraine is concerned, it is no doubt that there is a strong need to strengthen the copyright protections to meet its obligations to the European Union, and not only in online environment. The fact that copyright owners avoid going to the court to claim protection of their rights display the level of ineffectiveness and distrust of the court system and the liability regime under the Ukrainian law that isn't capable of being adjusted to the changes if the Intentioned. As a result, rightholders either chose to right a legal claim to a person who provides a link to unauthorized content, or just ignore this situation.

(v) Internet intermediaries are key drivers in the development of the Internet as well as in distributing creative content. They host, locate, provide access to the information and search for content facilitating its distribution. The current regime provided a so-called 'safe-harbour' for the Internet intermediaries like Google or YouTube. These immunities, contained in the E-Commerce Directive, provided that information society services are exempt from the liability for the illegal content published by the third parties. However, the new controversial Copyright Directive (DSM Directive) has brought even more controversy to this regime. Under this reform online platforms are required to gain content creators' permission to host their copyrighted content and would be forced to intervene to tackle unauthorised use of the material by its users. Hyperlinking issues would also fall under the definition of such use. In addition, despite the precise wording of Article 17 forbidding the general monitoring obligation, there is

still a risk. The main goal of this new Directive is to ensure copyrighted works are not made available without proper licensing. However, in order to effectively detect infringing content, a technological tool must be used to examine all newly uploaded content on the platform and comparing it with an existing database. It means installing upload filters by the service providers and systematically monitoring of all scope of the users' content. Such content monitoring obligation is being debatable since the adoption of the Directive. It is considered that imposing additional monitoring will significantly restrict the use of the Internet and may lead to overlocking of the content.

Governments are continually passing and creating new laws to keep up with this ever-changing digital landscape and therefore the regulatory uncertainty deters the massive adoption. Above all, the recommendations of the paper are summarized as follows:

As a first, and probably the simplest rule is try to avoid breaking the law. Before using or linking to any content that isn't your own intellectual property, always check its copyright status thoroughly. As a general rule, if a site doesn't explicitly make clear the material is free for reuse or appropriation, then always assume it's copyright material.

Second, from the cases examined in this paper, the CJEU tends to justify communication to the public based on the developed criterions that shall be applicable to each hyperlinking action. Following the established case law, there is a certain practice on similar cases that allows to prognosis to some extent the result of the dispute. Yet, this practice doesn't mean universal rules. As a proposal to clarify this issue, an explicit codified definition to such criterions and other relevant aspects can be made, at least on the level of the preliminary ruling. This would simplify the process of referring to the previous cases and can potentially make pending cases go faster.

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SUMMARY

This thesis is devoted to the challenges with respect to the liability of the Internet links and the action of hyperlinking as such. In the digital area, it is becoming more and more difficult to differentiate between the fair use of copyrighted works and other actions that are considered as a violation of the authors' rights leading to the copyrights infringement. The tangle here arises when even providing a link to a legally published content may be considered as a violation of copyrights, while doing the same about unauthorized works, that are already available elsewhere in the WWW, will not amount to an infringement.

The main goal of this paper is to conduct a research on the liability regime regarding hyperlinking in the EU and the existing practice on the issue in order to define the common approach. In order to achieve the aforementioned aims the following tasks have been completed:

- the various technics of hyperlinking have been examined;
- the risks of potential copyright infringements have been introduced based on the established practice by the CJEU;
- a brief overview of the foreign regimes approaches (the USA, Ukraine) to the relevant issue has been given;
- the scope of liability and immunities of different linking actions in relation to copyrighted content has been examined and characterised;
- the liability of online intermediaries brought in the New Copyright Directive and its impact on the 'safe harbour' provisions have been scrutinised.

The methods that were applied for the purposes of this paper are: comparative, logical and method of systematic analysis.

There is an infinite race between the Internet and laws to keep up with this ever-changing digital environment that consequently results in regulatory uncertainty deters the massive adoption of new laws. The practice developed by the CJEU remains to be the only applicable tool for resolving such disputes. Since this practice is not universal rules a recommendation to clarify this issue can lie in codified definition to the criteria of "communication to the public" and other relevant aspects of similar cases, in order to simplify the process of referring to the previous cases in the court and thus make pending cases go faster.