Copyright in the digital age

The CJEU's interpretation of Art. 3(1) InfoSoc Directive exemplified by hyperlinking on the internet

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ABSTRACT

This article evaluates the interpretation of the right of communication to the public, as per Art. 3(1) of Directive 2001/29/EC (the InfoSoc Directive), within the context of hyperlinking on the internet undertaken by the Court of Justice of the European Union (CJEU) in its case law over the last years on EU level as well as by the Federal Court of Justice in Germany (BGH). In order to determine how the interpretation - in particular the development of the new public criterion by the CJEU - influences the interests of authors and users, and the functioning of the internet, an in-depth analysis of the case law of the CJEU and the BGH is conducted. Thereby, the conditions under which the setting of a hyperlink infringes the right of communication under Art. 3(1) of the InfoSoc Directive are outlined. In this framework, the influence of the CJEU on the jurisprudence of the BGH is discussed. Ultimately, this article assesses the extent to which CJEU case law has given rise to alternative proposals regarding the treatment of hyperlinks, discussing both challenges and endorsements.

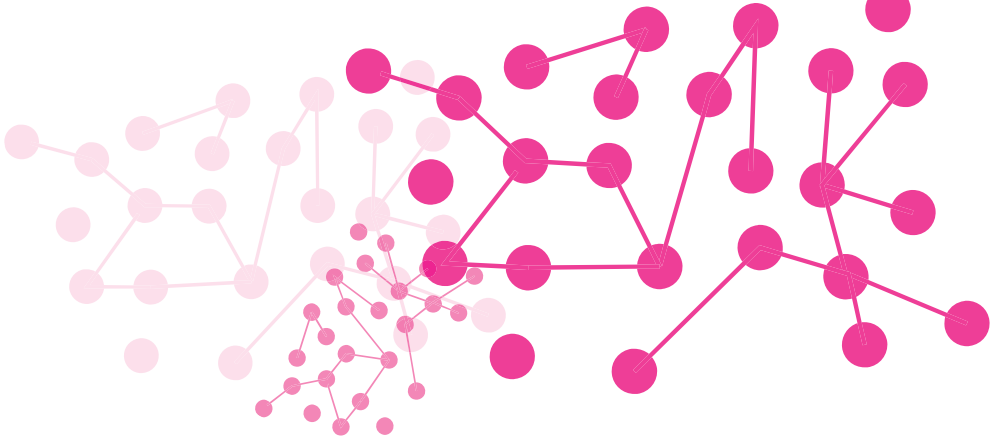
1. INTRODUCTION

The internet provides an opportunity for authors to distribute their works[1] to a broader audience around the world. However, the expansion of the internet also means that the author's control over his/her published work is partially withdrawn. Nowadays, internet users not only have the opportunity to access works from anywhere but also to circulate them themselves. The simple setting of a hyperlink, a cross-reference that allows one to jump to another electronic document, enables the further spread of a work. This offers the possibility to exchange information in real time. Since the internet virtually eradicated national borders, it was crucial to bring the rights of authors within the EU into accordance.[2] The InfoSoc Directive made a decisive contribution to this aim by harmonizing the authors' exploitation rights. One of the core rights of authors is the exclusive right to communicate a work to the public, contained in Art. 3(1) of the InfoSoc Directive. As a result of the introduction of this article, national courts repeatedly referred questions to the CJEU for preliminary rulings regarding its interpretation. Within the framework of its case law, the CJEU applied not only a two-step examination scheme, consisting of an act of communication and a public but also developed the much-discussed criterion of the "new public". The subsequent interpretation of this criterion, and of Art. 3(1) of the InfoSoc Directive in general, finds its decisive beginning in 2011 in the decision *Football Association Premier League (FAPL)*, C-403/08, concerning the broadcasting of a program, containing copyright-protected works, in a place accessible to the public.[3] In 2018 in the case of *Cordoba*, C-161/17, the CJEU considered the question of whether re-uploading a photo, published on the internet, was an infringement of Art. 3(1) of the InfoSoc Directive.[4] At national level in Germany, the right to communicate a work to the public was not only adapted to the harmonization by the EU but moreover was shaped by national case law. In 2003, the highest court of the ordinary jurisdiction, the BGH, ruled that the setting of a link[5] did not fall within the scope of the author's right to communicate a work.[6] In the course of the following years, however, with the implementation of the InfoSoc Directive and the evolving case law of the CJEU, the BGH modified its jurisprudence.[7] Case law at both EU and national level shows the need to transfer copyright from an analogue to a digital world, not necessarily by changing the law, but by interpreting it. Especially against a background where the internet has become an indispensable platform for the exchange of information and given that this is unlikely to change. Both authors and users benefit from the opportunity to share or access works. This article examines the impact of the CJEU's interpretation of the new public criterion in Art. 3(1) of the InfoSoc Directive on the interests of authors[8], users, and the functioning of the internet. This article also assesses the way in which Art. 3(1) of the InfoSoc Directive – and especially the criterion of a new public – is interpreted by the CJEU and the BGH in the context of hyperlinking on the internet.

2. LEGAL DEVELOPMENTS IN THE EU

2.1. Article 3(1) of the InfoSoc Directive

The exclusive right to communicate a work to the public, laid down in Art. 3(1) of the InfoSoc Directive, is one of the core rights of an author.[9] Not only shall it be interpreted broadly[10], but it is also non-exhaustible according to Art. 3(3) of the InfoSoc Directive. The concept of communication to the public is not defined within Art. 3(1), so its



meaning must be determined in the case law of the CJEU where the FAPL decision is of central importance.

2.1.1 Decision in FAPL

This case concerned a conflict between a pub owner, Ms. Murphy, and the Football Association Premier League Ltd (FAPL). FAPL organized the filming of Premier League matches, the leading professional league competition for football in the UK, and further granted licenses relating to these matches on a territorial basis. By buying a card and a decoder box to receive a foreign satellite channel broadcast in another Member State, bars and restaurants in the UK started to show Premier League matches to their customers. Ms. Murphy obtained a decoder card from the Greek sub-licenser of FAPL, called NOVA, to screen the Premier League matches. As a result, Ms. Murphy was accused of copyright infringement and in the course of this litigation the High Court of Justice of England and Wales referred a number of questions to the CJEU, among others, whether communication to the public within the meaning of Art. 3(1) of the InfoSoc Directive should be interpreted as including the transmission of a work via a television screen and loudspeakers to persons present in a public place.[11]

The CJEU answered this question in the affirmative, substantiating its answer with the following. In order to communicate a work within the meaning of Art. 3(1) of the InfoSoc Directive, two requirements must be met. First, an intervention, which gives access to the work, must have taken place. Secondly, a communication to a new public must have occurred. Thereby, the term 'public' means a fairly large number of persons, and those persons constitute a new public if the right holder did not have them in mind when agreeing to the original communication. In the present case, the CJEU found that Ms. Murphy intervened in a way that gave persons access to the broadcasts of the Premier League matches, and without this intervention, those persons would not have had the possibility to watch the matches. Regarding the criterion of a new public, the CJEU stated that an author who consented to the broadcast of his/her work only had owners of TV sets in mind that received the signal in an own or private circle. Therefore, the broadcasting of the copyright protected parts of the matches, such as the opening video sequence, the Premier League anthem and so forth, to visitors of a public house constituted a new public. Lastly, the CJEU argued that the profit-making nature of the communication within Art. 3(1) of the InfoSoc Directive is a relevant factor. Thus, the fact that the proprietor of a bar or a restaurant gained benefits from showing the Premier League matches - since this attracted more customers - plays a decisive role in whether the criteria of Art. 3(1) are fulfilled.[12]

2.1.2 New public criterion

In the *FAPL* decision, the Court relied on the new public criterion which it developed in the *SGAE* case that dealt with the retransmission of TV signals to private hotel rooms. In this case, AG Sharpston and the CJEU argued that the concept of the public in Art. 3(1) should be interpreted in the light of Art. 11*bis* (1)(ii) of the Berne Convention.[13] Sharpston stated in her opinion that the test in Art. 11*bis* (1)(ii)[14] has the same meaning as the criterion of a new public. By referring to the interpretive and non-bin-

1 In the course of this article, "work" refers to works, which are protected by copyright.
2 EU Commission, Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action, (COM(88) 172 final, 7 June 1988), p. 13.
3 Judgment of 4 October 2011, Football Association Premier League, C-403/08, EU:C:2011:613, paras. 31, 35.
4 Judgment of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634, para. 12.
5 The terms "hyperlink(ing)" and "link(ing)" are used as equivalents within the course of this article.
6 Decision of 17 July 2003, Paperboy, I ZR 259/00, pp. 5 - 9, 19.
7 Jani, O./Leenen, E., Paradigmenwechsel bei Links und Framing, in: NJW 2016, p. 3138.
8 In the course of this article, "author" stands for author as well as copyright holder.
9 Walter, Michael M./von Lewinski, Silke, European Copyright Law, A Commentary, Oxford, Oxford University Press, 2013, para. 11.1.26.
10 Recital 23 of the Preamble of the InfoSoc Directive and respective case law of CJEU.
11 Judgment of 4 October 2011, Football Association Premier League, C-403/08, EU:C:2011:613, paras. 32 - 42, 50 - 54.
12 Ibid., paras. 194 - 199, 204 - 206.
13 Judgment of 7 December 2006, SGAE, C-306/05, EU:C:2006:764, para. 40; Opinion of AG Sharpston delivered on 13 July 2006, SGAE, C-306/05, EU:C:2006:479, para. 46.
14 This article reads as follows: "(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one."

ding 1978 WIPO Guide[15] she concluded that Art. 3(1) includes a new public test.[16] The CJEU reached the same conclusion, referring to Art. 11*bis* (1)(ii) and the 1978 WIPO Guide.[17] The consequence of this interpretation is that, as soon as the same technical means are used, it is necessary to determine whether the communication is aimed at a new public. This new public is defined as a public which the right holder did not have in mind when consenting to the initial communication.[18]

2.2. Case law of the CJEU

The *FAPL* case was followed by a series of CJEU decisions dealing with the interpretation of Art. 3(1). These decisions placed particular emphasis on the criterion of the new public and its interpretation in a variety of situations. This article will treat CJEU cases in a thematic and not chronological way. The issues treated in the caselaw are:

- Broadcasting of works in certain establishments;
- Live-streams of TV broadcasts on the internet;
- Linking on the internet;
- Access to works without the consent of the right holder, and
- Downloading and uploading of a photo.

Broadcasting of works in certain establishments

Three preliminary rulings of the CJEU, *Circul Globus*, C-283/10, SCF, C-135/10, and *OSA*, C-351/12, concerned the broadcasting of works in certain establishments. All three cases involved the broadcasting of a work at a specific location.[19] While the CJEU did not address the new public criterion in its decision in the cases *Circul Globus* and *SCF*, these decisions underline the approach of interpretation of Art. 3(1)by the CJEU.[20] The decision in *OSA* on the other hand focuses on the criterion of the new public. The CJEU stated that right holders, when agreeing to the initial communication, only had private TV receivers in mind, the visitors of a certain establishment were therefore not taken into account and thus form a new public. In this context, the CJEU relied on the conventional definition of the new public. Namely, that a new public is a public which was not taken into account by the author when consenting to the initial communication.[21]

Live-streams of TV broadcasts on the internet

The CJEU dealt with two situations in which TV broadcasts were streamed on the internet: *ITV Broadcasting*, C-607/11, and *VCAST*, C-265/16. In both cases, the CJEU was asked whether the type of stream in question should be understood as communication to the public within the meaning of Art. 3(1). Rather than referring to the criterion of the new public, the CJEU used the criterion of specific technical means to determine the applicability of Art. 3(1). Because different technical means were used for the original communication and the following one, the consent of the right holder is required separately for each of these communications.[22]

Linking on the internet

Three of the CJEU's preliminary rulings concern linking on the internet and interpreted Art. 3(1) in the context of the provision of those links. The relevant cases are *Svensson*, C-466/12, *BestWater International*, C-348/13, and *GS Media*, C-279/13. Since the same technical means were used for the different forms of communications, namely the internet, the CJEU had to revert in fact to to the criterion of the new public. Whether a new public was present was decided based on whether the work was originally uploaded with or without the consent of the author as well as who it was that actually posted the link. In this regard, the CJEU established various case constellations. If the author gives their consent to the original communication and the work is freely available, the right holder has all internet users in mind and the application of Art. 3(1) fails because of the lack of a new public. If the author gives consent to the original communication but the work is not freely accessible, the right holder only has a certain public in mind and the provision of a link constitutes a communication to a new public within the meaning of Art. 3(1). In the absence of the right holder's consent to the initial communication, a distinction must be made, for the purpose of determining the existence of a communication within the meaning of Art. 3(1), as to who posts

15 AG Sharpston and the CJEU refer to Art. 11bis, paragraph (1), 11bis.12 of the 1978 WIPO Guide on pp. 68.

16 Opinion of AG Sharpston delivered on 13 July 2006, SGAE, C-306/05, EU:C:2006:479, para. 50.

17 Judgment of 7 December 2006, SGAE, C-306/05, EU:C:2006:764, paras. 40 - 41.

18 Eleonora Rosati, Copyright and the Court of Justice of the European Union, Oxford, Oxford University Press, 2019, p. 96.

19 In the cases concerned, the works were broadcasted either without the consent of the right holder or without the involvement of a collective management society.

20 Judgment of 24 November 2011, Circul Globus, C-283/10, EU:C:2011:772, paras. 26, 30, 35; Judgment of 15 March 2012, SCF, C-135/10, EU:C:2012:140, paras. 35, 81 - 88, 94 - 96.

21 Judgment of 27 February 2014, OSA, C-351/12, EU:C:2014:110, paras. 31, 32.

22 Judgment of 7 March 2013, ITV Broadcasting, C-607/11, EU:C:2013:147, paras. 37 - 39; Judgment of 29 November 2017, VCAST, C-265/16, EU:C:2017:913, paras. 48 - 50.

23 Judgment of 13 February 2014, Svensson, C-466/12, EU:C:2014:76, paras. 24 - 31, 26 - 28; Order of the Court of 21 October 2014, BestWater International, C-348/13, EU:C:2014:2315, paras. 15f.; Judgment of 8 September 2016, GS Media, C-160/15, EU:C:2016:644, paras. 37, 44 - 54.

24 Judgment of 26 April 2017, Stichting Brein (Filmspeler), C-527/15, EU:C:2017:300, paras. 47 - 49, 53; Judgment of 14 June 2017, Stichting Brein (The Pirate Bay), C-610/15, EU:C:2017:456, paras. 44f., 48.

25 Judgment of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634, paras. 26 - 40.

26 Unless expressly stated otherwise the term "Copyright Act" hereafter always refers to the German Act on Copyright and Related Rights (Urheberrechtsgesetz, UrhG).

the link. In the case of private individuals, it can be assumed that they are unaware of the lack of consent and therefore do not intervene in full knowledge within the meaning of Art. 3(1). The situation is different, however, if such a private individual knew or could have known of the lack of consent. In this case, creating the link constitutes a communication to the public according to Art. 3(1). The same applies if the link makes it possible for users to circumvent technical protective measures. Otherwise, if the link was posted for profit, it is assumed that the person who posted the link knew of the lack of consent since in this case it can be assumed that the necessary checks were carried out.[23]

Access to works without the consent of the right holder

Two cases in which access was granted via a multimedia player in *Filmspeler*, C-527/15 and via the internet in *The Pirate Bay*, C-610/15, to works published without the consent of the right holders, were decided by the CJEU. The Court referred to the importance of the author's consent as established in the cases regarding linking on the internet. Therefore, the fact that the right holder did not give his/her consent is known, and that an intervention was nevertheless carried out in such a way as to give users access to the work, led in these cases to a new public and the application of Art. 3(1).[24]

Downloading and uploading of a photo

The *Cordoba* case, C-161/17, is a case in which a work was freely accessible on a website, with the consent of the right holder, and a third party published this work on another website. As a download and subsequently an upload of the work took place - instead of providing a link to a work - the CJEU did not apply its criteria developed for the cases concerning hyperlinking but fell back on the general definition of the new public and asked which public the right holder had in mind when consenting to the original communication. This led to an affirmation of the presence and importance of a new public.[25]

2.2.1 Comparison of the categories

It can be observed that the CJEU consistently applies the two-stage examination within the framework of Art. 3(1). In addition to this examination, further criteria are applied which depend on the specific facts of the case. This was already established by the CJEU in the *SCF* case and has been applied since.

With regard to the criterion of a new public, the CJEU adheres to the definition developed in *SGAE*. However, in the light of the increasing complexity of cases related to hyperlinking, it can be said that it adapted this definition, since a too rigid adherence would otherwise lead to an extreme restriction of the author's rights.

Furthermore, the CJEU tends to fall back on criteria which it has introduced in earlier decisions. For instance, the criterion of a profit-making nature was already applied by the CJEU in 2012 in the *SCF* case. Four years later the Court used this criterion in the context of the new public criterion in the GS *Media* case.

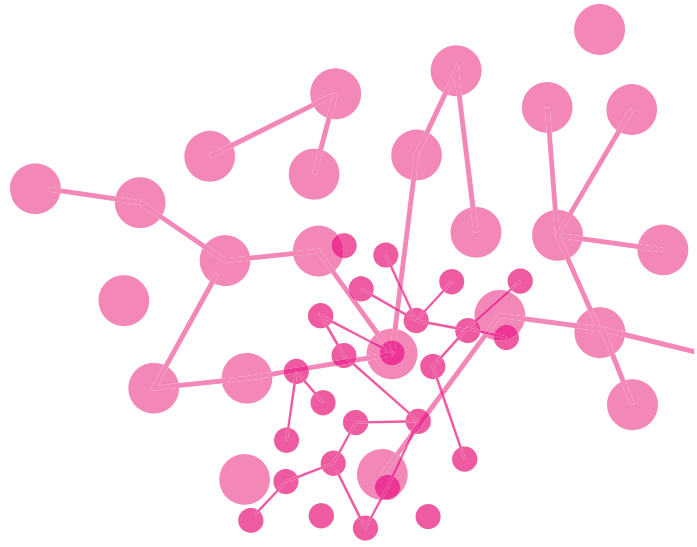
In terms of its interpretation of the criteria of Art. 3(1) it can be said that the CJEU interprets it in the identical manner only insofar as the situation of the case if also the same. This becomes evident from the *Svensson* and *BestWater International* cases, where the Court applied the same interpretation of Art. 3(1) by stating that the situations in both cases were the same. The *Cordoba* case can be used as an example of the explicit choice not to provide the same interpretation. Here, the CJEU chose not to apply its own jurisprudence, by stating that the constellation of those cases differed significantly from one another.

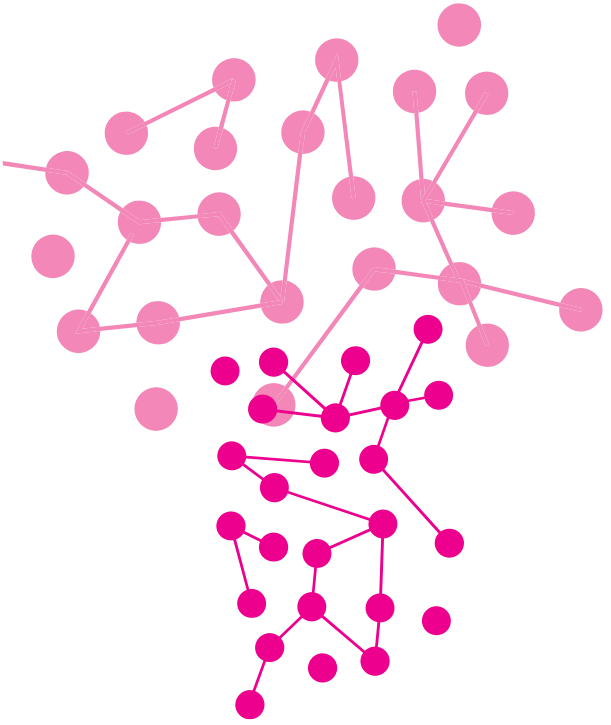
With regard to hyperlinks, this means that an exact differentiation must be made in order to determine whether the setting of a link falls within the scope of Art. 3(1) depending on the person that creates the link as previously discussed.

3. LEGAL DEVELOPMENTS IN GERMANY

3.1. Right of communication in the German Copyright Act

The German Copyright Act[26] distinguishes between physical and non-physical exploitation of a work. Art. 15 of the Copyright Act serves as a general clause that also assigns so-called unnamed forms of exploitation to the author. These exploitation rights are to be interpreted in conformity with the InfoSoc Directive. In the context of non-physical exploitation, Art. 15(2) of the Copyright Act constitutes the general clause, while the most important cases of application are regulated in Art. 19 et seq. of the Copyright Act. Of relevance are the so-called unnamed exploitation right of Art. 15(2)(1) as well as the right of making works available to the public as per Art. 19a of the Copyright Act. The unnamed exploitation right covers - as a general clause - the right of the author to publicly communicate the work in a non-physical form. Art. 19a of the Copyright Act includes the right to make the work accessible by electronic means in such a way that it can be retrieved at any time, thus online uses of protected works are covered hereby.





3.2. Case analysis

3.2.1. Prior to the implementation of the InfoSoc Directive

The first case in which the BGH had to deal with the subject of hyperlinking, *Paperboy*, I ZR 259/00, is from 2003, i.e. the same year that the InfoSoc Directive was implemented into German copyright law.[27] Newspaper articles were linked on the page of a search engine. The BGH ruled that the hyperlink merely referred to the work in a way that made it easier for the users to access a work which had already been published. The provider of the link did not keep the work available for access him/herself and did not transmit the work to third parties on demand either. The person who posted the work initially on the internet decided whether the work would remain accessible or not. An infringement of the right of communication was therefore excluded.[28]

3.2.2. Prior to the CJEU case law

The two subsequent decisions, *Vorschaubilder*, I ZR 69/08, and *Session-ID*, I ZR 39/08, were handed down by the BGH before the ruling of the CJEU in the *FAPL* case.[29] In the first case (*Vorschaubilder*) regarding thumbnails which the defendant had stored on its own server and thereby controlled their availability, it was decided accordingly that an act of communication was exercised. Nevertheless, this act did not lead to an infringement of the right of communication, since the BGH assumed that the claimant, the right holder, had consented to the use of his/her works as thumbnails by making the content of the website accessible to search engines without making use of technical means to exclude works from the search and the display by search engines in the form of thumbnails.[30]

On the same day (April 29, 2010), the BGH also announced its decision in the case of *Session-ID*, a case in which the defendant bypassed the claimant's homepage by a programmatic routine and led the users directly to the website containing the map sections. In this case, the BGH affirmed an infringement of the right of communication since access to the work, which would otherwise not exist for these users, was opened by a link circumventing protective measures. It is thereby irrelevant whether those protective measures were effective or not, the only decisive factor is if the measures are recognizable as such to third parties.[31]

3.2.3. Following the CJEU case law

The BGH decided the case of *Vorschaubilder* II in 2011, after the CJEU rulings in the cases of *FAPL* and *Circul Globus*. As in the previous decision concerning thumbnails from 2003, the question was whether the thumbnails infringed the author's right to communicate a work to the public. Within the course of this case the BGH confirmed its ruling made in the case of *Vorschaubilder*.[32]

Four years later, the BGH requested a preliminary ruling from the CJEU in the case of *Die Realität*, I ZR 46/12, concerning the question whether framing fell within the scope of Art. 3(1). The CJEU answered this question in the case of *BestWater International* in the negative. Thus, the CJEU contradicted the BGH's original view, since the BGH assumed that the so-called unnamed right of exploitation of communication to the public, laid down in Art. 15(2)(1) of the Copyright Act, included the act of framing.[33] In the subsequent decision (*Die Realität II)*, the BGH again denied a copyright infringement by linking. Even though it had to adjust its opinion regarding framing following the CJEU's decision, it came to the conclusion that there was no infringement in principle insofar the work was initially published on the internet with the author's consent. As in the decisions of the BGH regarding thumbnails, the consent of the right holder was the decisive factor for determining infringement. The BGH added a decisive element to the interpretation of the CJEU by stating that it can only be inferred from the case law of the CJEU that someone who published his/her work freely on the internet had all internet users in mind and thus a new public was regularly excluded, does not apply in the case in which the work was uploaded without the consent of the right holder.[34]

In 2017, the BGH had to decide again on the copyright admissibility of thumbnails in the case of *Vorschaubilder* III. For the third time, the operator of a search engine was on the defendant's side due to its image search service. The BGH ruled that there was no infringement, arguing that the presumption of knowledge - developed by the CJEU in GS Media - is not applicable to search engines, taking into account their special importance for the transmission of information on the internet and thus also their functionality. To impose an obligation on a search engine to monitor all displayed content would be contrary to its function. Therefore, knowledge of such an engine cannot be assumed but it must be positively established that the provider of the search function knew or could have known of the lack of permission.[35]

4. DISCUSSION

4.1 Influence of the CJEU case law on German jurisprudence

In the *Paperboy* case, the BGH attempted already at an early stage to liberalize copyright law and to adapt it to the demands of the digital age.[36] Many voices today accuse the CJEU of precisely this attitude.[37] Nevertheless, the *Paperboy* decision is no longer justifiable with regard to the case law of the CJEU, since linking was - from a copyright point of view - classified as irrelevant[38].

In its decision in the case of *Vorschaubilder*, the BGH tried to balance the interests in favor of the internet and the freedom of information and communication,[39] before the CJEU did. Therefore, not only the decision in *Vorschaubilder*, but also in *Session-ID* correspond to the ruling of the CJEU in *Svensson*.[40] In all these decisions, it was required that the work was freely available somewhere on the internet.[41] In contrast to *Paperboy*, the decisions of the BGH in *Vorschaubilder* and *Session-ID*, which were made after the implementation of the InfoSoc Directive but before the comprehensive case law on the right of communication to the public of the CJEU, would be certainly acceptable today.

With regard to the decision in *Vorschaubilder II*, no major tendency of the BGH in favor or against the caselaw of the CJEU can be discerned. It consistently remains in favor of its decision in the case of *Vorschaubilder* and continued to develop its created legal concept of justifying consent.[42] Even though this legal concept was criticized, the decision was ultimately understandable from the point of view of legal policy, since there was a lack of regulatory initiative at a European level to address the problems in this area.[43]

In the *BestWater International* case the CJEU ruled that it is not important whether the person who included the work of the third party on a website - by means of the framing technique - made this work his own.[44] In its decision in *Die Realität II*, the BGH then amended this answer of the CJEU by ruling that in the event that a third party made the work accessible to the public without authorization, the right holder does not intend to address any public at all.[45] However, the BGH agreed with the generous definition of technical means of the CJEU.[46] The BGH finally decided, although it was dissatisfied with the answer of the CJEU, not to re-submit the question to the CJEU on the grounds that no final decision was taken, as the Court of Appeal still had to clarify whether the right holder's consent to upload the video in question to YouTube was given or not.[47]

In the course of its decision in *Vorschaubilder III* which concerned the issue of setting links on the internet, the BGH carried out the paradigm shift prescribed by the CJEU in the interpretation of the right of communication to the public and adopted the criteria developed by the CJEU for this purpose.[48] In its decision the BGH adhered to the principles set out by the CJEU in the cases of *GS Media, Filmspeler* and *The Pirate Bay* and applied the requirement of knowledge or the necessity to know with regard to the illegality as the central guardrails.[49] At the same time it came to the conclusion that the presumption of knowledge does not apply to search engines which make a significant contribution to the open and structured landscape of information on the internet by invoking a normative fundamental rights-oriented interpretation of the individual criteria[50].

In summary, it can be said that a paradigm shift in the field of copyright took place at national level due to the case law of the CJEU, leading away from a purely objective view of the right of communication to the public to an interpretation determined by subjective aspects.[51] Even if the BGH applies the principles developed by the CJEU, it still allows itself the room to interpret them with regard to the individual case.

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[27] The InfoSoc Directive was implemented into German copyright law with the "Act Regulating Copyright in the Information Society of 11 April 2003".

[28] Decision of 17 July 2003, Paperboy, I ZR 259/00, pp. 5 – 9, 19f.

[29] Thumbnails are the reduced preview images shown in the hit list of a search engine.

[30] Decision of 29 April 2010, Vorschaubilder, I ZR 69/08, pp. 2 -15.

[31] Decision of 9 April 2010, Session-ID, I ZR 39/08, pp. 1f., 11 - 13.

[32] Decision of 19 October 2011, Vorschaubilder II, I ZR 140/10, pp. 2 - 12.

[33] Decision of 16 May 2013, Die Realität, I ZR 46/12, p. 10 et. seq.

[34] Decision of 09 July 2015, Die Realität II, I ZR 46/12, pp. 1, 9 - 11, 15, 19, 21 et seq.

[35] Decision of 21 November 2017, Vorschaubilder III, pp. 2 – 4, 9 - 12, 14 - 29.

[36] Wiebe, A., BGH: Paperboy, in: MMR 2003, p. 724.

[37] Xalabarder, R., The Role of the CJEU in Harmonizing the EU Copyright law, in: IIC 2016, p. 635.

[38] Jani, O./Leenen, E., Paradigmenwechsel bei Links und Framing, in: NJW 2016, p. 3137.

[39] Götting, H., Urheberrechtliche Zulässigkeit von Vorschaubildern in der Trefferliste einer Suchmaschine - Vorschaubilder, in: LMK 2010, 309481.

[40] Jani, O./Leenen, E., Paradigmenwechsel bei Links und Framing, in: NJW 2016, p. 3137.

[41] Decision of 09 July 2015, Die Realität II, I ZR 46/12, p. 15.

[42] Thum, D., Schlichte Einwilligung zu Google-Thumbnails wirkt abstrakt-generell - „Vorschaubilder II", in: GRUR-Prax 2012, p. 215.

[43] Spindler, G., BGH: Wiedergabe eines Lichtbilds als Vorschaubild im Internet - Vorschaubilder II, in: MMR 2012, p. 387.

[44] Michl, F., BGH: Urheberrechtliche Zulässigkeit des so genannten „Framing" - Die Realität II, in: LMK 2016, 376535.

[45] Ibid.

[46] Dietrich, N., Urheberrechtliche Zulässigkeit des Framing - Die Realität II, in: MMR 2016, p. 194 et seq.

[47] Ibid.

[48] Jani, O., BGH: Keine Urheberrechtsverletzung bei Bildersuche durch Suchmaschinen - Vorschaubilder III, in: NJW 2018, p. 781.

[49] Leistner, M., „In jedem Ende liegt ein neuer Anfang" - das BGH-Urteil „Vorschaubilder III", seine Bedeutung für die Bildersuche für die weitere Entwicklung des Haftungssystems im Urheberrecht, in: ZUM 2018, p. 288 et seq.

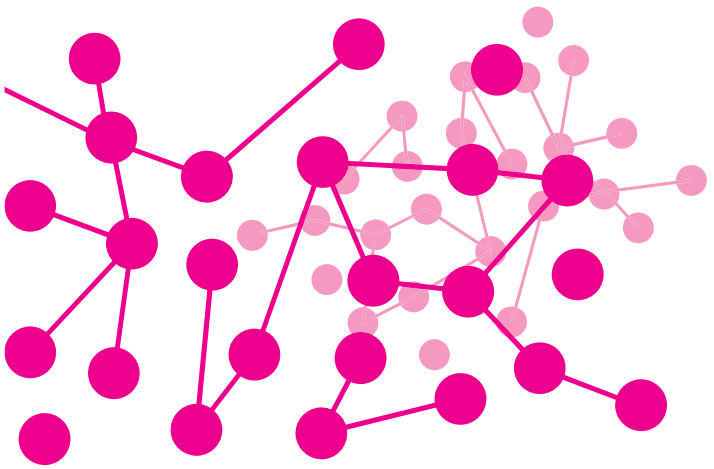
[50] Ibid.; AG Szpunar was of the same opinion in The Pirate Bay case (cf. Opinion of AG Szpunar delivered on 8 February 2017, The Pirate Bay, C-610/10, EU:C:2017:99, para. 52).

[51] Jani, O./Leenen, E., Paradigmenwechsel bei Links und Framing, in: NJW 2016, p. 3138.

In relation to the aforementioned, the BGH already applied some of the criteria that were later on stipulated in the CJEU caselaw.

In its decision *Session-ID* in 2010, the BGH ruled that the circumvention of technical protective measures leads to an infringement of the right of communication to the public.[52] The CJEU also made the same determination in the *Svensson*[53] and *GS Media*[54] decisions a couple of years later. The difference, however, is that the BGH gave a detailed opinion[55] on the requirements for a technical protective measure, while the CJEU did not give any further explanations.

In the *GS Media decision*, the CJEU determined the decisive importance of the right holder's consent to the initial communication for the existence of a new public and thus for an infringement of the right of communication.[56] The BGH established - already a year earlier - in its decision *Die Realität II* how decisive the consent of the right holder is.[57] Both, the BGH and the CJEU, concluded that if a work was uploaded without the author's consent, the author has no public in mind to whom he/she aimed to communicate the work, and thus any communication to a public constitutes a violation of his/her right.[58]



Even if the opinion of the AG in the *GS Media* case was not adopted - nor even discussed - by the CJEU, for the sake of completeness it is noted that the AG in *GS Media*, similar to the BGH in *Paperboy*[59], was of the opinion[60] that creating a hyperlink should not even fall within the scope of application of the right of communication to the public. The BGH argued that the person who sets a link to a work which was already freely available on the internet did not commit any act of copyright exploitation, providing thus a mere reference to the work. It compared hyperlinks with footnotes and emphasized that the person creating the link did not hold the work for retrieval himself, but the person who placed it on the internet.[61] The AG stated that there was no act of communication in the case of providing a link, since this was not indispensable or central for the enjoyment of the work.[62]

To ensure interpretation in conformity with the InfoSoc Directive, articulation of the right of communication to the public, the BGH had to proceed to apply the criteria and the CJEU's interpretation at a national level. Nevertheless, the Court interpreted these criteria specifically for each individual case, something that leaves certain flexibility at the national level.

It can be concluded that both the BGH and the CJEU pursue the goal of adapting copyright law to the digital age and of finding a balance of interests, which, above all, should not impede the proper functioning of the internet as a cornerstone of free communication and exchange of knowledge.

4.2. Discussion on an EU level

4.2.1 Alternative proposals

Almost to the day, exactly one year before the CJEU decided in the *Svensson case*, the European Copyright Society (ECS) published its opinion[63] on the case. The basic idea behind this opinion is that hyperlinking should not fall within the scope of Art. 3(1). AG Whatelet shared this view in the *GS Media* case a few years later by appealing to the CJEU to deviate from its case law on hyperlinking and to deny the applicability of Art. 3(1).[64]

The Association Littéraire et Artistique Internationale (ALAI), on the other hand, published three opinions regarding hyperlinking, and the criterion of the new public since 2013. However, with its opinion of 2015, ALAI withdrew both its first opinion of 2013 and its opinion of

[52] Decision of 29 April 2010, Session-ID, I ZR 39/08, p. 11 et seq.
[53] Judgment of 13 February 2014, Svensson, C-466/12, EU:C:2014:76, para. 31.
[54] Judgment of 8 September 2016, GS Media, C-160/15, EU:C:2016:644, para. 50.
[55] Decision of 29 April 2010, Session-ID, I ZR 39/08, p. 12 et seq.
[56] Judgment of 8 September 2016, GS Media, C-160/15, EU:C:2016:644, paras. 40 - 43.
[57] Decision of 09 July 2015, Die Realität II, I ZR 46/12, p. 15.
[58] Ibid.; Judgment of 8 September 2016, GS Media, C-160/15, EU:C:2016:644, paras. 40 - 43.
[59] Decision of 17 July 2003, Paperboy, I ZR 259/00, p. 19.
[60] Opinion of the AG Wathelet delivered on 7 April 2006, GS Media, C-160/15, EU:C:2016:221, paras. 48 - 60.
[61] Decision of 17 July 2003, Paperboy, I ZR 259/00, p. 19 et seq.
[62] Opinion of the AG Wathelet delivered on 7 April 2006, GS Media, C-160/15, EU:C:2016:221, para. 60.
[63] ECS, Opinion on the Reference to the CJEU in Case C-466/12 Svensson, 15 February 2013.
[64] Opinion of AG Whatelet delivered on 7 April 2016, GS Media, C-160/15.
[65] ALAI, Report and Opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the internet, 16 September 2013; ALAI, Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communica-

2014. Nevertheless, it continues to maintain the view that the criterion of the new public contradicts international treaties and EU directives.[65]

Hyperlinking outside the scope of Art. 3(1) of the InfoSoc Directive

The ECS bases its argument, namely that hyperlinking does not fall within the scope of Art. 3(1), primarily on the fact that hyperlinking does not constitute a transmission as would be required for the applicability of Art. 3(1).[66]

By referring to Recital 23 of the Preamble of the InfoSoc Directive, the Commission Proposal of the InfoSoc Directive and the Basic Proposal of 1996, the ECS assumed that a transmission is a necessary condition for a communication within Art. 3(1). This finding is fostered, according to the ECS, by the fact that the CJEU referred to a transmission in its previous case law regarding an act of communication.[67]

Following this argumentation, the ECS came to the conclusion that a hyperlink only tells the user the location of a work and, since transmission means that a work must be placed on an electronic network, hyperlinking does not amount to a transmission. In this context, the ECS also referred to the *Paperboy* case of the BGH and its reasoning there.[68]

Nevertheless, the ECS also offered a solution in the event that a transmission is not considered necessary for an act of communication. Again, it referred to the decision of the BGH in *Paperboy* and argued that a hyperlink does not provide access to a work. A work can be removed from the internet, even in spite of a hyperlink. Furthermore, it stated that, should the posting of a hyperlink be considered an act of communication, not only the consent of the author of the specific work would have to be obtained but also the consent of any author of all works displayed on the website linked to.[69]

Even a further solution was provided in the event that the CJEU sees the setting of hyperlinks as an intervention granting access, namely that this act of communication is not directed to a new public. The ECS supported this with two arguments. On the one hand, a right holder who publishes a work on the internet knows that in principle any internet user can access it. Creating a hyperlink therefore does not add anyone to this public which the rightholder initially had in mind. On the other hand, in the case of freely accessible works, users already have the option of accessing the work, so the hyperlink does not open up the possibility of access that users would not otherwise have.[70]

With regard to hyperlinks to non-publicly accessible works, the ECS merely referred to its previous statement that such links do not fall within the scope of Art. 3(1).[71]

Furthermore, it stated that framing should not be treated differently from hyperlinking. Even if there would exist an act of communication within the scope of framing, due to the technical peculiarities of this procedure, it is not addressed to a new public.[72] In order not to allow the creation of hyperlinks completely, without any restrictions, the ECS sees accessory liability, unfair competition, infringement of moral rights and the circumvention of technological measures as the solution.[73]

A few years later in the case of *GS Media*, AG Whatelet called on the CJEU not to regard the setting of hyperlinks as an act of communication within Art. 3(1), similar to the ECS. He argued that hyperlinks only simplify the finding of works and do not make them available if they are already freely available on the internet. He further explained that the person who posts the link did not play an indispensable role. If the Court, however, was to see an act of communication in the setting of a link, there would still be no new public. This criterion would only be applicable, according to the AG, if the right holder consented to the initial communication. In the case of *GS Media* there was no such consent and thus the criterion was not applicable.[74]

In the following, the arguments against the assumption that the creation of a hyperlink does not fall within the scope of Art. 3(1) are outlined.

The ECS bases its argumentation primarily on the statement that a transmission is necessary for an act of communication within Art. 3(1). Thereby, the policy documents of the WCT and the InfoSoc Directive are not considered in their entirety. The Basic Proposal of 1996 confirmed that the relevant criterion for an act of communication is the fact that access is provided.[75] The Basic Proposal of 2005 confirmed this, by stating that Art. 8 WCT covers those actions which give access to the public.[76] Within the framework of the InfoSoc Directive, which implemented *inter alia* Art. 8 WCT, the Commission Proposal of the InfoSoc Directive also stated that the decisive condition for Art. 3(1) is that the work is made available to the public.[77] The position that a transmission is not required is also supported by voices in literature

tion to the public, 17 September 2014; ALAI, ALAI Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet, 17 June 2015.

66 ECS, Opinion on the Reference to the CJEU in Case C-466/12 Svensson, 15 February 2013, para. 6.

67 Ibid., paras. 9 - 34.

68 Ibid., paras. 35 - 38.

69 Ibid., paras. 40 - 45.

70 Ibid., paras. 46 - 49.

71 Ibid., paras. 50 - 52.

72 Ibid., paras. 53 - 59.

73 Ibid., para. 7.

74 Opinion of AG Whatelet delivered on 7 April 2016, GS Media, C-160/15, paras. 65, 60, 67.

75 WIPO, Chairman of the Committees of Experts, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be considered by the Diplomatic Conference, (CRNR/DC/4, 30 August 1996), para. 10.10.

76 WIPO, Copyright in the Digital Environment: The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), (WIPO/CR/KRT/05/7, February 2005), para. 56.

77 EU Commission, Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, (COM(97) 628 final, 10 December 1997), p. 25 et seq.

that assume that the provision of access is sufficient to fulfill Art. 3(1).[78] Therefore, Art. 3(1) has the function of an "umbrella provision", which is not limited to the traditional understanding of communication but also applies in a digital context.[79]

Additional reasons contradict the ECS proposal. The InfoSoc Directive aims to harmonize copyright law within Europe and to guarantee authors the same level of protection in all Member States. If hyperlinking were to be excluded from the scope of Art. 3(1), right holders would have to try to find protection in the general laws of the different Member States. However, these general laws differ. Thus, the exclusion of hyperlinking from Art. 3(1) would contradict the basic idea of the EU, namely harmonization and equal protection. Furthermore, the ECS merely refers to the right of freedom of expression and information (Art. 11 of the Charter of Fundamental Rights of the European Union (Charter)), but ignored the fact that the Charter also contains the right to intellectual property (Art. 17 of the Charter) and effective remedy (Art. 47 of the Charter).[80]

Express authorization or exceptions

In its most recent opinion of June 17, 2015, ALAI proposes to solve the legal problems that arise when linking to a work through either express authorization or the application of exceptions. ALAI assumes that a distinction must be made between the different types of linking and thereby reaffirms its view from the previous opinions. Hyperlinking to the home page of another website does not constitute a communication within the meaning of Art. 3(1). On the contrary, deep links and framing links require the consent of the copyright holder, as they make the work publicly accessible. However, these types of links may also be permitted, by express authorization or the application of exceptions.[81]

The main argument of ALAI, which opposes the application of the new public criterion, is that the criterion has no fundament in the Berne Convention and other international accords. Accordingly, the criterion violates Art. 11(1)(ii), 11*bis* (1), 11ter (1)(ii) and 14*bis* (1) of the Berne Convention, Art. 8 WCT, Art. 2, 10, 14 and 15 WPPT and Art. 3 of the InfoSoc Directive. None of these texts contains a limitation as caused by the criterion of the new public in the view of ALAI. Art. 11*bis* (1)(ii) of the Berne Convention contains only the criterion of a new communicator which in no case corresponds to the criterion of a new public. The criterion of a new communicator requires solely that the communication is carried out by a communicator other than the original one, and thus whether the communication is directed to the same public is irrelevant. This is decisive for Art. 3(1) as it implements the WCT and the WPPT and also international treaties such as the Berne Convention.[82]

Having this as a background, ALAI offers a solution based on the express authorization by right holders. This is to be done by including collective management societies, which grant licenses for commercial use. In these licenses, it shall be explicitly stated that mere hyperlinking does not constitute a communication to the public, while embedding and framing is subject to specific licensing provisions. The other option proposed by ALAI is to use website-embedded instructions, such as an Automated Content Access Protocol which allow the rightholder to permit or prohibit different types of linking.[83]

Another way of considering links not as an infringement of the right of communication to the public is to let links fall within the scope of exceptions. In this context, the exception for the press as per Art. 5(3)(c) of the InfoSoc Directive as well as the exception for quotations as per Art. 5(3)(d) should be taken into account. The exception for the press would cover the linking of a broad range of

78 Ricketson, Sam/Ginsburg, Jane, International Rights and Neighbouring Rights: The Berne Convention and Beyond, Oxford, Oxford University Press, 2006, p. 746 et seq.; Stefan Bechtold, Directive 2001/29/EC - on the harmonization of certain aspects of copyright and related rights in the information society (Information Society Directive), in: Dreier/Hugenholtz, Concise Copyright Law, Alphen aan den Rijn, Kluwer Law International B.V., 2016, p. 443; Walter/von Lewinski, European Copyright Law, para. 11.3.22; Rosati, Copyright and the Court of Justice of the European Union, p. 96.

79 Tsoutsanis, A., Why Copyright and linking can tango, in: Journal of Intellectual Property Law & Practice, 2014, Vol. 9, No. 6, p. 500.

80 Ibid., p. 501 et seq..

81 ALAI, ALAI Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet, 17 June 2015, pp. 1.

82 ALAI, Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public, 17 September 2014, p. 9.

83 ALAI, ALAI Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet, 17 June 2015, p. 3.

84 Ibid., pp. 5 - 9.

85 UN. Economic and Social Council, Centenary of the Berne Convention for the Protection of Literary and Artistic Works, (E/RES/1986/68), 1986, p. 185.

86 WIPO, Guide to the Berne Convention for the Protection of Literary and Artistic Works, 1987, p. 68 et seq..

87 Axhamn, J., Hyperlinking: Case C-466/12 Svensson and Others and its Impact on Swedish Copyright Law, in: Europarättslig tidskrift, Vol. 18, no. 4, p. 864.

88 Koolen, C., The Use of Hyperlinks in an Online Environment: Putting Links in Chains?, in: GRUR Int. 2016, p. 870.

89 ALAI, Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public, 17 September 2014, p. 15; Hugenholtz, P./van Velze, S., Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public", in: IIC 2016, p. 810; Rosati, E., The CJEU 'new public' criterion? National judges should not apply it, says Prof Jan Rosen, 15 April 2015, The IPKat, available on: http://ipkitten.blogspot.com/2015/04/the-cjeu-new-public-criterion-national.html.

90 Axhamn, J., Internet Linking and the Notion of "New Public", in : Nordiskt Immateriellt Rättsskydd, 2014, p. 131; ALAI, Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public, 17 September 2014, p. 15.

works by the press. Within the framework of the exception for quotations, ALAI draws attention to the issue of whether links can be regarded as quotations. However, they come to the conclusion that potential problems can be solved in favor of the application of the exception. It is also pointed out that the contracting parties of the WCT are authorized to develop new exceptions under Art. 10 WCT. Nevertheless, ALAI highlights possible inconsistencies with the three-step test, starting by whether hyperlinking is considered a "certain special case".[84]

In the following it is outlined, why the new public criterion does not contradict international treaties and EU directives.

The preparatory works on the Berne Convention, for example, provide evidence that the criterion of the new public is also of relevance in the Convention. On the one hand, the Berne Convention Centenary of 1986 mentions that the *"new circle of listeners or viewers"*, to whom the broadcast is aimed, constitute a *"new act of broadcasting"*.[85] On the other hand, the 1978 WIPO Guide refers to the expectation of the author who has solely private or family circles in mind when authorizing the broadcast.[86] The fact that the term "public" is not defined on an international level and that the CJEU therefore acted within the scope of its competences when it interpreted this concept, speaks in favor of the conformity of the criterion with the EU Directives.[87]

In addition, the ALAI proposal raises practical questions. Websites that already contain deep or framing links would have to obtain the consent of the authors retroactively. Obtaining consent, even beforehand, can be quite challenging, since it could be unknown who owns the rights to the publicly accessible works on the internet. If it is not possible to obtain the permission of the right holder to post a deep or framing link, this may result in users no longer being able to find the relevant work due to the large number of sub-pages all over the internet.[88]

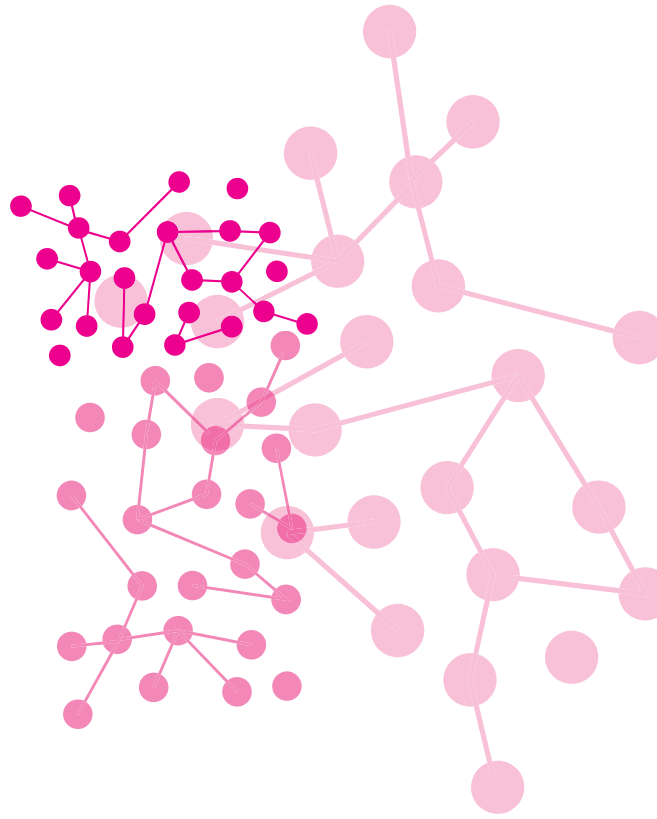
The proposal that linking should be covered by exceptions is furthermore too shortsighted because this would cover only a very small part of the links that are posted daily. It does not solve the question of what happens to bloggers or private individuals, who provide other internet users with hyperlink on their social media accounts or blogs, since these do not fall within the scope of the addressed exceptions.

4.2.2 Challenges of the new public criterion

By trying to balance the relevant interests within the scope of Art. 3(1), not only were alternative proposals put forward but there are also voices questioning the CJEU's approach of developing the new public criterion. It is accused of leaving questions unanswered and causing challenges within Art. 3(1), as discussed in the following.

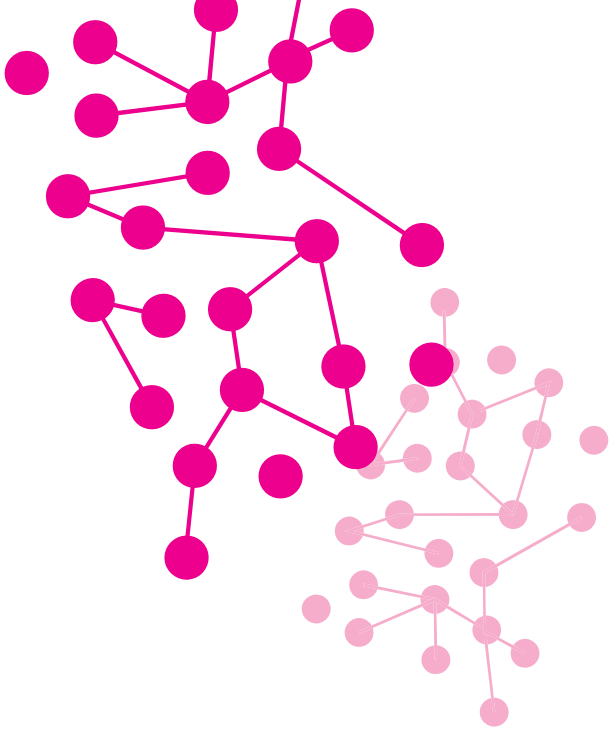
Creation of exhaustion

The ALAI recalled its opinion in which it stated that the CJEU creates exhaustion on Art. 3(1) by applying the new public criterion, nevertheless, voices in the literature are still of the opinion that the new public criterion establishes exhaustion on the right of communication to the public. This would contradict Art. 3(3) of the InfoSoc Directive



that explicitly states that the right of communication as per Art. 3(1) cannot be exhausted. Thus, it follows from Art. 3(3) of the InfoSoc Directive that the right holder's authorization is needed for every communication to the public. The CJEU stated in the *Svensson* case that a work, which is freely accessible on the internet, addresses all internet users, hence, never be communicated to a new public on the internet. This means that a right holder who makes a work freely accessible on the internet cannot object to a further communication of this work on the internet, unless restrictive measures were put in place when uploading the work. Thereby, the author's exclusive right would be in fact exhausted once he/she communicates the work online.[89]

Nonetheless, also ALAI already came to the conclusion that the alleged exhaustion is limited in scope, since not all forms of communication are affected. The CJEU emphasized in *Svensson* that its decision is solely applicable for cases in which the work is freely accessible on the internet, while cases concerning works, which are protected by restrictive measures or uploaded without the consent of the right holder, shall be dealt with differently. Therefore, the problem of the exhaustion in relation to Art. 3(1) seems to arise merely with regard to works which are freely accessible on the internet with the consent of the author. Notwithstanding, a hyperlink is a reference to a work uploaded on a different website, meaning that if the work were removed from the initial website, the hyperlink would not lead to the work, but to an empty website. Hence, the new public criterion does not create exhaustion of Art. 3(1) but constitutes an inherent limitation on the right based on economic considerations.[90]



"Unitary liability"

A further challenge that the development of the new public criterion by the CJEU and its corresponding case law allegedly aroused is the new form of "unitary liability" especially regarding intermediaries.

The CJEU is accused of interfusing primary and secondary liability as distinguished by most national jurisdiction within the EU. Primary liability means the liability for an action that is in the scope of an exclusive right. Secondary liability, on the other hand, is usually caused by an act that can be seen as a material contribution by facilitating, causing or otherwise being responsible for a direct infringement of an exclusive right. The EU Directives do not harmonize secondary liability within the EU. By its decision in *GS Media*, the CJEU made the operator of the website in question directly liable for the infringement of the right holder's exclusive right as of Art. 3(1). The CJEU derived this liability by adding the profit-making and knowledge criteria to the notion of a new public. The same argumentation was brought forward by the Court one year later in the cases of *Filmspeler* and *The Pirate Bay*. Consequently, operators of such websites, namely intermediaries, may be liable as primary infringers, provided they intervene in full knowledge. Their liability is not limited to injunctive reliefs and claims for removal any longer. A so-called "unitary liability" was thus established by the CJEU on the EU level, which does not draw a clear line between persons posting works themselves and intermediaries.[91]

In Germany this means that the doctrine of the interferer's liability must be adjusted accordingly or completely given up. The concept of communication now encompasses all forms of providing access, which means that it also covers acts in which the person providing the access does not have the authority of action within the meaning of German law. The distinction between perpetration, participation and interference liability, as it has been in German law, must be reviewed and adapted.[92]

After the European Parliament adopted the latest version of the proposal for the DSM Directive on March 26, 2019 and the vote of the Council in favor of the proposal on April 15, 2019, the question arises whether the purported mixing up of primary and secondary liability by the CJEU will still have an effect in the future.[93]

Art. 17 of the DSM Directive introduces various obligations for online content-sharing service providers[94] that organize and promote works uploaded by users on their platform for profit-making purposes. These platforms will in future be directly responsible for the communication of those works under Art. 3(1). Furthermore, the provider of such platforms must enter into license agreements with the relevant right holders. Failure to do so may result in liability under certain conditions. Additionally, such platforms will no longer be able to rely on the so-called safe harbor[95] in connection with copyright infringements. Moreover, there will exist an obligation to put mechanisms in place, to make certain information available to users in the general terms and conditions, and to make appropriate information available to the right holders.[96]

Although, it remains to be seen in the future exactly what impact the DSM Directive will have until it is finally implemented and applied, it is already assumed that the current legal situation will not change in the EU. With regard to Art. 17 of the DSM Directive, nothing seems to change for the Member States, since it is not intended to amend legal provisions under the InfoSoc Directive, but merely to clarify it as stated in Recital 64 of the Preamble of the DSM Directive. Art. 3(1) and the related case law concerning the liability of intermediaries therefore remain in force.[97]

Even though Art. 17 of the DSM Directive might have no influence on Art. 3(1) of the InfoSoc Directive and even if the fact remains that national systems of liability for intermediaries must be adapted to the case law of the CJEU, this is not necessarily negative. The Court created an EU-wide "unitary liability" with reference to Art. 3(1) of the InfoSoc Directive, which makes sense with regard to the often cross-border communication to the public of works.[98]

Unanswered questions

Notwithstanding it was welcomed that the radical approach from the *Svensson* case was modified in *GS Media*, the CJEU was accused of leaving questions unanswered regarding the new public criterion. Specifically, it was not sufficiently clarified which conditions a person must fulfill in order to act for profit. It was also left open what the knowledge must refer to exactly: the mere absence of consent or also the absence of possible applicable exceptions. Furthermore, it was not specified for exactly whom the presumption of knowledge is applicable. In this context, the applicability to search engines, for example, is unclear. The question regarding the exact nature of the necessary checks that have to be carried out also remains open.[99]

4.2.3 Endorsement of the new public criterion

Aside from the challenges caused by the case law of the CJEU, there is widespread endorsement of the path taken by the Court. Aspects of harmonization, economic consi-

derations, the protection of authors as well as the balancing of the interests play a crucial role. All of those considerations are also reflected in the InfoSoc Directive.

Flexible approach

Already at the very beginning of the InfoSoc Directive, in Recital 2 of the Preamble, the importance of creating a flexible framework to promote development in the EU is emphasized.

By interpreting Art. 3(1) as a general clause, the CJEU thus meets this demand for flexibility. Even if the fundamental structure consists of a two-stage examination scheme, other criteria (dependent on and intertwined with one another) must be taken into account, depending on the particular situation. The CJEU is thus shifting away from a rigid examination scheme towards a concept which includes not only additional criteria but also fundamental rights. Instead of a technical-schematic examination scheme, a function-related interpretation of the right of communication is adopted.[100]

This flexibility means that copyright, which was created before the digital age, is prepared for the challenges of rapid technological development. The approach taken by the CJEU should therefore be appreciated, above all, in the context of the information society.[101]

Economic considerations

In addition to purely copyright related aspects, the CJEU allows economic aspects to play a role in the interpretation of Art. 3(1). The Directive itself speaks of adapting copyright law to the economic reality.[102]

By giving these aspects a central role in the design of the infringing act, the CJEU is able to adapt the exploitation rights - taken over from the analogue world - flexibly to the requirements of the online markets, which are subject to rapid change. This can lead to new business models being adequately assessed and protected.[103]

Legal uncertainties addressed in further CJEU case law

At present, several questions for a preliminary ruling concerning Art. 3(1) are pending at the CJEU. Whether the operators of the platform Youtube exercise an act of communication within the meaning of Art. 3(1) under certain conditions is the question of two referrals, *Google and Others*, C-682/18, and *Elsevier*, C-683/18, by the BGH to the CJEU from 2018.[104] The case *VG Bild-Kunst*, C-392/19, revolves around the question of whether the embedding of a work which is freely available on the internet on the website of a third party by way of framing constitutes a communication to the public within the meaning of Art. 3(1) . The pivotal parameter might be the fact that protective measures against the framing taken or instigated by the right holder were circumvented.[105] Further, the case *Stichting Brein*, C-442/19, deals with the issue whether the operator of a platform for Usenet services made a communication to the public within the meaning of Art. 3(1).[106] The CJEU will therefore have sufficient opportunity in the future to further shape the right under Art. 3(1) and to clarify open questions.

Balance of interests

Another consideration of the InfoSoc Directive is the balancing of the interests involved. A uniform copyright law at EU level aims to contribute to a fair balance between

[91] Ohly, A., The broad concept of „communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?, in: GRUR Int. 2018, p. 517; Hanuz, B., Linking to unauthorized content after the CJEU GS Media decision, in: GRUR Int. 2017, p. 98; Ohly, A., EuGH: Keine "öffentliche Wiedergabe" durch Hyperlinksetzen ohne Gewinnrzielungsabsicht, in: GRUR 2016, p. 1156.

[92] Nordemann, J., EuGH-Urteile GS Media, Filmspeler und ThePirateBay: ein neues europäisches Haftungskonzept um Urheberrecht für die öffentliche Wiedergabe, in: GRUR Int. 2018, p. 528; Ohly, A., Der weite Täterbegriff des EuGH in den Urteilen "GS Media", "Filmspeler" und "The Pirate Bay": Abenddämmerung für die Störerhaftung, in: ZUM 2017, p. 793.

[93] The DSM Directive will not be discussed in the course of this thesis in detail, but only on this specific aspect regarding Art. 17 of the DSM Directive.

[94] Art. 17 of the DSM Directive does not generally refer to intermediaries, but only specifically to online content-sharing service providers defined as follows in Art. 2(6) of the DSM Directive: "'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. (...)".

[95] According to Art. 14(1) of the E-Commerce Directive service providers are not liable for copyright infringement in the case of hosting.

[96] Rosati, E., DSM Directive Series #4: Article 17 obligations ... in a chart, 17 April 2019, The IPKat, available on: http://ipkitten.blogspot.com/2019/04/dsm-directive-series-4-article-17.html.

[97] Rosati, E., DSM Directive Series #1: Do Member States have to transpose the value gap provision and does the YouTube referral matter?, 29 March 2019, The IPKat, available on: http://ipkitten.blogspot.com/2019/03/dsm-directive-series-1-do-member-states.html.

[98] Nordemann, J., EuGH-Urteile GS Media, Filmspeler und ThePirateBay: ein neues europäisches Haftungskonzept um Urheberrecht für die öffentliche Wiedergabe, in: GRUR Int. 2018, p. 532.

[99] Ohly, A., The broad concept of "communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?, in: GRUR Int. 2018, p. 521; Hanuz, B., Linking to unauthorized content after the CJEU GS Media decision, in GRUR Int. 2017, p. 98.

[100] Hofman, F., Aktuelle Entwicklungen der Rechtsprechung zum europäischen Urheberrecht, in: EuZW 2018, p. 518; Ohly, A., EuGH: Keine „öffentliche Wiedergabe" durch Hyperlinksetzen ohne Gewinnerzielungsabsicht - GS Media/Sanoma ua, in: GRUR 2016, p. 1156.

[101] Xalabarder, R., The Role of the CJEU in Harmonizing EU Copyright Law, in: IIC 2016, p. 635; Koolen, C., The Use of Hyperlinks in an Online Environment: Putting Links in Chains?, in: GRUR Int. 2016, p. 876.

[102] Recital 5 of the Preamble of the InfoSoc Directive.

[103] Ohly, A., EuGH: Keine "öffentliche Wiedergabe" durch Hyperlinksetzen ohne Gewinnrzielungsabsicht, in: GRUR 2016, p. 1156 et. seq.

[104] Referral C-682/18, Google and Others, 6 November 2018; Referral C-683/18, Elsevier, 6 November 2018.

[105] Case C-392/19, VG-Bild-Kunst, 21 May 2019.

[106] Case C-442/19, Stichting Brein, 12 June 2019.

the interests of authors and users but also those of the information society and thus of the internet.[107]

Especially in the *GS Media* case, it became apparent that the CJEU envisaged the negative effects that linking without further specifications or too restrictive measures would have. Thus, the CJEU weighed the right of freedom of information, as per Art. 11 of the Charter, the situation of users but also the protection of authors by differentiating who posts the link.[108]

It is not a novelty that the CJEU tries to balance the interests of authors and users within the framework of copyright law. New in *GS Media*, however, was that the CJEU not only took into account those interests, but also explicitly included the fundamental rights, laid down in the Charter, in its consideration. The Court also pointed out the decisive role of the internet in the exercise of these fundamental rights. In this context, it also addressed the special aspects of linking in detail.[109]

Harmonization of copyright law

One of the fundamental ideas of the EU is to harmonize the legal systems, such as copyright law, of the individual Member States. Not only does this benefit right holders by providing them with the same protection within the EU but it also ensures legal certainty for users by allowing them to determine throughout the EU which acts they can carry out without infringing any right. [110]

Although the CJEU does not form the legislative authority at EU level, but the European Parliament and the Council of the European Union, it is precisely that Court which shapes copyright law at European level and to some extent even designs it. The CJEU seems to have committed itself to the target of harmonization and is pursuing it in longer term. Especially considering the partly, distorted and rather slow harmonization of copyright law, the CJEU's approach is to be welcomed. In contrast to the other intellectual property rights, such as trademark, patent and design law, in which binding regulations exist, European copyright law is governed by directives that give the Member States a certain amount of individual autonomy.[111]

A uniform interpretation of the right of communication as per Art. 3(1), which takes into account the developments of the digital age, thus contributes significantly to the harmonization of copyright law within the EU. [112]

5. CONCLUDING REMARKS

The key article, around which this article revolves, is Art. 3(1) of the InfoSoc Directive that gives authors the exclusive right to communicate a work to the public. This article implements the right of communication under previous international treaties. It is composed of two pillars, the act of communication and the public, supplemented by other criteria, depending on the individual case. These interdependent and interconnected criteria include, among others, the new public criterion, developed by the Court. The interpretation of Art. 3(1) is strongly influenced by the case law of the CJEU over the last years.

In the context of this case law, the CJEU developed a system of when creating a link constitutes a communication to a new public, thus leading to an infringement of the right under Art. 3(1), and when it does not. It must be mentioned that the specific type of link does not play a role. First, it must be distinguished whether the work was originally published on the internet with the consent of the right holder. If this is the case, the next step is to differentiate whether the work is freely accessible to the public or protected by technical measures. In the former case, linking to the work does not constitute a communication to a new public. If technical protective measures are circumvented by setting the link, this in turn constitutes a communication to a new public, thus an infringement of Art. 3(1). Where the work was initially uploaded without the consent of the right holder, a distinction is made between three categories. If the work is freely accessible, the link provider does not pursue any profit-making intention by setting the link and the person is not aware of the unlawfulness of the work, no communication to a new public takes place. Otherwise, if the only difference in this constellation is that the person posting the link is aware of the unlawfulness, then this constitutes a communica-

[107] Recital 31 of the Preamble of the InfoSoc Directive.

[108] Ross, A., Hot links – pirate porn leads CJEU to rule on linking to unauthorised content, in: Entertain Law Rev 28, 2016, p. 18; Bellan, A., Compared to Svensson, GS Media is not that bad after all, 4 October 2016, The IPKat, available on: http://ipkitten.blogspot.com/2016/10/compared-to-svensson-gs-media-is-not.html.

[109] Torremans, Paul, Research Handbook on Copyright Law, Cheltenham/Northampton, Edward Elgar Publishing, 2017, p. 153 et seq.

[110] Recitals 3, 6, 9 of the Preamble of the InfoSoc Directive.

[111] Xalabarder, R., The Role of the CJEU in Harmonizing EU Copyright Law, in: IIC 2016, p. 639.

[112] Ibid.

[113] Tim Berners-Lee launched the first website (http://info.cern.ch/hypertext/WWW/TheProject.html) on its computer on the April 30, 1993 (cf. https://home.cern/science/computing/birth-web).

[114] Netcraft, April 2019 Web Server Survey, available on: https://news.netcraft.com/archives/category/web-server-survey/.

[115] Kemp, S., We Are Social, Digital in 2018: Essential Insights Into internet, Social Media, Mobile, And Ecommerce Use Around The World, 30 January 2018, available on: https://wearesocial.com/blog/2018/01/global-digital-report-2018.

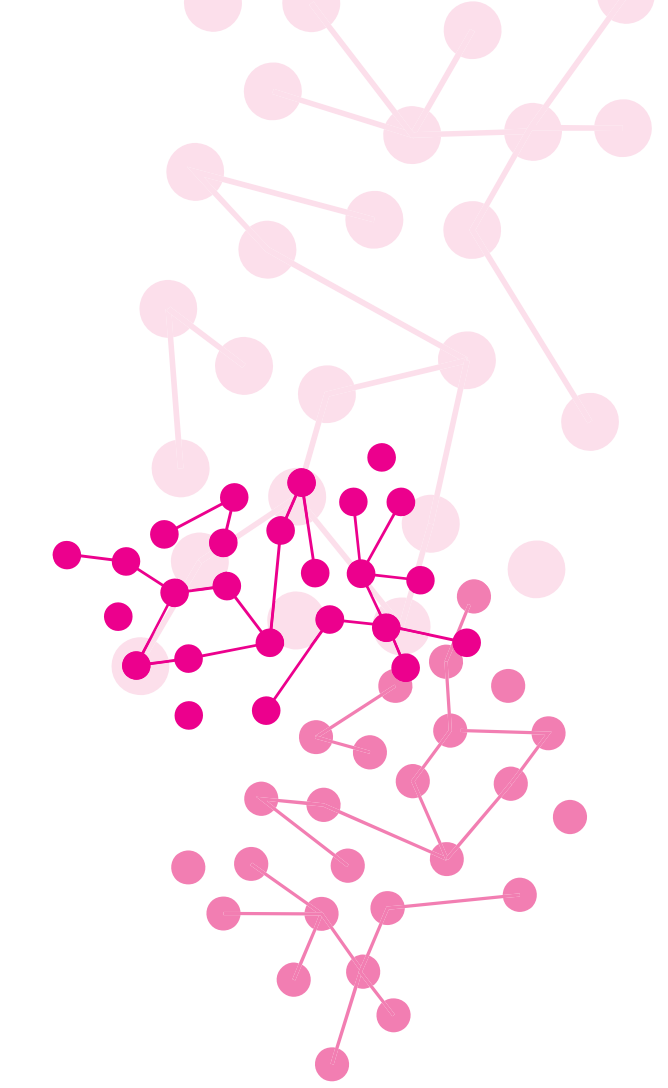
[116] Statistische Ämter des Bundes und der Länder, Private Haushalte in der Informationsgesellschaft: Europäische Erhebung zur Nutzung von Informations- und Kommunikationstechnologien (Private households in the information society: European survey on the use of information and communication technologies), 2019, available on: https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Einkommen-Konsum-Lebensbedingungen/IT-Nutzung/Publikationen/Downloads-IT-Nutzung/private-haushalte-ikt-2150400197004.pdf?__blob=publicationFile

tion to a new public. In the event that the work is freely accessible and the link provider acts with a profit-making intention, a rebuttable presumption of knowledge is applied and the provision of the link consequently leads to a communication to a new public and therefore to an infringement of Art. 3(1).

At national level in Germany, the BGH, prior to the influence of the EU, namely the InfoSoc Directive and the CJEU case law, decided that linking did not fall within the scope of the right of communication to the public. Due to the implementation of the InfoSoc Directive and the related case law of the CJEU, its interpretation had to be adapted. However, even if the BGH now applies the examination scheme and criteria developed by the CJEU in the course of the right of communication to the public, the BGH grants itself a certain leeway with regard to interpretation at national level.

Even though the case law of the CJEU caused considerable concern, and alternative proposals regarding the copyright handling of links were submitted as a result, there is still consensus on the result of the Court's case law. Similarly, the CJEU gained widespread endorsement and admiration for its courageous and innovative approach. By developing the new public criterion, the CJEU made a decisive contribution to the interpretation and further development of Art. 3(1). The decisions of the CJEU show that the broad wording of this article had to be clarified in order to meet the requirements of a modern information society. The CJEU endeavored to preserve the exclusive right of authors and to enable them to exercise this right even on a platform as complex as the internet. However, the CJEU did not only try to balance the interests of authors and users but also the functioning of the internet. Thus, the Court does not want to hinder the important functioning of the internet, on the other hand it also wants to prevent the emergence of a legal vacuum.

Copyright law is under constant pressure to undergo adaption, at national and EU level, as a result of technological developments. It has been 26 years since the first website went online in Switzerland.[113] Since then, the number of active websites rose to around 181 million.[114] Approximately 674 million people in the EU, thus approx. 80% of the total population, use the internet.[115] Moreover, 91% of Europeans use the internet to obtain information.[116] It is therefore likely that links, which make it much easier to find that information in the mass of websites, will not lose their importance. The development of the new public criterion by the CJEU was a courageous step to adapt copyright law, in particular Art. 3(1), to the digital age in Europe. Even if there are still unanswered questions, the current questions for preliminary rulings pending at the CJEU show that the Court will continue to have the possibility to answer these questions and thus contribute to a greater legal certainty on the internet in the future. As mentioned in the introduction of this article, the internet significantly changed the lives of authors and users. The rapid circulation of works throughout the EU is a key factor in the exchange of opinions and information. Copyright law must not hinder this exchange but should ensure that the interests of the parties involved are adequately protected.



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After finishing her law studies in Germany, Sophie-Elena Bohle obtained a master's degree in IP law from Stockholm University in 2019. Currently, she is a legal clerk in Berlin and is preparing for the second state examination. After various practical experiences in the field of IP law, most recently at Hannes Snellman law firm in Stockholm, she would like to pursue a career in this field, especially with a focus on copyright law.