Untangling online communication to the public in CJEU case law
Some implications for online intermediaries

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Online Intermediaries and Platforms in Copyright
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Outline

• Introduction to right of communication to the public (C2P)

• CJEU case law: snapshot of a conceptual framework

• New Public and Online use
  – Incl. implications for online platforms and intermediaries
Introduction

• EU right of C2P
  – Authors: **Art 3(1) InfoSoc Directive**
  – RR holders: Arts 3(2) InfoSoc, 8 Rental/Lending, 4 SatCab, Directives

• C2P
  – Communication at a distance (linear + on-demand)
  – No exhaustion
  – Autonomous concept of EU law, full harmonization

• CJEU so far
  – 18 cases, 3 preliminary references

• Offline
  – transmission of broadcasts in hotel rooms, spas, circuses, public places, and dental practices, and ≠ scenarios of C2P by satellite

• Online
  – Streaming: *ITV 1*
  – Hyperlinking: *Svensson, BestWater, C More, GS Media, Soulier(!), Filmspeler* and *Ziggo (The Pirate Bay)*
CJEU case law: a conceptual salad

Act of communication
Profit-making
For profit
Financial gain
Availability
Freely accessible
Implicit consent
(for linking)

Public
(targeted, receptive, de minimis)

Specific (or separate)
technical means

Intervention
(deliberate, intentional, crucial, indispensable)

Restrictive measures
(or access restrictions)

New Public

rebuttable presumption
of knowledge

Transmission
(un)authorized content

circumvention

J.P. Quintais, Untangling..., Munich 23.03.2017
CJEU case law: a conceptual framework

- Act of Communication
- To the public
- Profit-making nature

C2P
C2P

Act of Communication

Cumulative requirements

To the public

Rule: C2P = AoC + to the Public

Profit-making nature

Non-essential, Except maybe for related rights… (and hyperlinking?)
C2P = AoC (Intervention + [Transmission / Availability])
+ to Public (Public + [STM / NP])
C2P

Act of Communication

Deliberate or intentional intervention

Transmission or availability

Public

Specific technical means

New Public

To the public

Profit-making nature
A public not taken into account by the copyright holder when they authorized the initial communication to the public (SGAE onwards; first online use in Svensson)
New Public

After GS Media and Soulier
Hyperlinking to Works made available online → Act of Communication? → YES → Communication to a New Public?
Hyperlinking to Works made available online → Act of Communication?

- YES

Communication to a New Public?

- Link points to authorized content

- Link points to unauthorized content

Link points to authorized content

- Link circumvents restrictions?
  - Linker posts hyperlinks for-profit (e.g. a commercial platform)
  - Linker does not post hyperlinks for-profit (e.g. end-user)

Presumption Knowledge of unauthorized content

- No presumption

Copyright Irrelevant

- YES

Copyright Infringement

- NO

Removes Link?

- YES

Knowledge of unauthorized source?

- YES

Svensson; + GS Media

GS Media
Hyperlinking to Works made available online → Act of Communication? → YES → Communication to a New Public?

Link points to authorized content

- Content freely accessible
- Access restrictions or restrictive measures

Svensson; + GS Media

Knowledge of unauthorized source?

YES → Remover Link?

Copyright Irrelevant

Presumption Rebutted?

Copyright Infringement

NO

Linker notified of unauthorized status of content?

NO

J.P. Quintais, Untangling..., Munich 23.03.2017
Hyperlinking to Works made available online

Act of Communication?

YES

Communication to a New Public?

Link points to unauthorized content

Linker posts hyperlinks for-profit (e.g. a commercial platform)

Linker does not post hyperlinks for-profit (e.g. end-user)

Presumption Knowledge of unauthorized content

No presumption Knowledge of unauthorized content

Copyright Irrelevant

Copyright Infringement

NO

NO

YES

Removes Link?

YES

Knowledge of unauthorized source?

YES

Svensson; + GS Media

Svensson

Implied Consent

Soulier

Initial communication aimed at general Internet public

No new public = No C2P

J.P. Quintais, Untangling..., Munich 23.03.2017
Hyperlinking to Works made available online → Act of Communication? → YES → Communication to a New Public?

- Link points to authorized content
  - Content freely accessible
    - Implied Consent (Svensson)
      - Copyright Irrelevant
    - Copyright Infringement
  - Access restrictions or restrictive measures
    - Link circumvents restrictions? (Svensson & progeny)
      - NO
        - Implied Consent (Soulier)
      - YES → Link = essential intervention to reach a new public

- Copyright Irrelevant

- Copyright Infringement

J.P. Quintais, Untangling..., Munich 23.03.2017
Hyperlinking to Works made available online

Act of Communication?

Communication to a New Public?

Link points to authorized content

Link points to unauthorized content

Content freely accessible

Access restrictions or restrictive measures

Link circumvents restrictions?

Copyright Irrelevant

Copyright Infringement

Access restrictions or restrictive measures?

- Not contractual measures (Soulier, 36)
- Technological measures, e.g. paywalls, session IDs, robot.txt files
- Or just Art 6 TPMs? (AG GS Media, 77 & n.43)
Hyperlinking to Works made available online → Act of Communication? → YES

Communication to a New Public?

Link points to authorized content

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NO

Implied Consent

Copyright Irrelevant

Svensson; + GS Media

Copyright Infringement

YES

Linker notified of unauthorized status of content?

NO

Copyright Infringement

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Implicit consent

• Anti-exhaustion interpretation

• But… isn’t New Public cumulative criterion?

• If implicit consent, how to terminate it?

• Via subsequent restrictive measures
  • Technological
  • If contractual: duty to monitor links on commercial hyperlinkers → GS Media
Hyperlinking to Works made available online → Act of Communication? → YES

Communication to a New Public?

Link points to unauthorized content

Knowledge of unauthorized source?

GS Media

Copyright Irrelevant

YES

Presumption Rebutted?

NO

Copyright Infringement

NO

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Content freely accessible

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Hyperlinking to Works made available online → Act of Communication?

YES

→ Communication to a New Public?

→ Link points to unauthorized content

GS Media

→ Knowledge of unauthorized source?

Linker posts hyperlinks for-profit (e.g. a commercial platform)

Presumption Knowledge of unauthorised content

↓

Presumption Rebutted?

NO

NO

Linker does not post hyperlinks for-profit (e.g. end-user)

No presumption Knowledge of unauthorised content

↓

Copyright Irrelevant YES

→ Presumption Rebutted?

NO

NO

Copyright Infringement

YES

NO

Linker notified of unauthorized status of content?

YES

NO

Removes Link?
Hyperlinking to Works made available online → Act of Communication? → YES

Communication to a New Public?

Link points to unauthorized content

Knowledge of unauthorized source?

Linker posts hyperlinks for-profit (e.g. a commercial platform) → Presumption Knowledge of unauthorised content → Presumption Rebutted?

Linker does not post hyperlinks for-profit (e.g. end-user) → No presumption Knowledge of unauthorised content

Linker notified of unauthorized status of content?

Copyright Irrelevant → Copyright Infringement

NO → YES
Hyperlinking to Works made available online → Act of Communication?

Act of Communication? → Communication to a New Public?

Communication to a New Public? → Link points to unauthorized content

Link points to unauthorized content → Knowledge of unauthorized source?

Knowledge of unauthorized source?

- Linker posts hyperlinks for-profit (e.g., a commercial platform):
  - Presumption Knowledge of unauthorised content
  - Presumption Rebutted?

 Presumption Knowledge of unauthorised content → Copyright Irrelevant

Copyright Irrelevant → YES

Copyright Irrelevant → Copyright Infringement → NO

Copyright Infringement → Copyright Irrelevant

Copyright Irrelevant → NO

- Linker does not post hyperlinks for-profit (e.g., end-user):
  - No presumption Knowledge of unauthorised content
  - Linker notified of unauthorized status of content?

 No presumption Knowledge of unauthorised content → Copyright Irrelevant

Copyright Irrelevant → NO

Copyright Irrelevant → YES

Copyright Irrelevant → Copyright Infringement

Copyright Infringement → Copyright Irrelevant

Copyright Irrelevant → NO

Copyright Irrelevant → YES

Copyright Irrelevant → Copyright Infringement

Copyright Infringement → Copyright Irrelevant

Copyright Irrelevant → NO
**Knowledge & presumption**

- Subjective knowledge test
  - ‘knew or ought to have known’

- Rebutttable legal presumption:
  - if links posted for-profit, hyperlinker expected to *carry out the necessary checks* and therefore have full knowledge of the link’s legality

- Attempt to balance FoE of (end-)users

**Some issues**

- Unclear legal basis
- No distinction primary vs secondary liability
- No strict liability for hyperlinking to unauthorized content(!)
- Uncertain application of presumption
For-profit

‘Carried out for profit’ or ‘pursuing financial gain’

Strict and broad interpretations
1) specific link is profit-making (e.g. via clicks)
2) hyperlinking website is profit-making
3) hyperlinker is a commercial party

National applications of GS Media in SW, DE, NL, CZ and UK: mostly 2) (NL = 3)

• For profit = de facto presumption
• Hyperlinker → commercial website/platform → link for profit → knowledge presumed
• Result: (quasi) automatic liability for commercial websites/platforms posting/relying on links
Duty to monitor links?

**Svensson, 31 + GS Media:**

- Commercial websites have duty to monitor status of linked-to work
- Duty = ‘necessary checks to ensure that work concerned is not illegally published on the website to which those hyperlinks lead’ (*GS Media*, 51)
- Proactive checks *when posting and subsequently*

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**Diagram:**

- **Hyperlinking to Works made available online** → **Act of Communication?** → **YES** → **Communication to a New Public?**
  - **Link points to unauthorized content** → **Knowledge of unauthorized source?**
    - **Yes** → **Presumption Knowledge of unauthorised content** → **Presumption Rebutted?**
      - **Yes** → **Removes Link?**
        - **Yes**
        - **NO**
    - **NO** → **Linker notified of unauthorized status of content?**
      - **Yes**
      - **NO**
- **Linker does not post hyperlinks for-profit (e.g. end-user)** → **No presumption Knowledge of unauthorised content**
- **Linker posts hyperlinks for-profit (e.g. a commercial platform)** → **Presumption Rebutted?**
  - **Yes** → **Removes Link?**
    - **YES** → **NO**
  - **NO**
Duty to monitor links?

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Broad monitoring obligation online platforms?
- Burdensome & disproportionate? Fair balance?
- Contrary to Art. 15 ECD?

1) No: this concerns own use – platform as user – and does not trigger safe-harbours
2) Yes: at least for platforms who act ‘only as intermediaries’ re: content uploaded by users
   → Presumption = general obligation to monitor indexed/hosted content → prohibited
   → Actual knowledge required for joint primary liability (AG Opinion Ziggo, 49–54, re: TPB in P2P)

J.P. Quintais, Untangling..., Munich 23.03.2017
Rebuttable presumption

- Possible if no actual/constructive knowledge
- Rebuttal = evidence of absence of knowledge or awareness...
  - ... i.e. evidence of ‘necessary checks’
- Reasonable duty of care? rebuttal if illegality could not have been identified even w/ ‘reasonable, duly diligent controls’ (Leistner 2017)
Rebuttable presumption

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Other potential rebuttal scenarios (Senftleben 2016)

1) Link to content uploaded & not taken down on good faith hosting platform
   • Knowledge test + NTD system Art 14 ECD indirectly benefit hyperlinker

2) Link benefits from © limitation (e.g. quotation)

3) Link benefits from implicit consent?
   • Scenario 1)? Best efforts to contact © owner?

4) Art 13 DSM Dir. ‘agreements’ or ‘measures’?

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Hyperlinking to Works made available online ➔ Act of Communication?

Yes ➔ Communication to a New Public?

Yes ➔ Link points to unauthorized content

No ➔ Link points to authorized content

Content freely accessible ➔ Link points to unauthorized content

Access restrictions or restrictive measures ➔ Link circumvents restrictions?

No ➔ Copyright Irrelevant

Svensson: + GS Media

Linker notified of unauthorized status of content?

No ➔ Copyright Infringement

Copyright Infringement ➔ Yes

Copyright Irrelevant ➔ No

Linker notified of unauthorized status of content? ➔ No

Removes Link?

No ➔ Copyright Infringement

Copyright Infringement ➔ Yes

Linker notified of unauthorized status of content?

Yes ➔ Copyright Infringement

Copyright Infringement ➔ Copyright Irrelevant

Copyright Irrelevant ➔ No

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Copyright Irrelevant ➔ Yes
For online platforms

• **Primary Liability > Secondary Liability**
  
  – Hybrid platforms: borderline ‘non-neutral’ conduct *Google France; L’Oréal*
  
  – Neutrality $\rightarrow$ absence of control $\rightarrow$ absence of knowledge…
  
  – … knowledge presumption pushes commercial platforms towards *own use* scenario…
    
    • …and so does Rec 38 DSM Dir. pre-Comodini Cachia Report
  
  – Erosion of ECD liability exemptions, esp. hosting

• **Burden on platforms relying on linking technology**
  
  – ‘Necessary checks’ & duty to monitor: role of Art 15 ECD? Fair balance?
  
  – Content sharing platforms? Own use? Deliberate intervention?
  
  – Automatic link aggregators/generators/search engines: *act of communication or knowledge* absent deliberate (human) intervention?
  
  – P2P networks: joint direct liability only if full knowledge? *AG Opinion Ziggo*
  
  – Rebuttal of presumption?
Final remarks

- CJEU case law: complex, unclear, fosters technological restriction on access
- C2P right encroaches upon intermediary liability & erodes hosting safe-harbour
  - Commercial (content sharing) platforms relying on linking risk primary liability
- Key issue for online platforms: when are their activities a C2P?
  - Current © reform package (esp. Art. 13 DSM) does not address this
- Need for legislative action on C2P… some options:

<table>
<thead>
<tr>
<th>Exclusive right</th>
<th>Limitations</th>
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<tbody>
<tr>
<td>Clear(er) definition of C2P</td>
<td>Optional compensated limitation for ‘own use’ platforms + mandatory limitation automatic aggregators? (Leistner: ‘collective remuneration’ proposal)</td>
</tr>
<tr>
<td>Focus: genuine own use + commercial exploitation + prohibition of competing use (e.g. prohibition of harmful links, such as deceptive embedding)</td>
<td>Uncompensated limitation for non-commercial end-user linking?</td>
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<tr>
<td></td>
<td>ACS (+ harmonization of accessory liability)?</td>
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Thank you for your attention!

João Pedro Quintais  
Institute for Information Law (IViR)  
University of Amsterdam

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Upcoming book with Kluwer:

*Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law*

Kluwer Information Law Series  
(May/June 2017)