Hyperlinks to Illegal Content and Balancing Copyright Law and the Freedom of Expression

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## Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>ECFR</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAPL</td>
<td>Football Association Premier League</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights.</td>
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<td>TEC</td>
<td>European Community Treaty</td>
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<td>UK</td>
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Abstract

During the recent years the Digital World has grown rapidly with the changing technology reality. The Digital World has been a great development for the World’s society for individuals to connect with each other both on a business level and on a private level. New technologies have been created in order to access Internet all over the World which have created new job opportunities for people around the globe. There are many advantages with the development of the Digital World which will continue to flourish with the ongoing development of the Internet. However, as the Digital World increase everyday with new developed technology the European Framework of Copyright Law face difficulties to adapt to the new changes. This thesis will therefore focus on the communication to the public in relation to hyperlinks in the Digital World which have created problems for legislators around Europe to rule on different matters. This problem also influences the human right to express oneself and to receive information in the Digital World. Thus, the purpose is to find better ways for the European Framework to adapt to the increasing Digital World in relation to hyperlinks as well as balancing copyright law and the freedom of expression and the right to receive information.
1 Introduction

1.1 Overview
This thesis will focus on European copyright law within the interpretation of hyperlinks in relation to the communication to the public within Article 3(1) of the Information Society Directive (hereinafter: InfoSoc Directive). The information society has developed rapidly during the recent years which has created problems for the legal environment. Article 3(1) of the InfoSoc Directive defines the right to the communication to the public of right holders with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The provision of Article 3(1) of the InfoSoc Directive only covers acts that do involve a “transmission” or a “retransmission” of a work. However, the rights and interests of the right holder must be fairly balanced with the rights and interests of the user of the protected-subject matter. The latest judgement on hyperlinks in relation to the communication to the public is GS Media which interpreted hyperlinks as a communication to the public which may infringe copyright law if the hyperlink is directed to illegal content and is carried out for profit. There is no further development after this case which could possibly create problems in the future for courts around Europe to interpret the outcome in GS Media judgement to different situations in relations to hyperlinks.

1.2 Aim and Research Questions
The purpose of this essay is to examine what the legal regulations within the European Union (hereinafter: EU) state about the communication to the public in relation to the information society. There is no provision on how to interpret the communication to the public and therefore it is important to examine case-law in order to find out how courts around Europe should interpret this provision. The objective of this thesis is also to examine how courts shall be able to strike a fair balance between copyright law and the freedom of expression.
The following questions will be examined in this thesis:

- What happened after the *GS Media* case with the interpretation of the communication to the public in relation to hyperlinks?
- How should the European Court of Justice (hereinafter: CJEU) further develop the communication to the public when the hyperlink is directed to illegal content and is carried out for profit?
- Why does it not constitute copyright infringement when the hyperlink is not carried out for profit but is directed to illegal content?
- How shall courts strike a fair balance between copyright law and the freedom of expression?
- Should the InfoSoc Directive be amended in order to adapt to the challenges in the Information Society?

1.3 Method and Material

In this thesis a legal dogmatic method will be used in order to resolve these issues. Therefore, I will examine EU treaties, conventions, regulations, directives, case-law, articles and literature. Since there is no provision in the EU legislation on how to interpret the communication to the public in relation to hyperlinks a lot of case-law must be examined and presented in order to resolve these issues. In order to find a fair balance between the right holder of the protected copyright content and the user of the subject-matter an examination of the latest case-law must also be presented in order to be able to answer this question.

1.4 Delimitations

This thesis will only focus on the legal position of the communication to the public in relation to hyperlinks and on the balancing act between copyright law and the freedom of expression within the EU. Other legal systems outside the EU will not be examined in order to address the research questions. Neither will individual Contracting States’ legal rules be examined. Since the most important aspect of the problem is that the CJEU will find a mutual interpretation on this matter. Any derogations laid down in Article 5 of the InfoSoc Directive will not be examined either due to space limitations of this thesis.
1.5 Outline

This thesis will start with a chapter that will present the subject of the essay, aim, issues, method and material, delimitations and an outline in order for the reader to understand what this thesis will present. In the second chapter a background to the development of the information society will be presented and Hyperlinks will be defined. The third chapter will present the communication to the public in relation to treaties, regulations and directives. The InfoSoc Directive will mainly be presented. A development of case-law will also be examined in order to find out what the legal position is on hyperlinks within the information society. The fourth chapter will examine the EU Charter (hereinafter: ECFR) and the European Convention on Human Rights (hereinafter: ECHR) in order to strike a fair balance between copyright law and the freedom of expression. The fifth chapter will evaluate the balancing act and try to strike a fair balance between copyright law and the freedom of expression. Recent case-law on the balancing act will also be examined. The sixth chapter will be an analyse of the questions that has been raised in this thesis which also will be followed by a conclusion on the matters. The seventh chapter will present the legal resources in a Bibliography that has been used in this essay.
2 Hyperlinks

2.1 Background

Over the years the development of the Internet has increased rapidly.¹ During the years the online environment has been renewed and enriched users’ Internet experiences. In order to build and develop the online world billions of hours and hundreds of billions in research have been invested by entrepreneurs, technology activists, civic actors, educators, government agencies, non-profit organizations, new operations and millions of individuals.² As Internet developed individuals started to use online services and engage with others online and to share content with others.³ The technology’s networking capabilities and widespread availability are two factors that are due to the increasing development of the Internet which have enabled people all over the world to communicate with each other quickly and efficiently.

Nowadays, there are databases of digital information located around the world where many Internet users may access content. Such content could for example include music or pictures which could be placed on a website for Internet users to copy and further circulate to other people. The access of the Internet which enabled individuals to go online anywhere in the world has increased by the development of technologic devices.⁴ Issues of copyright law have arisen because of the development of the Internet and its increase globally.⁵ The digital media has affected intellectual property the most of all areas of law. Lawmakers struggle to adapt to copyright protection when the law is still in transition to a fluid medium while maintaining a balance between the rights of copyright holders and copyright users.⁶ Legal certainty for right holders has therefore been requested in the digital

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² Ibid, p. 67.
³ Ibid, p. 70.
⁵ Spindler, Gerald, Chapter 12; *Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms*, EU Internet Law, Publisher: Springer International Publishing AG, 2017, p. 289.
world in order for copyright holders to protect their content that is published on the Internet without their consent. In order to determine copyright infringement in the digital world a balance need to be struck between the right of the copyright holder to protect its property and the right of the Internet user to protect its freedom of expression. This thesis will focus on hyperlinks which is a development on the Internet that has caused issues within the European copyright law.

2.2 Hyperlinks

The technological capability of a hyperlink is to enable one website to link with another website. A hyperlink could be described as a navigational tool between websites that allows for various combinations of information. A user can click on a text or image on a website that contain a hyperlink that will direct the user to a new page or different website. Directional links are established by hyperlinks and they are used between websites on the Internet. A distributed hypertext system that consist of a network of content and hyperlinks with billions of interlinked pages can be defined as the World Wide Web. Webpages are the nodes and the hyperlinks are the lines between a complex network which constitute the Internet. Hyperlinks can be used on different social media platforms such as blogs, Twitter or Instagram. Hyperlinks have been used for a long time and there are still struggles with how they shall interpret such links in relation to copyright law. There are some hyperlinks that lead directly to the infringing material and some links that

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7 Spindler, Gerald, Chapter 12; Responsibility and Liability of Internet Intermediaries: Status Quo in the EU and Potential Reforms, EU Internet Law, Publisher: Springer International Publishing AG, 2017, p. 289.
8 Ibid, p. 305.
9 Ibid, p. 310.
lead to websites that require additional steps to be able to access the infringing material. Hyperlinks can also lead to websites where it’s not obvious that the person who clicked on the link was directed to infringing content.\textsuperscript{14}

3 Rights of Communication

3.1 Introduction to communication and making available to the public

The development of the Internet has been essential to the ability of copyright and related right holders to be able to control the transmission of protected works and subject matter to the public in order to exploit fully the commercial value of their works and subject matter.\(^{15}\) The rights of communication were established in the WIPO Copyright Treaty of 1996 (hereinafter: WCT) which introduced a single provision ‘communication to the public’ right in Article 8 and a new provision ‘making available to the public’ right in Article 6.\(^{16}\) Separate provisions were created to be consistent with the requirements of the Berne and Rome Conventions of the exclusive right of those right holders to prohibit or authorize a range of communicative acts.\(^{17}\)

Member States is required by EU law to implement these international provisions to ensure to authors, performers, phonogram producers of first fixations of films, and broadcasting organizations the exclusive rights to authorize or prohibit the communication of their works and subject matter to the public which is laid down in Article 3(1) of the InfoSoc Directive.\(^{18}\) Right holders have therefore an exclusive right to control the communication to the public and the distribution of their works and subject-matter to the extent that certain acts were not intended to be caught within their sphere of regulation or to the extent that the relevant directives expressly provide to the contrary.\(^{19}\) All other works than databases are subject to the communication right of Article 3 of the InfoSoc Directive which is published


to members of the public not present at the place where the communication originated, in which the work or subject-matter is restricted to transmissions or retransmissions.\textsuperscript{20} The activity must involve a “transmission” or a “retransmission” of a work in order for the communication right in Article 3 of the InfoSoc Directive to be applicable. Therefore, acts such as live presentations or performances of a work are not considered under this provision.\textsuperscript{21}

3.2 The terms in the InfoSoc Directive

New multiplied and diversified forms for creation, production and exploitation have been created through technical development. In order to adapt to the technical developments in the information society a harmonized Directive needed to be established which could respond to economic realities such as new forms of exploitations.\textsuperscript{22} In 1994, the European Council decided that a general and flexible legal framework at Community level was essential for the information society to evolve and function properly.\textsuperscript{23} The creation of the InfoSoc Directive provided for an internal market to be established in which the competition shall not be distorted by the institution of the system. In order for the European Council to achieve these objectives a harmonisation of the laws of the Member States on copyright and related rights needed to be established in the European Union.\textsuperscript{24} The proposal of the harmonisation of copyright law and related rights stipulated that the four freedoms of the internal market could be implemented easier and the proposal also stated that the new legal framework must be in compliance with the fundamental principles of law, especially the principles of property, including intellectual property and freedom of expression and the public interest.\textsuperscript{25} A high level of protection of

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\item \textsuperscript{21} C-283/10, \textit{Circul Globus Bucureşti v Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor (UCMR – ADA)}, [2001], para. 40.
\item \textsuperscript{23} Ibid, Recital 2.
\item \textsuperscript{24} Ibid, Recital 1.
\item \textsuperscript{25} Ibid, Recital 3.
\end{itemize}
\end{footnotesize}
intellectual property increased therefore the legal certainty in the EU by the establishment of a harmonised legal framework on copyright and related rights.

The objective of the InfoSoc Directive is to encourage the development of the information society in Europe. The objective of the InfoSoc Directive is also that the substantial investment in creativity and innovation, including network infrastructure, is encouraged which will advance the growth and increase the competitiveness of the European Industry. The purpose of the InfoSoc Directive is therefore to create new jobs which will also decrease the unemployment in the EU society. The principles of the InfoSoc Directive are based on the rules laid down in earlier directives and these principles were therefore placed in the context of the information society when this directive was developed.

The author’s right of the communication to the public should be further harmonised by the InfoSoc Directive. The right in Article 3(1) of the InfoSoc Directive should be interpreted in a broad sense which cover all communications to the public not present at the place where the communications originate. Acts of transmission or retransmission of a work to the public by wire or wireless means, including broadcasting should be covered by this right. No other acts should be covered by this right. All acts of making available such subject-matter to members of the public not present at the place where the act of making available originates should be covered by the right to make available to the public subject-matter referred to in Article 3(2) of the InfoSoc Directive. The subject-matter of different categories of right holders and users of protected subject-matter must be safeguarded by a fair balance of the rights and interests between these two groups. The exceptions and limitations must be applied in harmonisation between Member States in order to not have direct negative effects on the functioning of the internal market of copyright and related rights. The InfoSoc Directive is therefore to ensure that the exceptions and limitations in the information society will be applied more harmoniously.

26 Ibid, Recital 4.
27 Ibid, Recital 20.
28 Ibid, Recital 23.
29 Ibid, Recital 31.
Directive are laid down in an exhaustive list to the reproduction right and the right of communication to the public.\textsuperscript{30} The objective of the InfoSoc Directive is to consider a use lawful when the right holder has authorized the act and that act can therefore not be restricted by law.\textsuperscript{31} The exceptions and limitations of the InfoSoc Directive should be applied and exercised in accordance with international obligations. The legitimate interests of the right holder should not be prejudiced by the way the exceptions and limitations are applied by Member States nor should the application conflict with the normal exploitation of the right holder’s work or other subject-matter. Such exceptions and limitations in the electronic environment should be applied in a way that will reflect the increased economic impact.\textsuperscript{32}

3.3 Communication to the public in case law

Article 3(1) of the InfoSoc Directive defines the right to the communication to the public of authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The provision of Article 3(1) of the InfoSoc Directive only covers acts that do involve a “transmission” or a “retransmission” of a work.\textsuperscript{33} Article 3(1) should be interpreted broadly\textsuperscript{34} and should include all broadcasts of a work by wire and wireless means such as over the air, satellite and cable broadcasting.\textsuperscript{35} In the following sections, relevant case-law will be described and analysed.

\textsuperscript{30} Ibid, Recital 32.
\textsuperscript{31} Ibid, Recital 33.
\textsuperscript{32} Ibid, Recital 44.
3.3.1 SGAE v Rafael Hotels

The first key case that considered the interpretation of communication to the public in Article 3(1) of the InfoSoc Directive was SGAE v Rafael Hotels. In this case one of the parties, SGAE, claimed that the acts which the hotel Rafael had carried out by the use of television sets and the playing of ambient music, during the period from June 2002 to March 2003, constituted communication to the public of works which belonged to the repertoire which it managed. SGAE therefore brought an action for compensation against Rafael Hotels because such acts were considered to be carried out in breach of intellectual property law. In a preliminary ruling the court stated that the situation at issue fell under the InfoSoc Directive and not within the Council Directive 93/83/EEC. For the purpose of determining provisions of Community law where there is no express reference to the law of the Member States, as is the case with the InfoSoc Directive, there must be a uniform application of Community law and the principle of equality requires an autonomous and uniform interpretation throughout the EU. However, the Directive does not define what constitutes a ‘communication to the public’. In determining what constitutes a ‘communication to the public’ the court needs to assess both the wording of the InfoSoc Directive, but also the objectives pursued by the rules of which it is part and the context in which it occurs. The InfoSoc Directive must also be applied and interpreted in a way which is consistent with international law. According to Recital 23 of the InfoSoc Directive a communication to the public should be interpreted broadly. According to Recitals 9th and 10th state that the objective of the InfoSoc Directive is to establish a high level of protection of authors which means that they should be able to obtain an appropriate reward for the use of their works, in particular when their work is communicated to the public.

36 C-306/05, SGAE v Rafael Hotels, [2006], para. 21.
37 Ibid, para. 30.
38 Ibid, para. 31.
39 C-357/98, The Queen and Secretary of State for the Home Department, Nana Yaa Konadu Yiadom, [2000], para. 26.
40 C-306/05, SGAE v Rafael Hotels, [2006], para. 33.
41 C-156/98, Germany v Commission, [2000], para. 50 and C-306/05, SGAE v Rafael Hotel, [2006], para. 34.
42 C-341/95, Gianni Bettati v Safety Hi-Tech Srl, [1998], para. 20 and C-306/05, SGAE v Rafael Hotels, [2006], para. 35.
43 C-306/05, SGAE v Rafael Hotels, [2006], para. 36.
In earlier case-law the CJEU ruled on the term ‘public’ in a similar context which refers to an indeterminate number of potential television viewers. The court therefore took into account all customers of the Rafael hotel meaning not only customers in hotel rooms, but also customers who are present in any other area of the hotel who will be able to make use of a television set installed there. Therefore, the court ruled that the customers of the hotel were considered a public because of a fairly large number of persons who were involved. The court also noted that according to article 11bis(1)(ii) of the Berne Convention that a communication made in circumstances such as those in the present case constitutes a communication which is made by a broadcasting organization other than the original one. Thus, such a transmission is therefore made to a new public because the transmission is made to a different public than what the original act of communication of the work was directed. The public of the clientele of the hotel were interpreted in the light of the Guide to the Berne Convention which is an important document, but not legally binding, for the interpretation. The Guide states when the broadcast of an author’s work is authorized by the right holder the work will only be considered by direct users meaning that the recipient, the owner of the reception equipment who, either personally or within their own private or family circles, receive the programme. A new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument and it no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public if the reception is for a larger audience and also possibly for profit according to the Guide. Therefore, the author’s exclusive authorisation right will constitute such public reception. Thus, such a new public will therefore fall within the clientele of a hotel. The court ruled therefore that the hotel’s actions of transmission of the broadcast work to their clientele using television sets which meant that the hotel intervened in full knowledge of the consequences of its actions using technical means to ensure or improve reception of the original broadcast to give access to the

44 C-89/04, Mediakabel BV v Commissariaat voor de Media, [2005], para 30 and C-306/05, SGAE v Rafael Hotels, [2006], para. 37.
45 C-306/05, SGAE v Rafael Hotels, [2006], para. 38.
46 Ibid, para. 40.
47 Ibid, para. 41.
protected work to its customers. Their customers would not be able to enjoy the broadcast work physically within that area if the hotel had not intervened in the protected work.\textsuperscript{48} The court also stated that there is a communication to the public irrespective of the technique which is being used to transmit the signal and therefore is the hotel distributing the signal to customers staying in its rooms when the rooms are installed by means of television sets. There will be public access to broadcast works when such television sets are installed in such facilities and will therefore fall under the scope of Article 3(1) of the InfoSoc Directive.\textsuperscript{49}

The communication to the public also means that the public may access the works from a place and at a time individually chosen by them and therefore will the communication to the public also cover private places according to the InfoSoc Directive and the WCT.\textsuperscript{50} The communication to the public in such cases as the \textit{SGAE v Rafael Hotels} the transmission of a work involves a profit retransmission or intervention to ensure its receipt by a new public and is therefore in breach of Article 3(1) of the InfoSoc Directive. Therefore, in such cases the court established that permission is required from the relevant right holder when a communication to the public is taking place.\textsuperscript{51} Advocate General argued instead that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive”.\textsuperscript{52} He therefore argued that a satellite or terrestrial television signal is sent by cable to the television sets that are installed in the hotel rooms did not constitute an act of communication within Article 3(1) of the InfoSoc Directive.\textsuperscript{53}

The communication to the public needs to be interpreted broadly in order to adapt to the facts of every case and to pursue the aim of the InfoSoc Directive. However, since the digital environment has increased rapidly in the recent years requirements of what constitute a communication to the public need to be settled in order to find

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\item \textsuperscript{48} Ibid, para. 42.
\item \textsuperscript{49} Ibid, paragraphs 46 and 47.
\item \textsuperscript{50} Ibid, para. 51.
\item \textsuperscript{52} C-306/05, \textit{SGAE v Rafael Hotels}, [2006], Opinion of Advocate General Sharpston, para. 27.
\item \textsuperscript{53} Ibid, para. 29.
\end{itemize}
\end{center}
an autonomous and uniform interpretation within the EU. There is no definition of what defines the term communication to the public and therefore it’s been up to the CJEU to interpret a minimum requirement. This case settled a good start on the jurisprudence on how to interpret Article 3(1) of the InfoSoc Directive where a transmission or retransmission of a work is involved. It is important for authors to be able to consent to their communication to the public of their protected work when it is made through television sets in a hotel room. However, I can agree with the Advocate General Sharpston’s opinion that the physical facilities for enabling or making a communication does not in itself amount to communication within this Directive. There is no intention of intervening in the protected work by the hotel if a signal is sent by cable to the television sets. Therefore, it cannot be presumed that the hotel intervened with full knowledge of its actions. However, the hotel used technical means which improved the reception of the original broadcast which gave access to the protected work without their consent which I agree does amount to a communication to the public. The hotel should have been presumed to have intervened with full knowledge of the protected work when they used technical means to improve the reception. The aim of the InfoSoc Directive is to provide high protection for right holders of protected work. However, I don’t think it is necessary to prosecute individuals who had no knowledge that they intervened with protected work. This must be evaluated however to a case-by-case basis since in some situations individuals should have known that they intervened with copyrighted work even though they argue that they did not know. I suggest when it’s obvious that the individual knew that he intervened with copyrighted work it would amount to copyright infringement. However, I agree with Advocate General Sharpston that it’s not obvious that the television sets would receive signals of protected work by only using cable.
3.3.2 Football Association Premier League and Others

The Premier League is run by the Football Association (hereinafter: FAPL) which is the leading professional football league competition for football clubs in England.\textsuperscript{54} FAPL has the right to make the audio-visual content of sporting events available to the public by means of television broadcasting, which means activities such as organising the filming of Premier League matches and exercising in their regard television broadcasting rights.\textsuperscript{55} Such exclusive rights are granted on a territorial basis to broadcast Premier League matches which in general are directed to a single Member State.\textsuperscript{56} There is amongst right holders and broadcasters an established and accepted commercial practice to only direct its exclusive rights to a single Member State in Europe. The license agreement between the broadcasters and FAPL required broadcasters to compress and encrypt the signals, and then transmit them to subscribers, who used a satellite dish, in order for FAPL to protect territorial exclusivity and to prevent the public from receiving broadcasts outside the relevant Member States. The satellite decoder was composed of the signal which is decompressed and decrypted that required a decoder card for its operation.\textsuperscript{57} The licensee for live Premier League broadcasting of the time of the judgement in the United Kingdom (hereinafter: UK) was BskyB Ltd.\textsuperscript{58} The holder of the sub-license in Greece to broadcast Premier League matches was NetMedHellas. The NOVA platform, which was owned by Multichoice Hellas, showed matches on their SuperSport Channels that were broadcasted via satellite.\textsuperscript{59} Foreign decoder devices to access Premier League matches were purchased by certain restaurants and bars in the UK. A foreign decoder gave them access to receive satellite broadcasts from other States which they purchased from a dealer who gave them a subscription less expensive than BskyB Ltd’s subscription. The service provider had given the authorisation to manufacture and market the decoder cards, but they were used in an unauthorized way since they may not be used outside

\textsuperscript{54} Joined cases C-403/08 and C-429/08, Football Association Premier League (FAPL), [2011], para. 30.
\textsuperscript{55} Ibid, para. 30.
\textsuperscript{56} Ibid, para. 32.
\textsuperscript{57} Ibid, para. 38.
\textsuperscript{58} Ibid, para. 41.
\textsuperscript{59} Ibid, para. 39.
the national territory concerned.\textsuperscript{60} Therefore, the FAPL brought actions against pubs and suppliers which had used foreign decoder cards.\textsuperscript{61}

The court ruled that showing TV broadcasts of films of football matches in a pub or restaurant did amount to certain authorial works which involved the communication to the public within the meaning of Article 3 of the InfoSoc Directive because of three reasons.\textsuperscript{62} The first reason was that of a new public which involved the customers of the pub and restaurant which was not taken into account by the authors of the protected works when they authorized their use by the communication to the original public. \textsuperscript{63} At the time of the original communication to the public the owners of television sets who either personally or within their own private or family circles received the signal and followed the broadcasts were in principle only taken into account by the authors.\textsuperscript{64} Recital 23 of the InfoSoc Directive should be interpreted meaning that communication to the public does not cover ‘direct representation or performance’ which means that the public is not in direct physical contact with the actor or the performer of those works.\textsuperscript{65} Therefore, the second reason was that the work broadcasted must be transmitted to a ‘public not present at the place where the communication originates in order for there to be a communication to the public within the meaning of Recital 23 of the InfoSoc Directive.\textsuperscript{66} The third reason was that the communication to the public involved profit-making nature in which the pubs and restaurants benefited from attracting customers which increased their financial results.\textsuperscript{67}

\textsuperscript{60} Ibid, para. 42.
\textsuperscript{61} Ibid, paragraphs 43 - 49.
\textsuperscript{62} Ibid, para. 207.
\textsuperscript{63} Ibid, para. 197.
\textsuperscript{64} Ibid, para. 198.
\textsuperscript{65} Ibid, para. 201.
\textsuperscript{66} Ibid, para. 200.
\textsuperscript{67} Ibid, paragraphs 204 and 205.
3.4 Making available to the Public

Article 3 of the InfoSoc Directive includes an express provision which means that a work or subject-matter can be made available to the public which is communicated ‘in such a way that members of the public may access it from a place and at a time individually chosen by them’. Such acts involve works or subject-matter made available to the public over the Internet for download or for the provision of a hyperlink to a work or subject-matter which is hosted on a third party’s website for the purpose of download from that site. Peer-to-peer computer networks which involve the sharing of the works and subject-matter are also covered by this express provision.68

3.4.1 Svensson and Others v Retriever Sverige

The applicants, Svensson, published their written articles in the Göteborgs-Posten’s newspaper and on the Göteborgs-Posten’s website. A website which was operated by Retriever Sverige provided their clients with lists of clickable Internet links which lead to articles that were published by other websites. The articles on Göteborgs-Posten were common ground between the parties that they were freely accessible. The applicant argued that the links which were available on Retriever Sverige’s website were not clearly showing that the clients were directed to another site when they clicked on the links. However, Retriever Sverige argued that it was apparent that the client was redirected to another site.69 Therefore, the applicants brought an action against Retriever Sverige on the ground that the company had made use, without their authorisation, of several articles by them, by making them available to their clients.70 They also argued that their exclusive right to make their respective works available to the public had been infringed by Retriever Sverige by the services that were offered to their clients.71

The interpretation of Article 3(1) of the InfoSoc Directive must be that a work is communicated to the public when a website of clickable links to protected works

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69 C-466/12, *Svensson and Others v. Retriever Sverige AB*, [2014], para. 8.
70 Ibid, para. 9.
71 Ibid, para. 11.
which are available on another website are such works that are freely accessible on that site.\textsuperscript{72} The copyright holder therefore has to authorize every act of communication according to Article 3(1) of the InfoSoc Directive.\textsuperscript{73} The concept of the communication to the public includes two cumulative criteria which first is that an act of communication of a work needs to be established and secondly the communication of that work needs to be communicated to a public.\textsuperscript{74} As established in earlier case-law, \textit{Football Association Premier League and Others}, the act of communication must be interpreted broadly to be able to ensure a high level of protection for copyright holders which is stated in Recitals 4 and 9 of the Directive.\textsuperscript{75} For there to be an act of communication according to Article 3(1) it is sufficient that a work is made available to a public in such a way that the people forming that public may access it, irrespective of whether they avail themselves of that opportunity.\textsuperscript{76} The court therefore established in this case that ‘making available’ must be considered as using clickable links to protected works and the court ruled that it therefore should be considered as an act of communication.\textsuperscript{77}

The second criteria of Article 3(1) are that the protected work must be communicated to a public that refers to an indeterminate number of potential recipients and implies a fairly large number of persons.\textsuperscript{78} The clickable links which were made by the manager of the website aimed at all potential users of the site, that is to say, an indeterminate and fairly large number of recipients. \textsuperscript{79} The court therefore ruled that the act of clickable links which was made by the manager of the website was a communication to the public.\textsuperscript{80} However, according to Article 3(1) of the InfoSoc Directive the communication to the public such as the one in the main proceedings where the communication was made on the Internet, which means that the same technical means were used, the new communication to the

\begin{itemize}
\item \textsuperscript{72} Ibid, para. 14.
\item \textsuperscript{73} Ibid, para. 15.
\item \textsuperscript{74} C-607/11, \textit{ITV Broadcasting and Others v TVCatchup Ltd}, [2013], paragraphs 21 and 31, and C-466/12, \textit{Svensson and Others v Retriever Sverige AB}, [2014], para. 16.
\item \textsuperscript{75} C-466/12, \textit{Svensson and Others v Retriever Sverige AB}, [2014], para. 17.
\item \textsuperscript{76} Ibid, para. 19.
\item \textsuperscript{77} Ibid, para. 20.
\item \textsuperscript{78} C-306/05, \textit{SGAE v Rafael Hotels}, [2006], paragraphs 37 and 38 and C-466/12, \textit{Svensson and Others v Retriever Sverige AB}, [2014], para. 21.
\item \textsuperscript{79} C-466/12, \textit{Svensson and Others v Retriever Sverige AB}, [2014], para. 22.
\item \textsuperscript{80} Ibid, para. 23.
\end{itemize}
public must therefore be directed to a new public. This means that the communication to the public should be directed to a public that was not taken into account by the copyright holders when they authorized the initial communication to the public.\textsuperscript{81} The court therefore established that all potential visitors to the site concerned could consist of all Internet users since the website had no restrictive measures and therefore they had all free access to the clickable links.\textsuperscript{82} The court ruled that there is no new public and therefore were no authorisation needed for the communication to the public in this case.\textsuperscript{83}

3.4.2 Gs Media v Sanoma and Others
A photographer, Mr C. Hermès, took some photos at the request of the publisher of the Playboy Magazine which was called Sanoma. The photos were going to be published in the December 2011 edition of that magazine. These photos were therefore granted authorisation by the photographer to be published by Sanoma on an exclusive basis. The exclusive right arising from the photographer’s copyright were also granted to Sanoma.\textsuperscript{84} The GeenStijl website was operated by Gs Media which provided information such as news, scandalous revelations and investigative journalism which had more than 230 000 visitors daily. The GeenStijl website were therefore considered as one of the 10 most visited websites in the field of news in the Netherlands.\textsuperscript{85} A person sent a message using a pseudonym which included a hyperlink to an electronic file hosted on the website Filefactory.com which were located in Australia to the editors of the GeenStijl website in October 2011 and that electronic file contained the photos at issue.\textsuperscript{86} Since Sanoma had copyright authorisation for the photos they asked Gs Media to prevent the photos to be published on the GeenStijl website.\textsuperscript{87} However, the photos were published in an article on the GeenStijl website. The website accompanied by a text that was formed by a hyperlink which directed users by clicking on such a link to the Filefactory website, which allowed them to download 11 electronic files each containing one...

\textsuperscript{81} Ibid, para. 24.
\textsuperscript{82} Ibid, para. 26.
\textsuperscript{83} Ibid, para. 28.
\textsuperscript{84} C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 6.
\textsuperscript{85} Ibid, para. 7.
\textsuperscript{86} Ibid, para. 8.
\textsuperscript{87} Ibid, para. 9.
of these photos by clicking on another hyperlink.\(^{88}\) Sanoma demanded Gs Media through email to confirm that they had removed the hyperlink to the photos at issue on the GeenStijl website.\(^{89}\) Gs Media removed the photos at issue which appeared on the Filefactory website.\(^{90}\) However, another article were published on the GeenStijl website which informed about the dispute between Gs Media and Sanoma. This article also contained a hyperlink which directed the user to the website Imagehack.us where the users could view one or more of the relevant photographs. Sanoma requested to remove the article which the operator of that website did.\(^{91}\) However, the GeenStijl website published a third article which contained a hyperlink to the photos at issue. Afterwards new links to other websites were posted by the forum users of that website where the photos at issue could be viewed.\(^{92}\) The Playboy magazine published the photos at issue in December 2011.\(^{93}\) Sanoma and others claimed that Gs Media had infringed the photographer’s copyright by posting hyperlinks of the photos at issue on the GeenStijl website and that they had acted unlawfully towards Sanoma and others.\(^{94}\)

In a preliminary ruling the court of the Netherlands referred three questions to the CJEU. The three questions that were referred to the Court of Justice were stated as follows:

“1. (a) If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29?

(b) Does it make any difference if the work was also not previously communicated, with the rightholder’s consent, to the public in some other way?”

\(^{88}\) Ibid, para. 10.
\(^{89}\) Ibid, para. 11.
\(^{90}\) Ibid, para. 12.
\(^{91}\) Ibid, para. 14.
\(^{92}\) Ibid, para. 15.
\(^{93}\) Ibid, para. 16.
\(^{94}\) Ibid, para. 17.
(c) Is it important whether the ‘hyperlinker’ is or ought to be aware of the lack of consent by the rightholder for the placement of the work on the third party’s website mentioned in 1(a) above and, as the case may be, of the fact that the work has also not previously been communicated, with the rightholder’s consent, to the public in some other way?

2. (a) If Question 1 is answered in the negative: If the answer to question 1(a) is in the negative: in that case, is there, or could there be deemed to be, a communication to the public if the website to which the hyperlink refers, and thus the work, is indeed findable for the general internet public, but not easily so, with the result that the publication of the hyperlink greatly facilitates the finding of the work?

(b) In answering question 2(a), is it important whether the “hyperlinker” is or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable by the general internet public?

3. Are there other circumstances which should be taken into account when answering the question whether there is deemed to be a communication to the public if, by means of a hyperlink, access is provided to a work which has not previously been communicated to the public with the consent of the rightholder?"  

The three first questions should be answered together in which the CJEU needed to evaluate what constituted a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive in essence, whether, and in what possible circumstances, the fact of posting, on a website, a hyperlink to protected works, freely available on another website without the consent of the copyright holder.  

Any communication to the public of works should be the exclusive right of authors which should be provided by Member States to either authorize or prohibit, by wire or wireless means, including the making available to the public of their works in such a way that the members of the public may access them from a place and at a time individually chosen by them within the meaning of Article 3(1) of the InfoSoc Directive. The meaning and the scope of the communication to the public is not

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95 Ibid, para. 24.
96 Ibid, para. 25.
97 Ibid, para. 27.
provided in Article 3(1) of the InfoSoc Directive and therefore the objectives of that directive must be determined in the context of which the directive is being interpreted. As mentioned in earlier case-law the objective of the Directive is to provide a high level of protection for authors which is stated in Recitals 9 and 10 of the Directive, and therefore should authors be provided with an appropriate reward on the occasion of the communication to the public of their works. Therefore, Recital 23 of the Directive establishes that the communication to the public must be interpreted broadly. A fair balance must be made according to Recitals 3 and 31 between the interests of copyright holders and related rights to protect their intellectual property rights according to Article 17(2) of the ECFR and the protection of the interests and fundamental rights of users of protected objects such as their freedom of expression and of information which is laid down in article 11 of the ECFR.

Two cumulative criteria are included in the concept of communication to the public, namely, an act of communication of a work and the communication of that work to a public which the court stated in earlier case-law. An individual assessment is required by the court to evaluate the concept of communication to the public. When a protected work is given access to customers an act of communication is made by the user when it intervenes in full knowledge of the consequences of its actions and does so in particular where in absence of that intervention its customers would not in principle be able to enjoy the broadcast work. The second criteria refers to the concept of a public which means that an indeterminate number of potential viewers, meaning, a fairly large number of people will see the protected

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98 C-306/05, SGAE v Rafael Hotels, [2006], paragraphs 33 and 34, and Joined cases C-403/08 and C-429/08, Football Association Premier League (FAPL), [2011], paragraphs 184 and 185, and C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 29.
99 Joined cases C-403/08 and C-429/08, Football Association Premier League (FAPL), [2011], para. 186, C-607/11, ITV Broadcasting and Others v TVCatchup Ltd, [2013], para. 20, and C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 30.
100 C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 31.
101 C-466/12, Svensson and others v. Retriever Sverige AB, [2014], para. 16 and C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 32.
102 C-162/10, Phonographic Performance (Ireland) Limited v Ireland, [2012], para. 29 and C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 33.
103 C-135/10, Società Consortile Fonografic (SFC) v Marco Del Corso, [2012], para. 82, C-162/10, Phonographic Performance (Ireland) Limited v Ireland, para. 31 and C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 35.
work. The court has also stated in earlier case-law that specific technical means should be used which is different from those previously used when a work is communicated to the public. However, if the technical means are not different the court has stated that the work must be communicated to a public that is new which was not already taken into account by the copyright holders when the work was initial communicated to the public. Earlier case-law has also stated the relevance of profit-making nature when it comes to a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.

In earlier case-law, such as Svensson and Bestwater, the court interpreted the posting of hyperlinks on a website to works freely available on another website that it did not constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. However, in those previous cases the acts were not made to a new public and therefore had the posting of hyperlinks been made with the consent of the right holders of the protected works. The court ruled in both cases that the communication was made through the Internet which was the same technical means as the previous one and therefore was the communication to the public made to all Internet users who were not considered as a new public. Therefore, the copyright holders included all Internet users when they authorized their work on the Internet during the initial communication to the public. These cases show the importance of the consent of the right holder when a work is communicated to the public.

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104 C-135/10, Società Consortile Fonografic (SFC) v Marco Del Corso, [2012], para. 84, C-162/10, Phonographic Performance (Ireland) Limited v Ireland, [2012], para. 33 and C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 36.
106 Joined cases C-403/08 and C-429/08, Fotball Association Premier League (FAPL), [2011], para. 204 and C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 38.
107 C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 40.
108 Ibid, para. 41.
110 C-160/15, Gs Media BV v Sanoma Media Netherlands BV and Others, [2016], para. 43.
There would be a restriction on the freedom of expression and of information if all posting of such hyperlinks to works published on other websites would automatically be categorised as communication to the public since not all of those works have been authorized to the publication on the Internet. There would also be contrary to the objective of the InfoSoc Directive to be able to establish a balance between the interests of the public and the interests of the copyright holders. Therefore, the freedom of expression and information which is laid down in Article 11 of the ECFR is of importance of hyperlinks on the Internet since these rights contributes to the exchange of opinions and information. Problems that could arise with hyperlinks are that there could be difficult to ascertain whether websites to which those links are expected to lead will provide access to works which are protected and whether the copyright holders have authorized to their posting on the Internet, in particular for individuals who wish to post such links. Another problem could be that the person who created the link may not necessarily be aware of that the content of a website to which a hyperlink enables access to could be changed after the creation of that link.

Therefore, the court ruled that a person who does not pursue a profit when that person post a hyperlink to a work freely available on another website the court has to make an individual assessment of the concept of the communication to the public and take into account that that person did not know or could not reasonably have known that the protected work had been placed on the Internet without the copyright holder’s authorisation. As a general rule such a person does not intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the Internet by making that work available to the public by providing other Internet users with direct access to the protected work. However, it is necessary to consider that the provision of a link constitutes a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive when the person who posted the hyperlink knew or ought to have known

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111 Ibid, para. 44.
112 Ibid, para. 45.
113 Ibid, para. 46.
114 Ibid, para. 47.
115 Ibid, para. 48.
that the link provides access to a work illegally published on the Internet. It could for instance be considered as a communication to the public when the right holder of the protected work notified the person who posted the hyperlink about the illegal publication of that work.\textsuperscript{116} The presumption is therefore that necessary checks are carried out by the person who is posting the hyperlinks to ensure that the work is not illegally published on the website to which those hyperlinks lead to when the posting is carried out for profit. A person who posts hyperlinks for profit should therefore be presumed to have full knowledge of the protected nature of the work and would therefore know about the possible lack of consent to the publication on the Internet by the right holder. Therefore, a hyperlink that was posted on the Internet to a work which was illegally placed on the Internet would in such circumstances constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive.\textsuperscript{117} However, if there is no new public where the right holders have authorized the publication there will be no communication to the public.\textsuperscript{118}

This decision changed the interpretation on hyperlinking compared to the earlier judgements such as \textit{Svensson} and \textit{BestWater}. These judgements only referred to when the protected work that the hyperlink was directed to had been published freely on the Internet with the copyright holder’s consent and not to hyperlinks which were directed to protected works that were not published on the Internet with the consent of the right holder. Therefore, a new interpretation of hyperlinking needed to be established since the InfoSoc Directive does not have a provision on the communication to the public on hyperlinking.\textsuperscript{119} The CJEU decided to adopt an interpretation which arose from two complementary criteria in the \textit{GS Media} decision, namely, (1) the deliberate nature of the user’s intervention and (2) the profit-making nature of the communication instead of the two cumulative elements of the right of the communication to the public. The CJEU created instead a twofold presumption \textit{juris tantum} which manifests itself on these two cumulative criteria.

\textsuperscript{116} Ibid, para. 49.
\textsuperscript{117} Ibid, para. 51.
\textsuperscript{118} Ibid, para 52.
that are included in the act of communication. The most decisive matter is the profit-making nature of the act of communication. If the posting of the hyperlink is carried out for profit there is a presumption that the hyperlinker was in full knowledge of the nature of the protected work and the possible lack of consent to the publication on the Internet by the right holder. The hyperlinker is therefore expected to carry out necessary checks to ensure that the protected work is legally placed on the Internet. However, this presumption can be rebutted by the hyperlinker to indicate that he was aware of or could not reasonably be aware of the lack of authorisation for the initial act of making available. Therefore, the CJEU ruled that if the hyperlinker did not carry out the act for profit the presumption will be that he did not know about the nature of the protected work and if the hyperlink is carried out for profit the presumption is that he did know about the illegality of the protected work.

However, the interpretation of hyperlinking within the meaning of the act of communication is considered to be a broad interpretation. Such an interpretation is effective in judgements as the one as *GS Media* where the hyperlinker seems to be in full knowledge of the illegality of the protected work and at the same time makes a profit of it. However, there could be problems when the hyperlinker is ignorant to the protective nature to the work, but still can be prosecuted for infringing the copyright holder’s exclusive rights. For instance, such a person could be a blogger in fashion or sports in which that person uses hyperlinking which is monetized by the showing of ads. The problem that can arise in such cases is how should the presumption be interpreted?120 Probably the bloggers are making profit of the ads and therefore could it be difficult to show evidence that they did not know about the illegality of the protected works by showing that they did carry out the necessary checks before the posting of the hyperlinks.121 There may not be enough evidence to show that the bloggers were not notified by the right holders of the nature of the protected work and therefore may be sued irrespective if they were notified or not.122 There are many protected works without the copyright holders’ consent that are made available on the Internet. The hyperlinking is therefore threatened by the

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121 Ibid, p. 15.
interpretation of this judgement because more and more copyright holders start to take legal action against hyperlinkers. Therefore, the ability of the right to exchange information and opinions online could also be threatened by the interpretation of this recent judgement.\textsuperscript{123} The court therefore failed to give guidance on the profit-making nature of the communication to the public in this decision.\textsuperscript{124}

Advocate General Wathelet argued instead that hyperlinks do not ‘make available’ protected works since they lead, even directly, to such works to a public where the subject-matter is already freely accessible on another website. The person who effected the initial communication constitutes the actual ‘making available’ to the public.\textsuperscript{125} He continued arguing that the hyperlinker must intervene in a way that is vital or indispensable in order to establish an act of communication.\textsuperscript{126} However, in order to establish an act being vital or dispensable there must be an act of communication which include ‘making available’ within the meaning of Article 3(1) of the Directive.\textsuperscript{127} Therefore, Wathelet established that hyperlinks do not constitute an act of communication because links that are posted on a website which direct to works protected by copyright that are freely accessible on another website cannot constitute an indispensable intervention to the making available of the photographs to users in the present case.\textsuperscript{128} Since there is no act of communication the consent of the right holders are not relevant in this case.\textsuperscript{129} Wathelet also argued that there is no new public since the photographs were freely available to the general public on other websites and therefore the intervention cannot be considered as indispensable.\textsuperscript{130} However, it is not clear from the judgement that the works in questions were freely accessible to the general Internet public on third party

\textsuperscript{124} Rosati, Elenora, \textit{GS Media and its implications for the construction of the right of communication to the public within EU copyright architecture}, Publisher: Common Market Law Review, 2017, Volume 54, Booklet 4, p. 1238.
\textsuperscript{125} C-160/15, \textit{Gs Media BV v Sanoma Media Netherlands BV and Others}, [2016], Opinion of Advocate General Wathelet, para. 54.
\textsuperscript{126} Ibid, para. 57.
\textsuperscript{127} Ibid, para. 59.
\textsuperscript{128} Ibid, para. 60.
\textsuperscript{129} Ibid, para. 63.
\textsuperscript{130} Ibid, para. 70.
Therefore, this question is unresolved and would need more examination in order to find a violation of Article 3(1). Hyperlinks could distort the fair balance between right holders and users of the protected works. The development of the information society in Europe would therefore be undermined and the functioning of the Internet would be impaired of the interpretation of that provision in relation to hyperlinks. Internet users are unaware of and are not able to check whether the initial communication to the public of a protected work freely accessible on the Internet was made with or without the right holder’s consent. Hyperlinks by users on the Internet are necessary for the development of the Internet and this ruling of the present case will make users more reticent to post hyperlinks. Therefore, such an interference in hyperlinking must be avoided.

The most important aim of the CJEU in relation to hyperlinking must be to establish a clearer interpretation of the communication to the public within Article 3(1) of the InfoSoc Directive. When such hyperlinks are carried out for profit necessary checks are presumed to be established by the person who posted the links. However, how far do such necessary checks go and what include as necessary checks? The legislation and earlier case-law are not clear for Internet users to carry out necessary checks and the CJEU must make an individual assessment in every case in order to establish infringement. There is no provision in the InfoSoc Directive that will explain for the Internet user in which circumstances the hyperlinker will infringe a right holder’s copyrighted work on the Internet. Internet users must therefore read earlier case-law in order to get an understanding of the current broad legal position of hyperlinks. However, that may be hard for a non-legal practitioner to understand without any definition from the legislation on the communication to the public in relation to hyperlinks. Although case-law in relation to hyperlinks have come to some conclusions there are still questions on how to interpret the outcome of the GS Media judgement in future disputes. Why must an Internet user who carries out hyperlinks for profit establish necessary checks when such checks are not defined

131 Ibid, para. 71.
132 Ibid, para. 72.
133 Ibid, para. 77.
134 Ibid, para. 78.
135 Ibid, para. 79.
by the CJEU? A hyperlinker who makes profit may have carried out necessary checks and established that they have the consent of the right holder. However, as they are only Internet users they may not have the necessary tools to carry out the necessary checks in order to find the correct information and therefore may it in the end be that the hyperlinker did not have the right information of the right holder’s consent. An Internet user who does not make profit of hyperlinks may still have full knowledge of the protected nature of the work and would therefore violate Article 3(1) in the same way as the profit-making hyperlinker does. Although the Internet user is not making profit of the hyperlinks the user may still spread the content without the rightholder’s consent which can lead to other Internet users posting such content through a hyperlink and may be prosecuted for it. Therefore, I partly agree with the General Advocate’s opinion that hyperlinks cannot be an indispensable intervention since the content was freely accessible on another website and the Internet user may not have the necessary tools to check the illegality of the subject-matter because there is no clear decision on how to interpret hyperlinks in every situation.

However, I can also agree with the judgement of GS Media since the rights and interests of the right holder of the copyrighted work must be protected. It’s worse for the right holder if the hyperlinker is making profit of the works that are posted without their consent. The copyright holder should be the initial person to make profit and should be the initial person who authorize the content on the Internet. Therefore, I think it’s better if hyperlinkers who make profit will find out what the legal position of hyperlinks is when posting them on the Internet. Internet users may also seek legal advice to understand the legal position of hyperlinks in order to avoid infringement. There must however be a clearer provision on how to interpret the communication to the public in relation to hyperlinks. The broad interpretation can make it harder to strike a fair balance between copyright law and the freedom of expression/information on the Internet.
3.4.3 Stichting Brein v Filmspeler

Various models of a multimedia player were sold by Mr Wullem on different Internet sites including the site ‘www.filmspeler.nl’ which he owned himself. The device was a player which was sold under the name ‘Filmspeler’ that acted as a medium between a source of visual and/or sound data and a television screen. There was a source software installed on the player which integrated into add-ons that were available on the Internet that could link to websites where protected works were made available to Internet users without the authorisation of right holders through a user-friendly interface. Such add-ons gave access to streaming websites that were operated by third parties where some of the digital content were published without the copyright holders’ consent. The multimedia player could easily connect to a television screen to show the streaming content. Mr Wullem also advertised that the digital content on this multimedia player could be watched without the right holder’s consent. Stichting Brein therefore claimed that Mr Wullem made a communication to the public in breach of copyright law by the act of marketing the ‘Filmspeler’ multimedia player.

The CJEU ruled that a fairly large number of people had purchased the multimedia player which covered all persons who could potentially acquire that media player and who had Internet connection and therefore constituted an indeterminate number of potential recipients and involved a large number of persons. The posting of hyperlinks does not constitute a communication to the public when the copyright holders have given their consent to publish their protected works freely on another website within Article 3(1). In such an authorisation by the copyright holders it must be considered to constitute all Internet users as a public and therefore would the posting of hyperlinks not be communicated to a new public. However, that would not be the case if the copyright holders have not consented to the publication of the protected work. Necessary checks should be established when the

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136 C-527/15, Stichting Brein v Filmspeler, [2017], para. 15.
137 Ibid, para. 16.
138 Ibid, para. 17.
139 Ibid, para. 18.
140 Ibid, para. 20.
141 Ibid, para. 45.
142 Ibid, para. 48.
hyperlinks are carried out for profit and therefore should the person who posted such links knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the Internet. A presumption is therefore established when the hyperlinks are carried out for profit that the person had full knowledge of the nature of the protected work and the possible lack of consent by the copyright holders.\textsuperscript{143} The multimedia player was therefore considered by the court as a communication to the public within Article 3(1) of the InfoSoc Directive because the add-ons installed on the player which contained hyperlinks gave access to works published illegally on the Internet and therefore was the sale of the media player ‘Filmspeler’ made in full knowledge of the illegal nature of the protected work because their advertising showed that the copyright holders had not consented to the publication of the work on the Internet.\textsuperscript{144} The sale of the multimedia player was also sold for profit.\textsuperscript{145}

This case followed after the \textit{GS Media} case. However, there is no more development of the interpretation of hyperlinks. In this case it’s clear that the media player was sold for profit and it was clear that the media player was sold with the full knowledge of the unauthorized protected work which the advertisement also showed. This is therefore a case that is easy to evaluate according to the \textit{GS Media} judgement. It is clear that the operator had full knowledge of the unauthorized works and therefore was no further development made of how far the necessary checks must go in order to establish infringement. The CJEU seems to only conclude that the decisive part will be if the hyperlink is carried out for profit or not. However, there is no further development or no explanation on why there shall be a presumption of copyright infringement if the hyperlinks are carried out for profit. Since the situation on hyperlinks are so unclear there is even harder for the Internet users to know if they have carried out the necessary checks in order to post a hyperlink. Hyperlinks are there to inform Internet users as well as express their opinions of different works. In order for EU to harmonize the information society and also be able to strike a fair balance between copyright law and other

\textsuperscript{144} C-527/15, \textit{Stichting Brein v Filmspeler}, [2017], para. 50.
\textsuperscript{145} Ibid, para. 51.
fundamental rights a clearer interpretation of hyperlinks in relation to the communication to the public must be resolved. Article 3(1) of the communication to the public shall be interpreted broadly. However to find solutions on all the loopholes in the information society Article 3(1) must therefore be interpreted narrower.

There is a proposal for a new Directive on copyright law in the digital market to adapt to the new technological realities in the information society. The aim of the new Directive is to modernise EU copyright rules. The proposal provides for a necessity that shall ensure and improve the position of right holders of copyrighted subject-matter to negotiate and be remunerated for the exploitation of their copyrighted material. However, this proposal does not seem to focus on the communication to the public relating to hyperlinks that are directed to illegal content. It rather focus on licensing and Internet Service Providers. Article 11 of the Proposal for a new Directive implies that links shall require licensing when users of press share content. This Article refers to publishers and will give them 20 years of copyright protection. The problem with this is that every hyperlink that is posted on the Internet must require a license for the use of the content. This may amount to costly licenses and Internet users will be hesitant to post links. This will therefore amount to a violation of the freedom of expression. This option shall be available but may not include that all hyperlinkers must establish a license with the publisher before making content available on the Internet. Therefore, it would be good if a proposal on hyperlinking in relation to the communication to the public will be developed in order for courts to know how to rule on this matter. The outcome of the GS Media on hyperlinks must be defined in the new Directive on copyright law within the digital market. However, the CJEU must also develop a more strictly interpretation on the profit-making nature of hyperlinks that are directed to illegal content which also should be included in the new proposal. A new Directive that will amend the broad interpretation of Article 3(1) on the

147 Ibid, p. 3.
communication to the public will meet the challenges better than what the InfoSoc Directive may be able to face today in the digital world.
4 Fundamental Rights

4.1 Introduction

Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are values that are embedded in the EU treaties. Constitutions of individual countries within the EU and the ECFR guarantee fundamental rights. All EU institutions play a role in protecting human rights. Preliminary rulings to the CJEU can be made according to Article 234 of the European Community Treaty (hereinafter: TEC) if a fundamental right has been violated.\textsuperscript{149} However this is an expensive process and therefore the CJEU have heard less human rights complaints from individual applicants.\textsuperscript{150} The ECHR which has been ratified by all EU countries is consistent with the Charter. Individuals must first exhaust their national remedies before they can apply to the European Court of Human Rights (hereinafter: ECtHR) for redress according to Article 35(1) of the ECHR.\textsuperscript{151} All individuals in the EU possess Human Rights.\textsuperscript{152} Article 1 of the ECHR states that everyone shall be ensured human rights by the Contracting States within their jurisdiction and be able to enjoy the rights and freedoms of the Convention.\textsuperscript{153} It is important for Contracting States to ensure that the legal obligations that are flowing from the membership of the EU are complied with.\textsuperscript{154} Fundamental rights of EU law are equivalent to the rights of the Convention and therefore a presumption exist that the Convention is not breached if the Contracting States have implemented legal obligations resulting from their membership of the EU. However, if the protection of the Convention rights is ‘manifestly deficient’ the presumption will be rebutted.\textsuperscript{155}

\textsuperscript{149} C-50/00 P, \textit{Unión de Pequeños Agricultores v Council of the European Union}, [2002], para. 42.

\textsuperscript{150} Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh, Harris, David, \textit{International Human Rights Law}, Publisher: Oxford University Press, p. 475.


\textsuperscript{154} Ibid, p. 419.

\textsuperscript{155} Ibid, 420.
4.2 Right to Property
The right to property is a fundamental right which is laid down in Article 17 of the ECFR and in Article 1 of Protocol No. 1 of the ECHR. Article 17 of the ECFR states the right to property as follow:

1. “Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.”

Article 1 of Protocol No. 1 of the ECFR states the right to property as follow:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The aim of EU copyright law is to ensure legal certainty for rights holders and also to ensure a high level of protection for rights holders in recognition of the proprietary nature of their intellectual property rights and their protection under national and European fundamental rights instruments.\textsuperscript{156} The right to property is protected as a fundamental right in national constitutions which is interpreted in the light of Article 1 of Protocol No. 1 of the ECHR and in Article 17 of the ECFR which state that intellectual property shall be protected. In case \textit{Balan v Moldova} the Court recognized the right to property in relation to copyright as a human right that shall be protected under Article 1 of Protocol No. 1 of the Convention.\textsuperscript{157} First,

\textsuperscript{157} \textit{Balan v. Moldova}, Application No. 19247/03, [2008], paragraphs 32 and 35.
the Court must determine whether the complaint has any property rights, second the Court has to determine whether there has been an interference with that property and third the Court must determine the nature of the interference. These are distinct rules. However, the ECtHR has on many occasions considered them together in which the aim of the Article 1 of the Protocol No. 1 is to provide right holders with a peaceful enjoyment of their possessions.\textsuperscript{158} There is a wide Margin of Appreciation given to the public authorities in order to interfere with this right. The Contracting States have the right to deprive a person of their possessions if there is in the public interest or if it allows the state to impose such laws as it deems necessary in relation to penalties or litigations between individuals. Therefore, the domestic courts must act effectively and fairly in disputes between fundamental freedoms.\textsuperscript{159} There is no definition of any hierarchy among rights and liberties protected in the ECFR and in the ECHR.\textsuperscript{160} There shall be a fair balance between EU copyright law and competing interests such as other fundamental rights.\textsuperscript{161} It must therefore be a reasonably relationship of proportionality between the means employed and the aim pursued. There is a wide Margin of Appreciation which is available to the legislature implementation of political, economic and social issues because opinions of a democratic society can differ widely from State to State.\textsuperscript{162}

The InfoSoc Directive has been criticized for creating legal uncertainty; however the aim of the Directive was to harmonize the copyright rights in Europe.\textsuperscript{163} The ECtHR still needs to apply domestic copyright law in the light of Article 1 of the Protocol No. 1 of the Convention on a case-by-case analysis in order to comply

\textsuperscript{158} Carss-Frisk, Monica, \textit{The Right to Property; A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention of Human Rights}, Publisher: Council of Europe, Human Rights Handbook, No. 4, p. 25.


\textsuperscript{160} Sganga, Caterina, \textit{EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots, Balancing Copyright Law in the Digital Age}, Publisher: Springer Berlin Heidelberg, 2015, p. 4.


with the InfoSoc Directive as well as other Directives and Regulations enacted by the European Council and Parliament.\textsuperscript{164} Therefore, in order for the Court to establish an interference with Article 1 of Protocol No. 1 a balance must be struck between the demands of the society and the requirements of the protection of other fundamental rights in order for the interference to be proportional.\textsuperscript{165} Therefore is the right to property in Article 17 of the ECFR and Article 1 of Protocol No. 1 not absolute and shall be balanced against other fundamental rights. Fundamental rights are therefore part of primary EU law and must therefore be respected in an equal manner.\textsuperscript{166} Exceptions to the right to property is done in accordance with Recital 31 of the InfoSoc Directive in which the aim is to pursue a fair balance between the rights and interests of the right holders on the one hand and the rights of the users of the protected subject matter on the other.\textsuperscript{167}

\textsuperscript{164} Ibid, p. 188.
\textsuperscript{165} Carss-Frisk, Monica, \textit{The Right to Property; A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention of Human Rights}, Publisher: Council of Europe, Human Rights Handbook, No. 4, p. 31.
\textsuperscript{166} Angelopoulos, Christina, \textit{Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third party liability}, Publisher: Info (Cambridge, England), 2015, Volume 17, Booklet 6, p. 72.
4.3 Freedom of Expression

Freedom of Expression is a fundamental right which is laid down in Article 11 of the ECFR and in Article 10 of the ECHR. Article 11 of the ECFR states Freedom of Expression as follow:

1. “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.”

Article 10 of the ECHR states Freedom of Expression as follow:

1. “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Freedom of Expression is a vital freedom for the functioning of democracy, for modern economies and for the development. The right includes all communication of media where individuals may hear other individuals’ views and to exchange ideas and information with others. It also includes the right to be informed and to inform oneself. This has also extended to today’s digital environment on the Internet. As stated above the fundamental freedoms in the

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EU are considered to have equal importance and constitute separate legal effects.\textsuperscript{170} According to the Vienna Declaration all human rights are universal, indivisible and interdependent and interrelated which means that the fundamental rights must be treated in a fair and equal manner and with the same emphasis.\textsuperscript{171} The fundamental rights can therefore not be put in any hierarchal order since they are both a human right. There is however a difference in the United States where freedom of expression tends to prevail over copyright protection. However, in the EU the fundamental rights are of equal importance and therefore must a balance be struck when disputes between copyright law and freedom of expression arise.\textsuperscript{172} Since copyright holders have the right to seek an injunction against those who express themselves by content of unauthorized uses of copyright protected material which can lead to that some forms of freedom of expression can be suppressed entirely.\textsuperscript{173} However, there are human rights that are called core rights in the EU which represent core attributes of human life and human dignity which violations of such human rights need a special and imperative responsibility to prevent, to protect and to remedy. Therefore, such human rights as the right to life in Article 2 and the right to be free from torture or ill-treatment in Article 3 of the ECHR cannot be derogated from.\textsuperscript{174}

The Freedom of Expression include the right to express oneself in a way that could be considered offensive, shocking or disturbing, reflecting the need in a democratic society for pluralism, tolerance and broadmindedness.\textsuperscript{175} However, the freedom of expression is not absolute and can therefore be subject to certain limitations. Restrictions can be made according to Article 10 of the ECHR if the interference is

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\textsuperscript{170} Buss, Krisjanis, Copyright and Free Speech: The Human Rights Perspective, Publisher: Baltic Journal of Law & Politics, 2015, Volume 8, Booklet 2, p. 182.
\item \textsuperscript{171} Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, I point. 5.
\item \textsuperscript{172} Buss, Krisjanis, Copyright and Free Speech: The Human Rights Perspective, Publisher: Baltic Journal of Law & Politics, 2015, Volume 8, Booklet 2, p. 185.
\item \textsuperscript{173} Ibid, p. 188.
\item \textsuperscript{174} International Covenant on Civil and Political Rights (ICCPR), Article 4(2) and Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh, Harris, David, International Human Rights Law, Publisher: Oxford University Press, 2010, pp. 181 – 183.
\item \textsuperscript{175} Leach, Philip, Taking a Case to the European Court of Human Rights, Publisher: Oxford University Press, Third Edition, 2011, p. 362.
\end{flushright}
prescribed by law or is necessary in a democratic society.\textsuperscript{176} The test of necessity of what is considered necessary in a democratic society has developed through case-law of the ECHR. In \textit{Sunday Times v the United Kingdom} the ECtHR established that restrictions are necessary in accordance with Article 10(2) of the ECHR that the phrase “necessary in a democratic society” implies the existence of a “pressing social need”. The ECtHR also established that the individual Contracting States have the initial responsibility for securing the rights and freedoms enshrined in the ECHR. Therefore, the Contracting States have a Margin of Appreciation to interpret what is considered as a “pressing social need” in a democratic society.\textsuperscript{177}

The first case that considered a direct conflict between copyright and the freedom of expression was \textit{Ashby Donald and Others v France}. The ECtHR ruled that the applicants had infringed the fashion creators’ intellectual property rights and that the domestic courts in France had not overruled their Margin of Appreciation. The applicants in this case were fashion photographers who had taken photos at women’s winter 2003/2004 collection fashion shows in March 2003 which they had been invited to by various fashion houses. A company that received the photos of the fashion shows from the photographers published them online on a website that offered photos and videos of fashion shows on a free or pay-to-view basis and for sale. The designers’ federation and several fashion houses filed a complaint for copyright infringement which the applicants were found guilty of in the Court of Appeal in France. The applicants argued that their freedom of expression in Article 10 of the ECHR had been violated because they had been invited to the fashion shows with the right to take photographs with a view to their publication and it was therefore not necessary to convict them. However, there were no exclusive agreement to the publication of the photos online. The ECtHR ruled that the domestic courts have a particular wide Margin of Appreciation in this case because the Article 1 of Protocol No. 1 applied to intellectual property and the aim of the interference was to protect rights which are safeguarded by the Convention or its Protocols. The aim of the publication of the photographs was to sell them or charge


\textsuperscript{177} \textit{Sunday Times v. the United Kingdom}, Application no. 6538/74, [1979], para. 59.
a fee to view them. The aim of the applicants was considered a commercial one. Thus, the Court found the applicants guilty of copyright infringement since they had disseminated the photographs in issue without the right holders’ consent.

In this case the rights of the fashion houses’ property rights did prevail over the applicants’ right to freedom of expression. However, this case clarified that a sentence based on illegal reproduction or public communication of a material protected by copyright shall constitute an interference with the freedom of expression. This landmark case set the requirement for a more depth analysis of copyright-based limitations upon freedom of expression of balancing the two fundamental rights whether the restriction is prescribed by law, pursues a legitimate aim and is necessary in a democratic society. This case is important because it shows that the freedom of expression may be infringed by copyright protection. This case referred to commercial speech which did not prevail over copyright protection due to the domestic courts’ particular wide Margin of Appreciation. However, in cases with different facts for instance where speakers argue on the matters related to a debate of general interest freedom of expression might overcome copyright.

178 Ashby Donald and Others v. France, Application No. 36769/08, [2013], English translation only available in a Legal Summary; Information Note on the Court’s case-law No. 159; https://hudoc.echr.coe.int/eng#{"fulltext":"Ashby%20Donald%20and%20Others%20v.%20France"},"display":2,"languageisocode":"ENG"},"itemid":002-7393[1].
180 Ibid, para. 191.
5 Striking a fair balance

5.1 Introduction

There have been conflicts between copyright law and the freedom of expression for a long time. As stated above intellectual property must be balanced against other fundamental rights laid down in the ECFR and the ECHR. There is no express provision in the InfoSoc Directive that will guide the legislator on how to balance the two fundamental freedoms.\(^1\) Therefore, a development through case-law on the balancing act will follow.

5.1.1 Case-Law

The second case after *Ashby Donald and Others v France* that developed the balancing act further was the case *Pirate Bay v Sweden* case. Pirate Bay was a file-sharing website that offered copyright protected content such as music, films and computer games. The operators of the website made files on a computer available to other computer users who are part of a computer network which in this case constituted the Internet. The operators of the website were convicted in Sweden for copyright infringement according to the Swedish Copyright Act which is regulated in accordance with EU copyright law.\(^2\) This file-sharing website provided a service that used the BitTorrent protocol in which Internet users could share and download copyright protected files with each other. The ECtHR found that the conviction against the operators of the website interfered with Article 10 of the freedom of expression of the ECHR in which the defendants claimed that the conviction for other person’s use violated their right to receive and impart information. The applicants claimed that they had the right in accordance with the principles of freedom of expression to offer an automatic service of transferring unprotected material between users. The applicants alleged that they had the right in accordance with Article 10 to create a service on the Internet that could be used


for both legal and illegal purposes without them being responsible for the file-sharing website which were actions committed by the Internet users. The ECtHR also raised questions if the applicants’ freedom of expression had been violated and therefore discussed if potential copyright restrictions were necessary to make in order to balance the two fundamental rights. The actions committed by the applicants were considered by the ECtHR to fall within the scope of Article 10(1) of the ECHR. Therefore, the convictions against the applicants in this case were an interference against their right to freedom of expression. The ECtHR stipulated, like in *Ashby Donald and Others v France*, that certain actions are not deprived of the Convention protection although the actions are committed in violation of copyright law.¹⁸³

The Court therefore had to apply its “three-past-test” in which a restriction can be made in accordance with Article 10(2) whether the impugned measure was prescribed by law, second if it pursued a legitimate aim, and finally if it was “necessary in a democratic society”. The Court focused on the last requirement which is if the interference was “necessary in a democratic society”. The ECtHR reiterated that domestic courts enjoy a particular wide Margin of Appreciation since those courts can evaluate local needs and conditions better than the ECtHR.¹⁸⁴ In order for the Court to rule on which fundamental right that should prevail the interest of the freedom of expression on the one hand and the proprietary interest of copyright holders on the other need to be weighed against each other. The Court found that the interference of the applicants’ right to freedom of expression had not been violated since the restriction was necessary in a democratic society because of the particular nature of the information shared and that the operators of the website earned profit from it.¹⁸⁵ The Court ruled that the right holders’ property rights were more important to protect considering the circumstances of the case than to protect the operators of the website’s freedom of expression.¹⁸⁶

¹⁸³ Ibid, p. 320.
¹⁸⁵ Ibid, p. 322.
The latest landmark case on the balancing act between copyright and the freedom of expression is *Akdeniz v Turkey*. In this case websites such as myspace.com and last.fm were disseminating musical works in violation of copyright and therefore the ECtHR was confronted with an issue of blocking access in Turkey. The applicant was a regular user of the website who claimed that the restrictions amounted to a disproportionate response based on Article 10 of the ECHR because of the collateral effects of blocking. The Court ruled that it did not suffice for the applicant to be regarded as a victim for the Convention purposes since the applicant was a user who only had been indirectly affected by the blocking which all other Turkish users also had been. The Court noted that the applicant’s own website was not concerned by the blocking and other legitimate ways of accessing the musical works at issue was not deprived of the applicant.187 The ECtHR found that copyright can restrict freedom of expression in all these three cases. Therefore, the restrictions of the right to property must be interpreted strictly. However, as the digital world has developed with the Internet and with different technology devices that give access to the Internet the Court find challenges to provide a flexible framework to regulate the rapidly changing technology reality.188 It was found in *Scarlet Extended v SABAM* that a fair balance must be struck between copyright and the internet users’ freedom of information.189 In case *UPC Telekabel* the Court ruled that the Internet users cannot be deprived of their right to access legitimized copyright material and in such a case the Internet users right to receive information under Article 10 of the ECHR would be violated.190 In the digital environment especially the CJEU, alike the ECtHR, consider the freedom of expression interests in a position that is accounted for in the copyright discourse.191

190 C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Others*, [2014], para. 56.
In conclusion, the InfoSoc Directive states that there should be struck a fair balance between the rights and the interests of right holders on the one hand and the rights and interests of the users of protected subject-matter on the other hand. In a democratic society it is important to take account both the right holders property rights and the users rights under Article 10 of the ECHR. Therefore, restrictions of the freedom of expression cannot infringe innocent users right to an electronic marketplace.\textsuperscript{192} However, in case \textit{Akdeniz v Turkey} the ECtHR ruled that the users are not the victims of websites and therefore cannot invoke their rights under Article 10 of the ECHR which is a little different towards what the CJEU ruled in \textit{UPC Telekabel}. The development of case-law during recent years has however concluded that there should be a balancing act between the right holder and the Internet users in the digital environment. Therefore, the Courts consider both parties when assessing infringements of the fundamental freedoms.\textsuperscript{193} The Courts also seem to consider the profit-making nature to be an important element to balance the two fundamental freedoms. As in the case \textit{Ashby Donald and Others v France} the ECtHR ruled that the aim of the expression was commercial since they offered the photographs of the fashion shows online for sale. In such a case when the character of the expression is of profit-making nature the Courts have a wide \textit{Margin of Appreciation} in order to balance the two fundamental rights. It is therefore important to evaluate every case with the facts in order to be able to balance copyright law against the freedom of expression.\textsuperscript{194} However, as scholars Christophe and Elena argue in their Article the profit-making considerations might not always be decisive but important.\textsuperscript{195} The ECtHR has stated that the \textit{Margin of Appreciation} is reduced when commercial statements are involved in debate of general interest and therefore may the Court find a violation of Article 10 and set aside copyright protection.\textsuperscript{196} For instance if the defendants had in \textit{Ashby Donald and Others v France} only posted the photographs freely available on the website and not sold them the Court would probably have ruled that the photographs posted

\textsuperscript{192} Ibid, p. 118.
\textsuperscript{193} Ibid, 124.
\textsuperscript{195} Ibid, p. 329.
\textsuperscript{196} Ibid, p. 330.
were of informational purpose. However, as the defendants also sold the photographs the commercial purpose dominated over the informational purpose. Therefore, if all the relevant proportionality criteria had been applied in this case probably there would be a clearer case-law on how to strike a fair balance between copyright law and the freedom of expression. In the future the balancing act between these two fundamental freedoms will continue to develop in order to find more clear situations in which one of the fundamental rights will prevail over the other one.

5.1.2 Margin of Appreciation

The Contracting State has a wide Margin of Appreciation when they try to balance the right to property against the freedom of expression. The individual’s right to property can be deprived of their possessions if it is in the public interest and if it is necessary in a democratic society. However, since every Contracting State has its own apprehension of what constitute as necessary in a democratic society the application of the InfoSoc Directive will therefore be different to State to State. The InfoSoc Directive only states that a fair balance should be struck between the right to property and other fundamental rights. As the InfoSoc Directive wants to harmonize the legal uncertainty that exist among the Contracting States the Margin of Appreciation that is given will not make the uncertainty any better. The Margin of Appreciation is making the application of the balancing act between the interest of the right holder of the protected copyright material and the interest of the user of the protected subject-matter difficult to apply in a similar manner since every State implement the Directive in their own way in order to adapt to its public interest. I think it would be more legal certainty if the InfoSoc Directive may set a minimum requirement on how to interpret the balance between the right to property and the right to freedom of expression. Human rights should be applied equal, however which one should prevail? It is harder for the legislator to interpret in an equal way if every State is interpreting what is necessary in their society. The equal application of human rights will therefore be different from State to State and therefore fundamental rights will prevail different from State to State. I think it is better that

every State has a mutual understanding of what is necessary in a democratic society and in which situation the one fundamental right will prevail over the other one than giving the Contracting States a wide Margin of Appreciation that will be applied according to their own social needs. Also, when the freedom of expression is restricted every State has the right to interpret what they think is a “pressing social need” in its own society. The Margin of Appreciation that is given to the Contracting States is a good way in order for every State to be able to comply with the conventions, regulations and directives that are imposed on them. However, there must be some formal requirement in order to be able to follow the EU legislation in a similar way. The Contracting States should therefore be able to enjoy a reduced Margin of Appreciation instead of a wide one in order to comply correctly with the EU legislation.

5.1.3 Form of Expression
The freedom of expression also gives the right to express oneself that could be considered as shocking, offensive or disturbing in a democratic society. However, that cannot include disseminating protected material in an illegitimate way on the Internet. Although the disseminating unauthorized protected content is considered shocking, offensive and disturbing and should fall within the scope of Article 10 of the freedom of expression of the ECHR the interests of the right holder must be taken into account. As long as the copyrighted protected material is disseminated unauthorized I think copyright law should prevail over the freedom of expression since the copyright holders has the right to be remunerated when their protected material is disseminated to Internet users. However, the Internet user should not be prevented from disseminating authorized copyrighted content for instance such material that is put on the Internet with the right holders’ consent. The Pirate bay v Sweden case disseminated unauthorized protected material through a website to Internet users. I think the right holders who created the protected work for instance such as music and movies should be able to choose if they want to be compensated for the work they disseminate to their users of their protected work. The operators of the website did also earn profit of the file-sharing content. However, I don’t fully agree with what the Court ruled in case Ashby Donald and Others v. France because the photographers took the photos by themselves and after that chose to send them
to a company with the aim of selling them. They took the photos and should therefore have authorization for the photos but not the fashion shows that the photos illustrated. Although the photographers took the photos by themselves the photographs did not bear their personal mark. Therefore, I also agree with the ruling since there was no agreement or consent that the photographers had the right to sell the photos of the fashion shows without the right holders’ consent.

The form of the freedom of expression seems to be a demanding factor in order to be able to strike a fair balance between the rights and the interests of the right holder and the rights and the interests of the user of the protected subject-matter. As in Ashby Donald and Others v France the form of expression was found to be commercial and therefore was no violation of Article 10 of the ECHR found. However, if the aim was not to sell the photos and the aim was only informational instead Article 10 would probably be violated because in such a case it’s more important to protect the users right to information than to protect the author’s right to property. However, if the aim of the photographs only was of informational purpose would not the photographers disseminate the photographs of the fashion shows without their consent and still be in violation of the right holders’ copyright protection? The fashion houses would probably like to be the first ones who share their works on the Internet.

The profit-making nature cannot in my opinion be the decisive factor, because even though the user is not making a profit of the protected content the user could still be aware that the posting or sharing of the content on the Internet is made without the right holder’s consent. However, it’s easier to find a violation of the right to property since the fundamental right is not absolute when the communication to the public is made for profit. It is therefore understandable that there will be problems with other fundamental rights if copyright law always will prevail. The fundamental rights should be applied in a fair manner and therefore I think that a better guidance on the balancing act must develop in order for domestic courts to be able to rule on this problem in a similar and more equal way. I suggest therefore that the Margin of Appreciation that is given to the Contracting States should be reduced because although Contracting States have different opinions on how to interpret what is necessary and proportional in a democratic society the Contracting States still need
to agree on a minimum requirement what is legal and illegal in relation to balancing copyright and the freedom of expression. Since the purpose of the EU is to promote democracy and equality I think that a common practice on this balancing act should be developed to safeguard the application of copyright law within the EU.

5.1.4 Formal Requirements

The balancing act between freedom of expression and private law has come further in the development to establish a mutual interpretation within the EU. In case Von Hannover v Germany in 2004 the applicant who was the eldest daughter of Prince Rainier III of Monaco who claimed that her right to protection of her personality rights had been violated because several pictures had been published of her personal life which she had not been aware of that they had been taken of her.\(^{199}\) The ECtHR ruled that the photos that had been published in different German Magazines showed scenes from her daily life which included activities such as her engaging in sport, out walking, leaving a restaurant or on holiday which are considered as purely private nature. There were also several articles that informed that she dated someone.\(^{200}\) Since the applicant is a member of the Prince of Monaco’s family the applicant shall therefore be prepared to show parts of her private life that could contribute to a general debate in a democratic society.\(^{201}\) However, the ECtHR ruled that the photos and articles that had been published of the applicant did not amount to a debate of general interest because the publication only related to her personal life and did not have any official function. The applicant should not have to live in spatial isolation and therefore the Court ruled that the right to private life in Article 8 of the ECHR had been violated when the photos and articles had been taken of the applicant in places that were not only secluded from the public.\(^{202}\)

In a later case Von Hannover v Germany in 2012 the ECtHR ruled on several requirements that domestic courts in Europe should follow to balance the right to private life and the freedom of expression.\(^{203}\) The first criteria that needs to be

\(^{199}\) Von Hannover v Germany No. 1, Application No. 59320/00 [2004], paragraphs 8 – 18.

\(^{200}\) Ibid, para. 61.

\(^{201}\) Ibid, paragraphs 62 and 63.

\(^{202}\) Ibid, paragraphs 75 – 81.

\(^{203}\) Von Hannover v Germany No. 2, Application No. 40660/08 [2012], para. 108.
examined is if the photos and articles that are published have contributed to a debate of general interest.\textsuperscript{204} The second criteria that need to be examined is how well known the person concerned is and what is the subject of the report. Therefore, the courts need to draw a distinction between public figures and private individuals. Particular protection is given to private individuals who are unknown to the public which is not given to public figures. Facts of a public figure that amount to a debate in a democratic society may not be a violation of the right to private life in Article 8.\textsuperscript{205} The third criteria that needs to be assessed is the conduct of the person concerned prior to the publication of the report or that the photo and related information have already appeared in an earlier publication.\textsuperscript{206} Other factors that should be taken into account is the way in which the photo or report are published and the manner in which the person concerned is represented.\textsuperscript{207} The last criteria for the Court to assess is whether the person who was photographed gave consent to the taking of the photos and their publication or whether this was done without their knowledge or other unauthorized means. Factors such as how serious the intrusion is shall also be taken into account.\textsuperscript{208} The Court ruled by applying these criteria on the facts of the case that there was no violation found of Article 8 because the applicant was a public figure and the publication was not offensive.\textsuperscript{209} There are clearer criteria on how to strike a balance between freedom of expression and private law which amount to less misunderstandings between Member States. The interpretation between these two fundamental rights are more harmonized and uniform which amount to legal certainty within the EU. Therefore, it would be good if such criteria will develop in order to strike a balance between copyright law and the freedom of expression.

\textsuperscript{204} Ibid, para. 109.
\textsuperscript{205} Ibid, para. 110.
\textsuperscript{206} Ibid, para. 111.
\textsuperscript{207} Ibid, para. 112.
\textsuperscript{208} Ibid, para. 113.
\textsuperscript{209} Ibid, paragraphs 120 - 123
6 Analysis and Conclusion

6.1 Analysis

What happened after the GS Media case with the interpretation of communication to the public in relation to hyperlinks?

There has not been much further development of the interpretation of hyperlinks in relation to the communication to the public within Article 3(1) of the InfoSoc Directive. After GS Media the CJEU ruled in Stichting Brein v FilmSpeler on the interpretation of hyperlinking as communication to the public. However, this case was clear on that the media player was sold for profit and their commercial clearly showed that some of the content on the media player was not authorized by the right holders. Therefore, it was easy for the court to state its ruling according to the GS Media judgement. I think there must be a narrower interpretation on hyperlinks in order for courts around Europe to be able to rule on cases that are not as clear as the GS Media and Stichting Brein v FilmSpeler judgements where there were obvious that an infringement had occurred.

In another case, VCAST Limited v RTI Spa, the Court ruled that the right holder cannot be excluded from exercising its exclusive right to prohibit or authorize to the subject-matter of such content that natural persons want to make private copies of.210 VCAST actively intervened allowing their users to record and store the programmes in a private Cloud which could be provided to third parties.211 There were different technical means used in this case compared to the initial communication to the public and therefore was a new public targeted.212 This case did not concern hyperlinks, but it ruled on the communication to the public within the InfoSoc Directive and therefore might this be helpful in the development of the interpretation of hyperlinks. The development of the interpretation of hyperlinks should in my opinion concentrate on the intervention the hyperlinker make while exposing the content on another website. Therefore, I suggest that the CJEU rather

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210 C-265/16, VCAST Limited v RTI Spa, [2017], para. 39.
211 Ibid, para. 15.
212 Ibid, para. 48.
focus on the intervention made by the hyperlinker rather only focusing on the profit-making nature. VCAST probably made more profit by allowing this service, however they also intervened in full knowledge in the protected work by using specific technical means for their users to be able to provide the content to third parties.

*How should the CJEU further develop the communication to the public when the hyperlink is directed to illegal content and is carried out for profit?*

According to my opinion the CJEU must develop how the necessary checks should be carried out by the Internet users who want to post hyperlinks for profit. The *GS Media* case only stated that necessary checks must be carried out if the hyperlinks are made for profit. However, there were no guidelines or explanation stated on how these checks should be made or carried out. It is hard for an Internet user to know what seems necessary in order to not infringe copyright protected material when posting hyperlinks. Internet users may not have tools to carry out these necessary checks and may therefore not be able to hinder a possible infringement of copyrighted material.

Another problem with *GS Media* judgement is that it is hard for Internet users to know if they are linking to legitimized content. Since they are linking to content that are accessible on a third-party website it is hard for the hyperlinker to know if the content is authorized by the right holder or not. Another Internet user could have uploaded the content without the right holder’s consent and therefore could it be hard for the hyperlinker to know who to ask about the legal status of the content. The best way for the hyperlinker to ascertain that the content is made available on the Internet with the right holder’s consent is to ask the author. However, the Internet user may not know who the right holder is or may not know that the consent of the right holder is needed when the material is already made available on the Internet.

Advocate General Wathelet in *GS Media* argued that the photographs were not available to a new public because the photographs were freely accessible to the general public on other websites and therefore the intervention cannot be
considered as indispensable. In such a situation I agree with Advocate General Wathelet if the photographs already were available for the general public on another website there will be no new public met since all Internet users were already indicated. The Internet users already had access to the photographs and therefore can it not be considered as an infringement. However, the Advocate General also argued that it was not established if the works in question were freely accessible to the general Internet public on third party websites. Therefore, this question must be more examined according to my opinion before the Court may be able to make a further decision if copyright infringement has occurred. In such a situation I would suggest that the Court must define how the necessary checks should be carried out in order for the Internet user to be able to find out if the protected works were made available on the Internet with or without the right holders’ consent. In Svensson it was established that there was no new public met because the communication to the public was made on the Internet, which meant that the same technical means were used, in such a case the new communication must be directed to a new public. The CJEU established that no new public existed since all Internet users could visit the website. However, as Advocate General Wathlet argued in GS Media the character of the initial communication to the public was not defined and the CJEU must therefore develop how Internet users shall carry out these necessary checks to find out if the protected material is made available with the right holder’s consent. It is not fair if the hyperlinker will directly infringe the copyrighted material only because the link is carried out for profit and therefore the CJEU must determine a narrower interpretation on the communication to the public in relation to hyperlinks. It’s hard for the Internet user to know exactly what to do when the legislation is unclear. In SGAE v Rafael Hotels the CJEU ruled that there is a communication to the public irrespective of the technique which is being used. Therefore, I interpret it as it would not matter if hyperlinks are used again by an Internet user to consider the content as a communication to the public. However, the problem exists in that the CJEU has not defined what the Internet user is entitled to do in order to find out if a work has been made available on the Internet with or without the right holder’s consent.
During the recent years blogging in the information society has become popular. Some bloggers make profit of their ads and their hyperlinks that they provide on their blogs for their readers. Blogs with many followers should be aware of the fact that they can infringe any copyright protected content they link to if they don’t have the right holders’ consent. In such a case it would be clear that the hyperlinker should have known that the authors’ consent is needed and therefore it would be easier to apply the GS Media’s outcome on such a situation. However, a blogger who makes a small profit and have less readers would not be able to be aware of the possible infringement of the hyperlinking to illegal content. There would not be fair to rule on copyright infringement since the law is unclear of what constitute a communication to the public. Although it is important to be aware of the laws when profit is earned by a hyperlink it may not be the first thing an Internet user think about. A blogger who makes bigger profit has blogged for a longer time and should therefore understand that it would be a good idea to take legal advice from a legal practitioner in order to avoid any possible infringement of copyrighted content.

Therefore, I would suggest that the communication to the public in Article 3(1) must be defined as relating to hyperlinks in order for Internet users to understand the law without having to read all the case-law on this matter. The necessary checks that must be carried out by a profit-making hyperlinker must be defined in the InfoSoc Directive. Therefore, a narrower interpretation of Article 3(1) must be rendered for Internet users to be able to understand the legislation better and to avoid any misunderstandings. Better guidance must also be given to profit-making hyperlinkers in order for them to be able to avoid any possible infringement. Another problem is that hyperlinkers who make less profit may infringe any protected material as much as hyperlinkers may do who make more profit. The interpretation of the GS Media judgement may affect Internet users to post less hyperlinks since the users are afraid of infringing copyright protected content. Hyperlinks are necessary for the freedom of expression on the Internet and therefore must the CJEU rule on a narrower interpretation for courts around Europe to rule in an equal and uniform way. Therefore, I suggest that a distinction will be made between hyperlinkers who make more profit compared to hyperlinkers who make less profit.
Why does it not constitute copyright infringement when the hyperlink is not carried out for profit but is directed to illegal content?

The CJEU ruled in *GS Media* that the presumption of a hyperlinker who does not make profit is that the user did not know about the nature of the protected work. However, that person may still have full knowledge of the illegality of the protected work and may spread the content through hyperlinks and make other profit-making hyperlinkers believe that the linked content was made available on the Internet with the right holder’s consent. It could therefore be hard for a profit-making hyperlinker to know how to carry out the necessary checks to find out if the content was legitimized on the Internet since they are not defined in the legislation or in case-law. The outcome of the *GS Media* judgement is therefore unclear according to my opinion of what a profit-making hyperlinker should do in order to find out if the content was made available on the Internet with the right holders’ consent. Hyperlinkers who do not make profit may place content unauthorized on the Internet without any possibilities of being prosecuted for it. The objective of the InfoSoc Directive is to consider a use lawful when the right holder has authorized the act and therefore cannot that act be restricted by law. The presumption that a hyperlinker who does not make profit did not know of the unauthorized material and will therefore not be prosecuted for it may be contradictory to the objective of the InfoSoc Directive. The author is the only person who can authorize the content freely available on the Internet and therefore may the *GS Media* judgement be against the objective of the InfoSoc Directive stating that only profit-making hyperlinks may infringe copyright protected material. The 9th and 10th Recitals of the Directive also state that the right holders shall be able to obtain an appropriate reward for their protected work which they will not attain if hyperlinks that are not made for profit are linked to content that have been made available without the right holders’ consent.

However, early case-law stated in *SGAE v Rafael Hotels* and *Football Association Premier League and Others* that the communication to the public was made for profit and therefore in violation of Article 3(1) of the InfoSoc Directive. In *SGAE v Rafael Hotels* the Court ruled that the television sets that were installed in the hotel rooms and in the facilities of the hotel would possibly amount to profit. Since
the protected programs could be viewed in all the facilities they may therefore have more visitors to their hotel who are interested to watch the protected content which will possibly amount to more profit compared to if the hotel had not intervened in the protected work. In Football Association Premier League and Others the pubs and restaurants gained more profit because they received more visitors who were interested to watch the protected football matches. Therefore, it seems like the profit-making nature has been a decisive factor already from the beginning of the interpretation of the communication to the public. It’s understandable that profit-makers of protected subject-matter are important to find an infringement of since such use will be a great disadvantage for the right holders.

However, if all hyperlinks would constitute a communication to the public within Article 3(1) of the InfoSoc Directive the freedom of expression and the right to receive information would be violated. The objective of the InfoSoc Directive is to find a balance between the interests and the rights of the right holders and the interests and the rights of the user of the subject-matter. Therefore, in order for hyperlinks to not threaten the fundamental right to freedom of expression and the right to receive information all hyperlinks cannot constitute communication to the public within the Directive. However, the problem is that the interpretation of the profit-making nature is very broad which may lead to that more and more Internet users will be hesitant to post hyperlinks in the information society.

*How shall courts strike a fair balance between copyright law and the freedom of expression?*

A fair balance between copyright law and the freedom of expression must be struck in order to take into account the rights and the interests of the copyright holders and the right and the interests of the users of the protected subject-matter. The InfoSoc Directive states that there shall be a fair balance between copyright law and other fundamental rights when the domestic courts rule on different matters. However, there are no provision in the Directive that explains how this balancing act shall be interpreted. The InfoSoc Directive was created to ensure certainty in the information society, but the rapidly changing technology reality makes it hard for the CJEU to provide a flexible framework that can regulate every situation. Earlier
case-law has stated that the right to property and the right to freedom of expression are not absolute and may therefore be restricted in a fair way that seems appropriate to the facts. The Contracting States have a wide Margin of Appreciation when the domestic courts need to balance the two fundamental freedoms in a direct conflict. There is a particular wide Margin of Appreciation because every Contracting State has its own apprehension of what is considered necessary in a democratic society. However, as every State consider what seems necessary in a democratic society different the balancing act between the two fundamental freedoms may be applied different to State to State. Therefore, I suggest that a minimum requirement shall be implemented in the InfoSoc Directive that defines what is considered necessary in a European democratic society.

The balancing act between the freedom of expression and private law has been more developed through case-law which will make it easier for domestic courts around Europe to apply it in a more uniform way. The criteria were developed in case Von Hannover v Germany in 2012 where the ECtHR developed how to balance the two fundamental rights in conflicts. The courts in Europe will therefore have a reduced Margin of Appreciation since they need to follow several criteria when they rule on a conflict between freedom of expression and private law. There will also be easier for courts to rule on which fundamental freedom that will prevail over the other one in different situations since they need to follow a certain minimum requirement in order to make a decision on the matter. Therefore, I suggest that the ECtHR will develop such criteria in order for the domestic courts to be able to balance copyright law and the freedom of expression better. The uncertainties that exist on this matter in Europe will be less if such a framework will develop and the application will be more uniform. The apprehension of what restriction is necessary to make in a democratic society will also be clearer throughout the EU. The framework that exist now on the balancing act is only some suggestions for instance that the profit-making nature is important but however it may not be decisive. The Court also says that Internet users cannot be deprived of their right to access legitimized content online. The Margin of Appreciation is also reduced when commercial statements are involved in a debate of general interest. These are a few statements on how the courts could rule in a conflict between copyright law and the freedom of expression. Since the courts still have a Margin of Appreciation and I interpret it that they don’t
have to follow these statements literally since they decide in the end what their country perceives as necessary in a democratic society. Therefore, it’s better to develop criteria that courts are required to follow in order to find a uniform application of the balancing act. EU are created to promote democracy, equality and economic efficiency which an equal interpretation will strengthen when Contracting States conform to the same terms and conditions. Another alternative that could be developed is a new regulation that all Contracting States must comply with. Since the politics and cultures are different to State to State there will be hard to apply a uniform ruling that will develop from a minimum requirement which also will give the States some Margin of Appreciation. Instead a regulation may be imposed upon the Contracting States that they must comply with in order to strike a fair balance between copyright law and the freedom of expression.

Should the InfoSoc Directive be amended in order to adapt to the challenges in the Information Society?

There should either be an amendment of the InfoSoc Directive or a new Directive on the information society in order to adapt to the technological challenges that the InfoSoc Directive are facing today. The InfoSoc Directive on the communication to the public in Article 3(1) is too broad according to my opinion for courts in Europe to interpret a uniform application on hyperlinks. There is nothing in the provision that implies that hyperlinks are included in the communication to the public and therefore it’s hard for Internet users to know by only reading the legislation that hyperlinks constitute communication and making available to the public. *GS Media* is a recent case and the legislation may therefore not have complied yet with the newest interpretation on hyperlinks. I therefore suggest that the legislation must be amended in order for Internet users to comply with the new interpretation on hyperlinks. However, I also suggest that the CJEU must develop a narrower interpretation on the profit-making nature of hyperlinks in order for courts to be able to rule fairly and similar on this matter. The narrow interpretation of the profit-making nature on hyperlinks must then be implemented in the new Directive for EU individuals to be able to comply with the legislation when they post hyperlinks on the Internet. Necessary checks that must be carried out by the profit-making hyperlinker shall also be implemented in the new Directive for
Internet users to be able to follow the necessary steps before they post hyperlinks on the Internet. Another suggestion is that the formal criteria that may be developed to able to rule on the balancing act between copyright law and the freedom of expression shall be implemented as well in the new Directive. By amending the InfoSoc Directive the *Margin of Appreciation* that is given to domestic courts will be reduced and less uncertainties will exist with the new framework. A more defined framework will lead to less misunderstandings and infringements.

However, if the InfoSoc Directive may not be amended to include a definition on the communication to the public in relation to hyperlinks I suggest that EU may follow Advocate General Wathlet’s opinion in the *GS Media* case by saying that hyperlinks are not communication to the public because they do not include any ‘making available’ since the subject-matter is already freely accessible on another website. There may be less misunderstandings on the broad definition of the communication to the public in the InfoSoc Directive if hyperlinks may not constitute communication to the public. However, the aim of the InfoSoc Directive to provide a high protection for right holders and to give out an appropriate reward to right holders may be distorted by following Advocate General Wathlet’s opinion. Therefore, it’s important to develop a narrower interpretation on the profit-making nature on hyperlinks and to provide a definition of links in Article 3 of the InfoSoc Directive. The Court must also define what an indispensable intervention is in order to provide a narrow guidance on the profit-making nature.
6.2 Conclusion

The interpretation of communication to the public in relation to hyperlinks must be further developed in order for Internet users to be able to avoid a possible infringement. Guidance on the profit-making nature of hyperlinks must have a narrower interpretation in order for Internet users to know in which situations a possible infringement may occur. In order for CJEU to narrow the outcome of the *GS Media* the Court may provide guidance on how to carry out the necessary checks to be able to find out if the content was made available on the Internet with the right holders’ consent. There must also develop a distinction between hyperlinkers who make less profit compared to those who make more profit in order to find a balance between different kinds of infringements. The *GS Media* judgement is a good start on the interpretation of hyperlinks, but it only provides guidance to clear cases such as the following case *Stichting Brein v Filmspeler*. There may be cases that are not obvious that a possible infringement may have occurred and, in such situations, domestic courts may find problems to rule on such matters because of the unclear legal position that exist in Europe on hyperlinks. Therefore, must a further development on hyperlinks in relation to the communication to the public be developed both in case-law and in the European legislation.

The balancing act in conflict between copyright law and the freedom of expression must be developed further in order for domestic courts around Europe to apply in a uniform and equal way. Formal requirements must therefore be developed similar to private law for courts to be able to determine what restrictions are necessary to make in a European democratic society. European courts will therefore have a reduced *Margin of Appreciation* when they rule on a conflict between copyright law and the freedom of expression. A reduced *Margin of Appreciation* will help to develop a mutual understanding of what restrictions seem necessary to make in a European democratic society. EU is a cooperation among Contracting States and therefore must a mutual legal position of what seems necessary in a democratic society be developed in order to reach a functioning Union. The legal uncertainties will be reduced if formal requirements are developed in order to be able to strike a fair balance between copyright law and the freedom of expression.
A new Directive must therefore be developed to be able to ascertain that the development of hyperlinks will be included in the legislation. Article 3(1) does not include the communication to the public in relation to hyperlinks which may lead to that the Internet user may not understand that hyperlinks are included in that provision. Necessary checks are not included in the provision which make profit-making hyperlinkers unaware of how to carry these out. The InfoSoc Directive only states that a balance must be struck between copyright law and other fundamental rights, however the Directive does not define how the courts should be able to strike a fair balance between copyright law and the freedom of expression. The formal requirements that the ECtHR must develop should be included in the new Directive which will help Contracting States to apply the balancing act in a uniform way. The InfoSoc Directive today is too broad for Internet users to understand when a communication to the public on the Internet has occurred and also, it's hard for the users to know which of the fundamental rights that will prevail in different situations.
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