**Doctrines**

**Recent Evolutions in Digital European Copyright Law**

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The aim of this article is to critically overview recent evolutions in the field of European copyright law. It is divided in four parts. The first part focuses on the application of copyright law to online linking activities. The second part analyses the rise of freedom of expression as a possible external limitation to copyright law. The third part discusses how EU copyright principles could respond to challenges brought by artificial intelligence (AI). Finally, the fourth part considers copyright law as an experimental domain for Internet law and is dedicated to specific evolutions in the field of digital copyright law and on whether those evolutions could influence more generally EU Internet regulation.

L’objectif de cet article est de présenter de manière critique les évolutions récentes dans le domaine du droit d’auteur européen. Il est divisé en quatre parties. La première partie porte sur l’application du droit d’auteur à la fourniture de liens Internet. La deuxième partie analyse l’émergence de la liberté d’expression comme possible limite externe du droit d’auteur. La troisième partie traite de la manière dont les principes du droit d’auteur de l’UE pourraient répondre aux défis posés par l’intelligence artificielle (IA). Enfin, la quatrième partie considère le droit d’auteur comme un domaine expérimental du droit de l’Internet et est consacrée aux évolutions spécifiques au domaine du droit d’auteur numérique et à la question de savoir si ces évolutions pourraient influer de manière plus générale sur la réglementation de l’Internet par l’UE.

**Introduction**

The evolution of digital copyright law has been monopolised in recent years by the Court of Justice of the European Union’s (CJEU) dynamic construction of a European Union (EU) digital copyright acquis. The CJEU was called upon several times to shed light on the application of authors’ rights on the Internet, while one of the most emblematic expressions of the CJEU’s interpretative activity has been its constructions on originality and the right of communication to the public.

However, since December 2015 when, after years of legislative inactivity, the EU Commission launched the Digital Single Market strategy, several evolutions have taken place concurrently, at both the jurisprudential and the legislative level. The modernisation of EU copyright legislation resulted in a series of new legislative instruments, the most important one being the recently adopted Directive on copyright in the Digital Single Market.

This leads to a labyrinth of principles and provisions, which have to be combined and seen as part of the
broader picture, i.e. the whole body of EU digital copyright acquis created thus far. This article is divided into four parts which, as a sort of an ‘Ariadne’s thread’, aim to decode the basic principles of this jurisprudential and legislative effervescence. Part 1 focuses on the application of copyright law to online linking activities (I). Part 2 analyses the rise of freedom of expression as a possible external limitation on copyright law (II). Part 3 discusses how EU copyright principles could respond to the challenges posed by artificial intelligence (III). Finally, Part 4 considers copyright law as an experimental domain for Internet law and is dedicated to specific evolutions in the field of digital copyright law. It asks whether these evolutions could influence EU Internet regulation more generally (IV).

I. ONLINE CONTENT, ONLINE LINKING, COPYRIGHT LAW: MORE EXPLANATIONS, MORE CONFUSION

First of all, a lot of ink has been expended on the topic of the right of communication to the public. Indeed, there is no other topic of copyright law where the CJEU has intervened with so many decisions, yet ironically a lot of uncertainty remains.

The task facing the CJEU was not easy. The Court tried to respond to specific questions which were related to the circumstances of the cases brought before it and, at the same time, to maintain a solid and coherent line of interpretation.

In this context, the concept remains ambiguous, especially as regards online linking activities. Specifically, since 7 December 2006, when the SGAE Rafael Hoteles landmark/cornerstone decision was published, the CJEU has dealt extensively with the scope of application of the right of communication to the public in the digital context. The CJEU made a creative interpretation of EU copyright principles and confirmed the application of the right of communication to the public in different contexts. As will be shown in the following paragraphs, while it is possible to identify some general principles in relation to the application of the right of communication to the public, such as the latter has been interpreted by the CJEU, several grey areas still remain.

A. The state of the art: the ‘Svensson’/‘GS Media’ approach

First, the CJEU elaborated a broad EU autonomous concept of the right of communication to the public. Specifically, the right covers every transmission or re-transmission of a work to the public which is not present at the place where the communication occurs, including interactive on-demand transmissions. The right was broadly conceived in order to ensure a high-level protection of copyright. There are two basic conditions for the application of the right. Firstly, there must be an act of communication. In order to ascertain whether an act of communication has taken place, it is sufficient that the work was made available to the public, regardless of whether the public has actually accessed the work. Secondly, the work must have been made available to a public. The notion of the ‘public’ is the conceptual plinth of the right of communication, since only public – as opposed to private – acts of communication fall within this right. The CJEU has defined the public quantitatively as an indeterminate and fairly large number of people.

But the landscape is much more complex, as the CJEU has established some (not autonomous) additional criteria, which appear inconsistently and must be applied both individually and in their interaction with others. These criteria are the ‘new public’, the essential/indispensable intervention on the side of the user and the user’s motive, and specifically whether or not this is a profit-making motive. The principle, such as it appears, is that when a work is communicated using the same technical means (e.g. via the Internet) the communication must be directed towards a
new audience, a new public in order to be considered as an act of communication to the public. However, if the technical means change, there is no requirement for a new public. The new public is defined as the public which was not accessible the work, could also qualify as an act of communication to the public. This intervention must be ‘intentional’ or ‘deliberate’. Another criterion which, however, appears and disappears somewhat inconsistently in the CJEU’s decision is the profit-making purpose of the communication. It is noteworthy that, even in the decisions where this criterion is applied, the degree of its importance varies significantly. Accordingly, the terminology used by the CJEU is not coherent. Indeed, in the SGAE case, the CJEU acknowledged that a profit-making nature is not necessarily an essential condition for the existence of a communication to the public. In the Football Premier League case, the Court noted that the lucrative nature of a ‘communication’ is not irrelevant, while in the TV Catchup case it was held that the lucrative nature of the act of communication is not conclusively determinant. Nonetheless, the significance of this criterion has been accentuated in GS Media, since it has become a predominant factor for affirming or denying a hyperlinker’s liability if the hyperlink points to copyright-protected content which has been made available to the public without the right holder’s permission. Hyperlinking emerged as a controversial field in relation to the application of the right, since the Information Society Directive did not provide any clear answer or even any indication as to whether the act of linking should fall inside or outside the author’s exclusive right. In the landmark Svensson case, the new public criterion was affirmed as the main legal argument for the exclusion of hyperlinking to content which has lawfully been made available on the Internet (with the author’s consent) from the scope of communication to the public. For articles written by journalists and made freely accessible with their consent on the newspaper’s website, without any technical restrictions on access (paywall overlay), there is a presumption that the right holders have given their permission for the communication of these works to all Internet users, thus permitting Internet links to this website. The Court’s judgment in 2014 felt like an earthquake to copyright holders because it appeared to imply the digital ‘exhaustion’ of the right when Internet users linked to copyright-protected material available on the Internet, by emphasising the ‘new public’ criterion as a conclusive determining factor for the application of the right.

In GS Media, the CJEU clarified that the provision of a hyperlink to a work that is freely accessible but was made available without the author’s consent is an act of communication which is directed towards a new public if the person posting the link knows or ought to know that the link points to unauthorised content. If the posting is made for profit, then the linker is presumed to have knowledge of the absence of permission. In the latter case, linkers are expected to take the necessary precautions and to carry out reasonable checks in relation to the lawfulness of the source of the content. The distinction established in GS Media between professionals and non-professionals needs further explanation. Specifically, how will the profit-making nature of the activity be evaluated? In relation to the provision of the link itself or the surrounding environment? In this context, in the Pirate Bay case, it was held that financing by means of advertising revenues linked to the website’s traffic a priori comes within the scope of profit-making activities.

Overall, the CJEU’s findings in the hyperlinking cases show the way towards a more lenient approach to not-for-profit users of the Internet. This argument is not the-
theretical: it has been expressly advanced by the Advocate General in the Renckhoff case.

**B. The ‘Renckhoff’ case**

The facts of the case are not unique and they do not involve any technological complexity. A pupil in Germany downloaded a photograph of the city of Cordoba from a travel website and used it for a written school assignment. The photograph was originally uploaded and made accessible, without any technical restrictive measures, on the travel website with the photographer’s consent. The assignment was then uploaded to the school’s website. Mr Renckhoff, the author of the photograph, brought proceedings before the German courts claiming copyright infringement. The referring Court (the German Federal Court of Justice) asked the CJEU whether the uploading by the school’s website of an assignment which included the photograph, without the photographer’s consent, constitutes an act of communication to the public.

In a hotly debated opinion, Advocate General Campos Sanchez-Bordona elaborated a subversive (and contested) line of argument and denied the application of the right of ‘communication to the public’, by emphasising, inter alia, (a) that the photograph was of a secondary nature in the pupil’s assignment; (b) that the photograph was accessible on the online travel platform without any technical restrictions (and was therefore not aimed at a ‘new public’ since the photograph was easily and lawfully available to all Internet users with the copyright holder’s consent); and (c) that the pupil did not have a profit-making intention.

The analysis of the Advocate General, which is inspired by the CJEU’s reasoning in GS Media, favours the assessment of copyright infringements using a fault-based approach, in the sense that several criteria related to the intention or the constructive knowledge of the user are taken into account in order to assess copyright infringement. However, the CJEU took a different approach and deconstructed these arguments. For the CJEU, linking to copyright-protected works and uploading to a new website a copyright-protected work found on the Internet are also actions that differ substantially. Giving access to a work via linking is a secondary communication which depends on the work’s availability on the initial Internet source. If the access to the work on the original website is neutralised, access via linking is not possible. On the other hand, uploading the work and making it available on another site is an act of primary communication, which is no longer dependent on any initial communication. This marks a step backwards from the ‘hyperlinking’ cases of Svensson and GS Media. In Svensson, the Court implicitly developed the reasoning that if a work is openly available on the Internet, then it is presumably aimed at all Internet users. In GS Media, the CJEU built on this argument further, explaining that when the work was unlawfully first communicated to the public, a professional user should be in a position to determine the unlawful nature of the first communication. An opposing analysis would conclude that any non-professional user would be free to reuse any freely available online content.

This is the idea that the Court forcefully denies in its Renckhoff judgment. Renckhoff, however, should not be seen as the end of Svensson’s and GS Media’s line of reasoning. For the CJEU, the hyperlinking precedents continue to apply as a lex specialis only to hyperlinking activities, a position justified by the key role played by hyperlinks in the smooth operation of the Internet. However, the CJEU affirms that this approach cannot be interpreted in a way that completely neutralises authors’ rights.

**II. THE (POTENTIAL) RISE OF FREEDOM OF EXPRESSION AS AN EXTERNAL LIMITATION ON COPYRIGHT LAW**

Apart from the scope of economic rights, significant evolutions are pending in the minefield of copyright exceptions, where the CJEU has to take a position in 2019 in a series of cases referred by the German courts.

Advocate General Maciej Szpunar recently unveiled a novel approach which, although not very clear, might open the way to a new paradigm in the field of copyright exceptions.

For the past decade, scholars in Europe have been calling for a more liberal approach to exceptions and for a re-
casting of the three-step test.\textsuperscript{33} It appears that the practical judicial effects are only now just starting to be felt.

First it should be noted that the three cases each have a completely different factual background. However, they share three key features: (a) the balancing of copyright protection with fundamental rights (specifically with freedom of expression and freedom of the arts), (b) latitude in the implementation of copyright exceptions in the domestic laws of the Member States and (c) maintaining freedom of expression as an external limitation on copyright law.

\section*{A. The ‘Afghanistan papers’ case}

In the \textit{Afghanistan Papers} case, the question at issue is whether the German State is entitled to enforce copyright in confidential military reports to prevent their being communicated to the public on a newspaper website, which obtained these reports (the so-called \textit{Afghanistan Papers}) by unknown means.

The relationship between copyright law and freedom of expression lies at the heart of the dispute. Indeed, for the Advocate General, in this case the starting point is not copyright law, but freedom of expression. In his view, in reality this is an issue of confidentiality and it is doubtful whether military reports are copyright-protected works, due to their purely informative nature.

For the Advocate General, in this case the true legal basis is public interest and not copyright.\textsuperscript{34} Copyright has been used to protect the confidentiality of the reports, and has therefore been misused here to pursue objectives that are entirely unrelated to it.\textsuperscript{35}

As regards the key question of balancing freedom of expression with copyright, the Advocate General concludes that it is not possible to give a general answer to the question of whether freedom of expression can act as an external limitation on copyright law. Even if there are internal limits within copyright which aim to safeguard freedom of expression, such as the principle of non-protection of ideas and copyright exceptions, there may be exceptional cases where copyright must yield to an overriding interest relating to the implementation of a fundamental right or freedom.\textsuperscript{36} However, it is one thing to give precedence to freedom of expression over copyright in a specific and very particular situation. It is quite another to introduce into the harmonised copyright system, outside the provisions of substantive EU law governing that area, exceptions and limitations which, by their nature, are intended to apply generally.\textsuperscript{37}

\section*{B. The ‘Metall auf Metall’ case\textsuperscript{38}}

In the \textit{Metall auf Metall} case, the factual background is completely different. The question is whether the unauthorised sampling of two seconds of a phonogram used in the allegedly infringing song included in another phonogram is an unauthorised reproduction in part of the first phonogram, and therefore infringes the rights of the phonogram producer.

For the Advocate General, every reproduction of a phonogram, even of a small part of it, falls within the right of reproduction and has to be authorised,\textsuperscript{39} since the protection of phonogram producers is independent from copyright protection and is not subject to the requirement of originality.\textsuperscript{40} As the Advocate General emphasises, with reference to Article 2(b) of the WIPO Performances and Phonograms Treaty\textsuperscript{41}, ‘although the rights of producers of phonograms are rights related to copyright, they are not, however, derived rights. Accordingly, the scope of protection of a phonogram is in no way subject to the scope of protection of the work that it may possibly contain.’\textsuperscript{42}

If this use is not authorised, and as regards the possibility of justifying sampling on the basis of copyright exceptions, the Advocate General concludes that the German ‘free use’ exception\textsuperscript{43} is not compatible with EU law, as Article 5 of the Information Society Directive\textsuperscript{44} establishes an exhaustive list of exceptions and limitations. Member

\begin{footnotesize}
\begin{itemize}
  \item[35.] Paragraph 61 of the Opinion.
  \item[37.] Paragraph 71 of the Opinion.
  \item[38.] E. Rosati, ‘AG Szpunar advises CJEU to rule that unlicensed sampling MAY be a copyright infringement and German free use may be contrary to EU law’, 12 December 2018, http://ipkitten.blogspot.com/2018/12/the-ag-opinion-in-metall-auf-metall-its.html.
  \item[39.] WIPO Performances and Phonograms Treaty, adopted on 20 December 1996.
  \item[41.] Paragraph 40 of the Opinion.
  \item[42.] Paragraph 56 of the Opinion.
  \item[44.] Op. cit.
\end{itemize}
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States cannot introduce any other exceptions or extend their scope. However, it is noteworthy that the Advocate General mentioned that the degree of latitude enjoyed by Member States is also limited in the opposite direction by the Charter of Fundamental Rights of the EU, in the sense that failing to provide for certain exceptions in domestic law could be incompatible with the Charter.\(^45\)

Subsequently, the Advocate General analyses the concept of ‘quotation’. In his view, although a ‘quotation’ does not need to be only ‘for purposes such as criticism or review’, it must enter into some kind of dialogue with the work quoted and an interaction between the quoting work and the work quoted is necessary. It should be unaltered and distinguishable from the work in which it is incorporated, and it must indicate the source of the quotation, unless this is impossible. However, sampling does not satisfy these conditions, since its aim is not to enter into a dialogue with, to be used for comparative purposes, or to pay tribute to the works used. Sampling is the act of taking extracts from other phonograms, which are used as raw materials and are included in new works, as integral and recognisable parts of them. It is not, therefore, a form of interaction but rather a form of appropriation.

Finally, as regards the question of whether such use could be justified, not on the basis of a specific copyright exception, but of the fundamental right on artistic freedom,\(^46\) the Advocate General noted that freedom of artistic expression is not limitless. Freedom of the arts does not free artists from the constraints of everyday life, such as that of lawfully acquiring the means for the creation. Freedom of the arts cannot guarantee the possibility of free use of whatever is wanted for creative purposes.

C. The ‘Spiegel Online’ case

Finally, in the Spiegel Online case, the question posed is whether a press organisation infringes copyright when it makes an article written by a national politician available to the public on its website without consent, in order to substantiate the allegation made in a publication on that same website that the politician in question has misled the public.

To address this issue, the Advocate General analysed a series of questions related to copyright exceptions, such as the degree of freedom enjoyed by Member States in relation to copyright exceptions. In this context, he repeats the line of reasoning he adopted in the Afghanistan Papers and Pelham Opinions. He emphasises that although Member States enjoy some degree of freedom in the choice and wording of the exceptions they consider appropriate to be transposed into their national legislation, they are not entitled to introduce any exceptions not provided for in the exhaustive list set out in Article 5 of Directive 2001/29/EC or to extend the scope of the existing exceptions. The Advocate General puts forward some very insightful propositions on the concept of quotation, which, however, he finds to be not applicable in the present case. Even if the exception for quotation is capable of justifying uses of works employing different techniques (possibly including hyperlinking under specific circumstances\(^47\)) in the Advocate General’s view, it goes beyond the concept of this exception to make a work available, in its entirety, on a website, as an accessible and downloadable file in an autonomous manner.\(^48\) This is because such use obviates the need to access the original work by exempting the reader from having recourse to the original work, and thus exceeds the limits of this exception.\(^49\) As regards the question of whether fundamental rights can be used as external limits to copyright protection, in the view of the Advocate General, the balancing of copyright protection with other fundamental rights lies within the competence of the legislator and not of the courts, which might be required to intervene only exceptionally in the case of a violation of the core of a fundamental right. Enabling Member States to use fundamental rights to further limit the exclusive rights of the author beyond the list set out in Article 5 of Directive 2001/29/EC would neutralise the harmonisation effect of Article 5 of Directive 2001/29/EC. Such a possibility would result in a back-door introduction of an EU ‘fair use’ clause, because in practice every use of copyright-protected works could be based on freedom of expression. If new exceptions could be variably introduced by Member States on the basis of their own domestic perception of freedom of expression, the painfully established EU copyright acquis would collapse. However, it is admitted that there will be exceptional cases where the core of freedom of expression would be safeguarded only via a limitation of the author’s right, regardless of whether a limitation is prescribed in detail in a specific copyright exception.

Overall, in these three opinions, the Advocate General advances an approach which attempts to calibrate flexibility and legal certainty. In his view, ‘any answer formulated in general terms which disregards the specific situation of possible conflict between copyright and a fundamental right would be either too inflexible, as it would prevent any adjustment being made to the copyright system if necessary, or too permissive, as it would open the door to

\(^{45}\) Paragraph 77 of the Opinion in Pelham and Others.
\(^{46}\) Article 13 of the EU Charter of Fundamental Rights.
\(^{47}\) Paragraphs 43, 48 of the Opinion in Spiegel Online.
\(^{48}\) Paragraph 48 of the Opinion in Spiegel Online.
\(^{49}\) Paragraph 49 of the Opinion in Spiegel Online.
that system being questioned in any situation whatsoever, thereby depriving it of all legal certainty.\textsuperscript{50} The Advocate General is cautious in underlining that an analysis of the balancing of copyright law with fundamental rights should only be done on a case-by-case basis and not in a general way. This case-by-case approach enables the principle of proportionality to be applied as accurately as possible, thereby avoiding unjustified interferences with both copyright and fundamental rights.\textsuperscript{51}

This central finding of the three opinions has probably disappointed all those who have been waiting for a more liberal approach which would enable more elasticity in the European copyright law ecosystem.\textsuperscript{52} On the other hand, it should be borne in mind that the Advocate General’s approach opens the door to the prevalence of fundamental rights over copyright protection in exceptional cases, and in particular in cases where the ‘essence of a fundamental right’ is at stake. Furthermore, as Christophe Geiger and Elena Izyumenko point out, the Advocate General’s reference to the concept of copyright misuse is of particular importance, since this notion has never been applied before by the EU courts in such an explicit way.\textsuperscript{53}

III. PREPARING THE FIELD FOR THE ARRIVAL OF AI...

It is noteworthy that some of the recent EU copyright evolutions might have an impact on the question of how to regulate works generated using AI.

The advent of AI certainly raises significant legal and ethical issues, which extend beyond the scope of copyright law. For copyright law, the challenges posed by AI mainly appear at two levels. Firstly, as regards the possibility of conducting analysis (use) of copyright-protected works by AI systems. Secondly, as regards the authorship of AI-generated works.

In relation to the first question, the new text and data mining (TDM) exceptions of the Directive on copyright in the Digital Single Market\textsuperscript{54} are relevant, since the introduction of two TDM exceptions aims, inter alia, to enable the training of AI systems. Although classical TDM and machine learning each have a different utility, it should be borne in mind that both use the same key algorithms to discover patterns in data.\textsuperscript{55} Specifically, Article 3 provides for a new exception for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, TDM of works or other subject matter to which they have lawful access. Furthermore, Article 4 provides for an additional TDM exception, which is not solely limited to purposes of scientific research, provided that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their right holders in an appropriate way, such as machine-readable means in the case of content made publicly available online.

As regards the second question, the analysis is, for the time being, doctrinal. The regulation of AI-generated creation presupposes a redefinition of the principles of copyright law, with a focus on the question of authorship, which is not harmonised at EU level.\textsuperscript{56} In the case of AI-generated works, the author does not directly appear to be a human being, but rather another work, i.e. the computer program, which acts as the ‘mind’ of the AI system. Unless we disregard the prevailing underlying principle that the author must be a human being, the only way to award copyright protection would be to attribute the work to the natural person (the computer programmer) who created the software which, in turn, produced the work. The software engineer will be the one who, by dint of his or her personal creative contribution, will determine how the software reasons and acts. Paradoxically and unexpectedly, some of the findings of the recent CJEU Levola case\textsuperscript{57} could shed some light on the issue of whether the human author who created the software behind the functioning of the AI system could be recognised as the author of the works generated by the machine.

In the Levola case, the CJEU was called on to rule whether the taste of a cheese could be protected as a ‘work’ by copyright law. In the CJEU’s view, the concept of a work must be given an autonomous and uniform interpretation that will apply throughout the EU. Two criteria must be met for a product of the intellect to be recognised as a work: ‘originality’, in the sense that the subject matter is the author’s own intellectual creation, and ‘expression’, in the sense that only something which is the expression of the author’s own intellectual creation can be classified as

\textsuperscript{50} Paragraph 29 of the Opinion in Funke Medien.

\textsuperscript{51} Paragraph 31 of the Opinion in Funke Medien.

\textsuperscript{52} For a critical overview see: D. Jongsmia, ‘AG Szpunar on copyright’s relation to fundamental rights: one step forward and two steps back?’, IPRonia, 3 February 2019. No 1/2019, https://ssrn.com/abstract=3328100 or http://dx.doi.org/10.2139/ssrn.3328100. In the author’s view, ‘by main- taining that the judge may deviate from the balance struck by the legisla- ture only in “exceptional cases” or when the essence of a right is violated, the AG suggests a one-sided standard resulting in an excessive degree of restraint’.


\textsuperscript{57} CJEU, Levola Hengelo BV v Smilde Foods BV, 13 November 2018, C-310/17, EU:C:2018:899, LexNow Ref./ID 28708.
a ‘work’. So for a person, such as the computer engineer, to be recognised as an author of AI-generated works, this person must contribute to the expression of the work. In the case of AI-generated creation, however, the causal link between the software programmer and the expression of the work (the form of the work, such as it is identifiable) is weak and remote. The software programmer sets the rules and parameters by which the software operates, but he or she does not define the final form of the work. Since the final expression (the ‘form’) of the work is generated by the machine, attributing authorship to the ‘planning’ or to the ‘design’ as conceived by the software creator could be seen as a violation of the fundamental copyright principle of the dichotomy between idea and expression.

IV. COPYRIGHT LAW AS AN EXPERIMENTAL DOMAIN FOR INTERNET LAW

Finally, copyright enforcement in the digital era poses a number of problems which are shared with other aspects of Internet law. In point of fact, certain evolutions in the field of digital copyright law could potentially have a major impact on EU Internet law generally.

Two recent examples are (a) the hotly debated Article 17 of the New Directive on copyright law in the Digital Single Market and (b) the legal treatment of the IP address as a presumption of liability.

A. Article 17, characteristic of a contemporary challenge to the concept of the intermediary’s safe harbour

Certainly, the most controversial provision of the New Directive on copyright and related rights in the Digital Single Market is Article 17. Specifically, Article 17 stipulates that ‘Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.’ By introducing a specific liability mechanism for online service providers, the provision inserts a breach of the concept of the hosting provider’s safe harbour, which was established by Article 14 of the E-Commerce Directive, as regards liability for online copyright infringements. Under Article 14, platforms and other hosting providers were exempted from liability for content uploaded by their users if their role in the communication of the content was merely technical, neutral or passive, and they do not possess any actual knowledge of illegal activity or information and, as regards claims for damages, are not aware of the facts or circumstances from which the illegal nature of the activity or information is apparent.

Article 17 reverses this line of reasoning by establishing that platforms are directly liable for communicating copyright-protected content. On the grounds of Article 17 of the New Directive, platforms now have two possibilities. In order to escape liability, platforms must obtain licences for the content uploaded by users of the service (if the users do not operate on a commercial basis). However, if no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including the making available to the public of copyright-protected works and other subject matter, unless the service providers can demonstrate that they have made best efforts (a) to obtain authorisation and (b) to check, in accordance with high industry standards of professional diligence, the unavailability of the specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information; and in any event (c) have acted expeditiously, upon receiving sufficiently substantiated notice from the right holders, to disable access to, or to remove from, their websites the notified works or other subject matter, and (d) have made best efforts to prevent future uploads thereof in accordance with point (b).

There is no requirement for a full knowledge of the consequences of the platform’s action, in contrast to previous CJEU case law, whereby intermediaries were held

60. According to this criterion, the exemptions from liability only concerns cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’. In order to establish whether the liability may be limited under Article 14 of Directive 2000/31/EC, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.
liable if they had full knowledge of the facts and the consequences of their conduct. While there is no express obligation to use filters, the obligation to make best efforts to prevent future uploads of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information ends up in practice with the imposition of filtering mechanisms, such as the YouTube Content ID. This might result in blocking access to content which could be lawfully used on the basis of a copyright exception or is no longer protected by copyright law. Indeed, such filtering mechanisms have proved to be unpopular, because from time to time they have been accused of misuse committed by copyright holders wishing to silence critics or because of algorithmic accidents which resulted in non-infringing material being erroneously flagged as infringing. In this context, it is welcome news that the Directive 2019/790 on copyright and related rights in the Digital Single Market also includes a number of safeguards in this regard. Specifically, Article 17(7) provides a number of exceptions in favour of platform users. This provision requires Member States to ensure that users are able to rely on the exceptions of caricature, parody or pastiche when uploading and making available content generated by users on online content-sharing services. Furthermore, an expeditious complaints submitted by users shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review.

This fundamental change did not come out of the blue. The hosting provider’s safe harbour has been scrutinised by national courts. Expecting online service providers to act as completely passive content vectors has led to somewhat perverse effects, such as the ‘Good Samaritan’ paradox, whereby voluntary measures taken by service providers to detect content or prevent it being made available would lead to exclusion from restrictions of liability. Indeed, the role and the duty of care expected of hosting providers have been unclear.

Since the intermediary is best-placed to ensure the effective enforcement of the law, a more active approach has been advocated from time to time. This was also made clear in the L’Oréal v eBay case, where the Court recognised that notification by the injured party is not the only way to obtain knowledge of an illegal activity or information, but that this knowledge can also be discovered by an investigation undertaken at the hosting provider’s initiative. In subsequent case law in the field of copyright law, the CJEU stretched the application of the right of communication to the public in a way that also includes cases which have hitherto been classified by national courts as cases involving secondary liability. In this context, the CJEU was asked in the pending cases of YouTube and Elsevier to rule whether the YouTube and Uploaded platforms are responsible for copyright infringement by way of communication to the public. However, although Article 17 is a significant step towards more effective copyright enforcement and responds to the ‘value gap’ rhetoric, the effectiveness of the new regime has yet to be tested. Firstly, the effectiveness of the new mechanism depends on how the platforms will react in order to respond to their new duties. Secondly, the problematic application of filtering mechanisms has shown that freedom of expression might be the price that has to be paid for this shift. The right balance between the new obligation incumbent on platforms to prevent future uploads and the prohibition of the general monitoring obligation established by the E-Commerce Directive has yet to be found.

B. The ‘Bastei Lübbe’ case and possession of an IP address as a presumption of liability

Lastly, EU changes in the field of detection of online copyright infringers via the use of an IP address might serve as a precursor for law enforcement on the Internet. The IP
address has often proved to be the only means available to identify online copyright infringers, but we should bear in mind that in reality, this is a number linked to a device and not directly to a person.

The legal challenge is, therefore, essentially two-fold. Firstly, to balance copyright protection with personal data protection, and secondly, to define the legal consequences, for the owner of an IP address, of using his IP address for copyright infringement. Indeed, since the IP address might be shared by many people, the challenge of identifying the specific person who committed the infringement is not an easy one.

Certain EU Member States, such as Germany and Denmark, have adopted the presumption that the owner of the IP address is responsible for any infringements committed from the owner’s IP address. Specifically, in Germany, in the case Sommer unseres Lebens the Bundesgerichtshof (BGH) held that a private owner of an unprotected Wi-Fi network was liable for copyright infringement committed by an unidentified third party, because the owner of the network should have protected it with safety measures to prevent its misuse. As a result, Wi-Fi operators should password-protect their connections in order to avoid any third-party copyright infringements.

This legal framework was examined by the CJEU in the recent Bastei Lübbe case. Bastei Lübbe, the owner of copyright in an audio book, accused a German citizen of copyright infringement of an audiobook. The accused individual was the owner of an Internet connection, and therefore of the IP address, through which the audio book had been illegally shared in a peer-to-peer network. He denied that he had committed the copyright infringement, but also maintained that his Internet connection was sufficiently secure. He further asserted that his parents had access to the Internet connection but that he did not know whether they had committed the infringement. Under German law, if it can be demonstrated that an Internet connection was used to infringe copyright, the owner of that Internet connection is presumed to have committed the infringement. However, this presumption can be rebutted by the owner, if he or she can show that other persons had independent access to the Internet connection and were therefore capable of committing the infringement. Further, if a family member of the owner in question had access to the Internet connection, the owner, on the basis of the right to the protection of family life, can escape liability merely by naming a family member, without being required to provide further details as to how and when the Internet connection was used by that family member.

The main question referred to the CJEU is that of whether this legal regime is compatible with the need to safeguard effective copyright enforcement. To answer that question, the Court must perform a balancing act between, on the one hand, the protection of intellectual property rights as guaranteed by the German Copyright Act and Article 17 of the EU Charter of Fundamental Rights in relation to protection of the right of property, and on the other hand, the proper discovery process for evidence and respect for other fundamental rights. In the CJEU’s view, it is not compatible with the right holders’ fundamental rights to an effective remedy and to intellectual property if the owner of the IP address can avoid a presumption of liability merely by stating that a family member has also had access to the Internet connection. As regards the protection of family life, the Court affirms that family members enjoy special protection insofar as they need not incriminate each other. However, if a national law always granted precedence to the right to privacy over the right to intellectual property in infringement proceedings, then this national legislation would fail to properly enforce intellectual property rights. Such a national law would make it practically impossible to obtain evidence of an alleged infringement of copyright.

It has to be born in mind that the liability and the possible obligations of the owner of an IP address which is used by others have been examined by the CJEU in the past, in another landmark ruling in the McFadden case, though in a different context, since this was a case of an injunction against an Internet access pro-

73. See: CJEU, Productores de Música de España (Promusica) v Telefónica de España SAU, 29 January 2008, C-275/06, LexNow Ref./ID 25757; CJEU, LSG-Gesellschaft zur Wahrung von Leistungsschutzrechten GmbH v Telefónica de España SAU, 19 February 2009, C-557/07, LexNow Ref./ID 28709; CJEU, Bonnier Audio AB v Perfect Communication Sweden AB (Apheon), 19 April 2012, C-461/10, LexNow Ref./ID 17554.


75. BGH, Sommer unseres Lebens, 12 May 2010, I ZR 121/08.

76. CJEU, Bastei Lübbe GmbH & Co. KG v Michael Strötzer, 18 October 2018, C-149/17, LexNow Ref./ID 27415.

77. Paragraph 36 of the judgment.

78. Article 6(1) of the Enforcement Directive (Directive (EU) 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30 April 2004, OJ L 195, 2 June 2004, p. 16–25). According to this provision, ‘Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.’

79. Paragraphs 51–52 of the judgment.

80. CJEU, Tobias Mc Fadden v Sony Music Entertainment Germany GmbH, 15 September 2016, C-484/14, LexNow Ref./ID 28710.
provider concerning copyright infringements committed by third parties. In McFadden, the CJEU was called on to rule whether an injunction requiring the owner of a shop, which offered access to a Wi-Fi network to the general public free of charge, to prevent third parties from making copyright-protected works available on a peer-to-peer exchange platform, is compatible with the protection of fundamental rights. The referring court stated that it was inclined, by analogy, to apply the Bundesgerichtshof’s ruling in the Sommer unseres Lebens case, taking the view that this judgment, which concerned private persons, should also apply in the case of a professional who operates a Wi-Fi network that is accessible to the public.

The CJEU closely scrutinised the measures that can be taken by the access provider to prevent the making available of particular copyright-protected content. In the CJEU’s view, measures consisting in terminating the Internet connection completely or in monitoring all communications transmitted via a given network should be rejected because they cannot strike a fair balance between the conflicting fundamental rights.

The only measure which could be adopted is a single measure consisting in password-protecting the Internet connection, provided that the users are required to reveal their identity in order to obtain the necessary password and may not therefore act anonymously. Although such a measure interferes with the freedom to conduct business and freedom of expression, it does not damage these fundamental rights in essence. As regards whether such a measure is an effective means of preventing copyright infringements, the Court answers in the affirmative since, for the CJEU, this measure can make it difficult for users to gain unauthorised access to protected material and can seriously deter Internet users from accessing protected material. The Court’s reasoning gives rise to some doubts, because a mere password and an obligation on the part of the user of the connection to identify himself or herself cannot really establish a link to the infringer, given that the latter may be registered with false details. Lastly, it should be emphasised that this judgment does not create a legal obligation for providers of free Wi-Fi to password-protect their network and/or register users’ details, unless they are required to do so in order to comply with an injunction.

**CONCLUSION**

On the basis of the frenetic jurisprudential activity around the topic of communication to the public (Part 1), the slow transformation of exceptions in the light of fundamental freedoms (Part 2), the continuing uncertainties surrounding the notion of author and works and the rise of AI creations taking place in the background (Part 3) and the everlasting issues of online copyright law enforcement (Part 4), it would seem difficult, if not impossible, to perceive a clear pattern in the recent evolutions of European copyright law. At first sight, these eight most recent cases examined by the European Court have little in common.

This could be explained by the multiplicity of changes currently under way in this field. Both the Renckhoff and the Levola cases are contributing, one small step at a time, to the mammoth task of the harmonisation of European copyright law through jurisprudential interpretation of the mosaic of relevant directives. The Bastei Lübbe case, the controversial Article 17 of the New Directive, and to some extent the ongoing cases related to exceptions, are just some examples of another issue, one that is ontologically different: the unfitness of current copyright law for the practices of the digital era. The two evolutions are not, in theory, at odds with one another. However, in practice, both the effort put into constructing a European legal framework and an online friendly copyright law lead to more complexity.

These two layers of discussions interact in different ways. On a positive note, some synergies exist: the need for harmonisation is clearly affirmed and consolidated by the challenges of the digital era. It is no coincidence that the most recent cases concerning the right of communication to the public are all related, either directly or indirectly, to Internet activity. However, on a negative note, the legal issues thrown up by the digital era are provoking new interventions (e.g. Article 17) which cannot be effective without a stable and clear legal foundation, common to all Member States. Consequently, further legal uncertainty is added to a system which is already saturated with it. Maybe the time has come to be more audacious and, using the model of uniformisation of industrial property rights, to achieve a unification in order to become better-equipped to deal with the challenges of the digital era...

81. Paragraphs 90–92 of the judgment.