

Intellectual Property Law (6th edn)

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p.153 **6. Nature of the Rights**

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Abstract

This chapter is about the rights conferred by the law on copyright owners and the types of activity that amount to copyright infringement. It begins by considering the right to copy the work, in particular its distinct definition for different categories and types of work. It then looks at other rights granted to copyright owners, including distribution right (and the concept of its ‘exhaustion’); the right to rent and lend copies of the work, including the distinctive treatment of digital copies; the right to perform the work in public and UK law’s concept of ‘the public’; the right to communicate the work to the public, including the CJEU’s extensive case-law on the concept of ‘a new public’ and its treatment of hyperlinking, file-sharing, and content-sharing platforms; and the right to make an adaptation of the work. The chapter concludes by considering the copyright owner’s right to ‘authorize’ the carrying out of any of the exclusive rights as a mechanism to extend the field of responsibility.

Keywords: copyright, exclusive rights, reproduction right, distribution right, exhaustion, public performance right, communication to the public right, new public, adaptation right, authorization

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1 Introduction

This chapter is concerned with the rights that the law confers on the copyright owner. The scope of these rights determines the types of activity that, unless done with the copyright owner's consent (or under a defence), amount to an infringement of copyright.

One of the most consistent themes in the history of copyright law is that the types of activity that have fallen within the copyright owner's control have steadily expanded. While the 1709/10 Statute of Anne conferred on authors and proprietors of books the limited right to 'print and reprint' those books, subsequently, the copyright owner's monopoly was extended to cover the public representation of the work;¹ the 'adaptation' of a work (such as translation and conversion into dramatic forms of literary works);² broadcasting; and more recently rights to distribute, rent, and lend copies of the work.³ While the copyright owner is able to control the use that can be made of the work in many circumstances, there are still some that do not fall within the owner's control. If we take the case of the rights in a literary work, for example, the copyright owner is not able, at least yet, to control reading, browsing, private lending, or resale of a (hard copy of a) book containing the work that has been sold with their consent.

For the most part, the rights have developed in a piecemeal way in response to external pressures, most obviously to technological change.⁴ As well as producing a complicated regime, the cumulative way in which the rights have developed has also led to a degree of overlap between them.⁵ The expansion of the rights granted to the copyright owner has continued with the process of harmonization within the EU. As noted in Chapter 2, EU harmonization began in a piecemeal fashion, in particular with the Software, Related

p. 154 ↵ Rights, Term and Database Directives, and then more generally with the Information Society Directive. Two features of this harmonization process are worth noting at this stage: first, different directives have harmonized different rights (frequently in distinct terms). This has led to some linguistic and occasionally substantive inconsistencies. As a result, it is possible that acts that might count as infringement of a particular right in relation to one subject matter (e.g. artistic works) may not be infringements in relation to other subject matter (e.g. computer programs);⁶ or that an act which infringes one right in relation to, for example, authorial works may infringe another right in relation to, for example, computer programs. Secondly, some rights have never been the subject of harmonization. In particular, the public performance right has not been harmonized,⁷ while the adaptation right has only been expressly harmonized in relation to computer programs and databases (see Table 6.1).

This EU activity has at least three important implications for UK law. First, it means that, with respect to the harmonized rights, the detailed provisions of the Copyright, Designs and Patents Act 1988 (CDPA 1988)—for example, section 17(3) on what counts as reproduction of an artistic work or section 18 on the 'issuing right'—need to be treated with some caution, because (despite the United Kingdom's departure from the EU) they ↵ must be interpreted to give effect to the relevant directives in effect before 31 December 2020.

p. 155 Second, and relatedly, in relation to the harmonized provisions, the Court of Justice has been the key forum in which the scope of these rights has been elucidated (and such case law remains binding, at least on courts of first instance). Third, where EU law 'harmonizes' these rights, for the most part it creates *upper*, as well as lower, limits.⁸

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Table 6.1 Harmonization of the copyright owner's rights in the European Union (before 31 December 2020)

	Computer programs	Related rights	Databases	Authorial works
Reproduction	Software Dir., Art. 4(a)	Info. Soc. Dir., Art. 2(b)–(d)	Database Dir., Art. 5(a)	Info. Soc. Dir., Art. 2
Fixation	n/a	Rel. Rights Dir., Art. 7	n/a	n/a
Distribution	Software Dir., Art. 4(c)	Rel. Rights Dir., Art. 9	Database Dir., Art. 5(c)	Info. Soc. Dir., Art. 4(1)
Rental	Software Dir., Art. 4(c) Rel. Rights Dir., Art. 5(2)	Rel. Rights Dir., Art. 3(1)(b)–(d)	Rel. Rights Dir., Art. 3; Database Dir., Recital 24	Rel. Rights Dir., Art. 3(1)(a)
Public performance	Not referred to	Unharmonized	Database Dir., Art. 5(d)	Unharmonized
Communication	Info. Soc. Dir., Art. 3(1) ⁹	Rel. Rights Dir., Art. 8	Database Dir., Art. 5(d)	Info. Soc. Dir., Art. 3(1)
Making available	Info. Soc. Dir., Art. 3(1) ¹⁰	Info. Soc. Dir., Art. 3(2)(a)–(d)		Info. Soc. Dir., Art. 3(1)
Adaptation	Software Dir., Art. 4(b)	Unharmonized (as such)	Database Dir., Art. 5(b)	Unharmonized (as such)

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The primary rights that are currently granted to copyright owners are set out in sections 16–21 of the 1988 Act. Anyone who carries out any of these activities, or who authorizes someone else to carry out these activities, is liable for primary infringement (unless the defendant has the permission of the copyright owner or can show that the activity falls within one of the defences available to them). While the nature of the rights that are granted varies according to the type of work in question, these include the exclusive right to:

- (i) copy the work (a reproduction right);
- (ii) issue copies of the work to the public (a distribution right);
- (iii) rent or lend the work to the public (a rental or lending right);
- (iv) perform, show, or play the work in public (a public performance right);
- (v) communicate the work to the public;
- (vi) make an adaptation of the work, or do any of the above acts in relation to an adaptation (a right of adaptation); or
- (vii) authorize others to carry out any of these activities.

It should be noted that the particular rights that are granted to copyright owners vary depending on the type of work that is protected. In particular, while the right of reproduction and the distribution right exist in relation to all types of work, the other rights apply only to certain of them. For example, the performing right applies to all works except artistic works and typographical arrangements; the right to communicate the work to the public applies to all works except typographical arrangements; the right to make an adaptation of a work applies only to literary, dramatic, or musical works. Care must be taken to check which rights a copyright owner is given by the 1988 Act (see Table 6.2).

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Table 6.2 Rights under the CDPA 1988

Works	To copy the work (s. 17)	To issue copies of the work to the public (s. 18)	To rent or lend the work (s. 18A)	To perform or show the work in public (s. 19)	To communicate the work to the public (s. 20)	To make an adaptation (s. 21)
Literary, dramatic, and musical	✓	✓	✓	✓	✓	✓
Artistic	✓	✓	(but not buildings/ applied art)	✗	✓	✗
Film	✓	✓	✓	✓	✓	✗
Sound recordings	✓	✓	✓	✓	✓	✗
Broadcasts	✓	✓	✗	✓	✓	✗
Typographical	✓	✓	✗	✗	✗	✗

Traditionally, it has been understood that the restricted activities found in sections 16–21 are based on a notion of strict liability. This means that the state of mind of the defendant is not normally relevant when determining whether an infringement has taken place.¹¹ As such, it does not matter if a defendant knew that the work was protected by copyright or that the claimant owned the work. All that matters, at least in relation to primary infringement, is that the defendant carried out one of the acts reserved to the copyright holder with the claimant's work (or a part of it).¹²

In addition to the primary rights set out in sections 16–21, it is also worth noting that there are regimes of accessory and secondary liability. Accessory liability is based on common law principles of joint tortfeasance (and is discussed in Chapter 48). Secondary liability, which is set out in sections 22–6 of the CDPA largely concerns the commercial exploitation of copies where the defendant knew or had reason to believe that the copies were or would be infringements when made.¹³ We deal with secondary infringement in Chapter 8.¹⁴ For now, however, it is perhaps worth making one point about the place of 'accessory' and 'secondary infringement' in EU copyright law. While these matters hardly feature in the harmonized copyright *acquis*,¹⁵ it would, however, be a mistake to assume this is an area in which there is very little harmonization.¹⁶ In fact, the jurisprudence of the Court of Justice has interpreted the scope of the primary rights so broadly that accessory and secondary liability would have little, if any, place in a European copyright regime.¹⁷

2 The Reproduction Right

The oldest right given to copyright owners is the right to copy the work (s. 17).¹⁸ Article 2 of the Information Society Directive requires member states to confer on authors, film producers, phonogram producers, and broadcasters 'the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part'.¹⁹

While the precise understanding of what counts as a 'reproduction' varies (particularly as between authorial works and related rights, or what Mr Justice Arnold calls 'signal' and 'content' copyright),²⁰ one factor that is common to all works is that infringement takes place whether the copy is permanent, transient, temporary, or even incidental to some other use of the work.²¹ This means a person will infringe (absent a defence) when they store a work (or other subject matter) on a USB,²² when they take material from one website and place it on another, when they upload on to sites,²³ or when they download through peer-to-peer systems (such as The Pirate Bay).²⁴ More startling, a person will reproduce material when they access material from a computer (at which point, a temporary copy is made in the 'memory' of a computer),²⁵ or when they run a satellite box, because the buffer system of the decoder generates a temporary technical copy,²⁶ or when they access an Internet stream.²⁷ Moreover, the image created on a computer screen, or television screen,²⁸ is also regarded as a copy (albeit a temporary one).

It is also worth noting that, under the current approach, reproduction occurs irrespective of whether the user values the work for its expressive or communicative content.²⁹ For example, a person might digitize a work in order to conduct a search (e.g. to detect plagiarism), or to allow others to search the text (by creating indices for search engines).³⁰ In such cases, the text is not valued as an expression or communication, but only as a set of relationships to be examined (usually by non-human means), or as Professors Borghi and

Karapapa have said, ‘as data’.³¹ These non-expressive uses are currently caught by the reproduction right, and their legality therefore turns on the availability of a defence or exception.³² There are a growing number of commentators who argue that this approach is unjustified, and copyright should only protect a work as a communication.³³

p. 158 2.1 Literary, Dramatic, Musical, and Artistic Works

In relation to literary, dramatic, musical, and artistic works, copying means ‘reproducing the work in any material form’.³⁴ Thus reproduction is not limited to replicating a work in the same manner as it was originally produced, for example, repainting a painting or reprinting a book; reproduction also includes reproduction in other forms. Thus it is clear that a photocopy or electronic scan of a printed book,³⁵ an engraving of a painting, a painting of a photograph, and a sound recording of a song are (potentially) reproductions.³⁶ The conversion of a work into digital form—from symbols perceptible and understandable to the senses into a series of ones and zeros—will likewise be treated as a reproduction.³⁷ Moreover, the CDPA 1988 specifies in relation to artistic works that a person will reproduce a work if there is a change of dimensions, so that, for example, photographing a sculpture and making a car exhaust pipe from a design drawing involve reproduction.³⁸ One would expect the same result under the harmonized law (although it is not obvious that the limitation to artistic works can still be justified).³⁹

Are there limits on the extent to which a work can be changed and still constitute a reproduction? In the nineteenth century, courts held that the concept of ‘reproduction’ did not cover translation and other transformations of works and as a result the legislature introduced a distinct category of exclusive right, the right of adaptation. This suggests that there are limits to the concept of reproduction, even if it can be ‘in any form’. In particular, British courts have stated that, in order to infringe, the derived form must be ‘objectively similar’ to the copyright work.⁴⁰ The requirement of objective similarity means that, to infringe, the relevant part of the defendant’s work must be a copy or representation of the whole or part of the original work.⁴¹

In interpreting the concept of ‘reproduction’ under EU law, it is worth noting that, except in the field of databases and computer programs, there has been no explicit harmonization of the right to make an adaptation of a work (see Table 6.1), so that if a protected work is transformed such that it is no longer a reproduction, the question of liability falls to national law. However, the indications are that the Court of Justice sees little, if any room, for a derivative use that is not a reproduction.⁴²

p. 159 ↵ Two interesting questions as to the limits of ‘reproduction’ arose in British case law from the pre-harmonization era. The first is whether the copyright in a work that consists of *instructions* how to make something is infringed by making the thing as instructed. Case law indicated that the answer was ‘no’: a person will not infringe the literary copyright in a recipe if they follow the instructions and bake a cake to the recipe, for example.⁴³ This is because what is protected is the intellectual creation of the recipe as a literary work and not the creation of the cake per se. Similarly, a person who knits clothes according to a knitting guide does not infringe copyright in the guide.⁴⁴ We would expect the same result under harmonized EU law.

The second issue concerned whether there is infringement where a copyright work *describes* something and the thing is made to the description. If a novel describes a scene, would copyright be infringed by someone painting the scene so described? As with instructional works, the key issue here is: when is a description

'reproduced'? The issue is not merely theoretical: with developments in computer-aided design, computer code now commonly represents the three-dimensional article.⁴⁵ In *Sandman v. Panasonic*,⁴⁶ the Court indicated that, in certain circumstances, a two-dimensional literary work that describes something (in this case, circuit diagrams) could be reproduced in a three-dimensional form (the circuits that were incorporated into amplifiers and CD players). Pumfrey J explained that 'the circuit itself is a reproduction because it still contains all the literary content of the literary work, albeit in a form which would require analysis for it to be extracted'.⁴⁷ Nevertheless, it is unlikely that the copyright in a novel that describes a particular scene will ever be infringed when someone draws it. This may be because the description is unlikely to be sufficiently detailed.⁴⁸

2.2 Sound Recordings and Films

The definition of 'reproduction' used in relation to films and sound recordings is narrower than that used in relation to literary, dramatic, musical, and artistic works. These are what Arnold J has referred to, writing extrajudicially, as 'signal' copyrights.⁴⁹ As we saw earlier, entrepreneurial works (or, in EU parlance, 'related rights'), which are seen as the product more of investment than of creativity, are given a 'thinner' protection than is given to authorial works.⁵⁰ This is reflected in the fact that the scope of the reproduction right is inextricably linked to the way in which the particular work is defined.⁵¹ Sound recordings are defined as the 'recording of sounds from which the sounds may be reproduced'.⁵² Consequently, what is protected in relation to sound recordings is not the content per se—the song, storyline, plot, or language—or the music or lyrics (which are protected, if at all, as authorial works). Instead, copyright protects the 'signal'—that is, the recording of these sounds. Similarly, because a film is defined as a recording on a medium from which a moving image may be produced, the courts have held that film copyright protects the recording of the image (rather than the image itself).⁵³ Although the Court of Justice has yet to confirm this, there is no reason to suspect that it would come to any other conclusion.

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One of the consequences of reproduction being defined very narrowly is that copyright in a sound recording of a speech is not infringed where a person transcribes the speech; and copyright in a film (in EU parlance, a fixation) is not infringed when somebody writes a description of the film, or stages a play replicating events in the film. Likewise, the reshooting of a film sequence (in which not a single frame of the copyright film had been included) was held not to be a copy for the purpose of the CDPA 1988.⁵⁴ Similarly, copyright in a sound recording is not infringed where a person remakes (or 'covers') the same song or records the same song performed in a similar style (also known as a 'sound-alike').⁵⁵ However, it should be noted that while an entrepreneurial copyright will not be infringed where a new recording of identical or similar sounds or images is made, this might infringe copyright in an underlying work such as the music, lyrics, or screenplay,⁵⁶ or violate some other intellectual property right.⁵⁷

Having observed that the reproduction right in relation to films (i.e. fixations) and sound recordings is confined to the reproduction of the recording, it should be noted that the recording will be treated as having been reproduced even though the recording medium has changed (as long as the particular sounds or images embodied on the claimant's recording are replicated). For example, a reproduction occurs where a

person records a film that is being screened in a cinema on a digital camcorder, or uploads or downloads a sound recording from the Internet. Even though the Act does not specify that copying of a film or sound recording includes storing it by electronic means, there is no room for doubt that it does.

2.3 Broadcasts

The 1988 Act provides little guidance as to what it means to ‘copy’ a broadcast. However, it is clear that the making of an audio-recording of a radio broadcast or a video-recording of any image forming part of a television broadcast would amount to a reproduction of the broadcast (as well as the contents of the broadcast, be they sound recordings, films, or other works). In contrast with some jurisdictions, UK law does not differentiate between the first fixation and other reproductions of broadcasts.⁵⁸ Following the logic of entrepreneurial copyright, it seems that the reproduction of a broadcast protects only the information, sound, and images sent through particular signals. Thus a person would not infringe if they were to summarize a broadcast, or describe its contents. Similarly, the right to copy the broadcast would not be infringed if someone were to broadcast exactly the same sound recordings in the same order as had been used by another broadcaster.

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2.4 Typographical Arrangements

The scope of the reproduction right in relation to typographical arrangements is very narrow. This is because copying of a typographical arrangement means making a facsimile copy of the arrangement.⁵⁹ Although ‘facsimile’ is defined to include enlargements and reductions,⁶⁰ it seems to be confined to reproduction by way of reprography, photocopies, digital scanning, faxing, and little more. Retyping a work in a different font is a sure way of avoiding infringement of copyright in the typographical arrangement.

3 The Distribution Right

The owner of copyright in all categories of work is given the right to issue copies of the work to the public under section 18 of the CDPA 1988.⁶¹ This is commonly known as the ‘distribution right’. The provision is understood to implement various provisions of European copyright law.⁶²

The distribution right is given in respect of the issuing of each and every copy (including the original).⁶³ As such, it needs to be distinguished from a right to make the works available to the public *for the first time* (that is, a ‘publication’ or ‘divulgation’ right of the kind previously recognized in UK law).⁶⁴ Essentially, the distribution right is a right to put each tangible copy (which has not previously been circulated) into commercial circulation.⁶⁵ Once particular copies are in circulation (at least where the first circulation was consensual), the right no longer operates in relation to those objects. Because the right of distribution does not include ‘any subsequent distribution’,⁶⁶ copyright owners cannot control resale.⁶⁷

3.1 Distribution

Although section 18 refers to ‘issuing’ copies to the public, the Directives use the term ‘distribution’.⁶⁸ The Court of Justice define the concept very broadly to encompass not just ‘launching copies into circulation’,⁶⁹ but rather all acts leading to the transfer of ownership of the goods.⁷⁰ In *Donner* and *Dimensione Direct* cases,⁷¹ p. 162 the Court indicated that ‘distribution’ can encompass advertising,⁷² agreement to sell, sale, and subsequent delivery;⁷³ while in *Syed*,⁷⁴ storage of goods with a view to their sale counted as ‘distribution’.⁷⁵ Moreover, it seems, a distribution occurs with each of these acts.⁷⁶ In contrast, the display of goods other than for sale is not distribution.⁷⁷

Under conventional principles, a person is only primarily liable for their own acts. Therefore, it is also worth noting that in *Donner* the Court stated that a trader ‘bears responsibility’ for any act carried out by him or on his behalf giving rise to a ‘distribution to the public’. The acts of the third party are ‘attributed to him’, where the trader specifically targeted the public of the state of destination and must have been aware of the actions of that third party.⁷⁸ In doing so, the Court used language that comes very close to ‘accessory’ liability (in English terms, joint tortfeasance).⁷⁹

3.2 Of Copies

The right applies to tangible copies of works,⁸⁰ not electronic copies (except with respect to software). The distribution of the latter, for example through attachments to emails, is treated as within the scope of the right of communication.⁸¹

Although section 16 of the 1988 Act indicates that the rights conferred by the Act apply in relation to the whole ‘or any substantial part’ of a work, in the EU Directives nothing is said about the distribution of parts of works. In *Pelham v. Huetter*,⁸² when considering the distribution of sound recordings,⁸³ the Court of Justice adopted a different standard by which to understand the notion of ‘distribution of a copy’ than it embraced in relation to reproduction of a part. More specifically, the Court held that while a sound recording which included a short sample from another recording might infringe the reproduction right, distributing such a recording would not infringe the distribution right unless it reproduced the whole or a substantial part of the earlier recording.⁸⁴ It is unclear whether this conclusion relates only to the distribution of sound recordings, as the interpretation was based in part on the Geneva Convention,⁸⁵ or has more general applicability, either to the other objects referred to in Article 9 of the Related Rights Directive (fixations or performances, films, or broadcasts), or even to authorial works under Article 4 of the Information Society Directive. It is suggested that a UK appellate court might consider the virtues of ignoring this decision,⁸⁶ and treating the criterion for deciding whether use of a part is infringing as subject to the same criteria for each of the rights (reproduction, distribution, and communication). p. 163

3.3 To the Public

What is to be understood by the limitation of the right to distribution ‘to the public’? Although the concept of the public has been the subject of considerable jurisprudence, that case law does not seem automatically transferable to the distribution context.⁸⁷ From the ordinary meaning, the limitation to ‘the public’ would exclude from liability the distribution of infringing copies within a small personal network, such as a family

network, or within a firm (including between subsidiaries).⁸⁸ However, a transfer of a copy between two individual entities at arm's length—say, a wholesaler to a retailer—would seem to be a distribution to 'the public'.⁸⁹

3.4 Exhaustion

The distribution right applies to the first issuing of a copy; thereafter, the copy can be resold. This is the principle of 'exhaustion', first recognized in the context of trade between member states,⁹⁰ but extended by the Directives into the definition of the right and thus equally applicable to transactions within the United Kingdom.⁹¹ For there to be exhaustion, the act of sale or transfer must be by the right holder or with their consent.⁹² Moreover, the legislation makes clear that exhaustion occurs in relation to the distribution right and that there will only be exhaustion of that right (and not, in particular, of the rental right).

It is suggested that, despite the variations in language between the Directives, there is nothing special about 'sales',⁹³ and section 18 is correct to treat the distribution right as exhausted by each and every act of transfer of ownership. This is because, by transferring ownership, the transferor confers on the transferee the normal incidents of ownership of personal property, which include the capacity to resell. From a pragmatic perspective, too, the question of whether an initial act of transfer had been made by way of a 'sale' is a matter that would often be difficult to investigate.⁹⁴

p. 164 ↵ The Court of Justice has taken divergent approaches to the question of 'digital exhaustion' in relation to computer programs and other copyright works. In *UsedSoft GmbH v. Oracle*,⁹⁵ the Court held that the exhaustion doctrine applies to computer programs made available electronically where the substance of the arrangement is to transfer the copy to the user for an indefinite period (and thus is functionally the same as a sale of a copy on a CD-ROM). Nevertheless, in order to fall within the exhaustion derogation, further transfer is subject to a number of conditions, including a requirement that the reseller themselves destroy their own copy.⁹⁶ A later decision clarified that there is no exhaustion of lawfully made 'back-up' copies.⁹⁷ In contrast, in *Tom Kabinet*,⁹⁸ the Court held there was no digital exhaustion in relation to works (other than computer programs). There, publishers brought proceedings against Tom Kabinet which operated an online virtual market for 'second-hand' e-books. The CJEU interpreted Article 4 of the Information Society Directive in the light of Article 6 of the WCT,⁹⁹ the *travaux*,¹⁰⁰ and recitals,¹⁰¹ concluding that Article 4 only applied to 'tangible' copies.¹⁰² It distinguished the *UsedSoft* case, observing that 'an e-book is not a computer program, and it is not appropriate therefore to apply the specific provisions of [the Software Directive].'¹⁰³ Treating that Directive as a *lex specialis*, its operation was confined to its specific sphere. Moreover, while in the context of software, electronic and physical copies might be functional equivalents, that is not true of works in general. As the CJEU explained:

dematerialised digital copies, unlike books on a material medium, do not deteriorate with use, and used copies are therefore perfect substitutes for new copies. In addition, exchanging such copies requires neither additional effort nor additional cost, so that a parallel second-hand market would be likely to affect the interests of the copyright holders in obtaining appropriate reward for their works much more than the market for second-hand tangible objects...¹⁰⁴

- p. 165 ↵ The desirability of digital exhaustion has been widely debated, and the arguments seem finely balanced.¹⁰⁵ In a post-Brexit environment, UK courts will need to decide whether it is desirable to interpret the same statutory provision in contradictory ways, and thus give effect to the retained case law, or whether to prefer one or other approach.

3.5 Legitimate Reasons to Oppose Further Commercialization

In general, then, a UK copyright owner cannot prevent resale of works placed on the market in the UK or the European Economic Area (EEA). Copyright law stands in contrast with trade mark law, which explicitly allows the trade mark holder to prevent further commercialization of goods bearing its mark, even though they have been placed on the market, if there are 'legitimate reasons' to do so.¹⁰⁶ Nevertheless, a similar qualification might apply in relation to copyright. In *Art & Allposters International BV v. Stichting Pictoright*,¹⁰⁷ the Court of Justice was asked to consider the limits to the exhaustion principle in relation to a practice of taking lawfully marketed posters of famous artworks and transferring the image onto canvas for resale. The claimant, a Dutch collecting society, which represents the interests of artists, argued that the distribution right is infringed by this practice. The Court agreed, though it offered three inter-related reasons for its conclusion. First, at a textual level, it noted that the exhaustion principle applied only in relation to the 'object' transferred or sold: as a result of the process, the defendant presented the claimant's picture on a different object, and could not claim exhaustion in relation to that 'object'.¹⁰⁸ Second, the Court suggested that the process of transfer of the image itself involved reproduction, and therefore the sale by the defendant was of a copy that had not previously been marketed with the right holder's consent.¹⁰⁹ Third, and finally, the Court noted that the market for the object sold by the claimant, and that of the defendant were different, and in particular that there were significant differences as to what consumers were willing to pay.¹¹⁰ Quite which of these reasons can be said to be the true *ratio* of the case is difficult to say. We have doubts, in particular, about the Court's assumption that there was a 'reproduction'; if this were regarded as the *ratio*, it would seem that a copyright owner would not be able to prevent circulation of modified copies, for example if pictures from a Christmas calendar, in which rights had been exhausted, were removed from the calendar and sold as entities in their own right. We also feel uncomfortable with making the answer dependent on a level of divergence in the conditions of the markets for the object (which would seem to require a judgement to be made about when there are 'significant' differences of value between two markets).¹¹¹

- p. 166 ↵ Ultimately, then, the most convincing of the three reasons offered is that which relates to the transformation of the 'object'. If this is the true *ratio*, questions will arise as to when two objects are the same: presumably a mounted and/or framed poster is not a different object from a poster; but is a collection of monthly issues of a journal a different object once it has been sent for binding? And is a work of architecture, dismantled piece by piece and reassembled in a different location 'a different object'? Moreover, as is clear from *UsedSoft*,¹¹² a digital copy is not to be regarded as a different object from the copy originally purchased (at least where that copy has been destroyed). One test for a change in the identity of the object for these purposes might be whether the object has a new and different function, but as the case itself shows, this cannot be the only manner in which the 'nature' of the object is determined (as the image on paper has the same function as the image on canvas). In addition, focusing on the transformation of the 'object' leaves unclear the answer to the question whether the right holder might object where the *object* remains the same, but the *work* has been transformed. Can the owner of copyright in a painting, for example, complain about its

resale where *the image* has been altered? Can a photographer complain where an artist creates a collage that includes a published photograph by the photographer?¹¹³ As we will see (in Chapter 10), this is the province in part of authors' 'moral right of integrity', as well as the adaptation right (in international law).

3.6 Importation

The distribution right is exhausted by distribution in the EEA.¹¹⁴ Consequently, if a copy is legitimately put on the marketplace in the Netherlands, and then imported into the United Kingdom and sold, the importation and sale in the United Kingdom does not infringe the distribution right (or constitute secondary infringement). In contrast, the distribution right is available to prevent importation of copies into the United Kingdom from outside the EEA.¹¹⁵

But is 'importation' itself 'issuing'/distribution? *Blomqvist v. Rolex SA*¹¹⁶ concerned a counterfeit Rolex watch (apparently the subject matter of some sort of copyright), which a consumer purchased from a Chinese vendor through an Internet site and which was in the process of being sent to the customer. The Danish customs authorities confiscated the watch and proposed to destroy it, an act to which the customer objected. Drawing on the *Donner* decision,¹¹⁷ the Court of Justice held that the Danish authority was entitled to prevent the importation of the watch.

4 The Rental and Lending Rights

An owner of copyright in literary, dramatic, or musical works; artistic works (other than works of architecture or applied art);¹¹⁸ sound recordings; and films is granted an exclusive right to rent and lend copies of such works to the public.¹¹⁹ Rental and lending both involve the making of the original or a copy of a work available for use 'on terms that it will or may be returned'.¹²⁰ The distinction between 'rental' and 'lending' is that the act of rental involves making the work available 'for direct or indirect economic or commercial advantage', whereas lending occurs where there is no such advantage.¹²¹ It has been suggested that rental might include the situation in which DVDs are loaned to hotel guests.

Lending means 'making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public'.¹²² The right does not cover loans between private individuals. This is because lending is only prohibited when it is made 'through an establishment which is accessible to the public'. Lending does not become a rental, at least as regards loans between establishments accessible to the public, where payment does not go beyond what is necessary to cover the operating costs of the establishment.¹²³

When the Rental Directive was adopted, rental of tangible copies of films was particularly common, with retail outlets such as Blockbuster stores operating on every high street. It was easy to understand that owners of copyright in films regarded such uses as interfering with their returns from public playing at cinemas and broadcasting. However, in the three decades since the adoption of the Directive, video rental has collapsed, and it has become much more common to offer temporary access to works in electronic form. Is such activity (so-called 'e-lending') also within the scope of this right? We have already seen that in *Tom Kabinet*,¹²⁴ the CJEU held the 'distribution right' did not apply to digital copies. However, in its earlier decision in *VOB*,¹²⁵ the

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Court differentiated between rental and lending, concluding that lending included the temporary making available of a digital copy,¹²⁶ but that rental did not.¹²⁷ The differential treatment was justified by reference to international law: Article 7 of the 1996 WIPO Copyright Treaty required recognition of a rental right,¹²⁸ but p. 168 not a lending right, and for the former indicates that in that context ↵ the concept of ‘originals’ and ‘copies’ is limited to fixed copies.¹²⁹ The Court indicated that for distribution of an electronic copy to count as lending the electronic version should not be available to more than one person at a time and must only be for a limited period.¹³⁰

The significance of the decision that ‘e-lending’ is covered by the Related Rights Directive lies in the fact that, under Article 6, member states have broad freedom to derogate from the exclusive lending right so long as authors receive some form of remuneration. The United Kingdom does so, allowing public libraries to lend books and remunerating authors from a statutory fund (the public lending right).¹³¹ The VOB decision enabled the practice and arrangements to apply to e-books, and UK law has extended the definition of lending in that context accordingly.¹³² It should be noted, however, that the VOB decision is not reflected in any change in the language of section 18A of the 1988 Act. To give effect to that decision (as required by the EU(W)A (unless an appellate court decides not to follow it)), the requirement that a book ‘be returned’, which implies a tangible copy, must be disregarded in relation to lending.

The positive effect of the VOB decision (in facilitating the extension of the derogation in Article 6 of the Related Rights Directive to e-lending) has been thrown into doubt in the light of the Grand Chamber of the CJEU’s *Tom Kabinet* decision, which (as already observed) ruled that the distribution right (and thus its exhaustion) did not apply to electronic copies, the control of which fell within the purview of the communication right. If this is correct, it is difficult to see why the practice of e-lending does not also fall within the communication to the public right (to which there is no derogation equivalent to that in Article 6).¹³³ One answer might be that e-lending is communication, but if a library complies with appropriate restrictions necessary for lawful e-lending, there will be no communication ‘to the public’.¹³⁴ Another possibility is that the rules relating to e-lending should be regarded as a *lex specialis*:¹³⁵ the communication to the public right, adopted in a later Directive, is without prejudice to the solution found in the earlier instrument.¹³⁶ Until the matter is clarified, public libraries will no doubt remain anxious as to the confusing state of the law.

5 The Public Performance Right

The fourth right conferred on a copyright owner is the right to perform the work in public.¹³⁷ Section 3(1) of the 1988 Act provides that performance of a work in public is an act restricted by the copyright in a literary, dramatic, or musical work; section 19(3) states that the playing or showing of the work in public is an act p. 169 restricted by the copyright in a ↵ sound recording, film, or broadcast. There is no performing right for artistic works (and hence no right to authorize the public exhibition of the work)¹³⁸ or for typographical arrangements (see Table 6.2).

5.1 European Division Between Performance and Communication

As already observed, EU law harmonized the ‘communication to the public right’, but not the ‘public performance right’ (see Table 6.1). Unfortunately, the European categories do not map onto the division in UK law between section 19 and section 20 of the 1988 Act. But quite what division the EU categories require is more difficult to say. The answer matters, insofar as the tests adopted by the Court of Justice (e.g. the test of ‘the public’) differ from the tests adopted in domestic law.

Under UK law, the term ‘performance’ is defined in section 19 as including the ‘delivery’ of lectures, addresses, speeches, and sermons, as well as ‘any mode of visual or acoustic presentation of a work’, such as by means of a sound recording, film, or broadcast. Performance is distinguished from communication to the public in that, in the case of performance, the public must be present at the place where the performance occurs, the recording is played, or the film or broadcast shown.

Importantly, in this latter respect, the British performance right covers some of the ground of the European ‘communication to the public’ right, which has been held to cover cases in which the public is not present where the communication originated (rather than where the playing or showing occurred). Thus, in *Football Association Premier League v. QC Leisure*, the Court of Justice held that the showing of a broadcast of a football match on a screen in a public house was a communication to the public, whereas it would fall squarely within section 19(3) of the 1988 Act.¹³⁹ Subsequently, the Court also held that there was a communication to the public when a cafe played to its customers songs broadcast by a radio broadcasting station, by means of a radio apparatus connected to loudspeakers and/or amplifiers.¹⁴⁰ In contrast, in *Circul Globus Bucureşti*, the Court affirmed that the playing of live music before a circus audience constituted public performance, rather than communication to the public, and that, because ‘public performance’ is unharmonized, it is not a matter regulated by European law.¹⁴¹

Quite whether showing a film or playing a jukebox (clearly covered in UK law under section 19(2)(b) and (3)) is to be understood in European terms as a ‘public performance’ or ‘communication to the public’ has not p. 170 been conclusively determined.¹⁴² Given the Court’s inclination to deepen harmonization, we think that the interpretation the Court is most likely to adopt is that the unharmonized public performance right relates only to live performances.¹⁴³ However, even this conclusion creates its own anomalies.¹⁴⁴

5.2 Location

It has been held that a performance of a musical work (or a sound recording, if this still falls within the domestic performance right) takes place where it can be heard.¹⁴⁵ Presumably, a performance of a film (if there can be such a thing) takes place where it can be seen. Where the performance is live, it should be fairly obvious who is responsible for the performance. Where an apparatus is used, it is the person who operates the mechanism.¹⁴⁶

5.3 ‘In Public’ (Under Domestic Jurisprudence)

In order to infringe, the performance must be carried on ‘in public’. There are many situations in which it is clear that a performance is in public: a performance at the Brixton Academy, the Royal Albert Hall, a West End theatre, or in a public house would normally all be to the public. Beyond these examples, however, what is meant by ‘in public’ is less clear.¹⁴⁷ Over time, three different conceptions of the ‘public’ have been used in the case law.

In some cases, the concept of the public is understood according to the ‘character of the audience’.¹⁴⁸ In this context, a distinction is drawn between a section of the general public (which has no unifying character other than the desire to see the performance) and a group of people who share a private or domestic link.¹⁴⁹ Using a test of this sort, a performance in a shop,¹⁵⁰ before members of a club,¹⁵¹ or in a hotel lounge¹⁵² would be a performance to a ‘section of the general public’ (so long as anyone could enter the shop, join the club, or enter the hotel lounge), but a performance at a dinner party,¹⁵³ or to students at a boarding school,¹⁵⁴ would not be.

Another test that has occasionally been employed to determine whether a performance is in public focuses on whether the performance is motivated by financial considerations.¹⁵⁵ If the performance is run for profit, it is likely to be ‘in public’.¹⁵⁶

A third test has focused upon the copyright owner’s monopoly. Under this approach, a performance is ‘in public’ if it is made to or before ‘the copyright owner’s public’. This test, which first emerged in the 1930s, later came to be quite widely adopted. In *Jennings v. Stephens*,¹⁵⁷ the performance of a play *The Rest Cure* by the members of a women’s institute without charge and without guests was held to be a performance in public. Greene LJ said:

[T]he expression ‘in public’ must be considered in relation to the owner of the copyright. If the audience considered in relation to the owner of the copyright may properly be described as the owner’s ‘public’ or part of his ‘public’, then in performing the work before that audience he would in my opinion be exercising the statutory right conferred upon him.¹⁵⁸

This test has been used to hold that the playing of the BBC’s music broadcasts to 600 workers in a factory infringed the performing right.¹⁵⁹ This test seems prone to manipulation, since it is surely the case that most copyright owners would want to extend their monopoly as widely as possible and would therefore claim that all performances were before their ‘public’?¹⁶⁰

While uncertainties exist over the relationship between the three tests, it should be clear that, historically, the notion of public has been defined increasingly expansively, so as to favour the copyright owner. It is clear that performances in places that are open to the public (from hairdressers’ salons to hotel lounges) are performances in public; as are performances before substantial numbers of people not connected by family or domestic ties. The consequences of the different approaches to defining ‘the public’ now remain to be felt only in marginal cases (such as the case of a band, including the bride’s brother, performing at a wedding reception).

With regard to the infringement of the performing right, it is important to bear in mind that there are a number of related acts of secondary infringement. These are considered in Chapter 8.

6 The Communication Right

Section 20 of the CDPA 1988 confers on the owners of copyright in literary, dramatic, musical, and artistic works; films; sound recordings; and broadcasts, a right to communicate the work to the public, which includes the right to broadcast it and the right to make it available.¹⁶¹ Although traceable back to the CDPA as enacted, the current form of section 20 implemented the Information Society Directive.¹⁶² The right is often referred to as ‘the ← communication’ right.¹⁶³ A core example of a ‘communication’ is an electronic transmission of a work, such as a free-to-air broadcast, a cable transmission, or an Internet ‘stream’.¹⁶⁴ ‘Communication’ would also cover the emailing of digital material to those on email lists.

The communication right has taken on pre-eminent importance over the last century, first with the rise of radio and television broadcasting, cable and satellite, and more recently as a consequence of the Internet.¹⁶⁵ Perhaps because of the importance of the right in a rapidly changing technological and business environment, the right is attended with significant uncertainty. In turn, the Court of Justice has been faced with over 25 references and has struggled to offer a consistent interpretation.¹⁶⁶ Matters are exacerbated by the fact that (as already noted) the regional norms differentiate between authors’ rights on the one hand and related rights on the other, which, in turn, are informed by provisions in international law.¹⁶⁷

In what follows, we begin by discussing the concepts of ‘communication’, and the notion of ‘the public’, before going on to examine the questions of who is treated as responsible for making a communication and where a communication is regarded as occurring. Although breaking the analysis of ‘communication to the public’ into two stages has been repeatedly approved of by the CJEU, that jurisprudence also stresses that when deciding whether a particular act is a communication to the public an ‘individual assessment’ is required and this will involve consideration of several complementary, but interdependent, considerations.¹⁶⁸ Indeed, the ‘individual assessment’ might take into account matters, such as the defendant’s knowledge or behaviour, that do not strictly fit within the two specified elements of a ‘communication’ and the ‘public’.¹⁶⁹ Although there is no doubt a solid core of situations which everyone would accept constitute ‘communication to the ← public’, the insistence on an ‘individual assessment’ has created high levels of uncertainty and unpredictability, particularly where new technologies are involved.

6.1 Communicating

Section 3(2) of the CDPA indicates that the concept of communication includes the ‘broadcasting’ of a work or its ‘making available’. However, as we will see, the Court of Justice has interpreted ‘communication’ to embrace a disparate range of activities (from installation of TVs in hotel rooms to playing the radio at a rehabilitation centre, and from posting a hyperlink to supplying TV set-top boxes). Justifying its approach, the Court of Justice has explained that it is required to afford a ‘high level of protection’ and to interpret the concept ‘broadly’.¹⁷⁰ We consider the two specified forms of ‘communication’, before going on to consider what has been interpreted as the umbrella concept of ‘communication’.

6.1.1 Broadcast

Section 20 of the CDPA 1988 states that the right of the copyright owner to communicate the work to the public includes the right to broadcast it.¹⁷¹ As we saw in Chapter 3, a ‘broadcast’ is defined as an electronic transmission of visual images, sounds, or other information for simultaneous reception by the public, or which is made for presentation to the public, but excludes ‘Internet transmissions’.¹⁷² As we have already observed, this covers digital, analogue, terrestrial, and satellite transmissions, but not the placing of a work on a website. The relaying of a broadcast by reception and immediate retransmission constitutes a separate act of broadcasting (usually referred to as ‘retransmission’).¹⁷³

6.1.2 Making available

Section 20 of the CDPA 1988 also recognizes that copyright owners have the exclusive right to make the work ‘available to the public . . . by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them’. Rather than involving simultaneous reception, ‘making available’ encompasses *individual* communications to persons who are members of ‘the public’. A recital to the Information Society Directive explains that the right will cover interactive on-demand transmissions,¹⁷⁴ such as ‘video on-demand’ services.

The inclusion of this special provision reflects developments at an international level. The specific right (introduced in Article 8 of the WCT, and in turn in Article 3(1) and (2) of the Information Society Directive) was regarded as necessary because it was assumed the ‘communication to the public’ rubric was insufficient. At the time it was thought that a communication requires an act of transmission from a source to a group of recipients (‘the public’), whereas a making available involves transmission of a work to a location (typically, the Internet) from which it can be accessed individually at will. Conceived in this way, a making available falls short of an act of communication. However, the use of ↗ the term ‘includes’ in Article 3 (and Article 8 of the WCT, on which it is based) has led the Court of Justice to interpret ‘communication’ so broadly that any ‘making available’ is necessarily a ‘communication’.¹⁷⁵

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What is covered by the making available right? In addition to ‘on-demand’ transactions, it includes Internet transmissions where a person places a work on a website in such a way that members of the public can access the work ‘from a place’ (their terminal, whether it be in their office, home, or on their mobile telephone) and ‘at a time’ chosen by them.¹⁷⁶ Uploading material onto the (publicly accessible) ‘web’ is making available,¹⁷⁷ as is the provision of an on-demand music streaming service (such as SPOTIFY or AMAZON MUSIC), and installing peer-to-peer software that allows third parties to access works from the installer’s computer.¹⁷⁸ However, live-streaming of an event would not amount to ‘making available’, because the stream is only available for a limited time.¹⁷⁹

6.1.3 Other communications

There is now a considerable body of case law concerning the concept of ‘communication’. Despite that, it is difficult to identify the boundaries of what counts as ‘communication’ with much clarity. It appears to comprise five elements: (i) an intervention to give access to or experience of works or other subject matter (the ‘intervention’ condition); (ii) going beyond the mere provision of physical facilities; (iii) to a public that

is not present at the place where the work or subject matter originate; (iv) when it would not otherwise have had such access (the ‘indispensability’ condition); and (v) which is a deliberate act, carried out by a person with full knowledge of ‘the consequences’ (the ‘intention’ requirement). We look at each element in turn.

(i) The intervention condition Although some CJEU case law has equated ‘communication’ with ‘transmission’,¹⁸⁰ most jurisprudence applies a lower threshold. Instead it is said that ‘first and foremost’ amongst the factors that determine whether there is ‘communication’ is the indispensable role of the user whose intervention gives access to a work that recipients would not otherwise enjoy.¹⁸¹ The test of ‘intervening … to give access’ focuses on protecting right holders against particular effects, and disregards the means by which those effects are produced.¹⁸² As a result the ‘intervention’ test is significantly broader than ‘transmitting’ the work.¹⁸³

Applying this test, the Court has indicated that there is an act of communication where a broadcast of sound recordings is played (as the playing gives the listener ‘access’ to the sounds on the phonograms), and also where a person creates a hyperlink to material freely available elsewhere on the Internet.¹⁸⁴ The Court has also found that there is ‘communication’ where a person sells a multimedia device loaded with links to streaming services,¹⁸⁵ where a platform created an index for and classifies files in order to facilitate peer-to-peer file sharing,¹⁸⁶ and perhaps most dubiously of all, where a hotel makes available a CD player and CDs in hotel rooms.¹⁸⁷

While we understand some of the motivation of the Court,¹⁸⁸ we think that the ‘intervention’ threshold is much too low: if communication really is that broad, then lending libraries, video rentals, bookshops (which permit browsing), retailers who have works of applied art on display, and even art galleries may be involved in communicating to the public.¹⁸⁹ Some of these acts are indeed within the copyright owner’s rights, but under specific, carefully defined laws.¹⁹⁰ Moreover, the breadth of definition of ‘communication’ might interfere with fundamental rights.¹⁹¹ In the light of Brexit, it might be advisable for the UK Supreme Court to revisit the initial decision to define the ‘intervention’ that constitutes a communication quite so capacious.¹⁹²

(ii) More than mere physical facilities Second, to communicate a work, a person must do more than provide ‘mere physical facilities’ that enable access to the work. This limitation on what counts as communication derives from Recital 27 (and, in turn, the WIPO Copyright Treaty). Merely supplying television sets to a hotel is, of itself, therefore not ‘communication’; nor is the renting out of cars fitted with radio receivers.¹⁹³ However, it is hard to say what the Court regards as the trigger that changes provision of ‘physical facilities’, into something more, but it does not seem that a person need do much in order to go beyond ‘mere’ provision. For example, distributing signals collected from a central antenna to such televisions is enough to constitute communication;¹⁹⁴ as is the pre-installation of a structured menu of hyperlinks onto a multimedia player which enable users to have direct access to (unauthorized) streams.¹⁹⁵ Equally, in the Ziggo case,¹⁹⁶ the Court indicated that The Pirate Bay could not claim to have been engaged in ‘mere provision’ because the various acts of indexing and classifying of the torrent files made them readily accessible to users.¹⁹⁷ No criterion seems yet to have been proposed which persuasively explains why these acts are treated as involving communication as opposed to the provision of mere technical infrastructure that can supply content.¹⁹⁸

(iii) *Public not present at origination* Third, for an act to count as communication, as opposed to performance, the ‘public’ should not be ‘present at the place where the communication originates’.¹⁹⁹ Thus, for example, converting sounds into electronic signals and ‘streaming’ them is a communication (rather than a public performance); in contrast, live performance is not.²⁰⁰ Significantly, the CJEU does not regard a communication as necessarily ‘originating’ in the place where it ‘occurs’, so a person who plays a radio broadcast in a dental surgery is regarded as communicating, because the communication originates at the place of broadcast, not the place where the radio is operated.²⁰¹

(iv) *The indispensability condition* Fourth, the CJEU has said that the action of the user must be ‘indispensable’ or ‘essential’ to enable the public to access the work (or subject matter).²⁰² In many cases, it has been suggested that this means the public in question would not have access *but for* the intervention: without the act, the public would be ‘unable’ to see or hear the work.²⁰³ In the *GS Media* case, the Advocate-General presented this as a reason why hyperlinking to publicly accessible material should not normally be regarded as communicating that material to the public: the hyperlink is only ‘indispensable’ if it gives access to material that is not otherwise accessible (e.g. because it is behind a paywall).²⁰⁴ However, the Court did not appear to follow that reasoning, and commenced the elaboration of a less exacting standard.²⁰⁵ In particular, in *The Pirate Bay* decision, the Court did not require that the intervention render ‘possible’ access to the work that is otherwise ‘impossible’, but only that the intervention make access ‘less difficult’ (or even ‘less complex’).²⁰⁶ Because indexing and classifying made accessing the works much easier for users of the system, *The Pirate Bay*’s intervention amounted to communication. If this standard is adhered to, a wide range of acts of facilitation may be regarded as communications.

(v) *The ‘intention’ requirement*. Fifth, and finally, according to a series of Court of Justice cases, an act of communication to the public must be intentional, or deliberate, in the sense of the actor understanding the consequences of their acts.²⁰⁷ This has been contrasted with persons being ‘caught by chance’ and seems to relate primarily to the volitional nature of the act itself.²⁰⁸

In *SGAE v. Rafael Hotels SL*, the Court referred to the fact that the defendant hotel proprietor relayed signals that it received to hotel rooms as communication to the public, because it ‘is the organisation which intervenes, *in full knowledge of the consequences* of its action, to give access to the protected work to its customers’.²⁰⁹ Similarly, in *FAPL*, in which the Court treated the showing of broadcasts of football matches in public houses as communication to the public, the Court stated that ‘the proprietor of a public house *intentionally* gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers’.²¹⁰ Both these cases might suggest that a ‘deliberate intervention in full knowledge of the consequences’ is an important requirement in cases of ‘re-communication’, but not necessarily in relation to ‘originating’ communicative acts. In *Mircom v. Telenet*, Advocate-General Szpunar proposed just such a distinction, advising that users of BitTorrent client-sharing software communicated the works disseminated thereby to the public, even though each instance of uploading was an automatic consequence of installing the software, because these were ‘originating’ communications.²¹¹ The Court, however, did not follow him in this analysis, stating that such users would only be liable for communications where they ‘have subscribed to that software by giving their consent to its application *after having been duly informed of its characteristics*’.²¹²

These decisions can be contrasted with the English Court of Appeal's decision in *TuneIn v. Warner*.²¹³ There, foreign radio services streamed sound recordings, in many cases with the authority of copyright owners or at p. 178 least in compliance with local law. The ↵ services were aggregated by a third party, TuneIn, through links to the streams, and effectively redirected at the United Kingdom, a territory for which relevant permissions had not been sought by either the radio services or TuneIn. Holding there to be a communication to the public, the Court of Appeal indicated that the radio stations were themselves liable for primary infringement. Acknowledging that this might 'at first blush seem a surprising conclusion',²¹⁴ especially where the targeting was achieved by acts of the third party over which the radio stations had no knowledge (let alone to which they had consented),²¹⁵ the Court nevertheless insisted that it flowed logically from the conclusion that the streams had come to be targeted at the United Kingdom.²¹⁶ We detect a real tension between this conclusion (which frankly seems unfair on the foreign radio stations) and the language used by the Court of Justice: the foreign radio stations clearly did not have 'full knowledge of the consequences'.

In other cases (which would more conventionally have been regarded as cases of accessory liability), the Court has emphasized the importance of knowledge of the *illegal* (or *unauthorized*) status of the works being made accessible.²¹⁷ This requirement seems structurally distinct from that of a deliberate intervention in full knowledge of the consequences, which figures as an element in establishing that there has been a 'communication'.²¹⁸ Rather, as a matter of principle, the knowledge of illegality seems relevant to establishing 'responsibility' for communicative acts of others.²¹⁹ That said, the references to this form of 'scienter' are as yet sporadic and unsystematic: sometimes the 'knowledge' requirement is necessary to determine whether the communication is to a 'new public' (a concept discussed later),²²⁰ whereas at other times it appears as a free-standing consideration;²²¹ sometimes the 'knowledge' must relate to specific infringing (or unauthorized) acts,²²² at other times it suffices that there is general knowledge that infringements occur;²²³ sometimes knowledge can be presumed from the profit-making nature of the service, while at other times no such presumption is permitted.²²⁴

In *Wullems*, for example, concerning a multimedia player onto which the defendant had loaded links to streaming services, the Court observed that it was 'common ground that the sale of the "filmspeler" player was made in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on the player gave access to works published illegally on the internet'.²²⁵ In the *Pirate Bay* case, the Court observed that the operators could 'not be unaware' that the platform was used to provide access to material made

p. 179 ↵ available without the consent of the right holders.²²⁶ In *Peterson v. YouTube*, a similar participatory requirement, though couched in terms of the 'deliberateness' of the defendant's actions, was made key to extending responsibility for the communication beyond the primary actor (uploader) to the provider of the platform.²²⁷ There the Court indicated that knowledge that the platform might be used to disseminate infringing content was insufficient to make the hosting platform liable, but that other factors might lead to a conclusion that the platform was itself communicating the works—for example, encouragement of users to do so, or the adoption of a business model dependent on such illegal activity or selection of content. We think this case law concerns responsibility for infringing communication rather than the existence of a distinct act of communication, so we postpone detailed consideration to section 6.3.2.

6.2 To the Public

In a series of cases, the Court of Justice has sought to elaborate what ‘the public’ entails,²²⁸ holding that that the meaning of ‘the public’ is the same under the Related Rights Directive and the Information Society Directive.²²⁹ Although the legislation simply refers to communication to ‘the public’, the jurisprudence developed by the Court of Justice differentiates two issues: first, whether the work or subject matter is made accessible to a ‘public’, and second, whether it is a ‘new’ public.

6.2.1 ‘The public’

It will usually be simple to answer the first question. If a film is streamed over the Internet or a film of a football match is shown in a public house, the communication is ‘to the public’. It does not matter whether the work is accessed simultaneously or successively:²³⁰ so, posting a video game or an e-book to a website is equally a communication to ‘the public’. However, as with the question of when a performance is ‘in public’, there will be some tricky borderline cases. The CJEU has referred to three inter-related criteria that define a ‘public’:

- (i) the size of the group. If the group is ‘fairly large’, it will likely comprise the public (though the ‘group’ need not be in the same place at the same time, or even in the same place at all).²³¹ There is a *de minimis* threshold.²³²
- (ii) the character of the group. The Court has suggested that the public comprises ‘an indeterminate number of potential’ listeners or viewers, as opposed to ‘a private group’,²³³ and
- p. 180 (iii) ↵ the character of the communication. The Court has emphasized that it is relevant whether the communication is made with a view to making a profit, and whether the consumers were targeted or present by chance.²³⁴

Applying these criteria, the Court has held that communicating films and sound recordings to hotel guests (albeit in the privacy of their rooms), to residents at a health spa,²³⁵ and individual subscribers to a remote recording system,²³⁶ all constitute communication to ‘the public’, but—perhaps surprisingly—that playing a radio broadcast of sound recordings to patients attending a dental surgery does not.²³⁷ In the latter instance, the Court explained that the number of patients was small, and apparently a stable, relatively determined group, and the activity was neither profit-making nor a technique for attracting business.²³⁸ In contrast, in a parallel case concerning music in hotel rooms, the number of guests was ‘fairly large’, their character was ‘indeterminate’ (‘persons in general’), and the facility was offered as part of a package to attract visitors to a profit-making enterprise.²³⁹ One Advocate-General has suggested that the dentist surgery decision be confined ‘to the specific factual circumstances which gave rise to the judgment’.²⁴⁰ A further example of a communication not regarded as ‘to the public’ is where electronic documents are sent to those involved in court proceedings because the recipients constitute a ‘clearly defined and closed group of persons holding public service functions within a court’, that is, ‘specific individual professionals’.²⁴¹ This conclusion is not affected by the fact that members of the public have a right thereafter to access the document under freedom of information regulations.²⁴²

One area in which the question of the ‘public’ will likely need further clarification is in relation to communication of ‘second-hand’ e-books. Recall (from p. 164) that in *Tom Kabinet*,²⁴³ in the context of the resale of e-books, the CJEU held that distribution right only applied to physical copies, and so there was no exhaustion by sale of an ‘e-book’. That might have been thought to put an end to second-hand e-book markets. However, the CJEU was far from clear that the communication of an e-book (or for that matter a video game or other work) from one user to another would *in all cases* infringe the communication right. Based on its understanding of the facts of the defendant’s e-book reading club, the CJEU indicated this would likely count as ‘communication to the public’. To begin, the rendering of books accessible to its subscribers was ‘making available’;²⁴⁴ moreover, this was to ‘the public’ because anyone could join the club, so that such making available was potentially to a substantial number of simultaneous or successive readers. However, the Court also stated that this was only so because of the absence of technical measures ↗ limiting reading of the book to a single user at a time.²⁴⁵ Consequently, it seems entirely possible that if ‘the owner’ of an e-book, when reselling it, ensures it can only be ‘resold’ to one purchaser at a time (and, when repurchasing the book, that such pre-existing copies are deleted), this might not amount to communication to a public.²⁴⁶ One effect of this limitation on the notion of the public would be to avoid overlap between the lending right (which, the CJEU has held, extends to e-lending) and the communication right. Another, less attractive, implication might be that e-rental is covered neither by the rental right, carried out serially, nor by the communication right.²⁴⁷

6.2.2 A ‘new public’

Although a communication may be to a public, the Court has indicated that this will not necessarily lead to a finding of liability if the communication is of material that has already been communicated with the right holder’s consent. In cases in which there has been an ‘initial communication’, a retransmission or communication of that initial communication will fall within the right only if it is a communication to a new public.²⁴⁸ The notion of the ‘new public’, which Professor Graeme Dinwoodie has described as ‘an (at best) enigmatic concept’,²⁴⁹ was first deployed in SGAE.²⁵⁰ There, the Court considered how, even if an author had licensed a broadcast, they could be entitled to object to its retransmission to hotel rooms. The Court observed that this was a public that was distinct from that which the ‘author’ had in mind when it licensed the broadcast. Drawing on the *WIPO Guide to the Berne Convention*, the Court adopted the concept of a ‘new public’ as being critical in cases in which there is some sort of public retransmission of a work that has already been communicated.²⁵¹ Moreover, the Court observed that the provision of access to broadcasts was ‘an additional service’ provided by the hotel and ‘profit-making’.²⁵² Consequently, the relaying of signals by cable to customers staying in its rooms was a ‘communication to the public’. The requirement that there be a ‘new public’ has been reiterated in a number of subsequent cases.²⁵³

What constitutes a new public? The test offered by the Court of Justice purports to require an examination of the expectations of the author (or relevant right holder) when the initial communication was made.²⁵⁴ If the author expected the work to be received by a particular group, then merely doing an act that assists that aim does not make the work available to a new public. Thus if a broadcaster is given permission to broadcast a work and, in addition to the initial broadcast, uses ‘booster’ aerials to ensure that the same signal gets to its audience, then the use of the boosters would not involve broadcasting to a new public.²⁵⁵

However, if the author is found to have contemplated a specific public and a user transmits the work to a further public, then that act requires authorization from the right holder. In the hotel room cases, the Court found that the expectation of right holders who permitted broadcasts was that they would be received by the owners of domestic television sets and their families; thus further transmission to others, for example hotel guests, was to a new public.²⁵⁶ The same would be true of playing a radio or television in a cafe.²⁵⁷

From what material or evidence are we to deduce which ‘public’ was contemplated by the author or right holder when it initially consented to a communication? One clear indicator is the deployment of technological measures aimed to limit access to a particular audience.²⁵⁸ There is some suggestion, too, that express conditions imposed at the time of communication of the work might also be relevant (and in some circumstances possibly determinative). In *Tom Kabinet*, for example, the CJEU indicated that ‘resale’ of an e-book made it available to a ‘new public’ because the initial communication to the first user was subject to a user licence that limited use of the e-book to his own equipment.²⁵⁹ A third factor might be the legal and commercial background. A radio station that originates in a particular country which has obtained copyright licences for that country or is otherwise able lawfully to communicate material in that country (but has not indicated that a broader audience is intended beyond the local one) might reasonably be thought to contemplate only the local public. In *TuneIn*, the Court of Appeal inferred from this context that a rightholder who permitted use of material on a radio station in one country had not contemplated linking to that station globally; the defendant, which aggregated links to thousands of online music stations from around the world was, therefore, communicating the works that featured on those stations to a new public.²⁶⁰

The difficulty with identifying which public a right holder is contemplating is most apparent in relation to case law relating to the Internet. As we will see, in *Svensson*, the CJEU held that a person who posts material on the Internet is, in the absence of any technical restrictions, assumed to have intended the material to be available universally, that is, to ‘all Internet users’.²⁶¹ But in *Renckhoff*, a case of re-posting of material previously posted on the Internet, the CJEU suggested that the public taken into account by the copyright holder in relation to the initial posting ‘is composed solely of users of that site and not of users of the website on which the work was subsequently published . . . , or other internet users’.²⁶² While we have no difficulty with the conclusion in *Renckhoff* that the act of re-posting was in itself a communication to the public,²⁶³ the reasoning in this passage throws open to doubt the Court’s previous conclusion in *Svensson*.²⁶⁴ In *TuneIn v. Warner*, Birss J sought to resolve the tension with a nuanced understanding of how a tribunal is to ascertain the ‘contemplated public’ from an initial posting: the initial poster may contemplate the public to be both visitors to that site *and* those who access material on it through hyperlinks elsewhere on the Internet, the latter ‘because the rights holder should be taken to have understood that the internet includes that sort of linking and therefore to have consented to those links appearing on other websites and being seen by anyone on the internet’.²⁶⁵ The Court of Appeal approved this reasoning.²⁶⁶

Perhaps because the ‘new public’ test is so elusive in application, the Court of Justice has suggested that if a user utilizes ‘new technical means’ to retransmit a work, then this is per se a transmission to a new public (or that the ‘new public’ requirement does not apply).²⁶⁷ For example, in *ITV Broadcasting v. TV CatchUp*,²⁶⁸ there was a communication to the public when an Internet-based service captured television signals and retransmitted them at an individual subscriber’s request to that individual. The individual recipients were confined to those who would have been entitled to receive the signals from the free-to-air broadcasts (that is,

holders of television licences resident in the United Kingdom). TV CatchUp added advertising before sending the signals. The Court rejected the defendant's argument that, because the public was already entitled to view the programmes/broadcasts, there was no communication to a 'new' public. Instead, it found that 'each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorized by the author of the work in question'.²⁶⁹ Because the defendant streamed the broadcast 'under specific technical conditions, using a different means of transmission for the protected works', it did not matter that, in principle, the recipients were part of the public targeted by the initial communication.²⁷⁰ A similar approach was adopted in VCAST,²⁷¹ in which the CJEU held that the provider of a service for video-recording broadcast programmes in the cloud communicated the recordings of such broadcasts to the public because it deployed a 'different technical means'.²⁷²

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While the result in the *TV CatchUp* and *VCAST* cases seems consistent with those in the hotel transmission cases, the reasoning is different. Indeed, the hotel cases could have been resolved more readily on the basis that transmission to the television sets was a 'new technical means'.²⁷³

6.2.3 Hyperlinking

The Court of Justice has used the 'new public' concept to regulate the legitimacy of hyperlinks. As already observed, the Court found in the *Svensson* case that creating a hyperlink involved 'communicating' the work to which the link led.²⁷⁴ However, it did not suggest that every hyperlink would infringe; rather, the Court differentiated between linking to material that was generally available (with the consent of the right owner), and linking to material to which access had been limited. Linking to the former material involved no new technical means and was not a communication to a 'new public', and was thus non-infringing.²⁷⁵ Linking to material that was secured behind technical measures (such as a paywall) would, in contrast, communicate it to a new public.²⁷⁶

In subsequent decisions, the Court applied its reasoning to 'framing' (or 'transclusion'), according to which the subject matter to which the link is made appears within the hyperlinker's frame, rather than giving the impression to the user of moving to the site where the material has already been made accessible. The Court found that the specific mode of linking used was irrelevant if the subject matter was not being communicated to a 'new public'.²⁷⁷ Some commentators have been critical of this step, taking the view that a hyperlinker is involved in some form of misrepresentation when they utilize 'framing' rather than simple hyperlinking.²⁷⁸ Moreover, where remuneration of a copyright holder who licensed a particular site depends on advertising, such transclusion, if permitted, might undermine that business model.

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In a third case, *GS Media*,²⁷⁹ the Court clarified that the new public principle was qualified where the work or subject matter had been made available on the Internet without the permission of the right holder. The case concerned the potential liability of a blog which had linked to nude pictures that had been illegitimately made available on an Australian website. The Court indicated that if a copyright work is freely available on the Internet but has been posted without the consent of the right holder, then *prima facie* the link communicates the work to a new public because the author had not contemplated making the work available to *any* public.²⁸⁰ However, recognizing that such a conclusion might affect the free speech of many Internet users, who would not be able to know whether the material to which they are linking is authorized or not,²⁸¹ the

Court introduced a ‘knowledge’ component into the analysis. More specifically, it stated that whether a provider of a clickable link makes a communication to a new public depends on whether they knew or could not reasonably have known the work was posted without the consent of the right holder.²⁸¹ If the provider of the link did not know, or could not reasonably have known, then there is no communication to the public.²⁸² But when the linker knows, there is a communication to the public.²⁸³ Moreover, the Court added that if a linker is motivated by profit-making,²⁸⁴ this gives rise to a rebuttable presumption of knowledge because ‘when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead’.²⁸⁵ This resulting analysis is complex. Students may find the flowchart (Fig. 6.1) useful. On the facts of the case, the Court suggested that as GS Media was operating for profit, and indeed knew that the photographs had been made available illegally, the posting of the hyperlink counted as a communication to the public.

6. Nature of the Rights

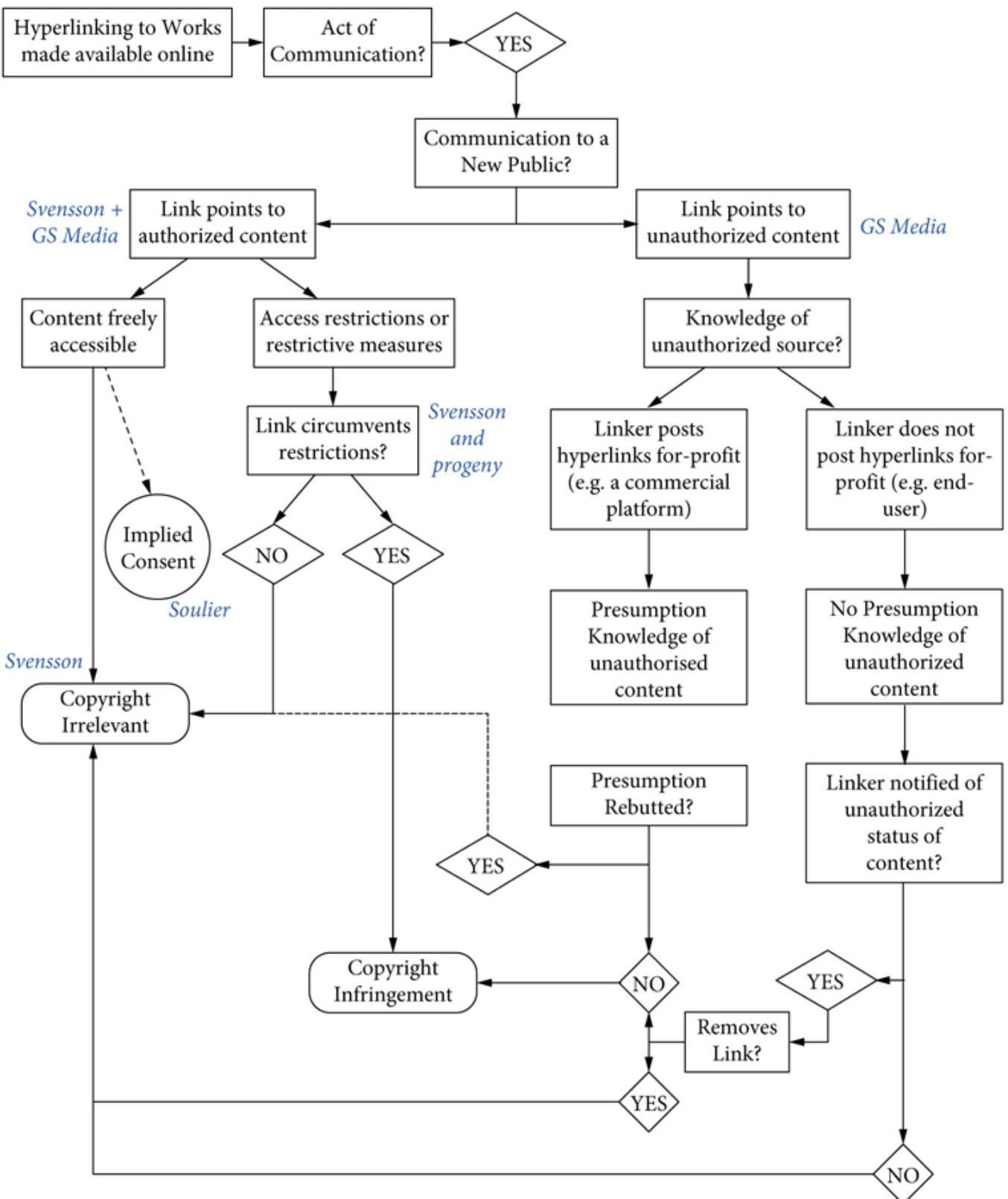


Fig. 6.1 Hyperlinking and new public flowchart

Source: Courtesy of Dr João Pedro Quintais and John Wiley & Sons Ltd ('Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public' (2018) 21 *JWIP* 385, 397).

The *GS Media* case generates both logical and practical questions.²⁸⁶ First, at a logical level, it is not at all obvious how, if a work is already very widely accessible on the Internet, so that no new audience is generated by adding a hyperlink, the unauthorized status of the material renders the act of creating the link a communication to a ‘new public’. Nor is it obvious how a hyperlinker’s absence of knowledge can transform an act of communication ‘to the public’ into an act of communication that is not ‘to the public’: the same people, after all, gain access to the subject matter irrespective of the knowledge of the linker.

Even if we overlook the absence of logic and just treat the judgment as establishing a series of positive rules, four practical questions arise as to the meaning of those rules. First, when is a hyperlinker to be regarded as profit-making? How close must the nexus be ↗ between the ‘posting’ of the link, and the profit?²⁸⁷

Second, how easily can the presumption be rebutted? Will it be sufficient to show that the links were created by an automatic system?²⁸⁸ Third, when will a non-profit-making hyperlink provider be regarded as having been in a position where they ought to have appreciated that the subject matter was ↗ uploaded without authorization? Fourth, if a person links to subject matter that they know was uploaded without authorization, but which they believe was lawfully uploaded (under an exception, e.g. for purposes of reporting current events), will they escape liability?²⁸⁹

There is not room here to explore all these questions. One circumstance where the answers would seem to be really quite significant concerns search engines. If these are regarded, as seems likely, as profit-making entities, there is a danger they will be presumed to appreciate that the material they link to is unauthorized, and therefore to be regarded as communicating that material to the public. That conclusion would be catastrophic for the Internet. Realistically, search engines cannot reasonably be expected to acquire such knowledge other than through some form of formal de-listing request.²⁹⁰ Perhaps, the answer is that such search engines are not caught by *Svensson* and *GS Media*, as those authorities are limited to cases of ‘posting’ hyperlinks, rather than including links in individual search returns.²⁹¹ Despite cases such as VCAST holding the transmission of individual subscriber-requested video recordings to be communications to ‘the public’, it is still possible that a link created in response to an individual search might not be treated as a communication ‘to the public’, as it is an automated process providing a link only accessible to a private individual (the searcher).

The *Svensson*, *Bestwater*, and *GS Media* cases seek to facilitate different legal responses to the range of different purposes to which hyperlinks are put. On the one hand, they recognize the fundamental role hyperlinks play in the operation of the Internet, and their regular use by the public in general. On the other, the Court is conscious that hyperlinking is a means of drawing attention to and spreading access to the vast quantities of illegal material on the Internet.²⁹²

6.3 Who Makes a Communication?

6.3.1 Who makes a broadcast?

Section 6 of the CDPA specifies that the person who makes a broadcast is *either* the person transmitting an item, such as a programme, where that person has responsibility for its contents, *or* the person providing the item for transmission who ‘makes with the person transmitting it the arrangements necessary for its transmission’.²⁹³

In a controversial decision (said to reverse business practice), the CJEU has held that where transmission of programme-carrying signals is made by so-called ‘direct injection’, according to which a person (A) transmits point-to-point by direct line to a distributor (B) who in turn sends signals to its subscribers, there is a communication by the distributor (B), rather than (A),²⁹⁴ unless B’s role is purely technical. As the distributor’s role is rarely merely technical, the decision seems to absolve A of needing to obtain permission, at least for the making of its transmission to B.

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6.3.2 Who makes other communications?

Mostly, it will be clear who is responsible for making a communication or ‘making available’: the person who uploads the material onto the website, or who streams the material in question. However, occasionally, while it will be clear that there has been a communication of a work to the public, it will be less obvious *who* is responsible for the act. Take, for example, the ‘extremely sensitive issue’ of whether video-sharing platforms (such as ‘YouTube’, ‘Daily Motion’, ‘Vimeo’, or ‘Vine’) or social networking sites (such as ‘Facebook’, ‘Twitter’, ‘Instagram’, or ‘Snapchat’), are ‘communicating’ material which their users upload to the sites.²⁹⁵ The providers of this ‘infrastructure’ would argue that it is not they who communicate the works (indeed, they have no idea what is being uploaded), rather the users who upload the material. However, when one adds in features such as ‘Auto-play’ (on YouTube), such that an end-user of a video-sharing is presented automatically with a succession of automatically selected videos, the end-user experience starts to feel very similar to that of a person who has turned on a radio or television set. The operators of such sites would no doubt say that this is merely a structural feature, and does not transform them into persons who communicate. Right-holder groups, however, maintain that, even without such features, these actors are involved in ‘communicating’. Who is right?

Traditionally, UK law has distinguished between primary liability and accessory liability (which we discuss in Chapter 48). For an accessory to be liable, they must have procured or induced an act, or it must have been the result of their common design.²⁹⁶ In *Twentieth Century Fox v. Sky UK*, Birss J drew the distinction between communication to the public and accessory liability when considering the operator of a website, ‘Popcorn Time’, which was central to an arrangement that allowed peer-to-peer users to watch unauthorized streams of films.²⁹⁷ The website allowed users to download, for free, an open-source application which enabled them to obtain content using the BitTorrent protocol. The copying took place between the ‘peers’, and the indexing and classification of the material that could be downloaded came from a different site (the SUI site, standing for ‘source of update information’). Birss J found that ‘Popcorn Time’ was not communicating the films to the public, but merely providing a tool that would facilitate access to the streams. Birss J found, likewise, that the

SUI site was not communicating the works. Rather, taking into account the perspective of the users, it was the application (on their computers) that was the source of the communication.²⁹⁸ Nevertheless, the Judge did hold that the providers of the ‘Popcorn Time’ application were liable as accessories, jointly with the operators of the host websites. The application procured the user to access the host website and thereby to make the unauthorized communication.²⁹⁹

While a UK court can distinguish different forms of responsibility, unfortunately (in terms of legal coherence), only ‘primary’ liability has been harmonized within the European Union. Therefore, the Court of Justice is unable to utilize to the same effect the distinction between ‘primary’ and ‘accessory’ liability: for the CJEU to deem an act to involve ‘accessory’ rather than ‘primary liability’ would require it to decline to offer

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an answer to the question referred,³⁰⁰ and to leave the issue without a common, harmonized, answer.

The Court has therefore tended to expand the concept of ‘communication’ rather than to address questions of responsibility.³⁰¹ Indeed, the implication is that many people involved in very different ways in a communication, might all be ‘communicating’ the work. This can perhaps be seen best in *Ziggo BV*,³⁰² a case which concerned potential remedies against Internet access providers who gave subscribers access to the website *The Pirate Bay*. The question before the Court was whether *The Pirate Bay* had made a ‘communication to the public’. As the facts revealed, no works are stored on the site, those works being made available by its users.³⁰³ However, *The Pirate Bay* website did provide the software, the indexing, and classification of the material available. While Advocate-General Szpunar asked whether *The Pirate Bay*’s involvement made them *jointly* responsible with the users for the acts of communication (finding that there was a simultaneous and joint act with the users),³⁰⁴ the Court did not try to characterize the nature of the relationship between the act of the platform and that of each of its users.³⁰⁵ Rather, the Court found that the operators of the site *also* communicated the works to the public, because its acts of indexing, categorizing, and deleting defunct files made access by their users to the works easier. The broad definition of communication had the necessary consequence that multiple actors in a chain could *all*, separately and distinctly, be regarded as primary infringers.

In many respects, this decision seems unsurprising. Given the name of the site, ‘*The Pirate Bay*’, and its notorious role in facilitating infringement of copyright, the Court would have found it difficult to resist offering an answer applicable throughout the EU. Moreover, similar conclusions had already been reached by the High Court of England and Wales, first in the *Newzbin* case,³⁰⁶ and more regularly in cases concerning so-called ‘blocking injunctions’.³⁰⁷

That matter of video-sharing platforms fell to be decided by the CJEU in two post-Brexit decisions

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concerning YouTube and Cyando.³⁰⁸ In *Peterson v. YouTube*, the reference ↗ to the Court arose in proceedings concerning the availability on YouTube of recordings of the performer Sarah Brightman. In *Elsevier v. Cyando*, the originating dispute was between the publisher of (inter alia) the medical textbook, *Gray’s Anatomy*, and a file-hosting service, ‘Uploaded’, which permitted the upload of files for storage and which provided the subscriber uploader with a link; in practice many such links were shared by the subscriber-user on other sites such as ‘rehabgate.com’. In both cases, the CJEU was clear that the subscriber-user was clearly ‘communicating to the public’ any copyright works that might be streamed on YouTube or accessed through the links.³⁰⁹ However, whether YouTube or Uploaded was also communicating such works depended primarily on the ‘deliberateness’ of their intervention. More specifically, the CJEU offered a

checklist of relevant considerations from which a tribunal might infer ‘deliberateness’. These included: whether the operator participates in selecting which content is communicated; whether it provides tools ‘specifically intended for the illegal sharing of such content’; whether it knowingly promotes such sharing, for example, through use of a financial model that encourages illegal communications by users;³¹⁰ whether the operator ‘refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform’; and whether the operator, once informed by the right holder that protected content is being communicated illegally to the public via its platform, refrains from expeditiously taking the measures necessary to make that content inaccessible.³¹¹

In contrast, the mere fact that the operator knows, in a general sense, that protected content is made available illegally on its platform is not sufficient ground to conclude that it intervenes with the purpose of giving Internet users access to that content.³¹² Moreover, the mere fact that the operator of a video-sharing platform or a file-hosting and file-sharing platform has the aim of making a profit neither establishes that its intervention in the illegal communication of protected content by some of the users of that platform was deliberate, nor gives rise to a presumption that that is the case.³¹³ Although it was a matter for the German court to apply these criteria, the CJEU strongly implied that YouTube could not be said to have ‘deliberately’ intervened: after all, its users select the material uploaded; the terms and conditions with users warn against copyright infringement, and it operates a take-down system and its own ‘Content-ID’ system to filter out potentially infringing material. The position with Cyando seemed less clear cut, but much of the evidence pointed against ‘deliberateness’ on its part.

6.4 Location of Act

For an act to infringe the UK communication right, that act must occur in the United Kingdom. With the exception of broadcasting, the legislation is silent about how to identify where the act occurs.

6.4.1 Location of act: broadcasting

Because of the potential transnational nature of broadcasting, it has long been acknowledged that it is important to ascertain where a particular broadcast takes place.³¹⁴ A person wishing to make a broadcast needs to obtain consents from copyright holders of → works included in the broadcast, but only as regards those copyrights that are operative in the territory in which the broadcast occurs. However, when a signal is sent or uplinked to a satellite (from place A) and is then beamed back to earth over a large reception area or ‘footprint’ (places A, B, and C), there are at least two possible territories where the act of broadcasting might be thought to take place. On the one hand, it could be said that the broadcast occurs from (A), the place where the signal was sent (the ‘emission’, or ‘introduction’, theory). Alternatively, it might be thought that the broadcast occurs in the places (A, B, and C) where it is received (the ‘reception’, or ‘communication’, theory). In the face of conflicting national decisions on this issue, it became clear in the late 1980s that it was necessary to harmonize the law in this area. Two contrary concerns dominated the decision as to the choice of the place of broadcast. On the one hand, the simplest answer and the one that facilitated satellite broadcasting was that the country of broadcast was the country of uplink. However, it was feared that this

would lead to satellite uplink facilities migrating to countries in which copyright protection was weak and that copyright owners would thus be best protected if consent was required in all countries where the signal could be received. In the end, a compromise was reached: the country of introduction is treated as the relevant place only where the standard of copyright protection is satisfactory.³¹⁵

Accordingly, section 6 of the 1988 Act defines the place of wireless broadcasting as the place where the broadcaster introduces programme-carrying signals into an uninterrupted chain of communication, including any satellite relay.³¹⁶ This is subject to the so-called ‘safeguard rules’ which operate in cases where the signals have been introduced in a place outside the United Kingdom and the laws of that territory do not afford appropriate levels of legal protection in relation to ‘communication to the public’.³¹⁷ In such cases, the Act requires the broadcast to be treated as occurring in the United Kingdom, if the ‘uplink’ occurred in the United Kingdom, or, if not, the making of the broadcast was commissioned by a ‘person who is established in the United Kingdom’.³¹⁸ The Act also alters, as necessary, the identity of the broadcaster.

6.4.2 Location of act: communications other than broadcasting

In the simple case of a British person who subscribes to a British service provider utilizing peer-to-peer software, it seems clear that deploying the software so that others can access files will amount to making available in the United Kingdom (even if those who access the files are, in many cases, outside the United Kingdom).³¹⁹ A more difficult case is that of a person in the United States creating a video using copyright-protected material, then uploading that material to a video-sharing platform, so that it can be accessed in the United Kingdom. Whether there is an infringement of UK copyright law may well depend on which acts are regarded as communicating or making the work available and where those acts are understood to occur. One candidate is the place where the individual uploads the work to a website, so that, in this example, there would be no infringement in → the United Kingdom (although there might be in the United States). A second possibility is that the act of making available occurs wherever the server that permits access is located: this may, or may not, be the United Kingdom. A third possibility is that the act occurs in the place, or places, from which it can be accessed. This would mean that video-sharing platforms would be making available all over the world. The fourth possibility is that the work is made available in the territory where the public at which the work is targeted is located. In a number of decisions in relation to trade marks, the Court of Justice appears to have indicated that its preferred approach is to focus on targeting.³²⁰

In *Football Dataco v. Sportradar*,³²¹ the question arose as to where a wrongful act of ‘reutilization’ occurred for the purposes of determining whether so-called *sui generis* rights in a database had been infringed.³²² The defendant uploaded a collection of sports results in Germany onto a server in the Netherlands, from which the results were accessible in the United Kingdom. An action was brought in the English court, relying on the fact that the wrongful act occurred in England.³²³ The Court of Justice ruled that the wrongful act takes place in a member state when the person performing the act intends to target members of the public in that member state.³²⁴ Importantly, it rejected the idea that the wrongful act occurred in any territory from which the material could be accessed. Subsequent English case law has adopted the targeting approach to determine whether a communication to the public occurs in the United Kingdom.³²⁵ In determining whether a territory is targeted, obvious considerations would be the language of the site and the top-level domain name, as well as the context (so, e.g. it could be assumed that football data relating to the English Premier League would

most likely to be of interest to English residents).³²⁶ However, in *Sportradar*, the Court did not rule out the possibility that the act might also occur elsewhere, for example in the territory where the material was uploaded.³²⁷ At least one English authority has accepted that communication also occurs at the point of introduction of the information.³²⁸

In *TuneIn v. Warner*,³²⁹ the Court of Appeal was called on to decide the potential liability of a radio service that collected and organized hyperlinks to up to 100,000 radio stations, many of which were operating abroad.³³⁰ The Court referred uncritically to the ‘targetting test’ adopted by Birss J at first instance.³³¹ To determine whether there is targeting one must consider the experience of the public: would a United Kingdom audience consider a service targeted at them? As 10 per cent of TuneIn’s audience and advertising revenue came from the United Kingdom, where there were millions of users per month, and adverts appeared which were clearly meant for a British audience (with prices in GBP), the Judge had no doubt that TuneIn targeted the United Kingdom.³³² More controversially, perhaps, while it was accepted that the radio stations themselves

p. 193 ↵ targeted their local audiences, the Court concluded that when those stations were included in TuneIn’s services, the stations were communicating the works in the countries at which TuneIn’s services were targeted.³³³ Even though many of those stations may not have intended to target the United Kingdom, the user experience was controlled by TuneIn and, given the conclusion that TuneIn targeted the United Kingdom, it followed that the foreign radio stations must also be regarded as having done so.

6.5 Reform

Of all the harmonized rights, the communication to the public right seems to be the most controversial, and the related jurisprudence the most incoherent. The right has been the subject of legislative activity in the EU, with Article 17 of the 2019 Digital Single Market Directive introducing a complex provision applicable to so-called ‘online content sharing service providers’ (OCSSPs). In short, the effect of this is to treat hosting platforms as ‘communicating to the public’ material uploaded by the users of the platform, unless they comply with certain conditions. The conditions require that the OCSSP has made its best efforts to obtain authorization and it has also made best efforts to exclude from the platform any subject matter for which the right holders have provided the OCSSP with the ‘relevant and necessary information’. In essence, absent a licence, OCSSPs must operate mechanisms to keep specified unauthorized material off the sharing service. Although the United Kingdom is not obliged to implement the Directive, and is not planning to do so, the government has undertaken to consider mechanisms to improve the remuneration of authors and performers, including the possibility of ensuring that hosting services contribute ‘more to the pot’.³³⁴ Close attention will therefore be being paid to implementation of Article 17 of the EU Directive on copyright in the digital single market and whether similar reforms are desirable in the United Kingdom.³³⁵

7 Right to Make an Adaptation of the Work

Section 21 confers on the owner of copyright in literary, dramatic, or musical work the exclusive right to make an adaptation of the work.³³⁶ The right is not granted to the owner of copyright in artistic works, sound recordings, and films. The adaptation right is restrictively defined and is not to be confused with a general right to control all derivative works, such as that recognized by copyright law in the United States.³³⁷ The adaptation right includes the right to do any of the other restricted acts in relation to an adaptation, including

the right to make an ‘adaptation of an adaptation’.³³⁸ Consequently, it is a restricted act not only to make an adaptation, but also to reproduce an adaptation in any material form, to issue copies of it to the public, to p. 194 perform it in public, or to broadcast it. Because ↗ it is not possible to draw a clear line between an adaptation and a reproduction, in many cases the same act might be both a reproduction and an adaptation.³³⁹

7.1 Meaning of Adaptation

‘Adaptation’ is defined differently for literary works, dramatic works, computer programs, databases, and musical works. We must deal with each in turn.

In relation to literary or dramatic works, an adaptation means a translation (such as a translation into French, but also translations between technical languages),³⁴⁰ or a dramatization of a non-dramatic work (such as where a novel is turned into a screenplay or ballet or, after *Norowzian v. Arks*,³⁴¹ a film). The adaptation right in a literary or dramatic work will also be infringed where the story or action is conveyed wholly or mainly by means of pictures (such as a comic strip).³⁴² As regards dramatic works, an adaptation means a version of a dramatic work that is converted into a non-dramatic work (such as the conversion of a film into a novel). In relation to musical works, an adaptation is defined as an arrangement or transcription of the work.³⁴³

The adaptation right also applies to computer programs and databases. In relation to computer programs, an adaptation means an arrangement, or altered version of the program, or a translation of it.³⁴⁴ In these circumstances, translation includes the conversion into or out of a computer language, or from a computer language into a different computer language or code.³⁴⁵ In relation to databases, adaptation means an arrangement or altered version of the database or a translation of it.³⁴⁶

8 The Authorization Right

As well as being given the right to carry out the restricted activities, the copyright owner is also given the right to authorize others to do any of the restricted acts.³⁴⁷ It has been said that ‘to authorize’ meant to sanction, countenance, or approve,³⁴⁸ or, alternatively, to grant or purport to grant to a third person the right to do an act.³⁴⁹ The latter formulation received the approval of the House of Lords in *CBS v. Amstrad*.³⁵⁰ In order to amount to authorization, the person to whom ‘authority’ has illegitimately been granted must in fact commit an infringing act.³⁵¹ However, the person giving the authorization ↗ (in contrast with the person to whom authority is given) need not be located in the United Kingdom.³⁵²

The concept of authorization has been applied in two distinct ways. First, it has been used to expand the network of potential liability beyond vicarious liability,³⁵³ for example, those who book performers who infringe copyright: hirers have been held liable for ‘authorizing’ infringing where the hirer was aware of the songs that the band would perform or did nothing to control the repertoire performed;³⁵⁴ but not where a warning was given to the performers and the infringements were by way of spontaneous encores of which the hirer had no prior knowledge.³⁵⁵

The concept of authorization has also been applied where a person manufactures or supplies equipment or other means that enable or facilitate infringement. In these circumstances, copyright owners have argued that where a person makes facilities available in the knowledge that they will probably be used to infringe, this is equivalent to ‘authorizing’ infringement. Thus it has been asserted that a person who supplies films to a cinema, who sells blank tapes to the public when renting out records,³⁵⁶ who makes photocopying equipment available in a library,³⁵⁷ or who manufactures tape-to-tape machines should be treated as having authorized the resulting infringements. The same kind of arguments have been used in relation to the activities of so-called ‘peer-to-peer’ operators such as The Pirate Bay and Kickass Torrentz, which make available file-sharing software (particularly the BitTorrent protocol),³⁵⁸ as well as others who provide hyperlinks to infringing material.³⁵⁹ The concept of authorization has also been applied to the distribution of so-called ‘cheat software’ authorizing infringement of copyright in videogame by users.³⁶⁰

The leading authority in the United Kingdom is *CBS Songs v. Amstrad*,³⁶¹ in which the House of Lords defined the term ‘authorize’ restrictively. Amstrad manufactured and marketed a double-speed twin-tape recorder, which was sold by a high street retailer. The advertisement, which Lord Templeman described as ‘hypocritical and disingenuous’, boasted that the model ‘now features hi-speed dubbing enabling you to make duplicate recordings from one cassette to another, record direct from any source and then make a copy and you can even make a copy of your favourite cassette’. An asterisk drew attention ↴ to a footnote warning that the recording and playback of certain material was possible only with permission. It also referred the user to the relevant legislation. The British Phonogram Industry (BPI), which represents various owners of copyright in sound recordings, claimed that Amstrad had authorized infringement of those copyrights.

The House of Lords held that neither the sale of the equipment nor the advertisement thereof amounted to an authorization. Lord Templeman said that an authorization means a grant or purported grant, express or implied, of the right to do the act complained of.³⁶² The House of Lords held that while the machinery enabled a person to copy lawfully or unlawfully, this did not constitute an authorization.³⁶³ Lord Templeman said that it was crucial that the footnote had warned that certain types of copying required permission and that Amstrad did not have the authority to grant that permission.³⁶⁴ In short, the Lords held that there was no authorization because it was up to the operator whether to infringe or not; Amstrad in no way purported to possess the authority to give permission to copy records.

The leading case applying the ‘authorization’ standard to those who facilitate infringement on the Internet is *Twentieth Century Fox v. Newzbin*.³⁶⁵ The case concerned material, particularly films, that third parties had uploaded to Usenet sites without the licence of the relevant copyright holders. Newzbin employed editors to index these sites and offered a paid service to access the index. By so doing, Newzbin enabled users to download the infringing files from Usenet bulletin boards (uploaded by third parties), especially using NZB files, which collect together all components of a work for downloading. Many of the Newzbin subcategories were ‘obviously’ infringing materials and the Judge took the view that the defendant knew this.³⁶⁶ Although Newzbin had instructed its editors not to index unlawful material and operated a delisting facility, these safeguards were found by the Judge to be cosmetic.³⁶⁷

Kitchin J explained that while authorization required a ‘grant’ or ‘purported grant’ of the freedom to do the relevant act, this could be implied from all of the relevant circumstances. The circumstances might include the nature of the relationship between the alleged authorizer and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable that it will be used to infringe, the degree of control that the supplier retains, and whether it has taken any steps to prevent infringement.³⁶⁸ In the circumstances, the Judge found that Newzbin provided the means for infringement, that it had been created by the defendant, and that was entirely within the defendant’s control. Moreover, the defendant did nothing to hinder infringement: there was no filtering and other preventative mechanisms amounted merely to ‘window dressing’. Kitchin J said that he was ‘entirely satisfied that a reasonable member would deduce from the defendant’s activities that it purports to possess the authority to grant any required permission to copy any film that a member may choose from the Movies category on Newzbin’.³⁶⁹

The *Newzbin* decision has become a key case in the legal strategy of content owners who are seeking to reduce levels of peer-to-peer copying and unauthorized streaming. Typically, the software providers who operate the peer-to-peer systems, or the operators  of the streaming site, are located out of the jurisdiction. It has become common, however, to seek orders blocking user access to such sites. The basis for many such orders is sometimes that the operators communicate the subject matter in the United Kingdom, but also often that they ‘authorize’ the infringements (making available or reproduction) of the users.³⁷⁰ The case has also been applied to an aggregator of links to foreign radio services: by doing so, it seems,³⁷¹ the aggregator not only redirected the targeting of the stations from their local territory to the United Kingdom, but also authorized the consequent act of communication of those works in the United Kingdom.

Notes

¹ Dramatic Literary Property Act, 1833, 3 & 4 Will. IV, c. 15; Copyright Law Amendment Act, 1842, 5 & 6 Vict., c. 45, s. 20.

² Copyright Act 1911. For background, see L. Bently, ‘Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries’ (2007) 82(3) *Chi-Kent L Rev* 1181–240.

³ CDPA 1988, s. 18 (as enacted, but substantially amended to implement Rel. Rights Dir.).

⁴ B. Sherman and L. Wiseman, *Copyright and the Challenge of the New* (2012); N. Netanel, ‘Why Has Copyright Expanded? Analysis and Critique’, in F. MacMillan (ed.), *New Directions in Copyright Law* (2007), vol. 6, ch. 1; L. Bently, ‘R v. The Author: From the Death Penalty to Community Service’ (2008) 32 *Colum JL & Arts* 1.

⁵ E.g. between the right of reproduction and the right of adaptation. This overlap is all the more problematic because the reproduction right is harmonized under EU law, whereas the adaptation right is not.

⁶ O.-A. Rognstad, ‘The Distribution Right’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), 163–4.

⁷ *Circul Globus Bucureşti v. Uniunea Compozitorilor şi Muzicologilor din România*, Case C-283/10 [2011] *ECR I-12031*.

⁸ *Funke Medien NRW GmbH v. Republic of Germany*, Case C-469/17, EU:C:2019:623, [38] (ISD, Arts 2(a) and 3(1)); *Pelham GmbH v. Ralf Hüttner*, Case C-476/17, EU:C:2019:624, [85] (ISD, Art. 2(c)). In a few contexts, the EU prescribes only minimum standards: Satellite Dir., Art. 6(1); Rel. Rights Dir., Art. 8(3).

⁹ M. Walter, ‘Information Society Directive’, in Walter and von Lewinski, 958, [11.1.20].

¹⁰ Ibid., [11.3.36].

¹¹ But see the case law of the Court of Justice described in section 3.1, p. 162 and section 6.1.3, pp. 177–9, where the CJEU treats such knowledge as relevant in cases of distribution and communication to the public.

¹² A defendant’s innocence may be relevant when damages are being determined: CDPA 1988, s. 97(1). See Chapter 49, section 5, pp. 1368–9, and section 6, p. 1377. For reflections, see P. Goold, ‘Is Copyright Infringement a Strict Liability Tort?’ (2015) 30 *BTLJ* 305.

¹³ CDPA 1988, ss 22–4, 27.

¹⁴ See Chapter 8, section 3, pp. 238–41.

¹⁵ The main example is Software Dir., Art. 7.

¹⁶ This is acknowledged in the context of trade marks: see *Google France*, Cases C-236/08–238/08 [2010] *ECR I-2417*, [57], [AG114]–[AG125] (AG Poires Maduro); *L’Oréal SA v. eBay International AG*, Case C-324/09 [2011] *ECR I-6011*, EU:C:2011:474 (Grand Chamber), [104], [AG55]–[AG56]; *Frisdranken Industrie Winters BV v. Red Bull GmbH*, Case C-119/10 [2011] *ECR I-13179*, [35].

¹⁷ See section 6.3.2, pp. 188–90, where the CJEU has extended the notion of ‘communication’ into the zone of what would, traditionally, have been thought of as accessory liability. C. Angelopoulos, ‘Primary and Accessory Liability in EU Copyright Law’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), ch. 10.

¹⁸ *VG Wort v. KYOCERA Document Solutions Deutschland GmbH*, Cases C-457/11, C-458/11, C-459/11, and C-460/11, EU:C:2013:34, [AG33] (AG Sharpston, referring to reproduction as the ‘fundamental’ right); cf. J. Litman, *Digital Copyright* (2001), 180 ff (proposing instead a general right to control commercial exploitation).

¹⁹ For an overview, C. Sganga, ‘The Right of Reproduction’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), 123.

²⁰ R. Arnold, ‘Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection’ (2011) 1 *QMJIP* 272; *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [60].

²¹ CDPA 1988, s. 17(6); Info. Soc. Dir., Art. 2. But note CDPA 1988, s. 28A and Info. Soc. Dir., Art. 5(1), discussed in Chapter 9, section 3, pp. 253–6.

²² *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [52].

²³ *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v. Strato AG*, Case C-433/20, EU:C:2021:763, [AG26n9].

²⁴ All these examples involve a proliferation of instances of the work, even if temporary. But the CJEU has suggested that ‘reproduction’ does not require multiplication, but can occur where material from one object is relocated on a different object: *Art & Allposters v. Pictoright*, Case C-419/13, EU:C:2015:27, [43]–[46]. Cf. *Théberge v. Galerie d’Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 SCR 336 (Supreme Court of Canada).

²⁵ *R v. Higgs* [2008] *EWCA Civ* 1324, [9].

²⁶ *Football Association Premier League Ltd v. QC Leisure and Karen Murphy v. Media Protection Services Ltd* (‘FAPL’), Cases C-403/08 and C-429/08 [2011] *ECR I-9083* (Grand Chamber); *ITV Broadcasting Ltd v. TV Catchup Ltd* [2011] *EWHC* 1874 (Pat).

²⁷ *FAPL v. British Communications* [2017] EWHC 480 (Ch), [31] (Arnold J).

²⁸ *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083, [159].

²⁹ See e.g. J. Litman, ‘Festischizing Copies’, in R. Okediji (ed.), *Copyright in An Age of Limitations and Exceptions* (2017).

³⁰ *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [37].

³¹ M. Borghi and S. Karapapa, ‘Non-Display Uses of Copyright Works’ (2011) 1 QMJIP 21.

³² On Art. 5(1) of the Info. Soc. Dir., see Chapter 9, section 3, pp. 253–6.

³³ A. Drassinower, *What’s Wrong with Copying?* (2015), ch. 3; A. Ohly, ‘A Fairness-Based Approach to Economic Rights’ and A. Strowel, ‘Reconstructing the Reproduction and Communication to the Public Rights: How to Align Copyright with Its Fundamentals’, in B. Hugenholtz (ed.), *Copyright Reconstructed: Rethinking Copyright’s Economic Rights* (2018), chs 4 and 7 respectively; A. Drassinower, ‘Remarks on Technological Neutrality in Copyright Law as a Subject Matter Problem: Lessons from Canada’ [2022] CLJ 50.

³⁴ CDPA 1988, s. 17(2). European Union law also refers to reproduction as covering reproduction by ‘any means and in any form’: Info. Soc. Dir., Art. 2; Software Dir., Art. 4(a); Database Dir., Art. 5(a).

³⁵ *Norowzian v. Arks* [1998] FSR 394, 398; *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [52] (copy on USB drive).

³⁶ *Bauman v. Fussell* [1978] RPC 485.

³⁷ *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [37]; *Pinckney*, Case C-170/12, EU:C:2013:400, [AG29] (AG Jääskinen); *Autospin (Oil Seals) v. Beehive Spinning (A Firm)* [1995] RPC 683, 698.

³⁸ CDPA 1988, s. 17(3).

³⁹ CDPA 1988, s. 17(3), is best understood as an example. No negative inference as to the scope of copyright in literary works should be drawn from it. Cf. *Moon v. Thornber* [2012] EWPCC 37, [98]–[99] (Birss J resisting the invitation to so hold), discussed in Y.H. Lee, ‘The Persistence of the Text’ [2018] IPQ 22 and 107, 129–30.

⁴⁰ *Francis Day & Hunter v. Bron* [1963] Ch 587, 623.

⁴¹ *Brigid Foley v. Elliot* [1982] RPC 433 (Megarry VC).

⁴² *Eva-Maria Painer v. Standard VerlagsGmbH*, Case C-145/10 [2012] ECDR (6) 89, [AG129]; *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 CMLR (4) 55, [77] (use of a computer manual, a literary work, as a basis for constructing a program, might be a reproduction of part of the manual); *Pelham GmbH v. Ralf Hüttner and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624, [29], [37], [39] (transformations of phonograms that are ‘unrecognizable’ count as reproductions of part of a phonogram, unless that such a transformation is done in exercise of the freedom of the arts to create a new work). Cf. *Infopaq Int. v. Danske Dagblades Forening*, Case C-302/10, EU:C:2012:16 (Order), [44]–[45] (making of an abstract summarizing a newspaper article would not amount to an infringement under EU law).

⁴³ *Davis (J & S) Holdings v. Wright Health Group* [1988] RPC 403, 414; *Autospin (Oil Seals) v. Beehive Spinning* [1995] RPC 683, 698; *Lambretta Clothing v. Teddy Smith* [2003] RPC (41) 728, [78]–[79]; *Abraham Moon & Sons v. Thornber* [2013] FSR (17) 312, [99].

⁴⁴ *Brigid Foley v. Elliot* [1982] RPC 433; *Autospin (Oil Seals) v. Beehive Spinning* [1995] RPC 683, 701.

6. Nature of the Rights

⁴⁵ *Autospin (Oil Seals) v. Beehive Spinning* [1995] *RPC* 683, 698.

⁴⁶ [1998] *FSR* 651.

⁴⁷ *Ibid.*, [10]. Cf. *Moon v. Thornber* [2012] *EWPCC* 37, [98]–[99].

⁴⁸ *Autospin (Oil Seals) v. Beehive Spinning* [1995] *RPC* 683, 701.

⁴⁹ R. Arnold, ‘Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection’ (2011) 1 *QMJIP* 272.

⁵⁰ The protection is limited to the ‘signal’ rather than ‘content’.

⁵¹ This is not the case with photographs, where the copyright extends to the content or arrangement, not only the ‘recording’: *Creation Records v. News Group Newspapers* [1997] *EMLR* 444, 450.

⁵² CDPA 1988, s. 5A(1)(a).

⁵³ CDPA 1988, s. 5B(1); *Norowzian v. Arks (No. 1)* [1998] *FSR* 394.

⁵⁴ *Norowzian v. Arks (No. 1)* [1998] *FSR* 394, 400. This is the case even if the second film closely resembles and imitates the claimant’s copyright film, or reproduces the essential features of that film.

⁵⁵ *Ibid.*, 394; *CBS Records v. Telemark* (1988) 79 *ALR* 604, (1987) 9 *IPR* 440.

⁵⁶ *Norowzian v. Arks (No. 1)* [1998] *FSR* 394.

⁵⁷ E.g. by passing the recording off as the recording of the claimant.

⁵⁸ Cf. Rel. Rights Dir., Arts 6 (fixation), 7 (reproduction of fixations).

⁵⁹ CDPA 1988, s. 17(5).

⁶⁰ CDPA 1988, s. 178.

⁶¹ As amended, to implement the Software Dir., Art. 4(c), and the original Rel. Rights Dir., Art. 9, and most recently ‘to provide greater clarity’ by the Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018 (SI 2018/995).

⁶² Software Dir., Art. 4(c); Rel. Rights Dir., Art. 9; Database Dir., Art. 5(c); Info. Soc. Dir., Art. 4 (which, in turn, implements WCT, Art. 6).

⁶³ CDPA 1988, s. 18(4).

⁶⁴ E.g. through so-called ‘common law copyright’ in unpublished works before 1912.

⁶⁵ Info. Soc. Dir., Art. 4(1), refers to distribution ‘by sale or otherwise’, whereas CDPA 1988, s. 18, refers to ‘putting into circulation’.

⁶⁶ CDPA 1988, s. 18(3)(a).

⁶⁷ This corresponds with the idea of exhaustion of rights. Note, however, the resale royalty right: see Chapter 13, section 7, pp. 403–6.

⁶⁸ Info. Soc. Dir., Art. 4 (distribution to the public ‘by sale or otherwise’); Database Dir., Art. 5(c) (‘any form of distribution to the public’); Rel. Rights Dir., Art. 9 (‘right to make available to the public, by sale or otherwise’); Software Dir., Art. 4(c) (‘any form of distribution to the public, including the rental’).

6. Nature of the Rights

⁶⁹ Laddie et al. (5th edn), [15.1].

⁷⁰ O.-A. Rognstad, ‘The Distribution Right and Its Exhaustion’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), ch. 8, esp. 157. Copinger (18th edn), [7–138], [7–154], rightly observes that CDPA, s. 18, fails to cover many of the acts that EU law now treats as ‘distribution’ such that it is by ‘no means straightforward’ to interpret the section to give effect to that case law.

⁷¹ *Donner*, Case C-5/11, EU:C:2012:370, [26]–[30].

⁷² *Dimensione Direct Sales Srl, Michele Labianca v. Knoll International SpA*, Case C-516/13, EU:C:2015:315, [2015] *ECDR* (12) 223, [25]–[32].

⁷³ Note the analogous reasoning in relation to ‘communication to the public’ in *Football Dataco Ltd v. Sportradar GmbH*, Case C-173/11 [2013] 1 *CMLR* (29) 903. See section 6.4, p. 192.

⁷⁴ *Imran Syed*, Case C-572/17, EU:C:2018:1033, [2019] *ECDR* (4) 75, [30]–[31]. For comment see J. Jütte, ‘A Careful Construction of the Distribution Right: Syed (C572/17)’ [2019] *EIPR* 459.

⁷⁵ *Ibid.*, [36].

⁷⁶ Thus if a sale transaction occurred in a place in which a work is unprotected, but delivery occurs in the United Kingdom where the work is protected, there may be infringing distribution in the United Kingdom.

⁷⁷ *Peek & Cloppenburg SA v. Cassina SpA*, Case C-456/06 [2008] *ECR I-2731*.

⁷⁸ *Football Dataco Ltd v. Sportradar GmbH*, Case C-173/11 [2013] 1 *CMLR* (29) 903, [27].

⁷⁹ See Chapter 48, section 3.4, pp. 1318–20. UK copyright law has its own, narrow version, that is ‘authorization’: see section 7.

⁸⁰ Info. Soc. Dir., Recital 28.

⁸¹ *BYv. CX*, Case C-637/19, EU:C:2020:863, [20].

⁸² *Pelham GmbH v. Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624.

⁸³ Specifically, Directive 2006/115, Art. 9(1)(b).

⁸⁴ *Pelham v. Huetter*, [55]. This might have been thought a more suitable test for the application of all the rights, including the reproduction right, but, as explained in Chapter 8, section 2.3.3, pp. 227–8, in the context of the reproduction right, the CJEU adopted a very broad interpretation of what amounted to ‘a part’ of a sound recording.

⁸⁵ *Ibid.*, [50]–[53] (noting Geneva, Arts 2 and 1(c), defining ‘duplicates’ by reference to reproduction of the whole or a substantial part of a recording).

⁸⁶ See Chapter 1, section 5.1.3, pp. 26–8.

⁸⁷ O.-A. Rognstad, ‘The Distribution Right’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), 158.

⁸⁸ Laddie et al. (5th edn), [15.16].

⁸⁹ *Response Clothing v. The Edinburgh Woollen Mill* [2020] *EWHC* 148 (IPEC), [78]–[88] (sale of fabric by supplier to retailer was issuing); Copinger (18th edn, 2021), [7–155].

⁹⁰ See Chapter 1, section 4.1, pp. 13–14.

⁹¹ Software Dir., Art. 4(c); Database Dir., Art. 5(c); Info. Soc. Dir., Art. 4(2); Rel. Rights Dir., Art. 9(2).

6. Nature of the Rights

⁹² Under CDPA, s. 18(2), the distribution right is regarded as exhausted if such a copy has been transferred anywhere in the EEA (though EEA countries would not consider the rights exhausted by transfer in the United Kingdom).

⁹³ The Software and Database Directives refer to ‘the first sale . . . of a copy’, the Rel. Rights Dir. to ‘the first sale . . . of that object’, while the Info. Soc. Dir. refers to the ‘first sale or other transfer of ownership . . . of that object’.

⁹⁴ See Chapter 41, section 8.2.1, pp. 1169–70. But cf. *Aleksandrs Ranks v. Finanšu un ekonomisko nozīegumu izmeklēšanas prokuratorūra, Microsoft Corp.*, Case C-166/15, EU:C:2016:762, [43]–[44] (no exhaustion in relation to ‘back up’ copies made by the transferee).

⁹⁵ Case C-128/11, EU:C:2012:407 (Grand Chamber), [47], [49], [58], and [61]. For commentary, see B. Batchelor and D. Keohane, ‘UsedSoft—Where To Now for Software Vendors?’ [2012] *ECLR* 545; C. Stothers, ‘When is Copyright Exhausted by a Software Licence?: UsedSoft v. Oracle’ [2012] *EIPR* 787; R. Hilty and K. Koklu, ‘Software Agreements: Stocktaking and Outlook—Lessons from the *Oracle v. UsedSoft* Case from a Comparative Law Perspective’ (2013) 44 *IIC* 263; L. Longdin and P. H. Lim, ‘Inexhaustible Distribution Rights for Copyright Owners and the Foreclosure of Secondary Markets for Software’ (2013) 44(5) *IIC* 541; O.-A. Rognstad, ‘Legally Flawed but Politically Sound’ (2014) *Oslo Law Review* 1; K. Moon, ‘Resale of Digital Content: *UsedSoft v ReDigi*’ [2013] *EIPR* 193; E. F. Schulze, ‘Resale of Digital Content such as Music, Films or eBooks under European Law’ [2014] 3 *EIPR* 9; M. Savic, ‘The Legality of Resale of Digital Content after UsedSoft in Subsequent German and CJEU Case Law’ [2015] *EIPR* 414–29; G. Mazzotti, ‘Is Geo-Blocking a Real Cause for Concern in Europe?’ [2016] *EIPR* 365, 368.

⁹⁶ *UsedSoft GmbH v. Oracle*, Case C-128/11, EU:C:2012:407, [78], [87].

⁹⁷ *Aleksandrs Ranks*, Case C-166/15, EU:C:2016:762, [43]–[44] (this was so even where the recipient had damaged, destroyed, or lost the original material medium: [53]).

⁹⁸ *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV*, Case C-263/18, EU:C:2019:1111.

⁹⁹ Ibid., [40] (and the Agreed Statement).

¹⁰⁰ According to the CJEU, *ibid.*, [56], ‘a clear distinction was sought between the electronic and tangible distribution of protected material’.

¹⁰¹ Recital 28 refers to the right of distribution as a right to control distribution of ‘tangible articles’ and to exhausting the right to control resale of ‘that object’; while Recital 29 states that ‘the question of exhaustion’ does not arise in the case of services and ‘online services in particular’ even ‘with regards to a material copy . . . made by a user of such a service’.

¹⁰² *Tom Kabinet*, [40].

¹⁰³ *Ibid.*, [54]. More generally, it seemed to approve the characterization of the Software Directive as a ‘lex specialis’.

¹⁰⁴ *Ibid.*, [58] (referring to the Opinion of AG Szpunar, EU:C:2019:697, [AG89]).

¹⁰⁵ A. Ohly, ‘Economic Rights’, in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright Law* (2009), 237–8. R. Hilty, “Exhaustion” in the Digital Age’, in I. Calboli and E. Lee, *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (2016), 64, 72 ff; M. Leistner and L. Antoine, ‘Exhaustion and Second-hand Digital Goods/Contents’, in C. Heath, A. Kamperman Sanders, and A. Moerland (eds), *Intellectual Property Rights as Obstacles*

to *Legitimate Trade* (2018), pp. 159–80; P. Mysoor, ‘Exhaustion, Non-Exhaustion and Implied Licence’ (2018) 49 *IIC* 656–84; Cf. A. Perzanowski and J. Schultz, ‘Digital Exhaustion’ (2011) 58 *UCLA L Rev* 889 (reviewing benefits of US concept of exhaustion and articulating a continued need in the digital context).

¹⁰⁶ See Chapter 41, section 8.3, pp. 1171–9.

¹⁰⁷ Case C-419/13, EU:C:2015:27.

¹⁰⁸ *Art & Allposters*, Case C-419/13, EU:C:2015:27, [35], [39].

¹⁰⁹ Ibid., [43]–[46].

¹¹⁰ Ibid., [48].

¹¹¹ Cf. L. Oprysk, *Reconciling the Material and Immortal Dissemination Rights in the Light of the Developments under the EU Copyright Acquis* (University of Tartu, 2020), 134, 174.

¹¹² *UsedSoft*, Case C-128/11, EU:C:2012:407.

¹¹³ See further S. Stokes, ‘Copyright and Artistic Practice’ [2016] *Ent LR* 172.

¹¹⁴ CDPA 1988, s. 18(2).

¹¹⁵ CDPA 1988, s. 18(2).

¹¹⁶ Case C-98/13, EU:C:2014:55, [28]. See also *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2007] EWHC 533 (Ch), [2007] FSR 525; *KK Sony Computer Entertainment v. Pacific Game Technology Ltd* [2006] EWHC 2509 (Pat).

¹¹⁷ *Donner*, Case C-5/11, EU:C:2012:370.

¹¹⁸ Rel. Rights Dir., Art. 2(3). Apparently, these were excluded because it was thought that the rental right would then cover rental of housing, cars, etc.

¹¹⁹ CDPA, s. 18A.

¹²⁰ CDPA 1988, ss 18A(2), 18A(6), 182C(2) (performers); cf. the terms of Rel. Rights Dir., Art. 1 ('making available for use, for a limited period of time')—with no specific requirement that the work 'be returned'). The Rel. Rights Dir. and the 1988 Act both contain a number of limitations to the rental and lending rights: first, neither covers the making available of a copy for public performance, playing or showing in public, or broadcast for example, where a cinema owner rents a film from a film distributor; second, neither rental nor lending covers situations in which a work, such as a painting, is made available for the purposes of exhibition in public; third, the rental and lending rights do not cover situations in which a work is made available for on-the-spot reference, e.g., magazines are made available in waiting rooms; and fourth, 'lending' does not cover the making available of a work between establishments that are accessible to the public, making permissible 'inter-library loans'. See J. Griffiths, 'Copyright and Public Lending in the United Kingdom' [1997] *EIPR* 499, 500.

¹²¹ Cf. Software Dir., Recital 16 ('rental' is the making available of a computer program for use, for a limited time, and for 'profit-making purposes').

¹²² CDPA 1988, s. 18A(2)(b). For exemptions for educational establishments and libraries, see Chapter 9, section 13.6, p. 285, and section 14.1, pp. 286–7; for the 'public lending right' compensation scheme, see Chapter 13, section 6, pp. 402–3.

¹²³ CDPA 1988, s. 18A(5), reflecting the Rel. Rights Dir., Recital 14.

¹²⁴ *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV*, Case C-263/18, EU:C:2019:1111.

¹²⁵ *Vereniging Openbare Bibliotheeken (VOB) v. Stichting Leenrecht*, Case C-174/15, EU:C:2016:856. For an intelligent commentary, see V. Breemen, ‘E-Lending According to the ECJ: Focus on Functions and Similar Characteristics in *VOB v. Stichting Leenrecht*’ [2017] *EIPR* 249.

¹²⁶ *Ibid.*, [54].

¹²⁷ *Ibid.*, [34]–[35].

¹²⁸ *Ibid.*, [30]–[34], [39]. For the view that ‘streaming’, the now predominant mode of distribution of recorded music, should be regarded as electronic rental, and performers recognized as having the associated ‘unwaivable right to equitable remuneration’, see the evidence provided to Digital, Culture, Media and Sport Committee, *Economics of Music Streaming*, Second Report of Session 2021–22, (HC 50), [64]–[65].

¹²⁹ WCT, Agreed Statement concerning Arts 6 and 7; *VOB*, Case C-174/15, EU:C:2016:856, [34]. Given that the Directive introducing the rental and lending right was adopted in 1992, several years before the diplomatic conference in 1996 which agreed the WIPO Copyright Treaty, it is odd that the meaning of ‘rental’ should be dictated by subsequent adherence to that Treaty. The Court, at [31], relies on Recital 7 of Dir. 2006/115, but as A-G Szpunar recognizes at EU:C:2016:459, [AG24], that Directive merely codified Directive 92/100, where Recital 10 was in precisely the same terms.

¹³⁰ *Ibid.*, [54]. The operative part limits this conclusion to ‘books’, and there is some hint, at [42], that films might be treated differently.

¹³¹ See Chapter 9, section 14.1, pp. 286–7 (explaining CDPA, s. 40A) and Chapter 13, section 6, pp. 402–3 (on the public lending right scheme).

¹³² *Ibid.*

¹³³ Cf. Info. Soc. Dir, Recital 28 (stating that the distribution right is without prejudice to the provisions relating to the rental and lending rights but making no such explicit statement in relation to the communication right).

¹³⁴ *Tom Kabinet*, [69].

¹³⁵ *Tom Kabinet*, [AG78]. See further [AG69].

¹³⁶ *VOB*, [56] (referring to Info Soc Dir, Art. 1(2)(b), which states that that Directive ‘leaves intact and in no way affects’ the provisions of EU law relating to the lending right); *VOB*, [AG55].

¹³⁷ M. F. Makeen, ‘Rationalising Performance “in Public” under U.K. Copyright Law’ [2016] *IPQ* 117.

¹³⁸ But see moral right of attribution, discussed in Chapter 10, section 2.2.2, p. 309.

¹³⁹ *FAPL*, Cases C-403/08 and C-429/08 [2011] *ECR I-9083* (Grand Chamber), [200]–[203]. Subsequently, Kitchin J held that showing a broadcast in a pub infringes both CDPA s. 19 and s. 20: *FAPL v. QC Leisure* [2012] *EWCHC 108 (Ch)*, [63]. For careful discussion, see C. Angelopoulos, ‘How Football Changed Copyright Law: Public Performance, Communication to the Public and the Free Public Showing of Broadcast Films’, in M. Senftleben et al., *Intellectual Property and Sports: Essays in Honour of P. Bernt Hugenholtz* (2021), 319, 327 ff.

¹⁴⁰ *Sociedade Portuguesa de Autores CRL v. Ministério Público* et al., Case C-151/15, EU:C:2015:468 (Order).

¹⁴¹ *Circul Globus Bucureşti (Circ & Variete Globus Bucureşti) v. Uniunea Compozitorilor şi Muzicologilor din România*, Case C-283/10 [2011] *ECR I-12031*.

6. Nature of the Rights

¹⁴² It may be implicit from *Phonographic Performance (Ireland) Ltd v. Ireland*, Case C-162/10 [2012] 2 CMLR (29) 859, [62]–[63], that playing sound recordings counts as ‘communication to the public’. In its reasoning in *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083, [188], the Court of Justice sought to interpret Art. 3 of the Info. Soc. Dir. and Art. 8 of the Rel. Rights Dir. in the light of the international treaties. However, on this question, the international treaties offer different answers for films and sound recordings. Article 14(1)(ii) of the Berne Convention might support the view that showing a cinematographic work is a ‘public performance’, whereas Art. 2 of the WIPO Performances and Phonograms Treaty (WPPT) suggests that playing sound recordings is ‘communication’. But surely direct representation of a film and sound recording must be treated in the same way by UK law?

¹⁴³ *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083, [193].

¹⁴⁴ Public karaoke would thus involve public performance of the lyrics and communication to the public of the sound recording. This suggests that when defining what constitutes ‘the public’ in relation to the performance right, UK courts should realign national case law with Court of Justice case law on the meaning of the ‘public’ under the right of communication to the public.

¹⁴⁵ *PRS v. Camelo* [1936] 3 All ER 557.

¹⁴⁶ *PRS v. Hammond's Bradford Brewery Co.* [1934] 1 Ch 21; *Messager v. BBC* [1927] 2 KB 543, 548.

¹⁴⁷ *Jennings v. Stephens* [1936] 1 Ch 469, 476, 481; *Harms v. Martans* [1927] 1 Ch 526, 530.

¹⁴⁸ *Jennings v. Stephens* [1936] 1 Ch 469, 476, 479; *PRS v. Harlequin* [1979] 2 All ER 828, 833.

¹⁴⁹ *Duck v. Bates*, (1884) 13 QBD 843 (CA) (no infringement through performance of play by an amateur dramatic club at Guy’s Hospital for the entertainment of the nurses, the event being regarded as ‘domestic’).

¹⁵⁰ *PRS v. Harlequin* [1979] 2 All ER 828.

¹⁵¹ *Harms v. Martans* [1927] 1 Ch 526, 537 (emphasizing that there was an invitation to the general public to become members of the club).

¹⁵² *PRS v. Hawthorns Hotel (Bournemouth)* [1933] Ch 855.

¹⁵³ *Jennings v. Stephens* [1936] 1 Ch 469, 481.

¹⁵⁴ *Ibid.*, 483.

¹⁵⁵ *Harms v. Martans* [1927] 1 Ch 526 (CA) 532–3 (treating as infringing a performance of a musical work to an audience of 150 members of a club and 50 guests, since the members paid a substantial subscription and an entrance fee and the club paid the orchestra).

¹⁵⁶ *Ibid.*

¹⁵⁷ [1936] 1 Ch 469.

¹⁵⁸ *Ibid.*, 485.

¹⁵⁹ *Ernest Turner Electrical Instruments v. PRS* [1943] 1 Ch 167 (Lord Greene MR). This would now count as ‘communication to the public’, so the EU test would govern the outcome.

¹⁶⁰ *PRS v. Harlequin Record Shops* [1979] 2 All ER 828, 834.

¹⁶¹ *ITV Studios v. TV Catch Up* [2010] EWHC 3063 (Ch) (Kitchin J) (rejecting view that, in UK implementation, communication comprised two rights, broadcasting and making available, and nothing more).

¹⁶² Info. Soc. Dir., Art. 3, itself implementing WCT, Art. 8. The picture is more complicated as regards related rights. Here, the right to control broadcasting and communication to the public were harmonized in the Rel. Rights Dir. of 1992 (which was amended by the Satellite Dir. to clarify that broadcasting included communication to the public by satellite). The Info. Soc. Dir. added the right of making available as a standalone right: Info. Soc. Dir., Art. 3(2). In the case of performers and owners of copyright in sound recordings, the right of communication and broadcasting is couched as a right to remuneration; Rel. Rights Dir., Art. 8(2). For broadcasting organizations, the right to prevent communication to the public of its broadcasts is subject only to ‘minimal harmonization under EU law’; Rel. Rights Dir., Recital 16 allows ‘more far-reaching protection’: *C More Entertainment AB v. Linus Sandberg*, Case C-279/13, EU:C:2015:199.

¹⁶³ The United Kingdom provides the communication right in s. 20 without discriminating between authors rights, sound recordings, and broadcasts. The CJEU jurisprudence on communication to the public, although developed in relation to authors’ rights, applies when interpreting s. 20’s application in favour of broadcasting organizations and owners of copyright in sound recordings: *Tuneln v. Warner Music UK* [2021] EWCA Civ 441, [57]–[58].

¹⁶⁴ The right is generating a literature of its own: J. Koo, *The Right of Communication to the Public in EU Copyright Law* (2019); B. Marušić, *The Autonomous Legal Concept of Communication to the Public in the European Union* (Stockholm University, 2021).

¹⁶⁵ *FAPL v. British Communications* [2017] EWHC 480 (Ch), [33] (Arnold J).

¹⁶⁶ In terms of economic importance to the music industry, streaming (e.g. by services such as Spotify and Deezer) is rapidly outstripping the making available of copies through download (e.g. by iTunes). Revenues from streaming now constitute 66% of the income of the recorded music industry: D. Hesmondhalgh, R. Osborne, H. Sun, and K. Barr, *Music Creators’ Earnings in the Digital Era* (IPO, Sept. 2021), 23; K. Brennan MP, Hansard (HC), 3 December 2021, Vol. 704, col. 1164 (70%). The same is true of the film industry where DVD sales have fallen quickly as new streaming services such as Netflix became available. See M. Sweeney, ‘Film and TV Streaming and Download Overtake DVD Sales for the First Time’, *The Guardian*, 5 January 2017.

¹⁶⁷ Writing in his academic capacity, a former Court of Appeal judge has observed that ‘the case law on the right of communication to the public is near chaotic’: R. Jacob, ‘Is IP Out of Control?’ (2020) 15 JIPLP 98, 102. Cf. *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v. GEMA*, Case C-117/15, EU:C:2016:109, [AG43] (describing the case law as ‘abundant and consistent’).

¹⁶⁸ First, the Berne Convention lacks an overarching concept of communication to the public, offering specific rights for specific works. It was only with the WCT that a new generalized right was recognized for authorial works. Second, as regards the case of performers and owners of copyright in sound recordings, the Rome Convention envisaged a shared right to equitable remuneration where a sound recording was communicated or broadcast: Rome, Art. 10. In 1996, the WPPT conferred on each an exclusive right of making available: WPPT, Art. 10.

¹⁶⁹ E.g. *Phonographic Performance (Ireland) Ltd v. Ireland*, Case C-162/10 [2012] 2 CMLR (29) 859, [29]–[30]; *GS Media BV v. Sanoma Media Netherlands BV*, Case C-160/15, EU:C:2016:644, [33]–[34]; *VG Bild Kunst*, Case C-392/19, EU:C:2021:181, [29], [33]–[34], [39]; *Peterson v. YouTube*, Case C-682/18 and *Elsevier v. Cyando*, Case C-683/18, EU:C:2021:503, [66]–[67]. For similar emphasis on the overall individualized assessment, see *Tuneln v. Warner* [2019] EWHC 2923 (Ch), [109](i), approved on appeal [2021] EWCA Civ 441, [70](iv), [132]–[133].

¹⁷⁰ See section 6.1.3, pp. 177–9.

¹⁷⁰ Referring to Info. Soc. Dir., Recitals 9, 10, 23: *Stichting Brein v. Ziggo BV and XS4All Internet BV*, Case C-610/15, EU:C:2017:456, [22] (high level); *Reha Training*, Case C-117/15, EU:C:2016:379, [36] (Grand Chamber) (interpret broadly).

¹⁷¹ The exclusive right to broadcast a work has been recognized in UK law since 1956. See B. Sherman, ‘Public Ownership of Private Spectacles’, in B. Sherman and L. Wiseman, *When Old Technologies Were New* (2013), ch. 9.

¹⁷² CDPA 1988, s. 6(1). See Chapter 3, section 8, pp. 95–7.

¹⁷³ CDPA 1988, s. 6(5A). However, special rules apply to retransmissions of broadcasts from an EEA member state: CDPA, 1988, s. 144A.

¹⁷⁴ Info. Soc. Dir., Recital 25.

¹⁷⁵ *Svensson v. Retriever Sverige AB*, Case C-466/12, EU:C:2014:76, [20]. Nevertheless, the ‘making available’ notion retains some importance in its own right, at least in the context of related rights. This is because, under international rules, contracting parties to the Rome Convention were not obliged to grant the holders of rights in sound recordings and performers an exclusive right of communication to the public of published phonograms, but only a right to a ‘single equitable remuneration’, and this has been translated into EU law in Art. 8(2) of the Related Rights Directive. However, under the WIPO Performers and Phonograms Treaty of 1996, contracting parties are obliged to grant performers and phonogram producers each their own ‘making available right’. The distinction between the two rights, then, becomes important because the making available right is a property right whereas the communication right is a mere right to remuneration. Paradoxically, many performers have found the ‘lesser’ legal right of remuneration to be economically more valuable than the property right.

¹⁷⁶ *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, Case C-314/12, EU:C:2014:192, [25]. In *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [42], giving access to a work on dedicated terminals in a public library is categorized as ‘making available’—though the user can hardly be said to choose the place from which they access the work.

¹⁷⁷ *Land Nordrhein-Westfalen v. Dirk Renckhoff*, Case C-161/17, EU:C:2018:634, [21] (posting of photograph); *Public Relations Consultants Association v. NLA*, Case C-360/13, EU:C:2014:1195, [57]; *Peterson v. YouTube*, Case C-682/18 and *Elsevier v. Cyando*, Case C-683/18, EU:C:2021:503, [74] (via a content-sharing platform). The sharing on blogs, forums, or ‘link collections’ of ‘download links’ to material stored ‘in the cloud’ is also ‘making available’: *ibid.*, [72]–[75].

¹⁷⁸ *Mircom International Content Management & Consulting (M.I.C.M.) v. Telenet*, Case C-597/19, EU:C:2021:492; *Dramatico Entertainment v. British Sky Broadcasting* [2012] EWHC 268 (Ch), [2012] RPC (27) 665, [69] (Arnold J.).

¹⁷⁹ *C More Entertainment AB v. Linus Sandberg*, Case C-279/13, EU:C:2015:199, [27]. As the Court goes on to explain, this act might be covered by the communication right, if a member state has granted such a right to broadcasting organizations that goes beyond the minimum right in Rel. Rights Dir., Art. 8(3).

¹⁸⁰ E.g. *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083, [193]; *ITV Broadcasting v. TV CatchUp*, Case C-607/11 [2013] 3 CMLR (1) 1, [23]; *YouTube*, Case C-682/18, EU:C:2020:586, [AG56]–[AG57] (AG Saugmandsgaard Øe). Note also Info. Soc. Dir., Recital 23; WPPT, Art. 2(g); *The Basic Proposal for the Treaty*, [10.15]–[10.16].

¹⁸¹ *Phonographic Performance (Ireland) v. Ireland*, Case C-162/10 [2012] 2 CMLR (29) 859, [31]; *SGAE*, Case C-306/05, EU:C:2006:764, [42].

¹⁸² *Ziggo BV*, Case C-610/15, EU:C:2017:99, [AG25].

¹⁸³ Cf. CDPA, s. 20 (defining ‘communication’ as involving electronic transmission).

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¹⁸⁴ *Svensson v. Retriever Sverige AB*, Case C-466/12, EU:C:2014:76, [18]–[20]. For domestic application, see *Mackie v. Maxi Construction* [2017] SC LIV 11 (link to photograph); *Tuneln v. Warner Music UK* [2021] EWCA Civ 441 (a free radio service that comprised hyperlinks to up to 100,000 radio stations from around the world).

¹⁸⁵ *Stichting Brein v. Jack Frederik Wullems*, Case C-527/15, EU:C:2017:300, [39]–[42].

¹⁸⁶ *Ziggo BV*, Case C-610/15, EU:C:2017:456, [35]; *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), [45]–[46] (website indexing BitTorrent files so as to enable users to access those files).

¹⁸⁷ *Phonographic Performance (Ireland)*, Case C-162/10 [2012] 2 CMLR (29) 859.

¹⁸⁸ One explanation is the unharmonized state of accessory liability—in English parlance, ‘joint tortfeasance’ (on which, see Chapter 48, section 3.4, pp. 1318–20). Reluctant to leave each member state to its own devices, the Court has chosen to include within ‘communication’ acts of ‘knowing facilitating of communication’. This has in turn led the Court to invent vague and unpredictable knowledge criteria.

¹⁸⁹ *Phonographic Performance (Ireland)*, Case C-162/10 [2012] 2 CMLR (29) 859, [62]–[63]. Cf. the memorandum accompanying the Commission Proposal for what became the Info. Soc. Dir., COM(97) 628 final, 25, which stated: ‘The expression “communication to the public” of a work covers any means or process other than the distribution of physical copies.’

¹⁹⁰ *VOB*, Case C-174/15, EU:C:2016:459, [AG55], [AG65]. It may be that these acts then fall outside the ‘communication to the public’ category on the basis that they fall within the so-called ‘lex specialis’. The provision of *physical* copies is covered by the distribution and rental right: see *Tom Kabinet*, Case C-263/18, EU:C:2019:1111, [44] (relying on the Explanatory Memorandum to the Proposal for a Directive on Copyright in the Information Society COM(97) 628 final).

¹⁹¹ *GS Media BV v. Sanoma Media Netherlands BV et al.*, Case C-160/15, EU:C:2016:644, [31].

¹⁹² P. B. Hugenholtz and S. C. van Velze, ‘Communication to a New Public? Three Reasons why EU Copyright Law Can Do Without a “New Public”’ (2016) 47 IIC 796, 813. While acknowledging that the CJEU’s jurisprudence on communication to the public is ‘not free from difficulty or criticism’ ([86]), the Court of Appeal has indicated it does not think the United Kingdom should depart from the CJEU case law: *Tuneln v. Warner Music UK* [2021] EWCA Civ 441. But, in that case, it seems the arguments of the appellant were not well thought through: [196] (Vos MR).

¹⁹³ *STIM, SAMI v. Fleetmanager Sweden AB, Nordisk Biluthyrning AB*, Case C-753/18, EU:C:2020:268, [2020] ECDR (5) 105, [33]–[35].

¹⁹⁴ *SGAE*, Case C-306/05 [2006] ECR I-11519, [45] ff.

¹⁹⁵ *Wullems*, Case C-527/15, EU:C:2017:300.

¹⁹⁶ *Ziggo BV*, Case C-610/15, EU:C:2017:456, [38].

¹⁹⁷ *Ibid.*, [38].

¹⁹⁸ In *STIM*, Case C-753/18, EU:C:2020:4, [AG35], A-G Szpunar suggested (unconvincingly) that the ‘something extra’ is ‘the direct link between the user’s intervention and the protected subject matter’.

¹⁹⁹ Info. Soc. Dir., Recital 23.

²⁰⁰ See section 5.1, pp. 169–70.

²⁰¹ *Società Consortile Fonografici (SCF) v. Marco Del Corso*, Case C-135/10, EU:C:2011:431, [AG125]. See further P. Mysoor, ‘Unpacking the Right of Communication to the Public’ [2013] IPQ 166, 172–4.

²⁰² *SCF*, Case C-135/10, EU:C:2012:140, [82]; *Ziggo BV*, Case C-610/15, EU:C:2017:456, [26].

²⁰³ E.g. *SGAE*, Case C-306/05 [2006] *ECR I-11519*, [42]; *FAPL*, Cases C-403/08 and C-429/08 [2011] *ECR I-9083*, [195].

²⁰⁴ *GS Media BV*, Case C-160/15, EU:C:2016:221 [AG54] (AG Wathelet).

²⁰⁵ *GS Media*, Case C-160/15, EU:C:2016:644, [35] (citing existing tests but adding ‘in particular’, so that giving access where it would otherwise be unavailable is transformed into an example of a deliberate intervention to give access).

²⁰⁶ *Ziggo BV*, Case C-610/15, EU:C:2017:456, [26]–[36]; [AG50] (‘less efficient’) (AG Szpunar); *Wullems*, Case C-527/15, EU:C:2017:300, [31], [41] (‘without which the purchasers would find it difficult to benefit from those protected works’); *YouTube*, Case C-682/18, EU:C:2021:503 [77] (‘more complex’).

²⁰⁷ *Ziggo BV*, Case C-610/15, EU:C:2017:456, [34] (‘full knowledge of the relevant facts’, begging the question ‘which facts are relevant?’). Later in the judgment, at [46], the Court develops the requirement of dealing with knowledge of illegality, but it seems this is a distinct and additional requirement.

²⁰⁸ *SCF*, Case C-135/10, EU:C:2012:140, [91] (though here the comment is made in the context of the relevance of ‘profit-making’), [98]; *Reha Training*, Case C-117/15, [48] (in the context of the ‘new public’). See J. Quintais, ‘Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public’ (2018) 21 *JWIP* 385, 389 (describing this requirement as ensuring that ‘an intervention is . . . volitional, not accidental’).

²⁰⁹ Case C-306/05 [2006] *ECR I-11519*, [42] (emphasis added). See also *SCF*, Case C-135/10, [82].

²¹⁰ Cases C-403/08 and C-429/08 [2011] *ECR I-9083* (Grand Chamber), [195] (emphasis added). See also *Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA) v. Léčebné lázně Mariánské Lázně a. s.*, Case C-351/12, EU:C:2014:110, [26], [33].

²¹¹ *Mircom International Content Management & Consulting (M.I.C.M.) v. Telenet*, Case C-597/19, EU:C:2020:1063, [AG57]–[AG61].

²¹² *Mircom International Content Management & Consulting (M.I.C.M.) v. Telenet*, Case C-597/19, EU:C:2021:492, [49] (emphasis added). It seems that in ordinary circumstances, as part of the installation process, BitTorrent users will have had ‘tutorials’ that provide such information, and so will be liable: *ibid.*, EU:C:2020:1063, [AG54]–[AG57].

²¹³ *Tuneln v. Warner Music UK* [2021] *EWCA Civ* 441.

²¹⁴ *Ibid.*, [191].

²¹⁵ For details, see *Warner Music UK v. Tuneln* [2019] *EWHC 2923 (Ch)*, [150] (some stations were added by web-crawlers, whereas others ‘signed up’).

²¹⁶ According to Arnold LJ, the foreign radio stations could avoid liability by requiring that they be removed from Tuneln Radio or that they be geo-blocked to UK users.

²¹⁷ This first appeared in *GS Media*, Case C-160/15, EU:C:2016:644, [44]–[55].

²¹⁸ At [AG100].

²¹⁹ *Ziggo BV*, Case C-610/15, EU:C:2017:99, [AG51]–[AG52]; A-G Szpunar thought such knowledge was necessary for there to be liability (in the factual circumstances in front of him).

²²⁰ *Ziggo BV*, Case C-610/17, EU:C:2017:456, [45].

²²¹ *GS Media*, Case C-160/15, EU:C:2016:644, [44]–[55].

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²²² *Wullems*, Case C-527/15, EU:C:2017:300, [50]–[51]; *YouTube*, Case C-682/18, EU:C:2021:503, [102] (sufficient if knowledge plus no expeditious action to remove).

²²³ *Ziggo BV*, Case C-610/17, EU:C:2017:456, [45]. Cf. *YouTube*, Case C-682/18, EU:C:2021:503, [84], [102] (though general knowledge will do if coupled with e.g. failure to use technological measures or encouragement).

²²⁴ *GS Media*, Case C-160/15, EU:C:2016:644 (knowledge presumed); *VG Bild Kunst*, Case C-392/19, EU:C:2020:696, [AG44] (AG Szpunar) (referring to the ‘subjective’ criterion of knowledge); *YouTube*, Case C-682/18, EU:C:2021:503, [86]–[89] (profit-making motive did not lead to a presumption of knowledge where defendant provided infrastructure rather than dealing with or linking to specific works).

²²⁵ *Wullems*, Case C-527/15, EU:C:2017:300, [50].

²²⁶ *Ziggo BV*, Case C-610/17, EU:C:2017:456, [45]. Cf. EU:C:2017:99, [AG51]–[AG52] (requiring actual knowledge of illegal nature).

²²⁷ *YouTube*, Case C-682/18, EU:C:2021:503, [84] (as a decision of the Court after the United Kingdom left the EU, this case can be referred to by a UK court (EU(W)A, s. 6(2)) but is likely to be regarded as of persuasive value given the first three (of the five) considerations referred to by Arnold LJ in *Tuneln v. Warner Music UK* [2021] EWCA Civ 441, [91], when finding *VG Bild Kunst*, Case C-392/19, EU:C:2021:181 ‘very persuasive’).

²²⁸ *SGAE v. Rafael Hotels SL*, Case C-306/05 [2006] ECR I-11519.

²²⁹ *Reha Training*, Case C-117/15, EU:C:2016:379, [31]–[34].

²³⁰ *Tom Kabinet*, Case C-263/18, EU:C:2019:1111, [68].

²³¹ *SCF*, Case C-135/10, EU:C:2012:140, [84] (fairly large number), [86]; *VCAST v. RTI SpA*, Case C-265/16, EU:C:2017:913, [47] (communicating to individual subscribers the recordings they had requested be made of television programmes was communication to ‘the public’ given ‘the sum of the persons targeted’).

²³² *Tom Kabinet*, Case C-263/18, EU:C:2019:1111, [68].

²³³ *SGAE*, Case C-306/05 [2006] ECR I-11519 [37], [38]; *SCF*, Case C-135/10, EU:C:2012:140, [84]–[85]; *Wullems*, Case C-527/15, EU:C:2017:300, [3].

²³⁴ *SCF*, Case C-135/10 [2012] ECDR (16) 276, [88], [90]–[91]. The ‘profit-making’ quality of a transmission is relevant, but not essential to whether it is ‘to the public’: *ITV Broadcasting v. TV CatchUp*, Case C-607/11 [2013] 3 CMLR (1) 1, [42].

²³⁵ *OSA*, Case C-351/12, EU:C:2014:110; *Reha Training*, Case C-117/15, EU:C:2016:379 (patients in a rehabilitation centre).

²³⁶ *VCAST v. RTI SpA*, Case C-265/16, EU:C:2017:913, [47].

²³⁷ *Società Consortile*, Case C-135/10 [2012] ECDR (16) 276.

²³⁸ In *SCF*, the Court said, at [95], that a group of dental patients was a ‘determinate’ number, a consistent group, and not the public in general. No evidence was referred to in the judgment as to the character of the provision of dental services in Italy. The Court said, at [96], that, even viewed sequentially, the number of patients was not large; indeed, it was ‘insignificant’. Details of the actual number were not provided. The Court indicated, at [97]–[99], that the playing of music was not profit-making and did not attract patients.

²³⁹ *Phonographic Performance (Ireland)*, Case C-162/10 [2012] 2 CMLR (29) 859, [41]–[43].

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²⁴⁰ *Reha Training*, Case C-117/15, EU:C:2016:109, [AG55] (AG Bot).

²⁴¹ *BY v. CX*, Case C-637/19, EU:C:2020:863, [28]–[29].

²⁴² See also *Reformation Publishing v. Cruiseco* [2018] EWHC 2761 (Ch), [41] (in the context of damages assessment, Nugee J suggesting that accessibility of an infringing advertisement to 257 travel agents was not to an ‘indeterminate’ number of recipients and thus not to a public).

²⁴³ *Tom Kabinet*, Case C-263/18, EU:C:2019:1111.

²⁴⁴ *Ibid.*, [64].

²⁴⁵ This might be a situation where the ‘profit-making’ factor comes into play, so that e-rental, even with suitable technological limitations, is treated as a form of communication to the public.

²⁴⁶ Cf. *Tom Kabinet*, Case C-263/18, [AG42]. The point is explored by C. Angelopoulos, ‘The Digital Exhaustion of Copyright’ [2019] *CLJ* 227, 230.

²⁴⁷ Perhaps the ‘profit-making’ involved in e-rental might change the ‘multi-factor analysis’, so that even communication on a limited basis is regarded as a communication to the public.

²⁴⁸ *Mircom*, Case C-597/19, EU:C:2020:1063, [AG63]; *VG Bild Kunst*, Case C-392/19, EU:C:2020:696, [AG38]. Cf. *Renckhoff*, Case C-161/17, EU:C:2018:634, [35].

²⁴⁹ For a valiant attempt to rationalize the case law, see E. Rosati, ‘When Does a Communication to the Public under EU Copyright Law Need to Be to a “New Public”? (2020) 45(6) *ELR* 802.

²⁵⁰ G. B. Dinwoodie, ‘A Comparative Analysis of Secondary Liability of Online Service Providers’, in Dinwoodie (ed.), *Secondary Liability of Online Service Providers* (2017), 14. For persuasive criticism of the ‘new public’ criterion, see P. B. Hugenholtz and S. C. van Velze, ‘Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”’ (2016) 47 *IIC* 797; S. Karapapa, ‘The Requirement for a “New Public” in EU Copyright Law’ [2017] *ELR* 63. For the objection that the new public criterion illegitimately introduces the idea of exhaustion of the communication right, see Association Littéraire et Artistique Internationale, *Opinion Proposed to the Executive Committee and Adopted at its Meeting, 17 September 2014 on the Criterion ‘New Public’, Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public* (17.09.2014), available at <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf> and J. Rosén, ‘How Much Communication to the Public is “Communication to the Public”?’, in I. Stamatoudi (ed.), *New Developments in EU and International Copyright Law* (2016), 341.

²⁵¹ Case C-306/05 [2006] *ECR* I-11519.

²⁵² *Ibid.*, [40]–[41].

²⁵³ *Ibid.*, [42] See e.g. *FAPL*, Cases C-403/08 and C-429/08 [2011] *ECR* I-9083 (Grand Chamber), [197]; *ITV Broadcasting v. TV CatchUp*, Case C-607/11 [2013] 3 *CMLR* (1) 1, [39]; *Svensson v. Retriever Sverige AB*, Case C-466/12, EU:C:2014:76, [24]; *Reha Training*, Case C-117/15, EU:C:2016:379, [45].

²⁵⁴ *Airfield NV*, Cases C-431/09 and C-432/09 [2011] *ECR* I-9363, [76].

²⁵⁵ See e.g. *FAPL*, Cases C-403/08 and C-429/08 [2011] *ECR I-9083* (Grand Chamber), [194]; *Airfield NV*, Cases C-431/09 and C-432/09 [2011] *ECR I-9363*, [74], [79]. In *Tuneln v. Warner Music UK* [2021] *EWCA Civ 441*, [70], Arnold LJ summarizes the case law by stating ‘mere technical means to ensure or improve reception of the original transmission in its catchment area does not constitute a “communication”’.

²⁵⁶ *SGAE*, Case C-306/05 [2006] *ECR I-11519*, [41]; *FAPL*, Cases C-403/08 and C-429/08 [2011] *ECR I-9083*, [198].

²⁵⁷ *Ibid.*, [199].

²⁵⁸ *Svensson*, [31]; *VG Bild-Kunst*, [39]–[43].

²⁵⁹ *Tom Kabinet*, [71]. Cf. *VG Bild-Kunst*, [46] (in relation to Internet posting, a copyright holder cannot be allowed to limit their consent by means other than effective technological measures).

²⁶⁰ [2021] *EWCA Civ 441* [145].

²⁶¹ *Soulier and Doke*, Case C-301/15, EU:C:2016:878, [36] (‘the general Internet public’).

²⁶² *Renckhoff*, Case C-161/17, EU:C:2018:634, [35]. See further *VG Bild Kunst*, Case C-392/19, EU:C:2021:181, [73].

²⁶³ *Ibid.*, [47]. We think the reasons for the distinction are identified adequately at [30]–[33].

²⁶⁴ Indeed, AG Szpunar has said that *Renckhoff* renders the legal fiction in *Svensson* ‘untenable’: *VG Bild Kunst*, Case C-392/19, EU:C:2020:696, [71].

²⁶⁵ [2019] *EWHC 2923 (Ch)*, [107], [109](vi) (Birss J). Birss J rejected our preferred route—a categorical distinction between posting/re-posting and linking, because it is not ‘an individualised assessment’: [106], [109](iv).

²⁶⁶ [2021] *EWCA Civ 441*, [131]. In *VG Bild Kunst*, Case C-392/19, EU:C:2020:696, A-G Szpunar offers a similar analysis, differentiating between expectations of the initial communicator in relation to the use of automatic, as opposed to ‘clickable’ links: [AG81]–[AG91] (public contemplated includes those who access the site via clickable links, of various sorts); [AG92]–[AG105] (public contemplated does not include users of other websites who experience material on those other websites as a result of automatic links). The Court, however, did not appear to adopt the reasoning.

²⁶⁷ T. Synodinou, ‘Communication to the Public in the Zurs.net Case: More Explanations, Less Clarity’, *Kluwer Copyright Blog* (23 Aug. 2017) (arguing that a new technical means creates a presumption of the existence of a new public).

²⁶⁸ *ITV Broadcasting v. TV CatchUp*, Case C-607/11 [2013] 3 *CMLR* (1) 1.

²⁶⁹ *Ibid.*, [24]. The proposition has been repeated in *Wullems*, Case C-527/15, EU:C:2017:300, [33]; *Ziggo BV*, Case C-610/15, EU:C:2017:456, [28].

²⁷⁰ *ITV Broadcasting v. TV CatchUp*, Case C-607/11 [2013] 3 *CMLR* (1) 1, [39].

²⁷¹ *VCAST v. RTI SpA*, Case C-265/16, EU:C:2017:913. The case, and the question of cloud recording services more generally, is reviewed by J. P. Quintais and T. Rendas, ‘EU Copyright Law and the Cloud: VCAST and the Intersection of Private Copying and Communication to the Public’ [2018] *JIPPL* 711.

²⁷² The doctrine established in *TV CatchUp* was both acknowledged (at [23]) and then ignored in *AKM v. Zürs.net Betriebs GmbH*, Case C-138/16, EU:C:2017:218, where a cable network operator which transmitted broadcasts including those of the national broadcaster was found not to be communicating to a new public despite using different technical means. In *VCAST*, Case C-265/16, EU:C:2017:649, [AG52], A-G Szpunar sought to reconcile *Zürs.net* with *TV CatchUp*, seeing the former as an exception to the ‘different technical means’ rule, applicable only where the

copyright owners had ‘taken into account the retransmission in question in connection with their authorisation of the initial broadcast’. He refers to *Zurs.net* as ‘the AKM exception’. See further, L. Oprysk, *Reconciling the Material and Immaterial Dissemination Rights in the Light of the Developments under the EU Copyright Acquis* (University of Tartu, 2020), 248 (distinguishing the cases on the basis of whether the retransmission ‘substantially interferes with the interests of copyright holder’).

²⁷³ *Svensson*, Case C-466/12, EU:C:2014:76, [24].

²⁷⁴ Ibid., [24]–[30]. For criticism of this approach, on the basis that it ‘treats availability as an all or nothing idea, when the world is not really like that’, see Birss J in *Tune-In Inc. v. Warner Music UK* [2019] EWHC 2923 (Ch), [57] (giving the example of finding a book in a library, and the importance of indexing in making such a book meaningfully accessible). For the claim that the Court’s reasoning ‘echoes an implied licence rationale without expressly stating so’, see S. Karapapa, *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (2020), 147.

²⁷⁵ See e.g. the facts of *C More Entertainment AB v. Linus Sandberg*, Case C-279/13, EU:C:2015:199 (where defendant offered access to a service of streamed sports events that the claimant operates behind a paywall). A right holder can therefore insist that its licensee utilize such measures when uploading the work to the Internet, including measures that proscribe linking: *VG Bild-Kunst*, Case C-392/19, EU:C:2021:181.

²⁷⁶ *Bestwater International GmbH v. Mebes*, Case C-348/13, EU:C:2014:2315; *VG Bild-Kunst*, Case C-392/19, EU:C:2021:181 (noted by C. Angelopoulos [2021] CLJ 225 and E. Rosati, ‘Linking and Copyright in the Shade of *VG Bild-Kunst*’ (2021) 58(6) *CML Rev* 1875). See also *Wheat v. Google LLC* [2020] EWHC 27 (Ch) (refusing service out of jurisdiction on the basis that there was no serious claim/realistic prospect of success in relation to a claim that Google communicated images to a new public when its search returns displayed the URLs not just of the claimant’s website, where there was free and unrestricted access to the image, but also those of sites that ‘hotlinked’ to the image on the claimant’s site).

²⁷⁷ M. Leistner, ‘Closing the Book on Hyperlinks’ [2017] *EIPR* 327.

²⁷⁸ *GS Media BV v. Sanoma Media Netherlands BV et al.*, Case C-160/15, EU:C:2016:644.

²⁷⁹ Ibid., [39]–[43].

²⁸⁰ Ibid., [44]–[46].

²⁸¹ Ibid., [47]–[49].

²⁸² Ibid., [47]–[48].

²⁸³ Ibid., [49]. In *TuneIn v. Warner Music UK* [2021] EWCA Civ 441, [158], the Court of Appeal took the view that references in *GS Media* to ‘illegally posted’ ([48]), ‘illegally placed’ ([49]) and ‘illegally published’ material ([51]) was to material posted *without the consent* of the right holder. As a result, where foreign legal systems afforded the right holders in sound recordings merely rights to remuneration from communication (as opposed to ‘preventive’ or full property rights), it was not possible to say that those right holders had ‘consented’ to the recordings being made available, so that the *GS Media* rules were equally applicable.

²⁸⁴ Ibid., [51].

²⁸⁵ Ibid., [51].

²⁸⁶ J. Ginsburg and L. Budiardjo, ‘Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives’ (2018) 41 *Colum JL & Arts* 153.

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²⁸⁷ J. Quintais, ‘Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public’ (2018) 21 *J World Intellect Prop* 385 (suggesting three possibilities: (i) that the specific link is posted with the intention to make profit; (ii) that the website where the link is posted is a commercial website; (iii) that the person or party posting the link is a commercial entity).

²⁸⁸ See especially the discussion in M. Leistner, ‘Closing the Book on Hyperlinks’ [2017] *EIPR* 327, 330.

²⁸⁹ The Court, at [51], recognizes two elements: first whether the work/subject matter is protected; and, second, whether there is consent. It says nothing about where the work is protected but that no authorization is needed because the making available of the work is justified by an exception or limitation. However, at [53], the Court recognizes this as another reason why material might already be accessible.

²⁹⁰ Indeed, the German Supreme Court has held that Google is not subject to the *GS Media* doctrine with respect to its image search: 1ZR 11/16—*Preview III* (21 Sept. 2017).

²⁹¹ In *YouTube*, Case C-682/18, EU:C:2021:503, [89], the Grand Chamber was unwilling to extend the logic of *GS Media* further than ‘the situation of a person posting a hyperlink who acts on his or her own initiative and who, at the time of posting, knows the content to which that link is supposed to lead’.

²⁹² *GS Media*, [45]–[46]; *Spiegel Online*, Case C-516/17, EU:C:2019:625, [81]; *YouTube*, Case C-682/18, EU:C:2021:503 [88]; *VG Bild Kunst*, Case C-392/19, EU:C:2021:181, [49]–[51].

²⁹³ CDPA 1988, s. 6(3).

²⁹⁴ *SBS Belgium NV v. SABAM*, Case C-325/14, EU:C:2015:764, [2016] *ECDR* (3) 74, commented on by S. van Leeuwen, ‘CJEU: “Direct Injection” Broadcasting Not an Act of Communication to the Public’ [2016] *EIPR* 458.

²⁹⁵ Case C-682/18, EU:C:2020: 586, [AG 3] (AG Saugmandsgaard Øe).

²⁹⁶ See pp. 1318–20. The same act could be both an act of primary liability and give rise to accessory liability for the acts of others: *Twentieth Century Fox Film v. Newzbin* [2010] *EWHC* 608 (Ch) (Kitchin J).

²⁹⁷ [2015] *EWCHC* 1082 (Ch), [17]–[24] for a full description of how ‘Popcorn Time’ operates.

²⁹⁸ *Ibid.*, [40]–[42].

²⁹⁹ *Ibid.*, [55].

³⁰⁰ In *YouTube*, Case C-682/18, EU:C:2020: 586, [AG 99], [AG102], AG Øe did indeed suggest that the *Filmspeler*, *Pirate Bay*, and *GS Media* cases were cases of accessory liability and thus questions for member states. The Grand Chamber of the CJEU, EU:C:2021:503, declined to adopt the approach. See, too, *Tune In Inc. v. Warner Music UK Ltd* [2019] *EWCHC* 2923 (Ch), [66] (Birss J) (noting that an approach based on accessory liability ‘is not in the toolbox available to the CJEU since accessory liability is not harmonised at the European level’). See further A. Ohly, ‘The Broad Concept of “Communication to the Public” in Recent CJEU Judgments and the Liability Of Intermediaries: Primary, Secondary or Unitary Liability?’ (2018) 13(8) *JIPLP* 664; C. Angelopoulos, ‘Primary and Accessory Liability under EU Copyright Law,’ in E. Rosati (ed.), *The Routledge Handbook of European Copyright Law* (2021), ch. 13, 193–214.

³⁰¹ G. B. Dinwoodie, ‘A Comparative Analysis of Secondary Liability of Online Service Providers’, in Dinwoodie (ed.), *Secondary Liability of Online Service Providers* (2017).

³⁰² Case C-610/15, EU:C:2017:456 (Second Chamber).

³⁰³ *Ibid.*, [36].

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³⁰⁴ *Ziggo BV*, Case C-610/15, EU:C:2017:99, [AG53].

³⁰⁵ Such users who participate in peer-to-peer networks do ‘make available’ the works that are accessible through their participation.

³⁰⁶ *Twentieth Century Fox Film v. Newzbin* [2010] EWHC 608 (Ch) (Kitchin J).

³⁰⁷ *EMI Records v. British Sky Broadcasting* [2013] EWHC 379 (Ch), [2013] ECDR (8) 224 ('The Pirate Bay'), [46] (communication involves both operators of website and users); *Football Association Premier League v. British Sky Broadcasting* [2013] EWHC 2058 (Ch), [2013] ECDR (14) 377, [39]–[42] ('FirstRow' website was 'responsible for the communication'); *Paramount Home Entertainment International v. British Sky Broadcasting* [2013] EWHC 3479 (Ch) (Arnold J) ('SolarMovie'), [32]; *Paramount Home Entertainment International v. British Sky Broadcasting* [2014] EWHC 937 (Ch) (Henderson J); *FAPL v. British Communications* [2017] EWHC 480 (Ch) (Arnold J).

³⁰⁸ *Peterson v. YouTube*, Case C-682/18 and *Elsevier v. Cyando*, Case C-683/18, EU:C:2021:503 (a post-Brexit decision that UK courts can take into account, but are not bound to do so, under EU(W)A, s. 6(2)). One factor that might influence a UK court is the fact that the CJEU decisions were made in the knowledge that the EU law would soon be altered as a result of the CDSM Directive, Art. 17.

³⁰⁹ Ibid., [75].

³¹⁰ Ibid., [84].

³¹¹ Ibid., [85].

³¹² Ibid., [85].

³¹³ Ibid., [86].

³¹⁴ See M. F. Makeen, *Copyright in a Global Information Society* (2000), ch. 4.

³¹⁵ The EU legislature has extended the solution in the Sat-Cab Directive, but the United Kingdom is not required to implement the so-called 'Net-Cab Directive': see T. Rivers, 'The NetCab Directive' in I. Stamatoudi and P. Torremans (eds), *EU Copyright Law: A Commentary* (2nd edn, 2021), 79.

³¹⁶ CDPA 1988, s. 6(4). But see *Lagardère Active Broadcast v. Société pour la perception de la remunération équitable (SPRE)*, Case C-192/04 [2005] ECR I-7199 (where signals were transmitted to a satellite from France, back to earth, and then sent to the French public from a receiver situated in Germany, the CJEU held that a transmission had occurred in Germany because the signal was interrupted—by its interception in Germany—before reaching the public).

³¹⁷ As defined in CDPA, s. 6A(1).

³¹⁸ CDPA 1988, s. 6A (as amended by SI 2019/605, reg. 3).

³¹⁹ *Polydor Ltd v. Brown* [2005] EWHC 3191 (Ch).

³²⁰ See Chapter 40, section 8, pp. 1133–4.

³²¹ *Football Dataco Ltd v. Sportradar GmbH*, Case C-173/11 [2013] 1 CMLR (29) 903.

³²² On which, see Chapter 13, section 3.3, pp. 385–7.

³²³ On issues of jurisdiction, see Chapter 48, section 10, pp. 1341–3.

³²⁴ *Football Dataco v. Sportradar*, Case C-173/11 [2013] 1 CMLR (29) 903.

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³²⁵ See *Lilley v. Chartered Institute of Management Accountants* [2013] EWHC 1354 (Ch), [25]–[26] (Roth J); *Football Association Premier League v. BSB* [2013] EWHC 2058 (Ch), [42].

³²⁶ *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), [50]–[51] (Arnold J) (outlining some factors).

³²⁷ *Football Dataco*, Case C-173/11 [2013] 1 CMLR (29) 903 [47].

³²⁸ *EMI Records v. British Sky Broadcasting* [2013] EWHC 379 (Ch), [35]–[38] (Arnold J).

³²⁹ *Tuneln v. Warner Music UK* [2021] EWCA Civ 441.

³³⁰ E.g. Country 104 (Canada), Gakku FM (Kazakhstan), Radio Dudelange (Luxembourg), Capital FM (Bangladesh), and Urban 96.5 (Nigeria).

³³¹ [2021] EWCA Civ 441, [60]–[61] (referring to [2019] EWHC 2923 (Ch), [16]).

³³² [2019] EWHC 2923 (Ch), [19]–[27] affirmed at [2021] EWCA Civ 441, [62].

³³³ Ibid., [34], [193] affirmed at [2021] EWCA Civ 441, [62]–[66].

³³⁴ Hansard (HC), 3 December 2021, Vol. 704, cols 1218–30 (G. Freeman MP, Parliamentary Under-Secretary for Business, Energy and Industrial Strategy). See generally Chapter 12, section 2.5, pp. 353–4.

³³⁵ A. Metzger and M. Senftleben, *Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law* (2020).

³³⁶ Implementing, for the most part, Berne, Arts 8 and 11(2) (translation), 12 (adaptations, arrangements, and other alterations), and 11ter(2) (communication of translation).

³³⁷ And in this respect seems narrower than Berne, Art. 12. See P. Goold, ‘Why the UK Adaptation Right is Superior to the US Derivative Work Right’ (2014) 92 *Neb L Rev* 843.

³³⁸ CDPA 1988, s. 21(2).

³³⁹ CDPA 1988, s. 21(6). For consideration of the relationship between the reproduction right and the adaptation right, see *Hodgson v. Isaac* [2010] EWPCC 37, [2012] ECC (4) 47, [21]; for discussion of the relationship in EU harmonization, see D. Jongsma, ‘Parody after Deckmyn’ (2017) 48(6) IIC 652, 666–70.

³⁴⁰ *Moon v. Thornber* [2012] EWPCC 37, [92].

³⁴¹ [2000] FSR 363.

³⁴² The adaptation right was extended in 1956 to include this practice in response to the growth in comics: J. McCutcheon, ‘Making Art from Words: The Picturisation Adaptation Right in Copyright Law’, in J. McCutcheon and F. McGaughey (eds), *Research Handbook on Art and Law* (2020), 11.

³⁴³ *Francis Day & Hunter v. Bron* [1963] 1 Ch 587, 611 (adaptation and translation must be deliberate).

³⁴⁴ CDPA 1988, s. 21(3)(ab).

³⁴⁵ CDPA 1988, s. 21(4); Software Dir., Art. 4(b).

³⁴⁶ CDPA 1988, s. 21(3)(ac); Database Dir., Art. 5(b).

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³⁴⁷ CDPA 1988, s. 16(2). Y. Gendreau, ‘Authorization Revisited’ (2001) 48 *J Copyright Soc'y USA* 341. The ‘authorization’ right needs to be compared with the general principles of joint tortfeasance described in Chapter 48, section 3.4. See R. Arnold and P. Davies, ‘Accessory Liability for Intellectual Property Infringement: The Case of Authorisation’ (2017) 133 *LQR* 442.

³⁴⁸ *Falcon v. Famous Players* [1926] 2 KB 474, 491.

³⁴⁹ *Ibid.*

³⁵⁰ [1988] AC 1013.

³⁵¹ *Nelson v. Rye and Cocteau Records* [1996] FSR 313, 337.

³⁵² CDPA 1988, s. 16(2), in contrast with s. 16(1), is not explicitly confined to ‘acts’ of authorization within the United Kingdom: *ABKCO Music & Records v. Music Collection International* [1995] RPC 657.

³⁵³ *PRS v. Mitchell & Booker (Palais de Danse)* [1924] 1 KB 762 (applying a ‘control’ test); *PRS v. Kwik-Fit Group Ltd* [2008] ECDR (2) 13 (OH CS).

³⁵⁴ *PRS v. Bradford Corporation* [1917–23] MacG CC 309, 312–13, 314. If the hirer were to specify that particular songs were to be performed and those performances were to infringe on copyright, the case would be even stronger: see *Standen Engineering v. Spalding & Sons* [1984] FSR 554; *Pensher v. Sunderland CC* [2000] RPC 249, 278–9 (Commissioner specifying infringing design). See also *PPL v. CGK Trading* [2016] EWHC 2642 (Ch), [60] (Master Clark) (indifference treated as authorization).

³⁵⁵ *PRS v. Bradford Corporation* [1917–23] MacG CC 309, 314. See also *PRS v. Ciryl Theatrical Syndicate* [1924] 1 KB 1 (managing director not liable for authorizing the infringing performance of a band as director had taken no interest in the content of the performance and was out of the country when it took place).

³⁵⁶ *CBS Inc v. Ames Records and Tapes* [1981] 2 All ER 812 (not authorization).

³⁵⁷ *Moorhouse v. UNSW* [1976] RPC 151, 159 (High Court of Australia) (authorization); cf. *CCH Canadian Ltd v. Law Society of Upper Canada* [2004] SCC 13.

³⁵⁸ As of 2017, levels of infringement through peer-to-peer file sharing are about half as significant as infringement through unauthorized streaming.

³⁵⁹ *Universal Music Australia v. Cooper* [2006] FCAFC 187 (authorization by provision of hyperlinks to infringing material).

³⁶⁰ *Take Two Interactive Software v. James* [2020] EWHC 179 (Pat).

³⁶¹ [1988] AC 1013.

³⁶² *Ibid.*, 1054C.

³⁶³ *Ibid.*, 1053A, E.

³⁶⁴ *Ibid.*, 1053C, E.

³⁶⁵ [2010] EWHC 608 (Ch).

³⁶⁶ *Ibid.*, [46], [78].

³⁶⁷ *Ibid.*, [41]–[45].

³⁶⁸ Ibid., [90]. These factors were cited with approval in *Warner Music UK v. TuneIn Inc.* [2021] EWCA Civ 441, [172]–[174].

³⁶⁹ Ibid., [102].

³⁷⁰ *Dramatico Entertainment v. British Sky Broadcasting* [2012] EWHC 268 (Ch), [73]–[81]; *EMI Records v. British Sky Broadcasting* [2013] EWHC 379 (Ch), [52]–[70]. See Chapter 48, section 3.6, pp. 1326–8.

³⁷¹ We say ‘it seems’, because Arnold LJ used language that implied the authorization was given to the recipient of the stream, but receiving the stream was not identified as an act of infringement: [2021] EWCA Civ 441, [174] (‘it did purport to grant UK users the right to link to the streams from the foreign stations using TuneIn Radio’).

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