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PROBLEMS OF THE LEGAL REGULATION OF THE RIGHT OF COMMUNICATION TO THE PUBLIC OF THE AUDIOVISUAL WORKS ON THE INTERNET

master thesis

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LIST OF ABBREVIATIONS

AG – Advocate General

Association Agreement – Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part

Brussels I – Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

CJEU – the Court of Justice of the European Union

CRM Directive – Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

DSM Directive – Directive of the European Parliament and of the Council On Copyright in the Digital Single Market

EU – the European Union; European Community

InfoSoc Directive – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

Internet Treaties – WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty

OCSSP – Online content-sharing service provider

Rome I – Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

SatCab Directive – Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

TFEU – Treaty on the Functioning of the European Union

TRIPS– The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization

VOD – Video-On-Demand

WCT –WIPO Copyright Treaty

WIPO – World Intellectual Property Organization

WPPT –WIPO Performances and Phonograms Treaty

INTRODUCTION

In the last years, digital technologies have challenged copyright in various ways. The rise of the Internet and daily creation of new devices brought up a new way to exploit works protected under copyright, lead to the impetuous rise of new copyright-driven business models and on the other hand opened the door to the numerous new possibilities to challenge of the right-holders exclusive rights. Though, the aim of the copyright stays unchangeable, even considering the rapidity of the technological development: to protect the exclusive rights of the right-holders and to ensure the balance between one's interests versus interests of society. In the scope of this, the existed exclusive rights rather have to achieve new interpretation and to provide sufficient instruments to ensure the purpose of copyright to be fulfilled.

Researched problem. Is the current approach to the right to communication to the public is sufficient enough to ensure right holders rights to audiovisual works in the online environment and the balance between the right holders' rights and social interests?

Relevance of the final thesis. The relevant topic has been on the spotlight recent years as the Internet provided a number of new instruments to deliver the works protected by copyright, to manage the distribution of audiovisual content in the digital environment and therefore, requires deeper research. Additionally, the relevance of the topic is also proved by the Copyright in Digital Single Market Directive on April 15, 2019, raising the new number of uncertainties for the copyright holders, end users and online platforms how the balance between them shifts within such legal developments. What's more, it can be stated that the Court of Justice of the European Union (CJEU) provides a wide number of case-law in the framework of defining communication to the public, which provides the understanding of this concept and how this exclusive right shall be enforced and protected. At the same time, a number of cases are inconsistent and contradict each other, which leads to the unclearness of the scope of the right in question.

Scientific novelty and overview of the research on the selected topic. Among the European academics who studied this issue can be called E. Rosati, Oliver Budzinski, Nadine Lindstädt-Dreusicke, Mihaly Ficsor, Yves Gaubiac, Ted Shapiro and others. This indicates the issue raised has been investigated, but while most of the researchers focus on the issue of assessment of liability and infringement of copyright online, while it is also required to determine the scope of the concept of the right to communication to the public, which emphasizes the relevance of the problem.

Significance of the final thesis. The Internet has been playing an important role in the daily acts of every human and commercial activity. Recent years the topic of the correlation of law and technology and how digital environment leads to the change of the current legislation. Copyright is not an exception and therefore also relies on the technological developments and had been

significantly impacted by the Internet. Therefore, it is significant to determine how right to communication to the public, which was firstly introduced by Internet Treaties as such right is the direct result of the technological developments.

The Aim is to analyze international, European and Ukrainian legal acts, regulating the right to communication to the public, identify if such regulation is sufficient for the audiovisual works in the digital environment, how current legislation can be interpreted and how it is performed by the right holders and end-users and shall it be changed or developed further.

In order to achieve aim provided the following *objectives* were formulated:

1) to examine how the digitalization benefited economically the copyright in the last 10 years and to define the rise of copyright-driven business models, expansion of the accessibility of the works online for the end users;

2) to evaluate what legal issues were raised by the digitalization of copyright, how the delivery of the audiovisual works evolved and to legally define the concept of 'new media rights' for audiovisual content;

3) to assess current international, European and Ukrainian legislation and case law of the CJEU on the relevance of the definitions and approaches provided in;

4) to analyze the intentions of the legislator as to the possible amendment of the right to communication on the Internet;

5) to introduce a possibility of the establishment of the test regarding the right to communication to the public in the online environment on the basis of the CJEU to avoid the rise of new legal issues provided by the possible future growth if the Internet.

Research methodology. In the master's thesis have been using the following methods as the comparative legal method, system-structural method, formal dogmatic method, and analytical method. The comparative method provided the possibility to compare existing legal acts on the international and European level; to compare legal acts being interpreted by the case-law and new legislation and how it correlates. The system-structural method was important for the attempt to provide the system of assessment of the right to communication to the public, while the formal dogmatic method was necessary to apply abstract legal acts to the specific situation and to make conclusions by means of the analytical method.

This research is based on the following structure. The master thesis includes three chapters. The first chapter covers the two sides of how Internet has impacted copyright economically and legally and what kind of benefits it raised for copyright, and namely the right of communication to the public and what challenges it has also raised. The second chapter is devoted to the current international, European and Ukrainian legislation in the framework of audiovisual works and how the right to communication to the public is secured internationally, in the European Union and in

Ukraine. The key purpose of this chapter is to analyze the current level of legislation in the researched sphere. The third chapter examines future legal developments in the framework of the right to communication to the public to resolve the issues the Internet had brought up. In the first subchapter Copyright in Digital Single Market Directive, that has been recently adopted by the European Parliament and approved by the European Council, how it may influence the market of communication of audiovisual content online and analyze of how it impacts the balance between the right holders and end user. The third subchapter has: the aim to propose the following resolutions: the issue related to the territorial principle of copyright and how it correlates with the Internet and communication to the public online and how to avoid territorial restrictions within the European Union to ensure the rights of the end users. It also analyzes how new media ways of delivery of content online correlate with the right to communication to the public and may they influence the further legal amendments; how considering the worked out the case of CJEU and how it can help establish an assessment test for the determination of the right to communication to the public. The last subchapter is devoted to the applicability of the Copyright in Digital Single Market Directive and assessment test provided to the Referral made to the CJEU as to the case related to the YouTube and whether the activity of this platform constitutes the act of communication to the public.

Statement of the defense. The concept of the right to communication to the public in the digital environment is broad and uncertain, therefore it is required to review how digitalization impacts the communication to the public of audiovisual works and how it can be assessed without radical amendments to the current legislation.

CHAPTER 1 COPYRIGHT AND DIGITALIZATION

1.1. Benefits Raised by the Evolution of Technology for Copyright

1.1.1. Raise of the Copyright-Driven Business

The concept of the creative economy was firstly introduced in 2000 in the "Business Week" as Richard Florida recalls in his research[1]. He also refers to the research of John Howkins[2], who includes to the creative economy over 15 sectors of the creative industries, including such as software development, research and design, and sectors of creative content, such as music and video content. Mr. Florida defines that creative industries partly rely on copyright, patenting, trademark law and etc. in their existence.[3] The main emphasis in this research stipulates the sector of creative content, specifically video content.

As to the legal attempts to define copyright-driven businesses, World Intellectual Property Organization (WIPO) in 2003 introduced a methodology that distinguishes copyright-intensive industries and divides them into four main groups: i) core, ii) interdependent, iii) partial, and iv) non-dedicated support. Core copyright industries in WIPO's opinion are the one that are wholly engaged in creating, producing and manufacturing, broadcasting of the works. Related to audiovisual works industries from the list WIPO stipulated are business related to motion picture and video and radio and television. WIPO also considered the necessity to identify interdependent, partial copyright and non-dedicated support industries.[4]

It shall be noted, that the WIPO is definition system is relatively old due to the technological evolution and the change of the creative industries since 2003, as it was noted by the report Organization for Economic Co-operation and Development.[5] Moreover, since 2012 structure of the copyright-driven businesses was turned over by the Internet and the music and video industries gained new stage of development with the establishment of the "video on demand" services (iTunes, Netflix, Apple Music, Spotify, Hulu, Amazon Video etc.), which lead to a new approach to the economic growth and worldwide distribution of the video content.

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[1] Richard Florida, *Rise of the Creative Class* (Tandem Library, 2003), 49.

[2] John Howkins**,** *The Creative Economy: How People Make Money from Ideas* (Penguin UK, 2002), accessed 2019 March 24, Google Books, https://books.google.com.ua/books/about/The_Creative_Economy.html?id=znXx2zJGY9QC&redir_esc=y

[3] Florida, *Rise of the Creative Class* (2003), 50.

[4]Organization for Economic Co-operation and Development, *Enquiries into Intellectual Property's Economic Impact, Copyright in The Digital Era: Country Studies*, 2015, accessed 2019 March 24, https://www.oecd.org/sti/ieconomy/Chapter5-KBC2-IP.pdf

[5] Ibid.

The beginning of the technology rise shall be analyzed to estimate how the new approach to the content delivery appeared and gave the rise to new business models within the digital environment.

In summer 1999, in the United States of America, the Napster was created and peer-to-peer (P2P) file sharing, which was the result of the possibility to digitalize content and paired with the availability of the Internet to the people. Napster has opened a new door for the appearance of digital piracy.[6]

As Jessica Hu, Charlene Leus, Barbara Tchobanian & Long T. Tran correctly analyzed in their research on Copyright and Napster influence on it, the Napster system provided free "music share" software from its website for users to exchange these music files. Such software gave its users the possibility to connect their computers to a hub of servers maintained by Napster and interact with other software developed and maintained by Napster on its computer servers. After registering, they could to receive, through the process of Internet downloading, the free music share software that was required to use the Napster program.[7]

Even though the Napster was shut down after in 2001 after the outcome of the case *A&M Records, Inc. v. Napster, Inc.*[8], when the Court's injunction consistent with its opinion against any of Napster's future infringing activities, it re-shaped the channels of the content delivery and gave the stakeholders the new challenges.[9]

Piracy, as we know, itself is a negative legal phenomenon and infringement of the international and national legal framework, thus, the fact that it pushed the right holders to re-think their business approach and measures cannot be denied. Digital piracy provided the consumers access to the libraries of the huge amount of content for free, thus which mostly resulted in low-quality, advertisement overwhelmed piracy platforms and this is where the copyright-driven businesses started to act in the new ways to prevent consumers for receiving their content illegally.

This how the most popular VOD services came to the market, such as Netflix, iTunes, Hulu, Amazon PrimeVideo, etc., using a different type of the interaction with the end-user to influence legal consumption of the video content.

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[6] Jessica Hu, Charlene Leus, Barbara Tchobanian & Long T. Tran, *Copyright vs. Napster: The File Sharing Revolution* (University of California Irvine Law Forum Journal Vol. 2 Fall 2004), accessed 2019 March 25, https://www.socsci.uci.edu/lawforum/content/journal/LFJ_2004_compilation.pdf

[7] Ibid.

[8] 239 F.3d 1004 (9th Cir. 2001); 114 F. Supp. 2d 896 (2000); 54 U.S.P.Q.2d 1746 (2000) quoted in Lisa M. Zepeda, *A&M Records, Inc. v. Napster, Inc.*, (17 Berkeley Tech. L.J. 71 (2002), accessed on March 24, 2019, https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1341&context=btlj

[9] Ibid.

1.1.2. Definitions of Globalization, the Right Holders and End-Users

Online consumption of the content has influenced both copyright holders (meaning content creators, producers, distributors, etc.) and end users of such content. To stipulate how globalization influenced the right holders and the end users, the proper definitions of 'globalization', 'right-holders', 'end users' shall be presented.

Globalization, as Ralf Christian Michaels correctly mentioned, does not have universally accepted definition[10], therefore, any notion of it can be considered subjective and evaluative. Where Mr. Michaels is considering globalization as reality, theory and ideology[11], for this particular research, the approach of Terence C. Halliday and Pavel Osinsky is more relevant.

In their article "Globalization of Law"[12], they tend to distinguish between two elements of globalization in whatever sphere it occurs. Structural changes occur (a) through increases in the flows of people, money, ideas, and material objects; (b) through responsive adaptations and adjustments of local institutions; and (c) through alterations in governance structures of global institutions and through some measure of organization of control by nation-states or substrate governmental actors. Discursive changes occur through alterations in the meaning attached to structural changes.

To be clear, the present research is related to the private sphere of law, namely intellectual property law, therefore, we will not go into details about the impact of the globalization on the state's stakeholders.

For the purpose of defining the impact of globalization on copyright, it shall be defined as a process of interaction between people and end companies as a result of the global market economy with the low level of the direct governments' influence.

A right holder refers to a legal entity or person with exclusive rights to protected copyright, trademark or patent, and the related rights of producers, performers, producers, and broadcasters. A right holder may license a portion or all of a protected work through international legal and licensing provisions. There is no standard definition of the right holder in the international and national legal framework, thus the notion presented is the result of the accumulation of the

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[10] Michaels Ralf, *Globalization and Law: Law Beyond the State* (Law and Social Theory: Second edition, edited by Reza Banakar and Max Travers, Hart Publishing, Oxford and Portland, Oregon 2013), accessed on ReseachGate, accessed 2019 March 25, https://www.researchgate.net/publication/256055356_Globalization_and_Law_Law_Beyond_the_State/citations, 288.

[11] Ibid, 288.

[12] Halliday, Terence C. and Osinsky Pavel, *Globalization of Law*. (Annual Review of Sociology, Vol. 32, August 2006), accessed on Academia.edu, accessed 2019 March 25, https://www.academia.edu/19159139/Globalization_of_Law, 448.

provisions provided by the Berne Convention[13], WIPO Copyright Treaty (WCT) [14] and The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (TRIPS)[15].

When we talk about audiovisual content nowadays, the big amount of the right holders are transnational companies. At this point, according to the report published in September 2017 from Research and Markets forecasts, streaming VOD revenue in Western Europe will nearly triple from $4.4 billion in 2017 to about $12.5 billion in 2023, near the value of the streaming VOD market in the U.S. today.[16]

Considering this reasoning, it is necessary to define the legal nature of transnational companies, which such as Facebook, Amazon, Apple, Netflix, and Google.

In an attempt to stipulate the definition of transnational corporations, the United Nation's Norms on Responsibility of Multinational Corporations and other Business Enterprises with regard to Human Rights provides in that definition of transnational corporation directs to a commercial entity that conducts its activity in more than one country or an accumulation of such entities that conducts in two or more countries, whichever their legal form, their home country or country of activity.[17]

As Olufemi O. Amao properly prescribed in his research regarding possibility of global company law for transnational corporations, a web of economic relationships which surpass the control of any one state and often operate beyond the reach of any national law has led to the recognition of the challenges posed by their operations for traditional legal frameworks.[18]

The emergence of transnational corporations is a direct result of the rise of technology and globalization, which benefited such corporations giving them access to the end users worldwide.

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[13] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, WIPO, accessed on WIPO website, accessed 2019 March 25, https://www.wipo.int/treaties/en/text.jsp?file_id=283698

[14] WIPO Copyright Treaty, adopted in Geneva on December 20, 1996, accessed by WIPO website accessed 2019 March 25, https://wipolex.wipo.int/en/text/295157

[15] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), accessed on WTO website, accessed 2019 March 25, 1995, https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm

[16] Andrew McDonald, *SVOD use in Western European tipped to reach 69% of homes by 2023 (*DigitalTV Europe), accessed 2019 March 25, https://www.digitaltveurope.com/2018/09/10/svod-use-in-western-european-tipped-to-reach-69-of-homes-by-2023/

[17] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), accessed 2019 March 25, par. 20, http://hrlibrary.umn.edu/links/norms-Aug2003.html

[18] Olufemi O. Amao, *The foundation for a global company law for multinational corporations*, (International Company and Commercial Law Review, 2010, I.C.C.L.R. 2010, 21(8), 275-288)) accessed on Westlaw UK:, accessed 2019 March 26.

This leads to defining the end-user of the services of such corporation.

Within the legal notions, the most suitable synonym for the end-user is a consumer.

The notion of the consumer has been defined in the regulations Brussels I[19] and Rome I[20], which include specific rules for consumer protection. To sum up the provisions of above-mentioned acts, the consumer is a natural person who is acting for the purposes which are outside his trade, business, and profession.[21] The wide exception can be found in Package Travel Directive[22] which uses a broad notion of 'consumer', extending it to include companies and business travelers (as purchasers and users of travel services).[23]

As Jana Valant correctly noted in the European Parliament research on consumer protection, the legal notion of the consumer in the EU legislation is built on the negative spectrum, providing the scope of activity that is out of the natural person purposes.[24]

Thus, such notion can be considered vague regarding the topic of the research, therefore, we shall refer to the national legal framework for some clarity. For example, in the Law of Ukraine On Consumer Protection[25] , the consumer is an individual who purchases, orders use or intends to purchase or order products for personal needs that are not directly related to entrepreneurial activity or the performance of the duties of a hired employee.

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[19] Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**, (**Official Journal L 012 , 16/01/2001 P. 0001 – 0023), accessed 2019 March 26, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001R0044

[20] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), (Official Journal of the European Union. L (177) 2008-07-04), accessed 2019 March 26, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32008R0593

[21]Jana Valant, *In-Depth Analysis On Consumer Protection* (EPRS - European Parliamentary Research Service, September 2015, — PE 565.904) accessed 2019 March 26, http://www.efcc.eu/media/1693/2015-09-ep_study-consumer-protection.pdf

[22] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (Official Journal of the European Union. L (326). 2015-12-11) accessed 2019 March 26 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.326.01.0001.01.ENG&toc=OJ:L:2015:326:TOC

[23] Rafal Manko, *The notion of 'consumer' in EU law*, (Library Briefing Library of the European Parliament 06/05/2013) accessed 2019 March 26, http://www.europarl.europa.eu/thinktank/en/document.html?reference=LDM_BRI(2013)130477

[24] Jana Valant, *In-Depth Analysis On Consumer Protection* (EPRS - European Parliamentary Research Service, September 2015, — PE 565.904) accessed 2019 March 26, http://www.efcc.eu/media/1693/2015-09-ep_study-consumer-protection.pdf

[25] Law of Ukraine On Consumer Protection (Publication of the Parliament of Ukraine as of 1991, No. 30, p. 379) accessed 2019 March 26, https://zakon.rada.gov.ua/go/1023-12

Therefore, in the scope of the research, the Ukrainian notion is more relative regarding the wider approach not including negative exceptions and at the same time narrow as it includes only natural persons, which suited suits the end-user of the services provided by transnational companies regarding the distribution of the video content.

Globalization as a phenomenon gave the right holders easily to communicate content in their ownership to the unlimited number of consumers via the Internet, which completely changed how right holders create and distribute their content.

1.2. Current Legal Issues Raised by the Evolution of Technology for Copyright

1.2.1. New Wave to Approach Cross-Territorial Nature of Copyright

In the digital environment any kind of content, including audiovisual works can be posted, sent anywhere in the world by both legal and illegal means. While the legal distribution of the content globally, as it was mentioned in par. 1.1.2., defiantly benefits both right holders and the end users, the illegal global access to the content protected by copyright causes negative consequences to the right holders, such as financial losses. Therefore, it also can harm the end users, as it is proven, the major right holders tend not to distribute their content to the countries with the high level of piracy, leaving the consumers with the access to either illegal low-quality content or absence of the interested content at all.

The percentage of internet users in Europe that occasionally downloads or streams music, films, series, books or games illegally decreased between 2014 and 2017.[26] This decrease is strongest for music, films, and series. Meanwhile, expenditure on legal content has increased since 2014. This follows from the Global Online Piracy Study that the Institute for Information Law of the University of Amsterdam.[27]

Thus, it can be perceived, that consumers are willing to pay digital content if is available to them and the geo-blocking practice initiated by the right holders leads to the piracy and to the low interest of the consumers, when the right holder decides to change its policy for such territory.[28]

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[26] Joost Poort et al., João Pedro Quintais, Martin van der Ende, Anastasia Yagafarova, Mathijs Hageraats, *Global Online Piracy Study*, (University of Amsterdam, IViR (Institute for Information Law July 2018), accessed 2019 March 26, https://www.uva.nl/en/content/news/press-releases/2018/07/number-of-internet-pirates-in-europe-decreases-legal-media-consumption-rising.html?1554284199106

[27] Ibid.

[28] European Commission, *Factsheet: Improving access to Audio-Visual programs across the EU*, published on 13 December 2018, accessed 2019 March 26, https://ec.europa.eu/digital-single-market/en/news/factsheet-improving-access-audio-visual-programmes-across-eu

As it is known, Article 5 of the Berne Convention provides that each signatory State must grant the nationals of other member states the same rights within its territory as its own nationals and that this protection is governed exclusively by the law of the country for which the protection is being claimed regardless of any existing protection in the country of origin of the work.[29]

Therefore, the Berne Convention provides the principle of territoriality for the copyright protection, giving States the right to navigate their national legal frameworks within the scope of the Berne Convention, so copyright is protected and exploited on a country-by-country basis.[30] So, as a result the per-country license is required.

Even though the European Union attempts to harmonize the copyright legislation within the Member States, each Member State still has its own national regime for copyright, and thus, even within the European Union, there is the low level of unitary within this matter.

According to the research of Directorate General for Internal Policies Policy Department, content-related services that are proposed across the EU demand licenses from the right holders covering all the territories in question. If such service is proposed to all consumers residing in the EU, as it for most services offered by the Internet, rights for all 27 Member States have to be cleared. Such problem is particular if the rights in the Member States in question are managed by different right holders or other kind of management. For example, research refers to the rights in cinematographic works that are often owned and/or managed by different number of representatives.[31]

The Internet had a purpose to give people of borderless access and this is where the law, including copyright and the Internet, conflicted. [32]

The problem of geo-blocking of the content protected under copyright has been on the spot for the few years in the EU now. As we know, some companies recognize an internet user's location and either block them from accessing the restricted content or redirect them to another website that permits their location. In others, companies block services to users that have an

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[29] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.
[30] Ibid.
[31]Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Legal Affairs, *Copyright Territoriality In The European Union*, (Institute for Information Law, University of Amsterdam, February 2010), accessed 2019 March 26, http://www.europarl.europa.eu/RegData/etudes/note/join/2010/419621/IPOL-JURI_NT(2010)419621_EN.pdf
[32] Jacklyn Hoffman, *Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union*, (49 Geo. Wash. Int'l L. Rev. 143 (2016), accessed on HeinOnline, accessed 2019 March 26.

address or credit card registered in a restricted country. Restrictions allow companies to charge different prices depending on a consumer's location.[33]

As the digital single market strategy is a goal of the European Union for the last few years, the Geo-blocking Regulation' was accepted with the purpose to address unjustified online sales discrimination based on customers' nationality, place of residence or place of establishment within the internal market. [34]

Thus, Geo-blocking Regulation did not expand to the audio-visual services. Services linked to non-audiovisual content protected under copyright and related rights were also not covered by the Regulation's prohibition of applying different conditions of access for the consumers.[35]

Thereby, as it was stated in the press release of the European Parliament, within two years after the entry into force of the new rules, the Commission shall carry out the first evaluation of their impact on the internal market, that will include a possible application of the new rules to certain services supplied online which offer content protected under copyright such as music, e-books, software, and online games and audiovisual content.[36]

The second step to the attempt to abolish geo-blocking was made when Portability Regulation[37] was adopted. The objective of the portability rules is to broaden access to online content services for travelers in the EU. Europeans, according to the European Commission, will be able to fully use their online subscriptions to films, sports events, eBooks, video games and music services when traveling within the EU.[38]

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[33] Melisande Cardona, *Geo-blocking in Cross-border e-Commerce in the EU Digital Single Market*. (Institute for Prospective Technological Studies, Joint Research Centre. Digital Economy Working Paper 2016/04), accessed 2019 March 26, https://ec.europa.eu/jrc/sites/jrcsh/files/JRC101438.pdf

[34] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, (Official Journal of the European Union. L (060I). 2018-03-02) accessed 2019 March 27, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R0302

[35] Ibid.

[36]European Commission, *Geo-Blocking: a new Regulation enters into force*, Press-release, accessed 2019 March 27, https://eur-lex.europa.eu/content/news/geo-blocking-regulation-enters-into-force.html

[37] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, (Official Journal of the European Union. L (168). 2017-06-30) accessed 2019 March 27, https://eur-lex.europa.eu/eli/reg/2017/1128/oj

[38] European Commission, *Policy On Cross-border portability of online content services* (published on the website of the European Commission, last update 1 April 2019), accessed 2019 April 01, https://ec.europa.eu/digital-single-market/en/cross-border-portability-online-content-services

However, this law does not allow you to pay for a subscription to a VoD service not offered in your home Member State in the first place, as Frank Gotzen correctly indicated in his research.[39]

Thus, the cross-border access to TV and radio programs is not finished question in the EU and is raised by the legislator's attempts addressed in the SatCab Directive reform, which will be discussed in 2.2.2.

While the piracy was the enemy of the right holders for a long time, the territorial limitation harms rather consumers, but can at the same time stimulate piracy due to the absence to the desired content. As it was indicated in recital 26 of the proposal to the Portability Regulation, it shall *'should also prevent copyright owners from having to renegotiate existing licensing agreements with a view to allowing providers to offer cross-border portability of their services'.* [40]

Indeed, the aim of the legislator not to push the right holders to the unnecessary obligations seems proper and does not harm private inserts of the right holders. Thus, in this situation, without legislator initiative to enforce the market players to fall in with their own ideas of borderless Internet is required to ensure end users protection, however the at same time without change in the international and national copyright laws regarding principle of the territoriality of the copyright within the EU, there will be no initiative from the right holders.

1.2.3. New Forms of Exploitation – New Media Rights for Audiovisual Content: Streaming, P2P etc.

New Media has significantly grown due to the evolving of the Internet, which, as it was previously mentioned, lead to the complex challenges for the copyright system within the world in the past years. The Internet has re-shaped the system ruined the borders for the content delivery, which changed the copyright in its core. New media includes websites, streaming, audio and video, chart rooms, e-mail, online communities, web advertising, DVD and CD-ROM media, virtual reality environments and number of other types of services.[41]

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[39] Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Legal Affairs, *In-Depth Analysis On the portability of online services as part of the modernization of copyright in the European Union*, (June 2016) accessed 2019 April 01, http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571359/IPOL_IDA(2016)571359_EN.pdf

[40] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017, (Official Journal of the European Union. L (168). 2017-06-30).

[41] Anthony O. Uche, Uche Ebeze, Adanma V. Obiora, *Intellectual Property And The New Media: Issues Andchallenges*, accessed on Academia.edu, accessed 2019 April 1, https://www.academia.edu/30767297/INTELLECTUAL_PROPERTY_AND_THE_NEW_MEDIA_ISSUES_AND_CHALLENGES

Relevant copyright legislation is respectfully important to the audiovisual media industry, which is a significant part of the creative economy market and the worldwide economy itself, which is why proper securing of the legal status of the ways of usage of the video content is required.

Firstly, Rental and Lending Directive provides the definition of the film, where 'film' means "*a cinematographic or audiovisual work or moving images, whether or not accompanied by sound"*.[42]

To go into a detailed analysis of the definition of the new media rights currently, it shall be noted that the most common and widely used distribution channel of video content online is a video on demand also usually called On-Demand.

As to the service providers, there is the existing legal definition of audiovisual media service in the Audiovisual Services Directive. According to it, audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to concept of services as defined by the Treaty on the Functioning of the European Union (TFEU) and therefore, it should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, including private websites and services consisting of the provision or distribution of audiovisual content generated by private users, i.e. social networks.[43]

At the same time, Portability Regulation[44] also provides the definition of the online content service', which means a service where a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is: '(i) an audiovisual

[42] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, (Official Journal of the European Union. L (376). 2006-12-27), accessed 2019 April 1, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0115

[43] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive (Official Journal of the European Union. L (95). 2010-04-05), accessed 2019 April 1, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010L0013

[44] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, (Official Journal of the European Union. L (168). 2017-06-30) accessed 2019 April 1, https://eur-lex.europa.eu/eli/reg/2017/1128/oj

media service as defined in point (a) of Article 1 of Audiovisual Services Directive[45] (notion indicated above), or (ii) a service the main feature of which is the provision of access to, and the use of, works, other protected subject-matter or transmissions of broadcasting organizations, whether in a linear or an on-demand manner'.[46]

On-Demand is being known as a system which provides its users with the possibility to select and watch to video content such as movies and TV shows at any time they choose. VoD can be provided to consumers by different models, such as catch-up TV, various subscription models, ad-supported video on demand, etc.[47]

To further categorization if stipulated above channels of delivering content and if they fall under the existing definitions, do they fall into the right communication to the public or shall receive a completely new legal regulation, the nature of these video on demand models shall be analyzed.

From the legal point of view, the on-demand services may be categorized as the one that falls in the notion of audiovisual media services provided by Audiovisual Services Directive[48] or not as it was made by research of Christian Greece and others in the research prepared for the European Commission.[49]

The broad categorization of the on-demand services was provided in the research mentioned[50], where their the on-demand services such as: Catch-up TV, Preview TV, branded services on sharing platforms, VOD. Catch-up TV service is considered an on-demand audiovisual service provided by a broadcaster who makes available recent programs, after their initial broadcasting of them and during a limited period of time and **preview** TV service is the one, that allows the user to access TV programs before their broadcast release, mostly on paid basis. [51]

VoD services are those services providing access on demand to a catalog of films or audiovisual programs independently of any television broadcast of those works. While VoD

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[45] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, (Official Journal of the European Union. L (95). 2010-04-05).
[46] Ibid.
[47] Callie Wheeler, *Advertising Terminology: A Primer for the Uninitiated or Confused*, (Videa. 2016-05-16, Retrieved 2018-12-24) accessed by Videa website, accessed 2019 April 1, http://www.videa.tv/2016/05/advertising-terminology-a-primer-for-the-uninitiated-or-confused/
[48] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, (Official Journal of the European Union. L (95). 2010-04-05).
[49] Christian Grece, *On-Demand Audiovisual Markets In The European Union,* (prepared for the European Commission DG Communications Networks, Content & Technology by European Audiovisual Observatory and Council of Europe, European Union, 2014), accessed 2019 April 02, ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=6352

[50] Ibid.
[51] Ibid.

services can be provided by various number of financial models (digital retail by means of downloading or lending, payment-per-work based, advertising-supported VoD with free videos), but most popular approach is considered the subscription-based, which is defined as a service that gives users unlimited access to a wide range of programs for a monthly flat rate, such as Netflix, Amazon Prime Video, Hulu, etc. [52] The others services, that are falling out of the definition provided under the Audiovisual Media Services Directive, are video-sharing platforms (YouTube), social networks, that allow uploading videos, promotional websites video-content, etc.[53]

Therefore, as to the research, we can conclude that by means of the Internet the content may be provided by (1) downloading (video is transmitted through the Internet in the provided format, which can be played on the video players and downloaded on the user's devices and any offline playback); (2) download with the specific player (video is transmitted through the Internet in the specific format, which can be played on the specific player and downloaded on the user's devices and any offline playback); (3) streaming (video is streamed through the Internet, in an open or proprietary format, under the Internet connection and does not allow for offline playback as video is not "stored" on the user's device); (4) peer-to-peer (video is exchanged between multiple users, downloaded to the devices and can exist in multiple formats); (5) through an open platform (video is streamed in the user's browser or application, requiring the Internet connection); (6) though the store or mobile application (video is transmitted via the Internet on the closed platform or application).[54]

As economists Oliver Budzinski & Nadine Lindstädt-Dreusicke correctly mentioned, where once "traditional" (free-to-air, cable, satellite) television was dominating, currently audiovisual media services, displays n strong growth of different types of video-on-demand, i.e. nonlinear audiovisual media services, including both paid VoD like Amazon Prime and Netflix and free like YouTube. [55] To sum up, the review of the current legislation is required to follow up with the market and the questions it is raising.

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[52] Ibid.
[53] Ibid.
[54]Ibid.
[55] Oliver Budzinski & Nadine Lindstädt-Dreusicke, *The New Media Economics of Video-on-Demand Markets: Lessons for Competition Policy*, (Ilmenau Economics Discussion Papers, Vol. 24, No. 116, Ilmenau University of Technology Institute of Economics) accessed 2019 April 02, https://www.econstor.eu/bitstream/10419/184728/1/1039859488.pdf

CHAPTER 2 THE LEGAL FRAMEWORK AS TO THE RIGHT TO COMMUNICATION TO THE PUBLIC OF AUDIOVISUAL WORKS

2.1. International Legislation

The first major international regulation related to copyright was Berne Convention, which was signed in 1886, and came into force on December 05, 1887[56], and established general international copyright rules, giving the signature parties legal framework to operate within and stipulated some level of international legal certainty internationally.

When the Berne Convention, there were no provisions in it regarding the communication to the public right, which is understandable as the Convention was signed in 1886, where there no technological instruments possible for such acts.

Thus, in 1971 the Berne Convention Paris Act provided the right of communication to the public in a few articles, using different notions to define one particular thing[57]. As it was correctly stated by Jane C. Ginsburg in her research, the Berne Convention 1971 Paris Act covered the right of communication to the public is incomplete and imperfect provided by tangle of occasionally redundant provisions on "public performance;" "communication to the public," "public communication," "broadcasting," and other forms of transmission. Additionally, Jane C. Ginsburg added, that the scope of rights hinged on the nature of the work, with some works receiving the broadest protection, and images, for example, the least; literary works, especially those adapted into cinematographic works, lying somewhere in between. [58]

Indeed, in the times when the Berne Convention 1886 and Berne Convention 1971 Paris Act were concluded, the development of digitalization was on its early stage and did not provide any prerequisites for the review of the existing scope of rights, therefore, as it was properly noted by the former Assistant Director General of WIPO, Mihaly Ficsor in his research of the copyright and the Internet, the notion of 'public performance' that was given in Berne Convention clearly means the performance in the physical presence of the public or, at least, at place open to public and it is obviously not relevant directly in the digitally networked environment, so no acts that involve transmission of works was not extended to communication to the public. [59]

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[56] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.
[57] Ibid.
[58] Ginsburg, Jane C., *The (New?) Right of Making Available to the Public* (Columbia Public Law & Legal Theory Working Papers. 0478, October 2004), accessed 2019 April 02, https://lsr.nellco.org/columbia_pllt/0478
[59] Mihaly Ficsor, *Copyright for the Digital Era: The WIPO Internet Treaties*, (21 Colum. -VLA J.L. & Arts 197 (1997), accessed on HeinOnline, accessed 2019 April 02.

2.1.1. WIPO Copyright Treaty

So, the adoption in 1996 of the WIPO Copyright Treaty[60] and WIPO Performances and Phonograms Treaty[61] (also called Internet Treaties) was a logical decision of the international community to answer the challenges raised by the Internet development. As the research aims to analyze the right to communication to the public regarding the work protected under copyright – audiovisual work, therefore, the WCT shall be analyzed detailly.

The authors of the WCT sought a way to address the growth of the new technologies, that directly influenced the exploitation of the works protected under copyright.

Yves Gaubiac expressed his concern on the fact that the Treaty did not solve the co-existence of the rights of reproduction and of communication and it may generate certain uncertainties, that are exercised simultaneously when a work is made available on the Internet since its communication to users necessitates several acts of reproduction on different sites during transmission on the network. [62]

According to the Mihaly Ficsor, at that time the assistant director of the WIPO, during the preparatory work of the text of the Treaty, WIPO committees struggled to decide where the transmission of the works on the Internet shall fall within the right to communication to the public or rather be a part of the right to distribution.[63]

To follow up the opinion expressed by Yves Gaubiac[64] as to the co-existence of the rights of reproduction and any type of communication, Mihaly Ficsor noted that the drafters of the proposed text of the Treaty understood that the need to apply either the right to communication to the public or the right to distribution emerged, because it was recognized that reproductions occur during any type of transmissions by digital means, thus the application solely the right of reproduction to such acts is not sufficient enough.[65]

Dr. Ficsor himself rooted for the "umbrella solution", insisting that the act of digital transmission shall be provided neutrally way, free from specific legal reference. In addition, Dr.

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[60]WIPO Copyright Treaty, 1996.

[61] WIPO Performances and Phonograms Treaty, adopted in Geneva on May 20, accessed 2019 April 02, https://wipolex.wipo.int/en/treaties/textdetails/12743

[62] Yves Gaubiac, *Remarks about the Internet in International Copyright Conventions*, (Perspectives on Intellectual Property, Sweet & Maxwell, 1999), accessed 2019 April 02, https://www.kimbroughlaw.com/articles/remarksinternetinternationalcopyrightconvention.html

[63] Mihaly Ficsor, *Copyright for the Digital Era: The WIPO Internet Treaties*,(1997).

[64] Yves Gaubiac, *Remarks about the Internet in International Copyright Conventions,* (1999).

[65] Mihaly Ficsor, *Copyright In The Digital Environment: The Wipo Copyright Treaty (WCT) And The Wipo Performances And Phonograms Treaty (WPPT)* (Center for Information Technology and Intellectual Property (CITIP), Budapest, February 2005, WIPO/CR/KRT/05/7) accessed 2019 April 03, https://www.wipo.int/edocs/mdocs/arab/en/wipo_cr_krt_05/wipo_cr_krt_05_7.pdf, p.11.

Ficsor stated that such concept should not be technology-specific and, simultaneously, it should express the interactive nature of digital transmissions in that way that it should match with specification that a work is deemed to be made available to the public, when the public may have access to it from different places and at different time[66]. Dr. Ficsor believed that the legal characterization of the exclusive right shall be in the discretion of the national legislators.[67]

Following, the right of communication is recognized under Article 8 of the WCT in the following terms:

"... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[68]

The final version of the text of the Article 8 of the WCT was not that neutral as Dr. Ficsor insisted as the wording provided did not turn out 'neutral' and excluded the right to distribution form possible application.[69] Thus, at the same, the wording of the Article 8 *de facto* provided the national laws with the possibility to two options to apply the right to communication narrowly as only transmissions and retransmissions broadly as including making available to the public by the direct contact to it.

In the WIPO Performances and Phonograms Treaty (WPPT) in Article 2(g), the communication to the public is defined as *'of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.'*[70]

It shall be said that it is was a correct move not to create a completely neutral position as it would negatively turn out nowadays. As in was indicated in 1.1. and territorially, the understanding of copyright territoriality limits has significantly changed in the recent years and the works, protected under copyright, that are mostly available worldwide, that why the unitary approach of the international legislation is a necessity to avoid a gap between domestic laws and therefore, the gap between the right holders and end users.

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[66] Ibid, p.14.
[67] Ibid, p.13.
[68] WIPO Copyright Treaty, 1996.
[69] Mihaly Ficsor, *Copyright In The Digital Environment: The Wipo Copyright Treaty (WCT) And The Wipo Performances And Phonograms Treaty (WPPT)* (2005, WIPO/CR/KRT/05/7), p.14.
[70] WIPO Performances and Phonograms Treaty, adopted in Geneva on May 20, 2002, accessed 2019 April 03, https://wipolex.wipo.int/en/treaties/textdetails/12743

2.1.2. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization

TRIPS was created within the framework of the General Agreement on Tariffs and Trade with rather a different goal as the Berne Convention and Internet Treaties. TRIPS was adopted to establish unitary trade rules internationally when the trade relations include intellectual property rights.

Article 7 of the TRIPS states that the protection and enforcement of rights "*should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations*.[71]

TRIPS has not provided something completely different from the Berne Convention as being the basic agreement in copyright internationally. The Agreement does not include a separate provision on the communication to the public right referring to the Berne Convention.

Even though, the draft of the TRIPS tried even to define 'public communication' as the one that ' *shall include communicating a work in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or communicating or transmitting a work, a performance, or a display of a work, in any form, or by means of any device or process to a place [mentioned above] or to the public, regardless of whether the members of the public are capable of receiving such communications can receive them in the same place or separate places and at the same time or at different times'*[72], this version does not make it to the final text of the Agreement.

Not including this definition and any significantly new changes in the final and adopted text of the Agreement may be a result of the goals stipulated by the TRIPS.

As it is indicated in the Article 1 of the TRIPS, the agreement sets minimum obligations for the Member States[73] and provision of the wide detailed notion might enforce a higher level of obligations for the signers of the Agreement.

2.2. Current EU Legislation

2.2.1. InfoSoc Directive

[71] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1995.
[72] Trips Agreement Draft of 23 July 1990 (W/76 published on WTO website, accessed 2019 April 03, https://www.wto.org/gatt_docs/English/SULPDF/92110034.pdf
[73] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1995.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) had a purpose to harmonize legal framework on copyright and related rights, as it was mentioned in the retail 4 of the preamble.[74]

As it is stated in the retail 23 of the preamble to the InfoSoc Directive, it *"should harmonize further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates."*.[75]

As it was mentioned by Justine Pila and Paul Torremans [76], in many European states historically the right of the public communication was defined broadly including both transmission of the work publicly, regardless whenever the public was present at that time and place. Such expanded definition in the EU legislation was secured only regarding databases, while regarding other works it was narrowed to transmission and retransmission[77]. This was confirmed in the Case *C-283/10 Circul Globus Bucureşti*, regarding the communication of musical work to the public during circus shows, where The CJEU found that since the communication of the works involved their live performance before the public that was in direct physical contact with the performers, it shall be considered as the one that falls outside the scope of the right to communication to the public.[78]

So, Article 3 of InfoSoc Directive states that '*MS shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'*.[79]

To sum up, The InfoSoc Directive's approach to the definition of the right to communication to the public is derivative from the WCT notion, therefore, InfoSoc lacks clarity regarding the notion of the act of communication to the public itself, which forced the CJEU to

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[74] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Official Journal L 167, 22/06/2001, P. 0010 - 0019), accessed 2019 April 04, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

[75] Ibid.

[76] Justine Pila, Paul Torremans, *European Intellectual Property Law*, (Oxford University Press, 2016), p. 311.

[77] Ibid, p. 311.

[78] C-283/10, Circul Globus Bucureşti (Circ & Variete Globus Bucureşti) v Uniunea Compozitorilor şi Muzicologilor din România - Asociaţia pentru Drepturi de Autor (UCMR - ADA), ECLI:EU:C:2011:772, accessed 2019 April 03, http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0283&lang1=en&type=TXT&ancre=

[79] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, (Official Journal L 167, 22/06/2001, P. 0010-0019).

provide proper meaning to the right to communication to the public and to the act of communication itself. CJEU's approach shall be analyzed further.

2.2.1. Satellite and Cable Directive

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (SatCab Directive) provides the fair amount of definitions that are necessary for the understanding of the right to communication to the public and what does it include under the current EU legislation.

According to the Article 1(2), *"communication to the public by satellite means the act of introducing, under the control and responsibility of the broadcasting organization, the program-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth, whether the act of communication occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the program-carrying signals are introduced".* [80]

According to the Article 1(3), "*cable retransmission means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programs intended for reception by the public".*[81]

The Directive also provides broadcasting right defining it as '*exclusive right for the author to authorize the communication to the public by satellite of copyright works'*[82], thus by this including in the notion of the right to communication to the public the broadcasting right which includes the communication by satellite.

As Ted Shapiro nimbly noted, that more than two decades since the Directive came into force, Europe's broadcasting landscape has changed dramatically and the provisions of the current Directive does not respond to the challenges raised. [83]

Therefore, the reform of the SatCab Directive was approved by the European Parliament on March 28, 2019, the European Council of April 15, 2019.

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[80]Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Official Journal L 248/15, 6/10/1993), accessed 2019 April 04, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0083

[81] Ibid.

[82] Ibid.

[83] Ted Shapiro, *The consultation on the Satellite and Cable Directive*, (Entertainment Law Review 2016, 27(1), 11-12) accessed on Westlaw UK, accessed 2019 April 04.

Under the new Directive addresses the difficulties related to the clearance of copyright by establishing the principle of the "country of origin", as the European Commission set out clarifying the scope of the amendments made. It was also added that the rights required to make certain programs available on the broadcasters' online services shall be cleared only for the broadcaster's country of principal establishment (instead of all Member States in which the broadcaster desires to make its programs available).[84]

It shall be noted that such principle under the changes made is not obligatory and it applies only to online services of broadcasters that give access to programs, which are transmitted through traditional broadcasts. Additionally, it is only applied to current affairs programs and programs that are fully-financed own productions of the broadcasting organizations.[85]

As a result, consumers will have more choice to watch and listen to online programs transmitted by broadcasters established elsewhere in the EU, which is a significant move for the reforming of the cross-border access to the video content raised in the subchapter 1.2.1, thus it still limited as it shall be discussed further.

2.2.4. Case Law of the Court of Justice of the European Union

As Article 3 of the InfoSoc Directive provides, the right to communication to the public is the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.[86]

Firstly, it includes (a) act of communication of the works directed to (b) the public.

It shall be indicated that the Court is Case *C-466/12 Svensson* that whether Article 3(1) of the InfoSoc Directive must be interpreted as precluding a Member State from giving **wider** protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.[87]

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[84] European Commission, *Fact Sheet, Questions and answers: Directive on television and radio programs*, (Strasbourg, 28 March 2019), accessed 2019 April 04, http://europa.eu/rapid/press-release_MEMO-19-1889_en.htm

[85] Ibid.

[86] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, (Official Journal L 167, 22/06/2001, P.0010-0019).

[87] Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, ECLI:EU:C:2014:76, accessed 2019 April 04, par. 33-34, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0466&lang1=en&type=TXT&ancre=

In the *Case C-306/05 SGAE*, the Court held that "*the term 'public' refers to an indeterminate number of potential television viewers*"[88] , redirecting to the earlier cases such as *Case C-89/04 Mediakabel*[89] and *Case C-192/04 Lagardère Active Broadcast*[90].

In that connection in *Case C-607/11 ITV Broadcasting Ltd*, '*the term 'public' in Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons'*.[91]

With regard to the notion of 'act of communication', there is a number of cases stipulating this complex cocept.

In the case *C-527/15 Stichting Brein* the Court noted that, "*concept of 'communication to the public', […] must be interpreted as covering the sale of a multimedia player, such as that at issue in the main proceedings, on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available to the public without the consent of the right holders'. The Court also summarizes that "concept of 'communication to the public', requires an individual assessment' and that any assessment includes 'several complementary criteria, which are not autonomous and are interdependent"*[92].

Additionally, the notion provided by the InfoSoc Directive includes the right to communication to the public such action as making available to the public. In the case *C-610/15 Stichting Brein* the Court stated that it must be "*interpreted as making available on the Internet, on a sharing platform which, by means of indexation of metadata related to the works and the*

[88] Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, ECLI:EU:C:2006:764, accessed 2019 April 04, par. 37, http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0306&lang1=en&type=TXT&ancre=

[89] Case C-89/04, Mediakabel BV v Commissariaat voor de Media, ECLI:EU:C:2005:348, accessed 2019 April 04, par. 42, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0466&lang1=en&type=TXT&ancre=

[90] Case C-192/04, Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), ECLI:EU:C:2005:475, accessed 2019 April 04, par. 31, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0466&lang1=en&type=TXT&ancre=

[91] Case C-607/11, ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd, ITV Studios Ltd v TVCatchup Ltd, ECLI:EU:C:2013:147, accessed 2019 April 04, par. 33, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0466&lang1=en&type=TXT&ancre=

[92]Case C-527/15, Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler, ECLI:EU:C:2017:300, accessed 2019 April 04, par. 23, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0466&lang1=en&type=TXT&ancre=

provision of a search, allows users to locate those works and to share them in the context of a P2P network".[93]

In mentioned above *SGAE* case, the Court noted that where the dispute was laid down in the issue of the communication to the public in cases where the hotel rooms provide television sets on which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public. The CJEU found the necessity to address the communication to the new public, as the transmission was made to the public different from the public for which the authorization was granted from the broadcasting organization. Additionally, the Court stated that the private nature of the hotel rooms does not preclude the commutation of a work by means of TV sets as the customers of such rooms change regularly and therefore, 'new public', having access to the changes rapidly.[94]

The Court was also asked to determine is the communication of the public exists when TV sets are installed in the bedrooms of a residential health spa establishment gave access to the protected works broadcasted and therefore, conducted unauthorized communication in the Case *C-351/12 OSA*[95]. Under the Court's decision, the communication to the public includes *'communication of their [works protected] works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients.'*[96]

In *Case C-117/15 Reha Training*, the CJEU was asked if the installation on the premises of the rehabilitation centers of TV sets, to which it transmits a broadcast signal and thus makes it possible for television programs to be viewed and heard by its patients constitutes a 'communication to the public'. The Court noted that '*the question of the interpretation of the concept of 'communication to the public' has given rise to significant case-law'.*[97] The Court stated that the communication to the public consists act of communication, that relies on the indispensable role of the user, who shall act intentionally in full knowledge of the consequences

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[93] Case C-610/15, Stichting Brein v Ziggo BV, XS4ALL Internet BV, ECLI:EU:C:2017:456, accessed 2019 April 04, par. 18, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0466&lang1=en&type=TXT&ancre=

[94] Case C-306/05.

[95] Case C-351/12, Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s., OSA, C-351/12, EU:C:2014:110, accessed 2019 April 04, par. 24–33, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0351&lang1=en&type=TXT&ancre=

[96] Ibid, p. 22.

[97] Case C-117/15, Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), intervening parties: Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), ECLI:EU:C:2016:379, accessed 2019 April 05, par. 42–47, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0351&lang1=en&type=TXT&ancre=

of its action, to give access to the protected work to its clients. Furthermore, the concept of 'communication' must be is broad and covers any transmission of a protected work, irrespective of the technical means or process used. By intentionally transmitting broadcast signals to television sets which it installed on its premises, Reha Training made it possible, outside its own private circle, for protected works to be viewed and heard by its patients, who constitute an additional and indirect public which had not been contemplated by the authors when they authorized the broadcasting of their works and, without the intervention of Reha Training, would have been unable to enjoy those works. The Court also noted that in assessing the existence of communication to the public, the 'profit-making nature' of the communication may prove to be relevant, thus, is not an essential condition.[98]

To follow up on the issue of the hotel rooms, spas, rehabilitation centers, the *Case C-135/10 SCF*[99] regarding private dental practices shall be also discussed. The Court decided that the communication of the phonograms by means of broadcast within dental practices shall be free of charge as the phonograms are communicated without the direct actions of the customers, therefore such activity does not constitute communication to the public within Article 3(1) of InfoSoc Directive.[100]

The major difference in hotel rooms, spas, rehabilitation centers vs. dental practices, in the first type of places the technical means (TV and/or radio sets) were installed and therefore, the acts of communication depended on active intentional act of the user of the establishment to turn on that equipment to access the broadcasted works and therefore, constituted a new public, that the rightholder did not authorize for the availability in the first place.

How these decisions of the Court may be correlated with the VoD services shall be developed further in subchapter 3.3.1.

In the Case *C-607/11 ITV Broadcasting*, mentioned before, indicated that the concept of communication to the public shall be interpreted as meaning that it covers "*a retransmission of the works included in a terrestrial television broadcast:*

(i) by an organization other than the original broadcaster,

(ii) by means of an internet stream made available to the subscribers of that other organization who may receive that retransmission by logging on to its server,

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[98] Ibid, par. 64-65.

[99] C-135/10, Società Consortile Fonografici (SCF) v Marco Del Corso, intervening party: Procuratore generale della Repubblica, ECLI:EU:C:2012:140, accessed 2019 April 05, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0351&lang1=en&type=TXT&ancre=

[100] Ibid, par. 98-102.

(iii) even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver".[101]

There is the number of cases of the Court that analyze the contradiction between linking and the communication to the public. Firstly, in the order regarding *Case C-348/13 BestWater International*, the Court found that the protected work, that is freely accessible on the Internet on one website is inserted into another website by means of link using 'framing' technique, i.e. and it cannot be classified as 'communication to the public' within the meaning of Article 3(1) of InfoSoc Directive, since the work is not transmitted to a new public or communicated a specific technical method different from the original communication.[102]

In the Case *C-466/12 Svensson* the position was established that communication to the public shall be understood as provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public', as referred to in the Article 3 of the InfoSoc Directive. The Court again stated that Article 3 includes wider protection of the right holders as the communication to the public includes a wider range of activities that those referred in the provision.[103]

To follow up hyperlinking defining in the CJEU case-law, the important shift was *Case C-160/15 GS Media*, where the following question was raised: whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public'. The Court provided that it is to be determined if those links are provided without the purpose of financial gain by a person who did not know or may not rationally have known that the publication of those works on that other website is illegal.[104]

In the Case *C-161/17 Renckhoff* the CJEU added to the concept of 'communication to the public' - *'posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website'.*[105]

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[101] Case C-607/11, par. 40.

[102] Case C-348/13, BestWater International GmbH v Michael Mebes, Stefan Potsch, OJ C 325, 9.11.2013, accessed 2019 April 05, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0351&lang1=en&type=TXT&ancre=

[103] Case C-466/12, par. 32.

[104] Case C-160/15, GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, ECLI:EU:C:2016:644, accessed 2019 April 05, par. 55-56, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0351&lang1=en&type=TXT&ancre=

[105] Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, ECLI:EU:C:2018:634, accessed 2019 April 05, par. 47, http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0351&lang1=en&type=TXT&ancre=

The case concerned the photographer, whose work was possible to access on the school website a presentation written by one of the school's pupils. The photo was downloaded by the pupil from an online travel portal, where it was posted on the online travel portal without any restrictive measures preventing it from being downloaded. Additionally, the pupil included a reference to that online portal under the photo in the presentation.[106]

The decision fully contradicts the Attorney General's opinion, who stated that inclusion on *'a school's website of an educational work that includes a photographic image freely available to any internet user free of charge, in that the image already appeared on the internet portal of a travel magazine with no warnings regarding restrictions on use, when there is no profit motive and the source is cited, does not constitute a making available to the public within the meaning InfoSoc Directive".*[107]

Important criteria also established in the case law of CJEU regarding the concept of new public, which is necessary for the assessment if the act of communication was made or not. The 'new public' test was introduced in the *Case SGAE*, already mentioned above. The Court referred to Berne Convention, mentioning, that transmission made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public, adding *'when the author authorizes the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the program. […] if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the program via […] analogous instrument […] is an independent act through which the broadcast work is communicated to a new public.'*[108]

Advocate General Sharpston in the Opinion[109] in this case partly referred to the opinion of AG La Pergola in *EGEDA*[110] case, while agreeing on the relevance of "*the economic importance of the new public*", considered that the Berne Convention "l*ays down the principle that the author*

[106]Ibid, par. 7-10.
[107] Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff, Opinion of Advocate General Campos Sánchez-Bordona delivered on 25 April 2018, ECLI:EU:C:2018:279, accessed 2019 April 06, par. 129. http://curia.europa.eu/juris/celex.jsf?celex=62017CC0161&lang1=en&type=TXT&ancre=
[108] Case C-306/05, par. 41.
[109] Case C-306/05.
[110] Case C-293/98, Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa), Opinion of Mr Advocate General La Pergola delivered on 9 September 1999, ECLI:EU:C:1999:403, accessed 2019 April 05, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CC0293

must authorize all secondary use of the broadcast work if this gives rise to independent economic exploitation for financial profit by the person responsible".[111]

Thus, as P. Bernt Hugenholtz and Sam C. van Velze correctly noted, that the Court has not made any reference to the "economic importance" of the 'new public', which according to AGs was a relevant requirement.[112]

Researches mentioned above provided the opinion that the criteria of 'new public' lacks clarity and is not needed. They are arguing that works may be exploited in many different ways, by different media on distinct markets, while at the same time aiming for, or even reaching, precisely the same 'public', which is a classic characteristic of modern-day's audiovisual market place, where the public, i.e. consumers, wish to consume, and pay for usage of the very same works offered by many different media and in multiple formats: on broadcast television, on DVD's, via Netflix, on cable, on mobile platforms, etc. While all these distinct services communicate to the same 'public', the researches noted, that they are acts of "independent economic exploitation for financial profit" – and should be treated accordingly under copyright law. [113]

This opinion shall be taken in consideration as indeed different acts of communication may be correlated to one public, but in this case, we talk about lawful and authorized communication, while in cases of infringements new public test still shall play an important role to determine if the infringement occurred or not.

Eleonora Rosati correctly indicated that, the CJEU has construed the right to communication to the public broadly and in such a way as to encompass a variety types of acts, including the making available of TV sets in certain contexts, linking to protected content, the provision of certain types of set-up boxes, indexing activities by a platform, and cloud-based recording services.[114]

To sum up, the right to communication to the public includes a possibility of (b) an indeterminate number of protentional recipients – fairly large number of persons, (a) to access the work irrespective of whether they avail themselves of such opportunity.

In addition to this, as Eleonora Rosati indicated, the CJEU in few of the cases has also highlighted the importance of considering additional criteria, which are not autonomous and are

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[111] Case C-306/05, par. 55.
[112] Hugenholtz, P.B. & van Velze, S.C., *Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public",* (IIC (2016) 47: 797). accessed 2019 April 05, par. 55, https://doi.org/10.1007/s40319-016-0512-7
[113] Ibid.
[114] Rosati, Eleonora. *Copyright and the Court of Justice of the European Union*, OUP Oxford. Kindle Edition, p. 95.

interdependent, and may—in different situations—be present to widely varying degrees. She indentded that such criteria must be applied both individually and in their interaction with one another.[115]

Clearly, from one point of view, such wide approach follows the discretion given by the WIPO Copyright Treaty[116] and the InfoSoc Directive[117], thus, from another of view, absence of the clear criteria harms the stability and development of the market and its participants.

It should be added that absence of clear consistent approach of the Court regarding the act of communication and its consequences, brings legal uncertainty for both right holders and users due to no clear understanding where the users' actions are legal or not (as in *Case C-527/15*[118]*)* or when the actions completely fall under the previous criteria provided by the CJEU before, but still constituted the infringement (*Case C-161/17*[119]) if the right holders operate with the necessary amount of rights on their content, how the control of the clearance shall be conducted, how the balance between the interests of the right holders and users is harmonized.

2.3. Current Ukrainian Legislation

2.3.1. Law of Ukraine On Copyright and Related Rights

Copyright legislation in Ukraine is included in both general legislation (such as Civil Code of Ukraine) and in special legislation as Law of Ukraine on Copyright and Related Rights.

While European legislation stipulates a system of division of rights conferred by the copyright as the right to reproduce, right to communicate to the public, right to distribute and rental and lending rights, Ukrainian legislator decided to define the right to use the work and provide the types of usage of the works.

Thus, while Civil Code provides a general overview of provisions for copyright, and in article 441 of the Civil Code says that usage of the work is: (1) publication of the work; (2) reproduction of the work in any form by any means; (3) translation of the work; (4) remake, adaptation, arranging and other similar changes; (5) inclusion as a part of collections, databases, anthologies, encyclopedias, etc.; (6) public performance; (7) rental and lending; (8) import of its

[115] Ibid, pp. 95-96.
[116] WIPO Copyright Treaty, 1996.
[117] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, (Official Journal L167, 22/06/2001, P.0010-0019).
[118] Case C-527/15.
[119] Case C-161/17.

copies, copies of its translations, alterations, etc. The Code also provides that the usage of the work is any other actions, provided by the law. [120]

The Civil Code came into legal force later than the Law of Ukraine On Copyright and Related Rights, thus implemented the provisions provided by the specific law.

Thus, additionally, the Law also provides unitary notions for mentioned above types of usage, which gives a proper understanding of rights coffered by copyright, including the right to communication to the public.

In article 1 of the Law, the following definitions related to the right of communication to the public are provided:

(a) public communication, which is transmission on the air with radio waves (as well as laser beams, gamma rays, etc.), including using satellites, or remote transmission by wire or any type of ground or underground (underwater) cable (conductor, optical fiber and other types)) of works, performances, any sounds and (or) images, their recordings in phonograms and videograms, programs of broadcasting organizations, etc., when the said transmission can be received by an unlimited number of persons in different places, the distance from the place of transmission is such that without the specified transmission of images or sounds cannot be perceived;

The Law also provides definition of audiovisual work, which is a work, fixed on the certain material carrier (film, a magnetic film or a magnetic disk, a CD, etc.) in the form of a series of sequential frames (images) or analog or discrete signals that represent (encoding) moving images (both with and without sound), and perception of which is possible only with the help of one or another type of screen (movie screen, television screen, etc.), in which moving images are displayed visually using certain technical means. Types of audiovisual work are movies, television films, video films, diafilms, slideshows, etc., which may be feature, animated (animated), non-feature, or other.[121]

Currently there are few drafts of the new Law of Ukraine On Copyright and Related Rights on the table before Ukrainian Parliament:

[120] Civil Code of Ukraine (Publication of the Parliament of Ukraine as of 2003, №№ 40-44, p.356) accessed 2019 April 09, https://zakon.rada.gov.ua/laws/show/435-15

[121] Law of Ukraine On Copyright and Related Rights (Publication of the Parliament of Ukraine as of 1994, № 14, p.64), accessed April 2019 April 09, https://zakon.rada.gov.ua/laws/show/3792-12

	Current version[122]	Draft No.10143[123]	Draft No.10143-1[124]
Definition of audiovisual work	a work, fixed on the certain material carrier (film, a magnetic film or a magnetic disk, a CD, etc.) in the form of a series of sequential frames (images) or analog or discrete signals that represent (encoding) moving images (both with and without sound), and perception of which is possible only with the help of one or another type of screen (movie screen, television screen, etc.), in which moving images are displayed visually using certain technical means. Types of audiovisual work are movies, television films, video films, diafilms, slideshows,	Sequence of episodes (shots) with sound or without it, connected with each other by creative thought, that conclude integral original work, fixed by means of videogram and is accessed for perception with the help of appropriate technical means;[126]	the work, that has its own concept and consists a series of sequential moving images, united by the creative idea (with or without sound), and can be viewed exclusively on the screen (cinema screen, TV screen, computer, other equipment).[127]

[122] Ibid.
[123] Draft of the Law Of Ukraine On Copyright and Related Rights as of No. 10143 as of March 12, 2019, published on the website of the Parliament of Ukraine, accessed April 2019 April 09, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=65661
[124] Draft of the Law Of Ukraine On Copyright and Related Rights as of No. 10143-1 as of March 29, 2019, published on the website of the Parliament of Ukraine, accessed April 2019 April 09, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=65771
[126] Draft of the Law Of Ukraine On Copyright and Related Rights as of No. 10143, (2019).
[127] Draft of the Law Of Ukraine On Copyright and Related Rights as of No. 10143-1, (2019).

	etc., which may be feature, animated (animated), non-feature, or other.[125]		
Definition of the videogram	a video recording on the proper material carrier (magnetic tape, magnetic disk, CD, etc.) of the performance or any moving images (with or without sound), in addition to images in the form of a recording included in the audiovisual work; the videogram is the source material for making copies of it;[128]	video recording on the proper material carrier (magnetic tape, magnetic disk, CD, etc.) of the performance or any moving images (with or without sound), not including the images in the form of the recordings, that are the part of the audiovisual work; the videogram is the source material for making copies of it;[129]	A first video recording of the performance or any other moving images (with the sound or not), not including the recordings made by the means of the automatic fixation, and also the recordings, that are included in the audiovisual work.[130]
Definition of communication to the public	transmission on the air with radio waves (as well as laser beams, gamma rays, etc.), including using satellites, or remote transmission by wire or any type of ground or underground (underwater) cable	transmission by wireless means, by cable network or satellite etc. of the objects of the copyright and (or) related rights, when such transmission may be simultaneously received by an	transmission on the air with radio waves (as well as laser beams, gamma rays, etc.), including using satellites, or remote transmission by wire or any type of ground or underground (underwater) cable

[125] Law of Ukraine On Copyright and Related Rights, (Publication of the Parliament of Ukraine as of 1994, № 14, p.64).
[128] Law of Ukraine On Copyright and Related Rights, (Publication of the Parliament of Ukraine as of 1994, № 14, p.64).
[129] Draft of the Law of Ukraine On Copyright and Related Rights as of No. 10143, (2019).
[130] Draft of the Law of Ukraine On Copyright and Related Rights as of No. 10143-1, (2019).

	(conductor, optical fiber and other types)) of works, performances, any sounds and (or) images, their recordings in phonograms and videograms, programs of broadcasting organizations, etc., when the said transmission can be received by an unlimited number of persons in different places, the distance from the place of transmission is such that without the specified transmission of images or sounds cannot be perceived;[131]	unlimited number of individuals in different places, the distance from the transmission point is such that without the said transmission of the image or sounds cannot be perceived or the method of **electronic (digital) access**, which is access to the object of copyright or related rights to the public with or without a cable, including on the Internet, in such a way that an uncertain number of persons can access the given object from a place and at a time chosen by them individually;[132]	(conductor, optical fiber and other types)) of works, performances, any sounds and (or) images, their recordings in phonograms and videograms, programs of broadcasting organizations, etc., when the said transmission can be received by an unlimited number of persons in different places, the distance from the place of transmission is such that without the specified transmission of images or sounds cannot be perceived.[133]

Table No. 1 Comparation between current legislation and proposed amendments

To analyze the proposed definitions of an audiovisual work, it shall also be mentioned that Ukrainian legislation also has a concept of a videogram, which under Article 1 of the Law On Copyright and Related rights, which is a video recording on the proper material carrier (magnetic tape, magnetic disk, CD, etc.), of the performance or any moving images (with or without sound),

[131] Law of Ukraine On Copyright and Related Rights, (Publication of the Parliament of Ukraine as of 1994, № 14, p.64).
[132] Draft of the Law of Ukraine On Copyright and Related Rights as of No. 10143, (2019).
[133] Draft of the Law of Ukraine On Copyright and Related Rights as of No. 10143-1, (2019).

in addition to images in the form of a recording included in the audiovisual work; the videogram is the source material for making copies of it.[134]

As Anna Shtefan mentioned in her research, the legislator made the disclaimer in the definition that the videogram is not the image as a tape, that belongs to the audiovisual work.[135] She tried to separate viodegrams from the audiovisual works by criteria of authorship and level of creativity. While audiovisual work is created by the director, director of photography, director of design, scriptwriter, and composer under the Ukrainian law[136], in the creation of the videogram can participate director of shooting, director of editing, sound director etc., thus the author of the videogram is considered the initiator, who carries the responsibility for the first video recording of the proper images. Also, the audiovisual work is characterized by the high level of creative activity conducted by a lot of people, while creation of the video recordings excludes creativity as the fixation of the something on the video by means of few camera and combination in one recording of the recorded fragments.[137]

Anna Shtefan properly indicated that videogram is an object of related rights and is purely developed in the current legislation, that is why this type of work raises a lot of legal questions and uncertainty.[138]

Thus, the current definition of the audiovisual work in Ukrainian legislation is very broad, given a detailed notion, while the proposed amendments in the first draft include the subjective criteria "by creative thought", that may provide the uncertainty in the Law. At the same time, the notion refers to the videogram, while the notion of the videogram directly excludes the parts of the audiovisual works, which is contradictory to each other and may bring a legal collision.

In the second alternative draft of the Law, the authors refer to other subjective criteria as "its own concept" and "united by the creative idea". The wording 'concept' lacks legal clarity and is strongly connected to the wording 'idea', which is not protected under copyright. At the same time, "united by the creative idea" is also the subjective notion, which is unclear and may bring up the need to assess what shall be covered by the legal idea or not, and as it was mentioned, ideas are not protected under copyright.

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[134] Law of Ukraine On Copyright and Related Rights, (Publication of the Parliament of Ukraine as of 1994, № 14, p.64).

[135] Anna Shtefan, Videogram: reseach of the legal nature (Theory and practice of intellectual property.–2011.-No.4.-p.16-20), accessed April 2019 April 09, http://nbuv.gov.ua/UJRN/Tpiv_2011_4_4

[136] Law of Ukraine On Copyright and Related Rights, (Publication of the Parliament of Ukraine as of 1994, № 14, p.64).

[137] Shtefan, Videogram: research of the legal nature (2011).

[138] Ibid.

Therefore, both versions of the definition of the audiovisual work are unclear, contradict basic principles of copyright and may lead to additional collisions.

In addition, the first draft brings un the text the wording "music video" in the few articles, including the indication that *'the economic rights on music videos are limited in the public demonstration and public communication of the musical video, not including* ***electronic (digital) access*** *and function in the scope of fair remuneration of the holder of such rights on the musical video and authors of it […]'.* [139]

The is no definition of the 'music video' provided in the draft, thus, it includes kind special regulation of the economic rights of the authors and right holders. If the Law will be passed in such version, it defiantly will raise a number of collisions of identifying which audiovisual work may be managed by 'music video' and therefore, the regulation regarding it, shall be applied or *vice versa*. Such negligent approach of the authors of the Law can lead to the rise of the new collisions, while the amendments are intended to eliminate any legal uncertainty, not bringing up a new one.

As to the notion of communication to the public provided by the drafts of the Law, while the second draft repeats the current version, the authors of the first draft try to review the wordings of the Law.

Mainly, the new notion such as **electronic (digital) access** is provided. From one point of view, the notion of electronic digital access partly repeats the notion of public communication, only differing by adding "including on the Internet".

This, again brings the absence of clarity on how electronic (digital) access and public communication intersect with each other: as separate categories, as parts of each other or duplication of the same concept.

It shall be brought up, that the Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part ('Association Agreement' between the EU and Ukraine, namely in the article 174[140], the right of communication to the public duplicates the provision provided by the InfoSoc Directive[141] as "*the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works*

[139] Draft of the Law Of Ukraine On Copyright and Related Rights as of No. 10143, (2019).
[140] Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part signed on 21 March 2014 (Preamble, Article 1, Titles I, II & VII) and on 27 June 2014 (Titles III, IV, V & VI, related Annexes and Protocols) and effective as of 01 September 2017 accessed 2019 April 10, https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf
[141] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, (Official Journal L 167, 22/06/2001, P.0010-0019).

in such a way that members of the public may access them from a place and at a time individually chosen by them".[142]

The Ukrainian legislators shall not try to create new complex legal constructions that may lead to the rise of the legal uncertainty, rather they should consider the provision provided in the Association Agreement[143], which is obligatory to be implemented in the national legislation of Ukraine and at the same time, to try to adjust it to the Ukrainian legal reality and to avoid legal collisions.

2.3.2. Right to Communication to the Public in the Decisions of the Supreme Court of Ukraine

Legal acts of the Supreme Court of Ukraine provide high-quality and systemic judicial control in the system of sources of law. In the Law of Ukraine On the Judiciary and Status of Judges it is provided that 'the conclusions on the application of the rules of law, set forth in the decisions of the Supreme Court, are considered by other courts in the application of such rules of law'[144], therefore the Decrees of the Supreme Court of Ukraine shall be analyzed.

In the Decree No. 5 On the appliance by courts of the provisions of the legislation in matters of protection of copyright and related rights as of June 04, 2010 it is provided that the publication of the works on the Internet by means, accessible for the public use, is making works available to the public as such, that the works may be accessed by the public from any place and at any time. So, the publication is only legal from the approval of the author or the right holder. The Court also refers to the act of reproduction, reminding that the reproduction is making one or more copies of a work, video game, phonograms in any material form, as well as their recording for temporal or permanent storage in electronic (including digital), optical or another form that the computer can read.[145]

Thus, the Court refers to the common concept, as it was brought up by the Internet Treaties' authors and is supported by the European Court practice, communication to the public is strongly connected to the right to reproduction of the work, especially if we talk about communication on the Internet. To be able to upload the work on the Internet, the right holder shall make a copy of the work which fully concludes the act of reproduction.

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[142] Ibid.
[143] Association Agreement between the EU and Ukraine, 2017.
[144] Law of Ukraine On the Judiciary and Status of Judges (Publication of the Parliament of Ukraine as of 2016, № 31, p.545) accessed 2019 April 10, https://zakon.rada.gov.ua/laws/show/1402-19
[145] Decree of the Supreme Court of Ukraine No. 5 On the appliance by courts of the provisions of the legislation in matters of protection of copyright and related rights as of June 04, 2010 published by the Supreme Court of Ukraine, accessed 2019 April 10, https://zakon.rada.gov.ua/laws/show/v0005700-10

In the Decree No. 12 About the questions on the practice of resolving disputes related to the protection of intellectual property rights as of October 17, 2012, the Supreme Commercial Court of Ukraine develops the notion provided above and includes the medium of how the infringement of such right can be proved.[146]

To sum up, it can be said that Ukrainian Courts lack detailed indication of the right to communication to the public, which results in possible uncertain applicability of the provisions mentioned and mislead the common understanding of the concept.

INTERMIT CONCLUSION ON CHAPTER I AND CHAPTER II

Taking in consideration all mentioned above, it shall be noted that the Internet has brought up both a number of issues for the current international, regional and national legal system, questioning the established principles, notions and definitions. Copyright treaties and laws are no exception, as the Internet directly and broadly influenced how the audiovisual works are created, distributed and consumed by the end users, therefore, brought up a number of questions: are not the basic principles of copyright out of date; is the system of rights established in the Berne Convention is enough; how the works can be protected in the online environment etc.

The issues raised above perfectly were followed by a European goal to build digital single market, the idea of which includes "to tear down unnecessary regulatory barriers and moving from individual national markets to one single EU market"[147].

In addition, Ukraine as the country, who entered in the Association Agreement with the European Union and took the number of obligations to implement number of EU legal provisions in its national legislation, also is questioned by the problems raised by Internet for copyright system.

Considering all mentioned in the Chapter I, the main legal issues boosted by the Internet for copyright and namely, for the right to communication to the public, which was secured in the Internet Treaties firstly are the territorial limitations within the European Union for the accessibility of the copyright-protected works online; secondly, the number of new ways to communicate the audiovisual content to the public, i.e. "new media rights", which is unclear if they should be covered by the right of communication to the public or receive a completely new

[146] Decree of the Supreme Commercial Court of Ukraine No. 12 About the questions on the practice of resolving disputes related to the protection of intellectual property rights October 17, 2012 published by the Supreme Commercial Court of Ukraine, accessed 2019 April 10https://zakon.rada.gov.ua/laws/show/v0012600-12

[147] Publication of the European Commission on Digital Single Market, published on the website of the European Commission, accessed 2019 April 10, https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html

system of rights within the copyright. The reason for such uncertainty is the broad definition of the right to communication to the public, which from one point of view gives a room for the Court to define the right to communication to the public differently on "case-by-case" basis, while at the same time brings up vagueness of the notion and therefore limits its enforcement, requiring the emergence of infringement for the determination of it.

The current European legislation in the sphere on copyright is still on the level of directives, therefore, relies on how they are implemented and transformed into the national legislation. It is another reason, why the notion provided in the InfoSoc Directive[148] replicated the definition from the WIPO Copyright Treaty[149], rather than providing a new detailed approach to such complex concept.

To sum up, briefly, the EU legislation requires a soft approach to reviewing the current legal system and establishing necessary instruments. The reason behind that is the fact that the international system of copyright is from point of view partly out of date, but from another point of view, establishes the basic principles, review of which may lead to the unclear consequences.

From another point of view, strict regulation by the EU's legislator, that may harm the national systems may lead to the negative feedback from the Member States, who are not interested in the radical change of the national legal systems of copyright. The same feedback can be met from the private stakeholders, i.e. audiovisual media services, tech companies, creators, music, and film major companies, etc., as the legislative initiative are tending to put more obligations on their activity, rather than securing their interests.

[148]Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, (Official Journal L 167, 22/06/2001, P.0010-0019).
[149] WIPO Copyright Treaty, 1996.

CHAPTER 3 REDIFINITION OF THE RIGHT TO COMMUNICATION TO THE PUBLIC

3.1. Directive on Copyright in the Digital Single Market and its Impact on the Right to Communication to the Public

In 2014, Jean-Claude Juncker was elected to the presidency of the European Commission and took office in November 2014. During his campaign, he indented on the potential to harmonize the various digital marketplaces among Member States. Andrus Ansip, as Vice-President for the Digital Single Market within the EU in 2014, was tasked to work on the required legislative steps that would be required to implement a Digital Single Market.[150]

The first draft of the proposed Directive from the EC was issued on 14 September 2016[151] and after the revision, on 5 July 2018, the European Parliament voted to reopen the directive for debate in September 2018.[152]

On September 12, 2018, an updated position of the parliament was approved[153] and the trialogue negotiations were completed on 13 February 2019[154] and the vote in Parliament was held on March 26, 2019, with the Directive passing by a vote of 348 Members of the Parliament to 274 against.[155]

On April 15, 2019 the European Council approved the DSM Directive, with Luxembourg, Italy, the Netherlands, Poland, Finland and Sweden voting against, and Belgium, Estonia and

[150]European Commission, *Questions and Answers: The Juncker Commission*, Press-release, published on September 10, 2014, accessed 2019 April 12, http://europa.eu/rapid/press-release_MEMO-14-523_en.htm

[151] Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, European Commission, published on September 14, 2016, accessed 2019 April 12, https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF

[152] BBC News, *Controversial copyright law rejected by EU parliament*, published on BBC website on July 5, 2018, accessed 2019 April 12, https://www.bbc.com/news/technology-44712475

[153] European Parliament, *Parliament adopts its position on digital copyright rules*, Press-release, published on September 12, 2018, accessed 2019 April 12, http://www.europarl.europa.eu/news/en/press-room/20180906IPR12103/parliament-adopts-its-position-on-digital-copyright-rules

[154] European Parliament, *Copyright: MEPs back provisional agreement*, Press release, published on February 26, 2019, accessed 2019 April 12, http://www.europarl.europa.eu/news/en/press-room/20190226IPR28811/copyright-meps-back-provisional-agreement

[155] European Parliament, *European Parliament approves new copyright rules for the internet*, Press release published on March 26, 2019, accessed 2019 April 12, http://www.europarl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet

Slovenia abstaining.[156] Now the Member States will have 24 months to transpose the Directive into their national legislation[157].

Firstly, it shall be noted that joint statement was issued by the Netherlands, Luxembourg, Poland, Italy and Finland regarding the content of the DSM Directive. Representatives of these countries strongly believe that the final text of the Directive is a step back for the Digital Single Market rather than a step forward and it does not strike the right balance between the protection of right holders and the interests of EU citizens and companies. Additionally, they intend that the Directive lacks legal clarity, will lead to legal uncertainty for many stakeholders concerned and may encroach upon EU citizens' rights. Representatives of Germany also issued detailed statement that the Directive lacks certainty and clarity.[158]

Therefore, we shall analyze the provisions related to the VoD services and the communication to the public of the DSM to assess how the new legislation may work for all interested parties and if the above-provided position of the few Member States of the EU has a point.

Firstly, retail 3 of the DSM Directive indicates, that rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited and the new business models and new actors continue to emerge. [159]

Retail 51 of the DSM Directive refers to the video-on-demand services, that have the potential to play a decisive role in the dissemination of audiovisual works across the Union, thus the availability of such works, on video-on-demand services remains limited. [160]

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[156] European Council, *EU adjusts copyright rules to the digital age*, Press-release, published on April 15, 2019 on the European Council website, accessed 2019 April 12, https://www.consilium.europa.eu/en/press/press-releases/2019/04/15/eu-adjusts-copyright-rules-to-the-digital-age/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU+adjusts+copyright+rules+to+the+digital+age

[157] European Commission, *Copyright reform clears final hurdle: Commission welcomes approval of modernized rules fit for digital age*, Press release, published on April 15, 2019 on the European Commission website, accessed 2019 April 12, http://europa.eu/rapid/press-release_IP-19-2151_en.htm

[158] Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland On Draft DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading) - Adoption of the legislative act – Statements, published on April 15, 2019 on the European Council website, accessed 2019 April 12, https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf

[159] Directive Of The European Parliament And Of The Council On Copyright And Related Rights In The Digital Single Market And Amending Directives 96/9/EC And 2001/29/EC, 2016/0280 (COD) published on the European Council website, accessed 2019 April 12, https://data.consilium.europa.eu/doc/document/PE-51-2019-INIT/en/pdf

[160] Ibid.

Article 1 of the DSM Directive provides that the scope of the Directive is building digital and cross-border uses of protected content.[161] Article 2 additionally adds a number of the definitions such as information society service, referring to the InfoSoc Directive[162], service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. In clause (6) also there is new definition, **online content-sharing service provider** (OCSSP) means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject-matter uploaded by its users, which it organizes and promotes for profit-making purposes.

Article 17 of the DSM Directive, which was expressly debated being in the first version of the Directive Article 13[163], and regulates the use of the protected content by the OCSSPs. The article provides a very massive level of regulation, that shifts the status of the platforms, called in the DSM Directive online content-sharing service providers. Article 17 basically brings up a new amount of obligations put on the OCSSPs as a profit-making provider of access to the copyright-protected works. Namely, DSM Directive obliges the OCSSPs to be directly liable for the illegal communication to the public conducted by the users by means of their platform, re-shifting the sustainable 'safe harbor' approach.[164]

It is unclear how this approach will be detailed in the national legislation, thus, it should be said that the transnational companies that meet the definition of OCSSPs, such as YouTube, Reddit, etc. strongly disagree with the European legislation initiatives. YouTube CEO Susan Wojcicki stated "would bankrupt YouTube's "creator economy," and "that uncertainty means we might have to block videos like this to avoid liability".[165]

The main message behind this provision is that if OCSSPs in some way benefiting from the content of the third-parties made available on their platforms infringing rights of others, shall be treated the same as they are the direct infringers. To avoid any kind of liability and minimize the risk OCSSPs shall either enter in the license agreement with the proper rightsholder to in some

[161] Ibid.
[162] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, (Official Journal L 167, 22/06/2001, P.0010-0019).
[163] Directive Of The European Parliament And Of The Council On Copyright And Related Rights In The Digital Single Market And Amending Directives 96/9/EC And 2001/29/EC, 2016/0280 (COD).
[164] Ibid.
[165] Isobel Asher Hamilton, *YouTube is pushing back against a new EU copyright law, which it says will massively restrict how many videos Europeans can watch*, Business Insider, published on November 12, 2018, on Business Insider, accessed 2019 April 12, https://www.businessinsider.com/youtube-is-pushing-back-against-article-13-2018-11?r=US&IR=T

way legalize the possible illegal flow of works on their platform or either demonstrate that they: "*(a) made the best efforts to obtain an authorization, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).''*[166]

Additionally, the OCCPs are obliged to provide "complaint and redress mechanism" for users in case of "disabling of access to, or the removal of, works or other subject matter uploaded by them" and provide rightsholders at their request with the "adequate information on the functioning of their practices" regarding license agreement concluded and information of the use of the content covered by the agreement.[167]

The following issues regarding the content of the new DSM Directive shall be addressed. Firstly, while the legislator clearly stated in Article 17(8), that the application of this Article shall not lead to any general monitoring obligation, basically bind the OCSSPs to conduct such monitoring to avoid any type of the financial losses and may lead to the filtering systems, that will harm first of, user-generated content, while the OCSSPs will just block such content to avoid any claims from the rightsholders regarding OCSSPs liability. Secondly, the possible license procedure is uncertain. The European Parliament in its press-release called the day of the approval of the DSM Directive "the win for the creators"[168], thus that position may be uncertain.

It shall be analyzed on the example. So, for instance, content used on YouTube, where videos (music videos, sample of movies, etc.) and music are used, the rightsholders of the most amount of content mostly belongs to the big publishers and production companies such as Paramount Pictures, Warner Bros. Pictures, Universal Pictures, Columbia Pictures, Walt Disney Pictures, Universal Music, adding to this list Netflix and Amazon Prime Video. Therefore, the big market players may dictate high royalty fees for these required license agreements, understanding their monopoly on the markets. Such scenario, of course, may be rather radical, then real, but still such obligation to enter in the license agreements, without providing the framework and limits of

[166] Directive of The European Parliament And Of The Council On Copyright And Related Rights In The Digital Single Market And Amending Directives 96/9/EC And 2001/29/EC, 2016/0280 (COD).
[167] Ibid.
[168] European Parliament, *European Parliament approves new copyright rules for the internet*, Press release, published on March 26, 2019, accessed 2019 April 12, http://www.europarl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet

it violates "checks and balances" and can lead to another contradictory between big companies, leaving the creators out of the discussion. From one point of view it is proper decision following the principles of the private law, not to regulate the cooperation between the private companies, thus, giving one of the parties the right not supported with the following obligation defiantly disbalances the relation between the OCSSPs and the rightsholders. In addition, the DSM Directive carries out a lot of evaluative provisions, such as "best efforts", "professional diligence", "acted expeditiously" etc., again, leaving the uncertainty for the OCSSPs as to their actions.

Indeed, this problem may be solved by the national legal acts during the following 24 months, but different national approaches will lead to the complete opposite results correlating with the purposes that the Directive establishes. While the Directive carries out the idea to unite digital single market for copyright in the EU, the vague framework provided by it, leaves questions raised above unclear for the national legislators to solve and they may be solved differently in the different Member States.

As it was mentioned before, retail 51 of the DSM Directive refers to the video-on-demand services, claiming that they have the potential to play a decisive role in the dissemination of audiovisual works across the Union, thus the availability of such works, on video-on-demand services remains limited [169], the DSM Directive by no means resolves the issue raised. Further, getting more in the right communication to the public, recital 64 of the DSM Directive clarifies that the Directive does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of InfoSoc Directive to other service providers using copyright-protected content[170].

Generally, it shall be said that DSM Directive in a result did not fully cover the purpose it stated. Foremost, while one of the goals of the DSM Directive was to minimize the issue of cross-border communication of the content, the role of the VoD services as the channels to provide audiovisual content. Rather, the DSM Directive has put a number of new obligations on the stakeholders failing the aim to minimize the value gap of the creators, rather providing new obstacles and bringing new legal uncertainty.

3.2. Minimization of the Restrictions Cross-Border Communication to the Public

[169] Directive of The European Parliament And Of The Council On Copyright And Related Rights In The Digital Single Market And Amending Directives 96/9/EC And 2001/29/EC, 2016/0280 (COD).
[170] Ibid.

Defiantly, it shall be established that the Internet is not the completely new phenomena, that does not fall into existing means of delivery of any kind of information. Rather than that, the Internet is mostly another channel to pass the content as the telephone, TV etc., when they were established, but the specialty of the Internet lays in the obvious fact that Internet completely re-shaped the borders of the existing territorial landscape.

One of the core principles of the European Union is the freedom of goods and services. Namely, article 56 of TFEU establishes the freedom to provide or receive services in an EU country other than the one where the company or consumer is established.[171]

This principle is the reason, why mentioned in the par. 1.2.1, Geo-blocking Regulation[172] and Portability Regulation[173] were approved. Thus, these legal acts have not resolved the issue of territorial limitation of communication to the public within the European Union. The right holders are required to clearance the rights of the content they deliver for every Member State separately, that is why they may choose not to provide their services in the smaller markers or that is why the content library may differ from one state to another.

As it was mentioned in the subchapter 1.2.1, this issue is partly related to the basic principle of copyright – the principle of territoriality under which copyright is protected and exploited on a country-by-country basis. It shall be said that the principle of territoriality is basic of the international copyright system, which was brought up by Berne Convention[174], therefore any radical amendments on the international level to resolve the regional issue of the European Union will be unnecessary and may lead to the unpredictable consequences. Rather than that, the European Commission shall continue building unitary copyright system in the EU as it still on its basic level due to the fact that EU legislation regulates copyright on by means of directives, giving Member States options to implement them in their own ways.

Additionally, providing a strict obligation for the audiovisual media services and platforms to communicate the same content within the whole EU will rather be met with disapproval as it may be considered as an intervention into the freedom of conducting commercial activity. Thus, the European Commission expressed their desire to rebuilt single digital market within the

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[171] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, (Official Journal C 326 , 26/10/2012 P. 0001 – 0390*)*, accessed 2019 April 12, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

[172] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018, (Official Journal of the European Union. L (060I). 2018-03-02).

[173] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017, (Official Journal of the European Union. L (168). 2017-06-30).

[174] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.

Community, thereby, the proper instrument to secure the balance between the private interests of the platforms, interests of European consumers and not interline the national legislation.

We shall not forget Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CRM Directive), where in the recital 44 it is provided that "*aggregating different music repertoires for multi-territorial licensing facilitates the licensing process and, by making all repertoires accessible to the market for multi-territorial licensing, enhances cultural diversity and contributes to reducing the number of transactions an online service provider needs in order to offer services."*[175] To clarify, in the scope of the CRM Directive 'multi-territorial license' means a license which covers the territory of more than one Member State[176] and at the same time ' 'online rights in musical works' means any of the rights of an author in a musical work provided for under Articles 2 and 3 of InfoSoc Directive which are required for the provision of an online service[177], which conclude right to reproduction and right to communication to the public, which confirms the idea stipulating the strong connection for these two rights.

What's more, Article 23 provides that Member States shall ensure that collective management organizations established in their territory comply with the requirements of this Title [III], when granting multi-territorial licenses for online rights in musical works.[178] The CRM Directive puts on the collective management organizations obligation to comply with transparency and accuracy of the information, when granting multi-territorial licenses.[179] This type of licensing was provided with the purpose to give consumers wider choice to download music or to listen to it in streaming mode.

Therefore, it is uncertain why such instrument was established only for online music services, leaving out of scope audiovisual content.

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[175] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, Official Journal of the European Union. L (84). 2014-03-20) accessed 2019 April 12, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:084:TOC

[176] Ibid.

[177] Ibid.

[178] Ibid.

[179] Ibid.

Whence, the negotiation instrument for the platforms shall be proposed, thus, if they are interested in increasing their territorial activity in the European Union and communicate all scope of their content library to the European consumers, they shall be allowed to do so without specific clearance for each Member State, only if they (i) has authorization from all the right holders of audiovisual content for the communication on the territory of whole European Union; (ii) clearances the rights on the content in dispute in more than 10 Member States of the EU.

Even though, such instrument will not fully settle the issue of cross-border communication of content and may not be welcomed by all platforms, but providing any minimization instruments that was provided for the music industry for film industry, can lead to decrease of difference between the content accessible in different Member States, therefore, has a possibility to ensure the securing the interests of European consumers.

3.3. Approximate Solution: Securing the Balance Between Interests

3.3.1. New Media Rights" V. Right to Communication to the Public: Inclusion or Separation

To analyze how new media rights, fall into the current legal system it shall be developed how the VoD services means of delivery correlate with the scope of the right to communication to the public.

New forms of exploitation as to the par. 1.2.2.	Act of communication and rights engaged
downloading (video is transmitted through the Internet in the provided format, which can be played on the video players and downloaded on the user's devices and any offline playback);[180]	video is uploaded to the server (**right of reproduction) >** downloaded, therefore, copied to the computer of the user in the chosen format (**right of reproduction) >** played on the user's computer (**act of communication**)
(2) download with the specific player (video is transmitted through the Internet in the	video is uploaded to the server (**right of reproduction) >** downloaded, therefore, copied to the computer of the user in the specified by the platform format (**right of reproduction) >**

[180] Christian Grece, *On-Demand Audiovisual Markets In The European Union*, (2014).

specific format, which can be played on the specific player and downloaded on the user's devices and any offline playback);[181]	played on the user's computer on the specific player (**act of communication**)
(3) streaming (video is streamed through the Internet through the website or mobile application, in an open or proprietary format, which requires an Internet[182] connection and does not allow for offline playback as video is not "stored" on the user's device); [183]	video is uploaded to the server (**right of reproduction) >** played on the website or in the mobile applications without storing any copies on the user's device (**act of communication without the reproduction**) (example, Netflix)
(4) peer-to-peer (video is exchanged between multiple users, downloaded to the devices and can exist in multiple formats);[184]	video is uploaded to the server **(right of reproduction) >** downloaded by the users (again the **reproduction) >** can be shown on the different devices in different formants (**act of communication)**
(5) through an open platform (video is streamed in the user's browser or application, requiring the Internet connection);[185]	video is uploaded to the server (**right of reproduction) >** played on the website or in the mobile applications without storing any copies on the user's device (**act of communication without the reproduction**) (example, YouTube)
(6) though the store or mobile application (video is transmitted via Internet on the closed platform or application).[186]	video is uploaded to the server (**right of reproduction) >** played on the platform or mobile applications without storing any copies on the user's device (**act of communication without the reproduction**) (example, iTunes)

[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Ibid.

Table No. 2 Correlation between new media and the act of communication.

It is clear that the communication to the public, even by digital means, is strongly related to the reproduction of the audiovisual work and this is the issue that was raised during drafting both Internet Treaties and InfoSoc Directive, thus was never addressed in the final text of all of the mentioned documents.

Secondly, the peculiarity of the act of communication conducted online as it is indicated in the analysis of the VoD services above is derived only when the end user initiates to open the website/app and stream the chosen audiovisual content. Thus, it is clear that the new media services, even providing the new ways of delivery of content to the public, still coordinate with the broad scope under the current legislation. However, we may differ the right to communication into two categories. First one includes acts of communication, mentioned above and included in the specific legislation (Satellite and Cable Directive), where we do not need complex legal analysis to determine if the actions conclude communication to the public or not. Thus, we have the second category, when mentioned above acts of communication shall be analyzed in the complex with the technical means by which the work is communicated and who participates in such communication. The second category shall be analyzed in the next subchapter.

3.3.2. Flexible 'Right to Communication to the Public Tests' to Comply with the Current and Future Digital Developments on the Basics of the CJEU Case-Law

As it was already mentioned, the concept of communication to the public has a very broad nature and it defined on a case-by-case basis, analyzing the nature of the act of the communication made to the public to determine if the right to communication to the public occurred in the specific situation or not.

On one hand, such wide and abstract concept has provided a CJEU court with the possibility and instruments to adapt the broad approach to current and future developments that may lead to the new means of acts of communication without the necessity to completely change the legislation, when a new technological shift is made.

Thus, from another point of view, such level of broadness may also lead to unclear understanding of the nature of act of communication online and bring legal uncertainty for both right holders and users.

Therefore, it is necessary to establish assessment test on the basis of the case law that CJEU has introduced in the recent years to determine which actions in the digital environment shall be considered as an act of communication to the public and which not.

Considering all key cases, shortly reviewed in the subchapter 2.2.3, such criteria as equipment criteria, linking criteria, how 'new public' test may be modified and following them assessment tests shall be proposed.

First criteria that influenced the case law of CJEU is the 'equipment criteria'.

The number of cases of CJEU raised the issue of installation of TV sets in the places where the number of customers can access them and by means of using them watch broadcastings on the TV sets.

In this place, the following shall be assessed: (i) where the equipment is installed (ii) who has access to it and who provides access to it.

To constitute the communication to the public the equipment shall be installed in the places, where the delivery of the works protected can be considered as an additional service in the place, which conducts its activity with the profit-making nature, where another service is provided.

As to whom the works protected are communicated in the place mentioned, to a new public, which was not considered by the broadcasting organization, when the authorization was given. Additionally, the user, who installs the TV sets in his establishment shall in full knowledge intentionally knowing the consequences of his actions and the public, that has access to the communication is not accidental and access to the communication itself is not merely.

As to the case law of CJEU (*Case C-117/1 Reha Training*[187], *Case 306/05 SGAE*[188], Case *C-351/12 OSA*[189]) most of the situation regarding the installed equipment transmitted the broadcast signals for the delivery of content. Thus, the situation may presume that the places mentioned these cases (spas, hotels, etc.) may also install the VoD services apps on the TV sets in their establishments (Netflix, Hulu).

Under the par. 4 of the Netflix terms of use, the Netflix service and any content viewed through the service are for your personal and non-commercial use only and may not be shared with individuals beyond your household.[190]

Under par. 3.2. of the Hulu terms of use, Hulu grants streaming-only basis through the Video Player, for personal, non-commercial purposes. [191]

This determinized provisions of the terms of use are necessary for the 'who has access and who provides it" analyze. If the holder of the establishment installs a TV set with the Netflix or

[187] Case C-117/15.
[188] Case C-306/05.
[189] Case C-351/12.
[190] Netflix Terms of Use, Last Updated: April 24, 2019, accessed 2019 April 15, https://help.netflix.com/legal/termsofuse
[191] Hulu Terms of Use, Effective Date: September 13, 2018, accessed 2019 April 15, https://secure.hulu.com/terms

Hulu app, giving the customers not the possibility to enter in their accounts on that platforms, but providing with his, it shall be considered as provision of additional services such as giving access to the customers to the platforms that strictly forbids commercial sharing of the account and therefore, the holder of the establishment is in full knowledge of the consequences of his actions. Additionally, the public that may recourse the account and therefore the streamed content on the platform is new, as under the agreement between Netflix and its user, such communication was not authorized.

Presumed situation partly coincides the criteria established by *C-527/15 Stichting Brein*[192], which considered selling of the multimedia player with the installed software that gave access to the buyers of the player to works protected under copyright without authorization.

So, to sum up, the equipment criteria of the assessment of the existence of the act of communication to the public:

(1) installation in the public establishments, where on mostly profit-basis services are provided or selling of the equipment, that has installed access to the broadcastings or to the VoD services or to unauthorized content;

(2) user (holder of the establishment) or seller acts on in the full knowledge intentionally provides such access;

(3) access is provided to the new public, i.e. which was not considered by the broadcasting organization/VoD services, etc. or access is given to unauthorized content, and therefore, the public will be considered new.

While provided above attempt to clarify the assessment of the acts of communication partly relates to the digital environment, detailed attention shall be determined to the acts of communication only online. While the approach as to the installation of the equipment mentioned above is certain and can be transferred in a test, the approach to the online environment still lacks clarity.

In addition, the case law of CJEU regarding the right to communication to the public can be inconsistent, as in Case *C-161/17 Renckhoff*[193] provided unbalanced decision shifting the balance in wider protection of the right holder.

Firstly, in the Case *C-466/12 Svensson*[194] from the act of communication was intelligibly excluded provision clickable links to works freely available on another website.

[192] Case C-527/15.
[193] Case C-161/17.
[194] Case C-466/12.

To follow up hyperlinking, thus, the important shift was *Case C-160/15 GS Media*[195], where

the test GS Media created, the following hyperlinking acts conclude act of communication:

(1) when the hyperlink is to not freely accessible work, posted there with the rightsholder's consent (it also constitutes the infringement);

(2) when the hyperlink is to freely accessible work, posted there without the rightsholder's consent, without profit-making intention and know that there was no consent from the rightsholder by his notification (it shall constitute the infringement if the hyperlink is not removed upon the notification);

(3) when the hyperlink is to freely accessible work, posted there without the rightsholder's consent, with profit-making intention and presumably knows the illegal nature of the publication ((is shall constitute the infringement if the hyperlink is not removed upon the rightsholder's notification);

(4) when the hyperlink is not to freely accessible work, posted there without the rightsholder's consent (is shall constitute the infringement and the profit and knowledge criteria do not matter).[196]

At the same, the act of communication to the public **does not exist** when:

(1) when the hyperlink is to freely accessible work, posted there with the rightsholder's consent;

(2) when the hyperlink is not to freely accessible work, posted there without the rightsholder's consent, without profit-making intention, without the knowledge of the unlawful nature of the posting.

While *GS Media*[197] *case* has given clear understanding when hyperlink is an act of communication to the public and when it is not, *Renckhoff* [198] re-shifted established balance between the rights of users and right holders to the side of the last ones. Namely, in the *Renckhoff* the CJEU added to the concept of 'communication to the public' - *'posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website'.*[199]

Not analyzing that in the first-place user's action fell under the exception provided by the InfoSoc Directive[200] as the actions were conducted with the educational purposes, *Renkhoff*

[195] Case C-160/15.
[196]Ibid, par. 93
[197] Ibid, par.93.
[198] Case C-161/17.
[199]Ibid.

approach can be considered as a step back from the *Svensson's.* While, in *Svensson,* the Court clearly understood the nature of the Internet as an instrument to spread any information and therefore, if a work was made available once on the Internet and is freely available there, then as a presumption it has been communicated to all Internet users and thus, there is no new public.

Thus, even though the concept provided in *GS Media* and *Svensson* and analyzed above is widely used and *Renkhoff* turnover of the established approach has not been spread, it shows the inconsistency of the Court's practice and more important seeks formal strict interpretation of copyright provisions, while copyright and moreover, such complex concept of communication to the public in the digital dimension requires flexible representation of the economic rights of the creator and how to balance them with interests of the society, therefore while adequate protection of the author's rights is the basis of copyright, the interests of the society and understanding how Internet works in a necessity for unitary flexible assessment to avoid such chaotic decisions. It may lead to loss of understanding which actions are lawful or which are not, what is an act of communication and what is not, that losing the common harmony of the legal approaches leads to the collisions and uncertainty.

So indeed, combing 'equipment criteria' summarized and 'hyperlink criteria', ignoring the *Renkhoff* case, the following common affirmative test can be proposed.

If the act of communication follows the original act communication and if the original communication was authorized by the right holder and new possible end user, i.e. new public was taken into account when such authorization was received, there **no act of communication** as there is no new public.

Thus, if the act of communication follows the original act communication and if the original communication was authorized by the right holder and new possible end user, i.e. new public was not considered when such authorization was received, there is **act of communication** as there is a **new public,** communication to which was not permitted.

This is when we shall return to the discussion of the necessity and scope of new public criteria, also established by the case law of CJEU. As it was already mentioned, the new public test relies on the non-authorized end users, i.e. 'new public' and economic profit the right holder may not receive from that end users, as AG La Pergola established. Namely, According to AG La Pergola, the right of communication to the public ought to protect any 'independent economic exploitation for financial profit', so right holders should be given direct control over each separate market where their works are being used. [201]

[201] Case C-293/98.

So, it shall be tried to exclude new public assessment when we decide when the act of communication was made or not.

So, In the first place, as the CJEU has consistently held, there should be an 'act of communication', which consists of acts of transmission and/or making available as to the Article 3 of InfoSoc Directive.[202] Secondly, public is a fairly large number of possible recipients, i.e. end users, that may be reached by the act of communication. And lastly, the "indispensable intervention without which users could not enjoy the works"[203]. It is clear that in the cases all mentioned above, for example, the owners of the establishments intentionally in full knowledge acted and without their intervention the users would not be able to enjoy the works.

Therefore, the test shall include (1) act of communication; (2) possible number of users, i.e. public; (3) intervention for the communication to occur. Additionally, the 'new public test' shall have complementary character and used or not on the case-by-case basis, when all the mentioned above criteria will not able to be assessed.

3.3.3. Application of the Test Proposed to the Referral C-682/18 (Google and Others, 6 Nov 2018) and few Other Cases Considering DSM Directive

In November German Federal Court of Justice made a referral *C-682/18 YouTube* to the CJEU**,** asking, '*does the operator of an internet video platform on which videos containing content protected by copyright are made publicly accessible by users without the consent of the rightsholders carry out an act of communication within the meaning of Article 3(1) of InfoSoc Directive, if:*

- *the operator earns advertising revenue by means of the platform;*
- *the upload process takes place automatically and without material being seen in advance or controlled by the operator;*
- *in accordance with the conditions of use, the operator receives a worldwide, non-exclusive and royalty-free license for the videos for the duration for which the videos are posted, in the conditions of use and during the upload process, the operator points out that copyright-infringing content may not be posted;*
- *the operator provides tools with which rightsholders can take steps to block infringing videos, on the platform, the operator prepares search results in the form of rankings and content categories, and displays to registered users an overview that is oriented towards*

[202]Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, (Official Journal L 167, 22/06/2001, P.0010-0019).
[203] Case C-160/15, Opinion of Mr Advocate General La Pergola.

previously seen videos and that contains recommended videos which can be displayed to registered users, if the operator is not specifically aware of the availability of copyright-infringing content or, after having become aware, expeditiously deletes that content or expeditiously disables access thereto'.[204]

To presume applicability of the test proposed in subchapter 3.3.2, we shall assess all necessary factors and then assess the status of the platform in this situation, considering the DSM Directive. It is clear that (1) the act of communication is conducted as the work is publicly accessible as it is made available to the (2) public, i.e. all users of the platform, that may at any time access the work published.

As to the third criteria, we can build the following chain of interventions as both users and the platform participate in it:

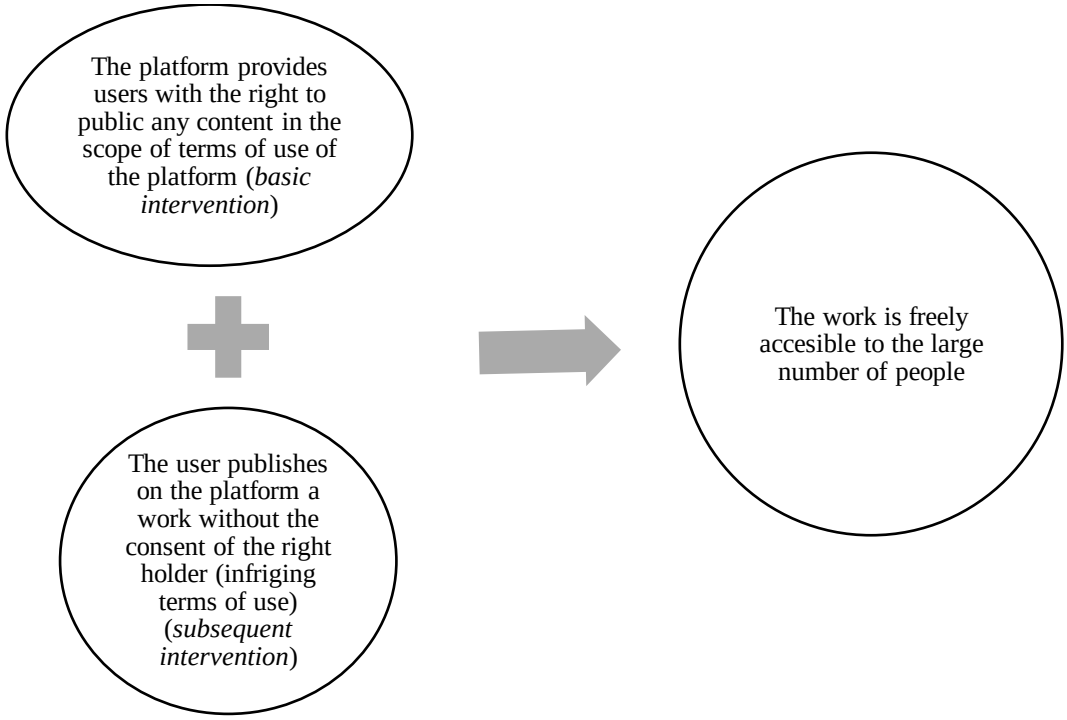

Figure No. 1 Framework of the interventions into the act of communication No 1.

We can determine two types of interventions, while YouTube provides the users with the abstract right to upload video content on their platform, providing in the terms of use with the obligation not to infringe copyright of the third parties[205], while users may misuse such

[204] Case C-682/18, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018 — LF v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH, OJ C 82, 4.3.2019, p. 2–3, accessed 2019 April 15, http://curia.europa.eu/juris/document/document.jsf?text=&docid=211267&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6592197

[205] YouTube Terms of Use, last update: May 25, 2018, accessed by YouTube website on April 15, 2019, https://www.youtube.com/static?template=terms

right by uploading unlawful content, which shall be considered as subsequent intervention, without which other users would not have any access to the works in question.

If the situation will be evaluated with the framework of the DSM Directive, considering that the operator earns advertising revenue by means of the platform, therefore the platform indirectly benefits from the content published, i.e. the platform receives economic revenue not from the illegal content itself, but from its flow on the platform, which also is depended on the platform's algorithm to recommend or not recommend certain content to other users. Therefore, according to the DSM Directive the platform shall be liable for the infringement conducted by its user, as without his intervention by the means of algorithms and recommendations proceedings, the user would have not been able to access the work, only if he has not searched for it directly by the search engine.

Therefore, it shall be assessed if the platform conducts only basic intervention, giving the users the **possibility to** upload content on the platform and the platform does not participate directly if the users may see that content, rather than by means of search engines, such actions shall not be considered as an act of communication, even if the platform gains revenue from the advertainments. To be clear, such scenario is analyzed on the example of the present case, where the platform, i.e. YouTube, provides the number of instruments for the right holders to report content infringing their rights and Content ID filter that also gives right holders ways to secure their rights.

Thus, if the platform not only gives the users **possibility to** upload content on the platform, but also adds unlawful content into the recommendation algorithm directly intervening of what content the user may see, such actions shall be considered as an act of communication to the public conducted not only by the user but by the platform.

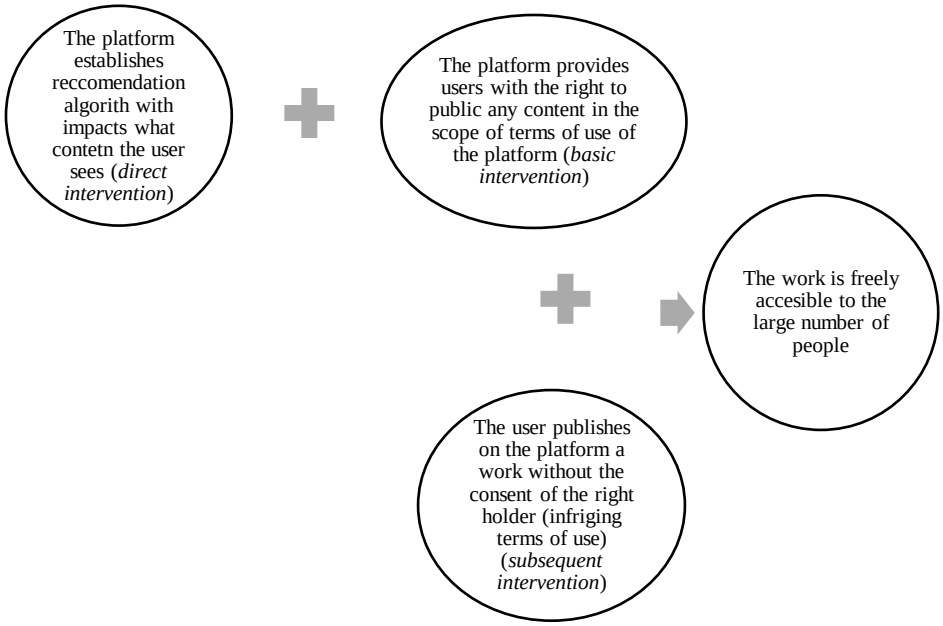

Figure No. 2 Framework of the interventions into the act of communication No 2.

It shall be added that probably under the new DSM Directive[206] the platform shall be liable in both cases, not taking into consideration the level of its intervention, thus it still in hands of the Court to give proper interpretation of the new legal rules, providing flexible, but consistent assessment mechanism for the right to communication to the public, considering the nature of Internet and technology, and not re-shifting the balance only to the side of the right holders, leaving such platforms with all the liability for the actions conducted by its users.

Similar referral *C-683/18 Elsevier* was also made, asking, '*does the operator of a shared hosting service via which files containing content protected by copyright are made publicly accessible by users without the consent of the rightsholders carry out an act of communication within the meaning of Article 3(1) of InfoSoc Directive if:*

- *the upload process takes place automatically and without being seen in advance or controlled by the operator,*
- *in the conditions of use, the operator indicates that copyright-infringing content may not be posted,*
- *it earns revenue through the operation of the service,*

[206] Directive of The European Parliament And Of The Council On Copyright And Related Rights In The Digital Single Market And Amending Directives 96/9/EC And 2001/29/EC, 2016/0280 (COD).

- *the service is used for lawful applications, but the operator is aware that a considerable amount of copyright-infringing content (over 9 500 works) is also available,*
- *the operator does not offer a directory of the content or a search function, but the unlimited download links provided by it are posted by third parties on the internet in link collections that contain information regarding the content of the files and make it possible to search for specific content,*
- *via the structure of the remuneration for downloads that are paid by it in accordance with demand, it creates an incentive to upload content protected by copyright that users could otherwise only obtain for a charge and*
- *by providing the possibility to upload files anonymously, the probability of users not being held accountable for copyright infringements is increased?'*[207]

The second case is partly similar to the YouTube referral, but the *Elsevie* platform has slightly different conditions as there is no search function, but there is the possibility for users to search for the specific content; it is unclear how the platform provides take-down procedure in case of infringement and how unlawful content may impact the revenue of the platform.

The existence of slight similarities and differences between two cases shows that the digital environment requires the flexible application of the law and analyze of the nature of the platform to determine if there is the act of communication or not.

Taking into account the assessment provided in subchapter 3.3.2 and advanced by classifying the types of intervention above, *Elsevie* can be assessed in the following way.

It is clear that here we also have (1) the act of communication is conducted as the work is publicly accessible as it is made available to the (2) public, i.e. all users of the platform, that may at any time access the work published by the '*the unlimited download links provided by it are posted by third parties on the internet in link collections that contain information regarding the content of the files and make it possible to search for specific content'*[208]. Again, the level of the intervention shall be determined to define if the platform conducts the mentioned act of communication. We clearly have the basic intervention as the platform gives its users the right to upload the content. As to the direct intervention, we may presume that the platform in question does not use any recommendation algorithm for the users to see the content that would not be able to see without such software.

[207] Case C-683/18: Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018 — Elsevier Inc. v Cyando AG, OJ C 82, 4.3.2019, p. 4–5, accessed 2019 April 16, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CN0683

[208] Case C-683/18: Request for a preliminary ruling from the Bundesgerichtshof (Germany).

Under such assessment procedure the *Elsevie* actions do not constitute the act of communication, thus to assess the possible liability of the platform it is required to analyze if the platform gives the right holders necessary right to take down the unlawful content.

The third case referred to the CJEU is related to right to communication to the public, was referred on April 25, 2019, the question asked is *"is framing and displaying protected content lawfully hosted on a third-party website an act of communication to the public under Article 3 of the InfoSoc Directive if done by circumventing measures against framing taken or introduced by the rightsholder?"*[209]

Even though the case is related not only to audiovisual content, it is interesting to provide the assessment of it under proposed test, as it is connected not to the who conducts the communication but is connected to framing and outflanking technical measures provided by the right holder.

As explained in the press release and provided by Eleonora Rosati, the First Civil Division of the Federal Court of Justice must decide whether a collecting society provides a possibility to use of digital copies of copyright works on the Internet dependent on the user taking effective technical measures against so-called framing, i.t. against the embedding of the content stored on the server of this user and posted on its website on the website of a third party.[210]

As to the *GS Media*[211] *and Svensson*[212] test, from the one point of view, the actions of the collecting society fall under 'no act of communication' as the right holder made the content freely accessible on the third-party website, which obtained the required authorization.

But, if we refer to the proposed assessment for the additional review, it shall be said that we have (3) direct intervention of the collecting society, who provides a possibility to use of digital copies of copyright works on the Internet, intentionally circumventing measures against framing taken or introduced by the rightsholder, therefore (1) communicating the work to the (2) public, framing it on another website.

To sum up, it shall be stated that nowadays technology significantly impacted copyright. The mentioned above cases reviewed by the CJEU before and referrals submitted and that are not

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[209] Press release, *Submission to the Court of Justice of the European Union on copyright infringement by framing* (Order of 25 April 2019 - I ZR 113/18), publication on the Federal Court of Germany (Bundesgerichtshof) website as of April 25, 2019, accessed 2019 April 25, quoted in Eleonora Rosati, *German Federal Court of Justice refers new case on communication to the public*, published Thursday, April 25, 2019, accessed 2019 April 25, Eleonora Rosati, *German Federal Court of Justice refers new case on communication to the public*, published Thursday, April 25, 2019, accessed 2019 April 25.

[210] Ibid.

[211] Case C-160/15.

[212] Case C-466/12.

addressed yet, show the pattern of challenges that are contributed to the legal regulation of the copyright and namely, the right to communication to the public. It also shall be indicated that the CJEU bears the important goal to inform unity within the EU how the mentioned above right is enforced in the Member States and therefore, its case-law shall be consistent and provide necessary level of legal certainty, to avoid such approaches as *Renkhoff* [213]and to establish sequential evaluation based on its previous decisions on the grounds of the assessment that was provided in this Chapter.

[213] Case C-161/17.

CONCLUSIONS

Right to communication to the public of the audiovisual works protected under copyright shall be considered as one of the key economic rights granted to the authors under the current legislation as in the last decade the Internet has provided a number of new instruments to deliver the content to the end-users.

1. It was established that the digitalization impacted copyright and business models driven by it both positively and negatively. The Internet leads for the development of the creative economy businesses, which relies on works protected under copyright, what at the same time also plays a major role in the globalization of the economy and of law nowadays.
2. At the same time, it was established that digitalization provided for the copyright a number of issues, such as accessibility of the works protected under copyright within the European Union and how the new ways of content delivery, i.e. new media rights (VoD services, etc.), fall within the current concept provided by the law.
3. It was acknowledged that the right to communication to the public has its roots in the number of international treaties and was further implemented in both European legislation and Ukrainian legislation. It shall be said that European legislation regarding the concept of communication to the public depends greatly on the Court of Justice of the European Union, which by means of its case-law provides the significant understanding on what is covered by such complex concept. Thus, it was also established that the case-law of the CJEU consists of the number of inconsistent approaches, that partly re-shifts the important balance of the rights of the rightsholders and the society, which leads to uncertainty on the how broad the concept of communication to the public may be. It was also set out that the Ukrainian legislation is on the stage on the possible change, thus the ideas proposed by the members of the parliament of Ukraine may bring more uncertain provisions, rather than sufficient implementation of the Association Agreement. In addition, it shall be said that Ukraine as the country, who entered in the Association Agreement, has taken the number of obligations to implement EU legal provisions in its national legislation, and therefore, these shall be also taken into account.
4. The new DSM Directive was not disregarded and was fully analyzed in the scope of how it covers the right of communication to the public. While the goal of the mentioned Directive was to adjust the current European legislation for the further establishment of the Digital Single Market, it shall be said that not all goals set in the preamble of the Directive found its realization in the main text of it. It was also analyzed how Portability Regulation and Geo-location Regulation can influence minimization of the digital borders within the

EU for the audiovisual content to be freely communicated by the right holders to the end users within the EU and how multi-territorial silence system established for online music platforms by the CMR Directive may be adjusted for the audiovisual media services.

5. Also, it was laid how VoD services in their wide range of possibilities to deliver audiovisual content fall into the concept of the right to communication to the public and correlate with the right of reproduction. Based on all the mentioned above, the assessment test was proposed on which acts shall consist of acts of communication to the public and which not for the identification of possible infringements. Therefore, the approach was expressed that the criteria of a 'new public' can be obsolete for the ascertainment of the public online, thus, it can be partly excluded as the mandatory requirement for the determination if the act of communication occurred or not. In addition, based on the assessment and the new DSM Directive, the few referrals to the the Court of Justice of the European Union that wait its consideration by the Court were analyzed for the purpose to determine if the approaches proposed may be used and how the act communication relies on the intervention of the platform by means of which its distributed.

In sum, the main aim to determine which legal issues were raised by the Internet for the current concept of the right to communication to the public and how these issues can be addressed, was fulfilled; the new assessment test for the CJEU to evaluate right to communication to the public was proposed and how new forms of exploitation of audiovisual works fall into the current concept of communication to the public was established.

RECOMMENDATIONS

Based on the research made, it is recommended for

(1) The European Commission to rise the necessity the CRM Directive to be reviewed by the European Parliament and the European Council and to amend it regarding the multi-territorial licensing for the purposes of the audiovisual works in the following way:

(a) to add the definition *'online rights in audiovisual works' means any of the rights of the rightsholder in an audiovisual work provided for under Articles 2 and 3 of Directive 2001/29/EC which are required for the provision of an online service.*

(b) to amend Title III in the means that the provisions that are applied to the music works can be applied to the audiovisual works.

Additionally, the negotiation instrument for the platforms shall be proposed, if they are interested in increasing their territorial activity in the European Union and communicate all scope of their content library to the European consumers, they shall be allowed to do so without specific clearance for each Member State, only if they (i) has authorization from all the right holders of audiovisual content for the communication on the territory of whole European Union; (ii) clearances the rights on the content in dispute in more than 10 Member States of the EU.

(2) The Court of Justice of the European Union:

(a) to review its position regarding the new public for the acts of communication online, as a work was made available once on the Internet and is freely available there, then as a presumption it has been communicated to all Internet users and thus, there is no new public;

(b) to apply for the determination of existence the act of communication to the public the test proposed in the subchapter 3.3.2. to follow the consistency of its case-law;

(c) to determine basic and direct intervention of a platform and subsequent intervention of a user in determination of the act of communication to the public and applicability of the DSM Directive as in was proposed in the subchapter 3.3.3.

(3) Supreme Court of Ukraine, High Commercial Court of Ukraine and/or newly established IP Court of Ukraine:

(a) to issue updated decrees on how the act of communication to the public shall be determined on the Internet in the specific situations, considering the case law of CJEU and the tests proposed in subchapters 3.3.2. and 3.3.3. with the purpose to update of the applicability of the copyright legislation by courts and to follow Ukrainian obligations under the Association Agreement.

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ABSTARCT

Right to communication to the public is one of the basic exclusive economic rights, provided to the authors under current copyright legislation. Audiovisual content is one of the most developed and impactful part of the creative economy market, especially in the scope of the technological changes and rise of the Internet. The master's thesis examines the correlation of the current concept of the right communication to the public for audiovisual content and rise of the online distribution channels, which changed how the audiovisual works are distributed and consumed worldwide.
Key words: *copyright, Internet, right to communication to the public, audiovisual works, digital single market.*

SUMMARY

The Master Thesis is dedicated to the problems how the right to communication to the public of the audiovisual works is regulated, focusing on the communication of the works mentioned by means of the world wide web – the Internet. Firstly, the general analysis of how the Internet both helps the copyright-driven businesses economically grow and how it is related to the globalization of the world economy and law, which is the result of the 21st century. In addition, the notion of the rightsholders, end-users and the perspectives of the globalization of law is analyzed. Shifting for the positive side of the digitalization, to the negative problems, the issue regarding the accessibility of the content based on the territorial residence of the end-user is analyzed. At the same time, the new forms of exploitation of the works protected under copyright are presented.

The second chapter is devoted to the current international, European and Ukrainian legislation related to the right to communication to the public and audiovisual works. The purpose of this part of the research is to analyze the present level of legal certainty regarding the issues raised for further determination how mentioned issues shall be addressed.

The third chapter acknowledges the attempt to solve problems raised by the Internet for copyright within the EU, i.e. the DSM Directive, that is widely discussed and either criticized or praised. The research focuses of how the Directive provides the number of new definitions, sets goals for regulating VoD services and how it provides a new assessment of the platforms' liability, which is strongly connected to the communication to the public. Secondly, the third chapter provides a proposition to adjust current legislation to minimize cross-border communication of the content to the end-user. In addition, in this chapter, the correlation between new forms of exploitation of audiovisual works with the concept of communication is established. Moreover, the assessment test based on the wide case-law of the CJEU is provided to avoid the inconsistent of the Court's approach and additionally, referrals made to the Court are analyzed considering new DSM Directive and the test established.

HONESTY DECLARATION

13/05/2019
Vilnius

I, **Anastasiia Yefimenko**, student of
(name, surname)

Mykolas Romeris University (hereinafter referred to University),
Faculty of Law, Institute of Private Law, Intellectual Property Law
(Faculty /Institute, Programme title)

confirm that the Master thesis titled

"Problems of the Legal Regulation of the Right of Communication to the Public of the Audiovisual Works on the Internet":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

(signature)	**Anastasiia Yefimenko** *(name, surname)*