

Under One Umbrella

Problems of Internet Retransmissions of Broadcasts and Implications for New Audiovisual Content Services

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Abstract: The development of broadband Internet connections has fostered new audiovisual media services and opened new possibilities for accessing broadcasts. The Internet retransmission case of TVCatchup before the CJEU was the first case concerning new technologies in the light of Art. 3.1. of the Information Society Directive. On the other side of the Atlantic the Aereo case reached the U.S. Supreme Court and challenged the interpretation of public performance rights. In both cases the recipients of the services could receive broadcast programs in a way alternative to traditional broadcasting channels including terrestrial broadcasting or cable

transmission. The Aereo case raised the debate on the possible impact of the interpretation of copyright law in the context of the development of new technologies, particularly cloud based services. It is interesting to see whether any similar problems occur in the EU. The „umbrella” in the title refers to Art. 8 WCT, which covers digital and Internet transmission and constitutes the background for the EU and the U.S. legal solutions. The article argues that no international standard for qualification of the discussed services exists.

Keywords: Audiovisual Media Services; CJEU; Right to make available to the Public; WCT; InfoSoc

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A. Introduction.

1 The aim of the WIPO Copyright Treaty (hereinafter: „WCT”) was to set the scene for the exploitation of works on the Internet. In the package of rights that should have ensured the interests of authors in the new (at the time of conclusion of the treaty) environment, a prominent one is the right of communication to the public covering electronic transmission. According to Art. 8 of the WCT, without prejudice to the provisions of the Berne Convention expressly referred to in this provision „*authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire and wireless means*”. According to the final part of the provision, the

right includes the right to make a work available to the public in such a way that members of the public may access this work from a place and at a time individually chosen by them. The characteristics of the Internet retransmission cases discussed in this article are that they may involve the authors’ rights as specified in the WCT, but also the rights in broadcast programs or rights of audio-visual producers. It is not necessary for the purpose of the article to unbundle those rights, yet it should be stressed that provisions of the WCT form the context in which the interpretation of provisions of the EU and the U.S. law is set, and that in the discussed cases the authors, and not the neighboring rights

holders are in focus. The provision of Art. 8 WCT is called an „umbrella solution”, which refers to a neutral way of describing the digital transmission, leaving sufficient freedom to national legislation as to the choice of the actual rights that apply. The broad right of communication to the public should also fill the gaps in the Berne Convention’s provision on broadcasting and retransmission rights.¹

- 2 The „umbrella solution” thus covers different acts of transmission, irrespective of the applied technology, as long as the communication is „to the public”. The “umbrella” of the WCT is the starting point to discuss the problems raised in the light of the CJEU judgment in TVCatchup², and the U.S. Supreme Court judgement in the Arereo³. The meaning of the term „to the public” is subject to discussion both in the EU and the U.S. In the article, the scope of the right of communication to the public, and particularly the delineation between those communicating to the public and mere distributors, with implications for the emerging audiovisual services is discussed. It is argued that enabling on-demand viewing, which is the core of various new audiovisual services, in itself does not trigger Art. 8 WCT, and that Art. 8 WCT „was never meant to make every provider of tools and services that allow consumer to make and transmit copies of content to themselves directly liable for copyright infringement”.⁴ It is of particular importance how this problem is approached in the EU law.

B. Right of communication to the public under EU law.

- 3 In the EU, the harmonization of the right of communication to the public for authors has been completed⁵ with the introduction of Art. 3 of the Information Society Directive⁶. Art. 3.1 of the Directive obliges the Member States to 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 of their works, which is characterized in an analogous way to Art. 8 of the WCT.
- 4 The last two years have brought new rulings in the CJEU’s body of case law on the right of communication to the public, where the potential exploitation of works on the Internet is at stake. In the *Svensson* ruling, the CJEU clarified that Art. 3.1. 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”. This confirms the earlier comments that Art. 3.1 constitutes the full harmonization⁷. This ruling strengthens the obligation to interpret the national law in a uniform way, taking into account

the case law of the CJEU in the subject matter. With this formal premise in mind, it should be noted, that the interpretation of this provision in the context of evolving services, for example in the audiovisual media sector, has just started.

C. Public performance right under U.S. law.

- 5 There is no analogous provision in the US Copyright Act and different rights may apply in the case of making the work available to the public, including reproduction, distribution, public display and public performance rights, depending on the facts of the case.⁸ In the *Aereo* case the application of the public performance right granted to copyright holders in motion pictures and some other works 17 U.S.C. §106(4) was the key problem. What it means to perform the work publicly is explained in the definitions in § 101, and the reference to electronic transmissions is enshrined in what is called the „Transmit” clause.⁹ To perform the work publicly means to „transmit or otherwise communicate a performance or display of works (...) to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times”. The solution that exists in the U.S. Copyright Act originates in the development of cable services and Community Antenna Television (CATV), where the courts were of the opinion that cable systems do not infringe or implicate the copyright owner’s right. Eventually, the Congress legislatively reversed those decision in the 1976 Copyright Act, with section 111 regulating cable services and providing for a compensation scheme¹⁰. With the advent of new transmission technologies the scope of the public performance right has been analyzed in relation to the new services offering access to broadcast content, with the example of services combining the possibilities for remote storage and playing the broadcast content¹¹. Those services might be described as combining the characteristics of video recorders and video on demand.

I. Retransmission of programs in the EU.

1. A look at CJEU’s case law on the right of communication to the public.
- 6 The „umbrella” may of course be a metaphor for seeking legal solutions in EU and US when it comes to the application of the right of communication to the public, but it is also used to underscore

the bundle or cluster¹² of authors' rights that this right covers. In the EU law, according to the preamble of the Information Society Directive, the right of communication to the public covers all communication to the public not present at the place where the transmission originates. This includes broadcasting and rebroadcasting by wire or wireless means¹³. There is thus an expressive reference to the act of rebroadcasting, but the criteria when a retransmission occurs are not defined. The scope of the right of communication to the public and particularly the problem what the indication that the right should not cover any other acts than transmission or retransmission actually means, has been discussed on the canvas of the *Svensson* case¹⁴.

- 7 The first cases decided by the CJEU on the basis of Art. 3.1 of the Information Society Directive did not consider new technologies, but rather examined the well-known problem of the use of broadcasts in hotel rooms.¹⁵ With the broad definition of the right of communication to the public, the collective management organizations challenged various national provisions that aimed at exempting some particular uses of broadcast from obtaining the rightholders' authorization. In the body of case law concerning the use of broadcasts, the CJEU considered not only hotels but also pubs, a spa resort and a dentist's practice¹⁶. Those cases are important for the interpretation of Art. 3.1 of the Information Society Directive. On the basis of the hotel room case, the CJEU formed the groundwork for the uniform interpretation of the right of communication to the public in the EU, and the *SGAE* case is referred to as establishing a standard.¹⁷

2. Broadcasters, webcasters and distributors.

- 8 The first case concerning Internet exploitation and the right of communication to the public has been *TVCatchup*. The question referred concerned the Internet retransmission of broadcasts. The Court's answer that such an act is covered by the right of communication to the public is not particularly controversial. The reasoning of the Court should however be discussed with reference to the development of the criteria for assessing whether there is a communication to the public and what the possible implications for other Internet and cloud based services are.
- 9 The case comes from the UK, one of the leading European markets in audiovisual services. The service at stake, which is to some extent similar to the Aereo service discussed in the U.S., *TVCatchup* was offering online television, streamed to users as a near-live transmission, without interference in the broadcasts but with addition of new pre-roll

advertising. *TVCatchup* ensured that users of the service were legally entitled to receive the broadcasts by virtue of their television license. Commercial broadcasters, whose broadcasts were retransmitted that way, initiated proceedings, claiming the infringement of the right of communication to the public as enshrined in the Sec. 20 of the Copyright, Designs and Patents Act 1988. The English High Court decided to halt the proceedings and to refer the question for a preliminary ruling. The questions of interpretation were raised particularly in the light of the earlier cases *SGAE*, and *Airfield NV and Canaal Digital* and they first of all concerned the significance of the criterion of the new public. In *SGAE*, the CJEU invoked the interpretation of the provisions of the Berne Convention and the explanation that when the author authorizes the broadcasts, he considers only direct users, which are the owners of the reception equipment. When the broadcast is received by a different audience and possibly for profit, the audience is considered to be a new public, and the broadcast requires separate authorization. The same reasoning has been applied by the CJEU to the communication of broadcasts in hotel rooms, where the clientele is forming a new public¹⁸.

- 10 In the joined cases *SABAM v Airfield NV and Canaal Digital*, and *Agicoa v Airfield NV*, the Belgian collective societies claimed that *Airfield NV* and *Canaal Digital* were infringing the right of communication to the public because they were rebroadcasting the programs of other broadcasters by satellite without the authorization of authors and producers of works included in the broadcasts. *Airfield* was a satellite television provider, offering viewers satellite packages consisting of free-to-air and encrypted channels, on the basis of the agreement the company concluded with the broadcasters. In case of encrypted channels *Airfield* offered its subscribers a decoder card enabling to access the broadcasts. *Airfield's* and *Canaal Digital's* position was that they carry rebroadcasting and thus did not communicate the broadcasts to the public, but that they only offered the programs to the public on behalf of the broadcasting organizations.¹⁹ The Court decided that the provisions of the Satellite and Cable Directive and not the provisions of the Information Society Directive were relevant to this case. This choice of the legal base may be questioned and the arguments of the Court have been criticized heavily²⁰. In its preliminary ruling, the CJEU has nonetheless applied the reasoning analogous to the one from the previous cases based on the Information Society Directive. The Court rejected *Airfield's* arguments, and stated that when the operator intervenes in the process of communication to the public, with the result that he makes the protected subject matter accessible to a public wider than targeted by the broadcasters, he is expanding the circle of viewers, and is communicating to a new public. The Court concurred that this was the case, noting

that the satellite package provider was offering a new audiovisual product and was responsible for its composition. It follows that satellite package operators are required to obtain the authorization, from the rightholders concerned for its intervention in the communication to the public by satellite²¹.

- 11 *The Airfield NV and Canaal Digitaal* case concerns the provisions of the directive covering only cable and satellite transmission. The *TVCatchup* case brought the question of the „new public”, when it comes to the „new audiovisual services”, to the fore of the Information Society Directive. *TVCatchup* claimed that in their case there is no „new public” as users are entitled to receive these broadcasts anyway. The English Court also asked whether it is relevant that the *TVCatchup* service is for profit (because of additional advertising) and in competition with traditional broadcasters for the same audience. In this case the CJEU’s interpretation of the scope of the right of communication to the public is that it covers a retransmission of the works included in the terrestrial television broadcast where the retransmission is made by an entity other than the original broadcaster, even though the subscribers are within the area of reception of those broadcasts and may lawfully receive the broadcasts on a television set. The Court has further explained that this answer is not influenced by the fact that the retransmission is for profit and made by an organization directly competing for the audience with the broadcasters. The CJEU distinguished the *TVCatchup* case from *SGAE* and *Airfield* cases stating that each transmission made under specific technical conditions and using different means of transmission requires a separate authorization.

II. Online access to broadcasts in the U.S.

- 12 The Aereo service was launched in 2012 for viewers of local channels in New York.²² Aereo offered its subscribers online access to over-the-air broadcasts by using a particular technology. The Aereo service functioned by operating thousands of tiny antennas individually assigned to users. When a user would click and choose a broadcast from a list of programs on Aereo’s website the server would tune one of the antennas to the broadcast chosen and the user would initiate streaming in a one-to-one connection and receive the broadcast on a laptop or other portable device. Aereo’s system operated by creating a subscriber specific copy. This individual copy was the source for the subsequent individual transmission and could also be saved for later viewing. As Aereo was acting without authorization from the holder of the copyright of the broadcasted works, the rightholders initiated proceedings before the District Court of New York. The District Court

denied their motion.²³ This decision was affirmed in the appeal before the Second Circuit Court.²⁴

- 13 As Aereo was not the only service of that kind other lawsuits concerning the service FilmOn - previously known as Aereokiller - and alike were initiated as well. The U.S. District Court for the Central District of California decided in *Fox Television Systems, Inc. v. BarryDriller Content Systems, PLC (BarryDriller)*²⁵ that FilmOn violated the plaintiff’s copyright - applying a different public performance test than in the Aereo case²⁶. Furthermore the U.S. District Court for the District of Columbia concluded that the Copyright Act forbids FilmOn retransmitting the copyrighted programs to the Internet, and issued an injunction.²⁷ In what was described as public-performance conundrum the Supreme Court granted certiorari to determine the public-performance approach,²⁸ and decided in favor of the broadcasters in June 2014²⁹.
- 14 It was correctly pointed out that Aereo’s „*design has to be viewed through the lens of recent judicial interpretation of U.S. copyright, and that Aereo sought to exploit the contours of existing law as interpreted in the Supreme Court’s decision in Sony*”³⁰ and the Second Circuit in *Cablevision*.³¹ The *Cablevision* decision³² seems of particular importance for the emergence of online television services,³³ and may be viewed as one of the sources of the divergent approach of the U.S. courts. In this case the cable provider Cablevision offered a Remote Storage Digital Video Recording System (RS-DVR), a service that allowed each subscriber to generally time-shift and play the chosen broadcasts on-demand. Digital video recording formed the basis for the service but the subscribers did not need to buy recording devices. A subscriber could simply press the button on the remote and initiate the recording on Cablevision’s hard drive. This way individual copies for each broadcast chosen by each user were created and were available only to this user. It was also possible to choose a broadcast from any channel within one’s subscription from Cablevision’s program guide. The content was played back on the user’s television set, with the use of a cable set-top-box and a remote. The interesting question was whether the transmission, when the video was played back to the customer, constituted a public performance?
- 15 Cablevision did not seek to obtain any license from the rightholders. In the district court it was successfully argued that Cablevision directly infringed the public performance right along with the reproduction right. But the Second Circuit reversed the decision comparing the service offered by Cablevision to video recorders and concluded that copies are „made by the RS-DVR customer”, so it is not sufficient to find Cablevision directly liable. The interpretation of the „Transmit” Clause was an important point of consideration in determining whether Cablevision was performing to the public. The Second Circuit

found it crucial that transmissions are made only to one subscriber, from the copy made by this specific subscriber. Therefore the copy is not transmitted „to the public”.³⁴ In the words of J. Ginsburg and R. Giblin it appears to instruct technology providers how to design their services so that the structure of the service immunizes it from copyright liability under reproduction and public performance rights in appropriate cases.³⁵

- 16 When considering the *Aereo* case, the U.S. Supreme Court raised two fundamental questions: is *Aereo* performing at all? Is *Aereo* performing to the public?³⁶ Stressing the similarities with CATV providers, the Court pointed out that *Aereo* is not simply an equipment provider. In the light of Congress' basic purpose in amending the Copyright Act with the CATV providers in mind, the Supreme Court decided that *Aereo* could be directly liable for the public performance, as long as the „to the public” element is satisfied. The Court dismissed the technical considerations that seemed so vital to *Aereo*'s functioning. It stated that the behind-the-scenes way in which *Aereo* delivers the programming does not render *Aereo*'s commercial objectives any different from cable companies, nor does it significantly alter the viewers' experience.³⁷ In the opinion of the Supreme Court the „Transmit” clause must permit the interpretation that an entity may transmit a performance through one or several transmissions and the „public” need not to be situated together either spatially or temporally. Taking into account the opinions expressed in a number of *amicus briefs* the Court called its holding „limited” and pointed out that it does not determine whether different types of providers in different contexts also „perform”.³⁸ The Court reversed the judgment of the Court of Appeals, and remanded the case for further proceedings.

III. „New public” and „public” at all – no easy answers?

1. EU –the „new public” problem.

- 17 The question when the communication, or performance „to the public” occurs, is one that resonates both in the EU and the U.S. discussion. Apart from the considerations on the notion of „the public”, relevant in a number of the CJEU's rulings, the two cases discussed in this article highlight the question when the „communication” is an act which requires the rightholders' consent? The answer should be easy: when it is made to the public. In the *TVCatchup* case, the Court summed up what seems to be the generally accepted definition. The Court began with stating that „the public” refers to an indeterminate number of recipients and implies a

fairly large number of people. The „cumulative effect of making the works available” should be taken into account, which means taking into account the members of the public „who may access the works at the same time and successively”. In the case of Internet retransmissions it led to the conclusion that it is „irrelevant that the potential recipients access the communicated works through a one-to-one connection”. It is sufficient that a „fairly large number of people have access to the same works, at the same time”.³⁹ Therefore, the „to the public” aspect of the communication is undisputed in the case of an Internet retransmission.

- 18 On the level of the language used it may be noticed that the Court explains the „right of communication to the public” by using the term „*making the works available*”. Even though the linguistic aspect should not be emphasized to much, the relationship between the interpretation of the broader right of communication to the public and the narrower making available right seems to be a bigger problem. If we look closer, we can see that the Court stated in the *SGAE* case that „for there to be a communication to the public it is sufficient that the work is made available in such a way that the persons forming the public may access it”⁴⁰ - which follows from article 3.1 of the Information Society Directive and Art. 8 of the WCT. It might be argued that this approach allows for qualifying hyperlinking as a potential infringement of the right of communication to the public. The debate among academics and copyright organizations such as the European Copyright Society and the ALAI Organization⁴¹ arose around the *Svensson* case and continued with the references in the *Bestwater* and *Cmore Entertainment* cases and the CJEU's rulings of this cases.⁴² Even though it has been submitted that a hyperlink does not „provide” the work, thus establishing that a hyperlink cannot be „communicating to the public of the work”⁴³, the Court justified the statement that „the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’, by invoking the specific part of the *SGAE* ruling⁴⁴. In the *Svensson* case the Court specified that the making available right, as one of the rights in the scope of the right of communication to the public, is at stake, and the final conclusion was that when all Internet users can have access to the particular work, providing a hyperlink does not lead to the works in question being communicated to a new public⁴⁵. Apparently, in this case the „new public” criterion is a decisive one. It leaves a substantial area of uncertainty when it comes to the future of application of the right of communication to the public.
- 19 Zooming in on the „new public” as the premise of the right of communication to the public we can make a short summary. It was introduced in the Court's interpretation of the *SGAE* case with an explicit

reference to the Berne Convention⁴⁶ and applied to clarify the position on the use of broadcasts in hotel rooms. In the *Premier League* case it was applied with the remark, that the commercial character of the service is not irrelevant⁴⁷. In the *Airfield* case the „new public” criterion was used to strengthen the position that *Airfield* is actually communicating to the public and to distinguish its activities from those of the mere distributor. In the *TVCatchup* case the „new public” issue was dismissed and the case distinguished from others on the basis of different technical means. In *Svensson*, the „new public” criterion was again relevant. In fact, for the first time the existence of the „new public” is a key element of the right of communication to the public. It is a difficult question which general conclusions might be inferred here. It has been welcomed that the CJEU took a purposive approach, thus avoiding the perils of interpreting copyright in a formalistic way, as in the *Aereo* case.⁴⁸ It was also noted that the approach in *TVCatchup* is economic and favorable to the rightholders⁴⁹. If we compare the application of the ‘new public’ criterion in *Svensson* and in *TVCatchup*, we can see that when the work is disseminated over the Internet (made available) without access restrictions, and subsequently a person provides a link to it, he/she is not a communicating to the public, because there is no new public. When however, the work is disseminated in an over-the-air transmission or satellite broadcast and subsequently retransmitted over the Internet it is communicated to the public and the fact that it is not to a new public is irrelevant. Although the first case concerns the making available right and the second the retransmission right. Both rights come under the umbrella of a right of communication to the public. The difference between Internet-only exploitation and other forms of communication to the public lies in the application of the technology dependent criteria developed by the Court. The application of the “new public”, „the specific technical conditions” and „different means of transmission” criteria in the future raises a lot of questions. In its interpretation of the retransmission right the CJEU has simplified the answer as much as possible, narrowing its reasoning to the presence of „organization other than the original broadcaster” and the different means of transmission, in the case the Internet stream. The guidance of the CJEU is so far limited, and hopefully the „new public” criterion is not a dead end.

2. U.S. - the public performance right and implications for cloud based services.

- 20 The question of the ‘new public’ was not a centerpiece of the debate in the US. Based on the new model of services, exemplified in the cases *Cablevision* and *Aereo*, the discussion focused on

the differentiation between public and private performance.⁵⁰ The suggested proposals aimed at substituting the *Cablevision* test for public performances with the new test and debated the consequences of sustaining that approach. This approach has been described as the „transmission centric public performance test”⁵¹. It was suggested that the „single copy” test be substituted by other tests applied to online performance - for example the „substitution” and „substantial audience” test.⁵² The latter would serve to differentiate the nonlinear performances that are a substitution for linear broadcasts from other services. In the case of online video streaming services, the application of a substantial audience criteria is suggested, to assess whether the performance is „public”.⁵³ The important point in the analysis is the question whether the *Cablevision* ruling should affect online technology or new technologies and new services.⁵⁴ On the one hand, it has been pointed out that the U.S. caselaw could encourage copyright avoiding business models⁵⁵ and that it has demonstrated how some services which were copyright infringing might be re-engineered⁵⁶. On the other hand, the *Cablevision* ruling was found to provide the legal cover for cloud computing processes.⁵⁷ Finding the right balance between emerging new services, the benefits of the consumers and the justified interests of copyright holders is not only a concern in the U.S.⁵⁸ The Second Circuit’s ruling in *Aereo* was supported in view of the underlying economics. It led G.S.Lunney Jr. to advocating that the difference from the legal (copyright) point of view should be drawn between intermediaries with and those without market power, taking into account the differences in the transmission method, whether they are operating through their own network or providing services over the Internet, with the assumption of non-discrimination between the service providers.⁵⁹ One point mentioned is that consumers might be paying twice, and the other recurring aspect is the consumers’ interest in the access to audiovisual content that is unbundled⁶⁰, which leads to „cord-cutting”⁶¹ and seeking independence from cable companies, at least in the U.S. market. These reasons prompted many entities and organizations to file amicus briefs.⁶² As mentioned above the U.S. Supreme Court did not disregard the problem of impact on new technologies, but neither has it dealt with it.

- 21 Interestingly, noting the impasses in considerations before the Supreme Court ruling, R.Giblin and J.C.Ginsburg state that focusing not on technology but on the „public” to which these services communicate copyrighted content may be a way out of the impasses.⁶³ They both take the use of copyrighted content in the hotel rooms as starting point but arrived at different conclusions. In the U.S. the case discussed by the authors did not concern putting radio or TV equipment in the hotel room, as in the

SGAE, but an on-demand electronic transmission of the videos.⁶⁴ Based on this case the commercial relation between the sender and the recipient was highlighted to assess whether the transmission was to the public. J.C.Ginsburg proposes a way forward by accepting the view that the transmissions of the work to the paying public, wherever and whenever the members of the public receive them, are public performances. In that case payment is understood in a broader sense than simply as the fee for the service. In order to differentiate (some) cloud-based services, the question on what the public is paying for should be answered.⁶⁵ Are they paying for simple storage of content and playback opportunities or for receiving the performances of copyrighted works as in the *Aereo* case? J.C.Ginsburg however notes the hybrid services and points out that the suggested approach would not disaggregate the initial content delivery and subsequent playback,⁶⁶ which may be understood that in cases where the service provider does not differentiate what kind of content is being played back (particularly in price), it would fall out of the public performance scope. In the U.S. Supreme Court's opinion in *Aereo*, in relation to the impact on other technologies, we find the summary of the position taken: „*the public*” apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs (...) that does not extend to those who act as owners or possessors of the relevant product. The Court further stressed that it was not considered ...whether the public performance rights is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage...⁶⁷ That leaves some room but also uncertainty for cloud service provider. In the opinion of J.C.Ginsburg, approach of broadly defining a „performer” is not without the shortcomings, but in many cases would suffice.⁶⁸

IV. Control over content

1. Categorizing audiovisual services

- 22 In the light of the possibilities created by the convergence of broadcast and Internet services it becomes extremely difficult to categorize emerging audiovisual services. It was noted that the Berne Convention was developed to respond to the growth of „push” models of communication and the Art. 8 of the WCT was developed to respond to the potential growth of „pull” services.⁶⁹ It is no longer enough to say that it covers Internet transmissions, as there is a growing number of new types of services enabling access to the video content. The concern that the distinction between pull and push exploitation is blurred has been voiced even before the expansion of the new type of television services.⁷⁰
- 23 In the regulatory sphere, the European Parliament has noted in its resolution on Commission's Green Paper on *Preparing for a Fully Converged in Audiovisual World* the role of a „content gateway” as an „entity which act as an intermediary between audiovisual content providers and end-users, and which typically brings together, selects and organizes a range of content providers and provides an interface through which users can discover and access that content”.⁷¹ These content gateways are not only TV platform providers but also manufacturers of devices in the case of connected television. From this perspective the distinction between physical facilities and services is also blurred.
- 24 The copyright problems have been recently discussed with respect to cloud TV recorders, with the combined problems of reproduction and the right of communication to the public⁷².
- 25 In the brief global overview of case law concerning cloud TV recorders it has been noted that two general models emerged: user initiated working as a remote digital video recorder (DVR) or a non-user initiated, where everything is recorded by the service provider. It was at the same time pointed out that technology and businesses develop rapidly and new services may not fall neatly in those categories.⁷³
- 26 In the overview of the national and the CJEU's case law on the public communication aspect of the services made in the *Brief Amici Curiae of Law Professors and Scholars* the aspect of making particular content available to all of its users in the on-demand services is emphasized as a key difference to the *Aereo* model.⁷⁴ In the German case on the online video recorders *shift.tv* and *save.tv* the BGH dealt with the issue whether the recordings of broadcasts are made by the users (*shift.tv*'s clients) or by the service provider. In the BGH ruling in 2009 the court differentiated between the situation where the service provider is recording and therefore violating §87(1) 2 UrhG⁷⁵ and where the users are recording. In the latter case it should be verified if the broadcasts are forwarded to the clients and in this way communicated to the public and in fact retransmitted.⁷⁶ This aspect of the case remained unclear after the ruling of the Court of Appeal in Dresden⁷⁷ and the BGH decided in its ruling in 2013 that there was a retransmission of broadcasts.⁷⁸
- 27 In case of the possibilities offered by cloud TV recorders the question to what extent the reproduction right applies is equally important.⁷⁹ In this article however the focus is on whether there was an unauthorized retransmission of broadcasts. The Court of Appeal in Dresden found no act of making available to the public as the service provider had transmitted the broadcasts to the individual clients and they were no longer in his „sphere of access” to be made available on demand.⁸⁰ In

simple words: the broadcasts were no longer in the broadcasters' sphere of control.⁸¹ The question that returns is where the dividing line between actually offering content or making the access possible and the „mere“ facilitation of access can be drawn. The latter was the issue raised by the defendants in the *Airfield* and *Aereo* cases.

2. Mere distributors or providers of technical facilities

- 28 In the Agreed Statement to Art. 8 WCT the parties have concluded that *mere provision of physical facilities for enabling or making the communication does not in itself amount to the communication to the public*. It was further explained that the Agreed Statement should serve to clarify the issue of liability of service and access providers in digital networks, particularly the Internet. The Agreed Statement is read as merely confirming that what is not covered by the right of communication to the public may not result in a direct liability.⁸² It was found that *Aereo* was doing more than merely providing physical facilities- in this case remotely operating tiny antennas, although judge Scalia in his dissent argued that *Aereo* cannot be found directly liable.⁸³ What is interesting from this perspective is - as reported by the press - that after *Aereo* suspended its operation following the Supreme Court's ruling, services offering hardware which allows the same operations, like watching television on mobile devices, became more active.⁸⁴
- 29 In EU law an analogous explanation to that included in the Agreed Statement is found in the recital 27 of the Information Society Directive: „the mere provision of facilities for enabling or making a communication, does not in itself amount to communication within the meaning of this directive“. In the case of hotel rooms the Court pointed out that the distribution of signals to hotel rooms was not just a technical means to improve or ensure the reception in the catchment area but that the hotel owner carries an act of communication⁸⁵. In the case of the public house owner in the *Premier League* case, the Court invoked SGAE ruling, and found that he „intentionally gives the customers present in the establishment access to broadcast“⁸⁶, and therefore, was also communicating to the public. In the *TVCatchup* the Court summarized its case law, stressing that the intervention of such technical means must be limited to maintaining or improving the quality of the reception of a pre-existing transmission and cannot be used for any other transmissions.⁸⁷ The *TVCatchup*'s intervention was not aimed at improving the quality of reception. This approach certainly focuses more on the nature of the services, than on the technical aspects.
- 30 There is no identical provision in the Cable and Satellite Directive, yet the act of the communication

to the public is defined as „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“⁸⁸. It follows that if there is an interruption in the chain of communication, the act cannot be treated as a single act of communication to the public. It is therefore explained that normal technical procedures relating to the program-carrying signals should not be considered as interruptions of the chain of broadcasting⁸⁹. There is no reference to physical facilities but the scope of this solution is limited to satellite broadcasting. Although the AG Jääskinen argued that the operations of *Airfield* clearly broke the chain of communication⁹⁰ the Court found that all the conditions set in Art. 1(2) (a) and (c) are satisfied - and among others - *Airfield*'s interventions fall within the customary technical activities of preparing the signals for their introduction into satellite communication uplink and do not break the chain of communication.⁹¹ One of the most interesting aspects of this case is that the Court also found that the activities of a satellite package provider should not be confused with the mere provision of technical facilities in order to ensure or improve reception. Therefore, the satellite package provider is required to obtain authorization⁹² even though the provisions of the Cable and Satellite Directive indicate the sole responsibility of the initial broadcaster for the act of communication. The *Airfield* ruling seems inconsistent at that point. Even though there is a reference to digital networks in the WCT Treaty the Agreed Statement and recital 27 of the Information Society Directive's scopes are limited to physical facilities. Further the Court stressed that the facilities must serve the reception of broadcasts. As such it offers little help in the delineating the activity of those communicating to the public and offering services that do not require authorization of right holders.

3. Elsewhere in the EU and the U.S. law.

- 31 Intermediary service providers are of course secured by the safe harbor provisions in the e-commerce directive under EU law⁹³. Designed specifically for information society services these provisions should provide the adequate framework for the development of new services, including cloud based services. However, the question of the „control over content“ returns here as well. One of the condition for the exemption of liability for hosting providers, is that the provider the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent. The CJEU's interpretation of

this provision in *L'Oreal v eBay*⁹⁴ case is that Art. 14 of the e-commerce Directive does not apply when the hosting provider *plays an active role of such a kind as to give it knowledge of, or control over* the data provided by the consumers. In the recent French case *TF1 v Dailymotion* on the liability of the video-sharing platform provider the Paris Court of Appeal agreed that Dailymotion plays a double role – with relation to some content the provider is an editor and thus could not claim the liability exemption and with relation to content posted by user it is just a host provider⁹⁵ and thus have no „control over content”. Referring to the aspect of “volition”, J.C.Ginsburg differentiates between the situation where there is a possibility of applying safe harbors and the requirement that each transmission manifest specific intent to deliver particular content.⁹⁶ It may be understood, that this approach would be too narrow; yet the delineation problem remains.

- 32 The problem of who has the control over content in the audiovisual on-demand services may also be discussed in light of the provisions of the Audiovisual Media Services Directive.⁹⁷ The provider of a service is an audiovisual media service provider only if he exercises the “editorial responsibility” which means the “effective control” over both the selection of the programs and over their organization.⁹⁸ The problems with allocating the “editorial responsibility” may be illustrated by the UK example of the decisions of Ofcom – the regulator in the field of audiovisual services. In the case of Nickelodeon and others, it was found that in case where Nickelodeon content could be found on the Virgin Media platform, it was the Nickelodeon UK that had editorial responsibility – as was also indicated in the contract with the platform operator.⁹⁹ In the case of BBC Worldwide content on the Mediaset platform, it was the Mediaset platform operator that was found to have editorial responsibility and therefore has to be seen as the audiovisual media service provider.¹⁰⁰ In these cases the detailed aspects of the contractual provisions and the actual relations and tasks of the content and service providers have been considered. It depends on the circumstances of the case whether it is the platform operator or the provider of the channels/content that has editorial responsibility, as they may be both engaged in taking “editorial decisions”.¹⁰¹ Apart from the focus on the contractual provisions and the thorough analysis of the activities of the parties there is no magic spell that can be used to determine who has the “control over content”. The abovementioned decisions demonstrate the complexity of these relations.

D. Conclusion

- 33 The case law in the EU and the U.S. Supreme Court ruling in the *Aereo* case have so far focused on the

issue of the retransmission and public performance as forms of communication to the public and did not elaborate further on the aspects of recording and subsequent streaming, or otherwise communicating to the public.¹⁰² The CJEU did not have the occasion to consider, e.g., the cloud based personal video recorders as a complex service. It may thus be the beginning of the considerations in the field of audiovisual content services, particularly those based on the cloud technology. One notable aspect is the differentiation between those acting within the sphere of copyright and those preserving the status of simple intermediaries¹⁰³. Despite the aim of the Agreed Statement to Art. 8 WCT the issue is not clear and obvious. In the EU the solutions in the area of satellite transmission could theoretically serve as a starting point for the discussion; with respect however to the particularities of Internet communication. The interpretation of the provisions of the Cable and Satellite Directive is complicated by the introduction of the analysis on the “new audiovisual product” and the “new public”. If the first basic question is: is there a communication to the public? The second could be: under whose control does the communication occur?¹⁰⁴ The approach indicating that it is worth considering if there is a “new audiovisual product” should not be disregarded but does not solve the problem in itself. The *TVCatchup* case is not a milestone or a breakthrough in the EU law since its relevance may depend on the existing legal solutions which vary in the Member States. If *TVCatchup* is read together with the *Svensson* ruling, the contours of “making the access possible” for the public are no longer clear; if they ever were. Though the problem of when exactly the new audiovisual services providers may be found liable for copyright infringement is only partly visible in the *TVCatchup* case, it is growing in the maze of the CJEU rulings.

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- 2 Judgment of the Court of 07.03.2013 *ITV Broadcasting and others v TVCatchup*, C-607/11.
- 3 *American Broadcasting Companies, Inc., et al., Petitioners v. Aereo, Inc., FKA Bamboom Labs, Inc. On Writ of Certiorari to the United States Court Of Appeals For the Second Circuit*, 573 U.S. (2014) p.2-3. http://www.supremecourt.gov/opinions/13pdf/13-461_1537.pdf.
- 4 *Brief Amici Curiae of Law Professors and Scholars in Support of Respondents*, submitted by: M.Kaminski, S.M.Fill-Flynn, M.Carrol, P.A.Jaszi, M.W.Jacob, p.15 and 17. http://infojustice.org/wp-content/uploads/2014/04/13-461_bsac_Law-Professors-and-Scholars.pdf
- 5 Further on the issue: K.Klafkowska-Waśniowska *Right of communication to the public: Towards Full Harmonisation?* [2013] E.I.P.R. p. 751-758.
- 6 Directive 2001/29/EC of the European Parliament and the Council, of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the Information Society, [2001] O.J. L 167,10-19.

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- 8 Currently this leads to a debate on the need of introducing more specific provisions. U.S. Copyright Office, *Study on the Right of Making Available; Comments and Public Roundtable* (2014) 79 Federal Register, 10571, <https://www.federalregister.gov/articles/2014/02/25/2014-04104/study-on-the-right-of-making-available-comments-and-public-roundtable>.
- 9 R.Giblin, J.C.Ginsburg *We need to talk about Aereo: Copyright Avoiding Business Models, Cloud Storage and a Principled Reading of the „Transmit” Clause* Columbia Law School Working Paper Series, Working Paper No 480 p.6, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443595.
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- 11 On the case law concerning the ‘Transmit Clause’ see D.Cassorla *Copyright Cowboys. Bringing Online Television to Digital Frontier*. *Fordham Intellectual Property Media & Entertainment Law Journal* vol.24 at 738,p.789-792.
- 12 M.van Eechoud, P.B.Hugenholtz, S.van Gompel, L.Guibault and N.Helberger, *Harmonizing European Copyright Law: The Challenges of the Better Lawmaking*. Kluwe Law International, 2009, p.71.
- 13 Rec. 23 of preamble to the Information Society Directive.
- 14 Judgment of the Court of 13.02.2014, Nils Svensson, *Sten Sjögren, M.Sahlman,P.Giad, v Retriever Sverige AB*. C-466/12.
- 15 Judgment of the Court of 7.12.2006 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* C-306/05, [2006] E.C.R.I-11519; Judgement of the Court of 04.10.2011, in cases *Football Association Premier League Ltd. i inni, p.Q.C.Leisure and others, C-403/08* and *Karen Murphy v. Media Protection Services C-429/08*. E.C.R. [2011] I-09083; Judgment of the Court of 24.11.2011 in case C-283/10 *Circul Globus Bucuresti v Uniunea Compozitorilor si Muzicologilor din România - Asociatia pentru Drepturi de Autor (UCMR - ADA)*.
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- 17 M.van Eechoud et al. *Harmonizing European Copyright Law...* p.93.
- 18 SGAE at 42.
- 19 Canaal Digitaal was offering the technical services to Airfield and subleasing the satellite capacity, but its role was not considered in detail in the judgement.
- 20 Judgment of the Court of 13.10.2011. *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* C-431/09 and *Airfield NV v Agicoa Belgium BVBA* C-432/09. *Airfield* at 39-40, S.Vousden, *Airfield, Intermediaries and the Rescue of EU Copyright Law*. *Intellectual Property Quarterly*, 4/2012, p. 317,<http://eulawradar.com/wp-content/uploads/2013/01/2012-Intellectual-Property-Quarterly-311-325.pdf>.
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- 22 *Aereo Announces \$20.5M Series A Financing Led by IAC; New Technology Platform Allows Consumers Access to Live TV Over the Internet* <http://www.marketwired.com/press-release/aereo-announces-205m-series-a-financing-led-iac-new-technology-platform-allows-consumers-nasdaq-iaci-1619629.htm>
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- 24 *WNET, Thirteen v. Aereo, Inc.; Am. Broad. Cos., Inc. v. Aereo, Inc.*
- 25 *Fox Television Stations, Inc., et al. v. BarryDriller Content Systems, PLC, et al.* No. CV 12-6921-GW(JCx), 2012.
- 26 D.Cassorla, *Copyright Cowboys...* p.786.
- 27 *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-CV-758 (RMC), 2013 WL 4852300, at *4 (D.D.C. Sept. 12, 2013).
- 28 D.Cassorla, *Copyright Cowboys...* p.786.
- 29 *American Broadcasting Companies, Inc., et al., Petitioners v. Aereo, Inc., FKA Bamboom Labs, Inc. On Writ of Certiorari to the United States Court Of Appeals For the Second Circuit*, 573 U.S._ (2014) http://www.supremecourt.gov/opinions/13pdf/13-461_l537.pdf.
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- 31 R.Giblin, J.C.Ginsburg *We need to talk about Aereo: Copyright Avoiding Business Models...*p.5.
- 32 *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).
- 33 D.Cassorla points that broadcasters expected legal easy victories with Aereo and FilmOn, but were blockaded by the Cablevision decision. *Copyright Cowboys...* p. 785.
- 34 *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), p. 138.
- 35 R.Giblin, J.C.Ginsburg *We need to talk about Aereo: Copyright Avoiding Business Models...*p.12.
- 36 *American Broadcasting Cos. V. Aereo, Inc.* 573 U.S._(2014) at II, p.4.
- 37 *American Broadcasting Cos. V. Aereo, Inc.* 573 U.S._(2014) p.12
- 38 *American Broadcasting Cos. V. Aereo, Inc.* 573 U.S._(2014) p.16.
- 39 *ITV Broadcasting v TVCatchup*, at 32- 34.
- 40 SGAE at.43.
- 41 *Association Littéraire et Artistique Internationale*, <http://www.alai.org/en/resolutions-and-positions.html>
- 42 Order of the Court of 21.10.2014r.,*Bestwater International GmbH przeciwko M.Mebes i S.Potsch*, C-348/13 and Judgment of the Court of 26.03.2015 in case *C More Entertainment v. Linus Sandberg* C-279/13.
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- 44 Svensson at 20.
- 45 Svensson at 24-25.
- 46 SGAE at 41.
- 47 Judgement of the Court of 04.10.2011, *Football Association Premier League Ltd. i inni, p.Q.C.Leisure and others, C-403/08* and *Karen Murphy p. Media Protection Services C-429/08*. E.C.R. [2011] I-09083 at 204.
- 48 S.Baggs, S.Hansson, *What's the catch?The CJEU judgement in ITV v TVCatchup*, E.I.P.R. 2013, 35(6), 363-365 p.365.
- 49 L.Guibault, J.P.Quintais, *Copyright, technology and the exploitation of audiovisual works in the EU*, IRIS Plus, 4/2014, p. 9-24, p.14.
- 50 See for example. D.Brenner „Gently down the stream”: when is an online performance public under copyright, *Berkeley Technology Law Journal*, vol:28, 2013, p.1167-1216;G.S.Lunney Jr, *Aereo and Copyright's Private-Public Performance Line*, U. PA. L. REV. ONLINE 205 (2014), http://www.pennlawreview.com/online/___-U-Pa-L-Rev-Online-___pdf.
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- 52 D.Brenner „Gently down the stream”... p.1200.
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- 54 P.Samuels, *Watching TV on Internet-Connected Devices*. *Communications of the ACM*, 7/2014, pp.22-24, p.22.

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- 57 D.Cassorla, *Copyright Cowboys...*p.786.
- 58 See for example, M.Senftleben, *Breathing Space for Cloud-based Business Models. Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, JIPITEC no 4/2013, pp.87-103.
- 59 G.S.Lunney Jr, *Aereo and Copyright's Private-Public Performance Line...*p.215.
- 60 D.Cassorla, *Copyright Cowboys...* p.797.
- 61 J.R.Alves-Park *Adapt or die: Aereo,IVI, and the right of control in an Evolving Digital Age*. Loyola of Los Angeles Entertainment Law Review 34:33, 2014, Electronic copy available at: <http://ssrn.com/abstract=2427847>
- 62 The list is available at: <http://www.pijip.org/events/aereo/>; Two might be mentioned as examples of the position taken: brief by professors P.Mennel, and D.Nimmer in support of petitioner, and brief of *Electronic Frontier Foundation* and others, in support of the respondent (*Aereo*), highlighting how the „Transmit” Clause should be read. P.S.Mennel, D.Nimmer, *Cable Television and the Aereo Case –then and now. Brief of Professors Peter S.Mennel and David Nimmer as Amici Curiae in Support of Petitioners...*; Brief by *Amici Curiae Electronic Frontier Foundation*, Public Knowledge <https://www.eff.org/document/amicus-brief-20>.
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- 64 *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 790 (N.D. Cal.1991).
- 65 R.Giblin, J.C.Ginsburg *We need to talk about Aereo: Copyright Avoiding Business Models...*p.39.
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- 86 *Premier League* at 195.
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