Right of Communication to the Public in the EU Revisited – What Lesson(s) are in Store for the Future

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INTRODUCTION

In 2016, when I started my doctoral journey, the problem of online content availability was already proving to be quite a nuisance. From YouTube's famous sentence of 'This video is not available in your country', to alternative (not so legal) ways of accessing content via Pirate Bay and LimeWire, for example, the proverbial chaos of legal uncertainty of access to content was in full bloom. Stakeholders reacted in two different ways as a result of this legal uncertainty. The first was the initial immobilisation of rightholders, who were unsure whether they had the right to prevent or allow use of their content. As a result, an environment where anything found online could be used without restriction was created. This made it possible for a number of services to grow, including YouTube, Pirate Bay, Napster, and LimeWire. Aggressive lawsuits followed when these services began to significantly reduce rightholders' income. The second response to this aggressive litigation was the immobilisation of end users, who were now unsure if they were infringing copyright. While some of these services, like Pirate Bay,[1] persevered in the face of the new situation, others, like YouTube, modified their business strategy to stay out of legal trouble. Nevertheless, neither of these opposing responses clarified the legal uncertainty around online access, much less how to resolve it.

ONLINE ACCESS TO CONTENT IN THE EU

Online access to content – within the European Union (EU) legal order, although found in other EU harmonising measures, is embodied in Article 3 InfoSoc Directive,[2] which is an implementation of Article 8 of the WCT[3] in EU law. This online access to content fund in the EU harmonising measure (InfoSoc Directive), and the international copyright treaty (WCT) – in legal terms – is called the economic right of communication to the public. In recent decades, this right has become the main economic right of a rightholder[4] in online spaces – meaning that it furnishes the rightholder with a possibility to prevent content from being made available online or conversely allow it to be.

In general terms the underlying restricted act of communication to the public is an act that enables original work to be disseminated (communicated) to a public (audience) without making a reproduction in a material form. This means that when this right was first formulated it was suited for particular types of works, such as dramatical and musical works – theatre plays and operas for example. Nevertheless, literary works are equally capable of dissemination in a non-material form, for example, if they are recited, and artistic works could be communicated by being exhibited to the public. With technological progress, it became possible to communicate all works on a much wider scale.

The manner in which a work is communicated to the public was and is contingent upon different ways that the audience is being enlarged. The first way to widen an audience is by sharing a work with the public by reading, reciting or performing that work in front of the said public – for example in public spaces such as squares, circuses, theatres. This type of action is sanctioned by the right of performance and recitation. The second way to enlarge an audience is by use of technical means – wire or wireless transmission – that can share the work with a public that is not physically present at the place where the work is being read, recited or performed – for example

1 Niklas Elert, Magnus Henrekson, Joakim Wernberg 'Two sides to the evasion: The Pirate Bay and the interdependencies of evasive entrepreneurship' (2016) 5(2) Journal of Entrepreneurship and Public Policy 176.

2 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 [2001] OJ L 167/10 (the 'InfoSoc Directive').

3 World Intellectual Property Office Copyright Treaty Dec. 20, 1996, 2186 UNTS 121; 36 ILM 65 (1997) (the 'WCT').

4 Gaetano Dimita, 'The WIPO right of making available' in P. Torremans (ed), *Research Handbook on Copyright Law* (2nd edn, Edward Elgar Publishing 2017) 135, 136; Justin Koo, 'The influence of football on the development of the communication to the public right' (2019) 41(9) EIPR 571, 573.

via radio waves and television screens. This type of action is sanctioned by the right of communication to the public.[5] Lastly, work can be shared with an audience across space and time, making the public the initiator of access to work – at the place and time of their own choosing, through on-demand actions – for example by choosing a song to listen on Spotify and a film to see on Netflix. This type of action is sanctioned by the right of making available to the public.[6] All of the above ways form a wider concept of communication to the public, nevertheless, it is generally understood that the core right of communication to the public entails a spatial distance between the place where communication occurs and the place where the public is situated.

Article 8 of the WCT – which was implemented in Article 3 of the InfoSoc Directive – contains both the communication to the public right and the making available right. The making available right in Article 8 of the WCT is formulated in a technology-neutral way and has therefore been dubbed the *umbrella right*. This is because it leaves it to the Contracting Parties to incorporate it through different economic rights under national legislation, as long as the subject matter from the said article is fully incorporated.[7] For example, the making available to the public right has been incorporated in the USA as a combination of the rights of distribution, public performance, and public display.[8] The EU has incorporated it under a broad right of communication to the public;[9] Australia has incorporated it as an exclusive right with slightly different wording;[10] and Japan has incorporated it as a separate making available to the public right alongside a legal characterisation of the free transmission right.[11] This means that the act of communication in the USA is broadly understood involving all types of restricted acts of presentation, communication and making available, in the EU the act of communication includes the act of making available, whereas Australia and Japan delineate act of communication and act of making available.

However, the manner of, and the intention behind, a formulation of a right in a legislative measure – particularly on an international level, and how a court interprets this legislative formulation, might not correspond.[12] Whereas the traditional understanding of the scope of this right presumed the existence of two cumulative criteria – an *act* that is directed to a *public*, the Court of Justice of the European Union (CJEU) introduced other supplementary criteria in the assessment of the scope. These were the criteria of the *new public*[13] and of the *profit-making nature*[14] of an act of communication. This introduction of the new criteria by the CJEU – firstly in the assessment of the right of communication to the public, and later in the assessment of the right of making available – dazed and confused national courts of the Member States on how these newly introduced criteria were to be applied. The situation of confusion has not been mitigated by the CJEU, but rather exacerbated once the two new criteria have been supplemented by the two additional complimentary cri-

5 Commission, 'Green paper on Copyright and Related Rights in the Information Society' COM (1995) 382 final 56–57; Commission 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society' COM (97) 628 final COM (97) 628 final OJ C 108/6 recital 16; see also European Copyright Society 'Opinion on The Reference to the CJEU in Case C466/12 Svensson 15 February 2013' <www.europeancopyrightsocietydotorg.files.wordpress.com/2015/12/european-copyright-society-opinion-on-svensson-first-signatoriespaginatedv31.pdf> accessed on 31 October 2025.

6 World Intellectual Property Office 'Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference (CRNR/DC/4) (1996)' 46 para 10.16.

7 Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights* (2nd edn, OUP 2005) 747; Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Geneva 2004) 227.

8 United States Copyright Office, 'The Making Available Right in the United States, a report of the Register of Copyrights, February 2016'.

9 Sari Depreeuw, Jean-Benoit Hubin et al, 'Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions (2014)'1, 85.

10 Cheryl Foong, *The Making Available Right: Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Elgar Law Technology and Society 2020) 82–83.

11 Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (OUP 2002) 502–509; Hiroshi Saito, 'Significance of the Making Available Right' in Gunnar Karnell, Annette Kur, Per Jonas Nordell, Daniel Westman, Johan Axhamn, Stephan Carlsson (eds) *Liber Amicorum Jan Rosén* (Visby:eddy.se 2016) 705.

12 Sari Depreeuw, *The Variable Scope of the Exclusive Economic Rights in Copyright* (Kluwer Law International 2014); Emanuela Arezzo 'Hyperlinks and making available right in the European Union – what future for the Internet after Svensson?' (2014) 45(5) IIC 524, 534–535; Bernt P Hugenholtz and Sam C van Velze, 'Communication to a new public? three reasons why EU copyright law can do without a "New public"', (2016) 47(11) IIC 797; Jan Rosén, 'How Much Communication to the Public Is "Communication to the Public"?' in Irini A Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016) 331, 341–343, 431–435.

13 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 41.

14 Ibid, para 44.

teria of *specific technical means*[15] and of *knowledge of copyright infringement*,[16] deepening even more the legal uncertainty about the scope of this right. In an attempt to alleviate the growing legal uncertainty regarding the regulation of copyright in an online setting, the EU legislator introduced the DSM Directive.[17] Nevertheless, even after the enactment of the DSM Directive – which only minutely solves the problem by an introduction of *sui generis* regime for large platform liability for copyright infringement in Article 17, the legal problem of the scope of this right in the EU remains the same.[18]

A mere glance at the literature list found in the footnotes of this contribution reveals the sheer volume of scholarly articles, opinions, studies, and case notes written on the topic. During my doctoral journey there have been at least six monographs that have extensively discussed the right of communication to the public: Makeen's *Copyright in a Global Information Society*;[19] Efroni's *Access Right: The Future of Digital Copyright Law*;[20] Depreeuw's *The Variable Scope of the Exclusive Economic Rights in Copyright*;[21] Koo's *The Right of Communication to the Public in EU Copyright Law*;[22] Foong's *The Making Available Right: Realizing the Potential of Copyright's Dissemination Function in the Digital Age*;[23] and Oprysk's *Reconciling the Material and Immaterial Dissemination Rights in the Light of the Developments under the EU Copyright Acquis*.[24] Makeen's monograph from 1998 discusses the right of communication to the public through a comparative lens of international, US, UK and French law, and unlike my thesis does not encompass EU harmonisation of this right and the CJEU's case law. Efroni's contribution focuses on the use of Shannon and Weaver's communication model – which depicts linear technological environment in order to explain why copyright is in essence an access right for rightholders and a right-of-access for end users. My thesis, which is as well socio legal study, uses three different communication models to shed light on the legal uncertainty around online access caused by the CJEU's case law. Depreeuw's extensive and seminal monograph offers an historical account of developments in this area and an in-depth analysis of both the reproduction right and the right of communication to the public, including the right of making available to the public in the EU; however, the last development in case law discussed in said monograph ends in 2014, when the number of internet cases before the CJEU soared. My thesis draws on this monograph and adds an analysis of developments in case law since 2014. Koo's monograph from 2019 builds on Depreeuw's case analysis, however it advocates that the right of communication to the public in the EU should be read in the light of the Berne Convention – and its underlying technology of linear transmission. As explained below in my conclusions, it is difficult to apply provisions made in 1930's technology (linear transmission of radios and TVs) to 2020's technology (non-linear transmission of Spotify and Netflix) – if not only since we are technologically not there, but also the law and the interpretation have progressed so far that we are beyond the point of no return. Foong's monograph from 2020 discusses the right of making available to the public in the US, the EU and Australia, however my thesis narrows the field of analysis to the EU, while at the same time widening it by examining the right of making available to the public as a species of the right of communication to the public. Lastly, while Oprysk's monograph discusses both the right of distribution and the right of communication to the public, including the right of making available to the public in the EU, the main point of departure in our work is that she advocates for an exhaustion principle to be available in online settings, while my thesis argues the opposite.

After my disputation and the publishing of a book[25] based on my thesis, one more doctoral thesis has been defended – with a focus on the right of communication to the public on digital platforms.[26] To add insult to injury, as of the date of writing this contribution, there are five pending referrals[27] in front of the CJEU on this same economic right. To put it simply – this topic was and is a never-ending saga.

15 Judgment in *ITV Broadcasting Ltd and Others v TVCatchUp Ltd*, C-607/11, EU:C:2013:147, para 26.

16 Judgment in *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:644, para 47.

17 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (the 'DSM Directive').

18 Christophe Geiger, Giancarlo Frosio, Oleksandr Bulayenko 'The EU Commission's proposal to reform copyright limitations: a good but far too timid step in the right direction' (2018) 40(1) EIPR 404; Ed Baden-Powell and Rachael Heeley 'Copyright in the Digital Single Market–long-debated Directive approved' (2019) 30(5) Entertainment Law Review 143 (note); Benjamin Farrand '"Towards a modern, more European copyright framework", or, how to rebrand the same old approach?' (2019) 41 (2) EIPR 65; Sylvia Stavridou, 'Copyright in the Digital Single Market in Europe: The Quest for Legal Certainty Still Remains' (2021) 70 (1) GRUR Int 1.

19 Makeen F Makeen, *Copyright in a Global Information Society: The Scope of Copyright protection Under International, US, UK and French Law* (Kluwer Law International 2000).

20 Zohar Efroni, *Access Right: The Future of Digital Copyright Law* (OUP 2011).

21 Sari Depreeuw, *The Variable Scope of the Exclusive Economic Rights in Copyright* (Kluwer Law International 2014).

22 Justin Koo, *The Right of Communication to the Public in EU Copyright Law* (Hart Publishing 2019).

23 Cheryl Foong, *The Making Available Right: Realizing the Potential of Copyright's Dissemination Function in the Digital Age* (Elgar Law Technology and Society 2020).

24 Liliia Oprysk, 'Reconciling the Material and Immaterial Dissemination Rights in the Light of the Developments under the EU Copyright Acquis' (PhD theses University of Tartu 2020).

25 Branka Marušić, The autonomous legal concept of communication to the public: interpretation in EU copyright law (Edward Elgar 2003).

26 Mbonu, JO, 'The Right of Communication to the Public on Digital Platforms – Issues of Liability, Proportionality and Creativity in EU Copyright Law' (PhD theses QMUL 2024).

27 Referral in *VHC 2 Seniorenresidenz*, C-127/24; Referral in *Austro-Mechana and AKM*, C-579/24; Referral in *Streamz and Others*, C-663/24; Referral in *Anne Frank Fonds*, C-788/24; Referral in *Like Company*, C-250/25.

CONCLUSIONS IN MY THESIS

I would like to lift one conclusion from my thesis –on the possibility of regulating technology in a technology neutral way. For the rest of the conclusions – most prominently the operational model on how to understand when we are breaching the right of communication to the public in the EU – I invite the reader to see my doctoral thesis (as of recently in open access)[28] or read my book (with less methodology and more clarity and an altered operational model).[29]

The conclusion I wish to highlight concerns the attempt to create a *technology-neutral* rule for a fundamentally *technology-driven* provision. The right of communication to the public, as formulated in the WCT and the InfoSoc Directive, has often been described as a technology-neutral rule – one intended to encompass all copyright-relevant acts that involve a spatial distance between the originator of a communication and the public to whom it is directed. In essence, this right ensures that rightholders receive remuneration for acts that enable audiences to see or hear their work– particularly when the number of audience members have been enlarged beyond initial authorisation, or the space has been changed to welcome a new type of audience.

The ambition to create a technology-neutral rule in Article 8 of the WCT and Article 3 of the InfoSoc Directive, arose against the historical backdrop of the Berne Convention,[30] which has been repeatedly revised in response to new technological developments that broadened access to works. The earliest technological stage was based on oral-formulaic traditions, where audiences could only experience protected works at predetermined places and times, such as local squares and theatres. This stage is reflected in the Berne Convention through provisions covering acts of presentation and recitation, applicable to certain types of works (Articles 11(1)(i), 11(2), 14(1)(ii), 14*bis*(1), 11*ter*(1)(i) and 11*ter*(2)).

The next technological stage – the era of linear transmission technologies, such as radio and television – posed significant challenges for legislative formulation. Provisions such as Articles 11(1)(ii), 11(2), 11*ter*(1)(ii), 11*ter*(2), 11*bis*(i) and (ii), and 14(1)(ii) Berne Convention reflect attempts to address these challenges. Yet, interpretation and application difficulties persist, particularly regarding the artificial division of transmission technologies into *primary* and *secondary* transmissions. This division arose from practical considerations linked to early mechanical transmission infrastructure.[31] Because analogue radio and television signals were large and required substantial

28 Branka Marušić, 'The Autonomous Legal Concept of Communication to the Public in the European Union' (LLD theses Stockholm Universitet 2021).

29 Branka Marušić, The autonomous legal concept of communication to the public: interpretation in EU copyright law (Edward Elgar 2003).

30 Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, completed May 1896, revised 13 November 1908, completed 20 March 1914, revised 2 June 1928, revised 26 June 1948, revised 14 July1967, revised 24 July1971, amended 28 September 1979) WIPO TRT/BERNE/001 (1984) (the 'Berne Convention').

31 João Pedro Quintais and Joost Poort, 'A Brief History of Value Gaps: Pre-Internet Copyright Protection and Exploitation Models' in P Bernt Hugenholtz (ed), *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International 2018) 11, 39.

bandwidth, the transmission process had to be split into segments across several mechanical devices. While digitisation has since mitigated these infrastructure limitations – transforming large analogue content into compressed digital form[32] – the outdated legislative formulations and terminology continue to complicate the interpretation of this economic right. To be specific, this relates to the use of the criteria of 'an organisation other than the original one' in Article 11*bis*(1)(ii) Berne Convention as delimiting criteria between primary and secondary transmission, which has been abandoned by the CJEU for the criteria of 'the new public' to assess the division between two transmissions – setting aside the idea that there are primary and secondary transmission.

With the emergence of the third technological stage – on-demand technologies such as the ones used by Spotify and Netflix – which expanded audience access both spatially and temporally, legislators sought to establish genuine technology-neutral rule, exemplified by Article 8 of the WCT and Article 3 of the InfoSoc Directive. However, residual problems from earlier technology-specific provisions have persisted, rendering the right of communication to the public a continuing source of complexity. The rapid pace of technological change has often made it practically impossible for such 'neutral' rules to function as intended. The legislative responses embodied in the NetCab[33] and DSM Directives at the EU level reflect this ongoing struggle. These measures – such as the *sui generis* regime for large online platforms in the DSM Directive, and provisions on regulating the technology of TV injections in the NetCab Directive – much like the historical revisions of the Berne Convention, represent reactive interventions designed to address technological evolution. In doing so, they introduce new copyright-relevant acts and even new categories of rightholders – a return, in many respects, to the cyclical legislative pattern established by the Berne Convention.

However, these modern 'return to Berne' provisions do little to clarify the operation of copyright rules in the online spaces. The central argument advanced in my thesis is that much of this uncertainty – regarding the clarity, functioning, and scope of copyright law – stems from an insufficient understanding of the underlying technological environment. My research adopts a technological perspective on the problem of online content access, using the technological environment – in the form of communication models[34] – as the analytical starting point for assessing copyright infringement. The findings demonstrate that this approach can be applied consistently across all types of copyright-relevant acts. Yet, the fragmented legislative framework (on international and EU level) – both in defining and harmonising such acts – limits the broader applicability of these conclusions. Moreover, this legislative fragmentation of harmonised copyright-relevant acts has produced three major consequences.

First, it has led to inconsistencies in the level of protection afforded to different categories of rightholders in the EU. For example, the objective of ensuring a 'high level of protection' appears explicitly in most EU directives but is absent from the Rental and Lending Rights Directive.[35] Consequently, holders of related rights receive a 'high level of protection' for the right of making available to the public, but are excluded from such protection concerning the right of communication to the public. This inconsistency has tangible legal implications. Under Article 17 of the DSM Directive, holders of related rights under Article 8 of the Rental and Lending Rights Directive are excluded from its scope, meaning that performers, phonogram producers, and broadcasters cannot oppose the use of their works by online content-sharing service providers (OCSSPs).

Second, in an effort to overcome the inconsistencies created by fragmented legislation, the CJEU has sought to interpret technology-driven provisions in a uniform manner. This interpretative effort mirrors the legislative goal of technological neutrality. However, in practice, the CJEU's case law has tended to privilege on-demand technologies (non-linear transmission), effectively marginalising traditional liner transmission-based forms of communication, and favouring on-demand technology over transmission technology.

Third, and finally, this interpretative evolution has transformed the scope of the economic right in online contexts – a paradigm shift in determining who must obtain authorisation to access protected works online. By interpreting the economic right through the lens of on-demand technologies, the CJEU has effectively placed responsibility with the person who creates the access point. As a result, rightholders are required to be vigilant in the dissemination of their content, and the online platforms are required to be diligent in obtaining authorisation when content is being disseminated through their facilities.

PRESENT DAY RELEVANCE OF THE RIGHT OF COMMUNICATION TO THE PUBLIC

One could say that an 'easy fix' to the never-ending saga of the interpretation of the right of communication to the

32 Eric Fleischmann, 'The Impact of Digital Technology on Copyright Law' (1987) 8 Computer Law Journal 1, 2–5.

33 Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (Text with EEA relevance) [2019] OJ L 130/82 ('NetCab Directive').

34 For linear transmissions (communication to the public right) my thesis uses Shannon and Weaver's model (for a technological environment that does not need to artificially split the signal), and Gerbner's model (for technological environment that requires a transmission signal to be split), for non-linear transmissions (making available right) my thesis uses both versions of the Westley and MacLean model.

35 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 (codified version) [2006] OJ L 376/28 ('Rental and Lending Rights Directive').

public would be to match the ambition of a technology-neutral rule to a legally neutral rule – one that encompasses all types of copyright-relevant actions, objects of protection, and rightholders. By this, the legislative fragmentation would not get in the way of technology and the proper functioning of rules. However, I do acknowledge the fact that this might be easier said than done. Nevertheless, and the reason I wanted to lift up the conversation on the possibility of a true technology-neutral rule is that since I have defended my thesis in late 2021, a new type of technology became commercial – artificial intelligence (AI).

Since the commercial emergence of AI, the debate surrounding the right of communication to the public has acquired new urgency and complexity. Drawing on historical patterns of technological development, one might argue that we are now midway through the regulatory cycle that typically accompanies major innovations. The first phase has been dominated by disputes over copyright inputs, specifically, whether training AI systems on online materials without explicit authorisation constitutes infringement. As with previous technological turning points, these initial conflicts are gradually giving way to a more pragmatic equilibrium. One of the questions before the CJEU in a pending case[36] touches upon the issue of whether chatbot training can fall under the text-and-data mining exception, and STIM, the Swedish collecting management organisation, launched an AI license for AI training.[37] These occurrences suggest that the legal system may ultimately accommodate AI training through a mixture of exceptions and licensing frameworks. Historically, copyright law has tended to evolve in ways that facilitate technological progress, even when doing so has required recalibrating the balance between creators and innovators. The story from the introduction on the state of 'uncertainty and lawfulness' on online access that has shifted into the rise of streaming platforms today (such as Spotify) illustrates how pragmatic solutions eventually prevailed over 'everything is free' and 'everything is infringement' views on online access to copyright-protected content.

Assuming a similar outcome for AI inputs, attention will inevitably shift towards the post-training phase, namely, the use of trained models in inference, fine-tuning, and retrieval-augmented generation (RAG). While inference is a neutral act of applying a model's learned parameters, fine-tuning and RAG raise more complex questions. In particular, RAG systems, which dynamically retrieve and integrate external information, could challenge established understandings of communication to the public. To explain RAG in simple terms, this is a technique that combines a retrieval system with a large language model to provide more accurate and up-to-date responses by grounding the AI's answers in external data.

The key issue is whether such systems, by summarising or referencing third-party content, might be seen as engaging in acts analogous to linking, framing, or streaming – activities that have historically tested the boundaries of the right. Extending this logic to AI-driven retrieval could lead to renewed debates about whether such outputs amount to new acts of communication, especially given their potential to substitute for the original content rather than direct users towards it. Applying the findings of my thesis – such a qualification will be contingent on the fact of whether the content that is being summarised or referenced can be found in a closed technological environment, or an open one. An open technological environment – one without technological protection measures – creates a situation where no such infringement claim can be made. This circles back to one of the conclusions on technology neutral rules in technology driven online spaces – that being that rightholders need to be vigilant on protection, and online platforms diligent in obtaining authorisation. How this vigilance is going to be manifested, and whether the new and improved rules on online platform liability – both in the DSM Directive and the DSA[38] – boost diligence, is a question for the 9th book on communication to the public.

In this sense, AI exposes the limitations of a fragmented, technology-contingent approach to copyright. A genuinely technology-neutral rule – one that applies consistently across diverse modes of creation, rightholders, and access – could provide greater coherence and predictability. However, achieving such neutrality remains a formidable legislative challenge, not least because each technological stage introduces distinct economic and normative considerations. Nevertheless, the advent of AI underscores the need to move beyond reactive, technology-driven regulation and to consider a more principled, legally neutral framework capable of accommodating future innovations without constant interpretive upheaval.

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36 Referral in *Like Company*, C-250/25.

37 STIM 'STIM Launches the World's First AI License for Music' <https://www.stim.se/en/news/stim-launches-the-worlds-first-ai-license-for-music> accessed on 31 October 2025.

38 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) [2022] OJ L 277 ('DSA').