



The Implications of *GS Media v. Sanoma Media Netherlands*’ ‘New Public’ on Digital Distance Learning

A comparative analysis of the UK’s and Portugal’s implementation of the InfoSoc Directive’s Art.3(1) Communication to the Public Right and Art.5(3)(a) Teaching Exception

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Introduction:

The internet is a borderless arena of information; its modes of information dissemination are ‘evolutionary’ in nature¹ and utilised by end-users who rely on service providers to give them the information.² Governance of information uploaded to the internet is underpinned by copyright law’s ‘balancing of interests’ paradigm.³ An interrelated topical intellectual property right (‘IPR’), the Information Directive’s⁴ (InfoSoc) Article 3(1) right of communication to the public when considered in relation to digital distance learning (‘DDL’) is a multifaceted debate.⁵ This contention is two-fold.

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¹ P. Bernt Hugenholtz, ‘Adapting Copyright to the Information Superhighway’ in P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (Kluwer Law International, 1996), 82.

² Simon Stokes, *Digital copyright law and practice* (4th edn, Hart Publishing, 2014) 153.

³ On one side, the public interest to access knowledge; on the other incentivising the creation of new works by affording creators of works rights to economically exploit their works.

⁴ 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 (‘InfoSoc’).

⁵ Lucie Guibault, ‘Evaluating Directive 2001/29/EC in the light of the digital public domain’ in Juan Carlos De Martin & Mélanie Dulong de Rosnay (Eds.) *The digital public domain: foundations for an open culture* (Open Book Publishers, 2012), 68; Péter Mezei, ‘Enter the matrix: the effects of CJEU case law on linking and streaming technologies’ (2010) 11(10) *Journal of Intellectual Property Law & Practice* 781; Rainer Kuhlen, ‘Copyright issues in the European Union: towards a science- and education-friendly copyright’ (KOPS, 2013) <https://kops.uni-konstanz.de/bitstream/handle/123456789/27083/Kuhlen_270834.pdf?sequence=1> accessed 30 March 2018, 1.

First, an area of contention pertains to the scope of Art.3(1) and the extent to which right-holders' can exercise their rights under it.⁶ Second, there is contention around the extent to which educators, as end-users, have the ability to disseminate knowledge for educational purposes,⁷ as provided to end-users within InfoSoc's Article 5(3)(a) teaching exception. This paper analyses Art.3(1) through the lens of *GS Media v. Sanoma Media Netherlands and Others*⁸ ('*GS Media*') 'new public' test,⁹ where the Court of Justice of the European Union ('CJEU') continued the development of the communication to the public concept.¹⁰ The analysis' central focus is the UK copyright regime's implementation of Articles 3(1) and 5(3)(a), with Portugal's copyright regime discussed for comparative purposes.

This paper takes a thematic analysis to establish its position that the implications of *GS Media*'s 'new public' has further blurred the contours of copyright's paradigm, by extending the scope of protection afforded to right-holders under Art.3(1), consequently tipping copyright's paradigm in favour of right-holders. Part one analyses Art.3(1) and Art.5(3)(a)'s implementation into national law pre-*GS Media*. Part two evaluates technical protection measures. Part three amalgamates elements of the previous parts to evaluate the myriad of judicial interpretations as to what constitutes communication to the public in light of Art.5(3)(a)'s teaching exception. The evaluation is explored through the lens of the implications of *GS Media*'s judgment for Art.3(1)'s 'new public' test, license agreements and intermediary liability in relation to DDL. Part four concludes this paper.

⁶ P. Bernt Hugenholtz; Sam Van Velze 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a 'New Public' (2016) 47(7) IIC 797, 809-810; interrelated with and further illustrating the scope of right-holders copyright protection, see summary of Case C-527/15 *Stichting Brein v. Filmspeler* [2017] ECLI:EU:C:2017:300 (discussed later) in Bernd Justin Jütte, 'A link too far: CJEU rules that sale equals communication and streaming from unlawful sources is illegal (C-527/15, Filmspeler)' (European Law Blog, 2017) <<https://europeanlawblog.eu/2017/05/24/a-link-too-far-cjeu-rules-that-sale-equals-communication-and-streaming-from-unlawful-sources-is-illegal-c-52715-filmspeler/>> accessed 10 April 2018.

⁷ Michele J. Le Moal-Gray, 'Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education,' (2016) 16(3) *Touro Law Review* 981, 1010-1011.

⁸ Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* [2016] ECLI:EU:C:2016:644.

⁹ The 'new public' test is a judicial concept taken into consideration during a courts decision-making process to ascertain whether there has been a breach of a right-holder's Art.3(1) right. The test's concept of 'new public' pertains to a 'public' that right-holders did not consider when they authorised access to and communication of their in-copyright work.

¹⁰ Sorin Berbec, '(Re)think before you link: A multidisciplinary study on the implications of linking to copyright protected works' (LLM Thesis, Tilburg University, 2018), 16-17.

1. Digital Distance Learning: The UK/Portugal Context

A rudimentary summary of digital copyright governance in the UK is that the UK's approach to governance, of which end-user activities for educational purposes constitutes infringement, is traditionally broader in scope than other European Union (EU) member states' national laws.¹¹ The Copyright, Designs and Patents Act 1988 ('CDPA 1988') is the UK's legislative instrument governing copyright protection to creative works and is the statute that implements EU wide and international copyright treaties. Relevant to this part's analysis is the CDPA 1988's section 20 (right of communication to the public) and, predominantly, section 32 (Illustration for instruction),¹² which forms part of the CDPA 1988's fair dealing provisions.¹³ The CDPA 1988 has no explicit fair dealing provision for educational purposes as such.¹⁴ Common law takes copyright protection beyond the CDPA 1988 in IPR governance within the UK.

Similarly, the Portuguese Copyright Act's¹⁵ ('PCA') Art.75 implements Art.5(3)(a). Meanwhile the PCA's approach to implementing Art.3(1) does not afford protection directly under one PCA Article.¹⁶ Instead there is a combination of criminal sanctions which fall under the umbrella of 'public'¹⁷ for acts which amount to infringement of Art.3(1).¹⁸ From this basic summary, this part analyses the UK and Portugal's national law approach to Art.3(1) and Art.5(3)(a). Due to limited national case law on this subject, the issue is explored through pre-*GS Media* CJEU judicial decision's pertaining to Art.3(1). This part applies the principles to Art.5(3)(a).

¹¹ Teresa Nobre, *Copyright and Education in Europe: 15 everyday cases in 15 countries* (Final Report, COMMUNIA, 2017), 5 (available at <https://rightscopyright.eu/wp-content/uploads/2017/04/15casesin15countries_FinalReport.pdf>).

¹² As amended by The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

¹³ The fair dealing provisions implement Art.5's E&Ls.

¹⁴ Giuseppe Mazziotti, 'Copyright and Educational Uses: The unbearable case of Italian law from a European and comparative perspective' (2011) European University Institute Working Paper 2011/17 <http://cadmus.eui.eu/bitstream/handle/1814/19697/LAW_2011_17_Mazziotti.pdf?sequence=1&isAllowed=y> accessed 20 February 2018, 17.

¹⁵ Code of Copyright and Related Rights 1985 (up to Law no. 49/2015), **on June 2nd 2017 Law No. 36/2017 was enacted which brought into force direct legal protection of end-user circumvention of TPM protected digital content for the purposes of exercising their rights under the E&Ls (per Article 75 of the PCA); Law No. 36/2017 is available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=451740 ('PCA').

¹⁶ For example, a category of right of public communication (as per Art.68(2)(e)) and communication authorisation (as per Art.108).

¹⁷ João P. Quintais, 'Dr Strangelaw, or how Portugal learned to stop worrying and love P2P' (2013) 8(3) *Journal of Intellectual Property Law & Practice* 193.

¹⁸ *ibid* 194.

1.2 Case Law: Communication to the Public and Digital Distance Learning

The concept of ‘new public’ within copyright’s normative rules pertaining to the right of communication to the public is not a new phenomenon.¹⁹ As Art.3(1) governs this right, it is the central focus throughout this paper. This part draws upon Art.3(1) to establish its position that the body of case law interpreting ‘new’ public per Art.3(1) contributes to the complex myriad of fragmented implementation of Art.3(1) and Art.5(3)(a) into national law regarding Digital Distance Learning (‘DDL’) governance.²⁰ CJEU judgments on Art.3(1) form the backdrop to this part’s analysis.

In the UK context, although *Football Association Premier League and Others*²¹ (‘FAPL’) did not address InfoSoc’s Art.5 Exceptions and Limitations (‘E&Ls’) for educational purposes, FAPL’s underpinning communication to the public principle is of relevance to DDL. FAPL’s ‘new’ public²² and territoriality²³ concepts highlight an obstacle to providing knowledge via DDL, due to FAPL’s lack of clarity regarding when the ‘new’ public test is applicable.²⁴ This obstacle correlates to the cross-border nature of DDL and the likelihood that despite dissemination of an in-copyright work via a closed network, there remains the potential for that work to be disseminated beyond the territory in which it was published.²⁵

In response to this, the literature consulted in relation to Art.3(1) and FAPL’s judgment discussed the need for a broad interpretation of Art.3(1)’s making available right in view of the communication right.²⁶ As Papadaki argues, the right would cover data transmitted to a ‘public’ not in attendance when the work is originally communicated. Consequently, applying this argument to FAPL’s ‘new’ public, end-users could arguably avoid falling within the scope of

¹⁹ Case C-306/05. *Sociedad General de Autores y Editores de España (SGAE). v. Rafael Hoteles SL* [2006] ECR I-11519.

²⁰ Mazziotti (n.14), 15; as the implementation of InfoSoc Art.5 E&Ls throughout member states is unharmonised with the exception of Art.5(1).

²¹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others v QC Leisure and Others* [2011] ECR I-9083 (‘FAPL’).

²² *ibid*, paras. 54(6)(b), 197 and 198.

²³ *ibid*, paras. 88-91.

²⁴ Hugenholtz and Van Velze (n.6), 804.

²⁵ Jean-Paul Triaille (ed.) and others, *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "InfoSoc Directive")* (European Union Publications, 2013), 381-382.

²⁶ Right that forms part of Art.3(1).

Art.3(1),²⁷ as a requirement of the ‘new’ public involved a different mode of communication to an audience not considered by the right-holder when authorisation was given.²⁸

For example, right-holders making available an in-copyright work subject to their control was a justification for stronger IPRs. This control, through avenues such as license agreements for on-demand music,²⁹ is a measure that can be argued to be beneficial to both right-holders and end-users. This is because end-users can access a work at a time and location they choose, whilst right-holders can protect their works from unauthorised access.³⁰ This suggested remedy is not without implications. Applying restrictions on dissemination of knowledge for educational purposes, as a response to the cross-border issue, can be argued to function as an ‘obstacle’³¹ to end-users exercising their fundamental Art.5(3)(a) right.

Due to licensing agreements forming a dimension of right-holder authorisation, their inclusion in this part is of relevance to this paper’s discussion of the implications for educators/end-users.³² Although Art.3(1) has an underpinning rationale that right-holders have a right to control exploitation of their works,³³ control through measures such as licensing agreements, suggests contract law can undermine copyright law’s paradigm by affording ‘*de facto monopolies*’³⁴ to right-holders to control and exploit an in-copyright work,³⁵ whilst also operating as *de facto* private regulators of in-copyright material.³⁶ Consequently, the implications for DDL are that such control functions are an obstacle to accessing knowledge provided by educators, as hard copy materials are costlier to utilise than digitised works due to

²⁷ Evangelia Papadaki, 'Hyperlinking, making available and copyright infringement: lessons from European national courts' (2017) 8(1) European Journal of Law and Technology; *FAPL* (n.21) at paras.200, 202 and 203.

²⁸ *FAPL* (n.21), para. 199.

²⁹ Randal C. Picker, 'Copyright as Entry Policy: The Case of Digital Distribution' (2002) 47(2-3) The Antitrust Bulletin 423, 433 and 462-463.

³⁰ Marcella Favale, 'The Right of Access in Digital Copyright: Right of the Owner or Right of the User?' (2012) 15(1) The Journal of World Intellectual Property 1, 5-7.

³¹ Nobre (n.11). 30, 40 and 43; Triaille (n.25), 381.

³² Discussed above; explored further in part three.

³³ Hugenholtz and Van Velze (n.6), 797 and 812-813.

³⁴ Paul Ayriss, 'Uncorrected Evidence: Written evidence submitted by Copyright for Knowledge' (Prepared for the Business, Innovation and Skills Select Committee, UK Parliament, 2011) (Available at <https://publications.parliament.uk/pa/cm201012/cmselect/cmbis/writev/1498/m21.htm>).

³⁵ *ibid.*

³⁶ Sophie Stalla-Bourdillon 'Chilling ISPs... when private regulators act without adequate public framework...' (2010) 26(3) Computer Law & Security Review 290, 291; although written in the context of technical protection measures, the principle is relevant as licensing agreements fall under the umbrella of private regulation that risks undermining copyright’s normative balancing of interests as evidenced by Vollmer’s summary discussion of the proposed Directive on Copyright in the Digital Single Market— Timothy Vollmer, '*RightsCon Redux: Working Toward A Progressive Copyright Framework For Europe*' (Creative Commons, 2017) <<https://creativecommons.org/2017/04/04/rightscon-redux-working-toward-progressive-copyright-framework-europe/>> accessed 29 January 2018.

the internet's simpler and cheaper communication functions.³⁷ A further obstacle to communication of knowledge for educational purposes and Art.3(1) derives from the issue of end-user liability.

Applying the above discussions to the UK context, unauthorised access, communication to the public and end-user liability for accessing digitised in-copyright works is illustrated by the Pirate Bay case *Dramatico Entertainment Limited*³⁸ ('*Dramatico*'). *Dramatico* held that, by providing end-users with unrestricted access to in-copyright works files online without authorisation, the owners of the Pirate Bay were '*jointly liable*'³⁹ with end-users for infringement, by 'enabling' end-users to infringe.⁴⁰ Although *Dramatico* involved linking to potentially infringing material, the *Dramatico* judgment is of relevance in relation to DDL, as the cross-border nature of the internet, in addition to the unharmonised E&Ls, could render end-users disseminating creative works liable for infringement of a right-holder's communication right within jurisdictions such as the UK, if they are held to have knowledge of infringement.⁴¹ These discussions are built upon through the lens of the *Nils Svensson and Others* ('*Svensson*')⁴² judgment, discussed below.

The implications were evaluated as to whether students remotely located are regarded as a 'new public' by the court in the case of *Svensson*,⁴³ as affirmed in Case C-348/13 *BestWater International GmbH (BestWater)*.⁴⁴ It could be argued that Portugal's copyright law's silence on the act of communication does not wholly limit end-users' ability to make available in-copyright works via DDL,⁴⁵ as it was held that the act of linking to another site does not

³⁷ Jia Wang, 'Copyright: Rebalancing the Public and Private Interests in the Areas of Education and Research' (Ph.D. Thesis, Stellenbosch University, 2013), 1; William W. Fisher and William McGeeveran, 'The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age' (2006) Berkman Centre Research Publication No.2006-09

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=923465> accessed 12 February 2018, 7.

³⁸ *Dramatico Entertainment Limited and Others v. British Sky Broadcasting Limited and Others* [2012] EWHC 268 (Ch) ('*Dramatico*').

³⁹ *ibid*, para.83

⁴⁰ *ibid*, para.81.

⁴¹ Robert C. Piasentin 'Unlawful? Innovative? Unstoppable? A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada' (2006) 14(2) International Journal of Law and Information Technology 195, 204-205.

⁴² Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* [2014] ECLI:EU:C:2014:76 ('*Svensson*').

⁴³ *ibid*.

⁴⁴ Case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch* [2014] ECLI:EU:C:2014:2315 ('*BestWater*'); for a summary of *BestWater*, see Eleonora Rosati, 'That BestWater Order: it's up to the Rightholders to Monitor Online Use of Their Works' (IPKat, 2014) <<http://ipkitten.blogspot.co.uk/2014/10/that-bestwater-order-its-up-to.html>> accessed 7 April 2018.

⁴⁵ Maria Daphne Papadopoulou, 'Copyright Limitations and Exceptions in an E-Education Environment' (2010) 1(2) European Journal of Law and Technology; Papadaki (n.27), 13.

necessarily constitute communication to the public;⁴⁶ with communication to the public for the purposes of Art.3(1) to be interpreted broadly.⁴⁷ As held in *FAPL*, the ‘new’ public must be different to those taken account of when communication authorisation was given by the right-holder.⁴⁸ However, as in the UK, it depends upon whether the work was ‘freely’ available online prior to a hyperlink creation to that work.⁴⁹ Finally, InfoSoc’s Art.6 governance of technical protection measures (TPMs) is an interrelated topical issue of the implications for DDL, as it has been argued to ‘overlap’ with Art.3(1), discussed below.⁵⁰

2. Technical Protection Measures and Art.3(1)

In light of previous discussions, this part acknowledges the comparative approaches to InfoSoc’s Art.6 governance of TPMs as implemented into national law within Portugal and the UK’s copyright regimes. TPMs are acknowledged due to the implications for educators/end-users and DDL, as there is contention as to whether TPM circumvention amounts to communication to the public.⁵¹

TPMs afford right-holders an additional layer of protection against circumvention of measures put in place to prevent unlawful copying. The UK’s implementation of Art.6 InfoSoc⁵² arguably functions as a secondary measure of control of access to digitised in-copyright works for right-holders.⁵³ As the CDPA 1988 does not afford an exception to end-users who circumvent TPMs to access an in-copyright work that would otherwise have fallen within Art.5’s E&Ls.⁵⁴ Comparatively, the PCA does not prohibit circumvention of TPMs

⁴⁶ *Svensson* (n.42), para.25.

⁴⁷ *ibid*, para.17 (referencing *FAPL* (n.21)).

⁴⁸ Eleonora Rosati, ‘GS Media and Its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture’ (2017) 54(4) *Common Market Law Review* 1221, 1222-1223.

⁴⁹ *ibid*, 1222-1223.

⁵⁰ Papadaki (n.27), 13.

⁵¹ Anne Lepage, ‘Overview of Exceptions and Limitations to Copyright in the Digital Environment’ (e-Copyright Bulletin of January to March 2013, UNESCO, 2013)

<<http://unesdoc.unesco.org/images/0013/001396/139696E.pdf>> accessed 10 April 2018, 13-14; Papadaki (n.27), 13-14.

⁵² Copyright Designs and Patents Act 1988. s.296 (‘CDPA’); Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer-Verlag, 2008), 75.

⁵³ Aashit Shah, ‘UK’s Implementation of the Anti-Circumvention Provisions of the EU Copyright Directive: An Analysis’ (2004) 2 *Duke Law & Technology Review* 1, 1-2.

⁵⁴ Applicable to Art.5’s E&Ls as implemented into CDPA 1988 (n.52), ss.30-32; Christopher T. Wheatley, ‘Overreaching Technological Means for Protection of Copyright: Identifying the Limits of Copyright in Works in Digital Form in the United States and the United Kingdom’ (2008) 7(2) *Washington University Global Studies Law Review* 353.

beyond international treaty obligations.⁵⁵ Instead, circumventing TPMs does not exclude the application of Art.5(3)(a), as implemented into the PCA.⁵⁶

Therefore, it is argued that in the context of TPMs and Art.3(1), both the UK and Portugal's approaches to Art.5(3)(a) suggest that, although there are limitations, under the PCA there is a broader scope for end-users to exercise their fundamental rights,⁵⁷ as circumvention of a TPM for the purposes of exercising a fundamental right for educational purposes would arguably not constitute communication to the public.⁵⁸ These discussions form the basis for part three's analysis, below.

3. Implications post-GS Media

As demonstrated above, cases pertaining to infringement of the communication to the public right are not a new phenomenon. This part amalgamates elements of previous discussions to analyse the myriad of judicial interpretations of Art.3(1) and implications deriving from those interpretations through the lens of *GS Media*, where the CJEU confirmed that hyperlinking to in-copyright works published on the internet, without authorisation from the right-holder, can constitute copyright infringement. This consequently added further complexity to the 'new public' concept.⁵⁹ This continuous interpretation of the 'new public', the contours of which were further defined earlier in *Svensson*,⁶⁰ is explored below.

3.1 The New 'New Public' Test and Digital Distance Learning

Drawing upon the discussions above, this part considers the *GS Media* 'new public' judgment in relation to Art.5(3)(a), by amalgamating elements of parts one and two to evaluate the extent to which there are implications for end-users exercising their right. It has been argued that the new direction of the 'new public' which has been taken by the CJEU as a legal test is 'flawed',⁶¹ as discussed below.

⁵⁵ Mireille Van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Law-making* (Kluwer Law International 2009), 109.

⁵⁶ Ian Brown, 'Introduction to: Implementing the EU Copyright Directive' Cambridge: Foundation for Information Policy Research, 2003), 111 (Available at: <https://www.fipr.org/copyright/guide/eucd-guide.pdf>).

⁵⁷ As per Art.5 InfoSoc's E&Ls.

⁵⁸ *ibid.*

⁵⁹ Mezei (n.5), 780-781; Hugenholtz and Van Velze (n.6), 798.

⁶⁰ Hugenholtz and Van Velze (n.6), 806.

⁶¹ *ibid.*, 811.

A predominant obstacle for DDL and end-users deriving from the *GS Media* judgment pertains to the extended breadth of parties who can be held liable for infringing the right-holder's right to communication.⁶² For example, *GS Media* held that the poster of an online link to unauthorised content need not have posted the link with actual knowledge that the content linked to lacked authorisation, as knowledge is presumed to exist where it 'ought' to have been known.⁶³ Although this is a rebuttable presumption, the decision renders such knowledge and actions as communication to the public.⁶⁴ Applying this argument to DDL it is argued that the implications of *GS Media* renders the functions of DDL disadvantaged, as educators may avoid risking liability by not posting content/disseminating knowledge for DDL educational purposes.⁶⁵

This in turn suggests that digital copyright law potentially creates barriers to accessing knowledge in the online environment for educational purposes, particularly in the context of non-traditional institutions, as copyright regimes in jurisdictions such as the UK and Portugal require non-traditional establishments to acquire permission from right-holders.⁶⁶ Additionally, where knowledge is presumed, the Art.5(3)(a) exception will not apply.⁶⁷ Finally, *GS Media* extended the scope of right-holders' Art.3(1) communication right in a new direction in relation to authorisation, as evidenced by the fact that authorisation is an increasingly prevalent element highlighted in judicial decisions in light of the challenges of enforcing Art.3(1) against online activities.⁶⁸ As such, there is argument that decisions such as *GS Media* and Case C-527/15 *Filmspeler* have resulted in a tip of copyright's paradigm in favour of right-holders by extending the scope of Art.3(1). As touched upon in part 1.2, tipping the balance of copyright's paradigm in favour of right-holders is argued to restrict end-users from exercising their fundamental access to knowledge right.⁶⁹ These discussions are built upon below.

3.2 Licence Agreements

⁶² Erik Ahlgren, 'Does EU copyright law threaten digital freedom?' (LLM Thesis, Uppsala University, 2017), 24-25.

⁶³ *GS Media* (n.8), para.49; including where there is intent for profit (para.51).

⁶⁴ Even where the communication was not transmitted by different technological means.

⁶⁵ Rory McGreal, 'Stealing the goose: Copyright and learning' (2004) 5(3) *International Review of Research in Open Distance Learning*, 16.

⁶⁶ Nobre (n.11), 6.

⁶⁷ Rosati (n.48), 1230-1231

⁶⁸ Kuhlen (n.5), 24-25.

⁶⁹ N.S. Gopalakrishnan 'Copyright Term Extension Proposal in India' (2007) Centre for IPR Studies at Cochin University of Science and Technology <<http://ciprs.cusat.ac.in/wp-content/uploads/2017/05/Copyright-term-exte-working-paper-Gopalakrishnan-Yogesh1.pdf>> accessed 29 March 2018, 3.

This part builds upon discussions within parts 2 and 3.1. Regarding DDL and Art.3(1), the concepts of implied licenses, explicitly agreed license agreements and availing end-users from infringement liability, implementation into national laws, such as, the UK and Portugal is a myriad of governance regimes. Although in the EU context they have been tackled in some international copyright treaties, license agreements are not directly governed by the treaties ‘as such’.⁷⁰ For example, within the EU, the governance of license agreements and how they are implemented is left to member states.⁷¹

With regards to Art.5(3)(a), the relevance of acknowledging the aforementioned myriad of license agreement governance is because both the CDPA 1988⁷² and PCA⁷³ prohibit the use of license terms and conditions contractually preventing end-users from exercising their fundamental rights under the E&Ls.⁷⁴ The implications for DDL online activities post-*GS Media*’s extended scope of protection are that avoiding liability could be problematic for end-users who exercise their rights under the E&Ls but who do not fall within the scope of readily ‘identifiable’⁷⁵ parties, such as a traditional educational institution.⁷⁶ Consequently, obtaining right-holder authorisation for the purposes of Art.3(1) could be problematic for such end-users (discussed later). As such, their consequent use of work could fall within the scope of infringement of Art.3(1), due to the use not forming part of what the right-holder considered its use for.⁷⁷

Negotiations for license agreements can be argued to be more difficult to create between right-holders and individuals or smaller parties, for example, due to sourcing the right-holder/end-user or due to financial restraints on behalf of the end-user.⁷⁸ This issue regarding

⁷⁰ Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar Publishing, 2011), 202-203.

⁷¹ Zhiqin Wu, ‘A legal framework for global joint copyright management in musical works: based on Rawls’s Theory of Justice’ (PhD. Thesis, Lancaster University, 2017), 22-23.

⁷² CDPA (n.52), s.29(4B).

⁷³ PCA (n.15), art.75(5).

⁷⁴ Daniel Seng, ‘Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities’ (Standing Committee on Copyright and Related Rights: Thirty-Fifth Session SCCR/35/5 REV, WIPO, 2017), 10.

⁷⁵ Van Eechoud (n.55) pp.107-108.

⁷⁶ *ibid.*

⁷⁷ *FAPL* (n.21); In the context of end-user liability and licensing agreements, at paras.46 and 47, the CJEU in *GS Media* (n.8) provided guidance to judicial decision-makers on the issue of content already freely available online. Whereby the court stated that account should be taken as to the fact that end-users linking to infringing material may be unaware of a pre-existing license agreement. However, there remains the possibility of end-users falling within the scope of Art.3(1) due to ‘new public’ test, alongside the consideration of establishing knowledge, being subjective in nature. As such, there continues to be legal uncertainty for end-users as to the circumstances in which they will be held liable for copyright infringement; Berbece (n.10), 25-27.

⁷⁸ William M. Landes and Richard A. Posner, ‘Indefinitely Renewable Copyright’ (2003) 70(2) *The University of Chicago Law Review* 471, 475.

license agreements becomes of further relevance in light of the proposed Directive on Copyright in the Digital Single Market ('the Directive'). As where a license agreement is present, the teaching exception does not need to be implemented into national law. Intermediary liability⁷⁹ is another dimension to post-*GS Media* implications, discussed below.

3.3 Intermediary Liability

Copyright law is not static,⁸⁰ as demonstrated by the interrelated topical issue of intermediary liability, whereby, according to MacQueen, courts are steadily finding service providers and end-users liable for copyright infringement where no license agreement exists.⁸¹ As illustrated by *MGM Studios Inc v. Grokster Ltd*,⁸² which held that file-sharing companies could be liable for the infringing actions of their users when the company in question had encouraged such infringing activities.⁸³ For example, by distributing a device,⁸⁴ consequently infringing the right-holder's right to communication to the public.⁸⁵ By extending the scope of Art.3(1) to include intermediary liability, a consequence could be a restriction of end-users' access to digitised creative works, bringing to the fore issues of access to knowledge and lawful dissemination of knowledge as provided by the E&Ls for educational purposes.

⁷⁹ Intermediaries are predominantly private businesses such as, Google, Twitter and file-sharing websites who operate as the messengers between end-users within the internet's environment, providing a platform for end-users to communicate across digital borders. Within the contemporary digital copyright regime, there are growing governmental and right-holder policy pushes for intermediaries to be legally liable of contributory copyright infringement where end-users utilising their platform have engaged in copyright infringing activities. For example, instances where end-users have illegally shared files with other end-users that contain copyrighted content- Christopher M. Swartout, 'Toward Regulatory Model of Internet Intermediary Liability: File-sharing and Copyright Enforcement' (2011) 31(2) *Northwestern Journal of International Law Business* 499, 499-501.

⁸⁰ Susan K. Sell, (2009) 'Cat and Mouse: Forum-Shifting in the Battle Over Intellectual Property Enforcement' (Prepared for American Political Science Association Meeting September 3-6, 2009)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466156>, 5; The Society of Authors, 'Submission: Modernising the European Copyright Framework' (Submission to the EU Commission, The Society of Authors, 2016) <<http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/20161205-Submission-to-IPO-on-DSM-directive-dec-2016.pdf>>, 4; as illustrated by the UK's application of GS Media in intermediary live streaming blocking case: *Football Association Premier League Ltd v British Telecommunications plc & Ors* [2017] EWHC 480 (Ch). See also Eleonara Rosati, 'First live blocking order granted in the UK' (IPKat, 2017) <<http://ipkitten.blogspot.co.uk/2017/03/first-live-blocking-order-granted-in-uk.html>> accessed 7 April 2018.

⁸¹ Hector L. MacQueen 'Appropriate for the Digital Age? Copyright and the Internet' (2014) in Lilian Edwards and Charlotte Waelde (eds.), *'Law and the Internet'* (3rd edn, Hart Publishing, 2009), 184.

⁸² *MGM Studios Inc v. Grokster Ltd*, 545 US 913 (2005).

⁸³ *Ibid*, para. 919 (Justice Souter).

⁸⁴ *ibid*.

⁸⁵ Okechukwu Benjamin Vincents, 'When Rights Clash Online: The Tracking of P2P Copyright Infringements Vs. the EC Personal Data Directive' (2008) 16(3) *International Journal of Law and Information Technology* 270, 279.

With regards to DDL, *GS Media*'s extended 'new public' scope means that the prospect of increased liability for intermediaries could result in over-cautious censorship⁸⁶ of the internet by service providers who 'fear' copyright infringement liability.⁸⁷ As *GS Media* contributes to legal uncertainty already in existence surrounding the scope of intermediary liability within digital copyright law,⁸⁸ it can be argued that the additional layer of uncertainty created by *GS Media* functions as a contributory motivation for service providers to limit access to, and the availability of, creative works.⁸⁹ As the uncertainty has further fuelled service provider concerns about a financial 'burden' placed upon their business by potentially being required to 'preventively and reactively'⁹⁰ police the internet.⁹¹

As a consequence, the aforementioned motivations and legal uncertainty create a risk to end-users' ability to exercise their fundamental rights under Art.5(3)(a). As the scope of the rights could be limited due to service providers blocking lawful access to and dissemination of content that they assume to contain infringing material. This means that such responses from service providers could restrict access to digitised content for educational purposes, as the service providers may block end-user access to legitimate content digitally uploaded and disseminated by educators into the DDL sphere.⁹² Further, due to the potential for over-cautious censorship, end-users face additional legal uncertainty as to the extent to which creative works

⁸⁶ Censorship for this paper's purposes is utilised as an umbrella term that pertains to limitations placed upon end-users exercising their fundamental rights such as, freedom of expression, the ability to access and communicate through the internet's borderless arena. This lens of censorship is in light of the intermediary being 'enlisted' as a regulator 'by proxy'; Seth F. Kreimer, 'Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link' (2006) 155(1) *University of Pennsylvania Law Review* 11, 16-17.

⁸⁷ Daphne Keller, 'The Right Tools: Europe's Intermediary Liability Laws and the 2016 General Data Protection Regulation' (2018) 33(1) *Berkeley Technology Law Journal* 297, 306-307 and 363.

⁸⁸ Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8(2) *JIPITEC* 139, 139-140; Tambiana Madiega, 'Copyright in the digital single market' (Briefing- EU Legislation in Progress, European Parliamentary Research Service, 2018), 3 (Available at:

<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593564/EPRS_BRI\(2016\)593564_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593564/EPRS_BRI(2016)593564_EN.pdf)>); an illustrative example of the *GS Media* judgment contributing to the broad scope of legal uncertainty surrounding intermediary liability comes from *GS Media* (n.8) at para.45. As whilst the CJEU recognised that linking to and dissemination of digitised content forms part of the internet's function as a medium for freedom of expression, the guidance within para.45 is a subjective consideration for courts ascertain whether the intermediary had knowledge of the infringing material and therefore, liable for copyright infringement.

⁸⁹ Keller (n.87), 306.

⁹⁰ Christina Angelopoulos, 'Sketching the Outline of a Ghost: The Fair Balance between Copyright and Fundamental Rights in Intermediary Liability' (2015) 17(6) *The Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 72, 72.

⁹¹ Thomas Southey Capel, 'Fighting the File-Sharing War through Notice-and-Takedown Regimes: Plunging a Sword of Copyright through the Heart of Freedom of Expression on the Internet' (2002) 2(1) *Southampton Student Law Review* 51, 59-60 and 73.

⁹² Grete Eline Brunsvig, 'Intermediary Liability for Copyright Infringement in the EU's Digital Single Market'. (LLM Thesis, University of Oslo, 2017), 35-36; Aleksandra Kuczerawy, 'The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression' (2017) 8(3) *JIPITEC* 226, 228.

can be disseminated for DDL purposes. The end-user legal uncertainty is despite the fact that uploading and disseminating in-copyright creative works by educators⁹³ for DDL purposes would arguably fall within the scope of Art.5(3)(a). This assertion is supported recorded complaints from end-users that there have been instances where digitised content was removed.⁹⁴

Consequently, building upon part 3.1's *GS Media* analysis, it is argued that such intermediary liability and the aforementioned end-users' restriction to knowledge could occur where the intermediary's business model is 'interfered' with. That is, interfered with to such an extent that the balance of interests between right-holders and intermediaries become tipped in favour of right-holders' interests.⁹⁵ However, in this context, the UK approach is comparatively broad in scope insofar as end-users' abilities to access in-copyright works through the use of service providers.⁹⁶ This is because the burden placed onto intermediaries' requirements to act on infringing activities is less than requirements within other EU jurisdictions.⁹⁷

4. Conclusion

Through its thematic analysis of DDL pre and post-*GS-Media*, this paper established its position that, whilst the position remains overall the same insofar as copyright's balance of interests, copyright's paradigm has, to a degree, arguably tipped in favour of right-holders *in re* accessing in-copyright works for educational purposes. This is because *GS Media* contributes to the E&Ls flexibility issues by extending the scope of those who can be held liable. This is problematic as there already exists inflexibility of the E&Ls application for educational purposes. Therefore, by extending the scope of Art.3(1)'s 'new' public, it is argued that the implications of *GS Media* for Art.5(3)(a), as implemented into national law, highlights the already narrow scope and fragmented implementation of the E&Ls into national law for educational purposes,⁹⁸ which has become further narrowed by extending the scope of

⁹³ alongside access to the content by end-users.

⁹⁴ Commission, '*On the Modernisation of EU Copyright Rules*' SWD (2016) 301 final (available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2016:0301:FIN:EN:HTML>).

⁹⁵ See, Case C-70/10 *Scarlet Extended SA v SABAM* [2011] ECR I-11959, para.46, where it was held that a 'fair balance' must be struck between right-holders and intermediaries' interests.

⁹⁶ *Sell* (n.80), 5

⁹⁷ *ibid.*

⁹⁸ Triaille (n.25) p.381; Stephanie Reynolds and Others, 'Review of the EU Copyright Framework: European Implementation Assessment' (European Parliamentary Research Service, 2015) (Available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU\(2015\)558762_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf)), 14.

protection afforded to right-holders under the Art.3(1) communication to the public right,⁹⁹ explored further below.

With regards to license agreements post-GS Media, this paper has argued that GS Media's extended scope renders it simpler for end-users to be held liable for infringement under Art.3(1), where the right-holder cannot be sourced to acquire authorisation. This is because in instances where a license agreement cannot be obtained due to the end-user's inability to source a right-holder, end-users who exercise their Art.5(3)(a) right for DDL purposes can still fall within Art.3(1)'s extended scope when utilising an in-copyright creative work; the use of which would otherwise fall within the scope of the E&Ls for educational purposes. The implications of the extended scope could be a particularly problematic obstacle for end-users who neither fall within the scope of a readily 'identifiable' institution, nor are able to source a right-holder¹⁰⁰ to avail themselves from infringement liability of Art.3(1).

Additionally, although proposed legislation, such as the Directive, proposes a broader scope of inclusion for distance learning activities, the Directive is not without issue. For example, where a license agreement exists, member states need not incorporate the teaching exception into national law. This could be problematic for the scope of flexibility available to end-users exercising their fundamental rights (as evidenced by GS-Media's extended scope of parties who can be held liable for infringing the right-holder's Art.3(1) right), as where authorisation cannot be acquired, end users can be held liable for copyright infringement.

Finally, as legal uncertainty surrounding intermediary liability under digital copyright law existed prior to GS Media, it is argued that the implications of GS Media's extension of Art.3(1)'s 'new public' test has contributed to further blurring the contours of an already complex legal system affecting intermediary liability. As such, it is argued that as a direct consequence of Art.3(1)'s extended scope in relation to holding intermediaries liable for the infringing actions of end-users, intermediaries could be motivated to over-cautiously censor the internet to avail themselves of liability. By over-cautiously censoring the internet, there is a risk that restrictions could be placed upon the extent to which end-users can exercise their Art.5(3)(a) fundamental right. This in turn arguably affects the normative order of the core values within copyright law's paradigm, as increased liability for intermediaries could result in

⁹⁹ Assertion is based on evidence discussed throughout this paper.

¹⁰⁰ For example, individuals and smaller organisations could be limited in their ability to source the right-holder due to a lack of financial resources.

restricted access to digitised content for DDL purposes, whilst consequently contributing to tipping copyright law's paradigm in favour of right-holders.¹⁰¹

¹⁰¹ Ben Depoorter and Robert Walker, 'Copyright False Positives' (2013) 89(1) Notre Dame Law Review 319, 345-346 — This paper summarises the implications for copyright's normative balance of interests and the possibility of 'chilling effects' for end-users' fundamental rights in light of intermediaries removing content for fear of copyright infringement liability.