

Copyright Piracy

**Assessment of national legislative
approaches and court practice
regarding online copyright piracy**



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- ▶ To learn more about the IPC project, please visit <https://www.eurojust.europa.eu/intellectual-property-crime-project> or scan the QR code provided.
- ▶ The IPC project team can be contacted via IPCrime@eurojust.europa.eu.



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Key findings

- National legislations governing criminal infringements of copyrights vary considerably across the EU.
- Despite the existence of minimum international standards for the criminalisation of copyright infringements, some Member States have expanded, and others have restricted, the scope of criminal liability by raising or lowering the thresholds for the crime of copyright piracy in national legislation.
- Notwithstanding similarities in legal traditions, countries within the same geographical region often exhibit differences in national legislative approaches to criminal copyright infringement.
- The jurisprudence of the Court of Justice of the European Union has been instrumental for a better understanding of infringements of copyrights in the online environment, and it has to an extent helped to harmonise case-law on the treatment of certain online infringing acts.
- The concept of online copyright infringements is not static and is gradually evolving in line with national and European jurisprudence, especially in the context of cybercrime.
- The elements necessary for the criminalisation of a copyright infringement in national law may vary depending on the type of infringing act.
- Commercial aim and/or scale is a central element in setting the limits of criminal enforcement at national level, as well as in determining the minimum and maximum thresholds for custodial sentences. Nevertheless, the actual duration of the sentence is a matter for national judges.
- The preconditions for commercial scale vary across national legislations; in some jurisdictions, its existence is determined on the basis of criteria set in national legislation, whereas in others the existence of this element depends on the interpretation made by national courts.
- While providing for the same type of criminal sanctions and penalties, national legislations differ considerably in relation to the fines and the maximum prison sentences foreseen for criminal copyright infringements.
- In most EU countries, the basic offence of copyright piracy (in the absence of aggravating circumstances) leads to a maximum custodial sentence of 1 year, which mostly results in a financial penalty in lieu of prison time.
- In cases where aggravated circumstances are present, the maximum custodial sentences do not exceed 5 years, with a few exceptions. These are, however, often suspended in their execution.
- Besides fines and imprisonment, some jurisdictions include additional measures to sanction infringers, including civil procedures.
- Low sentences can prove an obstacle to the success of investigations and prosecutions of IP crime, by limiting the use of all the available (and the more effective) intelligence and investigative tools and causing a general deprioritising of this crime type. These factors contribute in some measure to making IP crime a high-value low-risk activity for organised crime groups.
- The current system of criminal legislation and sentencing practice is unable to effectively deter criminals from committing copyright piracy, as the benefits derived outweigh the risks.
- Advances in technology will continue to impact the type and nature of copyright infringements on the internet, possibly leading to the future criminalisation of new acts.

Introduction

Intellectual property (IP) has long been the engine powering nations' progress with new ideas, innovations and products. Copyrights, in particular, have not only been instrumental in contributing to the economic development of countries across the world, but they have also helped to create and promote new forms of culture and entertainment.

The internet and new technological developments have opened up new opportunities for creators to promote their work and increase revenue streams, but they have proven to be a double-edge sword, bringing along new challenges that caused the rise of unauthorised use of copyright-protected works. In the last few decades, the online environment has become the new frontier for copyright infringements, enabling malicious actors to exploit protected works in new ways and at scale, while simultaneously providing them with an extra layer of anonymity and protection.

At the same time, the protection of IP rights has remained largely unchanged since the main international norms in this area were created at the turn of the 20th century. The Paris Convention and the Berne Convention, adopted in 1883 and 1886 respectively, were last amended in 1979, and the WIPO Copyright Treaty – created to strengthen the protection of works and their authors in the digital environment – remains unaltered since 1996, when it was first adopted. Likewise, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) came into effect in 1995, during the age of dial-up internet when the average size of a file was recorded on a floppy disk with a capacity of 1.4 megabytes. Today, the slowest internet connection can download 10 times this data in a second but the provisions of TRIPS remain unchanged.

Against this background, IP criminals are now using 21st century technology to carry out new forms of copyright infringements at scale, while the legislation in place to protect IP owners lags behind, unable to keep up to speed with the changes in the environment within which creators and criminals operate.

Online piracy involves large profit margins for criminals, and consequently a loss of revenue for rights holders, which translates into fewer jobs, less innovation and weaker economies. Notwithstanding, online piracy is too often perceived as a victimless crime – a reality that is reflected in few prosecutions and low sentences handed to those who infringe the rights of creators and innovators. These factors have helped to make online piracy a low-risk, high-profit enterprise, in turn becoming more attractive for individual infringers and organised criminals alike.

Violations of copyrights are largely dealt with by civil courts, which provide a quick and effective response to most cases where stopping the infringement is the primary goal of the injured party. However, the large-scale nature of infringements and the increasing involvement of organised crime groups calls for a stronger and more dissuasive response to enforce copyrights.

Over the past years, criminal law has proved to be an important tool for rightholders to enforce their rights and prevent future violations. As a matter of national competence, criminal law and its responses to copyright infringements are not harmonised at the EU level – except for some minimum international standards ⁽¹⁾. As a result, national approaches to online piracy tend to

(1) Today, TRIPS is the only internationally recognised treaty that contains provisions for the implementation of criminal law measures to tackle piracy in the form of minimum international standards. These will be addressed in more detail in subsequent sections of this report.

vary between EU Member States (MS), making a comparative analysis of national enforcement responses not only necessary, but also very interesting.

The present report intends to contribute to that effort. Developed with IP practitioners in national judicial authorities in mind, it aims to provide a better understanding of how criminal infringements of copyrights are legislated and enforced across MS.

It focuses on online criminal infringements of copyrights – specifically, infringements of the exclusive right of communication to the public and its ‘making available’. The reason to focus on online piracy alone is twofold. Firstly, online piracy makes up the majority of copyright-related cases that are brought before courts today. Secondly, this area has exposed members of the judiciary to novel legal problems that often require them to possess knowledge in or gain an understanding of emerging issues in complex fields involving the internet, technology and e-commerce. In the context of online copyright infringements, the communication to the public and the making available right take centre stage, since most infringing acts carried out on the internet violate this specific right.

The report begins by looking at the minimum core international standards for the criminal enforcement of copyright infringements set by TRIPS, which came into effect in 1995, and other relevant EU instruments that have harmonised certain aspects of copyright protection and enforcement at the EU level.

The report then separately addresses each of the elements of the crime of copyright piracy set in TRIPS and examines how they are construed in national legislation and court practice. For this purpose, it refers to a select cohort of MS in different regions to capture important differences at the national level and ensure a balanced geographical representation and legislative coverage. The aim of the report is neither to provide an exhaustive overview of all the elements in each individual MS, nor to make an in-depth analysis of the national laws and court rulings. These are beyond the scope of this report.

Online copyright infringements are a more recent phenomenon, which means that national courts have had to contend with new legal questions in previously unexplored areas. Against this background, the Court of Justice of the European Union (CJEU) has played a central role in helping national courts make sense of new aspects of copyright-infringing conducts and setting new standards for the interpretation of EU laws on copyrights. For this reason, the [section on infringement](#) (Chapter 3) first begins with a review of the CJEU case-law and then continues with an assessment of the practice of national courts regarding common copyright infringing acts.

While the main focus of this report are criminal cases of online piracy, references are made to civil law cases, including the rulings of the CJEU, as these are sometimes the only available judicial basis for criminal prosecutions. Furthermore, as demonstrated in existing national case-law, criminal law often relies on civil law concepts and provisions regulating copyrights.

Chapter 1 – Copyright, neighbouring rights and their protection

A copyright, also known as author's right, is a legal term used to describe the rights of creators over their literary and artistic creations ⁽²⁾.

In line with the Berne Convention ⁽³⁾, adopted in 1886 and amended in 1979, every literary, scientific and artistic production, regardless of the way in which it is expressed, is worthy of copyright protection. Examples of copyright-protected works include books, pamphlets, other types of writings, musical, cinematographic and photographic works, dramatic or dramatico-musical works, musical compositions, illustrations, maps and works of drawing, paintings and sculptures, to name a few ⁽⁴⁾.

Importantly, copyright protects only the creative expression and not the underlying ideas or the physical object onto which the work is incorporated ⁽⁵⁾.

In order to be protected, a work has to be original, meaning that it needs to reflect the author's intellectual creation. As a human-centred discipline, modern copyright law attributes rights to human creators, who become the owners and beneficiaries of the copyright granted to their work. In the age of AI-generated content, questions are starting to emerge as to whether works generated by AI models can become the subject of copyright protection. However, as current national and international laws stand, only human creators are entitled to own copyrights.

Generative AI and its impact on IP crime

To learn more about how generative AI can be harnessed by criminals to perpetrate IP and other crimes, please refer to the recently-published Eurojust paper on the topic by scanning the QR code below.



Unlike with other types of intellectual property rights (e.g. patents and trademarks), registration is not a prerequisite for a work to be copyright-protected. Copyright arises automatically from the moment the work is created and it applies internationally. In accordance with the Berne Convention, authorship of a work shall be presumed based on the name or pseudonym (where no doubts exist as to the identity of the author) that appears in the work, in the absence of proof to the contrary ⁽⁶⁾.

Notwithstanding, registration helps to prove ownership in the event that legal disputes arise or in cases of infringement. Some MS provide a system for the voluntary registration of works. For example, the Spanish Ministry of Culture and Sports has instituted a Copyright Registry ⁽⁷⁾ that allows for the registration of any type of work, including contracts related to copyrights. In Greece, the Hellenic Copyright Organisation has introduced an online service that enables authors to timestamp ⁽⁸⁾ their work and thus prove its existence from a specific date. Belgium provides a

⁽²⁾ World Intellectual Property Organisation, <https://www.wipo.int/copyright/en/>.

⁽³⁾ The Berne Convention deals with the protection of copyright works and the rights of their authors. As of April 2023, 181 states are signatories to the Berne Convention. For more information, please go to <https://www.wipo.int/treaties/en/ip/berne/>.

⁽⁴⁾ Art. 2 of the Berne Convention provides a comprehensive and non-exhaustive list of examples of works protected by copyright protection.

⁽⁵⁾ TRIPS Agreement, article 9(2).

⁽⁶⁾ Art. 15 of the Berne Convention – transposed into EU law by Article 5 of Directive 2004/48/EC (known as the enforcement directive).

⁽⁷⁾ Ministerio de Cultura y Deporte – Gobierno de España, Registro de Propiedad Intelectual, <https://www.culturaydeporte.gob.es/cultura/areas/propiedadintelectual/mc/rpi/inicio.html>.

⁽⁸⁾ Hellenic Copyright Organisation, <https://opi.gr/en/timestamp>.

service that enables creators to record their ideas ⁽⁹⁾ (e.g. a lyric, script or song). In Germany, copyright owners can deposit their work with a lawyer or a notary as a means to prove copyright ownership ⁽¹⁰⁾. Existing registration practices, while voluntary in nature, help to strengthen an author's position by providing them with factual evidence of their authorship.

Copyright grants owners certain rights over their work. These fall under two main categories.

Economic rights (also known as patrimonial rights). These are associated with the commercial exploitation of the work and give rightholders exclusive rights to authorise or prohibit certain acts involving their work, including the reproduction, translation, distribution, broadcasting, adaptation, communication to the public and making the work available. Economic rights also entitle rightholders to be remunerated for the authorised use of their work by others. Despite being exclusive, economic rights can be transferred or licenced to a third party.

Moral rights. These protect the non-commercial interests of authors and allow them to control how their work is used outside the commercial sphere. In particular, moral rights recognise authors' right to claim authorship over their works and assert its authenticity and integrity by objecting to changes to the work that could harm their reputation ⁽¹¹⁾. Unlike economic rights, moral rights cannot be waived or transferred, which means that they remain with authors during their lifetime and cannot be passed on to others.

Copyright law also protects **neighbouring rights** (also known as related rights), which are attributed to certain categories of beneficiaries that play a key role in making works accessible to the public, namely performers (e.g. actors, singers, dancers), producers of phonograms and broadcasting organisations. With a few exceptions (e.g. duration of the rights), neighbouring rights work similarly to copyrights in that the legal protection provided confers economic rights to the beneficiaries and, in some legislations, moral rights, in particular with regard to performers. Such is the case in Portugal, where the national legislation on copyright confers on performers the same moral rights as authors (right of authorship and right of integrity over the performances) ⁽¹²⁾.

Copyright and neighbouring rights are essential to guaranteeing that authors, performers, producers and broadcasters can enjoy and benefit from their work, and to incentivising creative industries that benefit economies and the public at large. [Chapter 3](#) will explore in more detail some of the infringements that threaten the rights of copyright holders in the information society.

⁽⁹⁾ Benelux Office for Intellectual Property, <https://www.boip.int/en/entrepreneurs/ideas/ideas>.

⁽¹⁰⁾ Philipp Beck, German copyright law, <https://www.beck-law.eu/en/lexicon/german-copyright-law/>.

⁽¹¹⁾ Berne Convention, art. 6bis(1), <https://www.wipo.int/wipolex/en/text/283698>.

⁽¹²⁾ Art. 180 and art. 182 of the Portuguese Code of Copyright and Related Rights.

Chapter 2 – Legal framework for copyright protection and enforcement

International benchmarks

At the international level, [TRIPS](#) is the main multilateral instrument setting out obligations for domestic IP enforcement regimes ⁽¹³⁾. The agreement establishes core minimum standards for the enforcement of IP rights across World Trade Organization (WTO) member countries ⁽¹⁴⁾. These are addressed in Part III of TRIPS, which contains 20 provisions that define the general enforcement obligations incumbent on WTO member countries, by identifying a set of procedures and remedies that should be available under national enforcement regimes to ensure effective action against infringements ⁽¹⁵⁾.

Under these categories of procedures and remedies are civil and administrative procedures and remedies (articles 42–49), which include, but are not limited to, access to evidence, the use of injunctions, payment of damages and other expenses, and the disposal of infringing goods. Provisional measures are the second category of procedures identified in TRIPS (article 50) and they broadly encompass measures to prevent an infringement of IP rights from occurring in the first place, avoid the infiltration of the legal supply chain and the preservation of evidence related to the infringement. Thirdly, procedures related to the border measures are identified (articles 51–60), which deal with the rights of rightholders to request the suspension of the release of illicit goods into the chain of commerce and their right of inspection of such goods, as well as *ex officio* actions by national competent authorities at their borders and powers of destruction and disposal. Lastly, but most importantly for the purposes of this report, are measures concerning criminal procedures and penalties (article 61) that member countries shall have in place to properly address instances of wilful trademark counterfeiting or copyright piracy on a commercial scale.

These measures are designed to ensure the existence of an effective mechanism in the TRIPS member countries to prevent and respond to acts of infringement of the IP rights recognised in the TRIPS agreement, with the ultimate objective of serving as a deterrent to future infringements.

Article 61 of TRIPS deals specifically with the criminal enforcement of IP infringements. It states that:

‘Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or **copyright piracy** on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases

⁽¹³⁾ Article 10 of the [Budapest Convention on Cybercrime](#) also calls on its State parties to criminalise the infringement of copyrights and related rights in line with their obligations under other major treaties and agreements. In defining the conducts that should be subject to criminal enforcement under national law, article 10 of the Budapest Convention largely adopts the criteria set in article 61 of TRIPS – that the infringing act is committed wilfully and on a commercial scale – adding to it a third element, namely that the act is committed by means of a computer system.

⁽¹⁴⁾ For a complete list of WTO member countries, please visit https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁽¹⁵⁾ Article 41 of the TRIPS Agreement.

of infringement of intellectual property rights, in particular where they are committed **wilfully** and on a **commercial scale**'.

TRIPS enabled international IP law to move from a space absent of any obligations on criminal IP enforcement to one containing a set of commonly agreed international minimum standards for conducts that necessitate a more punitive response.

Nevertheless, the language of article 61 gives WTO member countries ample policy space to implement criminal procedures tailored to their domestic circumstances. Indeed, an analysis of article 61 reveals the somewhat limited scope of this provision, which is worth addressing briefly.

Firstly, it sets an obligation on member countries to provide criminal sanctions only in cases of wilful trademark counterfeiting and copyright piracy. This means that the decision on the criminalisation of infringements of other IP rights (e.g. patents, plant variety rights, geographical indications, trade secrets), even if committed wilfully and on a commercial scale, is left to member countries. Accordingly, some countries have chosen to deal with infringements of certain IP rights outside of criminal courts. Such is the case of infringements of plant variety rights in Portugal or patent infringements in Latvia.

Importantly, infringements of trademark counterfeiting and copyright piracy must be committed wilfully and on a commercial scale. While the former is a rather straightforward requirement, denoting an awareness of the infringing activity, the latter is less so and, as discussed later in this report, provides a lot of leeway for national legislators.

WTO countries are given the option to choose between imprisonment or monetary fines to remedy infringements of wilful trademark counterfeiting and copyright piracy on a commercial scale. The choice of remedy must be in line with the penalties applied at national level to crimes of a comparable nature, thus suggesting that this will follow domestic practice in other areas of national legislation. Accordingly, the length of imprisonment and the amount of the fines issued tend to vary significantly across countries. Article 61 also foresees other remedies, including the seizure, forfeiture and destruction of the infringing goods or materials used to commit counterfeiting or piracy. By requiring that these measures be available in appropriate cases, the provision gives countries a generous discretion to decide in which situations these remedies should apply.

Despite the success of TRIPS in introducing a certain level of uniformity and harmonising important aspects of IP rights enforcement, the flexibilities inherent to article 61 have led to the emergence of different standards for the criminal enforcement of copyright infringements across various countries. These will be explored in more detail throughout this report.

EU standards for the harmonisation of copyright protection and enforcement

The EU does not have an exclusive act on copyright. Instead, EU copyright law consists of a number of different pieces of legislation that address various aspects of copyright (the [EU copyright acquis](#)). The EU directives and regulations enacted so far in this area have helped to reconcile certain aspects of copyright protection and enforcement.

One of the most important legal acts is [Directive 2001/29/EC](#) (commonly known as the InfoSoc directive), enacted to implement the WIPO Copyright Treaty. This directive harmonises the protection of copyrights and related rights in the information society across the EU. It does so, in part, by recognising the exclusive rights of copyright owners – the right of reproduction

(Article 2), communication to the public (Article 3) and distribution (Article 4) – and possible exceptions or limitations to the reproduction right (Article 5).

On the side of enforcement, [Directive 2004/48/EC](#) (best known as the enforcement directive or IPRED) has been the main instrument to address IP right infringements, including infringements of copyrights, at the EU level. In essence, the directive sets an obligation for MS to implement a regime of (fair and equitable) civil measures, procedures and remedies to achieve the enforcement of IP rights in the EU. These are intended to have an effective, dissuasive and proportional effect with the aim to prevent future infringements. As a whole, the directive harmonises rules around evidence (Articles 6 and 7), the right of information (Article 8), seizure and destruction of illicit goods and the materials used in their production (Article 10), injunctions (Article 11), damages (Article 13), legal costs (Article 14) and the publication of judicial decisions (Article 15).

The InfoSoc and enforcement directives have been instrumental in implementing uniform standards for key aspects of copyright protection and enforcement, thereby helping to minimise legislative differences between MS and guaranteeing a more uniform level playing field with higher standards of protection across the EU.

In the area of criminal law however, no EU instruments exist, as the enforcement of copyright infringements remains a matter of national competence. Hence, criminal responses to copyright infringements tend to vary considerably across EU countries, reflecting, among others, differences in national sanctions regimes. This is particularly true with respect to the minimum and maximum prison sentences, which tend to vary considerably between countries.

Chapter 3 – Building blocks of copyright piracy

The elements of a criminal copyright offence are the building blocks upon which a successful prosecution is built and prosecutors need to be able to prove them in order to obtain a conviction.

As shown earlier, article 61 of the TRIPS agreement sets three minimum standards for the application of criminal procedures and penalties to copyright piracy. These include the act of piracy itself (the infringement), wilfulness and commercial scale. Nevertheless, the TRIPS provisions give member countries plenty of room to legislate what types of conducts should be criminalised and the applicable penalties.

The following section will examine the extent to which the elements of copyright piracy defined by TRIPS are reflected in national jurisdictions and how they are construed in the legislation and court practice of MS.

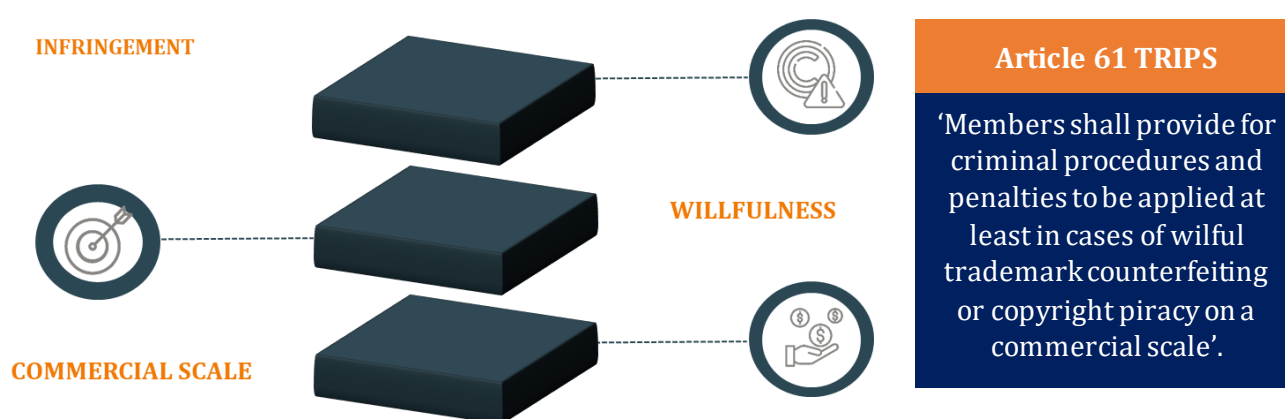


Figure 1. Minimum standards for the institution of criminal procedures and sanctions established in article 61 of TRIPS

Element 1: Copyright infringement

Footnote 14 to article 51, TRIPS

Pirated copyright goods shall mean any goods which are copies made without the consent of the rightholder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

Piracy is often used to describe unauthorised acts of reproduction or dissemination of copyright-protected content that are not covered by one of the exceptions prescribed in national laws. The TRIPS agreement does not define copyright piracy, but it does offer a definition of pirated goods in footnote 14 to article 51.

Applying the TRIPS article 51 definition of pirated copyright goods to make sense of the concept of copyright piracy may lead to the interpretation that copyright piracy is restricted to acts of reproduction. However, national legislation and court practice show that criminal liability in copyright cases extends beyond acts of reproduction and covers violations of other exclusive rights recognised in international, EU and national IP laws.

TRIPS was created at a time when piracy was limited to trading in illegal copies of physical (copyrighted) goods. Its definition of pirated copyright goods has become outdated in the context of online copyright piracy, as it fails to address the phenomenon of virtual infringements of copyrighted works.

While extensively used at the international level, the term piracy does not have a place in national legislations governing criminal copyright infringements (mostly copyright acts and criminal codes) across the EU. Instead, national legislations adopt a slightly different and more specific language to refer to illegal acts that violate copyrights. National legislations thus show a preference for terms such as **copyright**

infringement, unlawful exploitation of copyrights, or copyright offence to describe the illegal conduct – one of the key elements of piracy. In this report, the terms piracy and copyright piracy will be used interchangeably.

International and EU efforts to reconcile aspects of protection and enforcement of copyrights have enabled a certain degree of harmonisation across national legislations, not least concerning the conducts that constitute a copyright infringement.

Following on from the main international (Berne Convention and WIPO Copyright Treaty) and EU legal acts (Directive 2001/29/EC), most national laws on IP in the MS recognise authors' exclusive rights to reproduction, distribution and communication to the public. An act that violates any one of these exclusive rights is a copyright infringement that can be subject to criminal liability, should the other elements of the crime foreseen in national laws (e.g. wilfulness and commercial scale) be fulfilled.

However, rapid technological developments and improvements in connectivity have resulted in a change of online behaviour, and in turn, in the way copyrights are exploited online, forcing national legislators and courts to contend with new legal problems. This has at times resulted in contradictory legal interpretations of the same act – including by courts in the same country – and the widening of the legal gap between national jurisdictions, thus hampering efforts to harmonise copyright protection and enforcement further.

In some cases, the solution to this problem has lain in the rulings of the CJEU, which have been instrumental in promoting a certain level of uniformity with respect to how MS respond to novel forms of copyright infringement.

What is a copyright infringement under EU and national laws?

A copyright infringement is essentially a violation of one of the exclusive rights of copyright owners. Before exploring national legislative approaches to criminal copyright infringements and the existing case-law in this area, it is important to examine in more detail the exclusive rights recognised by EU and national law. EU and most national legislations recognise three exclusive rights of rightholders, namely the right of reproduction, the right of distribution and the right of communication to the public. Some MS may also provide for other exclusive rights, such as the exclusive right of exhibition in Germany ⁽¹⁶⁾.

⁽¹⁶⁾ S 15(1)(3) of the German Act on Copyright and Related Rights.



Figure 2. Main exclusive rights of copyright holders recognised in EU and national laws

These rights remain largely undefined in major treaties and conventions, and in EU and national legislation. Consequently, many of the answers to the question of what constitutes copyright infringement derive from case-law, following the interpretation by national and EU courts of various provisions in the respective (national and EU) laws.

This section will explore a subset of online conducts that infringe the right of communication to the public⁽¹⁷⁾ in the information society. It starts with an introduction to the right of reproduction and communication to the public, and continues with an assessment of selected infringing acts in light of national legislation and court practice in MS.

Right of reproduction

While the right of reproduction is not the focus of this report, it is worth a mention, as it assumes relevance in the context of copyright infringements in the online environment. This is because arguably every use (and infringement) of copyright-protected works, whether in the online or the physical world, involves reproducing the work first.

The right of reproduction is one of the exclusive rights granted to rightholders in copyright law, allowing them to control the making of a copy of their work. Essentially, this right entitles copyright holders to authorise or prohibit reproductions of their works by others.

The right of reproduction is largely harmonised at EU level. Within EU copyright legislation, the right is enshrined in Article 2 of the InfoSoc directive, which transposes article 9 of the Berne Convention⁽¹⁸⁾.

Though not defined in international or European legislation, reproduction in copyright law guarantees a wide scope of protection that covers various beneficiaries (authors, performers, phonogram producers and broadcasting organisations, among others) and different forms and modes of reproduction (both direct and indirect, temporary and permanent, whole or partial) regardless of the means used. This broad interpretation is highlighted in Recital 21 of [Directive 2001/29/EC](#), which asserts that ‘a broad definition of these acts is needed to ensure legal certainty within the internal market’.

Article 2 – Directive 2001/29/EC

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect to the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including cable or satellite.

⁽¹⁷⁾ These two rights are the most pertinent exclusive rights in the context of online copyright piracy. The right of distribution is mostly applicable in cases of physical infringements of copyrights and is therefore not addressed in this report.

⁽¹⁸⁾ The Berne Convention is available at <https://www.wipo.int/wipolex/en/text/283698>.

In the MS which have directly transposed Article 2 of the InfoSoc directive into national law, the right of reproduction equates with different uses. These include, for example, the production of copies of a work (in **Germany** ⁽¹⁹⁾, **Croatia** ⁽²⁰⁾ and **Cyprus** ⁽²¹⁾), the multiplication of copies (in **Italy** ⁽²²⁾), physical fixation of a work that allows it to be communicated in an indirect way (in **France** ⁽²³⁾) or the direct or indirect duplication of a work or part of it (in **Bulgaria** ⁽²⁴⁾).

In case-law, the exclusive right of reproduction tends to be rather straightforward and uniformly interpreted and applied throughout EU jurisdictions, including in cases of copyright infringement in the digital world.

Right of communication to the public

Article 3 – Directive 2001/29/EC

- (1) Member States shall provide authors with the exclusive right to authorise or prohibit any **communication to the public** of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
- (2) Member States shall provide for the exclusive right to authorise or prohibit **the making available to the public**, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;
 - (b) for phonogram producers, of their phonograms;
 - (c) for producers of the first fixations of films, of the original and copies of their films;
 - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
- (3) The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

The right of communication to the public is one of the three exclusive rights (the other two being the rights of reproduction and distribution) that copyright holders have over their works.

Within the EU's regulatory framework for copyright and related rights, the exclusive right of communication to the public is enshrined in Article 3 of the InfoSoc directive, which transposes article 8 of the WIPO Copyright Treaty (1996) ⁽²⁵⁾.

The right of communication to the public encompasses two separate acts – the right of communication to the public and the right of making available to the public copyrighted works. The latter, sometimes perceived as a separate right ⁽²⁶⁾, is particularly important in today's information society whereby streaming services and on-demand transmissions have become central to the way people consume content. This right is an important form of legal protection for rightholders against

those who upload to the internet files with protected works and claim no infringement of copyrights by virtue of only making the files available.

⁽¹⁹⁾ S 16(1) of the German Act on Copyright and Related Rights.

⁽²⁰⁾ Art. 19 of the Croatian Copyright and Related Rights Act.

⁽²¹⁾ Art. 2 of the Cypriot Copyright and Related Rights Law.

⁽²²⁾ Art. 13 of the Italian Copyright Law.

⁽²³⁾ Art. L122-3 of the French Intellectual Property Code.

⁽²⁴⁾ Art. 102 of the Bulgarian Copyright Act.

⁽²⁵⁾ The WIPO Copyright Treaty is available at <https://www.wipo.int/wipolex/en/text/295166>.

⁽²⁶⁾ Hugenholtz, P. B. and van Velze, S. (2016), 'Communication to a new public? Three reasons why EU copyright law can do without a "new public"', *SSRN*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811777.

The right of communication to the public has taken a central place in EU copyright law discourse. This is to an extent explained by the fact that the concept remains undefined in EU and international legislation governing copyrights and their enforcement.

Nevertheless, the InfoSoc directive provides some guidance (albeit limited) on the scope of the right by highlighting a few important aspects.

In line with its Recital 23, one of the key principles of the communication to the public right is that it should be interpreted broadly. This is to ensure a high level of protection for rightholders. Recital 23 further adds that the right covers all communication to the public not present where the communication originates, including transmissions or retransmissions of the work by wire or wireless means, or through broadcasting.

The scope of the act of making available is similarly described in Recital 24, which provides that the right covers all acts of making available sound recordings, fixation of performances and broadcasts to a public not present where the act of making available originates.

The lack of a clear definition and limited guidance on the right of communication to the public has left its interpretation and development largely to national courts. Against this backdrop, the CJEU has been playing an instrumental role in helping to clarify its scope and operation in the context of preliminary rulings from national courts⁽²⁷⁾. This, it is argued, has led to a piecemeal development of the right of communication to the public⁽²⁸⁾.



Case-law on the right of communication to the public and the making available right – guidance from the CJEU

The case-law of the CJEU has been essential for a better understanding of what constitutes communication to the public in the context of copyrights, providing national courts with concrete guidance on how to apply the provisions of Article 3 of the InfoSoc directive to different situations involving copyright infringement cases.

This right was first addressed by the CJEU in the Spanish case [*SGAE v Rafael Hoteles*](#)⁽²⁹⁾, in which the Court was asked whether the cable retransmission of a broadcast to TV sets in hotel rooms constituted an act of communication to the public under Article 3(1) of the InfoSoc directive.

The CJEU began to set out the initial (complementary) criteria for the existence of a communication to the public, namely (a) an act of communication, (b) to a public. These are part of a two-step test which should be carried out as an individual assessment in each individual case.

➤ First criterion: act of communication

Though not providing a specific definition of communication, some important aspects can be derived from the CJEU ruling. In particular, the Court noted that an act of communication can occur regardless of access by the end users. In this way, an act of communication can be

⁽²⁷⁾ Koo, J. (2019), *The Right of Communication to the Public in EU Copyright Law*, Hart Publishing, Oxford, pp. 46–47.

⁽²⁸⁾ *ibid.*

⁽²⁹⁾ Judgment of the Court (Third Chamber) of 7 December 2006, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, ECLI:EU:C:2006:479.

understood as any act that establishes a new access channel to copyright-protected content, irrespective of whether those allowed access make use of that opportunity.

By alluding to the role of the hotel as the 'organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected works to its customers' ⁽³⁰⁾, the Court further highlighted the central role of the provider and their knowing intervention to give access to protected works for an act of communication to be established.

'For there to be an act of communication, it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it. Therefore, it is not decisive ... that customers who have not switched on the television have not actually had access to the works'.

SGAE v Rafael Hoteles (*)

(*) See footnote 29, paragraph 43.

In the subsequent case of [Football Association Premier League v QC Leisure](#), concerning the broadcasting of football matches in public spaces, the CJEU complemented its previous guidance on the concept of communication, indicating that the term communication refers to 'any transmission of the protected works, irrespective of the technical means or process used' ⁽³¹⁾.

➤ Second criterion: public

In *Rafael Hoteles*, the CJEU concluded that the customers of the hotel constituted a new public within the meaning of Article 3 of the InfoSoc directive since, without the intervention of the hotel through the installation of TV sets, customers would not be able to enjoy the initial act of communication (broadcasting).

In *SGAE v Rafael Hoteles*, the CJEU also explored the concept of public in the context of a communication of copyright-protected works. It held that the term public 'refers to an indeterminate number of potential television viewers' ⁽³²⁾ and that, for there to be a public, 'a fairly large number of persons are involved' ⁽³³⁾.

Importantly, the Court ruled that the nature of the place (whether public or private) where the communication takes place is irrelevant ⁽³⁴⁾ for the assessment of the public criterion. This is because the purpose of the right of communication to the public is to protect the right of making copyrighted works available in a way that the public can decide when and where to access them ⁽³⁵⁾, rather than to protect only communications in public spaces (communication to the public, not in public).

In defining this second criterion, the CJEU further held that for an act of communication to occur, the target public must be a **new public** – defined as 'a public different from the public at which the original act of communication of the works is directed' ⁽³⁶⁾.

• Same technical means

Following the guidance of the CJEU in *Rafael Hoteles*, every retransmission of a work must target a new public to be deemed an act of communication to the public. However, an exception to this

⁽³⁰⁾ See footnote 29, paragraph 42.

⁽³¹⁾ Judgment of the Court (Grand Chamber), 4 October 2011, *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08, ECLI:EU:C:2011:631, paragraph 193.

⁽³²⁾ See footnote 29, paragraph 33.

⁽³³⁾ Ibid, paragraph 38.

⁽³⁴⁾ Ibid, paragraph 50.

⁽³⁵⁾ Ibid, paragraph 51.

⁽³⁶⁾ Ibid, paragraph 40.

rule emerged in a later ruling – [ITV v TVCatchup](#) ⁽³⁷⁾ – which concerned the first case of internet retransmission of protected works initially broadcast on TV channels.

In it, the CJEU concluded that since the act of internet retransmission was technically distinct from the original act of communication by terrestrial broadcast, it constituted a new act of communication requiring fresh authorisation from the rightholders ⁽³⁸⁾ regardless of the public reached. Accordingly, since the two transmissions were carried out using different technical means, each should be treated separately and authorised individually.

As it stands, national courts should side with infringements of the exclusive right of communication to the public in cases where a copyright-protected work is communicated to a new public or where the act of retransmission is technically different from the original act of communication. [Annex I](#) provides a schematic of communication to the public based on the CJEU guidance.

What acts constitute an infringement of the right of communication to the public and the making available right?

With the advent of the internet, the making available aspect of the communication to the public right became a key issue in cases before national courts and, consequently, cases referred to the CJEU. Despite concerning traditional broadcasting and retransmission methods, the criteria established in *Rafael Hoteles* remained a starting point for cases concerning communication of copyright-protected works to the public in the digital environment.

Nevertheless, the new challenges posed by the dissemination of protected content via the internet led to the emergence of a new set of cases on the communication to the public right and, in turn, the introduction of new parameters for its interpretation and new requirements to assess the new public criterion.

Today, the interpretation of communication to the public continues to expand as novel ways of infringing copyrights emerge and new legal questions are brought before the CJEU. The right of communication to the public itself has also evolved, with national courts widening its scope (and in some cases limiting it) to certain acts and technologies ⁽³⁹⁾. This has resulted in an increasing number of instances being regarded as communication to the public.

A. Hyperlinks

Hyperlinks have long been a commonly used method to share content online. While proving an important tool for the dissemination of culture and the promotion of freedom of expression, hyperlinks have simultaneously enabled the rapid and large-scale sharing and widespread proliferation of illicit content online.

It is thus no wonder that the use of hyperlinks to provide access to copyright-protected content on the internet has been a recurrent issue before national courts, and in turn in CJEU case-law.

⁽³⁷⁾ Judgment of the Court (Fourth Chamber), 7 March 2013, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd.*, C-607/11, ECLI:EU:C:2013:147

⁽³⁸⁾ See footnote 37, paragraph 26.

⁽³⁹⁾ Koo, J. (2019), *The Right of Communication to the Public in EU Copyright Law*, Hart Publishing, Oxford, pp. 46–47.

In 2006, the CJEU ruled for the first time on this issue in what has become one of the best known cases on hyperlinking and the making available aspect of the communication to the public right – [Nils Svensson and Others v Retriever Sverige AB](#) ⁽⁴⁰⁾, commonly known as the Svensson case.

The Svensson case concerned a website that provided hyperlinks to articles written by a group of journalists published on a newspaper's website without access restrictions. The website, journalists argued, made available their articles to clients without their authorisation, thereby infringing their exclusive right to communicate the works to the public.

Following its previously established two-step test, highlighted above, the CJEU found that the communication of a work (criterion 1) had occurred, but the work had not been communicated to a new public (criterion 2). In the Court's reasoning, since no access restrictions had been put in place on the website where the works were initially published, the users of Retriever Sverige's website would be able to access the works without the latter's intervention. Accordingly, the lack of restrictive measures meant that the public contemplated in the initial communication made by the website that published the works consisted of all the potential visitors to the website. Thus, in these circumstances, no authorisation was required from the copyright holders for the subsequent communication to the public on the website of the accused party.

In Svensson, the CJEU stressed the need for an individualised assessment of cases based on knowledge and profit. The reasoning for this stems from the need to ensure a proper functioning of the internet and the full enjoyment and exercise of users' rights. To this effect, the CJEU explained that automatically categorising all hyperlinks to content published on other websites as communication to the public would curtail the freedom of expression and information of online users, and in turn jeopardise the functioning of the internet.

This has become a key ruling in the area of copyright infringements at EU level, as it provided relevant guidance as to when linking to copyright-infringing content in the internet constitutes an act of communication to the public.

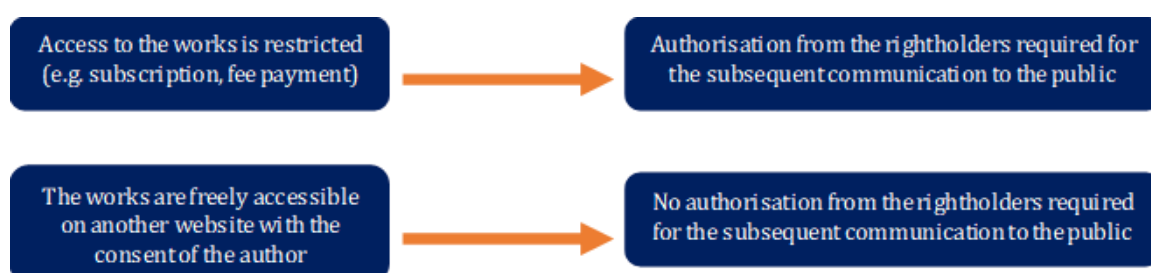


Figure 3. Criteria for communication to the public using hyperlinks set by the CJEU in the Svensson case

➤ New criteria: profit and knowledge

In a subsequent case – [GS Media v Sanoma](#) ⁽⁴¹⁾ – the CJEU addressed for the first time the initial unauthorised communication to the public of copyright-protected works through hyperlinks.

⁽⁴⁰⁾ Judgment of the Court (Fourth Chamber), 13 February 2014, *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, ECLI:EU:C:2014:76.

⁽⁴¹⁾ Judgment of the Court (Second Chamber) of 8 September 2016, *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, ECLI:EU:C:2016:644.



Figure 4. New elements introduced by the CJEU in cases of hyperlinking

GS Media operated a website that provided hyperlinks to other pages, on which pictures from Playboy magazine posted without the consent of the copyright holder could be viewed. The CJEU introduced new criteria for the determination of the communication to the public right in instances where the work hyperlinked is not authorised by the copyright holder.

The first criterion concerns **profit**. According to the Court, in instances where the posting of hyperlinks is carried out for profit (such as in the present case), the person who hyperlinks to an unauthorised work is expected to have exercised all due diligence to verify that the work hyperlinked is not illegally published on the website to which the hyperlink gives access. In such cases, it should be assumed that those hyperlinking the content have done so in full knowledge of the protected nature of the content and the possible lack of consent of the copyright holder to publish the works on the internet.

This rebuttable presumption places the onus on individuals providing hyperlinks to prove that the conduct of hyperlinking to material illegally placed online does not constitute an act of communication to the public within the meaning of Article 3(1) of the InfoSoc directive. In this way, the element of profit has become central to the determination of knowledge.

The second criterion concerns the **knowledge** that the hyperlink provides access to unauthorised work. Here, the Court asserted that where persons share a hyperlink without pursuing profit, it can be assumed that they did not know or ought to have known that the work hyperlinked was uploaded without the authorisation of the copyright holders. In these cases, the person does not act in full knowledge of the facts and therefore, no act of communication and no communication to the public occur.

On the contrary, where those providing hyperlinks know or ought to have known that the hyperlink leads to unauthorised material (i.e. by way of notification by the copyright holders), the act of hyperlinking is deemed an act of communication to the public within the meaning of Article 3(1) of the InfoSoc directive.

[Annex II](#) provides a schematic of communication to the public based on the new criteria introduced by the CJEU in the GS Media ruling.

The Svensson and GS Media cases highlight the centrality of consent in determining what constitutes communication to the public of copyright-protected works and ensuring the protection of this exclusive right in the online environment.

➤ National approaches to the use of hyperlinks

Following the CJEU's decision in Svensson, national courts seem to have generally taken the view that the act of setting a hyperlink to content available online without the authorisation of rightholders constitutes an infringement of the exclusive right of communication to the public, including the making available aspect of the right, which can be criminalised should the other elements of the criminal offence be present.

Courts in Spain have long dealt with cases of hyperlinking. The legal qualification of hyperlinks has traditionally been a contentious matter for the Spanish judiciary, often resulting in contrary decisions by different courts on the same matter ⁽⁴²⁾.

⁽⁴²⁾ See for example case 453/13, available at Sentencia España Bajatetodo.com (elderechoinformatico.com) and case 856/2015, available at <https://www.bufetalmeida.com/698/la-audiencia-de-valencia-confirma-la-absolucion-de-zonaemule-tras-10-anos-de-proceso.html>, both of which have arrived at different conclusions regarding the criminal liability of the defendant for

Cases concerning hyperlinks frequently involve the creation of webpages on which links to copyright-infringing material are uploaded, indexed and categorised. Spanish courts had generally ruled that providers of links to IP-infringing content online played a mere passive role that exempted them from criminal liability. Indeed, the defence has historically relied on the infringer's role as a mere intermediary – limited to facilitating access to copyright-infringing content, rather than storing it – to avoid prosecution in cases of hyperlinking. In this context, [Article 17 of Law 34/2002 on the services of the information society and electronic commerce](#)⁽⁴³⁾ has offered a safe harbour for hyperlink providers to evade criminal liability.

In 2015, Spain undertook a reform⁽⁴⁴⁾ of its penal code, introducing new provisions on IP. Among these was a new article (270(2)) that criminalises the conduct of those who actively facilitate access to copyright-protected works placed on the internet without the authorisation of rightholders by providing classified lists of hyperlinks. Moreover, to be criminalised the conduct must meet two additional criteria, namely to be carried out with a profit motive and cause damage to a third party.

This provision aims directly at prevailing conducts that in previous cases would exonerate infringers due to their perceived role of mere facilitation of access to copyright-protected works. The introduction of a provision that deals specifically with hyperlinks further speaks to the importance of this technological method in facilitating large-scale abuse of copyrights on the internet.

Combined, the Spanish reform of the penal code and the CJEU jurisprudence – on which national courts often rely – have led to a change in jurisprudential practice in Spain, whereby court decisions converge towards finding infringers criminally liable, and in some cases handing down heavy sentences. For an example of how national courts have been treating the conduct of



Case 1 – Spain

National High Court (117/2016)

This case concerned a group of individuals (two Spaniards aided by five Ukrainians) who created a webpage that allowed users to access a high volume of copyright-protected content made available online without the authorisation of the rightholders.

In finding the defendants guilty of an aggravated crime against IP (art. 270 and 271 CC), the court gave particular weight to their role in making the content accessible to users – directly uploading the material, selecting and indexing the content so that it could be directly streamed by users. In so doing, the defendants went beyond the mere intermediary role they claimed to have, placing their conduct within the scope of an act of communication to the public.

Creating fake accounts to mask their involvement in uploading the illegal content to the website further convinced the court that the defendants had full knowledge of the illicit nature of their conduct and acted with intent.

This case was particularly impactful in Spain, not least due to the (unusually) high prison sentences handed to the defendants (3 years), which enabled courts to send a strong message to IP infringers.



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hyperlinking to illegal content online.

⁽⁴³⁾ This provision deals with the responsibility of providers of services that facilitate links to online content. It establishes the conditions under which their conduct is exempt of responsibility for facilitating access to illicit content.

⁽⁴⁴⁾ The reform was introduced by the Organic Act 7/2015.

hyperlinking following the penal code reform and the CJEU Svensson ruling, please refer to Case 1.

In Germany, courts have also shown a tendency to follow the CJEU's line of reasoning, examining cases on the provision of hyperlinks in light of the general conditions established by the CJEU for the communication to the public ⁽⁴⁵⁾.

In cases where hyperlinks circumvent the technical measures employed by rightholders to control access to their work, German courts have ruled in favour of an infringement of the right of making a work available to the public (see Case 2). Accordingly, the existence of a hyperlink that unlawfully makes protected works available to the public appears to be sufficient for establishing infringement. In such cases, the defence that infringers have limited themselves to the provision of hyperlinks instead of other acts such as the reproduction, editing, uploading or storing of the works does not seem to bear much weight in the consideration of German courts.

What is an embedded link?

An embedded link is essentially the use of text to redirect users to another page instead of a URL. For example, instead of displaying the link to the Eurojust IPC Project page as <https://www.eurojust.europa.eu/intellectual-property-crime-project>, the embedded link will look like this: [IPC Project](#).

Even before the CJEU's major rulings on hyperlinks ⁽⁴⁶⁾, the Czech Supreme Court had already set the jurisprudence with regard to **embedded links**, where it qualified the posting of such links an infringement of the exclusive right of communication to the public (see Case 3).

Such a decision effectively aligned Czech jurisprudence with what would later become the general practice of courts in Europe, spearheaded by the CJEU.

On the whole, the available decisions of national courts on the use of hyperlinks to facilitate access to IP-protected material on the internet seem to suggest a certain level of unanimity in case-law at the EU level. In this context, the CJEU jurisprudence, and in particular the Svensson ruling, has played a crucial role in attaining a degree of uniformity in the application of EU law on this subject.

The role of operators in creating and administering portals that facilitate access to protected works, selecting, indexing and organising hyperlinks, and providing tools that enable the exchange of files between users, has been an important consideration for national courts in deciding whether a certain conduct infringes the right of communication to the public of rightholders. Ultimately, national courts will side with copyright holders in cases where the hyperlink provided circumvents the restrictions applied by rightholders to prevent the unauthorised online dissemination of their work.

Ever since the CJEU ruling in the Svensson case, some MS have adjusted their laws to provide more clarity and a stronger legal basis to combat online piracy through hyperlinks. Others continue to interpret national provisions in line with the reasoning of the CJEU. Future case-law of national courts will help to further determine to what extent the legal status of hyperlinks has been harmonised at the EU level and whether the legal understanding of their role in facilitating online piracy might evolve alongside new developments in information technology.

⁽⁴⁵⁾ Case 310 O 402/16, available at <https://openjur.de/u/942708.html>.

⁽⁴⁶⁾ See also the *BestWater* case, which deals with the issue of embedded links: Order of the Court (Ninth Chamber), 21 October 2014, *BestWater International GmbH v Michael Mebes and Stefan Potsch*, [C-348/13](#), ECLI:EU:C:2014:2315.



Case 2 – Germany

Aachen Local Court (334 Ls 158/10)

The defendant set up a film portal that allowed users to download copyright-protected works free of charge. The portal became one of the largest file-sharing websites in Germany.

In assessing the defendant's liability, the court highlighted the distinction between cases where hyperlinks are used to provide access to a file containing protected works made available by an authorised person in another website, and those where direct access to the works is provided through hyperlinks that circumvent the protective technical measures employed by rightholders to open up public access to such works. In the reasoning of the court, the former does not constitute a violation of copyrights, but the latter interferes with the rightholder's exclusive rights.

Rejecting the defendant's claim of impunity for setting a hyperlink, the court noted that by providing access through his portal to copyright-protected material not freely available on the internet, the defendant made those works available to the public (section 19 of the Act on Copyright and Related Rights). This decision was informed by the fact that the film offer in the defendant's portal was not targeted at a specific group of users, but at any visitor of the portal. Thus, for the court it seemed irrelevant that the defendant did not possess, reproduce, edit or upload the works to the server himself. Making them available through his portal was enough.

Similarly to Case 1, the defendants were given a prison sentence of more than 3 years, an outcome that should send a strong message to other online infringers.



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Case 3 – Czechia

Supreme Court (8 Tdo 137/2013)

This case concerned an appeal to the Supreme Court against the judgement of the Regional Court in Ústí, which found the defendant guilty of an infringement of copyright, rights related to copyright and database rights pursuant to section 270(1) of the Penal Code.

The defendant, a juvenile at the time of the offence, operated a website where he posted embedded links to pirated content posted in other internet pages without the consent of the rightholders.

The Supreme Court upheld the decision of the lower instance court, noting that the action of the defendant infringed the rightholders' exclusive right to communicate their works to the public (section 18 of the Copyright Act) and did so intentionally.

According to the Court, the duration of the infringement (10 months), the intensity of the conduct and the serious consequences that resulted led to the conclusion that the actions of the defendant significantly interfered with the exclusive right of the rightholders.

In view of existing evidence, the Court was also satisfied that the defendant fulfilled the subjective element of intent. In particular, his tech-savviness and awareness that the works linked to were subject to copyright – following a warning letter from the Anti-Piracy Union informing him to the effect – provided sufficient proof that the juvenile acted with the requisite intent. As a result, he was sentenced to a 5-month conditional prison sentence, which he ultimately did not serve.



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B. Illegal streaming and internet protocol television

Use of pre-loaded set-top boxes

Despite representing a more recent trend in online infringement of copyrights, internet protocol television (IPTV) services are playing an important role in promoting piracy in Europe and abroad. According to the Audiovisual Anti-Piracy Alliance, around 4.5 % of the EU population used illegal IPTV services in 2021 ⁽⁴⁷⁾.

The predominance of illegal IPTV services in the piracy landscape is further evidence by the increasing number of investigations at EU level. Today, illegal IPTV content is commonly distributed through set-top boxes (or TV decoders) pre-loaded with malicious links to the copyright infringing material.

A set-top box is a media player that allows users to play files stored on it (e.g. music and videos) and stream internet content. Set-top boxes have a very user-friendly interface, which can be tailored to the preferences of the user – features that make them a widespread device, found in many homes today. While these boxes are entirely legal ⁽⁴⁸⁾, their user-friendliness has made them attractive targets for criminals, who pre-install onto them apps that enable the illegal streaming of online content and sell them to everyday consumers.



Figure 5. Example of a Kodi box / TV decoder

Source: Google images.

In 2015, the use of set-top boxes to stream illegal content reached the CJEU. In the *Filmspeler* case ⁽⁴⁹⁾ – as it is commonly known – the accused sold various models of multimedia player (named *filmspeler*) on the internet, including on his own website. The players were equipped with an open source software, installed by the accused, which enabled users to play files, organised in structured menus. The accused also pre-installed on the device add-ons created and made available on the internet by third parties, some of which specifically linked to websites where protected content was made available without the consent of copyright holders. Upon being activated by the media player, the add-ons retrieved the desired content from streaming websites, which users could view directly on their television screens when connected to the multimedia player.

The Court ruled that the sale of the multimedia player, which enabled users to access copyright-protected content made available on the internet without the consent of the rightholders constitutes an infringement of the exclusive right of communication to the public protected by Article 3 of the InfoSoc directive.

In its assessment, the Court referred back to its established case-law on communication to the public. In addressing the first criterion of communication of a work, the CJEU noted that in pre-installing add-ons that allowed users to directly access protected works published without the consent of copyright holders, and watch them on their television screens, the accused created a direct link between the streaming websites where the works were illegally published and the users. Accordingly, the conduct of the accused made it easier for users of the multimedia player to access the protected works, which would otherwise not be easily identifiable by members of the public.

⁽⁴⁷⁾ Audiovisual Anti-Piracy Alliance (2022), 'Illicit IPTV in Europe', <https://www.aapa.eu/illicit-iptv-in-europe-an-aapa-economic-report>.

⁽⁴⁸⁾ Many major brands such as Amazon, Nokia, Xiaomi and Xbox sell set-top boxes.

⁽⁴⁹⁾ Judgment of the Court (Second Chamber), 26 April 2017, *Stichting Brein v Jack Frederik Wullems*, [C-527/15](#), ECLI:EU:C:2017:300.

As regards the nature of the public, the Court took the view that the potential target public of the multimedia player included any person with an internet connection that was able to buy the device. In this regard, it was also relevant that a large number of users had acquired the media player. As a result, the communication of protected works was directed at an indeterminate number of potential recipients who comprised a public within the meaning of Article 3 of the InfoSoc directive.

In determining whether the public reached was a new public, the Court applied the same criteria and reasoning as in *GS Media*. The advertising of the multimedia player as a device capable of watching on a television screen audiovisual material illegally available on the internet demonstrated that the accused was aware that his product helped users to access works available on the internet without the consent of rights holders. In addition, no doubts existed that the multimedia player was provided to make a profit. As a result, the accused communicated copyright-protected works to a new public through his multimedia player.

Perhaps the same question would have been answered differently by the Court, were the accused not have pre-installed in his multimedia players new functionalities that made it easier for the users to access those works. Such questions emphasise the need for each case to be looked at individually and answered in light of the existing guidance provided of the CJEU.

National approaches to the use of pre-loaded multimedia streaming devices

The use of set-top boxes in copyright infringements is a relatively novel issue for national courts, which means that case-law in this area remains scarce. An uptake in investigations and prosecutions in this area will naturally result in an increase of national judgements that will enable a better understanding of how courts interpret the issue of unlawful exploitation of protected works through the use of these multimedia devices.

Nevertheless, existing court practice in this area can help to provide an indication of how other courts may respond to future cases. Courts in a number of countries, including Denmark, Spain and Sweden, have had the opportunity to address this issue in recent years. The judgements show an overall tendency to treat the sale and distribution of set-top boxes loaded with infringing apps and add-ons that facilitate the unauthorised access to copyright-protected content as a sufficiently serious offence that can warrant a custodial sentence.

The cases dealt with by national courts mostly relate to resellers of illegal IPTV packages – individuals who buy the set-top boxes, install the necessary apps to enable the access to the infringing content and sell them to the final consumers who are able to access a plethora of domestic and foreign channels in exchange for the payment of a subscription. Prices for the service tend to vary, depending on the duration of the subscription and the catalogue of channels purchased.

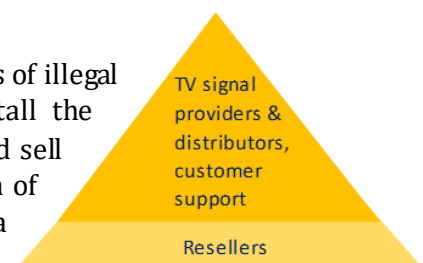


Figure 6. Basic overview of an IPTV service structure

Resellers rely on others for the provision of the IPTV playlists needed to stream the content and the authorisation to act as a reseller. In this way, they operate at the bottom of what is often a pyramid structure involving several actors that perform different roles – individuals that hack and re-encode the signal, administer user panels and manage the relationship with resellers or provide user support. Nevertheless, the (limited) case-law so far available in this area shows that resellers can be convicted for direct infringement of the right of communication and making available to the public even if they do not have entire control of the illegal IPTV operation (for examples, see Cases 4 and 5).

While every conviction represents an important step towards the successful disruption of an illegal service, resellers represent the lower level of the illegal IPTV structure. Investigations and prosecutions of IPTV cases should therefore include a follow the content approach in order to find, prosecute and convict other enabling actors that make the proliferation of illegal IPTV services possible.

IPTV is a particularly complex area for many investigators, prosecutors and judges, as it sits at the intersection between technology and cyber-related issues. The lack of understanding of how illegal IPTV services function and key concepts within intellectual property crime can pose obstacles to the success of prosecutions and convictions. National legislation permitting, national authorities should consider enlisting the support of rightholders who can provide expertise and play a pivotal role in inspecting and testing the devices, making test purchases and helping to identify the content accessed via the set-top boxes.



Case 4 – Denmark

Court of Esbjerg (99-2036/2021)

The defendant in this case operated two websites through which he marketed an IPTV service that offered access to thousands of illegally retransmitted foreign and Danish channels.

The channels were accessed through a set-top box that the defendant pre-configured and sold to customers, but the TV signals were re-encoded and transmitted by another party.

The defendant was not in charge of the entire IPTV operation, but worked as a reseller after obtaining authorisation from the organisation that retransmitted the TV signals.

Nevertheless, the court found that the actions of the defendant in making copyright-protected works available to the public without the authorisation of the rightholders constituted a particularly serious offence under article 299b(1) of the Danish Penal Code.

Unlike the defendants in Case 5 however, the defendant in this case was given a 5-month suspended prison sentence and ordered to carry out 100 hours of community service. The court further ordered the confiscation of the proceeds of the crime in the amount of DKK 150 000 (approximately EUR 20 155).



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Case 5 – Spain

Zamora Court of Appeal (00014/2022)

This case concerned eight defendants that were convicted for a crime against intellectual property (art. 270(1) CC) in conjunction with the crime of facilitating access to a radio or television broadcast service (art. 286 CC).

The operation of this illegal service resembled a pyramid structure of operators who simultaneously acted as buyers and sellers. Accordingly, defendant 1 acted as the head of the pyramid and was at the origin of the distribution of the illegal content, providing M3U lists to defendant 2 in exchange for money payments. The latter created a resale system whereby the remaining defendants (resellers) bought the M3U lists from him and resold them to the final users by way of periodic subscriptions, thus creating their own commercial structure. Defendant 2 also provided set-top boxes with a pre-installed app for the visualisation of illegal content for the amount of EUR 112. The subscriptions were available at prices substantially lower than those offered by legal providers.

All the defendants were convicted for their direct involvement in the infringement of copyrights and all pleaded guilty. In light of the special gravity of the crimes, reflected in the damage caused to the rightholders (around EUR 1 216 460), all the defendants were handed prison sentences ranging from 9 to 23 months.



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C. Unauthorised file-sharing and torrent websites

File sharing has been around for some time and has become a widespread practice among internet users to exchange online content and information. This type of technology allows users to transfer content among each other using a network or internet connection.

Copyright piracy through online file sharing is often perpetrated by users who upload and disseminate copyright-protected content through available file-sharing services. In some MS however, this type of conduct may not be criminalised, as it falls short of the minimum requirements for criminalisation. For example, some MS require that the infringement be carried out for profit or on a commercial scale (see [element 3](#)), but many users who infringe copyrights through file sharing (including on a large scale), do so without the intent to make money.

Overall, the deployment of criminal law as a tool to enforce copyrights against individual users of illegal sharing services tends to be rare. Instead, its use is reserved for prolific infringers – those who download or upload large volumes of protected materials ⁽⁵⁰⁾.

In some MS however, prosecutors have found legal pathways to enforce copyrights in the context of unauthorised file sharing through criminal law, by targeting those that support or incentivise the primary offence. The Pirate Bay and Finreactor cases (Cases 6 and 7) are possibly the most prominent examples of case-law where national criminal courts have extended the legal doctrine of criminal liability to find the operators of the file-sharing services liable for the infringement.

In both cases, the courts took the view that the services offered by the defendants played an instrumental role in facilitating the principal offence of copyright infringement, as the functionalities offered by these services were pivotal to the distribution of illegal content.



Case 6 – Sweden

Stockholm District Court (B 13301-06)

The defendants were operators of the Pirate Bay website, which provided a peer-to-peer file-sharing service based on BitTorrent technology that enabled users to locate and share copies of copyrighted works amongst themselves. The function of the BitTorrent tracker was limited to intermediating between users and did not host any type of protected content.

According to the court, the website and its functionalities allowed users to commit the principal offence of breach of the Copyright Act. By providing a website with advanced search functions, easy uploading and downloading features, and putting file sharers in contact through the torrent tracker, the operation run via the Pirate Bay website aided and abetted the main copyright offences.

Given their level of participation in the running and technical operation of the service and knowledge of each other's involvement and role, the defendants were responsible for the organisation, administration, programming, financing and operation of the file-sharing service. Their actions constituted collaborative work with the common aim to further expand the technical and business sides of Pirate Bay. Accordingly, the defendants were jointly liable for aiding and abetting the copyright infringements.

As the website was financed by advertising – the defendants generated at least SEK 1 200 000 (approximately EUR 128 000) in advertising space – the court concluded that the offence took place within the framework of a commercial activity. The duration and substantial extent of the infringement, number of works made public, and damage caused carried particular weight during sentencing. As a result, each defendant was sentenced to 1-year imprisonment.



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⁽⁵⁰⁾ Rights Alliance (2022), 'Suspended sentence for illegal downloading and sharing of films, series, music, and books', 29 November, <https://rettighedsalliancen.com/suspended-sentence-for-illegal-downloading-and-sharing-of-films-series-music-and-books/>.

These two cases provide an interesting angle for prosecution for a number of reasons. Firstly, the defendants in Pirate Bay and Finreactor were convicted on the basis that the services that they operated (which could also be used to share legitimate files) were indispensable for the execution of the infringing acts perpetrated by the users, in spite of these services not storing any type of copyright-protected material.

Secondly, in the two cases, the prosecution framed the role of the file-sharing services' operators differently. In Pirate Bay, the prosecutor relied on provisions on contributory liability. Accordingly, while the users of Pirate Bay were considered the main offenders, the defendants in the case – the administrators of the Pirate Bay service – were still convicted as accomplices to the primary offence. On the other hand, in the Finreactor case, the Supreme Court in Finland did not base its ruling on provisions of aiding and abetting, but instead convicted the administrators as main authors of the crime, alongside the users of the service. According to the Court, the joint conduct of the operators and users of Finreactor enabled the infringements on a large scale.

The type and level of sanctions have also contributed to setting these two cases apart. In Pirate Bay, all the defendants were sentenced to a one-year imprisonment for the act of aiding and abetting – not for committing the primary offence of copyright infringement⁽⁵¹⁾. To this day, Pirate Bay remains one of the cases with the highest penalties for aiding and abetting an infringement of copyrights.

In Finreactor, the defendants did not receive prison sentences, but the culpable nature of their actions was reflected in the high amount of damages established (EUR 680 000).

The two cases presented are rather unique, not only due to the way the prosecution argued their case and the courts interpreted the law, but also because of the outcome of the judgements. Arguably, the prison sentence given to the administrators of the Pirate Bay service in Sweden might be explained by the need for criminal



Case 7 – Finland

Supreme Court (KKO:2010:47)

Finreactor was a peer-to-peer filesharing network that operated a BitTorrent tracker, which provided users with information (the torrent file) about files available for downloading and the users who owned those files. The network was accessible to the public free of charge and had around 10 000 registered users.

Finreactor's administrators (the defendants) were in charge of the technical operation of the service and user management.

The court argued that the maintenance of the service by the defendants was a direct and indispensable part of the production and distribution of the protected works, and therefore they had actively participated in the infringement. Coupled with the division of tasks among the administrators and the service's purpose to enable efficient file sharing, this meant that the actions of the administrators had to be assessed as a whole. The fact that their direct involvement in sharing and copying the works was not required for the technical implementation of the file-sharing network did not exclude them from criminal liability.

The court found that by jointly operating the Finreactor service, the defendants had intentionally infringed copyrights by participating together, and in collaboration with the users, in the distribution and the making available to the public of copies of protected works.

Seven of the defendants were convicted as authors of the primary offence under the Finnish Copyright Act, and the remaining four were found guilty of aiding and abetting. They were, additionally, ordered to pay EUR 680 000 in damages to the rightholders.



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⁽⁵¹⁾ Recent cases of file-sharing services have resulted in shorter sentences (sometimes suspended) and community service (e.g. DanishBytes cases).

enforcement systems to provide a strong deterrent that contributes to preventing and responding to infringing acts (as stipulated by article 61 of TRIPS).

Element 2: Wilfulness

Wilfulness constitutes the second element required by article 61 of TRIPS for the provision of criminal sanctions against copyright infringements. The requirement acts as a qualifier, which means that in its absence the obligation to institute criminal procedures does not apply. This helps to ensure that cases of infringement carried out in good faith are excluded from criminal liability.

Wilfulness refers to the infringer's mental state (*mens rea*), reflected on a voluntary intention to commit the infringing act. In many jurisdictions, prosecutors must prove that the defendant infringed the copyright of another wilfully.

A corollary to the provision of criminal sanctions in cases of copyright infringement is that a higher standard of proof will apply than that which is required in civil proceedings. At its most demanding, wilfulness may require the prosecution to prove the infringer's knowledge that the materials reproduced, shared or distributed are illegal. At its least demanding, the burden of proof may be satisfied if the infringer acted recklessly or negligently.

Some countries consider wilfulness a very difficult element to prove and therefore apply other standards of *mens rea*. Accordingly, the subjective element for copyright piracy is construed differently across EU countries, making it important to identify the applicable requirement within each jurisdiction, as it can have implications for evidence collection, the work of the prosecution and, in some cases, for sentencing.

With respect to the legal qualification of the *mens rea* in MS, two main groups of countries emerge.

The first and largest group comprises MS where copyright infringements are only criminalised if committed with intent. An example is **Germany**, where the law provides for criminal sanctions for the unlawful exploitation of copyrighted works ⁽⁵²⁾ (including the reproduction, distribution and communication of a work to the public), unlawful affixing of the designation of authorship ⁽⁵³⁾ and infringement of related rights ⁽⁵⁴⁾.

Section 15 of the German Criminal Code makes it clear that criminal liability results from intentional acts, unless negligence is expressly stated by the law. The main provisions of the German Copyright Act on criminal enforcement are silent with regard to the requisite *mens rea* for the criminalisation of infringing conduct, leading to the conclusion that negligence-based acts of infringement are not subject to criminal liability in Germany. These may, however, still be pursued by the victims through civil action.

German Criminal Code

Section 15 – 'Unless the law expressly provides for criminal liability for negligent conduct, only intentional conduct attracts criminal liability'.

The second group includes MS that apply other standards of *mens rea* besides wilfulness. Accordingly, these countries have loosened the thresholds set by TRIPS for the criminalisation of copyright infringements and, consequently, expanded the range of situations to which criminal sanctions can be imposed.

⁽⁵²⁾ S 106 of the German Act on Copyright and Related Rights.

⁽⁵³⁾ S 107 of the German Act on Copyright and Related Rights.

⁽⁵⁴⁾ S 108 of the German Act on Copyright and Related Rights.

Danish Copyright Act

76. –(1) Anyone who **with intent or by gross negligence**

(i) violates section 2 or section 3;

(ii) violates sections 65, 66, 67, 69, 70 or 71;

(iii) violates section 11(2), section 60 or sections 72–75;

(iv) fails to file a statement or information according to section 38(7);

(v) fails to register or fails to disclose information to the joint organisation according to section 41(1), section 42(6), and the first sentence of section 46, or fails to keep and hold accounts according to section 45; or

(vi) violates regulations laid down pursuant to section 61(2);

is liable to a fine

(2) Where an intentional violation of the provisions mentioned in subsection (1)(i) and (ii) has been committed by using works, performances or productions protected under sections 65–71 or by distributing copies hereof among the general public, the punishment may under particularly aggravating circumstances be increased to imprisonment of 1 year and 6 months, unless a more severe punishment is provided by section 299b in the penal code (...).

One such country is **Denmark** where, besides wilful infringements, acts committed with gross negligence (reasonable belief) are also subjected to criminal sanctions ⁽⁵⁵⁾.

Generally, however, acts committed by gross negligence, regulated in s 76 of the Copyright Act, are punished with a fine. Danish law also provides for harsher sanctions for more serious acts committed with intent. In particular, intentional violations of the right of reproduction or making available to the public may result in a term of imprisonment for a period of up to 18 months when aggravating circumstances are present ⁽⁵⁶⁾ (serious offence) or, in more severe cases involving particularly aggravating circumstances, up to 6 years imprisonment, as foreseen in section 299b of the Criminal Code ⁽⁵⁷⁾.

Aggravating circumstances in the context of copyright infringements are deemed to exist where the offence is committed for commercial purposes, a significant number of copies are made available or distributed to the public, or the works are reproduced in a way that the public can access them at a place and time individually chosen by them ⁽⁵⁸⁾.

Finland takes a similar approach to Denmark with respect to *mens rea* requirements, as both infringements carried out intentionally and with gross negligence attract criminal liability.

Negligence-based conducts ⁽⁵⁹⁾, including, among others, violations of copyright, technical measures and electronic rights management information, are regulated in the Copyright Act ⁽⁶⁰⁾ and are generally punished with a fine.

On the other hand, the Criminal Code regulates mostly severe infringements, which may result in imprisonment and/or a fine. In addition to the existence of other elements (including gain and damage to the rightholder) ⁽⁶¹⁾, an essential precondition for criminalisation is that the act is intentional. The applicable *mens rea* for the copyright offence and other related offences is derived from section 5 of the Criminal Code.

⁽⁵⁵⁾ S 76 of the Danish Copyright Act.

⁽⁵⁶⁾ S 76 (2) of the Danish Copyright Act.

⁽⁵⁷⁾ S 299b(1) of the Danish Criminal Code.

⁽⁵⁸⁾ S 76(2) of the Danish Copyright Act.

⁽⁵⁹⁾ The same conducts, if carried out with intent, will be punished in the same way, unless they constitute a more severe infringement regulated in section 1 of chapter 49 of the Criminal Code.

⁽⁶⁰⁾ S 56a–56f of the Finnish Copyright Act.

⁽⁶¹⁾ Chapter 49, s1 of the Finnish Criminal Code.

Finnish Criminal Code

Section 5 (515/2003)

Imputability

‘Intent or negligence is a prerequisite for criminal liability.

Unless otherwise provided, an act referred to in this Code is only punishable when intentional.

What is provided in subsection 2, also applies to an act referred to elsewhere in law for which most severe punishment provided by law is imprisonment for more than 6 months or concerning which the penal provision has been issued after this Code entered into force’.

National approaches to the element of wilfulness in copyright infringements are nuanced at the EU level. Some MS have loosened the requirements set in TRIPS by introducing lower (negligence-based) standards of *mens rea* for the criminalisation of certain infringing acts, whereas others have maintained wilfulness as the only standard applicable for the imposition of criminal penalties.

Copyright infringement notices are a commonly used tool to alert infringers to the illegality of their conduct – a practice that can be relied upon by rightholders in IP disputes. However, their use may not be feasible in all instances of criminal copyright infringement (e.g. large-scale piracy perpetrated by organised criminal groups). In such cases, the existence of commercial scale could in principle help to establish wilfulness⁽⁶²⁾, but in jurisdictions where commercial scale is not

an element of the crime, proving wilfulness might prove more challenging. Moreover, the way courts determine wilfulness or negligence in copyright infringement cases may differ and is not always straightforward. When combined, these factors highlight the importance for prosecutors to present a combination of evidence at court to help strengthen the case and successfully prove criminal intent.

Would you like to know more about infringement notices?



Scan the QR code above to consult the IPC Project's flyer on copyright infringement notices.

Element 3: Commercial scale

Commercial scale is the third requirement set by article 61 of TRIPS for the criminalisation of copyright infringements. In line with this provision, the national laws of TRIPS member countries should foresee criminal procedures and penalties including imprisonment and/or fines for wilful acts of copyright piracy carried out on a commercial scale.

Similarly to the element of wilfulness, commercial scale acts as a qualifier, meaning that wilful acts of copyright piracy are not subject to the obligation set out in article 61 if the commercial scale criterion is not present⁽⁶³⁾.

TRIPS is silent as to what constitutes commercial scale, possibly to give member countries the discretion to define this criterion in line with their national realities. However, a few attempts were made at defining it.

The final text of the Anti-Counterfeiting Trade Agreement (ACTA) – a multilateral treaty designed to strengthen the legal framework for the enforcement of IP rights⁽⁶⁴⁾ – defines this concept as

⁽⁶²⁾ Haber, E. (2018), *Criminal Copyright*, Cambridge University Press, Cambridge, p. 239.

⁽⁶³⁾ World Trade Organization (2009), 'China – Measures affecting the protection and enforcement of intellectual property rights', p. 106, https://www.wto.org/english/news_e/news09_e/362r_e.htm.

⁽⁶⁴⁾ The members of ACTA currently include Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United

‘acts carried out as commercial activities for direct or indirect economic or commercial advantage’⁽⁶⁵⁾. Some commentators have taken the view that the definition of commercial scale provided in ACTA remains somewhat unclear due to the ambiguous nature of the concept of indirect commercial advantage⁽⁶⁶⁾.

In 2009, a WTO report addressed the concept, providing a somewhat vague interpretation of commercial scale. It provided that commercial scale ‘is the magnitude or extent of typical or usual commercial activity’ and that piracy on a commercial scale refers to ‘piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market’. Thus, piracy on a commercial scale can vary, and is dependent on the extent that is common for a given product in a specific market, which can be small or large⁽⁶⁷⁾. Such an interpretation alludes to the circumstantial nature of the concept of commercial scale and the importance of national realities of commerce, which may differ across countries and reflect different factors, not least the consumer base and patterns of consumption.

Furthermore, the interpretation of the panel highlighted the relevance of financial gain for commercial scale, highlighting that ‘the magnitude or extent of typical or usual commercial activity relates, in the longer term, to profitability’⁽⁶⁸⁾.

Acknowledging the importance of technological developments and the adaptation of commerce practices to them, the panel further asserted that the term ‘commercial’ takes a neutral approach to technology, which means that commercial scale ‘can apply to various forms of commerce, and therefore, various means of infringement’⁽⁶⁹⁾. Thus, commercial scale is a flexible element that follows trends in online and offline infringements and adjusts itself to changes in ‘magnitude or extent’ and ‘degree or proportion’⁽⁷⁰⁾.

The lack of a definition of commercial scale at the international level and the interpretation offered by the WTO leave considerable discretion to national legislators to set thresholds for criminal liability based on products and markets. At the EU level, however, the approach to the interpretation of commercial scale is comparable, as no common definition exists in MS’ national legislation. Consequently, national courts remain the final arbiters in this matter.

In the context of IP infringements, commercial scale is used as an umbrella term that encompasses various national criteria with an inherent economic, business or profit orientation.

As regards the role of commercial scale in national legislation, national approaches tend to vary significantly across the EU. With a few exceptions, MS largely fall into three main groups based on how they approach this element in national law. These include MS that make commercial scale (or the equivalent national variation of this element) a necessary pre-condition for the existence of a crime of copyright piracy; MS where commercial scale is not considered an aggravating circumstance in the crime; and countries where the concept does not exist in national IP legislation.

States. The EU participated in the negotiations but did not sign the final text of the treaty and is therefore not bound by its provisions. This means that the definition of commercial scale provided in ACTA is not applicable within the EU-27.

⁽⁶⁵⁾ Anti-Counterfeiting Trade Agreement, art. 23 (2011).
https://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

⁽⁶⁶⁾ Geiger, C. (2014), ‘Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach’, in Torremans, P. (ed.), ‘Research Handbook on the Cross-Border Enforcement of Intellectual Property’, Max Planck Institute for Innovation and Competition, No 14-01, p. 13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382603.

⁽⁶⁷⁾ World Trade Organization (2009), ‘China – Measures affecting the protection and enforcement of intellectual property rights’, p. 115, https://www.wto.org/english/news_e/news09_e/362r_e.htm.

⁽⁶⁸⁾ Ibid, p. 116.

⁽⁶⁹⁾ Ibid, p. 130.

⁽⁷⁰⁾ Ibid.

An example of a MS in the first group is **Lithuania**, where the law foresees criminal sanctions for the illegal use of a literary, scientific or artistic work or parts thereof for commercial purposes ⁽⁷¹⁾. To help determine the existence of this element, the national law draws on the use of thresholds. These relate to the total value of the illicit copies vis-à-vis the price of legal copies or the originals of the reproduced copies. These values are expressed in minimum salary levels, which in 2023 stand at EUR 49 ⁽⁷²⁾. Accordingly, national provisions concerning the unlawful reproduction, distribution, transportation or storage of a copyright-protected work or an object of a related right, provide for various criminal sanctions (community service, fine, restriction of liberty, arrest or imprisonment) where the total value of the illegal copies exceeds 100 minimum salary levels ⁽⁷³⁾ (EUR 4 900). Violations that fail to meet these economic thresholds will thus not attract criminal liability, but could still be subject to administrative liability.

Similarly, in **Slovenia**, the national provisions regulating copyright violations allude to the total market value of the copies of copyrighted works, and of performances, phonograms, video recordings, broadcasts and databases. This helps to determine the length of the sentence, which can go up to 3 years if the market value of the copies is high or 5 years if the market value is very high ⁽⁷⁴⁾. The question remains as to what constitutes a high or very high market value. Since these criteria are not defined in national law, the answer is left for national courts to decide on.

The adoption of thresholds in national laws, while limited to a few MS, likely reflects an intention by national legislators to only criminalise more severe infringements where the profit gained by the infringer or the potential loss to the rightholder is greater, and thus leave outside the scope of criminal sanctions situations where the outcome of the infringement is considered less serious and may be best addressed via the civil route. Nevertheless, advances in technology and online advertising, which have provided infringers with new opportunities to generate very large profit, means that most cases of online piracy will likely reach these national thresholds.

In **Spain**, the element of commercial scale is encapsulated by the requirement of financial gain – intrinsically linked to the (subjective) element of wilfulness. The 2015 reform of the Spanish Criminal Code has helped to bring some clarity to this element by establishing both direct and indirect financial gain as an element of the basic offence foreseen in article 270. By introducing both the direct and indirect nature of the profit, the reform has not only minimised the potential for discrepancies in jurisprudence ⁽⁷⁵⁾, but also ensured a wider scope of application of the criminal law to situations where the profit is generated by other means not directly linked to the infringing conduct (e.g. revenue from advertising and the sale of piracy site users' data to third parties), and by entities that may not pursue strictly economic interests ⁽⁷⁶⁾.

In practice, the element of financial gain should be interpreted in the strict sense of commercial profit. This is because the protection of IP rights through criminal law should be reserved for the most severe instances of infringement, leaving cases directed at non-commercial advantage or benefit to the civil courts. In this way, criminal sanctions for copyright infringements in Spain will apply to infringers whose actions are carried out with a commercial gain motive – to be understood as the intention to obtain an economic return, profit or income – excluding from criminal liability those whose infringing activities are not aimed at generating a profit, even if

⁽⁷¹⁾ Art. 192 of the Lithuanian Criminal Code.

⁽⁷²⁾ Decision on the resolution of the Government of the Republic of Lithuania of 2014 5 No. 1206 'on the approval of the amounts of reference indicators for social assistance benefits', (2022), <https://www.e-tar.lt/portal/lt/legalAct/08b004f07c7311ed82a7ae4cb6b10027>.

⁽⁷³⁾ Art. 192 of the Lithuanian Criminal Code.

⁽⁷⁴⁾ Art. 148 and art. 149 of the Slovenian Criminal Code.

⁽⁷⁵⁾ Circular 8/2015 of 21 December on intellectual property crimes committed through information society services following the reform implemented by Organic law 1/2015 (2015), <https://www.boe.es/buscar/doc.php?id=FIS-C-2015-00008>.

⁽⁷⁶⁾ Ecija (15 February 2019), El ánimo de lucro en la defensa penal de los derechos de autor, <https://ecija.com/el-animo-de-lucro-en-la-defensa-penal-de-los-derechos-de-autor/>.

causing harm to copyright owners. In the latter scenario, cases will be addressed in the civil courts. This interpretation of commercial profit brings Spanish national legislation in line with EU, which defines acts carried out on a commercial scale as those 'carried out for direct or indirect economic or commercial advantage' ⁽⁷⁷⁾, and with international norms such as the Budapest Convention ⁽⁷⁸⁾.

Denmark is an example of MS in the second group – countries where commercial scale is not a necessary requirement for the criminalisation of copyright infringements, but its existence triggers a higher penalty. Under Danish law, commercial scale constitutes an aggravating circumstance, which results in the imposition of heavier criminal sanctions for certain types of copyright infringements. This is the case, for example, of intentional violations of the exclusive right of reproduction and making available to the public that have a commercial nature, which may be sanctioned with a term of imprisonment of 1.5 years (as opposed to a fine if the activity is not commercial) ⁽⁷⁹⁾. In the most serious cases of extremely aggravating circumstances, a more severe punishment – up to 6 years imprisonment – is prescribed by the Criminal Code ⁽⁸⁰⁾.

The same approach has been taken by legislators in **Germany**, where violations of infringements conducted on a commercial basis attract more severe penalties ⁽⁸¹⁾. Accordingly, the unlawful reproduction, distribution or communication to the public of a copyright-protected work ⁽⁸²⁾, unlawful affixing of designation of authorship ⁽⁸³⁾ or infringement of related rights ⁽⁸⁴⁾ committed on a commercial basis carries a term of imprisonment of up to 5 years or a fine, instead of 3 years (foreseen for the basic offences).

The third group includes MS where the concept of commercial scale is absent from national legislation. This means that certain acts of copyright infringement are criminalised regardless of whether they are committed as part of a commercial activity or to generate profit. A case in point is **Portugal**, where the crime of copyright piracy occurs when there is an unauthorised use of an author's exclusive rights in any of the ways foreseen in national law ⁽⁸⁵⁾, irrespective of whether the infringer intended to obtain an economic advantage, as reflected in the case-law of national courts ⁽⁸⁶⁾. The same approach has been taken in **Sweden**, where the criminalisation of copyright piracy is based solely on the commission of the infringing act (committed intentionally or with gross negligence) ⁽⁸⁷⁾. Similarly to Denmark, Swedish national law distinguishes between less serious and more serious copyright violations. The latter can be determined with reference to a number of factors ⁽⁸⁸⁾, none of which concern the commercial nature of the offence or the intent to generate gain or profit.

⁽⁷⁷⁾ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, preamble 14, OJ L157, 30.4.2004, pp. 16–25, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29>.

⁽⁷⁸⁾ Article 10 of the Budapest Convention, <https://www.coe.int/en/web/cybercrime/the-budapest-convention>.

⁽⁷⁹⁾ Section 76(2) of the Danish Act on Copyright.

⁽⁸⁰⁾ Section 299b of the Danish Criminal Code.

⁽⁸¹⁾ Section 108a of the German Act on Copyright and Related Rights.

⁽⁸²⁾ Section 106 of the German Act on Copyright and Related Rights.

⁽⁸³⁾ Section 107 of the German Act on Copyright and Related Rights.

⁽⁸⁴⁾ Section 108 of the German Act on Copyright and Related Rights.

⁽⁸⁵⁾ Articles 195, 196, 198 and 199 of the Portuguese Act on Copyright and Related Rights.

⁽⁸⁶⁾ Court of Appeal of Coimbra, case no. 1788/04.5JFLSB.C1 (2011), <http://www.dgsi.pt/itrc.nsf/c3fb530030ea1c61802568d9005cd5bb/a67b13b71f10a3828025786c0049150c?OpenDocument>.

⁽⁸⁷⁾ Article 53 of the Swedish Copyright Act.

⁽⁸⁸⁾ In line with art. 53 of the Swedish Copyright Act, these factors include that the infringing act (1) has been preceded by particular planning, (2) was part of criminal activities conducted in an organised form, (3) was conducted on a large scale, or (4) was otherwise of a particularly dangerous nature.

Finally, a few MS do not fall specifically under one particular group, but instead combine aspects of the three groups. A MS that represents this approach is **Poland**, where legislators have given commercial scale a double role as an essential element and an aggravating circumstance. Specifically, certain acts – including the infringement of the author’s moral rights⁽⁸⁹⁾ and the acquisition or assistance in the disposal or concealment of an object carrying a protected work, performance, phonogram or videogram⁽⁹⁰⁾ – must be carried out with the aim to obtain a financial or economic benefit in order to be criminally sanctioned. In other cases – for example fixation, reproduction or dissemination of works, performances, phonograms, videograms and broadcasts – the conduct of the infringer may be criminalised without the existence of a profit motive, although the same acts, carried out with the intent to profit, are met with higher sentences⁽⁹¹⁾. This approach places Poland at the intersection of the first and the second group of countries.

The Polish Copyright Act makes a further distinction between cases where the offence is undertaken to obtain economic benefits and those where it is carried out as a regular source of income. With this approach, the Polish law points to a more ample interpretation of this third element of copyright piracy, which seems to allow for the attribution of criminal liability to those who commit one-off infringements with a view to generating some profit, and to recurrent offenders.

Finally, in a few circumscribed acts, the profit aspect is neither a required element nor an aggravating circumstance. These acts include, but are not limited to, the usurpation of authorship and the dissemination of works (or their derivatives) and performances without the identification of the author⁽⁹²⁾. Such conducts can make an infringer criminally liable in Poland, irrespective of profit.

As is possible to infer from the above, national legislative approaches to commercial scale are not uniform across MS. Moreover, in groups of countries where the law treats this element in a similar way, the level of sentencing often tends to differ.

⁽⁸⁹⁾ Art. 115(3) of the Polish Act on Copyrights and Related Rights.

⁽⁹⁰⁾ Art. 118 of the Polish Act on Copyrights and Related Rights.

⁽⁹¹⁾ Art. 116 and 117 of the Polish Act on Copyrights and Related Rights.

⁽⁹²⁾ Art. 115(1) and (2) of the Polish Act on Copyrights and Related Rights.



Case 8 – Estonia

Supreme Court (3-1-1-112-12)

The defendant wanted to create an internet casino with his partner. Following the breakdown of their professional relationship, the defendant took possession of files relating to their internet casino and discovered that several of them contained online casino software whose copyright belonged to company P.

The defendant contacted company P and demanded compensation to make up for the expenses incurred in the development of his business model (which had in the meantime become unusable) in exchange for the return of their software.

The first instance court ruled that by not immediately deleting the software after discovering it belonged to P, the defendant was in illegal possession of a computer program for commercial purposes and sentenced him to a 6-month suspended prison sentence, a decision upheld by the second instance court.

On appeal to the Supreme Court, the defendant was acquitted. The Court highlighted that the concept of commercial scale in criminal law should not be interpreted broadly, as done in the previous instances, and indicated that this concept includes only activities carried out with the purpose of receiving a financial benefit in a systematic or repetitive way.

With this interpretation, the Court effectively ruled out one-time copyright violations where infringers nevertheless generate revenue.



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Case 9 – Germany

Frankenthal Regional Court (6 O 325/08)

The applicant, who develops and markets computer and video games, requested an internet service provider for information on the users behind IP addresses involved in making files with a copyrighted computer game program available to other internet users on a commercial scale through a file-sharing program. He argued that as the owner of the exclusive rights of exploitation over the computer game program, he is entitled to information on the users of the infringing services on the basis of section 101(9) of the Act on Copyright and Related Rights.

The court denied the request on the basis that the provision of copyrighted works could not be considered to be done on a commercial basis. The court supported its decision on the fact that the requirements for the existence of commercial scale (regularity or permanence of the trade, intention to make a profit, externally obvious participation in gainful employment) could not be inferred from making a single file available. Despite recently placed on the market, the retail price of the game – EUR 25 – convinced the court that the action of the users behind the IP addresses did not constitute a particularly serious infringement that indicated commercial activity on the part of the infringers.

The court further noted that the legislator did not intend for the provision of a single file with copyrighted material on internet file-sharing networks to be regarded as commercial scale. This, it said, highlights the view of the German Parliament that most participants in file-sharing networks do not participate in gainful employment.



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In principle, commercial scale should be limited to for-profit activities on a large scale, but in practice it could also include small-scale activities undertaken by a single person with little financial return. Thus, in deciding what constitutes commercial scale, courts are still the final arbiters.

In some MS, national courts have had the opportunity to provide an interpretation of commercial scale.

In Estonia, where the Supreme Court addressed the meaning of the concept in criminal law (see Case 8), commercial scale presupposes a certain level of repetition and consistency of the infringing activity. According to the Court, commercial scale in criminal law should be interpreted more strictly to include only those activities carried out with the purpose of generating a financial benefit in a systematic or repetitive way.

In Germany, several courts have also provided an interpretation of commercial scale, sometimes arriving at disparate conclusions with regards to its scope in copyright infringement cases.

For example, in a 2008 case of infringement via file-sharing networks, the regional court of Frankenthal noted that, as a concept rooted in commercial law, commercial scale in copyright law refers to activities that are planned, independent and permanent, carried out with the intention to make a profit and externally recognisable in at least one market (see Case 9). In the same year, the local court of Darmstadt came to a different conclusion, taking the interpretation of commercial scale in copyright infringements over file-sharing networks a step further. In its view, commercial scale does not necessarily have to be directed at money but may relate to other pecuniary advantages such as the downloading of sought-after works – an essential feature in file-sharing networks without which users would have to pay to access the works.

The court anchored its interpretation on EU law, in particular the enforcement directive, which defines infringements on a commercial scale as

those 'carried out for direct or indirect economic or commercial advantage' ⁽⁹³⁾. In doing so, it argued that restricting commercial scale to its commercial law definition of activities that are permanent and profit-oriented would fall short of achieving the effective copyright protection required under EU law, particularly in the context of internet file-sharing networks where such criteria may never be fulfilled. In its decision, the court further highlighted the importance for the infringing copies to amount to a considerable number, and the duration of the file-sharing session to be of a considerable length, pointing out that the provision of 620 audio files over a file-sharing session lasting several hours constituted commercial scale ⁽⁹⁴⁾.

Turning to a more ample definition of commercial scale, the Schleswig regional court ruled in a 2010 case that any infringement aimed at a direct or indirect economic or commercial advantage has a commercial dimension. Accordingly, the court took the view that an intention to profit or a certain level of regularity or duration of the infringing activity are not requirements for an infringement to be deemed to occur on a commercial scale. With this ruling, the court effectively offered a much broader interpretation of the element of commercial scale, which encompasses a wider spectrum of situations. These could include infringing activities that have a more permanent or recurrent nature, and where profit is generated directly from them, or those where the infringement is temporary (including one-off infringements) and the revenue originates from an indirect parallel activity (i.e. advertising).

⁽⁹³⁾ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, preamble 14, OJ L 157, 30.4.2004, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29>.

⁽⁹⁴⁾ District Court of Darmstadt, case no. 9 Qs 490/08 (2008), <https://www.lareda.hessenrecht.hessen.de/bshe/document/LARE190005143>.



How do online pirates generate revenue?

IP crime means big money for criminals and low risk of detection and punishment. While some infringers have introduced a subscription-based system that enables users to view copyright-infringing content in exchange for the payment of a daily/monthly/yearly fee – akin to legal services – many have resorted to the use of advertisements as a form of generating revenue.

The use of ads has become one of the most widespread forms of monetisation for infringers. This modus operandi involves placing ads on pages that offer illicit content, which users are shown (e.g. through banners, pre-roll videos and pop-up windows) before they can freely access the content on those pages. Fewer cases have involved the sale of users' data to advertising companies or redirecting customers of infringing pages to porn sites. To learn more about how criminals are feeding off advertising on their illicit pages, please refer to the flyer on ad-funded piracy produced by Eurojust and White Bullet, available via the QR code below.



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The national approaches highlighted above demonstrate how MS have used the discretion inherent to TRIPS to tailor the elements of the criminal offence of copyright piracy to their national realities, and in this way lowered, loosened or adhered to the thresholds for criminal enforcement set by article 61 of TRIPS.

Considerable differences in legislative and jurisprudential practices, and in the understanding of the element of commercial scale, thus prevail, not only between different MS, but also within individual countries, where different national courts hold divergent views and interpret the concept in different ways.

On the legislative level, commercial scale is a central element in defining the limits of IP enforcement. This

element alone contributes to a decision on the level of sentencing and on the legal routes available to copyright holders to enforce their rights – whether civil courts, criminal courts or both.

Despite the lack of uniformity in the assessment of this criterion, it remains clear that some courts have been reluctant to find commercial scale in one-time copyright infringement cases, even where these enable infringers to generate revenue. Many courts take the view that commercial scale, with its inherently business-oriented nature, requires a certain level of regularity and duration, whereas others argue that commercial scale exists where any type of economic or commercial benefit is derived. Ultimately, commercial scale remains a matter for national courts to decide upon based on the national legislation, the circumstances of the case and the nature of the infringing activity. Its scope and existence will thus continue to be decided on a case-by-case basis.

TRIPS-plus elements in national legislations

The minimum elements required by the TRIPS agreement for the criminalisation of copyright infringements are largely reflected in MS national laws, although with some variations. Some countries, including **Estonia** and **Lithuania**, have fully transposed the requirements of TRIPS into national law, thus making criminal prosecution dependent on the existence of the three elements of infringement, wilfulness and commercial scale.



Figure 7. Overview of elements in Sweden

Other MS, such as **Denmark, Cyprus, the Netherlands** and **Sweden**, have slightly lower thresholds, requiring at a minimum a combination of two elements to institute criminal proceedings against copyright piracy.

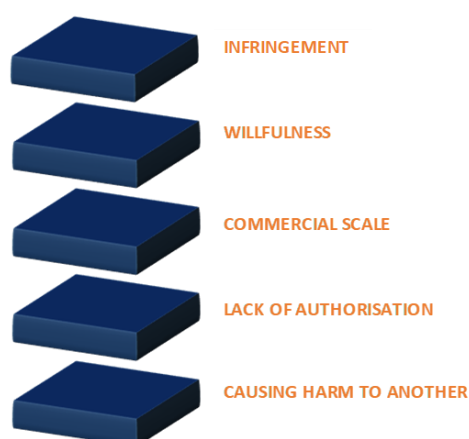


Figure 8. Overview of elements in Spain

Beyond the minimum requirements established by article 61 of TRIPS, some MS have chosen to set additional criteria for the crime of copyright piracy to their national laws. One such criterion concerns the requirement that the exploitation of a copyright be carried out without the authorisation of the rightholders. **Bulgaria, Germany, Spain, France, Croatia, Italy, Portugal and Slovenia** are just some of the countries where national law requires the presence of this element for the existence of a crime of copyright piracy. The requirement that a copyright be exploited without the consent of the rightholders is self-explanatory, since the exploitation of an exclusive right with the authorisation of the copyright holder would not amount to an infringement in the first place. Its intrinsic nature may also explain why this element is not explicitly set out in the national provisions of some MS laws.

In a smaller group of countries, including **Spain, Hungary, Malta** and **Finland**, the criminalisation of copyright piracy further depends on the element of damage to another. Accordingly, for an act of copyright piracy to be criminalised in these MS, prosecutors must be able to prove that the infringement of a copyright is carried out in a manner that causes harm (Spain), loss or prejudice (Malta) ⁽⁹⁵⁾ or inconvenience or damage (Finland) to the rightholder. In Finland however, this element is only required in relation to the more severe copyright offences governed under the criminal code.



Figure 9. Overview of elements in Hungary

The way the minimum standards set by TRIPS have been transposed in national laws is quite nuanced at the EU level. Some MS have chosen to tighten the criminalisation of copyright infringements by adding additional elements to the minimum standards established by TRIPS. Others have loosened national requirements, for example by giving commercial scale a more limited role or introducing other forms of *mens rea*, which has resulted in a wider scope of application of criminal measures to infringements.

The selection of the different elements of the crime of copyright piracy is one of the reasons for the great diversity of criminal enforcement approaches in the EU. However, the lack of harmonisation at the EU level also finds root in national differences concerning the sanctions regimes applicable to criminal copyright infringements.

⁽⁹⁵⁾ Art. 298B of the Maltese Criminal Code.

Conclusion

This report looked at the important area of copyright piracy in an attempt to help practitioners at the national level make sense of the different approaches to the criminalisation of copyright infringements within the EU.

The analysis herein shows that despite key international and European legislation, which have helped to harmonise key aspects of IP protection and enforcement, significant differences prevail in national approaches (e.g. elements of crime, statute of limitations and sentencing, to name a few). This is particularly true in the branch of criminal enforcement, which remains a MS prerogative and a matter of national competence. Hence, the same copyright infringing act will at times lead to different results, sanctions and penalties across MS.

Furthermore, in spite of existing common criteria for the attribution of criminal responsibility in many MS, national courts do not necessarily assess the requirements of the crime of copyright piracy uniformly, but may give different interpretations to the same concept. Against this backdrop, the CJEU has proved to be an important player, assisting national courts with the interpretation of key aspects of copyright, and in this way helping to bring a certain level of harmonisation to case-law in this area.

The existing disparities between MS national approaches and lack of harmonisation in copyright law has created an uneven playing field in the EU, which may result in legal difficulties for international cooperation and pose challenges in cross-border cases of copyright infringement. This adds further weight to an area that is by its own very nature complex and difficult to navigate.

This complexity results in part from the proximity of copyright infringements to the online environment and the internet. Advancements in technology have led to the emergence of new types of copyright infringements and allowed them to take place at a larger scale and faster rate, forcing investigators, prosecutors and judges to operate in a rapidly changing and increasingly multifaceted landscape that brings new legal issues and questions. The dynamic nature of piracy means that the case-law in this area will continue to evolve, alongside new infringing online (and offline) behaviours.

Going forward, the market for illicit streaming devices such as set-top boxes, file-sharing tools, cyberlockers, and the increasing use of mobile applications to infringe copyrights is likely to continue. The misuse of tools based on artificial intelligence to infringe copyrights, which has already begun to emerge, will also provide a new playground for criminals, bringing along a new set of cases and complex legal challenges.

The prevailing perception that IP crime in general – and copyright infringements in particular – is a victimless crime, together with lack of understanding, often stands in the way of successful prosecutions and convictions. A successful prosecution starts with a well-rounded knowledge of IP crime at the national and international levels, alongside an understanding of technology and cyber-related issues. This report hopes to have contributed to the first part, by pointing out some key similarities and differences that have made the area of copyright law so unique in Europe.

But despite the difficulties inherent to this area of law, some of the cases illustrated in this report show that well-built prosecutions can generate good results and have a dissuasive effect on infringers. The outcomes of these cases are important, as they help to recognise the role played by individuals who may not directly infringe copyrights but help to build the systems and structures that enable large-scale infringements and make the illegal ecosystem of digital copyright piracy work.

Ultimately, IP crime is about money, and while the damage caused by copyright piracy cannot always be objectively determined, it is felt particularly acutely by the EU economy. As research conducted by the European Union Intellectual Property Office and the Organisation for Economic Co-operation and Development has found that, in 2016 losses to the EU economy resulting from the importation of counterfeit and pirated goods amounted to EUR 121 billion – 6.8 % of EU imports (up from 5 % in 2013) ⁽⁹⁶⁾. This loss represents revenue that could not be re-invested in national economies and translates into fewer jobs, less innovation and smaller growth.

This finding alone speaks to the importance of having a strong criminal enforcement system for IP crime in Europe and highlights the need for every investigation and prosecution to focus on the revenue streams behind the illicit distribution of copyright-protected material, tracing and recovering criminals' assets, and on building a holistic approach to every cross-border IP crime case, aimed at the complete dismantling of the networks behind these crimes.

The generally low sentencing that is characteristic of cases in this area contributes to giving IP crime a low level of priority amid the high number of crime areas that compete for resources at the national level. But similarly to other higher priority crime areas, IP crime does not happen in isolation, as criminals commit other offences in the process, including fraud and document fraud, cyberattacks, money laundering, environmental crime and endangering public health.

Making the link between IP crime and other crime areas is critical, as it helps to uncover the real extent of a given case and map the entire ecosystem within which it occurs, while providing investigative and judicial authorities with access to a wider range of tools and legislation that can be used to collect evidence, build the prosecution case and increase the sentencing to reflect the severity of the case.

Within law enforcement and the judiciary, the response begins with strengthened cooperation, continuous education and training and making full use of the support, tools and funding available at the EU level to improve methods and responses in this crime area.

Lastly, in the vast universe of online copyright infringements, rightholders also have a role to play to help root out or minimise instances of copyright infringement and change the perception that the unlawful exploitation of copyright is an acceptable behaviour in society.

Illegal streaming is often carried out by individuals who wish to access content that is not available in their location. Online streaming service providers charge users in different countries the same price for a subscription, but the type of content made available varies significantly across geographical regions. A case in point is the United States, where subscribers can access a much larger library of movie and series than customers of the same service can view in Europe. This approach results in customers with a more limited access to content resorting to VPN services to mask their location in an attempt to watch content that is not included in their subscription or available in their region.

While the use of VPN services to access content in a different region will not lead to criminal liability for the user, this example is illustrative of how current business models in the entertainment industry can desensitise everyday consumers and create the perception that illicit streaming is an acceptable alternative of content consumption in cases where paid subscriptions do not provide the full catalogue of material that users wish to access. Over time, this process results in a change of mindset in the customer base, making legitimate customers perceive copyright infringement as a normal part of everyday life.

⁽⁹⁶⁾ OECD/EUIPO (2019), *Trends in Trade in Counterfeit and Pirated Goods*, Illicit Trade, OECD Publishing, Paris / European Union Intellectual Property Office, <https://doi.org/10.1787/g2g9f533-en>.

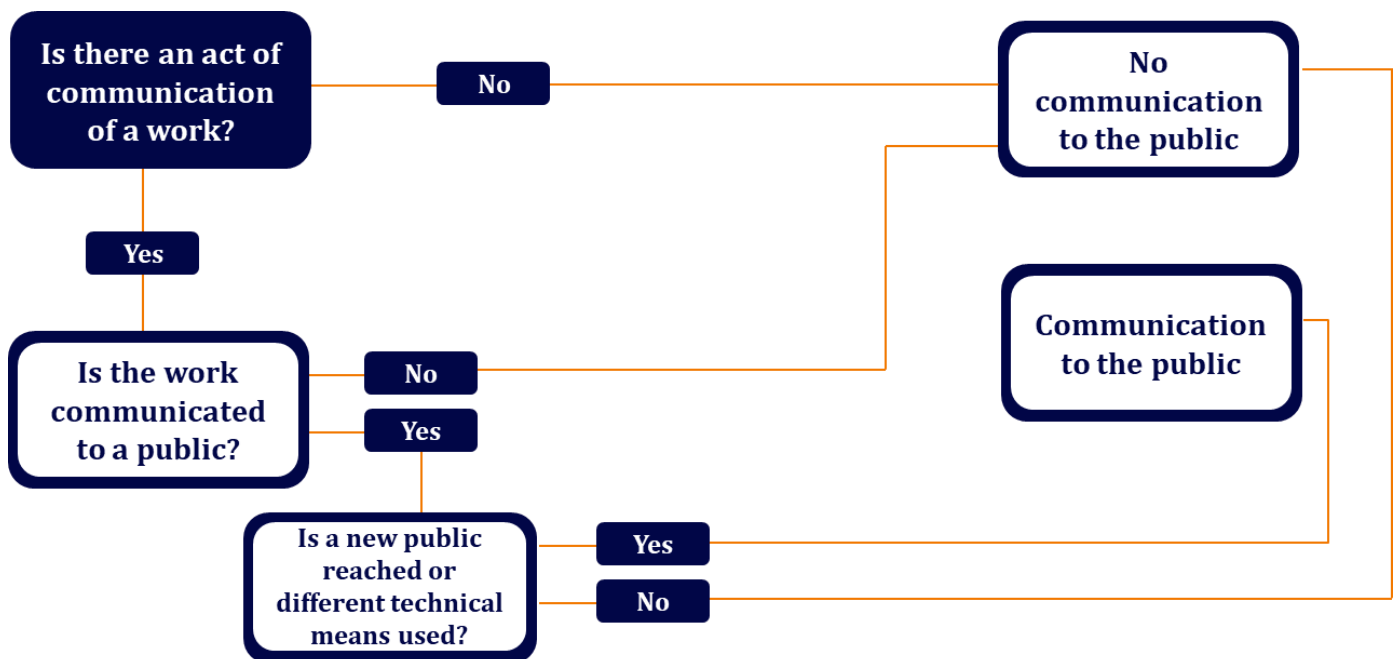
Ultimately, a large portion of copyright infringements today that are perpetrated by ordinary citizens can only be solved outside the boundaries of criminal jurisprudence. The solution to the problem calls for the commitment of all the actors involved to create a system that is fair for rightholders, licensees and consumers. Such an approach not only has the potential to dissuade the use of unlawful and harmful practices, but also to ensure that criminal law remains the last resort and not the first step in the enforcement of copyrights and other IP rights more generally.

Annexes

Annex I

Schematic on communication to the public (based on the CJEU's 2-step test)

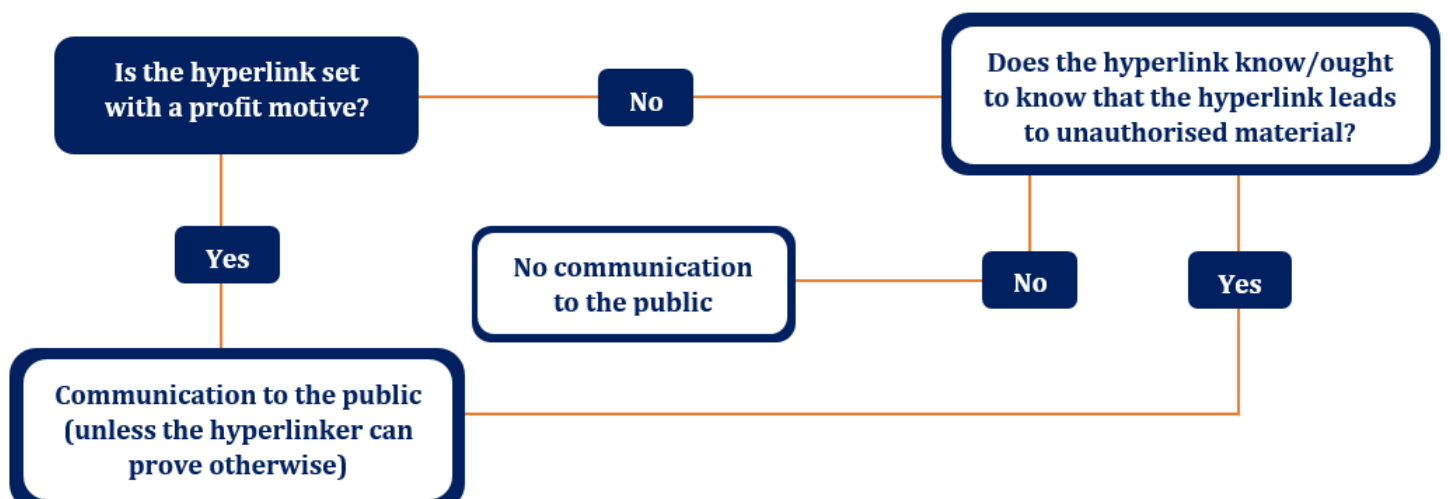
Decision chart – Does communication to the public exist?



Annex II

Schematic on communication to the public in instances of hyperlinking (CJEU's Svensson and GS Media rulings)

Decision chart – Does communication to the public exist?





Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, The Netherlands
www.eurojust.europa.eu • info@eurojust.europa.eu • +31 70 412 5000
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