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Maastricht University
Institute for Globalisation and International Regulation/IGIR
Intellectual Property Law and Knowledge Management/IPKM

Resistance is futile?
The impact of the CJEU on the development of copyright law and policy

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Outline

1. Judicial activism
2. Precedent in EU judicial practice
3. Impact of CJEU case law
4. Conclusions

The CJEU as an activist court

- Rulings on several key aspects of copyright law
- De facto harmonisation of certain concepts not harmonised in EU legislation
    - Example: originality as the author's own intellectual creation
- Claims of judicial activism/judicial law-making

Shortcomings of relying on claims of judicial activism

- No acepted definition of "judicial activism"
- Discretion of the Court = no scientific yardstick for evaluating its rulings
- Circularity of the concept
  - Judicial activism implies going beyond the law...
  - ...but it is up to the courts to decide what the law is
  - Art. 19.1 TEU: the CJEU "shall ensure that in the interpretation and application of the Treaties the law is observed" (*Kadi*: exclusive jurisdiction)

Effects of CJEU case law

- Central concept: precedent

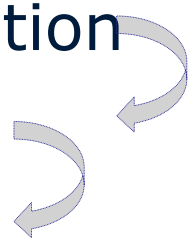
Precedent in EU judicial practice

- Justifications for the use of precedent
  - Principle of non-discrimination
  - Legal certainty and consistency
  - Ratio of article 267 TFEU

- But authors don't agree on this
  - Formally binding
  - De facto precedent
  - No precedent

(the myth of?) Precedent in EU judicial practice

- "Autonomous concepts of EU law"
  - Need for uniform interpretation
  - Harmonisation of concepts
  - Precedential strenght



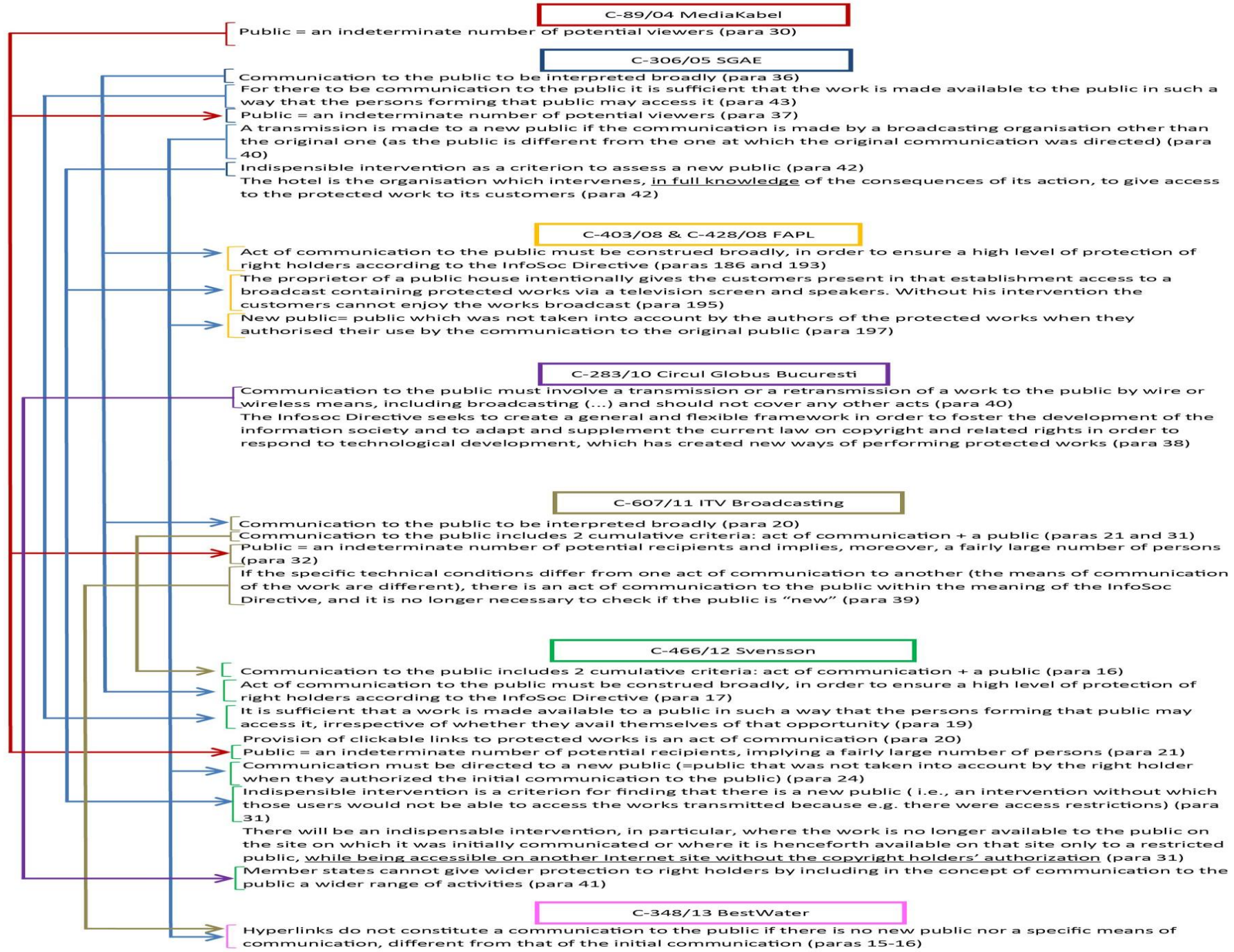
- Self-reference
  - "According to established case law"; "as the court as consistently held"

Impact of CJEU case law

- Case law is part of the *acquis*
- Normativity of precedents
  - CJEU itself
  - National courts
  - EU legislator

CJEU

- No system of formally binding precedent...
- ...but Court tries to be consistent with previous decisions (self-citation)
- Very few cases of reversal
- Path dependency: (danger of) reinforcement of future policy choices and policy lock-in


C-89/04 MediaKabel
Public = an indeterminate number of potential viewers (para 30)
C-306/05 SGAE
Communication to the public to be interpreted broadly (para 36)
For there to be communication to the public 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 (para 43)
Public = an indeterminate number of potential viewers (para 37)
A transmission is made to a new public if the communication is made by a broadcasting organisation other than the original one (as the public is different from the one at which the original communication was directed) (para 40)
Indispensible intervention as a criterion to assess a new public (para 42)
The hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers (para 42)
C-403/08 & C-428/08 FAPL
Act of communication to the public must be construed broadly, in order to ensure a high level of protection of right holders according to the InfoSoc Directive (paras 186 and 193)
The proprietor of a public house intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers. Without his intervention the customers cannot enjoy the works broadcast (para 195)
New public= public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public (para 197)
C-283/10 Circul Globus Bucuresti
Communication to the public must involve a transmission or a retransmission of a work to the public by wire or wireless means, including broadcasting (...) and should not cover any other acts (para 40)
The Infosoc Directive seeks to create a general and flexible framework in order to foster the development of the information society and to adapt and supplement the current law on copyright and related rights in order to respond to technological development, which has created new ways of performing protected works (para 38)
C-607/11 ITV Broadcasting
Communication to the public to be interpreted broadly (para 20)
Communication to the public includes 2 cumulative criteria: act of communication + a public (paras 21 and 31)
Public = an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons (para 32)
If the specific technical conditions differ from one act of communication to another (the means of communication of the work are different), there is an act of communication to the public within the meaning of the InfoSoc Directive, and it is no longer necessary to check if the public is "new" (para 39)
C-466/12 Svensson
Communication to the public includes 2 cumulative criteria: act of communication + a public (para 16)
Act of communication to the public must be construed broadly, in order to ensure a high level of protection of right holders according to the InfoSoc Directive (para 17)
It is sufficient that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity (para 19)
Provision of clickable links to protected works is an act of communication (para 20)
Public = an indeterminate number of potential recipients, implying a fairly large number of persons (para 21)
Communication must be directed to a new public (=public that was not taken into account by the right holder when they authorized the initial communication to the public) (para 24)
Indispensible intervention is a criterion for finding that there is a new public (i.e., an intervention without which those users would not be able to access the works transmitted because e.g. there were access restrictions) (para 31)
There will be an indispensable intervention, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorization (para 31)
Member states cannot give wider protection to right holders by including in the concept of communication to the public a wider range of activities (para 41)
C-348/13 BestWater
Hyperlinks do not constitute a communication to the public if there is no new public nor a specific means of communication, different from that of the initial communication (paras 15-16)

CJEU (cont.)

- Distinguishing techniques: precedent still in place, but (claims of) different situations
- Departing techniques: precedent is eliminated (with justification)

Leeway dependent on CJEU's will

National courts

- Reciprocal relation to the CJEU
- Existence of "precedent" does not preclude national courts from referring the same question (*ICC*)
- ...although that does not happen often

National courts (cont.)

- Referring courts
  - In principle, must apply the ruling
  - But some cases of rebellion (Solange I; Roquette)
- Non-referring courts
  - Binding nature more controversial
  - CJEU: binding on all national courts (Brasserie du Pecheur)
  - More cases of rebellion

National courts (cont.)

- Different degrees of bindingness according to the court at stake
- Options to national court:
  - Apply the ruling
  - Seek new ruling

Leeway dependent (to a certain extent) on national court's will

EU legislature

- 3 Directives based on CJEU decisions
- "Do nothing" → uncertainty → IM needs
- ...but Commission is not always a blind follower
- Relationship between negative and positive integration not regulated

Leeway dependent on legislator's will (but political factors might play a role)

Conclusions

De facto: policy lock-in
De jure: not formally binding; different force for different actors

Enough leeway to put copyright policy on the right track, if need be

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Thank you for your attention!

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