Cross-checking the recitals: the exclusion of ‘the mere provision of physical facilities’ from the right of communication to the public in recent CJEU case law

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Abstract

In its two recent decisions in Blue Air Aviation and Ocilion IPTV, the Court of Justice of the European Union has considered the exclusion of ‘the mere provision of physical facilities’ from the scope of the right of communication to the public under Article 3 of Directive 2001/29 (InfoSoc Directive).

This article explores whether the understanding applied by the Court in these decisions is consistent with the international origins of the exclusion and previous case law of the Court. The article explains why the decision in Blue Air Aviation seems to diverge from previous case law, while this does not appear to be the case in Ocilion IPTV.

Further, the article argues that the uncertainties regarding the scope of the concept of ‘act of communication’ is caused by the Court’s extensive understanding of indispensability, rather than its interpretation of ‘the mere provision of physical facilities’.

1. Introduction

Since the introduction of Directive 2001/29 (InfoSoc Directive) more than two decades ago, no provision in the Directive has generated more referrals to the Court of Justice of the European Union (CJEU) than the right of communication to the public in Article 3. The CJEU has understood communication to the public as requiring an ‘act of communication’ directed at the ‘public’.

While several of the cases decided by the Court, as well as scholarly debate, have centred around the latter aspect, there has also been a steady flow of decisions regarding the concept of an ‘act of communication’. The Directive does not define the ‘act of communication’ but, in accordance with Recital 23, the CJEU has constructed it broadly to cover everything from publishing hyperlinks, managing an online piracy platform and playing television programmes in a rehabilitation centre. A consequence of this broad understanding of the right is that a potentially large number of users can fall within the scope of Article 3, even when they play a peripheral role in the communication of a work to the public. This is because any communication to the public usually requires the contribution of multiple actors. For example, if a work is communicated to the public through an online platform, this would require, among others, the contributions of the person uploading it, the online platform, the internet service provider (ISP) of the uploader and the seller of the computer used. This illustrates a point emphasized by Advocate General (AG) Saugmandsgaard Øe in the YouTube case, namely that not every individual who plays a role in the communication should be held directly liable under Article 3, regardless of the nature of their contribution.

One way by which the InfoSoc Directive limits who can be held directly liable under Article 3 is through Recital 27, which excludes ‘[t]he mere provision of physical facilities’ from being considered an act of communication.

This article explores the boundaries of what can constitute an act of communication by investigating how Recital 27 has been interpreted by the CJEU. It reviews the decisions in Blue Air Aviation and Ocilion IPTV, and discusses the implications of these for both the legal framework and practical implications for the Internet. The article concludes with a discussion of the potential for further developments in this area of case law.

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applied by the CJEU, particularly in its recent decisions in Blue Air Aviation and Ocilion IPTV. By examining the international origin of ‘the mere provision of physical facilities’, how it has been implemented into EU law and how it has been understood by the CJEU, this article explains why the decision in Blue Air Aviation seems to diverge from the previous understanding of the exclusion, while this does not appear to be the case in Ocilion IPTV.

2. International origin and implementation into EU law

The right of communication to the public in EU copyright law has its origin in Article 11bis of the Berne Convention, which was first adopted with the Rome Act in 1928 and then revised and broadened to include transmission, retransmission and transmission by loudspeaker or analogous instruments with the Brussels Act in 1948. In 1996, the Berne Convention was supplemented by the WIPO Copyright Treaty (WCT), which filled the gaps in the Berne Convention by adopting a generally applicable right of communication to the public and introducing the concept of making available to the public. Neither Article 11bis of the Berne Convention nor Article 8 of the WCT mentions the notion of ‘the mere provision of physical facilities’, however, in the agreed statement accompanying the latter, it is specified that:

[... the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication within the meaning of this Treaty or the Berne Convention.]

The concept of ‘mere provision of physical facilities’ is not defined in the agreed statement. However, the preparatory works to the WCT suggest that the concern of the drafters was ensuring that providers of telecommunications and ISPs would not be held liable for the acts of communications performed by the users of their services. The qualification ‘mere’ in the agreed statement indicates that it should be interpreted restrictively so that acts going beyond the ‘provision of physical facilities’ are not excluded from the communication to the public right. It should be noted that, while the agreed statements are themselves not binding on the parties to the treaty, hereunder the EU, they serve as a means of interpretation.

The right of communication to the public in Article 3 of the InfoSoc Directive is derived from Article 8 of the WCT. During the negotiations of the Directive, the European Parliament suggested specifying in the text of Article 3 that the ‘mere supply of physical equipment designed to effect a communication or make one possible does not constitute an act of communication’. Although supported by the Commission, the provision was later removed on request of the Council. The agreed statement to the WCT is, however, reproduced in Recital 27 to the Directive, which reads ‘[t]he mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive’. Despite the recitals not being binding, they are, like the agreed statement, a means of interpretation, and—as we shall see in the following—the CJEU has frequently referred to Recital 27 when interpreting the right of communication to the public.

3. Hotels, multimedia players and rental cars: initial interpretation by the CJEU

Already in its first decision regarding the communication to the public right in Article 3 of the InfoSoc Directive in SGAE, the CJEU had the chance to address the relationship between acts of communication and the ‘mere provision of physical facilities’. The background for the case was proceedings brought by a collective management organization against a Spanish hotel owner, who had installed TV sets in their hotel rooms, and distributed TV signals from the hotel’s main antenna to those television sets. Two of the questions referred to the CJEU by the Provincial Court of Barcelona were whether the distribution of TV signals to the television sets in the hotel rooms constituted communication to the public, and whether this was also the case for the installation of the television sets. In its decision, the CJEU answered these questions together. The Court held that, although the mere provision of physical facilities does not constitute an act of communication itself, the installation of such facilities makes it technically possible for the public to access the work. Therefore, the Court concluded that if the hotel, by the means of the TV sets installed, distributed the signal to its visitors, it would constitute an act of communication. The Court thereby confirmed that if the provider participated in the communication beyond providing physical facilities, for example, by installing facilities and making access to the work technically possible, it cannot rely on Recital 27 to exclude the application of Article 3. In its judgment, the CJEU employs a restrictive reading of Recital 27 by limiting the exclusion to acts consisting exclusively of the provision of physical facilities, the example of which given by the Court is the sale or hire of televisions.

The CJEU followed up the decision in SGAE in OSA and Reha Training, where it considered that the distribution of signals
through radio and TV sets in a spa and a rehabilitation facility, respectively, constituted an act of communication. The applicability of Recital 27 was not considered in these decisions. Subsequently, in Filmspeler, the CJEU found that Recital 27 did not apply to the sale of a multimedia player that contained pre-installed links to piracy websites. According to the CJEU, this act was ‘quite different from the mere provision of physical facilities’ as it enabled a direct link between websites broadcasting unauthorized works and purchasers of the multimedia player, without which it would have been difficult for the purchasers to enjoy the protected works. The judgment illustrates that the exclusion of ‘the mere provision of physical facilities’ from the scope of Article 3 does not apply in cases where the defendant plays an active role in connection to the works being communicated. This was considered the case because the defendant actively enabled access to the unauthorized works by preinstalling links to piracy websites. If the defendant, on the other hand, had provided the multimedia players without the preinstalled links, Recital 27 would likely have been considered applicable.

Looking beyond the understanding of Recital 27, the judgment is significant because it broadens the notion of act of communication. For there to be an act of communication, the CJEU has held that the defendant’s act must constitute an indispensable and deliberate intervention, meaning that the defendant must have intervened in full knowledge of the consequences of his or her action to give the public access to the protected work. Traditionally, the Court has understood indispensability to only include situations where the public would not have been able to enjoy the work without the act of the defendant. Conversely, in Filmspeler, indispensability is understood more broadly to include acts that facilitate the public getting access works, even when the act is not a precondition for access. The CJEU has applied this broader understanding of indispensability both before and after the Filmspeler decision. One example of this is the decision in Svensson and Others, where the Court considered that publishing links to openly available websites containing protected works constitutes an act of communication of those works. Another example of this can be found in Ziggo, where the Court held that operating an online piracy platform can constitute an indispensable intervention with regard to acts of file sharing by the platform’s users. The consequence of this broadening is the extension of primary liability to acts that have traditionally been considered to fall under secondary liability. As it has been suggested by Martin-Prat, a possible explanation for this expansion of primary liability is that secondary liability is unharnorized in EU law and that the Court, seeing a need for harmonization, used the only method available to it—expanding the scope of primary liability.

It was not before its judgment in Stim and SAMI in 2020 that the CJEU first applied Recital 27 to exclude the finding of an act of communication to the public. The essential question referred to the Court was whether car rental companies performed acts of communication to the public by hiring out rental cars equipped with radio receivers. In its short decision, the Court held that the hiring out of the rental cars was a ‘mere provision of physical facilities’, as the radio receivers formed an integral part of the rental cars, making it possible for the renters to receive broadcasts without additional intervention by the rental companies. This decision is important, first because it confirms what was already suggested in Filmspeler, namely, the need for some activity beyond the provision of a physical facility for there to be an act of communication. Second, it illustrates the need for a link between the activity and the work communicated, which gives the provider influence over whether the public can access the work. This point was further emphasized in the Opinion of AG Szpunar, where it is held that for there to be an act of communication, and not ‘the mere provision of physical facilities’, it is decisive that there is a direct intervention with regard to the content of the communication.

These three initial cases from the CJEU illustrate that the exclusion of ‘the mere provision of physical facilities’ has been read narrowly to only cover instances where the provider of the facilities does not play an active role in the communication and does not have any influence over whether the works are communicated to the public.

4. Online platforms as ‘physical facilities’

The cases discussed thus far have concerned the notion of ‘mere provision of physical facilities’ in the physical realm. However, it has been argued that Recital 27 should also be applied to online platforms, most notably by AG Saugmandsgaard Øe in his Opinion in the YouTube case. In that case, the question before the Court was essentially whether video-sharing platforms such as YouTube and cyberlockers such as Uploaded could themselves be considered to perform acts of communication to the public of content uploaded by their users. Contrary to the AG Opinion, the CJEU did not exclude online platforms from the scope of Article 3 on the basis that they would be merely providers of physical facilities. However, the Court applied Recital 27 as a means for interpreting the scope of ‘act of communication’. The Court held that the fact that platforms play an indispensable role in the public being able to enjoy the work does not automatically entail an ‘act of communication’ on the part of the platforms, as this would be contrary to Recital 27. According to the Court, it is additionally necessary that the platform acts deliberately, meaning in full knowledge of the consequences of its conduct, for there to be an act of communication. This decision suggests that online platforms cannot be considered to play a sufficiently passive role to be excluded from the scope of Article 3 on the basis of Recital 27; rather, it is necessary to conduct an individual assessment of whether they have acted deliberately.

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25See judgment of the Court of 27 February 2014, OSA, C-351/12, EU:C:2014:110, para 26 and Reha Training (n 5), paras 54–56.
27Ibid, paras 39–42.
28See among others, SCAE (n 18), para 42, Reha Training (n 5), paras 56 and Ziggo (n 4), para 26.
30Svensson and Others (n 3), para 20.
31Ziggo (n 4), para 36.
33Martin-Prat, Ibid 141.
34Judgment of the Court of 2 April 2020, Stim and SAMI, C-753/18, EU:C:2020:268.
36Further discussed in Perry and Hyland (n 21) 209.
38AG, YouTube (n 6), paras 70–80.
39Judgment of the Court (GC) of 22 June 2021, YouTube, C-682/18, EU:C:2021:503.
40Similarly, in Ziggo (n 4), para 38.
41YouTube (n 37), para 77–79.
42Ibid, paras 81–89; the Court also provided a list of relevant criteria in such an assessment in paras 84–86 of the judgment.
Although online platforms cannot rely on Recital 27 to exclude the application of Article 3, they can, along with other information society service providers (ISSPs), avoid primary liability for infringement under the safe harbour immunities. These are now found in Articles 4–6 of the Digital Services Act (DSA), and establish the negative conditions for ISSPs to avoid liability. Of key importance is that the safe harbour immunity does not apply to acts by the ISSP that go beyond the provision of mere technical and automatic processing of data provided by its customers, entailing that the ISSP plays an active role which gives it knowledge of or control over the data. In YouTube, the CJEU held that this will, by definition, be the case when the online platform itself is performing an act of communication to the public. Therefore, online platforms cannot rely on the safe harbour immunities to avoid primary liability for acts of communication to the public. If the platform has not performed an act of communication to the public itself, it can however avoid secondary liability for acts of infringement by its users, as long as it has not played an active role in their infringements.

As discussed, to determine whether an online platform is performing an act of communication to the public of content uploaded by its users, it is necessary to assess whether the platform acted deliberately, meaning in full knowledge of the consequences of its conduct. That said, online platforms that qualify as Online Content Service Sharing Providers (OCSSP) are now, by definition, considered to communicate to the public content uploaded by its users under Article 17 of Directive 2019/790 (DSM Directive). Because the ‘communication to the public’ right in Article 17 of the DSM Directive is the same right as that in Article 3 of the InfoSoc, one could ask whether OCSSPs playing a passive role in the communication could rely on the exclusion of the ‘mere provision of physical facilities’ in relation to Article 17. This is not the case, as it would be contrary to the rationale behind the requirements in Article 17(4), which mandates upon OCSSPs to take proactive actions to avoid liability under the provision. In an earlier draft of the DSM Directive, it was specified in (then) Recital 38 that OCSSPs go beyond the ‘mere provision of physical facilities’ when giving the public access to works uploaded by its users; this was however later removed.

As shown in Section 2, the rationale behind excluding the provision of physical facilities under the WCT in the 1990s was to ensure that ISPs would not be held liable for acts of communication performed by users of their services. However, the CJEU and the EU legislature have not extended this reasoning to online platforms in the 2010s and 2020s.

5. Planes, trains and Internet Protocol Television: continuity or revision?

In two recent decisions, the CJEU has had the chance to consider the notion of ‘mere provision of physical facilities’, the first being its joint decision in Blue Air Aviation. The cases originated from proceedings brought before Romanian courts by two collective management organizations claiming payment of a licensing fee and penalties from an airline and a train operator on the ground that they performed an act of communication to the public by installing sound systems onboard their airplanes and trains. During the proceedings, the Bucharest Court of Appeal referred several questions to the CJEU, including whether the broadcasting of background music on means of public transport would constitute an act of communication to the public, and whether the installation of a sound systems and software enabling the playing of background music on means of public transport constitute an act of communication to the public. With regard to the first question, the CJEU held that the broadcasting of background music was a deliberate and indispensable intervention directed at a public, which therefore would constitute an act of communication to the public.

In its assessment of the second question, the CJEU held that the fact that use of sound equipment and software would be necessary for the public to enjoy the work would not automatically entail the finding of an act of communication, as this would encompass the provision of physical facilities excluded by Recital 27. On this basis, the Court concluded that installing sound systems and accompanying software on means of public transport would not constitute an act of communication to the public. Thereby, the Court confirmed what was already suggested in the YouTube decision, namely that an intervention can be indispensable while still constituting a ‘mere provision of physical facilities’. More surprising is that the Court, without further assessment, concluded that the installation of sound systems was covered by Recital 27: this appears to diverge from the Court’s decision in SGAE, where the Court did not apply Recital 27 on the ground that the installation of physical facilities could make it possible for the public to access the work. Although the Court emphasized that the scenario at hand was not comparable to that in SGAE, it did not explain why this would be the case. One possible way of reconciling these decisions is to read Blue Air Aviation narrowly, so that installation can be considered a ‘mere provision of physical facilities’ when it is required by national law. While the Court mentions that the installation was required by law, nothing in the decision suggests that the Court meant that Recital 27 would only apply to installation in such situations. Another possible understanding, suggested by Mariušić, is that the Court considered the installation to be a ‘mere provision of physical facilities’.

[40] The relationship between Recital 27 and safe harbour immunities is further discussed in Mariušić (n 9) 160.


[43] YouTube (n 37), paras 107–8. However, AG Saugmandsgaard Øe did reach the opposite conclusion in his Opinion, AG YouTube (n 6), para 138–9.

[44] The positive criteria for secondary liability are (still) a matter of the national laws of the member state, as pointed out in the Opinion of Advocate General Szpunar in Louhoutin, C-148/21 and C-184/21, EU:C:2022:422, para 79; see also Martin-Prat (n 30) 141 and Eleonora Rosati Copyright and the Court of Justice of the European Union (2nd edn OUP Oxford 2023) 268.


[48] For the same reason, safe harbour immunities do not apply to OCSSPs with regard to situations covered by the provision as held in art 17(4).


[50] Blue Air Aviation (n 7), paras 54–55.

[51] Ibid, para 68.

[52] Ibid, para 69.

[53] YouTube (n 37), para 79.


[55] Blue Air Aviation (n 7), paras 70–71.
facilities’ because the use of the sound system would automatically entail an act of communication.\footnote{Marušić, ‘The Mere Provision of Physical Facilities for Acts of Communication to the Public Revisited - Joined Cases Blue Air and CFR (C-775/21) and (C-826/21)’ (2023) 45 European Intellectual Property Review 551, 555.} In this author’s view, such an understanding is inconsistent with the Court’s finding that the broadcasting of music was an act of communication to the public.\footnote{Blue Air Aviation (n 7), para 57.} This is because it is difficult to see why the assumed automatic nature of the broadcasting would be relevant when assessing whether the installation was a ‘mere provision of physical facilities’, but not when considering whether the broadcasting of the background music was an act of communication in the first place. Furthermore, the Court does not mention the automatic nature of the broadcasting in its reasoning, neither when assessing whether the broadcasting or the installation was an act of communication. Therefore, the Court does not appear to have given this any significant weight. The most convincing conclusion is rather that Blue Air Aviation cannot be reconciled with SGAE, and that the decision represents a departure from previous case law and the restrictive understanding of the ‘the mere provision of physical facilities’ established in the agreed statements to the WCT. This is not to say that the conclusion of the Court appears incorrect. However, it would arguably have been more in line with previous case law to reach that conclusion based on a broader assessment of whether the communication was deliberate, as the Court did in YouTube, rather than simply excluding the installation on the basis of Recital 27. This approach would have allowed for more circumstances to be considered, including whether there was a profit-making motive on the part of the airline and train operator, as well as considered relevant in SGAE,\footnote{SuniTV and SAMI (n 2), C-426/21.} as well as the fact that the installation of the sound system was required by law.

Most recently, the CJEU touched upon the distinction between the provision of physical facilities and acts of communication in Ocilion IPTV.\footnote{Ocilion IPTV.} This case stemmed from proceedings brought against Ocilion, an Austrian provider of services for Internet Protocol Television (IPTV) to commercial clients. One of the ways Ocilion offered its services was by providing the necessary hardware, software and technical support on-premises for the commercial clients to give its customers, the end-users, access to TV broadcasts online. One of the questions referred by the Austrian Supreme Court was whether the provision of on-premises software and hardware, as well as technical support, constituted an act of communication to the public. In its judgment, the CJEU did refer to Recital 27, but it fell short of characterizing the acts of Ocilion as a ‘mere provision of physical facilities’.\footnote{Ibid, para 60.} Rather, the Court found that the acts did not constitute an indispensable intervention due to the lack of a link between the acts of the defendant and the end-users.\footnote{Ibid, paras 60-64.}

Despite the Court not categorizing the acts as a ‘mere provision of physical facilities’, it appears to have been influenced by previous decisions regarding Recital 27, in particular Stim and SAMI, due to the emphasis on the lack of a link between the provider and the communication of the works.\footnote{As was done by AG Szpunar in Opinion of Advocate General Szpunar in Ocilion IPTV, C-426/21, EU:C:2022:899, paras 64-67.} The decision may at first glance appear incompatible with the CJEU’s previous decision in Filmspeler. Yet, there is an important distinction between them, namely, that the provider of the multimedia player enabled the purchasers to gain access to pirated works specifically by preinstalling the links on them. While the IPTV solution and technical assistance provided by Ocillion could be used for broadcasting of unauthorized works, the provider did not take additional steps to enable this specifically. Therefore, Ocilion IPTV can be considered a nuancing of the reasoning in Filmspeler, rather than a divergence from it.\footnote{For a different view, see Tito Rendas ‘Karma’s a Boomerang - The Right of Communication to the Public After Ocillon (C-426/21)’ (4 September 2023), EU Law Live. Available at https://eulawlive.com/op-ed-karma’s-a-boomerang-the-right-of-communication-to-the-public-after-ocillon-c-426-21-by-tito-rendas/ (accessed 4 February 2024).}

### 6. Conclusion

Since its decision in SGAE, the CJEU has considered Recital 27 in many different contexts. However, the common thread in the Court’s reasoning is that the ‘mere provision of physical facilities’ has been understood restrictively to apply to cases where the provider does not play an active role with regard to the works communicated. Yet, in its recent decision in Blue Air Aviation, the Court arguably departed from its case law, particularly in SGAE, by adopting a broader reading of the exclusion. It is hard to predict at the time of writing whether this is a general change of course by the CJEU, especially in light of the cautious application of Recital 27 in the subsequent decision in Ocilion IPTV. In this regard it should be noted that AG Szpunar in his recently delivered Opinion in GEMA applies an understanding of Recital 27 that appears more faithful to the CJEU’s traditional interpretation of ‘the mere provision of physical facilities’.\footnote{Opinion of Advocate General Szpunar in GEMA, C-135/23, EU:C:2024:151.} The question referred to the CJEU in this case is whether the operator of an apartment building performs an act of communication to the public by providing TV sets in the apartments without a central reception for transmitting the signals. In his Opinion the AG suggests that the answer to this is ‘yes’. Emphasising the factual similarity to SGAE, the AG ruled out that the renting out of the apartments with TV sets could be considered a ‘mere provision of physical facilities’.\footnote{Ibid, paras 25-29.} With regard to the factual differences from SGAE, namely that there was no central reception and retransmission of the signal, the AG noted that one should not take an overly formalistic approach and that the underlying rationale taken in SGAE applies regardless of this technical difference.\footnote{Ibid, paras 39-41.} It will be very interesting to see whether the CJEU adopts this ‘faithful’ approach suggested by the AG in its decision, or whether it applies the more expansive understanding of Recital 27 taken in Blue Air Aviation.\footnote{This is not the only forthcoming opportunity the CJEU will have to further clarify the scope of Recital 27. In the recent referral in VHC 2 Seniorenresidenz, C-127/24 the German Federal Court of Justice (Bundesgerichtshof) has asked the CJEU whether the retransmission of radio broadcasts in a senior citizens home constitutes a communication to the public. See the press release by the Federal Court of Justice (8 February 2024), available at https://juris.bundesgerichtshof.de/cgi-bin/techsprech/doku.cfm/Gerichts-bgh&Art=p&pm=&Datum=2024&nr=186369&pos=1&anz=26 (accessed 13 February 2024).}

It is difficult to identify any difference from previous case law that explains why the Court took a diverging approach in Blue Air Aviation. However, it has been suggested that ‘extra-legal’ factors could offer a possible explanation, specifically that it could be relevant that the case had a different Judge-Rapporteur than a majority of previous cases regarding the communication to the public.\footnote{Eleonora Rossati, ‘CJEU Rules that Broadcasting Music on a Plane or Train is a Communication to the Public, but Installing Relevant Equipment isn’t’ IPKat (21 April 2023). Available at https://ipkitten.blogspot.com/2023/04/cjeu-rules-that-broadcasting-music-on.html (accessed 9 February 2024).} Although there is no formal specialization within...
the Court, there is informal specialization in the sense that a small pool of judges have been chosen as Judge-Rapporteur in a majority of copyright cases. In this regard, it should be noted that, as illustrated by Rosati, the Judge-Rapporteur in SGAEE, Judge Malenovsky, and Judge-Rapporteur in Filmspeler, Stim and SAMI, and YouTube, Judge Ilesić, were Judge-Rapporteurs in more than 60 per cent of copyright cases in the period 1998–2022. Furthermore, Favale, Kretschmer and Torremans have shown that different approaches are taken in cases within the field of copyright depending on the Judge-Rapporteur. While it seems probable that the continuity in Judge-Rapporteurs has been a contributing factor in the consistent manner Recital 27 has been applied, it is difficult to ascertain whether the fact that Judge Ziemele was Rapporteur in Blue Air Aviation, and not Judge Ilesić or Judge Malenovsky, was decisive for the divergence between this decision and the previous case law. In any case, there does not appear to be any basis for assuming that Judge Ilesić is going to apply Recital 27 more broadly than the earlier Judge-Rapporteurs, as she was also a Rapporteur in Ocilion IPTV, where a far more cautious approach to Recital 27 was taken.

Although it is difficult to discern the exact reason for the diverging approach taken in Blue Air Aviation, an Opinion by the Advocate General could arguably have contributed to elucidating the relationship between the questions referred and previous case law of the Court. It is not clear why the Court did not consider this necessary. However, according to the Statute of the CJEU, the Court can decide that an AG Opinion is not necessary when the ‘case raises no new point of law’, and, as we have seen, the Court itself does not appear to consider its decision to conflict with its previous case law. Nevertheless, an Opinion from the AG could potentially have contributed to a broader discussion of the relationship between the referred questions and previous case law. It can in this regard be recalled that the Court also previously decided cases without an AG Opinion, where it, in hindsight, seems preferable with the broader discussion that an AG Opinion allows. This is arguably the case with Svensson and Others, where the Court controversially both considered linking to constitute an act of communication and applied the ‘new public’ criterion to de facto exhaust the communication to the public right with regard to links to material publicly available on the internet.

Looking more broadly at the CJEU’s application of Recital 27, the Court has applied the Recital as an effective tool for defining the outer boundaries of what constitutes an act of communication. However, some scholars have argued that the CJEU has broadened the application of ‘mere provision of physical facilities’ beyond what was envisaged in the agreed statements to Article 8 of the WCT by applying the concept not only to ISPs but also in the physical realm, and that as a result, the understanding of when an act is copyright relevant has been muddled. In the author’s view, such an understanding gives too much weight to the preparatory works to the WCT, as the fact that the drafters had ISPs particularly in mind does not entail that the exclusion was only meant to apply to them. Furthermore, nothing in the wording of the agreed statement indicates such a limitation on its applicability. Since Recital 27 in previous case law has been applied relatively consistently to only exclude providers of physical facilities who play a passive role, it is arguably difficult to see any manifest effect of muddling. However, with its decision in Blue Air Aviation, the Court leaves some uncertainty as to when an act is copyright relevant. This muddling on the side of the Court is arguably to a greater extent a consequence of the expansion of the notion of primary liability evident in, for example, Filmspeler. Nevertheless, a broader reading of the exclusion of ‘the mere provision of physical facilities’ would likely not be adequate to ensure a consistent application of the communication to the public right. To ensure a more predictable understanding of what constitutes an act of communication, it would rather be preferable for the Court to apply a stricter understanding of when an intervention is considered indispensable and deliberate.

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