A hand holding a smartphone is visible on the left side of the frame. The background is a blurred grid of various streaming service logos, including Disney+, Netflix, Plex, Hulu, YouTube, and Amazon Prime Video. A semi-transparent dark grey banner is overlaid across the middle of the image, containing the title text in white.

“Streaming without Frontiers”? Enforcing with many Frontiers

Eleonora Rosati
24 February 2022



- Territoriality of copyright laws
- Cross-border nature of several infringements
- (Potentially) Global reach of the internet

A close-up, artistic shot of a camera lens. The lens is dark and metallic, with a reflection of a cityscape and greenery visible on its glass surface. The background is a soft, out-of-focus purple and blue gradient.

Contents

- Substantive aspects
 - A Digital *Single* Market?
- Enforcement aspects
 - Applicable law and jurisdiction
 - Available remedies
- Looking into the future

Substantive aspects

Multiple layers

- Offline/online aspects
- Cable retransmission (C-716/20)
- Copyright's exclusive rights
 - Reproduction
 - Distribution
 - Communication/making available to the public
- Related/sui generis rights
 - Related Rights Directive
 - A sports events organizer's right?

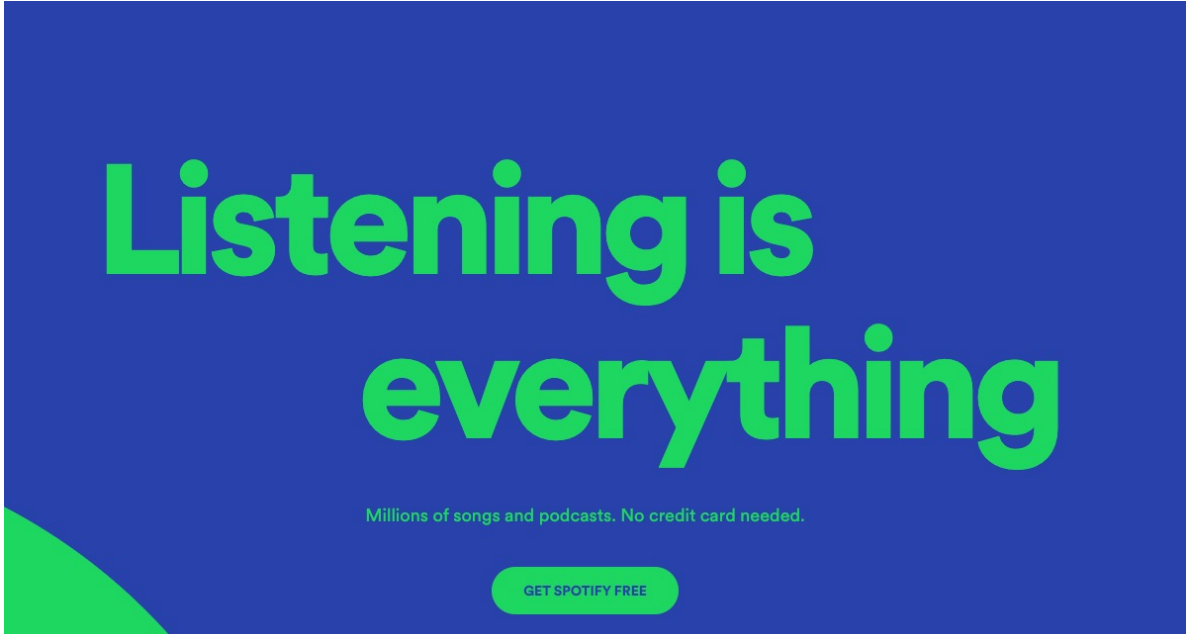
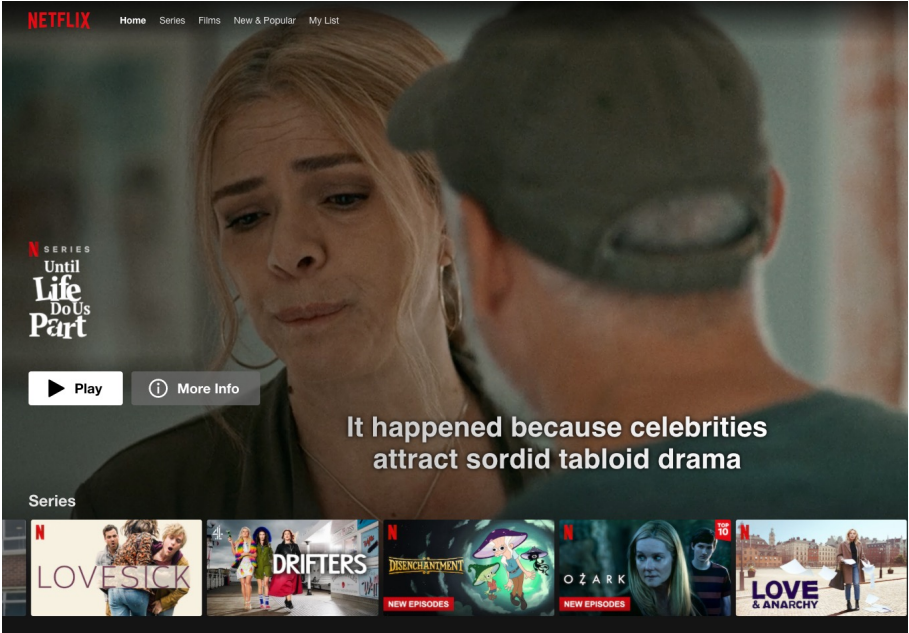
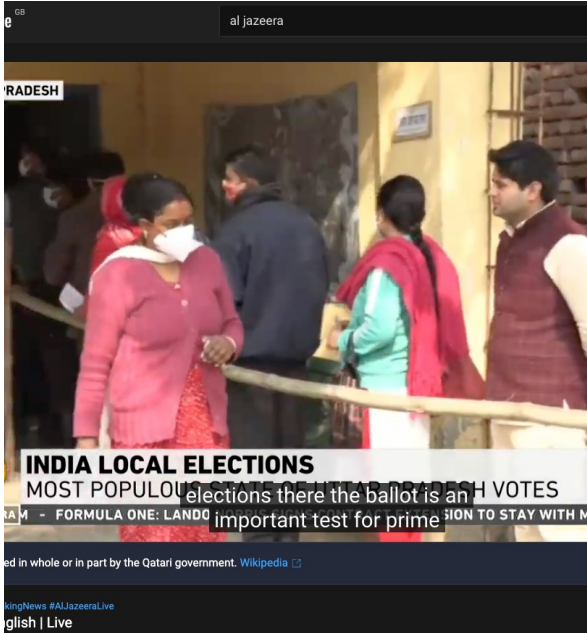


The EU right of communication/making available to the public

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 the 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.



What is this right relevant to?



Yet defining its meaning and scope has been challenging

Just think that there have been over 25 referrals to the Court of Justice in 20 years ...

For users: C-435/12 and C-527/15

An 'act of communication': transmission or simple accessibility?

- Indispensable intervention (full knowledge)

A 'public': indeterminate number of people above de minimis threshold

- Technical means; 'new public'

Access from place and at a time individually chosen

Other, non-autonomous, interdependent criteria

- Profit-making intention
- Knowledge



TV and radio sets



Cloud-based
recording services

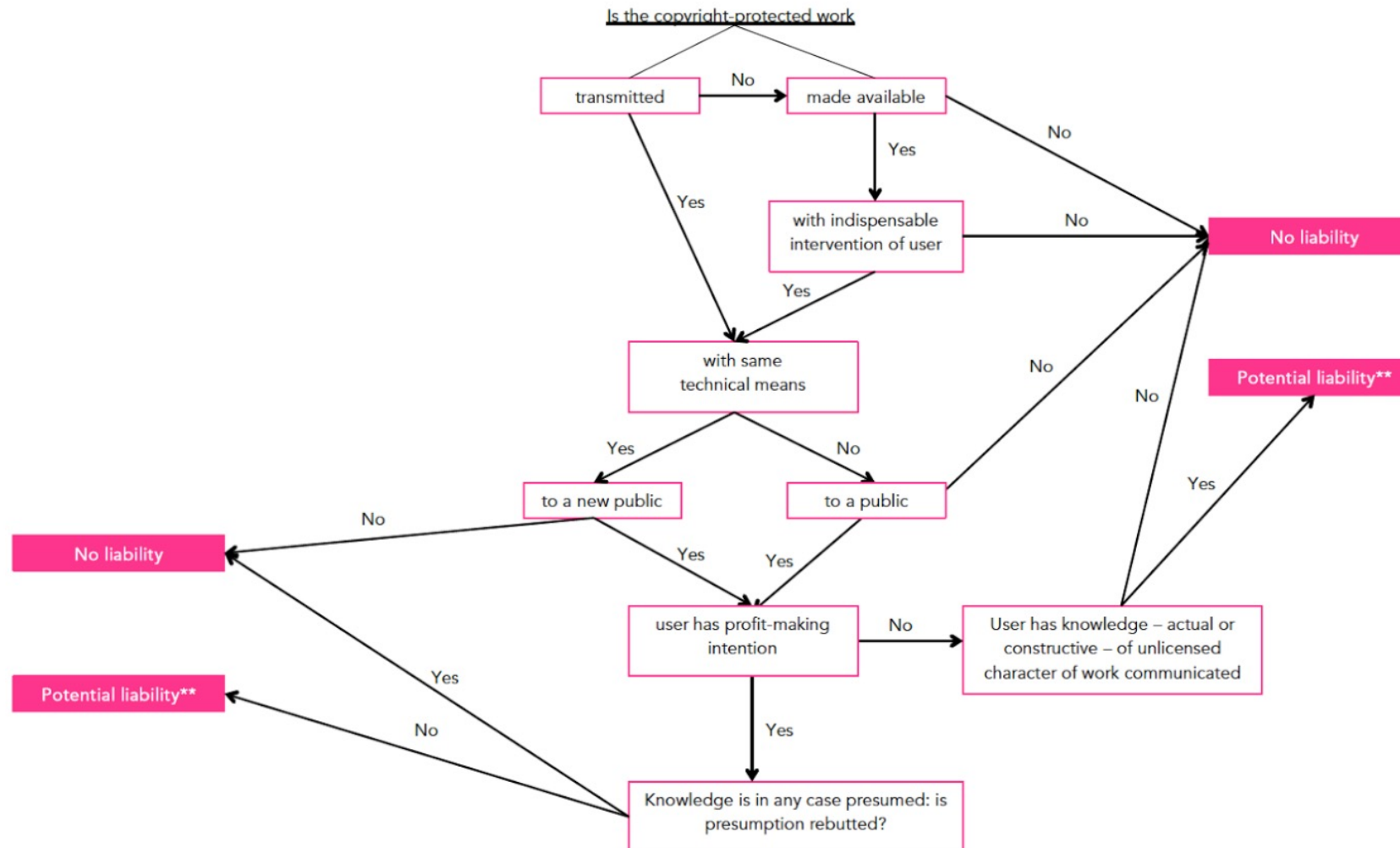


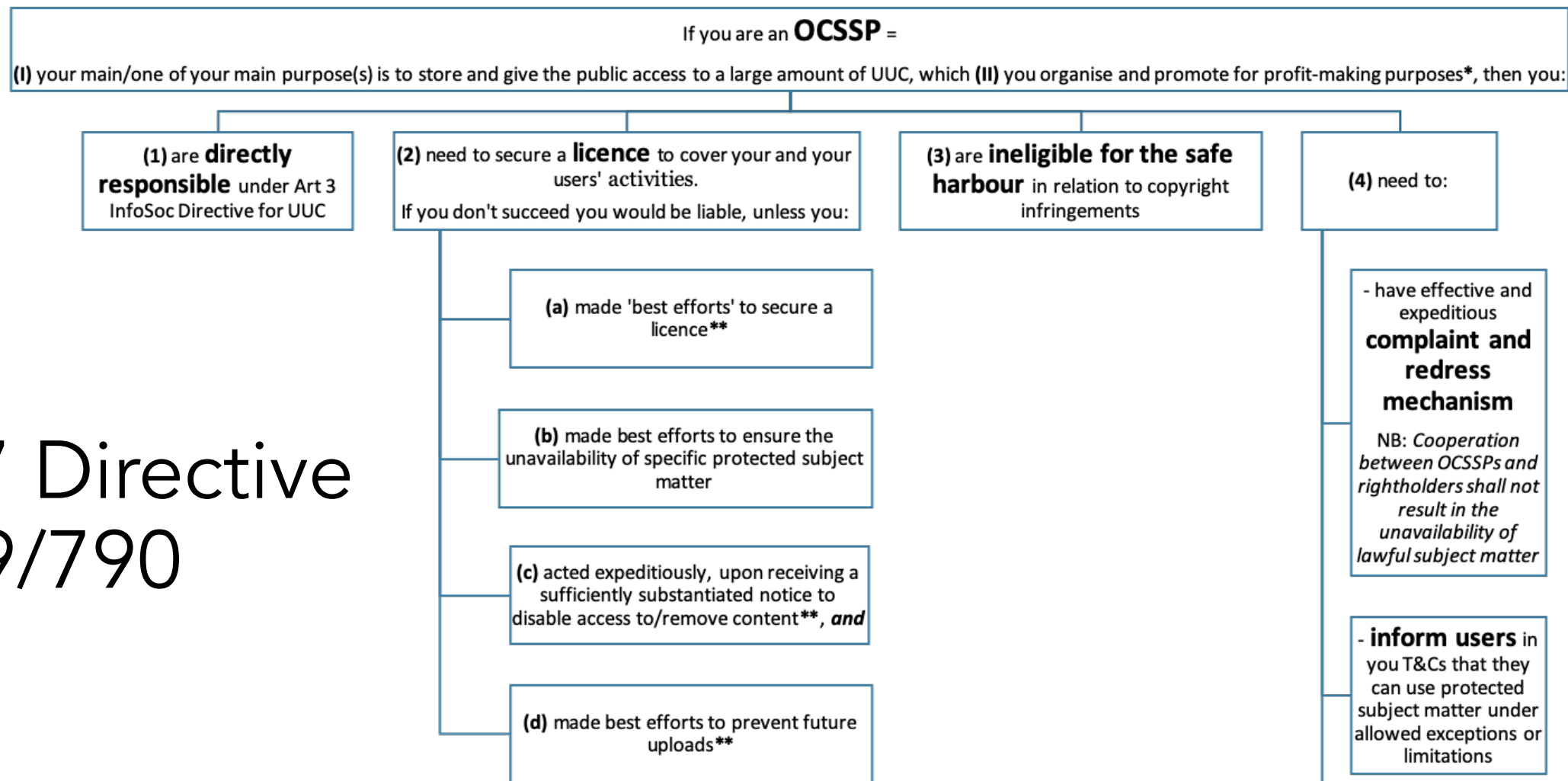
Linking to
protected
content



... and liability of
platform
operators

Right of communication to the public – Potential liability under Article 3(1) InfoSoc Directive*





Article 17 Directive 2019/790

* The notion of 'OCSSP' does *not* include providers of services like: not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, electronic communication service providers as defined in Directive (EU) 2018/1972, online marketplaces, B2B cloud services and cloud services that allow users to upload content for their own use

** If your service (i) has been available in the EU for less than 3 years *and* (ii) has an annual turnover below €10m, then you only need to comply with (a) and (c). If, in addition to (i) and (ii), (iii) the average number of monthly unique visitors exceeds 5 million, then you also need to comply with (d).

A Digital Single Market?

- Very validity of Article 17 (C-401/19)
- EC Guidance
- National transposition approaches
 - What freedom do MS enjoy?
 - Ex ante / ex post blocking
- Impact of forthcoming DSA
- ISSPs that are not OCSSPs: C-682/18 and C-683/18

Criteria	YouTube	Uploaded
Knowledge of unlawful content	😊	😊
ToS	😊	😊 (TBC)
Content filtering tools	😊	😈
Unlawful content promotion	😊	😊
Business model	😊	😈 (TBC)
% unlawful content		😈 (TBC)

Article 17	Some examples			
(1) (and Art 1(6))	Notion of OCSSP: "large amount"		😞	
	"Authorisation"			😞
	Relevant rightholders		😞	
(2)	"Significant revenues"		😞	
(3)	Availability of hosting safe harbour		😞	
(4)-(5)	Determination of whether efforts are "best"		😞	
	Content of notices (TBC – DSA, as is for (8))		😞	😞
(6)	Specific liability regime for start-ups		😞	
(7)	Availability and content of mandatory exceptions		😞	
(9)	Ex ante/ex post blocking			😞

Enforcement aspects

A woman with blonde hair, wearing a red dress, stands in a courtroom. She is looking towards the camera with a slight smile. In the background, a judge in a black robe is seated at a bench, and other people are visible in the courtroom. A green desk lamp is on a table in the foreground.

Applicable law & jurisdiction

- Lex loci protectionis
 - What does it mean for online infringements? Targeting?
- Jurisdiction
 - Courts with jurisdiction over non-existing damages? (C-170/12)

Available remedies

- The minimum harmonization achieved by the Enforcement Directive
 - One example for all: 'address' (C-264/19)
- Injunctions against intermediaries (C-324/09, C-314/12)
- Extra-territorial injunctions (C-145/10, C-18/18)

Looking into the future

- 
- A hand holding a magnifying glass over a globe with a molecular structure overlay.
- More harmonization?
 - EU DSA
 - Notice and 'stay-up'?
 - A sports events organizers' right?
 - Discussion within DSM Directive
 - 2021 EU Parliament resolution
 - European Commission to look into it in 2022 (?)
 - A WIPO Treaty?
 - Breaking down territoriality?
 - Geoblocking in the AV sector
 - Legislation and case law
 - Injunction types and reach
 - For the EU: more internal market

A hand holding a black remote control is positioned on the left side of the frame. In the background, a television screen displays a grid of streaming service logos, including Disney+, HBO Max, PLEX, Hulu, and Netflix. A semi-transparent dark red banner is overlaid across the middle of the image, containing the text "Thanks for your attention!".

Thanks for your attention!

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