

Copyright Update

Recent Decisions and the Current State of the EU Reform Debate

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Contents



- Current shape of EU copyright
 - Construction of exclusive rights: reproduction and communication to the public
 - Enforcement: the role of intermediaries
- The reform debate
- What's next?

1.

**Current shape of EU copyright:
The role of the CJEU**

The role of the CJEU

- Growing number of references for a preliminary ruling
- Growing activism of the Court



Construction of exclusive rights

- High level of protection
- Online dissemination of content subject to such high level of protection
- Right of distribution: advertising and digital exhaustion (*Tom Kabinet*)

Right of reproduction

- Harmonized requirements of protection (originality)
 - Also true for designs (*Cofemel*)?
- ‘Substantial’ taking = taking of any part that is sufficiently original

The Brontë Sisters (Anne Brontë; Emily Brontë; Charlotte Brontë)

1 of 4 portraits of **Charlotte Brontë**



The Brontë Sisters (Anne Brontë; Emily Brontë; Charlotte Brontë)

by Patrick Branwell Brontë

oil on canvas, circa 1834

35 1/2 in. x 29 3/8 in. (902 mm x 746 mm)

Purchased, 1914

[Primary Collection](#)

NPG 1725

Click on the links below to find out more:

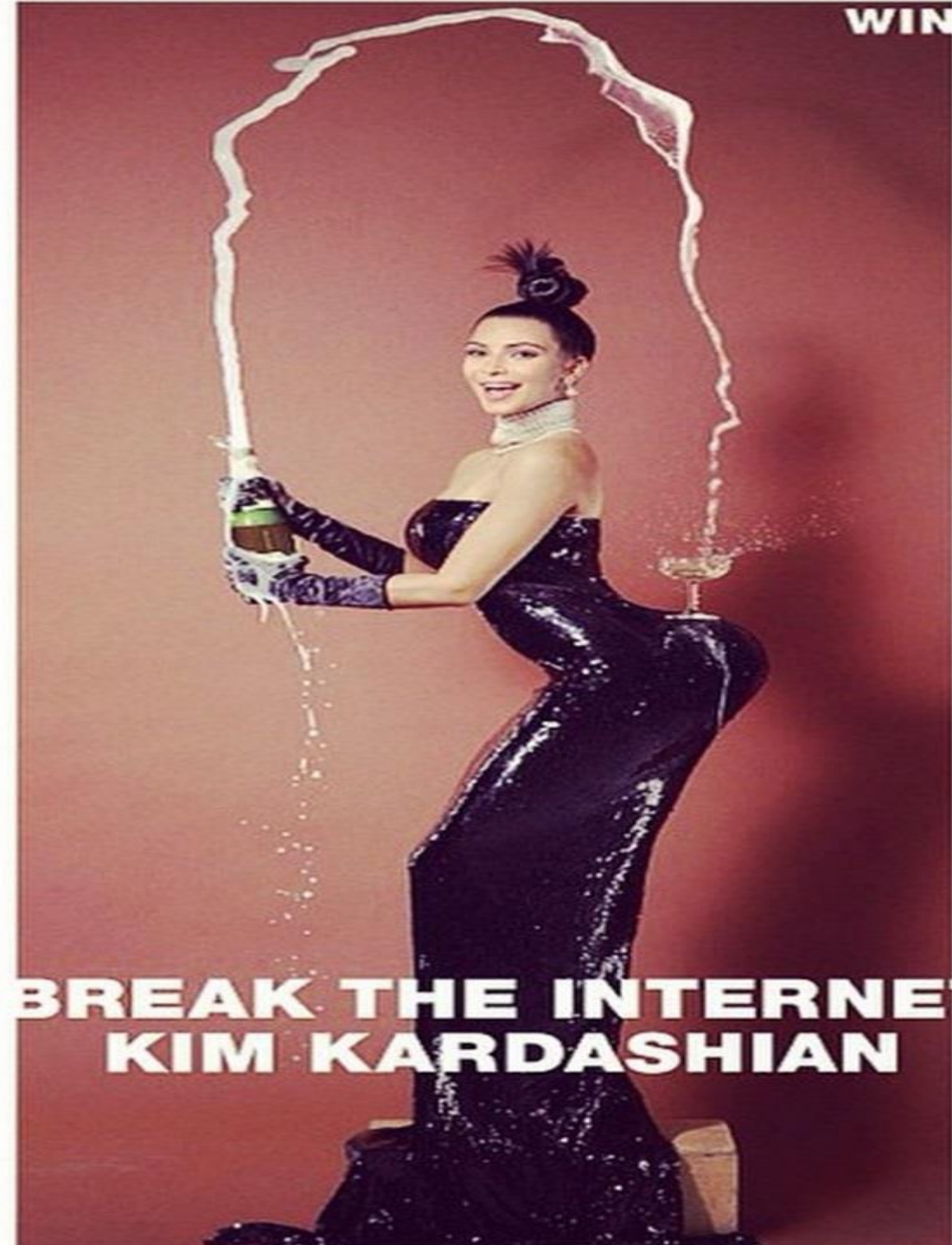
[Sitters](#)

[Artist](#)

[This portrait](#)

[Linked publications](#)

[Subjects & Themes](#)



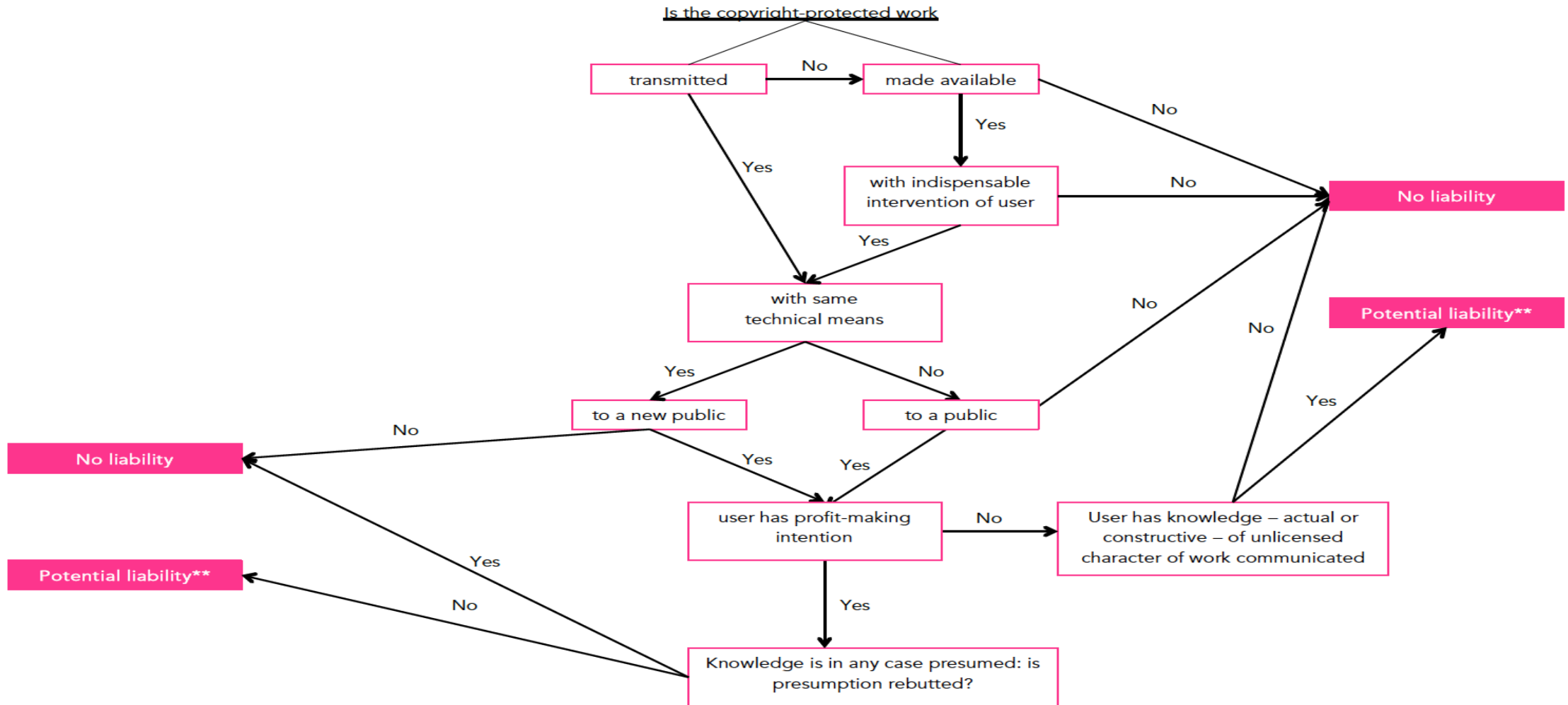
WIN

**BREAK THE INTERNET
KIM KARDASHIAN**

Right of communication to the public

- Act of 'communication'
- To a 'public'
- (Additional interdependent criteria)

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



*Note that the mere provision of physical facilities falls outside Article 3(1).

** Whether user/defendant is actually liable depends on further considerations, including whether any exceptions apply.

Linking



Linking after *GS Media*, C-160/15

Accessibility of content	Content published with rightholder's consent	Profit-making intention	Knowledge that content linked to is unlawful	Act of communication to the public	Potential infringement
Freely accessible	Yes	n/a	n/a	No (<i>Svensson, GS Media</i>)	No
Not freely accessible	Yes	n/a	n/a	Yes (<i>BestWater, GS Media</i>)	Yes
Freely accessible	No	No	No	No (<i>GS Media</i>)	No
Freely accessible	No	No	Yes (eg because notified)	Yes (<i>GS Media</i>)	Yes*
Freely accessible	No	Yes	Presumed (rebuttable presumption)	Yes (<i>GS Media</i>)	Yes*
Not freely accessible	No	n/a	n/a	Yes	Yes

*If rightholder notifies link provider (without prior knowledge of unlawfulness) that content linked to is unlawful and he refuses to remove the link, and exceptions in Article 5(3) InfoSoc Directive are inapplicable.

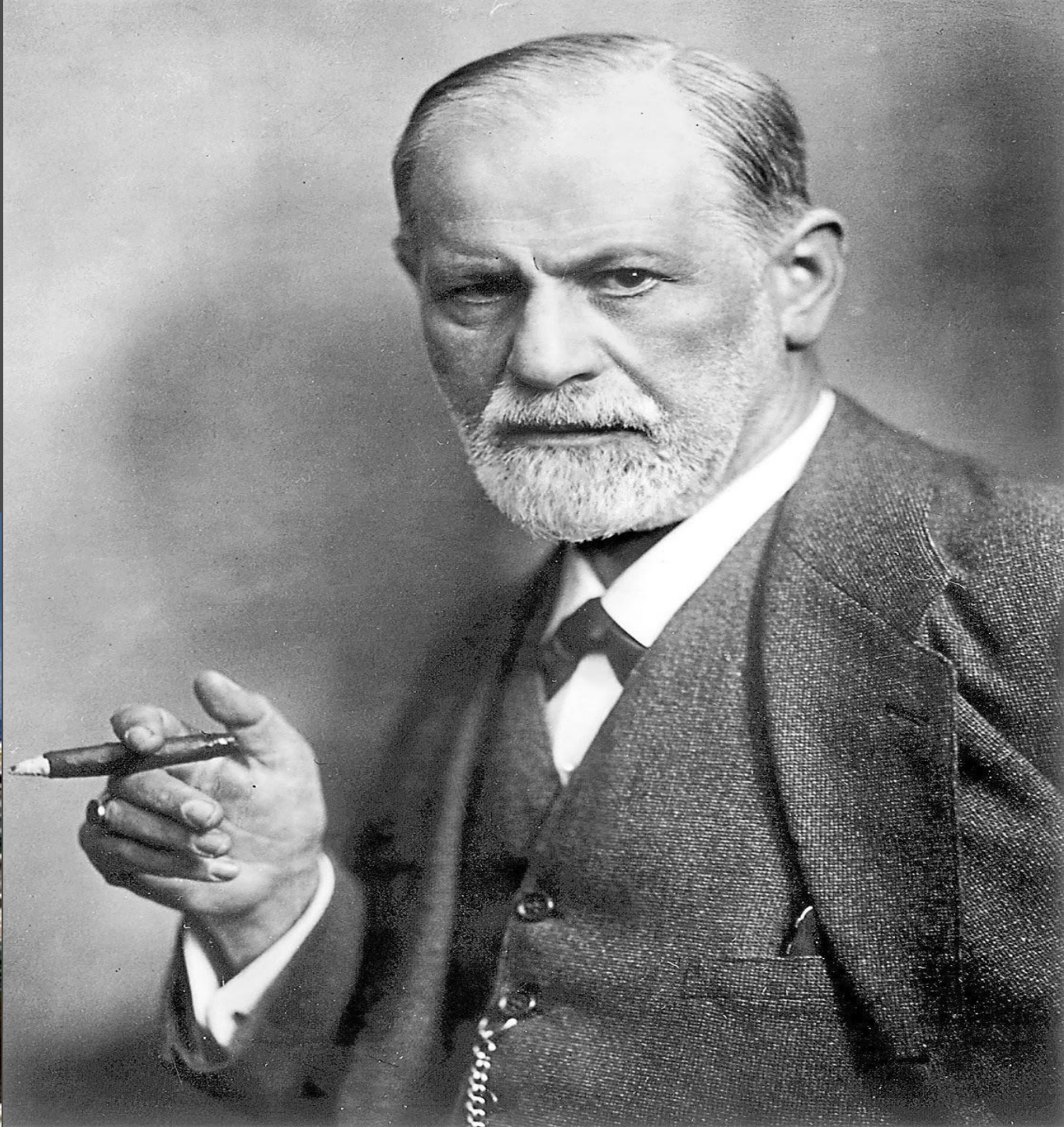
But now possibly also in the US: *Goldman v Breitbart*



Conclusion on exclusive rights

- Actual shape given by CJEU
- Online issues to be dealt with so to grant 'high level of protection' to rightholders

The (next) big player?



Enforcement: the role of intermediaries

3 main areas of development

- Safe harbours
- Injunctions
- Direct (primary) liability



Complex legislative framework

- E-commerce Directive
- InfoSoc Directive
- Enforcement Directive (Directive 2004/48)
- EU Charter of Fundamental Rights

Five key principles (provided by CJEU)

- The notion of 'intermediary' is broad
- Injunctions can be aimed at repressing existing infringement and preventing future infringements
- Injunctions must comply with various legislative sources and principles
- Blocking injunctions are allowed under EU law
- An intermediary can be directly (primarily) liable for third-party infringements

So?

- Also this an area in which Court primary role
- High level of protection
- Allowing effective enforcement also online

2.

The reform debate

The proposed Directive on copyright in the DSM

- Value gap proposal
- Press publishers' right
- Text and data mining
- 'Compromise' versions: the Coreper text



Andrus Ansip ✓

@Ansip_EU

Following

Good exchange on [#digitalsinglemarket](#) with [@evanspiegel](#), CEO of [@Snapchat](#). We followed up on this morning's discussion on [#illegalcontent](#): eCommerce Directive and good Samaritan clause are at the core of our approach. [#Onlineplatforms](#) must be proactive in removing illegal content



3.

In conclusion

Legislative and policy discourse

- Greater harmonization
- Polarization of the debate
- Rationales other than internal market one at the EU level
- Spill-over effects and competition
- Risk of obsolescence?



Judicial developments & practical implications

- Expansive protection
- Dichotomy
rightholder/infringer too simple
- Less room for national
approaches
- Trends becoming global
- Increasingly complex risk
assessment



Thanks for your attention!



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