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Investigating the relationship between linking and  
communication to a 'new public'

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# Summary

In the context of the internet and the World Wide Web, the position of links – such as hyperlinks and embedded links – is essential. Linking facilitates web navigation and information retrieval to a point where it is difficult to conceive of a web without them.

The copyright holder's right of *communication of the work to the public* is an exclusive, economic right. Each new act of communication of that work to a public is subject to the rightholder's authorisation. In the absence of such authorisation, a public communication of that work is deemed intervening. However, case law of the Court of Justice of the European Union (CJEU) has established that an unauthorised public communication of a work, in order to be considered intervening, *sometimes* also has to be directed to a *new* public – a public not taken into account by the rightholders when they authorised the initial public communication of the work.

Recent case law of the CJEU has established that linking to copyright protected works constitutes an 'act of communication' of the works that the link refers to. However, the same case law also establishes that such links are only intervening if they communicate the work to a new public. Thus, if the work is 'freely accessible' on the website where it was initially communicated, a link to that work does not communicate it to a *new* public.

In its quest to strike a *fair balance* between the rights and interests of rightholders and users, it appears that the CJEU – so far – has respected the significant position of links in the context of web navigation. Nevertheless, it also seems that the transfer of the 'new public criterion' to internet communications has created new and particularly complicated implications, potentially leading to undesired commercial exploitations of protected works in the online environment contrary to the interests of rightholders. There may be an argument that this neglects the goal of ensuring a high level of protection for rightholders. Moreover, unanswered questions remain regarding what content is to be considered 'freely accessible' as well as the status of links that refer the user to unauthorised versions of a work. As the answers to these questions may unreasonably prejudice the interests of both users and rightholders, it is possibly too early to claim that the CJEU has achieved its goal of striking a fair balance.

# Sammanfattning

Internetlänkar – såsom hyperlänkar och inlinelänkar – är centrala inom internet och World Wide Web ("nätet"). Länkning förenklar navigering på nätet och informationssökning till den grad att det är svårt att föreställa sig ett nät utan dem.

Upphovsrättsinnehavarens rätt till *överföring av verket till allmänheten* är en exklusiv, ekonomisk rättighet. Varje ny överföring av verket till en publik måste tillåtas av rättsinnehavaren. I brist på sådan tillåtelse föreligger en olovlig överföring till allmänheten. Praxis från Europeiska unionens domstol (EUD) har emellertid fastställt att en överföring till allmänheten, för att anses vara olovlig, också måste vara riktad till en *ny publik*, det vill säga en publik som verkets upphovsmän inte beaktade när de lämnade sitt tillstånd till den ursprungliga överföringen av verket till allmänheten.

Vidare har praxis från EUD fastställt att länkning till upphovsrättsskyddade verk utgör en "överföring" av verken som länken hänvisar till. Samma praxis slår emellertid även fast att sådana länkar endast är olovliga om de överför verken till en *ny publik*. Om verket är "fritt tillgängligt" på den webbplats där det ursprungligen lades upp, överför därför inte en länk verket till en "ny" publik.

Det framstår som att EUD, i sin strävan att upprätthålla en *skälig avvägning* mellan rättigheter och intressen hos rättsinnehavare och användare, hittills har tagit hänsyn till länkars betydelsefulla roll i samband med navigering på nätet. Det förefaller dock även som att övergången av konceptet om en "ny publik" till internetöverföringar har gett upphov till nya och särskilt komplicerade konsekvenser. Dessa kan potentiellt leda till oönskade kommersiella utnyttjanden av skyddade verk på nätet, i strid med rättsinnehavarens intressen. Det kan hävdas att detta inte tar hänsyn till målet att skapa en hög skyddsnivå för rättsinnehavare. Dessutom kvarstår frågor gällande betydelsen av "fritt tillgängligt" material samt rättsläget kring länkar som hänvisar användaren till en otillåten version av ett verk. Eftersom svaren på dessa frågor kan leda till oskäliga resultat för både användare och rättsinnehavare, är det förmodligen för tidigt att fastställa att EUD har upprätthållit en *skälig avvägning* mellan rättsinnehavare och användare.

# Preface

Initially, I would like to thank the Faculty of Law at Lund University for providing a stimulating education. Also, many thanks go to Ulf Maunsbach for guidance during this final semester, as well as Johan Ekstrand for proofreading.

I would also like to extend my gratitude to the University of Edinburgh Law School for igniting my interest in legal issues in relation to information technology, especially intellectual property issues such as the ones dealt with in this essay.

Finally, thank you Sophia for all your valuable comments, proofreading and general support.

Jens Nesson

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# Abbreviations

ALAI	Association Littéraire et Artistique Internationale
ECS	European Copyright Society
CJEU / The Court	Court of Justice of the European Union
EU	European Union
HTML	Hypertext Mark-Up Language
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
URL	Uniform Resource Locator
WIPO	World Intellectual Property Organisation
WTO	World Trade Organization
WWW	World Wide Web

# 1 Introduction

## 1.1 Background

This essay contains sixteen links. Arguably, the World Wide Web contains billions. Upon following (*i.e.* clicking) those links, many will refer the user to websites containing copyright protected content. By allowing for easy and user-friendly web navigation, the position of linking as a core function of the web cannot be overstated.

Consequently, this essay deals with the legal regulation of links in the EU. More precisely, it will answer the question whether or not links can intervene in a copyright holder's public communication right. Undoubtedly, the answer is 'yes'. A link can be an act of communication in itself. As a link 'makes available' a copyright protected work that it refers to, that work is being communicated. However, not every unauthorised 're-communication' intervenes in the author's exclusive public communication right. Under some circumstances, the CJEU has established that an unauthorised re-communication is only intervening when it is also directed to a new public.

The public communication right is an exclusive, economic right. Every act of communication of the work to a (new) public requires the copyright holder's authorisation. Hence, while the regulation of links is an important part of this essay, it is mainly an essay about the public communication right and, in particular, what will hereinafter be referred to as the 'new public criterion'. Indeed, as for links in relation to the public communication right, this appears to be the decisive criterion.

## 1.2 Thesis

The ultimate purpose of this essay is to analyse the new public criterion in relation to the public communication right, with a specific focus on linking. This requires investigation of both the technical and legal context of links, as well as the legal context of the new public criterion.

The notion of new public was introduced in a CJEU case concerning ordinary television broadcasts, and it is not obvious that the criterion's subsequent transition to the online



environment was fully taken into account, or that the transfer has been smooth. While aiming for a high level of protection for copyright holders, the InfoSoc Directive<sup>1</sup> also strives to strike a fair balance between the interests of rightholders and users. There may be an argument that the application of the new public criterion does not always achieve this. Indeed, there may even be an argument that the new public criterion as such is unfounded.

Consequently, the following questions will be answered:

- How are linking techniques regulated through the public communication right?
- What is the basis of the new public criterion, and when is it applied?
- What specific issues have arisen as a result of the transfer of the new public criterion to internet communications such as links?
- Does the new public criterion strike a fair balance between users and rightholders in relation to linking activities?

The first two questions are generally descriptive, but provide a necessary groundwork for the analysis. However, the ultimate discussion will focus on the final two questions.

### 1.3 Delimitations

This essay concerns certain aspects of the regulation of linking practices, in the EU, from a copyright perspective. There are other methods of regulating links. For example, the much debated right to be forgotten ruling<sup>2</sup> regulates, *inter alia*, linking practices for privacy concerns. This is beyond the scope of this essay.

There is also a *sui generis* database protection right that has been the subject of scrutiny in relation to linking activities that extract or re-utilise the contents of a database.<sup>3</sup> This essay does not seek to address that particular issue.

Even within the area of linking in relation to the public communication right, certain delimitations are necessary. Much of the debate has revolved around whether or not a link can constitute an ‘act of communication’ in the first place. This is mainly a result of

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<sup>1</sup> Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>2</sup> Case C-131/12 *Google v González*.

<sup>3</sup> Case C-202/12 *Innoweb*.

disagreements regarding whether an ‘act of communication’ requires actual transmission of the work. In essence, a link does not transmit the work that it refers to. However, in the EU, it is now established that linking to a copyright protected work *is* an act of communication. While this is controversial, it will not be discussed in any great lengths, but generally accepted as a fact.<sup>4</sup> Instead, the focus is on the concept of public.

Furthermore, the rightholder’s public communication right is separate from his right of reproduction. This essay does not concern itself with links in relation to any potential reproduction of the content. Neither will there be any specific discussion about the provision of links resulting in indirect liability, such as contributory or vicarious liability to infringement.

Finally, as far as possible, the discussion aims to cover all different types of links. The CJEU has adopted a neutral approach to different types of links (at least for manually activated links), which means including so called hyperlinks and inline links, as well as framing. Explanations will be provided below.

## **1.4 Method and material**

This essay explains and interprets EU legislation. It does not purport to interpret international treaties. Oftentimes, EU directives on copyright are based on international treaties, and should be studied in the light of those treaties. However, while studying international treaties is therefore an inescapable part of this essay, this is not a result of any overarching ‘international legal method’. Rather, it is a result of an EU legal principle – that EU directives should be seen in the light of any underlying international treaties. Consequently, it is not incorrect to claim that this essay applies a ‘European legal method’. For the purposes of this essay, EU directives and other international treaties have only provided limited guidance. Instead, the discussion is built on the preliminary rulings of the CJEU. As for Member States’ domestic legal regulation of links, the few cases that are mentioned only serve to highlight some general approaches to the regulation of links prior to recent CJEU case law.

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<sup>4</sup> See section 4.3.2 for a brief discussion.

In many respects, CJEU rulings on linking have been frustratingly ambiguous. Hence, there have been significant differences of opinion between commentators on many issues. Therefore, this essay is also an effort to understand and highlight different issues, viewpoints and solutions. Considering the many remaining uncertainties, the author's own opinions will be provided. However, the aim has been to maintain a neutral and objective approach towards unanswered questions. While respecting the need for protection of intellectual property rights, one must also consider the interests of users.

There is also a technical aspect. It will be made apparent that the applicability of the new public criterion depends on the technical means of communication. Furthermore, a basic understanding of different types of links makes the essay easier to understand. Because of this, the legal discussion is preceded by a descriptive technical part. For these technical descriptions, Wikipedia has partly been used. Certain readers might find this provoking. However, while unsuitable for legal guidance, it is submitted that Wikipedia can often be an adequate source for finding factual information. Still, it is also accepted that one must be cautious. Therefore, as far as possible, alternative sources have been used.

Regarding the terminology, some clarifications should be provided. In general, the term link is used, meaning all types of manually activated links. This is appropriate, as recent developments indicate neutrality towards different types of links, but perhaps not automatically activated links. Also, the authorised communication of a work is referred to as the 'original communication' or 'initial communication'. An unauthorised communication of that work is referred to as a 're-communication' or 'retransmission'.

Finally, I would like to bring particular attention to Johan Axham's *Internet Linking and the Notion of "New Public"* and Alexander Tsoutsanis' *Why copyright and linking can tango*, as well as several interesting linking-related blog posts in The IPKat, that have been particularly helpful.

## **1.5 Outline**

There are five chapters. *Chapter 2* puts linking in its technical context, and presents the potential implications of links. *Chapter 3* presents the legal regulation of links, which

includes suggested approaches as well as the approach eventually adopted by the CJEU. It will be made apparent that the decisive criterion is the occurrence of a new public. Consequently, in *chapter 4*, the new public criterion is put into its legal context and fully explored. Finally, *chapter 5* discusses and analyses the new public criterion and its suitability in relation to links and internet communications. The author's own opinions and conclusions will partly be provided throughout the essay. However, these conclusions will converge into a final discussion in chapter 5.

## 2 ‘Linking’ and its implications

### 2.1 Background

To be able to discuss the regulation of links, it is necessary to understand the fundamentals of the underlying technology. Later in this essay, it will be made apparent that the application of the new public criterion is sensitive to the *technical means* of a communication, as well as to any *access restrictions* put on the initial communication. Also, different types of links may entail different potential implications. The following technical explanations are therefore motivated.

### 2.2 Linking in a technical context

#### 2.2.1 The internet and the web

The internet is ‘a global system of interconnected computer networks that use the standard internet protocol suite (TCP/IP) to link several billion devices worldwide. It is an international *network of networks*’.<sup>5</sup> In turn, the internet allows the use of the World Wide Web (WWW, w3, or the ‘web’), an information retrieval service that offers access to interlinked documents that are connected by hypertext or hyperlinks. Stemming from the late 1980s, and popularised in the following decade, the web allows users, through web browsers (such as Internet Explorer), to view and navigate between documents (such as websites) easily.<sup>6</sup>

Typically, web navigation (*i.e.* ‘surfing the web’) is done by following various kinds of links. Consequently, the position of links – in the context of the internet and the web – is central. Linking constitutes a cornerstone of the web, making its navigation simple and fast.<sup>7</sup> The possibility of providing links has even been considered a way of exercising the right of free speech.<sup>8</sup>

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<sup>5</sup> Wikipedia: Internet (e-source).

<sup>6</sup> Encyclopaedia Britannica: World Wide Web (WWW) (e-source).

<sup>7</sup> Westman, p. 800.

<sup>8</sup> Bently et al, p. 1; Berners-Lee (2) (e-source).

## 2.2.2 Different types of links

Links are actions within HTML, the most common language for writing websites.<sup>9</sup> Technically, a link is a reference to the location of data that can be easily followed. Generally, this is done by clicking the link, but there are also links that are activated automatically.<sup>10</sup>

There are generally considered to be two main branches of links, *hyperlinks* and *inline links*.<sup>11</sup> The most basic hyperlink refers the user to the homepage of a website upon clicking the link. While there is no consensus on the naming of these types of links, I will refer to them as a ‘simple links’.<sup>12</sup> Here is an example: [www.jur.lu.se](http://www.jur.lu.se). A variant of the simple link, which is sometimes treated separately, takes the user to a specific destination on a website containing copyright protected content such as a specific article, video or sound recording. It may also refer the user straight to a pop-up window, typically giving him the options to ‘Run or Save’ the file. These links are generally called ‘deep links’.<sup>13</sup> Here is an example: <http://en.wikipedia.org/wiki/Internet>. While deep links are oftentimes considered different from simple links, the technical process is similar. Also, the homepage of a website will often contain copyright protected content, which can make the difference between simple links and deep links negligible.<sup>14</sup>

Inline linking, alternatively embedded linking, refers to the situation where one website (the linking website) uses a linked object from another website, such as an image or a video clip. That content then appears on the linking website, but without any permanent reproduction taking place. The URL (web address) of the linking website, instead of the address of the targeted website, is still shown in the address field at the top of the browser.<sup>15</sup>

In relation to this, the act of *framing* can be considered separately. When one clicks a framed link, the targeted website is shown ‘within frames’, but still incorporated in the same window as the linking website. Similarly to inline links, this may cause confusion

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<sup>9</sup> Westman, p. 803.

<sup>10</sup> Wikipedia: Hyperlink (e-source).

<sup>11</sup> Westman, p. 803; ALAI Report (1), p. 153.

<sup>12</sup> ALAI Report (1), p. 153. Alternative terms are ‘normal links’ and ‘reference links’.

<sup>13</sup> Rosén, p. 163; ALAI Report (1), p. 153.

<sup>14</sup> Westman, p. 808.

<sup>15</sup> Honkasalo, p. 259; Tsoutsanis, p. 497.

regarding the origin of the linked content, especially since it is the URL of the linking website that is typically shown in the address field.<sup>16</sup>

Importantly, links do not permanently reproduce the source content – the content on the other end of the link.<sup>17</sup> Both hyperlinks and inline links are dependent on the availability and accessibility of the source content. If that content is removed, or access restricted in any way, a link to it will normally fail.

### **2.2.3 Access restrictions**

Since CJEU case law has suggested that links that circumvent restrictions may receive separate treatment, it is relevant to mention some ways of restricting linking techniques and access to content in general.

Common access restrictions include paywalls, in conjunction with log-in requirements, as well as territorial restrictions (*i.e.* limiting access to the users in a country or region). Normally, such restrictions should hinder undesired linking techniques. However, this may not always be effective, as some linking practices may circumvent access restrictions.<sup>18</sup>

Finally, simple contractual restrictions can occur, *e.g.* requiring the user to agree to the website's terms of use in order to proceed. While such contractual restrictions do not restrict access in any technical way, they *may* still be relevant in determining which public the rightholder took into account when authorising a communication. There may therefore be an argument that contractual restrictions as such can affect whether or not the content is to be considered 'freely accessible'. This will be further explored at a later stage.

## **2.3 Implications of links**

Despite the essential position of links to ensure the normal functionality of the web, they may also entail potentially negative implications. The reasons for limiting linking techniques may not be obvious to the reader, and it is therefore necessary to list a few.

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<sup>16</sup> Berners-Lee (1) (e-source); Garrote, p. 185.

<sup>17</sup> Garrote, p. 185: Much internet usage, such as the act of browsing websites, does create *temporary* copies in the computer's RAM (random-access memory). This potential issue is not covered in this essay.

<sup>18</sup> See still pending Case C-279/13 *C More Entertainment*, where unauthorised links were provided to live streams of ice hockey matches, circumventing a paywall.

Initially, the copyright holder will object to links leading to illicit content – *i.e.* content that was uploaded without the copyright holder’s authorisation in the first place. Of course, removing the link will not remove the unauthorised reproduction. Nevertheless, removing the link can be more effective, as it hides the content from the public eye.<sup>19</sup> This may be particularly relevant in the case of so called ‘link farms’ and aggregator sites – websites providing a multitude of links to illicit content such as torrent files to pirated content or links to live streams of sports matches, but not providing the actual works. Furthermore, even if such websites link to legally uploaded content, the behaviour may generate undue profits for the owner of the linking website, upsetting the rightholder.<sup>20</sup>

Another commonly stated argument, relating in particular to deep links, inline links and framing, is that such practices circumvent homepages, often the main place for advertisements – the main source of income for many websites.<sup>21</sup> Conversely, it can be argued that it is the operator’s own responsibility to place the advertisements not only on the homepage, but all across the website or at its most popular pages.<sup>22</sup> Still, website operators preferring to limit advertisements to the homepage – e.g. for layout reasons – may feel they have a valid interest in restricting links that evade it.

In relation to this, another potential conflict is that the origin of the content subject to the link can be uncertain for the end user. In many cases, this will be a non-issue as the origin of the content is indisputable, such as when a deep link takes the user to an article on a newspaper’s website with its logo and the author’s name clearly displayed. However, linking techniques also create situations where the origin of the content may be ambiguous. Inline links can selectively embed the targeted content on the linking website, making its origin uncertain, and deep links may take the user straight to a ‘Run or Save’ pop-up window, causing similar confusion. In these cases, the end user may be unaware of, and uninterested in, the origin of the content, and may believe it stems from the linking website. The rightholder may then prefer links that take the user directly to the website’s homepage.

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<sup>19</sup> This is comparable to the reasoning in the right to be forgotten judgement (Case C-131/12 *Google v González*).

<sup>20</sup> Tsoutsanis, p. 508.

<sup>21</sup> Bainbridge, p. 282; Ebersöhn, p. 73.

<sup>22</sup> Bainbridge, p. 285.



Consequently, it is not difficult to envisage situations where rightholders will object to linking techniques. On the other hand, rightholders will often encourage links to their websites, as they also constitute a way of attracting desired traffic. Therefore, too strict of an approach towards linking would not necessarily be in the interest of every rightholder.

# 3 The regulation of linking

## 3.1 Background

Until recently, there was no harmonised regulation of linking in the EU. This is perhaps surprising considering the substantial discussion regarding the legal status of links since the beginning of the 2000s, often concerning whether or not linking can amount to communication, or making available, to the public within Article 3(1) of the InfoSoc Directive. The concepts of ‘communication’ and ‘making available’ to the public will be further elaborated in Chapter 4 of this essay. However, at this stage, it is already useful to present Article 3 in its entirety, which reads as follows:

*‘Article 3*

**Right of communication to the public of works and right of making available to the public other subject-matter**

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 fixation 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.<sup>23</sup>

Consequently, the debate has created two camps. On one hand, there are those who argue that links are not relevant acts from a copyright perspective and that providing links should not entail direct liability. The proponents of this view sometimes compare links with footnotes, simply being references to the location of content regardless of that content being illicit or not. Furthermore, it has been argued that communication requires actual *transmission* of a work. As a link does not transmit a work, it is not an act of communication.<sup>24</sup>

On the other hand, it has been contended that transmission is not a requirement for establishing an act of communication. Proponents of this view have pointed out that the concept of ‘making available’ expands the notion of ‘communication’ so that it does not require actual transmission of a work, but simply requires that a work is offered and, at least indirectly, made available through a link. Hence, from this viewpoint, it is possible to consider linking as an act of communication within Article 3(1).<sup>25</sup> It has also been pointed out that links are often more than just ‘footnotes’, but can operate as ‘shortcuts’ to viewing content. For example, embedded links effectively use a linked object as a part of a document.<sup>26</sup>

There have been a multitude of domestic cases in the Member States of the EU, such as *Shetland Times v Wills*<sup>27</sup> (Scotland) *Paperboy*<sup>28</sup> (Germany), *napster.no*<sup>29</sup> (Norway), and *MP3*<sup>30</sup> (Sweden). The outcomes have varied. For example, in *Shetland Times v Wills*, stemming from 1996, an interim interdict was granted on behalf of The Shetland Times when a competing newspaper, The Shetland News, created a website that provided deep links, in conjunction with headlines, to articles of The Shetland Times. However, the

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<sup>23</sup> Italics added.

<sup>24</sup> See for example Bently et al, p. 2-3. Note that the authors (European Copyright Society) remained open to indirect liability through providing hyperlinks to illicit content.

<sup>25</sup> See for example ALAI Report (1); Tsoutsanis, for comprehensive discussions.

<sup>26</sup> Tsoutsanis, p. 497.

<sup>27</sup> *Shetland Times v. Jonathan Wills and Zetnews*, interim interdict, October 24, 1996, Court of Session, Edinburgh [1997] FSR 604.

<sup>28</sup> BGH I ZR 259/00, Urteil vom 2003-07-17.

<sup>29</sup> Høyesteretts dom 2005-01-27, HR-2005-133-A-Rt 2005-41.

<sup>30</sup> NJA 2000 s. 292.

case was finally settled out of court.<sup>31</sup> In *Paperboy*, the German Bundesgerichtshof adopted a more permissive approach towards hyperlinks, comparing them with footnotes – and not relevant acts in copyright law.<sup>32</sup> In *napster.no*, the Norwegian Høyesterett was similarly sceptical of regarding links as communications to the public (though not completely excluding the possibility).<sup>33</sup> Conversely, in *MP3*, Sweden's Högsta Domstolen ruled the provision of deep links as being a communication to the public.<sup>34</sup>

Considering the different outcomes in domestic cases, the lack of harmonisation in Europe may be regarded as unfortunate, especially bearing in mind the inherent cross-border nature of internet communications. This has led to extensive discussion and differences of opinion regarding the legal status of links. Through Article 3(1) of the 2001 InfoSoc Directive, there has been legislation that could potentially clarify the issue of links. Nevertheless, it was not until 2014 that a harmonised legal status of links began to crystallise through several referrals of cases to the CJEU.

Following lengthy discussion, several CJEU cases relating to linking activities suddenly emerged, starting with *Innoweb*,<sup>35</sup> then *Svensson*<sup>36</sup> – the first CJEU case concerning clickable links in relation to the public communication right, and copyright protected content in general. This was followed by the Court's order in *BestWater*,<sup>37</sup> while another reference, *C More Entertainment*,<sup>38</sup> is in the pipelines.

## 3.2 Case C-466/12 *Svensson*

### 3.2.1 Background

In a much-anticipated judgement, *Nils Svensson and Others v Retriever Sverige*, the CJEU responded to some questions regarding the legal status of links, while also raising new ones. Remarkably, the judgment was not preceded by an Opinion of the Advocate-

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<sup>31</sup> See *Shetland Times v Wills*; Garrote, p. 188.

<sup>32</sup> BGH I ZR 259/00, Urteil vom 2003-07-17.

<sup>33</sup> Høyesteretts dom 2005-01-27, HR-2005-133-A-Rt 2005-41. See for comparison Westman, p. 815-816; Honkasalo, p. 260.

<sup>34</sup> NJA 2000 s. 292.

<sup>35</sup> Case C-202/12 *Innoweb*. This case related to the *sui generis* database protection right.

<sup>36</sup> Case C-466/12 *Svensson*.

<sup>37</sup> Case C-348/13 *BestWater*.

<sup>38</sup> Case C-279/13 *C More Entertainment*.

General, a surprise as this step can primarily be ignored only when the case does not concern a new point of law.<sup>39</sup> In fact, *Svensson* was one of several recent copyright related cases where the Advocate-General was not consulted, the reason remaining uncertain.<sup>40</sup> Considering the significant differences of opinion regarding the legal regulation of linking, both before and after the judgement was handed down, foregoing the Advocate-General's opinion is very surprising.

In the case, Swedish news aggregator website 'Retriever' was providing users with clickable hyperlinks to news articles (*i.e.* deep links) uploaded on other websites. Amongst the linked content were articles on the *Göteborgs-Posten* website, where the articles were indisputably freely accessible and uploaded with the rightholders' authorisation. The applicants, rightholders Nils Svensson and fellow journalists, contended that the linking activities to their articles constituted intervening communications to the public as it amounted to 'making available' of the copyrighted works as expressed in Article 3(1) of the InfoSoc Directive.

Conversely, Retriever contended that the provision of links to the works already communicated to the public on the original website did not constitute an act liable to infringe copyright as linking, in any case, did not amount to transmission as allegedly required by Article 3(1). In other words, Retriever did not consider there to be an intervention in the authors' exclusive public communication right.

Consequently, the main question referred was, in essence, whether the unauthorised provision of clickable links to protected works constitutes an intervening act of communication to the public within Article 3(1) of the InfoSoc Directive.

### **3.2.2 Judgement and comments**

Initially, the Court clarified that the concept of communication to the public involves two cumulative steps. Firstly, an 'act of communication' must be established and, secondly, that communication must be made to a 'public'.<sup>41</sup>

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<sup>39</sup> Protocol (No 3) on the Statute of the Court of Justice of the European Union, Article 20.

<sup>40</sup> Rosati, p. 619.

<sup>41</sup> Case C-466/12 *Svensson*, paragraph 16.

As for there being an act of communication, it was stated that this must be construed broadly in order to ensure a high level of protection for copyright holders. Without further ado, the Court then concluded that since it is sufficient that a work is made available so that the public may access it, regardless of whether they actually do so, providing clickable links must be considered ‘making available’ and, therefore, also an ‘act of communication’ within Article 3(1) of the InfoSoc Directive as such links afford users direct access to works.<sup>42</sup> Consequently, it was established that links to copyright protected works *do* constitute ‘acts of communications’, and that a communication does not require actual transmission. Still, the lack of an elaborated discussion from the Court supporting this crucial conclusion is truly remarkable.<sup>43</sup>

Less controversially, it was also held that Retriever’s provision of links meant that the works were communicated to a ‘public’, a concept that refers to ‘an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons’.<sup>44</sup>

However, the Court further held, with reference to settled case-law, that since Retriever’s re-communication used the same technical means as the initial communication of the works, it must also be directed to a new public, meaning a public that was not taken into account by the copyright holders when the initial communication was authorised.<sup>45</sup> Consequently, as the articles had been made freely accessible without restrictions on the *Göteborgs-Posten* website, the public that had been taken into account by that initial communication was considered to consist of all potential visitors. Therefore, when Retriever provided links to the articles, it was a communication to a public, but not to a *new* public.<sup>46</sup> The wording of the CJEU fuels speculation that the new public criterion is only applied when the re-communication uses the same technical means as the initial communication. Also, it appears that different linking techniques should be considered as using the same technical means – ‘the internet’. Hence, it may

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<sup>42</sup> Case C-466/12 *Svensson*, paragraphs 17-20.

<sup>43</sup> Some commentators asked for clarifications regarding why linking amounts to transmission of the work (see for example Arezzo, p. 539). However, the judgement rather infers that actual transmission is not a requirement.

<sup>44</sup> Case C-466/12 *Svensson*, paragraphs 21-23.

<sup>45</sup> Case C-466/12 *Svensson*, paragraph 24.

<sup>46</sup> Case C-466/12 *Svensson*, paragraphs 25-27.

be expected that a new public criterion will always be used when both the initial communication and the re-communication are made through internet technology.

Furthermore, though not being practiced by Retriever in the case, it was held as irrelevant that the clicking of a link presents the work in such a way as to give the impression that it is appearing on the site on which that link is found. Even in such cases, there is no ‘new public’, as long as there is an authorised and freely accessible version of the work on another website.<sup>47</sup> This seems to mean that inline linking, such as the embedding of content, and framing receive no separate treatment from hyperlinks.

Finally, however, when a link allows users to *circumvent restrictions* placed on the initial communication, that link must be considered communicating the work to a ‘new public’. Particularly, this should be the case when the work is no longer available on the original website where it was lawfully uploaded, or when access has subsequently been restricted on that website while being available on a another website without authorisation.<sup>48</sup>

This final statement causes confusion. If the work is no longer available on the original website, or access has been properly restricted there, any link to it will typically fail. In the efforts to make sense of this paragraph, some have concluded that even linking to unauthorised third-party reproductions of a work is permissible, but only as long as an authorised version of that work is also freely accessible on the original website as well.<sup>49</sup> After all, if one strictly applies the new public criterion, a link to an unauthorised third-party version of a work does not communicate the work to a new public, as long as the initial communication is also freely accessible on another webpage.<sup>50</sup> However, it should be noted that others interpreted the passage as meaning that linking to unauthorised or restricted communications of a work is not permissible.<sup>51</sup>

It also remains uncertain what is to be considered ‘restrictions’. Access limitations such as paywalls and territorial restrictions are likely to fall within the concept. Whether

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<sup>47</sup> Case C-466/12 *Svensson*, paragraphs 29-30.

<sup>48</sup> Case C-466/12 *Svensson*, paragraph 31.

<sup>49</sup> Arezzo, p. 545-546; Husovec: CJEU: Hyperlinks Are Copyright Free. Are They Really? (e-source).

<sup>50</sup> It should be noted that the third-party version may be an unauthorised reproduction.

<sup>51</sup> Bellan; Rosati: *Post-Svensson stress disorder #2: What does “freely available” mean?* (e-source).

contractual restrictions are covered, such as agreeing to terms of use on a website's homepage, was not clarified by the Court's judgement.<sup>52</sup>

Consequently, the Court's position, in particular regarding its position on the legality of the source content, and what constitutes 'freely accessible' content, remained somewhat ambiguous. Regarding this, the case of *BestWater* provided an opportunity to make further clarifications.

### **3.3 Case C-348/13 *BestWater***

#### **3.3.1 Background**

On 21 October 2014 the CJEU handed down its decision in *BestWater*, a case that had been left pending awaiting a final decision in *Svensson*. Notably, the *BestWater* decision was handed down through a 'reasoned order' in accordance with Article 99 of the Court's Rules of Procedure. According to that provision, this can only be done when the referred question is identical to questions in previous rulings, when the reply can clearly be deduced from previous case law, or otherwise where the answer 'admits of no reasonable doubt'.<sup>53</sup> Consequently, the Court must have considered its judgement in *Svensson* as an established precedent in determining the public communication right in relation to linking practices.

However, the facts in *BestWater* differed from *Svensson*. In the case, the copyright holder, BestWater International, had uploaded an authorised and freely accessible promotional video on its own website. Subsequently, according to BestWater, a third-party posted an unauthorised reproduction of the same video on YouTube.<sup>54</sup> However, neither the origin, nor the illegality of the YouTube version were established as facts. Later, a competitor to BestWater provided a link to the allegedly unauthorised YouTube version by *embedding* the video on its own website.<sup>55</sup> The question referred to the CJEU was:

'Does the embedding, within one's own website, of another person's work made available to the public on a third-party website, in circumstances such as those in the

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<sup>52</sup> Headdon, p. 665.

<sup>53</sup> Rules of Procedure of the Court of Justice, Article 99; Case C-348/13 *BestWater*, paragraphs 12-13.

<sup>54</sup> Case C-348/13 *BestWater*, paragraph 4.

<sup>55</sup> Case C-348/13 *BestWater*, paragraph 5.



main proceedings, constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29 ... insofar as the work concerned is neither directed at a new public nor communicated by using specific technical means that differ from that used for the initial communication?'

### 3.3.2 Judgement and comments

The facts in *BestWater* gave the CJEU the opportunity to discuss embedded linking in general. More importantly, there was also an opportunity for the Court to clarify its position on the legality of the source content that is being communicated through the link. After all, since the original video was still freely accessible on BestWater's website, it could be argued that linking to the allegedly unauthorised YouTube version did not communicate the work to a 'new public'.

Following its reasoning in *Svensson*, the Court initially concluded that embedded links should be treated the same way as hyperlinks. As long as there was no new public, there was no intervention in the public communication right. Hence, the fact that the case concerned embedding techniques did not change the Court's position.<sup>56</sup> Consequently, it was confirmed that different types of linking techniques are not to be considered 'different technical means'. This came as no surprise, as the CJEU previously had considered 'the internet' as being the common technology for linking activities.

However, the Court remained ambiguous regarding the legality of the source content, seemingly only considering a situation where the linking is directed to lawful source content. This author submits the following translation:

'Indeed, when and as long as the work is freely accessible on the website to which the link refers, it must be considered that, *when the rightholders have authorised this communication*, the public taken into account consists of all internet users.'<sup>57</sup>

According to some commentators, this passage meant that the Court made a new rule – that freely accessible content should generally be *assumed* to be authorised.<sup>58</sup> If that is

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<sup>56</sup> Case C-348/13 *BestWater*, paragraphs 14-17.

<sup>57</sup> Italics added. Case C-348/13 *BestWater*, paragraph 18: 'En effet, dès lors que et tant que cette œuvre est librement disponible sur le site vers lequel pointe le lien Internet, il doit être considéré que, lorsque les titulaires du droit d'auteur ont autorisé cette communication, ceux-ci ont pris en compte l'ensemble des internautes comme public.'

correct, the issue of the legality of the source content would be solved. However, in this author's opinion, the passage is *dependent* on the fact that the rightholder authorised the specific communication to which the link refers. If that is correct, *BestWater* does not provide any new guidance regarding the status of links to unauthorised content. It only provides that embedded links are to be treated the same way as hyperlinks. This would also explain why the Court decided to hand down its ruling through a fast-track 'reasoned order'.

Therefore, while it is certain that one may embed content from an *authorised source* as long as there is no new public, it remains unclear if this also applies if one links to content from an unauthorised third-party source, as long as an authorised version is still freely accessible on another website. It is also possible that one can link to a freely accessible source in general, regardless of the legality of the source content. The lack of clarification is unfortunate, but probably a result of factual uncertainties regarding whether the YouTube version of BestWater's video was authorised or not.<sup>59</sup>

Regardless of this, the CJEU's judgements in *Svensson* and *BestWater* both turned on the application of the new public criterion. This has garnered a mixed reaction of praise and criticism. Hence, in the following chapter, the new public criterion will be explained.

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<sup>58</sup> Husovec, *What Does BestWater Decision Mean For Future of Embedding?* (e-source); Rosati; *That BestWater order: it's up to the rightholders to monitor online use of their works* (e-source).

<sup>59</sup> Admittedly, one of the reasons for the uncertainties may be owing to the fact the order, at the time of writing, only is available in French and German, leading to a great variety of English translations (including the one submitted by this author).

# 4 Putting ‘new public’ in communication to the public

## 4.1 Background

In this chapter, the concept of ‘new public’ will be put into its legal context.

Particularly, this means examining Article 3 of the InfoSoc Directive, as well as case law relating to that provision. Also, it means presenting the international treaties that initially introduced the right of communication to the public, and, at a later stage, the closely related right of ‘making available’ to the public.

The copyright holder’s right of communication of the work to the public is not new. In 1847, French composer Ernest Bourget found success in French courts after he had refused to pay his café bill since the café band played his music without consent or compensation.<sup>60</sup> Technological developments have since expanded the public communication right, and it is clearly no longer limited to the actual live performance of a work. Terrestrial broadcasting of programs and playing sound recordings are acts of ‘communication’. Providing online streams of videos or sounds recordings, as well as uploading literary works, can also be ‘communications’.<sup>61</sup> Furthermore, through *Svensson*, it is established that providing a link to a protected work is a ‘communication’ of that work.

A public performance or communication right has long been present in international copyright treaties, introduced in the Berne Convention and further developed in the two WIPO Internet Treaties of 1996, the TRIPS Agreement and several EU directives. However, not one of these treaties or directives defines what constitutes an ‘act of communication’, or the ‘public’.

Superficially, the ‘new public criterion’ appears to be a construct of CJEU case law. However, it can perhaps be argued that it has support in international treaties and guidelines. As the public communication right as such is based on those treaties, it is

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<sup>60</sup> Keane, p. 165.

<sup>61</sup> Ricketson & Ginsburg, p. 703-704.

necessary to investigate its legal context, as well as any possibility that the new public criterion may not comply with underlying international treaties.

## 4.2 Legal context

Under international law, the copyright holder's public communication right stems back to the Berne Convention,<sup>62</sup> entering into force in 1886. The Berne Convention, which was subsequently revised in 1896, 1908, 1928, 1948, 1967, 1971, and amended in 1979, relates to literary and artistic works – including films – and constitutes the cornerstone in copyright law worldwide.<sup>63</sup> The Berne Convention was complemented by a non-binding guide in 1978.<sup>64</sup> In the Berne Convention, a public communication right, together with the neighbouring right of public performance, can be found in Article 11, 11*bis*, 11*ter* and Article 14. Hence, the public communication right in the Berne Convention is spread out across several articles. This makes its coverage, both regarding the subject matter and the form of transmission, incoherent and hard to overview.<sup>65</sup>

For the purposes of this essay, Article 11*bis* is of particular importance, targeting broadcasting, and some neighbouring forms of transmission, of literary and artistic works, initially introduced through the Rome Revision in 1928.<sup>66</sup> However, as the Berne Convention was last amended in 1979 it never specifically envisioned communications through internet technology and it evidently became clear that a more purposeful framework was needed. Nevertheless, Article 11*bis* has been frequently referred to in CJEU case law in relation to the new public criterion.

As for the EU, the Convention is binding upon Member States as a result of Article 9(1) of the TRIPS Agreement, providing that members shall comply with Articles 1 through 21 of the Berne Convention.<sup>67</sup>

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<sup>62</sup> The Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971).

<sup>63</sup> Waelde et al, p. 33-34.

<sup>64</sup> WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works (1978).

<sup>65</sup> Ricketson & Ginsburg, p. 717.

<sup>66</sup> Ricketson & Ginsburg, p. 722; WIPO Guide to the Berne Convention (1978), p. 66.

<sup>67</sup> In turn, the TRIPS Agreement is binding upon EU Member States through Council Decision 94/800/EC.

As an effort to adjust copyright protection to the digital age, particularly in order to prevent the increasing problem of piracy, two WIPO treaties were adopted in 1996, the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).<sup>68</sup> The latter introduced ‘making available’ in Article 8, as a sub-category to communication to the public. This was considered one of the main achievements of the WCT.<sup>69</sup> Particularly, the introduction of ‘making available’ alongside ‘communication’ was meant to catch on-demand technologies as there were concerns that the concept of ‘communication’ would otherwise be restricted to traditional scheduled broadcasts to passive recipients (‘push’ technologies), but not more interactive on-demand services such as streaming at the user’s time of choosing (‘pull’ technologies).<sup>70</sup> While the Berne Convention did not expressly exclude the possibility of members extending the public communication right to on-demand transmissions, it was highly uncertain whether the provisions put a requirement on members to do so.<sup>71</sup> Hence, Article 8 of the WCT provides:

‘Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing 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 these works from a place and at a time individually chosen by them.’

Furthermore, in the agreed statements to the WCT, it is said in relation to Article 8:

‘... the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention ...’<sup>72</sup>

This additional declaration was meant to relieve concerns from telecommunications organisations and internet service providers. Simply providing the technical infrastructure that enables infringing communications should not incur liability.<sup>73</sup>

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<sup>68</sup> Bainbridge, p. 269. See also the 15<sup>th</sup> recital in the preamble to the InfoSoc Directive.

<sup>69</sup> Tsoutsanis, p. 499; Axham, p. 119-120.

<sup>70</sup> Mysoor, p. 168.

<sup>71</sup> Ricketson & Ginsburg, p. 742, 746.

<sup>72</sup> Agreed Statements concerning Article 8 to the WIPO Copyright Treaty 1996.

The two WIPO treaties were approved in the EU in 2000.<sup>74</sup> While some of the addressed issues had already been covered in previous EU legislation, certain new introductions paved the way for the InfoSoc Directive. In the EU, ‘communication to the public’ has moreover been introduced in several directives related to copyrights, such as the Rental Right Directive,<sup>75</sup> the Satellite Directive<sup>76</sup> and the Related Rights Directive.<sup>77</sup>

Here, the focus is on the InfoSoc Directive. Regard should be had to the fact that the harmonisation of copyright is based on a high level of protection, being ‘crucial to intellectual creation’.<sup>78</sup> However, harmonisation should also strive to achieve a fair balance between the rights and interests of rightholders and users,<sup>79</sup> balancing the ‘fundamental principles of law and especially property, including intellectual property, and freedom of expression and the public interest’.<sup>80</sup> These two crucial concepts – high level of protection and fair balance – must be kept in mind, and will be returned to later in this essay. However, the recitals include additional, similarly vague, statements. For example, the copyright rules shall respond adequately to ‘economic realities such as new forms of exploitation’.<sup>81</sup> There is also an overarching goal to foster the production and dissemination of creative works.<sup>82</sup> Contrary to the Berne Convention, Article 3(1) is phrased neutrally both regarding the subject matter covered and the form of dissemination.

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<sup>73</sup> Ricketson & Ginsburg, p. 745.

<sup>74</sup> Council Decision 2000/278/EC.

<sup>75</sup> Directive 2006/115/EC of the European Parliament and of the Council on 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

<sup>76</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

<sup>77</sup> Directive 2006/116/EC of the European Parliament and of the Council on 12 December 2006 on the term of protection of copyright and certain related rights.

<sup>78</sup> See the 9<sup>th</sup> recital in the preamble to the InfoSoc Directive.

<sup>79</sup> See the 31<sup>st</sup> recital in the preamble to the InfoSoc Directive.

<sup>80</sup> See the 3<sup>rd</sup> recital in the preamble to the InfoSoc Directive; Tsoutsanis, p. 495-496.

<sup>81</sup> See the 5<sup>th</sup> recital in the preamble to the InfoSoc Directive.

<sup>82</sup> See especially the 4<sup>th</sup> recital in the preamble to the InfoSoc Directive; Axham, p. 110-111.

## 4.3 Article 3 of the InfoSoc Directive – the concepts of ‘communication’, ‘making available’ and the ‘public’

### 4.3.1 A two-prong test

To investigate the relationship between linking, communication to the public and, eventually, the meaning of new public, the public communication right contained in Article 3 of the InfoSoc Directive will now be broken down in smaller parts. As held in *Svensson*, establishing an intervention in the public communication right consists of two steps. Firstly, a ‘communication’ must be established. Secondly, that communication must be made to a ‘public’.<sup>83</sup> As a qualification to this second step, there sometimes has to be a communication to a *new* public.

The right of communication to the public is a transferable, economic right, as opposed to a moral right. Its exploitation by the owner is a potential source of income.<sup>84</sup> In relation to this, Article 3(3) of the InfoSoc Directive expressly states that, unlike the owner’s distribution right, the public communication right is not subject to exhaustion after its initial exploitation. Each additional act of communication to the public must be authorised by the rightholder. This is developed in the recitals, where it is underlined that exhaustion should be limited to tangible goods and not to services or online services in particular.<sup>85</sup>

While ‘communication to the public’ is not further defined, it is clear that the meaning and scope of the concept should be given an autonomous interpretation throughout the EU.<sup>86</sup> The concept should also, unless a different intention has been expressed, be consistent across different directives.<sup>87</sup> Furthermore, the concept should, as far as possible, be interpreted in a consistent manner with international law.<sup>88</sup>

Considering the fast-changing landscape of the information age, the boundaries of the public communication right in the EU have not been entirely certain, though several recent CJEU rulings are starting to give clarity. Generally, the communication right has

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<sup>83</sup> Case C-466/12 *Svensson*, paragraph 16.

<sup>84</sup> Waelde et al, p. 119.

<sup>85</sup> See the 29<sup>th</sup> recital in the preamble to the InfoSoc Directive.

<sup>86</sup> Case C-306/05 *SGAE*, paragraph 31 and there cited case law.

<sup>87</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, paragraph 188.

<sup>88</sup> Case C-61/94 *Commission v Germany*, paragraph 52; Case C-341/95 *Bettati*, paragraph 20.

been interpreted broadly in favour of the right holder.<sup>89</sup> Indeed, this is also expressly stated in the 23<sup>rd</sup> recital in the preamble to the InfoSoc Directive.

‘Making available’ is not a *sui generis* right, but should rather be considered as a subset to, or a specified form of, communication. Consequently, making available *expands* the notion of communication.<sup>90</sup> Before *Svensson*, some, including the European Copyright Society (ECS), argued that hyperlinking could not be considered an act of communication, primarily claiming that ‘transmission’ of a work is a pre-requisite for communication.<sup>91</sup> However, this approach was criticised for not fully investigating the concept of making available, which does not necessarily require actual transmission.<sup>92</sup> Conveniently, the relationship between ‘communication’ and ‘making available’ can be exemplified by the case of linking.

#### **4.3.2 Something about linking as ‘making available’**

While this essay mainly purports to discuss the decisive concept of ‘new public’, something should be mentioned about the reasons for considering why linking amounts to the ‘making available’ of content in the first place. Through *Svensson*, it is now a fact that at least some linking techniques constitute ‘making available’ of the content to which it refers. Hence, linking can be an act of communication. The lack of motivation behind this conclusion by the CJEU has been criticised and further elaboration would have been welcomed. That said, the conclusion that linking can be ‘making available’ is not necessarily out of line.

The ECS, envisioning that the CJEU might conclude that transmission is not necessary in order to establish an act of communication, argued that a hyperlink, regardless of that, does not communicate a ‘work’ but rather communicates the *location* of a work.<sup>93</sup> Hence, while a hyperlink sometimes facilitates access to a work, or increases the work’s visibility on the web, it could be argued that it does not amount to the ‘making available’ of that work. The work is ‘available’ regardless of the hyperlink’s existence, until the original communication is taken down or access restricted.

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<sup>89</sup> Mysoor, p. 166-167.

<sup>90</sup> Axham, p. 119; Arezzo, p. 531.

<sup>91</sup> Bently et al, p. 2.

<sup>92</sup> Tsoutsanis, p. 498.

<sup>93</sup> Bently et al, p. 11-12.



So, why is it then that linking amounts to ‘making available’? The CJEU’s succinct approach in *Svensson* can be summed up as follows:

- An ‘act of communication’ must be construed broadly, in order to assure a ‘high level of protection’ for copyright holders.
- A clickable link offers users *direct access* to works on another website.
- It is sufficient that the work is made available to a public that *may* access it, regardless of whether they actually do so. Actual transmission of the work is not required.<sup>94</sup>

Despite this brief motivation, as well as opposition from some commentators, setting aside the requirement for actual transmission in order to establish a ‘communication’ of a work has support. Indeed, the introduction of ‘making available’, alongside ‘communication’, was originally *meant* to cover cases where actual transmission did not necessarily take place, but the works were simply *offered* and made *accessible* on-demand.<sup>95</sup> This position is confirmed by both old<sup>96</sup> and new<sup>97</sup> WIPO statements concerning the concept of ‘making available’, supporting the notion that it is the offering of access that is decisive. Moreover, it was supported by the EU Commission Proposal in relation to Article 3(1).<sup>98</sup>

Therefore, despite the limited motivation in *Svensson*, it must probably be accepted that always requiring actual transmission of a work in order to establish a ‘communication’, is outdated in our digital world. Offering access to the work is sufficient. Through *Svensson*, it is also established that a hyperlink generally offers access to a work, and is therefore an act of communication. Having said that, the decisive concepts of public and new public shall now be investigated.

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<sup>94</sup> Case C-466/12 *Svensson*, paragraphs 17-19.

<sup>95</sup> Tsoutsanis, p. 498-499; ALAI Report (1), p. 150.

<sup>96</sup> WIPO *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection for Literary and Artistic Works to be considered by the Diplomatic Conference*, p. 44, paragraph 10.10.

<sup>97</sup> WIPO *Copyright in the digital environment: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, p. 13, paragraph 56.

<sup>98</sup> Tsoutsanis, p. 500.

### 4.3.3 The ‘public’

A communication must be made to the ‘public’. As has already been stated, this concept has not been defined in the InfoSoc Directive or any underlying treaties. Nonetheless, the definition of ‘public’ should be given an autonomous and uniform interpretation throughout the Union.<sup>99</sup> Subsequently, CJEU case law has provided some clarity.

According to settled case law, the ‘public’ refers to an ‘indeterminate number of potential recipients and implies, moreover, a fairly large number of persons’.<sup>100</sup>

Emphasis should be put on the wording *potential* recipients. It is not decisive whether the potential recipients actually avail themselves of the opportunity to access the content.

Furthermore, in *SGAE*, a hotel that provided television services to its customers was considered to communicate the programs to a ‘public’ despite the fact that the amount of hotel visitors at one single moment was limited. As hotel customers come and go quickly, the cumulative effects were considered to amount to an indeterminate and fairly large number of people and therefore a communication to the ‘public’.<sup>101</sup> Hence, the public does not have to be gathered simultaneously. This may be particularly relevant in relation to selective websites providing hyperlinks to illicit content. Even if such websites only accept a limited amount of users at a time, this could still be seen as communications to a ‘public’, considering the cumulative effects.

This means, if one provides links that are freely accessible for all or many internet users, there is no doubt that this is a communication to a ‘public’, as the number of potential users is large and indeterminate. This was rightly confirmed in *Svensson*.

However, all usage of links cannot reasonably be considered to be communication to a ‘public’. A hyperlink posted in a private message, from one natural person to another, is clearly not communicated to a ‘public’. On the other hand, a hyperlink to copyrighted works posted on one’s Twitter ‘feed’, Facebook ‘timeline’, or blog – at least provided those pages are accessible to everyone and not restricted to ‘friends’ or ‘followers’ – can perhaps be considered communicated to a ‘public’. If the user’s Facebook page (or

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<sup>99</sup> Case C-306/05 *SGAE*, paragraph 31 and there cited case law.

<sup>100</sup> Case C-306/05 *SGAE*, paragraphs 37-38; Case C-466/12 *Svensson*, paragraphs 21-22.

<sup>101</sup> Case C-306/05 *SGAE*, paragraphs 37-39.

similar) is ‘friend-locked’, unauthorised communications may still be permissible as the work is not communicated to an indeterminate number of recipients.<sup>102</sup>

As a comparison, in another CJEU reference, *Lindqvist v Kammaråklagaren*<sup>103</sup>, the processing of personal data on a freely accessible website was considered not to benefit from the so called ‘household exception’<sup>104</sup> as that data had been made accessible to ‘an indefinite number of people’.<sup>105</sup> This was the case despite the fact that the content on the website was only meant to target, and most likely only attract, a limited number of visitors. Although the judgement concerned the processing of personal data, it supports the argument that the CJEU has adopted an approach of distinguishing public spaces from private spaces on the internet, depending on the accessibility and openness of the website.

## 4.4 The new public

### 4.4.1 Background

The concept that an intervening act of communication – in some circumstances – must be directed to a ‘new’ public in order to fall within Article 3(1) of the InfoSoc Directive cannot be directly read out from EU legislation or any other international treaties.

The new public criterion has been developed by the CJEU, but originally seems to stem from an extensive interpretation of Article 11*bis*(1) of the Berne Convention.<sup>106</sup> While not obvious from its wording, that provision may imply that the *technological means* of communication is of relevance when determining the applicability of the new public criterion. Indeed, it will emerge that this is the approach taken by the CJEU. Article 11*bis*(1) provides:

‘Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

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<sup>102</sup> See Ricketson & Ginsburg, p. 742-743 for a *comparable* reasoning.

<sup>103</sup> Case C-101/01 *Lindqvist*.

<sup>104</sup> Under the ‘household exception’, personal data of others can be processed by a natural person in the exercise of activities which are exclusively personal or domestic, correspondence and the holding of records of addresses. See Article 3(2) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive).

<sup>105</sup> Case C-101/01 *Lindqvist*, paragraphs 46-47.

<sup>106</sup> Axham, p. 123; Arezzo p. 534.

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.’

Article 11*bis*(1) therefore envisions three different types of communication to the public, type (i), (ii), and (iii), that have subsequently been built upon in the CJEU.<sup>107</sup>

Consequently, there have been several CJEU cases relating to the concept of new public, with reference to Article 11*bis*(1) of the Berne Convention. At the time of *Svensson*, some commentators speculated that the new public criterion had played its part, considering its non-appliance in *TVCatchup* (see below).<sup>108</sup> However, a study of the cases suggests that the CJEU has, after all, been relatively consistent in its application of ‘new public’.

#### **4.4.2 Cases involving a new public criterion**

##### **4.4.2.1 Case C-306/05 *SGAE***

In *SGAE*, a hotel disseminated broadcasts to the hotel guests by placing televisions in their rooms and common areas. The CJEU established that this was an act of communication directed to a public.

The Court then stated, with reference to Article 11*bis*(1)(ii) of the Berne Convention, that the hotel’s actions were to be considered a communication made by a broadcasting organisation other than the original one (separate from the original broadcast). Hence, it was a type-(ii) communication, directed to a ‘new public’.<sup>109</sup> Supported by the Guide to the Berne Convention, the CJEU then continued by stating that the rightholder who authorised the broadcast of his work (*SGAE*) envisioned a limited public, typically the

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<sup>107</sup> Axham, p. 123-124.

<sup>108</sup> Tsoutsanis, p. 507.

<sup>109</sup> Case C-306/05 *SGAE*, paragraph 40: ‘It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11*bis*(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.’

owners of reception equipment and their private or family circles. In this case, the hotel had communicated the works to a larger audience than the author intended – a new section of the public.<sup>110</sup> Hence, it was through this brief reasoning that the new public criterion was created.

As an endnote, it was also underlined that profit-making is *not necessarily* a condition for establishing an act of communication to the public. Nevertheless, the CJEU pointed out that providing television services affected the hotel's standing and, consequently, the price of rooms. Therefore, the communication was of a 'profit-making nature'.<sup>111</sup> The role of profit-making was thus not clarified.

**4.4.2.3 Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal***  
*SGAE* was followed by *Airfield and Canal Digitaal*.<sup>112</sup> In the case, which concerned communications within the Satellite Directive, encrypted satellite broadcasts of television programmes were broadcasted to end users. This prompted rightholders, with reference to the Berne Convention, to claim that authorisation was needed.

While the CJEU did not expressly refer to Article 11*bis*(1) of the Berne Convention, the case is still relevant as the Court expressly strived for a coherent interpretation with the InfoSoc Directive.<sup>113</sup> The broadcasting was considered an additional means of broadcasting, expanding the circle of television viewers.<sup>114</sup>

With reference to *SGAE*, the rightholder's authorisation was also considered necessary *in particular* when the re-transmission was directed to a 'new public', not taken into account by the authors of the protected works.<sup>115</sup> Interestingly, the Court based this on economic considerations, finding support in the 17<sup>th</sup> recital in the preamble to the Satellite Directive. There, it is stated that the rightholder must be ensured appropriate remuneration, taking account of both actual and potential recipients.<sup>116</sup> Such statements from the Court imply that the new public criterion is meant to limit the owner's

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<sup>110</sup> Case C-306/05 *SGAE*, paragraph 41-42.

<sup>111</sup> Case C-306/05 *SGAE*, paragraph 44.

<sup>112</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*.

<sup>113</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*, paragraph 44.

<sup>114</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*, paragraph 47.

<sup>115</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*, paragraph 72. The wording 'in particular' may suggest that the Court did not yet consider a 'new public' as always being a necessary requirement.

<sup>116</sup> Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*, paragraph 73.

exploitation of the public communication right after its full economic value has been realised.

#### **4.4.2.4 Joined Cases C-403/08 and C-429/08 *Football Association Premier League***

In *Football Association Premier League and Others (FAPL)*, the intervention in the rightholder's public communication right consisted in a pub owner showing satellite broadcasts to its customers via television and speakers.

Generally using the same reasoning as in *SGAE*, but classifying the intervention as a type-(iii) communication,<sup>117</sup> the CJEU reiterated the need for a broad interpretation of the public communication right.<sup>118</sup> Comparable to *SGAE*, the pub owner enabled customers to enjoy broadcasted works that they would otherwise not be able to enjoy in that position. It was therefore an act of communication to a public.<sup>119</sup>

In very clear words, it was then held that, in circumstances such as those of the main proceedings, the work had to be communicated to a *new* public. Since the pub owner communicated the broadcast to an additional public than the owners of televisions and their immediate private circles that was considered, in principle, by the rightholders, the works were communicated to a new public.<sup>120</sup>

Again, the fact that the communication was of a profit-making nature, making the pub more attractive to visit, was considered 'not irrelevant'.<sup>121</sup>

Hence, in *FAPL*, the occurrence of a new public was seemingly firmly established as a necessary requirement in establishing a communication to the public. However, this immediately created new issues in the following case, *TVCatchup*.

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<sup>117</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, paragraph 192: '...communication by loudspeaker or any other instrument transmitting, by signs, sounds or images, covering ... a means of communication such as display of the works on a screen'.

<sup>118</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, paragraphs 193-194.

<sup>119</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, paragraphs 195-196.

<sup>120</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, paragraphs 197-199. 197: '... in order for there to be a 'communication to the public' ... it is also necessary for the work broadcast to be transmitted to a new public ...'.

<sup>121</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, paragraph 204.

#### 4.4.2.5 Case C-607/11 *TVCatchup*

With the CJEU seemingly having established that an intervention in the public communication right required re-communication to a ‘new public’, its judgement in *TVCatchup* initially confused commentators.

Again, the case concerned the interpretation of Article 3(1) of the InfoSoc Directive. The claimants, ITV Broadcasting and others, were commercial television broadcasters of films and programs in the United Kingdom. *TVCatchup* offered an unauthorised *internet-based* live streaming service of those broadcasts. Importantly, *TVCatchup* asserted that it only allowed access to users who also had legal access to ITV’s television broadcasts by virtue of their television licence. Also, the internet streaming service could only be used in the United Kingdom.<sup>122</sup>

In essence, *TVCatchup* argued that its streaming service did not intervene in ITV’s public communication right, since user restrictions meant that the retransmission was not communicated to a new public. While this assertion might have seemed to be in line with previous case law, the CJEU did not agree. The Courts findings can be summed up as follows.

Initially, the Court ruled, each transmission or retransmission of a work which used a *specific technical means* must be individually authorised by the rightholder of that work. Since the streaming service used a specific technical means other than the original transmission (internet as opposed to television), there was an act of communication.<sup>123</sup> The CJEU supported this new qualification by analogous use of Articles 2 and 8 of the Satellite Directive, which required new authorisation where new technologies for transmission were used, despite the works being available in the catchment area through other technical means.<sup>124</sup>

Consequently, *TVCatchup*’s argument that there was no ‘new public’ was dismissed as inapplicable. Since the internet streaming service used a specific and different technical means (‘the internet’) of transmission than the initial transmission (‘terrestrial broadcast’), it was no longer necessary to examine whether a ‘new public’ was reached.

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<sup>122</sup> Case C-607/11 *TVCatchup*, paragraphs 8-10.

<sup>123</sup> Case C-607/11 *TVCatchup*, paragraph 23-24.

<sup>124</sup> Case C-607/11 *TVCatchup*, paragraph 25.

This effectively distinguished *TVCatchup* from *SGAE*, *FAPL*, and *Airfield and Canal Digitaal*.<sup>125</sup> Most interestingly, the CJEU seemed to reach this conclusion with reference to Article 3(3) of the InfoSoc Directive relating to the non-exhaustion of the public communication right, in addition to the Satellite Directive analogy.<sup>126</sup>

Finally, the Court yet again remained vague on the role of profit-making in establishing a communication.<sup>127</sup>

#### 4.4.2.6 Comments

From the case law, it seems that one can conclude that when the retransmission, or re-communication, uses a different technology than the original communication, the new public criterion is dropped. This was introduced in *TVCatchup*, and later confirmed in *Svensson*. Such re-communications need to be individually authorised. This may be a result of the CJEU wanting to uphold the principle of non-exhaustion of the public communication right. However, one may question the Court's blunt position of regarding 'the internet' as one coherent technology.

Conversely, when the same technical means is used, the re-communication must be directed to a new public, meaning, a public not taken into account by the rightholder when authorising the initial communication. This phrasing suggests that the criterion is based on the subjective conception of the rightholder.<sup>128</sup> In practice, in the absence of the rightholder expressly having delimited the targeted public, the task of defining what public was 'taken into account' by the rightholder may be left to the courts. However, in *SGAE*, the CJEU gave some guidance, mentioning that the public taken into account should consist of direct users, such as owners of reception equipment and their private circle of family and friends, but not new segments of the public such as hotel guests (*SGAE*) or pub guests (*FAPL*).

Finally, the role of profit-making in establishing an intervening communication is uncertain. While probably not a decisive criterion, the Court's reiteration of the potential relevance of profit-making should at least be noted.

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<sup>125</sup> Case C-607/11 *TVCatchup*, paragraphs 37-39.

<sup>126</sup> Case C-607/11 *TVCatchup*, paragraphs 23 and 39.

<sup>127</sup> Case C-607/11 *TVCatchup*, paragraphs 41-44.

<sup>128</sup> See Bellan & Rosati: *Post-Svensson Stress Disorder #1: Does it matter whether linked content is lawful?* (e-source); Baker, p. 102.



### 4.4.3 Legitimacy of the new public criterion

#### 4.4.3.1 Defending the new public criterion

It appears that the existence of the new public criterion is based mainly on Article 11*bis*(1) of the Berne Convention, and the 1978 Guide.<sup>129</sup> In the Guide, it is stated that the rightholder, when authorising the communication, only takes account of the direct audience receiving the signal within the family circle. Conversely, the rightholder cannot be considered to have authorised a retransmission to a wider circle or to an additional section of the public. As an example, the Guide mentions the case of broadcasting programmes meant for private use in public places. In such scenarios, the *new public communication* requires specific authorisation. Consequently, the rightholder should be given control over such new public performances of his work.<sup>130</sup> The CJEU did not expressly refer to this specific section in the Guide. However, the Advocate-General did, and it is likely that it is this approach, expressed in the Opinion, that was eventually adopted by the Court.<sup>131</sup>

Support for a new public criterion can also be found elsewhere, for example in the preparatory works to the Berne Convention, stating that:

‘...any broadcast aimed at a new circle of listeners, whether by means of a new emission over the air or by means of a transmission over wire, must be regarded as a new act of broadcasting, and as subject to the author’s specific authorization. ... Consequently, the majority (12 votes to six) decided in favour of a Belgian proposal presupposing the intervention of a body other than the original one as a condition for the requirement of a new authorization.’<sup>132</sup>

Furthermore, there is support in a WTO panel report in a dispute between the EU and the United States, concerning a section of the United States Copyright Act, providing exceptions in the rightholder’s public communication right by allowing communications

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<sup>129</sup> Axham, p. 125.

<sup>130</sup> WIPO Guide to the Berne Convention (1978), p. 68-69. See paragraph 11*bis*.11-12: ‘... the author thinks of his license to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this *new* public performance of his work [italics added].’

<sup>131</sup> Case C-306/05 *Opinion*, paragraphs 50-52.

<sup>132</sup> Berne Convention Centenary: The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986, p. 185.

in certain public places. The section was considered being partly in violation with the TRIPS Agreement.<sup>133</sup>

Consequently, these sources seem to constitute the foundation both for the new public criterion as such as well as for it only being applied when a specific technical means is used for the retransmission.

#### **4.4.3.2 Attacking the new public criterion**

The new public criterion has not escaped criticism. In particular, a post-*Svensson* ALAI Opinion expressed criticism to the new public criterion, arguing that it is contrary to international agreements, including Article 3 of the InfoSoc Directive itself.<sup>134</sup> This criticism is not necessarily unfounded. Firstly, the idea that a communication sometimes must be directed to a different public than the one that was originally taken into account, simply does not follow from the wording of Article 11*bis* of the Berne Convention. Indeed, that provision only refers to retransmission made by an ‘organisation other than the original one’, not to a different or new public.<sup>135</sup>

Another criticism has been that the new public criterion is simply based on a misreading of the WIPO Guide to the Berne Convention. It is argued that the CJEU has wrongly interpreted the wording ‘new public performance’ to mean that a ‘new public’ constitutes a necessary requirement. Hence, a potentially more correct interpretation would conclude that each *new* (act of) public communication requires authorisation as such, rather than each *new public* communication.<sup>136</sup>

Perhaps in particular in relation to internet communications, a strong case can also be made that the new public criterion leads to undue exhaustion of the public communication right (exhaustion being limited to the distribution of goods). If this is the case, it is expressly contrary to Article 3(3) of the InfoSoc Directive. The argument is that when a work has been made freely accessible by the rightholder on the web, the new public criterion means that anyone can re-communicate it. Hence, the rightholder

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<sup>133</sup> Report of the Panel: United States – Section 110(5) of the US Copyright Act (WT/DS160/R, 15 June 2000), p. 12-13 and 56.

<sup>134</sup> ALAI Opinion (2), p. 2.

<sup>135</sup> ALAI Opinion (2), p. 13-14.

<sup>136</sup> ALAI Opinion (2), p. 16-18.

loses control over the public communication right of the work, which has consequently been exhausted.<sup>137</sup>

The rationale behind exhaustion is that the rightholder should not be entitled to further remuneration after realising the full economic value of the content after it has been distributed.<sup>138</sup> It can be argued that the permissive new public criterion, perhaps especially in relation to embedded links and framing, which may circumvent advertisements and cause confusion regarding the origin of the content, severely undermines the possibility for the rightholder to realise this value, whilst at the same time potentially creating profits for ‘linkers’. Hence, the public communication right, as an exclusive, economic right, is potentially undermined.

Finally, there is an argument that the application of the new public criterion may, in effect, force rightholders to add technical protection measures on their internet communications. This can be considered contrary to Article 5(2) of the Berne Convention, which states that the enjoyment and exercise of the rights should not be subject to any formality.<sup>139</sup>

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<sup>137</sup> ALAI Opinion (2), p. 15; Axham, p. 128-129.

<sup>138</sup> Axham, p. 128.

<sup>139</sup> ALAI Opinion (2), p. 2, 22-23; Rosati: *Link and threat? Why the story with hyperlinks and copyright is not over yet* (e-source).

# 5 Discussion

## 5.1 Introductory remarks and conclusions

When discussing the new public criterion, two approaches may be taken. Firstly, one can discuss its *existence* as such. Secondly, one can discuss its *application*. Regarding the former, the arguments both for and against the criterion's existence have already been presented. Interestingly, the criticism mainly seems to have surfaced after the CJEU's judgement in *Svensson*. Arguably, this is a result of the fact that the new public criterion's transfer to internet communications has created different and more complicated implications than it did in previous cases. Consequently, it is the *application* that makes for a more interesting discussion.

Before moving on to the actual analysis, certain conclusions should be reiterated. The following seven conclusions are considered relevant for the ensuing discussion:

- Linking to a copyright protected work amounts to the 'making available' of that work. Hence, it is an act of communication.
- The new public criterion is only applied when the re-communication uses the same technical means as the initial communication.
- Communications made through 'the internet' are considered using the same technical means. Different types of links are thus treated in a neutral manner.
- The issue of the legality of the source content remains uncertain. However, it is certain that one may link to authorised and 'freely accessible' source content.
- What constitutes 'freely accessible' content is uncertain, especially regarding the status of contractual restrictions in relation to the initial communication.
- In the case of an authorised and 'freely accessible' communication of a work on the internet, the rightholder is considered to have taken into account a public consisting of 'all internet users'.
- The role of profit-making in establishing an intervening communication is uncertain, but its relevance should perhaps not be excluded.

On the basis of these conclusions, the following analysis ultimately purports to discuss two questions regarding the new public criterion, as mentioned in chapter 1 of this essay:

1. What specific issues have arisen as a result of the transfer of the new public criterion to internet communications such as links?
2. Does the new public criterion strike a fair balance between users and rightholders in relation to linking activities?

The questions depend on each other. To a large extent, the answers are dependent on the outcome of certain unresolved questions. These will be discussed first. Arguably, one of the main issues with the new public criterion's transfer to internet communications is that the rightholder loses control of some unauthorised re-communications. In effect, it could be argued that this is comparable to exhaustion of the public communication right. Other issues relate to the unclear concept of what constitutes 'freely accessible' content as well as the legality of the source content.

It should be borne in mind that linking is an activity performed by both private individuals and commercial parties. In the former case, the act of linking is typically an innocent, routine act in daily life. In the latter case, linking can be (but not always) an intentionally exploitative act with the purpose of earning profits. So far, the CJEU seems to have disregarded this difference.

## **5.2 Remaining issues**

### **5.2.1 'Freely accessible' content**

The ultimate status of links to content that is not 'freely accessible' might be clarified in the still pending *C More Entertainment*. In that case, the content was behind a paywall and therefore arguably not 'freely accessible'. Thus, the 'public taken into account' had intentionally been limited to subscribers. Following the reasoning in *Svensson*, it seems likely that such intentional circumvention results in an intervening communication to a *new* public. That conclusion should not be altered by the Court's ruling in *BestWater* as that case did not concern, or even mention, the status of links which circumvent restrictions.

In the best of worlds, *C More Entertainment* would moreover clarify whether the concept of ‘freely accessible’ only refers to technical access restrictions, or if contractual restrictions also can be considered to affect and limit the ‘public taken into account’. It has been argued that the latter is a subjective criterion, which might support the idea that even legal restrictions – such as terms of use – on a website could affect whether the content is to be considered ‘freely accessible’. But this might create undesired implications. Imagine that a website in its terms of use explicitly states that embedding of the website’s content is not allowed. If such a statement was relevant in delimiting the rightholder’s intended public in relation to Article 3(1), it would put a heavy onus on ‘linkers’ to scan the terms of use of every target website. As it seems, this requirement would apply to both private individuals and commercial parties. This seems like an unreasonable and not necessarily balanced conclusion, intervening in the core functioning of web activity.

Instead, one should remember that the internet allows for easy ways of restricting access to content through paywalls or simple log-in requirements. Since the CJEU has expressed a desire to offer legal protection for such technical access restrictions, rightholders should resort to such solutions, without having to feel that they are self-enforcing their rights. This result would also lead to desired predictability for all parties concerned. Accordingly, in my view, contractual restrictions alone should generally not be considered to affect what is to be considered ‘freely accessible’ content.

### **5.2.2 Legality of the source content**

The issue of the legality of the source content must also be considered as unresolved. Four possible scenarios come to mind:

First, it has been argued that freely accessible content should be *assumed* to be coming from an authorised source. In that case, one may link to a ‘freely accessible’ source *in general*, regardless of its legality.

Second, *Svensson* possibly implies that one can link to an unauthorised reproduction of a work, but only so long as an authorised and freely accessible communication is also available on the web. However, this interpretation may simply be a result of ambiguous wording from the Court (or clumsy interpretation from others).

Third, it is also possible that one may *not* link to an unauthorised reproduction of a work in cases where the initial communication took place outside of the internet context. In such cases, the re-communication uses a specific technical means from the initial communication and it is sufficient that the link is communicated to a ‘public’.

Finally, it is also possible that one may not link to unauthorised content whatsoever.

Admittedly, the three latter scenarios would face providers of links with the near-impossible task of monitoring the legality or free accessibility of authorised content. The Court’s indiscriminative approach also seems to imply that it would apply to both commercial parties and private individuals. This seems unreasonably complicated.

Hence, some commentators have suggested that the Court in *BestWater* provided the *assumption* that freely accessible content is coming from an authorised source. While this author is not convinced that this conclusion actually follows from *BestWater*, it would at least clarify the status of links to unauthorised content. However, it would also disregard commercial exploitations of copyright protected works by third-parties and would, in effect, lead to exhaustion of the public communication right.

Both *Svensson* and *BestWater* dealt with commercial exploitations of works, but the Court did not mention the possible idea of requiring profit-making in order to establish an intervening communication. However, those cases did not concern linking to (established) unauthorised content. While the role of profit-making might have to be downplayed considering the vague language in *SGAE* and *FAPL*, it could possibly be explored further in order to differentiate commercial from non-commercial re-communications of unauthorised content. That would render profit-seeking re-communications of unlawful content of works intervening, but not similar re-communications by private individuals. However, this solution seems unlikely given the lack of any such discussion in either *Svensson* or *BestWater*. Consequently, the future of links to unauthorised source content is hard to predict.

### **5.2.3 The issue of exhaustion**

The public communication right shall not be subject to exhaustion. Every new act of communication to a public needs to be individually authorised. This principle does not prevent private persons from inviting friends and family to take part of the

communication (e.g. a television programme or a live stream). In the context of linking, it also does not prevent anyone from sending links to someone else in a private message. In these cases, there is no 'public' and, therefore, no need to investigate any occurrence of a 'new' public. After *Svensson* and *BestWater*, it may be going too far to constitute that the public communication right is fully exhausted in relation to internet communications. Rather, in some cases, something that may be referred to as 'semi-exhaustion' arises.

In the early cases where the new public criterion was introduced, such as *SGAE* and *FAPL*, the Court dealt with terrestrial broadcasts. In those cases, the re-communications had a commercial significance. The Court considered the communications, by the hotel and pub respectively, to be directed to a wider audience than the one that the rightholder could have reasonably taken into account when authorising the initial communication. Consequently, there were new public communications. In such cases, it was likely that most re-transmissions would either reach a 'new' public, or no 'public' at all. The concepts of 'public' and 'new public' were close knit.

The exception was *TVCatchup*. Again, commercial considerations arguably lay behind the Court's decision to drop the new public criterion. As there was no new public, a strict application of the new public criterion would have threatened the financial position of the rightholders. By limiting the application of the new public criterion to situations where the same technical means is used, the Court effectively managed to evade the new public criterion, thereby protecting the interests of rightholders. Hence, since the full economic value had not been realised, the public communication right was left intact, and the principle of non-exhaustion was not compromised.

However, by upholding the new public criterion and the specific technical means-doctrine that protected the rightholders in *TVCatchup*, particular issues arise in relation to linking. In fact, it can be argued that the new public criterion leads to undue exhaustion *despite* the fact that the full economic value may not have been realised.

For example, commercial websites can now provide embedded links to (authorised) content that is 'freely accessible' on another website, without communicating the works to a *new* public. This means that many users will never need to take part of the initial,



authorised communication. Hence, the full economic value of the rightholder is not always realised. Instead, the rightholder may either restrict access to content, but will then risk losing desired traffic, or choose to let the content remain freely accessible, but that will entail exhaustion of that content and loss of profits. However, the rightholder is still *ultimately* in control since removing or restricting access to the work *probably* also renders unauthorised communications of that work illicit. Hence, the exhaustion is merely ‘temporary’.

Also, while Article 3(3) of the InfoSoc Directive clearly states that the public communication right shall not be exhausted, it can be argued that the new public criterion is not contrary to that provision, as the criterion inevitably has altered the scope of the public communication right. Again, Article 3(3) provides:

‘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.’<sup>140</sup>

However, when the new public criterion is applicable, the right in paragraphs 1 and 2 have been limited. In such cases, the rightholder simply *does not have the right* to authorise or prohibit re-communications of the work that do not reach a new public. While the CJEU does not explicitly support this approach, it is clear from *TVCatchup* that the Court has at least not forgotten about the non-exhaustion rule. Rather, it seems that the principle of non-exhaustion of the public communication right has been qualified as well. The rightholder retains the right to prohibit and authorise re-communications to a *new* public, and that right is *not* exhausted. This conclusion does not fully answer whether or not the new public criterion has transferred well to internet communications. This author simply considers that its application is not necessarily contrary to Article 3(3) of the InfoSoc Directive.

### **5.3 A balanced future?**

Having made the effort to provide answers to some key questions regarding the new public criterion in relation to linking and internet communications, this essay will now conclude in an attempt to provide answers to the questions set out earlier in this chapter.

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<sup>140</sup> Italics added.

Unfortunately, the answers must partly be left pending awaiting certain clarifications. This in itself may suggest that the new public criterion has *not* transferred smoothly to internet communications, considering the significant amount of criticism and unresolved issues. However, it does seem that the Court has not been oblivious to the status of linking as a core function of the web, which has required a dynamic approach to certain concepts. Despite reiterating the need for a *high level of protection* for rightholders, it seems that the boundaries of the new public criterion, in relation to internet communications, may be much more decisive than before. For example, the notion of the ‘public taken into account’ is evidently a dynamic concept. In relation to terrestrial broadcasts, the intended public is narrow, relating to owners of reception equipment and their private circles. However, in relation to internet communications, the intended public is widened, consisting of all internet users who could have accessed the content. Hence, the new public criterion proves to be a *dynamic* concept.

The Court clearly realised the importance of maintaining the ability to link to content and has adjusted key concepts of the new public criterion accordingly. It rather seems that the Court has adopted a purposeful and pragmatic approach, respecting the importance of links as a form of dissemination but also the need for rightholders to protect their content (through access restrictions). This could be considered as an effort to strike a *fair balance*. However, there is an argument that unshackled commercial exploitations of the content of rightholders may force them to impose technical access restrictions, or accept a ‘semi-exhausted’ public communication right. Accordingly, the Court’s priority seems to be to maintain the normal functioning of the web, rather than ensuring a high level of protection.

However, there are unsolved questions. The Court has been unwilling to put its foot down regarding the legality of the source content. In this author’s view, some leeway must at least be granted to private individuals who link to unauthorised content. Too strict of an approach would certainly ensure a high level of protection for rightholders, but would hardly strike a fair balance. One solution could be to return to the unclear role of profit-making in establishing an intervening public communication. After all, for most private individuals, linking is a mundane activity without regard to the legality of the source content. On the contrary, commercial websites that systematically provide

links to illicit content may have to be treated differently. However, additional qualifications to the already controversial new public criterion may not be received warmly. Unfortunately, *C More Entertainment* does not concern unauthorised content and is unlikely to provide clarifications in that regard.

At this stage, it can simply be concluded that a cautious CJEU still has work to do in relation to the legal status of linking activities and the public communication right. So far, the Court has been very pragmatic, perhaps somewhat favouring users before rightholders so as not to ‘break the internet’. However, the unwillingness of the Court to make up its mind on key questions suggests that it may still be some time before the issue of linking in relation to the public communication right is ultimately resolved.

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