



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

OPINION

Proposed to THE EXECUTIVE COMMITTEE and adopted at its meeting, 17
SEPTEMBER 2014*

on the criterion “New Public”, developed by the Court of Justice of the
European Union (CJEU), put in the context of making available and
communication to the public

Summary

On 13 February 2014, the CJEU rendered, in the *Svensson* case¹, a milestone decision about the question of whether hyperlinking to subject matter which is protected by copyright requires the permission of the rightholder. On the occasion of this case, the present Opinion comments on various criteria developed by the Court in respect of communication to the public, whilst building, in relevant parts, on the statement ALAI submitted, preceding the decision, in its Opinion of 15 September 2013.² In *Svensson*, the CJEU ruled on the question

“whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision, on a website, of clickable links to protected works available on another website constitutes an act of communication to the public as referred to in that provision, where, on that other site, the works concerned are freely accessible.”

The CJEU considered that the concept of communication to the public includes two cumulative criteria, namely, an ‘act of communication’ of a work and the communication of that work to a ‘public’.³ While the CJEU in *Svensson* gave a correct and positive response to the basic question of whether hyperlinking is (interactive) making available/ communication - a position enunciated in the aforementioned statement of ALAI’s Opinion of 15 September 2013 - the CJEU has in the very same decision, as to the question of whether that act concerns a communication to ‘the public’, confirmed a number of other recent decisions in which it

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¹ CJEU 13 February 2014, Case C-466/12, Nils Svensson and Others v Retriever Sverige AB.

² ALAI 15 September 2013, *Report on the making available and communication to the public in the internet environment – focus on linking techniques on the internet*, <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>; also published in (2014) 36(3) EIPR 149, and in NIR Nordiskt Immaterialt Rättsskydd 5/2013 pp 512 et seq.

³ In par. 16, quoting earlier jurisprudence in Case C-607/11 ITV Broadcasting and Others [2013] ECR, paragraphs 21 and 31.

introduced a problematic “new public” criterion, qualified by, *inter alia*, an equally problematic new “specific technical means” criterion.

The “new public” criterion developed in the CJEU’s case law construing the exclusive right of communication to the public⁴ is in conflict with international treaties and EU directives. Initially articulated in the offline environment to justify application of the right of communication to the public to certain retransmissions of television broadcasts, the criterion, as also subsequently applied by the court, is inconsistent with the communication to the public right of the Berne Convention and the WIPO Copyright Treaty et al., as well as with provisions of the 2001 Information Society Directive. As applied in *Svensson*, the “new public” criterion has the effect of inappropriate exhaustion of the exclusive right of communication to the public of works which their authors or other rightowners have made available over generally accessible websites. Moreover, to the extent that *Svensson* indicates that the “new public” criterion will not apply if restrictions accompany the work’s making available, the decision risks establishing an obligation to reserve rights or protect works etc. by technical protection measures, in violation of the Berne Convention’s prohibition of formalities that condition the exercise of exclusive rights.

In conclusion, the application of the "new public" criterion in the *Svensson* decision is contrary to

- Articles 11(1)(ii), 11*bis*(1), 11*ter*(1)(ii), 14(1) and 14*bis*(1) of the Berne Convention
- Article 8 of the WCT
- Articles 2, 10, 14 and 15 of the WPPT
- Article 3 of the EU Information Society Directive
- previous CJEU decisions and
- interpretation rules of Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

The *Svensson* decision is also based on the misinterpretation of the old (1978) Guide to the Berne Convention.

It may lead to a WTO dispute settlement procedure and liability under the TRIPS Agreement for its inconsistency with the Berne Convention.

Insofar as the *Svensson* decision may have been inspired by apprehensions that a different result might have impeded on the optimal development of digital communication, this is a misconception. There are other, better, means than those pursued by the CJEU in *Svensson* to

⁴ Case C-306/05, SGAE; Case C-135/10, Del Corso; Case C-607/11, TVCatchup.

preserve the role of hyperlinks in the basic functioning of the Internet without violating or misinterpreting fundamental international copyright norms.

ALAI is determined to participate in a constructive dialogue by submitting, in the near future, its views on how new means of communication can be fostered without emptying and exhausting the sources of creativity.

Report and Opinion

The International Literary and Artistic Association (*l'Association Littéraire et Artistique Internationale* – ALAI), in its 15 March 2014 Executive Committee meeting formed a study group with the mandate to analyse the ramifications regarding the criterion of “new public” (as well as the “specific technical means” qualification) as a carve-out from the general exclusive rights of authors and owners of related rights of communication to the public/making available to the public.

Following the report of the study group, the Executive Committee has adopted the following text, which builds on the Report and Opinion of the ALAI Executive Committee, adopted on its 15 September 2013 meeting in Cartagena, Colombia, analysing three separate phenomena, (i) communication to the public, (ii) making available to the public and (iii) the notion of the public, followed by (iv) a statement/conclusion focused on hypertext and inline linking (see www.alai.org).

This report is focused merely on the criterion “new public” as introduced and used by the CJEU and its conflicts with international copyright law. However, ALAI, taking a profound interest not merely in the correct application of international copyright norms, also wants to promote feasible solutions to complex matters of internet uses of copyright and related rights. Hence, the ALAI Executive Committee has formed a new study group to analyse and report on such matters to the Executive Committee meeting in March 2015.

1. Introduction

The CJEU has introduced, since its 2006 decision in the *SGAE v. Rafael Hoteles* case, several criteria to define “communication to the public”. This report primarily analyses the “new public” criterion and concludes that it is in conflict with international law.

The CJEU’s resort to the “new public” criterion must be seen in light of basic copyright principles that reflect the international norms established, e.g. in the Berne Convention,⁵ the WIPO Copyright Treaty (WCT)⁶ and the WIPO Performances and Phonograms Treaty (WPPT)⁷ (the latter two frequently referred to as the “WIPO Internet Treaties”). The two

⁵ Berne Convention for the Protection of Literary and Artistic Works, last revised in Paris on July 24, 1971, and amended on September 28, 1979.

⁶ WIPO Copyright Treaty (WCT), adopted in Geneva on December 20, 1996.

⁷ WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20, 1996.

latter instruments were adopted in response to the need to ensure that appropriate levels of protection persisted in the “digital environment”.⁸

The main or most significant EU Directive, which also serves the purpose of implementing the WCT and the WPPT in a harmonized way at the EU level, is Directive 2001/29 on copyright in the information society.⁹ The dual aim to stimulate the production of works or to recognize authors’ contributions to society by giving them a reward and at the same time foster the dissemination of their works, *inter alia* in relation to technological developments, is enshrined in several of the recitals in the preamble to that Directive.¹⁰ Similar statements are found in the preamble to the WCT¹¹ and WPPT.¹² Hence, at its very core the copyright system is concerned with the production and dissemination of creative content for the benefit of authors and of society, and the need to strike a fair balance between these interests.¹³ This dual objective has been stressed by the CJEU as well.¹⁴

⁸ These objectives at that time were referred to as the “digital agenda.” See e.g. Ficsor, *The Law of Copyright and the Internet*, 2002, para 1.45 *et seq.*

⁹ 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, Official Journal L 167, 22/06/2001 p. 10-19.

¹⁰ Recital 31 of directive 2001/29 holds that “A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of right holders and users of protected subject-matter must be safeguarded.” Cf. recital 4 which states that “A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.” See also recital 2 which holds that “[c]opyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.”

¹¹ The preamble to the WCT includes the following statements: “Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments”, “Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention” and “Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works.”

¹² The preamble to the WPPT includes the following statements: “Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments”, “Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms”, and “Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information.”

¹³ Axhamn, *Exceptions, limitations and collective management of rights as vehicles for access to information, in Access to Information and Knowledge, 21st Century Challenges in Intellectual Property and Knowledge Governance* (ed. Beldiman, 2013), p. 164.

¹⁴ See e.g. joined cases C-403/08 and C-429/08, *FAPL*, para. 179.

2. Relevant international texts

The Berne Convention and WIPO Copyright Treaties set out the right of communication to the public and its corollary, the right of making available to the public. These treaties provide, in relevant parts:

Berne Convention

Article 11

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

...

(ii) any communication to the public of the performance of their works.

...

Article 11bis

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(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 11ter

(1) Authors of literary works shall enjoy the exclusive right of authorizing:

...

(ii) any communication to the public of the recitation of their works.

...

Article 14

(1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

...

Article 14bis

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

WIPO Copyright Treaty (WCT)

Article 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(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.

WIPO Performances and Phonograms Treaty (WPPT)

Article 2

Definitions

...

(g) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 10

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, 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.

Article 14
Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, 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.

Article 15
**Right to Remuneration for Broadcasting
and Communication to the Public**

(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of [paragraph \(1\)](#) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made 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 shall be considered as if they had been published for commercial purposes.

**Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain
aspects of copyright and related rights in the information society**

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 fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 8

Sanctions and remedies

...

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Irrelevance of the New Public criterion in the International Conventions and the Copyright Directive

None of these texts enunciate a “new public” limitation on the scope of the communication to the public right (including the making available right). Article 11*bis*(1)(ii) of the Berne Convention brings within the general scope of the communication to the public right secondary transmissions made by a different communication entity; the text may be said to support a requirement of a *new communicator* in the case of a new transmission of a prior broadcast, but it says nothing about the public that receives the new transmission. Moreover, a “new public” limitation would be inconsistent with WCT Article 8, which fills in the interstices of the various Berne communication to the public rights, by providing for “any

communication to the public,” without distinction between primary and secondary transmissions.

The “preparatory work” (the *travaux*) of the Berne Convention – mentioned in Article 32 of the Vienna Convention on the Law of Treaties as a key supplementary source of interpretation – further undermines any basis for a “new public” limitation. With respect to retransmissions, concern arose that the original broadcasting entity, which was relaying a transmission across different time zones, might be obliged to pay twice for an act that might be considered within the scope of the original broadcast. It was proposed to distinguish acts requiring fresh authorization from those comprehended within the initial authorization on the basis of the transmission’s reaching a “new audience.” The 1948 Brussels Revision delegates, however, came to perceive that the distinction, and other variations on its theme, would be unworkable, and the concept was rejected.¹⁵

The international treaties are of binding force for the interpretation of the Directive. Article 9(1) of the TRIPs Agreement provides that its ‘Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto [...]’ The TRIPs Agreement was approved on behalf of the European Community.¹⁶ The WCT and the WPPT were approved on behalf of the Community by Council Decision of 16 March 2000.¹⁷ The CJEU considered, in *Football Association Premier League*,¹⁸ that

“ [...] Article 3(1) of the Copyright Directive must, so far as possible, be interpreted in a manner that is consistent with international law, in particular taking account of the Berne Convention and the Copyright Treaty. The Copyright Directive is intended to implement that treaty which, in Article 1(4), obliges the Contracting Parties to comply with Articles 1 to 21 of the Berne Convention. The same obligation is, moreover, laid down in Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (see, to this effect, SGAE, paragraphs 35, 40 and 41 and the case-law cited).”

If the “new public” criterion cannot be found in the text of the governing international instruments, neither can it be discerned in Article 3 of the Information Society Directive, a text that implements the WIPO Treaties. In fact, the CJEU interpolated the “new public” criterion based on a misunderstanding and misinterpretation of the 1978 *WIPO Guide to the*

¹⁵ See discussion in Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, para 12.26, 12.27 (2006).

¹⁶ Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). See Case C-306/05 of 7 December 2006, SGAE, par 3-5.

¹⁷ Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6). See Case C-306/05 of 7 December 2006, SGAE, par. 7.

¹⁸ CJEU 4 October 2011, Joined Cases C-403/08 and C-429/08, *Football Association Premier League*, par. 189

Berne Convention.¹⁹ Before reviewing the *old WIPO Guide*, and where justified referring to the *new WIPO Guide* [2003]²⁰, however, we examine the CJEU's decisions that articulated the "new public" criterion.

4. "New Public"

4a. Limiting the application of the right of communication to the public to communications to a "new public" – development of the CJEU case law

In the CJEU's *SGAE* ruling, the concept of "new public" first appears in paragraph 40:

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*. (Emphasis added.)

In fact, the "Thus" does not follow: the fact that the communication is made by a different broadcasting organization does not mean that the public to which the communication is directed must be "different from the public at which the original act of communication of the work is directed." In the context of the *SGAE* decision, this *non sequitur* did not yet seem pernicious, as the Court still appears to use the concept of "new public" to mean a public to which a work is communicated by a *new act* of communication to the public. The concept appeared, in accordance with the wording and purport of Article 11*bis* of the Berne Convention, in support of extending (not limiting) the understanding of communication to the public to cover the distribution of a television signal by a hotel to guests in its rooms.

But the CJEU in *Del Corso* began to unmoor the "new public" from its initial context, in which the concept had been summoned in support of the characterization of the communication as being made to "the public." Now the Court reasoned *a contrario*: in the absence of a "new public," the retransmission would not be "to the public."²¹ It is true that

¹⁹ "Guide to the Berne Convention" WIPO publication in English, French and Spanish versions: No. 615 (E), No. 615(F) and No. 615(S) (hereinafter: "the old WIPO Guide").

²⁰ "Guide to Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms" WIPO publication in English, French and Spanish versions: No. 891 (E), No. 891(F) and No. 891(S) (hereinafter: "the new WIPO Guide").

²¹ The court accompanied this unfounded gloss with a further qualification equally unsupported by international or EU texts: the existence of a "new public" may turn on whether the new act of transmission was undertaken for profit. To assess whether the patients in a dentist's office waiting room constituted a relevant communication the court considered its non profit-making nature to have been determinative. *SCF/Marco del Corso*, C-135/10, par 90, 97, and in particular 99. Although *del Corso* was a neighboring rights case, the Court had already

Del Corso, was – as the ECJ itself strongly emphasized²² - a neighboring rights case, the results of which do not necessarily compel the same solutions in cases involving copyright; therefore its compatibility with Berne Article 11*bis*(1) is technically not at issue. It is, to be noted, however, that since the same concepts – “communication” and “to the public” – are concerned, it creates huge confusion if their interpretation and meaning depends on whether they are applied to copyright and to an exclusive right or, as in *Del Corso*, to related rights and to a right to remuneration. All the more so, as the arguments which the Court presents for this distinction are vague and academic.

Different from *Del Corso* however, in *Svensson* copyright itself was at stake. There, the court looked to whether the work in question is communicated *to a new public*. The making available of the work via clickable links does not lead, in the eyes of the Court, to such a new public:

25 In the circumstances of this case, it must be observed that making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public.

26 The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.

27 In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial

introduced the criterion of a “profit-making purpose” in its decision in *Premier League*, CJEU 4 October 2011, C-403/08 and 429/08, Football Association Premier League, par 205 and 206, which did deal with genuine copyright. However, in that decision the Court of Justice seems to give profit-making no more importance than that of a circumstance possibly indicating that there is an intentional intervention from the part of the profit-making party aiming at a transmission of signals to an additional public. In *del Corso*, the Court goes much further. It allows the absence of a profit-making purpose on the part of the user to be used as a defense against a claim of infringement of neighboring rights.

Under no circumstances can this argument be used as a defense either to copyright infringement or a related rights infringement. The application of the criterion “profit-making purpose” is fundamentally at odds with governing norms. Attention may be drawn to e.g. Articles 10(1)(ii), 11*bis*(1), 11*ter*(1)(ii) and 14(1)(ii) of the Berne Convention, Articles 3(f) and (g), 7.1(a) and 12 of the Rome Convention, Article 14(1) of the TRIPS Agreement, Article 8 of the WCT, Articles 2(f) and (g), 8(a), 10, 14 and 15(1) of the WPPT and now also Articles 2(c) and (d), 6(i), 10 and 11 of the Beijing Treaty on Audiovisual Performances (BTAP) as well as Article 8 of the Rental and Related Rights Directive, Articles 1(1) to (3), 2, 4 and 8 of the Satellites and Cable Directive and Article 3 of the Information Society Directive along with any of the agreed statements and recitals and the entire “preparatory work” of these treaties and Directives. There is no indication whatsoever that the concept of “communication to the public” and any subcategories thereof, such as broadcasting, rebroadcasting, retransmission by cable, making available to the public, might be understood or limited to “communication of a profit-making nature”.

²² Cf *SCF/Marco del Corso*, C-135/10, par 74-77; see again *OSA/Léčebné lázně Mariánské Lázně*, C-351/12, par 35.

communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.

In this regard the CJEU decision of 19 December 2013 in case C-202/12, *Innoweb/Wegener*, concerning a dedicated meta search engine and the rights under the 1996 Database Directive, forms a revealing contrast to *Svensson*. There, the CJEU found that the dedicated meta search machine reutilised content taken from the original database. (The Database Directive's "reutilization" right is generally considered an analog to the "making available right" in the Information Society Directive.) Yet, in many respects, the dedicated meta search engine did not offer much more than a framed link (albeit a sophisticated one) showing the content of the original database. The CJEU's inconsistent treatment of framing paradoxically results in an interpretation of the Database Directive that offers even databases protected by the sui generis right for reasons of investment more protection than to works of authorship, for which the CJEU denies the same protection under copyright.

4b. Inconsistency of the "new public" criterion with international norms and EU Directives

The CJEU has presented the "new public" criterion as if it followed from Article 11*bis*(1)(ii) of the Berne Convention.²³ But it does not. In this Berne Convention provision there is no mention whatsoever of "a public different from the public at which the original act of communication of the work is directed." It simply reads as follows:

[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing: ... 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*"; (Emphasis added)

The text of the provision is crystal-clear. The only condition is that the re-transmission or re-broadcasting is made by an organization other than the original one. It may be made to the same public; it may be made to a part of the same public, it may be made to the same public or a part thereof along with a public not covered by the original broadcast and it may be made truly to a new public. The acts set out in subparagraphs (ii) and (iii) - the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work - are recognized as new acts of communication to the public because they consist in new exploitation of a work by an organization different from the original broadcasting organization. This is what is new in them and not that the communication is directed to a public to which the original act of broadcasting was not

²³ In C-306/05, SGAE, of 7 December 2006, par. 40 (quoted above).

directed. Since the plain text of the provision is clear, under the interpretation rules of the Vienna Convention on the Law of Treaties²⁴, the requirement that the right of communication by wire or by rebroadcasting of a broadcast work only applies where the communication is directed to a “new public” is unfounded.

The “new public” criterion, as exposed by the CJEU, seems to substitute “communication to a *new public*” for “*new (act of) communication to the public*”. But the text of Article 11bis(1) is unequivocal in that the right of broadcasting under subparagraph (i), the right of retransmission of a broadcast work by wire or by wireless means by an organization other than the original one (rebroadcasting) under subparagraph (ii), and the right of public communication “by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work” under subparagraph (iii) are separate rights, not because each of these cases involves a new public (which may very well not be the case), but because they constitute a *new act* of communication. As already stated above in the comment regarding the conventional texts, Article 8 of the WCT fills in the interstices of the various Berne communication to the public rights, by providing for “any communication to the public,” without distinction between primary and secondary transmissions. If the term “communication to the public” is used in the broad sense of Article 8 of the WCT, *any* retransmission of a broadcast work – as compared to the original act of broadcasting – is a new act of communication to the public, and the same is true as regards an act of “public communication” of a broadcast work. Moreover, Article 8 of the WCT is not limited to new communications of broadcasts; it covers (without prejudice to Berne Article 11bis’ coverage of broadcasts) initial and subsequent transmissions regardless of the technology employed to effect the first or subsequent transmissions. Thus, there is no basis in the WCT, nor in the

²⁴ *Article 31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

WPPT, to exclude subsequent transmissions made to the same public that was capable of receiving the initial transmission.

The CJEU's conversion of the concept of a "new public" from a *justification* for application of the communication to the public right into a *limitation* on the scope of the right in *Svensson* has the unfounded and illegitimate effect of exhaustion of the communication to the public right or, rather, the scope of that right is *reduced* by the court from the outset. Under *Svensson*, once the work is accessible to "all potential visitors to the site concerned," i.e., for unrestricted sites, to all users of the Internet, the author or rightholder may no longer invoke the communication to the public right to prohibit further making available of the work via the Internet, notably by linking or framing, even if these acts bring revenue to the linkers and framers.

Admittedly, the "exhaustion", or reduction of the scope of minimum rights that results from *Svensson* is limited in scope, since it does not cover all applications of the communication to the public right, but rather has the effect of an exhaustion of the right to make available from the source website by means of linking. It nevertheless means that an author who publishes, without restrictions, works on a website can neither have nor license exclusivity for this mode of exploitation as long as this initial act of exploitation lasts. As a result, the right of exploitation on the internet is severely truncated in a way unprecedented in copyright or any other intellectual property right, even as the internet is swiftly developing into the main exploitation market for works of authorship. This will be elaborated on hereunder.

In particular with respect to works made available on unrestricted websites, the CJEU's de facto extension of the exhaustion of rights – which, under the international treaties and the EU directives, concerns only the right of distribution and no other rights – is in conflict with the international copyright treaties and EU norms. Article 3(3) of the Information Society Directive states explicitly that "[t]he rights referred to in paragraph 1 [communication to the public, including making available to the public] and 2 [making available to the public] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article." Article 4 of the Information Society Directive provides only for the exhaustion of a single right covered by the Directive: the right of distribution. *A contrario*, it follows that in the case of the other rights covered by the Directive, no such exhaustion applies.

The *new WIPO Guide* [2003] confirms these findings and makes it clear that no interpretation of Article 11*bis*(1)(ii) would be acceptable that would suggest what was, rightly enough, rejected by the Executive Committee of the Berne Union; namely that it would be permissible to subject the application of the right of communication to the public (in particular, in the form of rebroadcasting or retransmission by cable) to any criterion, such as communication to a “new public”, that is *not* provided in the Convention.²⁵

The introduction, by the CJEU, of the concept of a ‘new public’ therefore goes much further than a simple difference in interpretation of the right of communication to the public. It fundamentally changes that concept. Exercise of the right of communication to the public now resembles a waiver *erga omnes* (or at least, as to all members of the intended public) rather than a *permission* granted to the partner to the agreement. This construction of the license and/or its result therefore fundamentally alter the nature and meaning of the notion of communication to the public as well as copyright agreements regarding that same act of exploitation. *Inter alia*, granting exclusive licenses will become impossible in practice, as third parties will always be allowed to recommunicate works once communicated to the same public for the first time.

This makes the present interpretation of the notion of *communication to the public* in the European Union one which might be liable to be challenged under the TRIPS Agreement for inconsistency with the communication to the public right under the Berne Convention.

4c. The misunderstanding and wrong interpretation, in *Svensson*, of the *old WIPO Guide*’s reference to a “new public”

If the “new public” criterion cannot be found in any international text nor in the EU Directives, what is its basis? The court in fact derived the “new public” criterion not from the text of the Berne Convention or other international instruments, but exclusively from the *old WIPO Guide*, a 1978 publication which does not purport to be an “authentic interpretation” of the Berne Convention. The *old Guide*’s reference to “new public,” in any event, appears not in connection with the wired or wireless retransmission of broadcast works, but in the context of explaining why communicating a broadcast via a loudspeaker is an act of communication to the public requiring authorization.²⁶ In *SGAE v Rafael Hoteles*, the court stated:

²⁵ See *new WIPO Guide* (see note 20 above), pp. 77-78.

²⁶ The *old Guide* in its original French version, states:

41 As is explained in the Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an *independent act through which the broadcast work is communicated to a new public*. As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorisation right. (Emphasis supplied.)

In *SGAE*, the court acknowledged, but then disregarded, the context of the *old Guide*'s evocation of a "new public." The *Guide*'s references to new and different audiences, to a new public different from the public initially contemplated for the first transmission, are intended to explain why it is fair to consider retransmissions by *loudspeaker* to be independent acts requiring independent authorization.

Firstly, the *Guide* only formulates the question "whether the license given by the author to the broadcasting station covers, in addition, all the uses made of the broadcast, which may or may not be for commercial ends. The Convention's answer is "no".²⁷

De la même façon que dans le cas où la réception d'une émission est suivie d'une communication publique visant un nouveau cercle d'auditeurs [ou de téléspectateurs], **soit au moyen d'une nouvelle émission soit au moyen d'une transmission par fil (voir 1o et 2o de l'alinéa 1)** la communication publique par haut-parleur (ou instrument analogue) est **considérée comme atteignant un nouveau public, différent de celui que l'auteur avait en vue lorsqu'il autorisait la radiodiffusion de son œuvre**. En effet, bien que par définition la radiodiffusion puisse atteindre un nombre indéterminé de personnes, l'auteur en autorisant ce mode d'exploitation de son œuvre ne prend en considération que les usagers directs; c'est à dire les détenteurs d'appareils de réception qui, individuellement ou dans leur sphère privée ou familiale, captent les émissions. A partir du moment où cette captation se fait à l'intention **d'un auditoire se situant sur une plus large échelle, et parfois à des fins lucratives, une fraction nouvelle du public récepteur est admise à bénéficier de l'écoute** [ou de la vision] de l'œuvre et la communication de l'émission par haut-parleur (ou instrument analogue) n'est plus la simple réception de l'émission elle-même mais un acte indépendant par lequel l'œuvre émise est **communiquée à un nouveau public**. Cette réception publique donne prise au droit exclusif de l'auteur de l'autoriser. (Emphasis supplied.)

The English version provides:

Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence 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.

²⁷ *Old WIPO Guide* (see note 19 above), p. 68, par 11bis.11-12.

Therefore, the possibility that there might not be *communication to the public* is not even mentioned in the *Guide*. The only reason why the *Guide* refers to the question of a *licence* is to explain why the Berne Convention has set out a separate minimum right for communication to the public by loudspeaker and otherwise, namely, among others, since this is a separate act by which the work is communicated to a public that the author had not previously “contemplated” when he gave permission.²⁸ However, neither the Berne Convention nor the *Guide* deals with licencing as such, nor does it make the new public a condition of the separate right as provided in the Convention.

This is not the approach of the CJEU in *Svensson*: the Court simply seems to consider the new public a condition of the right, in the sense that if a communication is not directed at a new public, it is not even covered by the concept of ‘communication to the public’.²⁹

The *old WIPO Guide* was extremely restrictive as to the instances in which there is ‘no new public’. It was limited to the owners of ‘reception equipment’ who, either personally or within their own private or family circles, received the programme via loudspeaker – an approach which the Court of Justice still followed in par 41 of the *SGAE* judgment, cited above. It is clear that the later widening of the ‘no new public’ circle in *Svensson* from the own private or family circle around one and the same reception equipment to the virtually unlimited audience of the internet is beyond any margin of interpretation offered by the text of the *old WIPO Guide*. Transposed to the digital environment, what the *old Guide* suggested is minimal. It consists of no more than that someone visiting the original website may show family members, or members of the private sphere, what is displayed on the *computer screen* (or larger screen of a smart television) which forms his or her ‘reception equipment’.

Nothing in the *old WIPO Guide* supports treating the “new public” discussion as any kind of a re-transmission carve-out from the scope of communication to the public. Such a reading is out of context and misleading.

Therefore, the Court’s rulings would have been in accordance with the Berne Convention only if it had used the concept of “new public” to mean a public, other than the family- or private circle, to which a work is communicated by a *new act of communication* to the public (irrespective of whether or not the works concerned have already been communicated to the same public or to a part thereof).

²⁸ *Old WIPO Guide* (see note 19 above), p. 68, par 11*bis*.12.

²⁹ *Svensson*, par 24.

Finally, it should be noted that the Court's treatment of "communication on the Internet" as a "technical means" and the corollary that unrestricted accessibility means that "all potential visitors to the site" constitute the initial public, are more than problematic. Notably, they are inconsistent with the Court's prior decisions distinguishing mere accessibility (all potential visitors to a site) from targeting particular audiences.³⁰ If the communication to the public right were to be inapplicable if the work is communicated anew to the same intended audience (an outcome which, as the next section will show, is in tension with international and Community norms), then, at the very least, the Court should not have grossly declared that audience to be all users of "the Internet." If "the Internet" is the relevant "technical means," then the "means" becomes so vast as to be almost meaningless.

5. Limiting the new public criterion to the same "specific technical means"

In the *TVCatchup* case, the CJEU supplemented the "new public" criterion with the introduction of the "specific technical means" criterion. Like the *Svensson* case, this judgment concerned the use of works through the Internet, albeit in a different way. In the dispute, ITV claimed that TVCatchup had infringed the copyright in its broadcasts by communicating them to the public through a process of electronic transmission (in the form of streaming). From the viewpoint of the "new public" criterion, it was quite a relevant feature of TVCatchup's system that its users were allowed to watch only those streamed broadcasts to which they were entitled to watch on the basis of a license valid in the same country, the United Kingdom. It was also relevant that TVCatchup's income was derived from advertising shown before the user could watch the streamed program, just as the aggregator services making available works through hyperlinks in the same way the plaintiff in the *Svensson* case did, also obtaining their income from advertisement money.

First, the CJEU – on the basis of some quite unclear arguments – confirmed the "new public" criterion as applied in the previous, although different, cases. Secondly, it introduced a new criterion for the concept of communication to the public unknown in the international treaties and the EU directives - the "specific technical means" criterion. This is done in particular in no. 26 of the *TVCatchup* decision:

26 Given that the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means *different from that of the original communication*, that retransmission must be considered to be a 'communication' within the meaning of Article 3(1) of Directive 2001/29. Consequently, such a retransmission cannot be exempt from authorisation by the

³⁰ See, e.g., Case C-173/11, *Football Dataco v. Sportsradar*, and Case C-5/11, *Donner*, for copyright and related rights and Case C-324/09, *L'Oreal v. eBay*, for trademarks.

authors of the retransmitted works when these are communicated to the public. (Emphasis supplied.)

Thus, the “new public” criterion has been maintained in cases where the same technology is used for subsequent transmissions; the right of communication to the public applies to such retransmissions only if they take place through specific technical means different from that of the original communication. The joint application of the combination of the “new public” and “specific technical means” criteria in the *TVCatchup* case in effect neutralized the first criterion, therefore leaving the right of communication to the public intact.

However, in the *Svensson* case, the “specific technical means” criterion could not restore the right of communication to the public, because the Court considered that the same means – the Internet – were employed to access the original website whether through direct implementation of the site’s URL or by following a hyperlink to the copyrighted content on the site.

24 None the less, according to settled case-law, in order to be covered by the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, a communication, such as that at issue in the main proceedings, concerning the same works as those covered by the initial communication and made, *as in the case of the initial communication, on the Internet, and therefore by the same technical means*, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public (citations omitted, emphasis supplied).

The CJEU's gloss, in *TV Catchup*, abandoning the new public criterion when the communication is by a different technical means, alleviates some of the problems of treating "new public" as a limiting factor, but in fact reveals the incoherence of the CJEU's erroneous derivation of that criterion from the *old WIPO Guide's* discussion of 11*bis*(1)(iii). The nature of the communication at issue in the *old WIPO Guide* was by definition by a different technical means: an initial radio transmission retransmitted by loudspeaker. As the *old WIPO Guide's* commentary indicates, the initial over-the-air communication was to private homes, the re-transmission by loudspeaker is to places open to the public. Different technical means are employed to reach publics in different places. Under the CJEU's reading, the nature of the public is irrelevant if the communication is by a different technical means. But in that case, the "new public" criterion becomes meaningless in the very example which served as the foundation for the introduction of the "new public" criterion, because that example in fact involved different technical means.

A “different technical means” criterion also contravenes the text of the Berne Convention. Article 11*bis*(1)(ii) of the Berne Convention provides for an exclusive right not only for

retransmission by cable but also for rebroadcasting which means retransmission by wireless means, and thus, accordingly by the same “specific means” as what is used for broadcasting. Still, the Berne Convention provides for two separate rights and thus recognizes that there are two separate acts. It makes no difference whether the subsequent communication is made by different technical means or by the same technical means, that is to say - in the case of Article 11*bis*(1)(ii) - by wire or by wireless means.

Moreover, if the reasoning of the CJEU were applied, the retransmission would amount to a separate act of exploitation and therefore to a copyright infringement, if *the same* organization retransmits a broadcast by a different technical means, whereas the Berne Convention specifically intended to keep that use free.

This shows in an unequivocal manner that the “specific technical means” criterion is in conflict with international copyright norms regarding the scope of the minimum rights of communication to the public and making available to the public and the EU rules implementing them. There is no element of those norms and rules or of their “preparatory work” that would support it.

6. Links circumventing restrictions

The CJEU’s further gloss, modifying the “new public” and “different technical means” criteria if the author has restricted the access to the website that initially makes available the work, is also inconsistent with international norms.

In *Svensson*, the CJEU introduced a further corrective criterion: if access to the content is restricted, then those who access in violation of those restrictions constitute a “new public.” In para. 31, it stated:

31 On the other hand, where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders’ authorisation is required for such a communication to the public. *This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders’ authorisation.* (Emphasis supplied.)

The italicized language indicates that the exhaustion effect may be avoided either by initially making available the work subject to restrictions, or by subsequently imposing restrictions on access from the source website, or by removing the content altogether from the initial source site. Post-making-available restrictions or removals apparently restore the full right of communication to the public as to the restricted or removed content because any access by hyperlinking would in these circumstances satisfy the “new public” requirement.

In effect, if linking is no longer possible because of restrictions, or because there is no longer anything to link to, then the communication to the public right provides a right to control (or authorize) linking. But this variant of the “new public” criterion is ultimately meaningless. There is no point in a right to authorize acts which can't be done in any event. The utility of a right is to prohibit conduct in which, but for the right, anyone could otherwise engage.

7. “New public” corrections by the CJEU – also in conflict with international law

The “new public” criterion has gone through two corrections by the CJEU. The first one was that no new public is needed if the communication is made by different specific technical means and the second one is that no different specific technical means are needed in case of communication through the Internet (the population of which is considered to be the same public) if access is restricted. This outcome seems to be the case even though the CJEU uses a new-public-criterion-based language: because “the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication.”

Those qualifications do not alleviate the conflict of the CJEU’s criteria of “new public” and “specific technical means” with international copyright norms and the EU rules implementing them. On the contrary, if the way to avoid application of the “new public” carve-out is to restrict access to the site, it is absolutely not clear what form the restrictions are to take. Must the author impose technological restraints, or will it suffice to state somewhere on the website that the author does not authorize (certain kinds of) links?

To the extent that the restrictions entail declarations of reservations of rights, then the CJEU’s prescription may violate another fundamental international copyright norm, namely the

prohibition on conditioning the exercise of copyright on compliance with formalities (Berne Convention, Art. 5(2)).
