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**Swensson in the light of CJEU case law on communication to the public –
(it “has saved the Internet” and, despite some defective elements,
it may also save copyright)**

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INTRODUCTION

The now long series of preliminary rulings of the CJEU on the right of communication to the public –including the right of making available to the public as a component thereof – is particularly suitable to analyze and characterize the Court’s practice in the field of copyright. Among these rulings, there are some which, in the concrete contexts, have offered adequate – or at least reasonable – results (such as the *SGAE* judgment¹). Nevertheless, even those rulings contain certain findings that do not seem to be in due accordance with the international treaties and the *acquis communautaire*. Those findings, in the contexts of other cases, have led to undesirable consequences (the *Del Corso*² ruling is an example for such an outcome).

The judgment adopted in the *Swensson* case³ may be regarded to fall into the category of rulings producing reasonable results. However, such results may only be guaranteed (i) if it is judgment is subjected to thorough scrutiny from the viewpoint of the relevant international and EU norms; (ii) if, of its various possible interpretations, that one is chosen which is in the most complete possible accordance with those norms; and (iii) if, in the subsequent cases, that interpretation will be applied consistently. Such interpretation is necessary to get rid of the “alluvial deposit” piled up by the flood of preliminary rulings that may deter the stream of CJEU cases into an undesirable direction.

It is submitted that the interpretation problems in the CJEU practice are, in a way “programmed” by the present preliminary ruling system under the Treaty on the Functioning of the European Union (TFEU) and other organizational and procedural rules. The outburst of judicial activism of the Court certainly also plays a role in this, but the analysis of the “constitutional” problems created by the Court’s undesirable excursions in the field of

· Member and Honorary President of the Hungarian Copyright Council, former Assistant Director General of WIPO.

¹ Case C-306/05.

² Case C-135/10.

³ Case C- 466/12.

legislative activity would require a separate study. The topic of the paper does not justify and the limits of its volume do not allow dealing with this phenomenon in any detail. It is also hardly necessary at this conference since it was discussed both at the 2012 and the 2013 Fordham IP conference.⁴

In this paper, first, those aspects of the referral and preliminary ruling system are discussed which seem to have negative impact on the chance for a duly consistent copyright practice. Then, it is reviewed how these aspects are manifested in the CJEU rulings on the right of communication to the public. This is followed by an analysis of the Swensson description; how certain defective elements of the “established case law” appear in it and how it might still be implemented and applied by also offering good chances for rightholders to exploit their right in the online environment. Finally, it is outlined, how it would be possible to “save” even if those defective elements were eliminated.

STRUCTURAL AND PROCEDURAL PROBLEMS OF THE PRELIMINARY RULING SYSTEM

The practice of the CJEU is criticized not only due to Court’s judicial activism (in the view of the author of this paper, not without well-founded reasons) but – frequently in close connection with that activism – also due to the legal quality of some of the Court’s judgments. This criticism sometimes is expressed in quite a blunt way.

The view expressed by *Roman Herzog*, former President of Germany is quite well-known:

The cases described show that the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law, that its decisions are based on sloppy argumentation that it ignores the will of the legislator, or even turns it into its opposite, and invents legal principles serving as grounds for later judgments.⁵

Similar not too polite opinions have also been expressed by academics such as by *Jan Komárek*:

The...fundamental Court of Justice’s task, when ensuring that in the interpretation and application of the Treaties the law is observed,... is to provide national courts with authoritative guidance. However, to be able to speak with authority, the Court must speak clearly and persuasively. This cannot be done if it pulverizes its authority into hundreds of (sometimes) contradictory and (often) insufficiently reasoned answers. The current system of preliminary reference, which undermines national judicial structures by allowing the lowest parts of the judicial pyramid to talk directly to the ultimate interpretative authority, has negative effects both for the national judicial process and for the Court of Justice’s mission.⁶

⁴ At the 2012 Conference by Lionel Bently under the title „Harmonization by Stealth – Copyright and the ECJ” and at the 2013 conference, by the author of this paper under the title „The Inundation of the CJEU by Copyright Referrals and the Dangers of ‘Creeping Harmonization’”.

⁵ See http://www.cep.eu/fileadmin/user_upload/Preseemappe/CEP_in_dem_Medien/Herzog-EuGH-Website_eng.pdf.

⁶ Jan Komárek: „In the Court(s) We Trust? – On the need for hierarchy and differentiation in the preliminary ruling procedure”, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982529.

In the light of the Court's copyright judgments, this criticism seems understandable. Some of those who deal with other branches of intellectual property rights also have unfavorable opinion on the CJEU's practice. For example, at the time when it was discussed what kind of judicial structure should be established for the EU's unitary patent system, *Jochem Pagenberg*, the President of the European Patent Lawyers Association summed up the EPLA's position about the option of leaving the task to the CJEU:

If one wants a really unattractive, inefficient, unpredictable and probably extremely expensive patent court system, then we will get it; one must only give the ECJ a chance to receive as many referrals in patent law as possible. If one wants to see substantive patent law in Europe to be decided by judges without any solid knowledge and experience in this field, then one must involve the ECJ whenever possible. And if somebody intended to lay a solid ground for failure of this - at some time very promising - project, then he will probably succeed.⁷

The above-quoted critical statements refer to a basic feature of the EU judicial system which – along with judicial activism – may lead to poorly argued judgments in the field of intellectual property rights. As the patent lawyers have stated, CJEU judges “are without any solid knowledge and experience in this field.” This, in itself, should in no way be understood as a negative statement of the judges' lawyerly and human qualities; just a *description of a factual situation* which, in the case of high-level courts with broad competence covering all kinds of legal issues, may be regarded typical.

The absence of specialized knowledge and experience in a given field is a less substantial problem if the issues involved may still be more or less duly settled on the basis of some general legal principles and teleological – legal-political – considerations. However, *the more complex and detailed the regulation in a branch of law is, there is the more obvious need for non-specialized courts to get access to and apply adequate information* about all relevant aspects of the legal issues involved. However, unfortunately, it seems *that CJEU sometimes adopt judgments on the basis of such general principles and teleological considerations as if there were not well-established specific rules*. What the author of this paper would like to stress is that this does not happen simply because the CJEU judges disregard the specific rules but that *it is rather the consequence of dysfunctional aspects of the preliminary ruling system*.

The undermining of national judicial hierarchies to which Komarek has referred might be the source of “constitutional” conflicts between the Union and the Member States regarding the application or non-application of the principles of subsidiarity and proportionality, but as stressed above, this paper is not intended to cover this delicate topic. In contrast, the impact of this aspect of the preliminary ruling system on the quality of CJEU judgments is very much relevant.

The basic provisions on preliminary rulings may be found in *Article 267 of the TFEU* which read as follows:

⁷ See at www.eplaw.org/Downloads/President's%Report.pdf.

The Court of Justice of the European Union shall have *jurisdiction* to give preliminary rulings concerning:

(a) the *interpretation of the Treaties*;

(b) the *validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. (Emphasis added.)

The most conspicuous structural problem of the EU's judicial system results from the second unnumbered paragraph of Article 267. A first-instance court, instead of trying to adopt a decision may directly turn to a supranational "Supreme Court" to rule on the issue. As Komarek has pointed out this is a *highly undesirable circumvention of judicial hierarchy*.

First-instance courts may and time and again commit certain errors. It does happen concerning any kinds of legal norms and it may certainly happen concerning EU norms too; the more so because *first-instance judges tend to be less experienced*. However, *in a normal judicial system, their decisions may be revised and, if necessary, corrected* by second-instance – and possibly even by third instance – courts to which the interested parties may appeal. Therefore, it does not seem to be necessary that the highest judicial forum of the EU take over the roles of both the first-instance and the second-instance courts. Such a system is hardly a fortunate one also because, in this way, *the CJEU adopts judgments* on certain – by definition, important – legal questions normally *without the possibility of appealing against them*.

The provision of the third unnumbered paragraph of Article 267 – at least, *in the way it is applied in practice* – may also create undesirable disruption of due procedures in a normal judicial hierarchy. In this case, the CJEU takes over the role of second-instance courts and its judgments are binding for all courts of all the Member States.

In the first sentence of the preceding paragraph the phrase "in the way it is applied in practice" is emphasized. *It is obvious that, in the EU, where certain issues are regulated at Union level, it is necessary to harmonize the interpretation and application of certain important legal issues*, in particular in those cases where, without this, problems could emerge in the functioning of the internal market. *This, however, does not justify regular intervention of the highest judicial forum*; more restraint and thorough selection of the truly relevant cases would be desirable.

"Eurosceptic" politicians – but also others who are for a strong EU but insist on the need for more faithful application of the principles of subsidiarity and proportionality – frequently stress that the EU is not a United States of Europe and, therefore, its "constitutional" structure must not be so centralized as in the case of federal states, such as the United States of America. However, *a comparison of the judicial system of the US and the EU shows*

that the EU's system is much more centralized than the federal judicial system of the US. This is also clearly manifested in respect of the frequency of adopting judgments by the highest judicial bodies, the Supreme Court of the US (SCOTUS) and the CJEU, respectively. The number of preliminary rulings adopted by the CJEU is cca. ten times higher than the number of judgments adopted by the SCOTUS on the basis of writ certiorari,⁸ and it is extremely rare that the SCOTUS intervenes in cases that have not gone through yet the normal judicial hierarchy.

The comparison of the conditions of accepting cases to deal with at the highest judicial level shows even more telling differences. The relevant rules (Rules 10 and 11) of the Rules of the Supreme Court of the United States state that a writ of certiorari on the basis of which the SCOTUS may deal with an issue of the interpretation of current legislation “will be granted only for compelling reasons” and that “[a] petition for a writ of certiorari to review a case pending in a... court of appeals, before judgment is entered in that court, *will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.*” (Emphasis added.) In contrast, Article 267 foresees regular – and consequently frequent – interventions by the CJEU which is further confirmed by the “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings”⁹

The first obvious consequence of this regulation of judicial competences is that *the highest judicial body of the EU is inundated by a big number of cases*; this is happening certainly in this way concerning the narrower topic of this paper: the right of communication to the public. *Too much work burden may in itself influence quality* in a negative way; judges may settle a certain issue without that kind of thorough analysis which would be necessary in the given case.

It is another – and even weightier – consequence of jumping too early to the highest judicial level that *less room and time is left for considering all valid – or at least defensible – legal arguments and counter-arguments*. In this way, there is a danger that *not duly informed judgments* are adopted. *In normal hierarchy, it is possible to correct judicial errors*. The intervention of the highest court is only necessary if there are differing decisions on important legal aspects also at the appeal courts level.¹⁰ *Correction is much more difficult if*

⁸ In 2013, the CJEU completed 701 cases, a considerable increase compared with the previous year (595 cases completed in 2012). The Court had 699 new cases brought before it, which amounts to an increase of approximately 10% compared with 2012 and constitutes the highest annual number of cases brought since the Court's creation (source: CJEU press release No. 34/14. In contrast, As regards the number of writ of certiorari granted by the SCOTUS, according to the Court's statistics, for example, between June 30, 2011 and July 2, 2012, the Court disposed of 7,654 appeals and granted 63 for oral argument (.862%), certainly not more than 1%. (source: <http://dailywrit.com/2013/01/likelihood-of-a-petition-being-granted/>.

⁹(2012/C 338/01.

¹⁰ For example, the *Rule 10* of the Rules of SCOTUS on *Considerations Governing Review on Certiorari* provides as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that

rulings are adopted immediately at the highest level. It is possible but “*institutional pride*” may act against it. Nevertheless, maintaining an erroneous position in a series of contradictory rulings is more damaging for the prestige of a court, such as the CJEU, than the recognition of an error and subsequent self-correction.

There is one more feature of the preliminary ruling system that may contribute to adopting judgments in a way that non-specialized CJEU judges are not in possession of all the specific information which would be indispensable for well-founded rulings. Namely that, *under the Statute of the Court, the submission of observations by the representatives of key stakeholders groups* – whose rights and legitimate interests may be gravely concerned the Union-level settlement of a case – *is not allowed*. This possibility is only available for the concrete parties in the case. In additions to them, only the governments of the Member States, the Commission and certain institutions may submit observers. In principle, interested stakeholders might persuade the governments of certain Member States to submit observations reflecting their position and arguments. However, this involves a kind of political filter by the administrative branch and, thus, it may happen that some weighty legal arguments are not made available to the Court. The Advocate General’s opinion may influence the Court in a right direction but experience shows that sometimes such opinions are not helpful either. There could be better guarantees for adequate judgments if the preliminary ruling procedure were more participatory and transparent. The CJEU would also need that kind of “friendly” support as what is available to the SCOTUS in the form of high-quality *amici curiae* submissions.

DEFECTIVE ELEMENTS OF THE CJEU’S JUGDMENTS ON THE RIGHT OF COMMUNICATION TO THE PUBLIC

Applying a notion of “public” based on a definition in an out-of-date edition of the WIPO Glossary – recognized as suitable to “shed light” on the interpretation thereof – without being informed that there is a new edition with a definition containing decisive new elements

There is quite a concise description of the concept of “public” adopted and applied by the CJEU in the *Del Corso* judgment:

84...[T]he Court has held that the term ‘public’ within the meaning of Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons (see, to that effect, Case C-89/04 *Mediakabel* [2005] ECR I-4891, paragraph 30; Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraph 31, and *SGAE*, paragraphs 37 and 38).

conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

85 As regards, to begin with, the ‘indeterminate’ nature of the public, the Court has observed that, according to the definition of the concept of ‘communication to the public’ given by the WIPO glossary, which, while not legally binding, none the less sheds light on the interpretation of the concept of public, it means ‘making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group’.

The definition provided in the above-mentioned WIPO Glossary – which is recognized as applicable since it “sheds light on the interpretation of the concept of public”) – is somewhat more precise than the concept previously adopted in the *Mediakabel*, *Lagardère* and *SGAE* cases: an indeterminate number of potential listeners implying a fairly large number of persons. It is somewhat more precise since it in a way clarifies that “public” is what is “not restricted to specific individuals belonging to a private group.”¹¹

It seems quite evident that *the Court found the definition in the Glossary applicable because it had recognized it as a reliable source since it was a publication of WIPO*, the specialized UN agency responsible for the administration of the relevant international treaties. However, the CJEU’s reference to that old Glossary definition *was an example of an erroneous finding due to the absence of sufficient information*. This is so, because, since the Court was of the view that a WIPO Glossary, although not legally binding, may be an appropriate basis for interpreting the concept of “public”, *it should have quoted the definitions which may be found in the WIPO publication reflecting the position of this UN specialized agency recognized by the Court as a reliable source suitable to “shed light” on such a concept*. Those definition differ from the one having quoted by the Court:

Communication to the public, the right of ~

In a narrower sense – the way it is applied in the *Berne Convention* it means the transmission, by wire or by wireless means, of the images or sounds, or both, of a *work* or of an *object of related rights*, making it possible for the images and/or sounds to be perceived by persons outside the normal circle of a family and the closest social acquaintances of the family, at a place or places the distance of which from the place where the transmission is started is such that, without the transmission, the images or sounds, or both, would not be perceivable at the said place or places, irrespective of whether the said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times. The actual *reception* of the transmitted *program* is generally not a condition for the completion of such an act and is not a part of it.”¹²

Public, the ~

1. “The public” is a group consisting of a substantial number of persons outside the normal circle of a family and its closest social acquaintances. It is not decisive whether the group is actually gathered in one place; the availability of *works* or *objects of related rights* for the group suffices. In cases of *communication to the public* (including *broadcasting*), and (interactive) *making available to the public*, it is irrelevant whether the members of *the public*

¹¹ „WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights”, WIPO publication No. 816(EFS), 1980, p. 42.

¹² „WIPO Guide to Copyright and Related Rights Treaties Administered by WIPO – Glossary of Copyright and Related Rights Terms”, WIPO publication No. 891(E), 2003 (hereinafter: WIPO Guide and Glossary), pp. 275-76.

capable of receiving the *works* or *objects of related rights* may receive them at the same place or at difference places, and at the same time or at different times.

2. As an adjective in reference to an act, “public” (such as *performance* or *recitation*) means that the act is performed in the presence of the public, or at least at a place open to the public.¹³

The problem is that *the CJEU quoted an out-of-date version of the WIPO Glossary* published in 1980. In contrast, the quotation in the preceding paragraph is from the WIPO Glossary published in 2003. The quite important substantive differences between the 1980 and 2003 glossaries is mainly due to the fact that, *in the two decades between the two publications, a thorough analysis of and debate on the relevant issues took place at a great number of meetings of governmental experts* (see a more detailed description on it in connection with the old and new WIPO Guide to the Berne Convention, below). There are *two new elements* of the definition in the updated Glossary which – as a result of such an analysis and debate – offer important clarification about notion of “public” in the context of the expression “communication to the public.” First, *more precise criteria on what may still be regarded as a “private group”* mentioned in the old Glossary and what qualifies already as “public”, namely “a group consisting of a substantial number of persons outside the normal circle of a family and its closest social acquaintances”. Second, the recognition that, from this viewpoint, *it is irrelevant whether the “said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times.”*

If the CJEU had applied this concept of „public”, for example, in the *Del Corso* case, *it would not have adopted an erroneous judgment*. Unfortunately, it did. *It is unimaginable that the Court knew about this definition but just it neglected it*. It is sure that *it did not have information about it*. Under a duly-hierarchicized participatory judicial system like the one in the US, it could hardly happen that, by the time the highest court is to rule on a legal issue, it would be so badly informed as the CJEU proved to be, for example, in this case.

This is one the reasons for which the preliminary ruling system is in need of substantial reform. New rules are necessary to avoid getting the CJEU into such unpleasant situation with absence of due specific information.

Limiting the application of the right of communication to communications made to a “new public” – in conflict with the international norms and the EU directives which do not allow such limitation

In the *SGAE* ruling, the CJEU refers to “new public” in the following way:

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.

¹³ *Ibid.*, p. 306.

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.

42 The clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.

These arguments reflect multiple aspects of misunderstanding – or misinterpretation.

In point 40, the statement in the second sentence is presented as if it followed from Article 11*bis*(1)(ii) of the Berne Convention to which reference is made in the first sentence but – it does not follow. Under Article 11*bis*(1)(ii) of the Convention, “[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.” It is to be noted that the text does *not* read in this way: “[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, provided that the *transmission is made to a public different from the public at which the original act of communication of the work is directed.*”

The text of the provision is crystal-clear in that *the only condition is that the re-transmission is made by an organization other than 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.* Since the plain text of the provision is clear, under the interpretation rules of the Vienna Convention on the Law of Treaties¹⁴ (hereinafter: the Vienna Convention) the “new public” theory should be rejected.

¹⁴ 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 connexion 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:

The Court did not offer any real argument for interpreting Article 11bis(1)(ii) in contradiction with the unequivocal terms thereof. *The reference to the old WIPO Guide to the Berne Convention is not suitable as such an argument* although apparently it is the Court's only basis for its "new public" theory.

There are multiple problems with the way in which the Court handles the old WIPO Guide. The basic one is reflected in the last sentence of paragraph 41 of the judgment: "As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorisation right." It is *a kind of summary of the analysis made by the Court – not of Article 11bis(1)(ii) and (ii)* the interpretation of which would have been a minimum obligation of the Court *but – of a single commentary on those provisions*. The conclusion of this analysis is made in the next sentence which is the first of paragraph 42 of the judgment: "The clientele of a hotel forms such a new public." That is, *according to the Court the requirement of a "new public" corresponds to what is described in the old WIPO Guide*.

It would have been helpful to know exactly on which comments in the Guide the Court had based its theory if it had quoted those comments. Since the Court has not done so one may only guess it. *Probably the reference was made to the comments which may be found in paragraph 11bis.12* and which read as follows:

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 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 performance of his work.¹⁵

The first thing to be noted is that *this paragraph of the old Guide is not about the kind of use which was involved in the SGAE case*. Although, at the beginning of the paragraph, there is a reference to a similarity to subparagraph (1)(ii), *what is described is a use covered by subparagraph (1)(iii) of Article 11bis*. This consists in *public communication* and not in communication to the public. The following paragraph of the old Guide – paragraph 11bis.13

(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.

¹⁵ „Guide to the Berne Convention,” WIPO publication No. 615(E), 1978 (referred to as „the old WIPO Guide”), pp. 68-69.

describes precisely what is involved: “What matters is whether the work which has been broadcast is then publicly communicated by loudspeaker or by some analogous instrument e.g., a television screen.”¹⁶ The communication is made in the same way as public performance: in the presence of public or in a place open to the public; it is certainly due to this that the expression “new performance of [a] work” is used – a kind of short-hand description – in the last sentence of the paragraph quoted above. The definition of public communication in the new WIPO Glossary expresses both the similarity and the difference between public communication and public performance as well as the difference between communication to the public and public communication:

1. The term “*public communication*” is used in Article 11*bis*(1)(iii) of the *Berne Convention*, which provides that the *owners of copyright* enjoy the *exclusive right of authorizing* “the *public communication* by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the *broadcast* of the work.” The use of this term, rather than the term “*communication to the public*,” is appropriate, since this act does not involve the transmission of the *work* to another place: it is an act carried out in a place where *the public* is or may be present, and, in that sense, it is similar to “*public performance*” and to “*public recitation*.” It means the *reception* of the *broadcast* in a way that it becomes audible and/or visible to those who are present and correspond to the concept of “(the) *public*.”
2. The term differs from the expression “*communication to the public*,” since in the case of the latter, those to whom *works* or *objects of related rights* are transmitted for *reception*, and who correspond to the concept “*the public*,” are at different places.¹⁷

The factual situation was different in the SGAE case: „the distribution of a signal by means of television sets by a hotel to customers staying in its rooms”. Thus, communication to the public rather than public communication was involved.

It is also true, however, that the above-quoted paragraph of the old WIPO Guide dealing with subparagraph (1)(iii) on public communication in the sense discussed above begins with a reference to paragraph (1)(ii) on rebroadcasting and retransmission by cable stating that it is a common element of the acts concerned “an additional audience is created” as a result of which “the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given.”

*The CJEU did not apply Articles 31 and 32 of the Vienna Convention containing the rules of interpretation of treaties under which the plain text of a treaty provision is the most decisive. It based its ruling on some comments in the old WIPO Guide and a kind of interpretation thereof. There is no explanation in the judgment as to why the Court has accepted the criterion of “new public” as a condition of the application of Berne Article 11*bis*(1)(ii) and (iii) when the text of those provisions does not contain such limitation. There is particularly no indication why the Court – which must have noted this conspicuous contradiction – did not make any attempt at applying supplementary means of interpretation, in particular the “preparatory work” of the provisions (as reflected in the records of the relevant diplomatic conferences) and did not review either certain authoritative copyright treatises offering more thorough analysis of the issues involved.*

¹⁶ *Ibid.*, p. 69.

¹⁷ WIPO Guide and Glossary, p. 305.

If the Court had made such inquiry it would have had to find (i) that – as discussed below – *the “preparatory work” does not confirm but rebuts the theory of “new public”* as a condition of the application of the right of communication to the public; (ii) that – in accordance with this – *the most authoritative treatises refute the theory either*; (iii) that *it was not accepted by meetings of competent WIPO bodies* dealing with this issue and attended by representative of the governments of Berne member countries; and (iv) that, in accordance with this, *even the source which seems to be regarded by the Court as the most reliable one – namely the WIPO Guide to the Berne Convention – has rejected it*. Not the old Guide of 1978 referred to by the Court but the new Guide published by WIPO in 2003.

The answer to the question of why the Court had not taken into account these sources of information (if it had considered them, it would have certainly referred to them even if – what would have been surprising, of course – it had not found them decisive) and thus adopted a poorly informed judgment is certainly that *it had not been informed about them*. This is another proof that there is a need for a thorough review of the provisions on the preliminary ruling system. New procedural means are needed – which do exist and are duly applied in in other jurisdictions – to guarantee that the highest court of the EU is not left alone without due assistance to get all the necessary information for truly well-founded judgments.

However, before discussing the reasons for which the above-mentioned sources of information offer a clear rebuttal of the “new public” theory, it seems justified to try to find some explanation for the comments made in the old WIPO Guide. It is easier as regards cable retransmissions, while the comments on public communications by loud speakers, etc. form a more suitable basis for an understanding that, when the Guide speaks about *communication to a new public*, it may be just a kind of a short-hand reference to *new act of communication to the public*.

To apply the expression used by the CJEU concerning the question of whether or not communication to the public is for profit-making (as discussed below), *“it is not irrelevant” that the Guide was published in 1978 when communication technologies – including satellite broadcasting and cable retransmissions – were less developed and that the thorough legal analysis mentioned below had not taken place yet*. At that time, it was more frequent – and typical – that, in many areas, broadcast programs were only receivable through a cable network. This may explain why the Guide spoke about “additional public” not covered by the original broadcasting – in spite of the fact that previously it also stated that the real (and, in fact, only) condition for the application of subparagraph (ii) of Article 11*bis*(1) is that the broadcast works are retransmitted by an organization other than the original one (since in the case of the original one, the issue of such retransmissions may be settled in the underlying contract).

The interpretation and application of subparagraph (iii) on public communication by loudspeaker, etc. is another matter. First of all, it should be noted that, in contrast with cable retransmission, subparagraph (iii) is applicable irrespective of who performs such an act (meaning that it is even not a condition that it is performed by an organization other than the original broadcaster). The nature of such an act is duly expressed – although in a short-

hand manner “*assimilating*” public communication to public performance – by the statement in the above-quoted paragraph of the old Guide: “*new performance.*”

The essence is what is described in that paragraph; namely that *broadcasting is communication just for reception of the broadcast works. If they are not just received but they are simultaneously made available again to the public the same way as through public performance, it is simply a new public exploitation of the works concerned.* Such acts of public communication *are not communications to a new public but new communications* (in the form of public communications), or as the old Guide refers to them *new performances*. The right provided in Berne Article 11(1)(iii) is not only applicable where broadcast works are not receivable to the public in a certain territory but, through such public communication they become receivable (and in this case one may truly speak about an “additional” or “new” public). It is *applicable also where a broadcast program is receivable without any problem in a given area* and, thus, the same members of the public in the area could enjoy the broadcast works at home, but they are present, for example, in a nearby pub where they can listen to or watch the same works received and simultaneously publicly communicated by the owner of the pub through loudspeakers or on a television screen. *The rights provided in the three subparagraphs of Article 11bis(1) are cumulatively applicable irrespective of whether the different communications – broadcasting, rebroadcasting, retransmission by cable, public communication by loudspeakers, etc. – are made to the same public or a group within the same public.* This is also clarified in the last comment to Article 11bis in the old Guide.¹⁸

Let us turn now to the above-listed four decisive sources of interpretation rebutting the “new public” theory.

As regards the “preparatory work” as the most important subsidiary source mentioned in Article 32 of the Vienna Convention, it is very helpful since the Records of the Brussels revision conference shows that there was an explicit proposal to limit the right of retransmission to retransmissions where they are made to a new public, it was rejected by the Diplomatic Conference.

The basic proposal submitted to the Brussels Conference by the Belgian government contained the following draft text of Article 11bis(1)(ii): “Authors of literary and artistic works shall enjoy the exclusive right of authorizing:... any new communication to the public by wire or by wireless means of the broadcast of the work”¹⁹ and under the notes to this draft clarified that “new communication” means that a broadcast work is *emitted “to a new circle of listeners”* (emphasis in the original text)²⁰. It seems sufficient to compare the proposed text accompanied by such a note and the text adopted by the Diplomatic Conference – which has remained the same in the 1971 Paris Act – to find that *the proposal was not adopted; there is no reference to new public; the right is applicable in any case where the retransmission is made an organization other than the original one.* This is different from a case where there would not have been a proposal to limit the right of retransmission to retransmissions to a new public. In this way, it is even clearer that no

¹⁸ Old WIPO Guide, p. 69.

¹⁹ „Documents de la Conférence de Bruxelles”, published by BIRPI, 1951, p. 270.

²⁰ Ibid., p. 266.

such condition is applicable. The records of the Brussels Diplomatic Conference prove that *the “new public” criterion was discussed and explicitly rejected.*

This may lead us to the second source unfortunately *not taken into account by the CJEU* in its SGAE ruling – since certainly it had not been assisted by due information, namely *authoritative copyright treatises* containing much more detailed analysis than the old WIPO Guide.

Sam Ricketson, in his seminal book on the Berne Convention, after describing and analyzing the discussion and rejection of on the above-mentioned proposal on the condition of “new public” in respect of rebroadcasting, it states the following concerning retransmission by cable:

Article 11bis(1)(ii) deals only with the distribution of broadcast programs, and does this under the same conditions that applies to rebroadcasting: a separate authorization for this secondary utilisation of a broadcast is only required where the ‘communication by wire’ is done by an organization other than the original one. In the same way as, no question as to whether this communication is made to a ‘new public’ arises.²¹

This comment is repeated in a more recently published book co-authored by *Sam Ricketson* and *Jane Ginsburg* entitled “International Copyright and Neighboring Rights – The Berne Convention and Beyond”.²²

The same position is reflected by the following remark made in *Paul Goldstein’s* and *Bernt Hugenholtz’* treatise on “International Copyright”²³: “In Europe, despite the *clear language of Article 11bis(1)(ii)*, it required an extensive jurisprudence to establish that *cable retransmission of broadcast programs constitutes a restricted act* and therefore *requires licensing, even within the ‘direct reception zone’ of the broadcast*”²⁴ (emphasis added; that is, even within the zone where any members of the public may receive the broadcast and, therefore, it is also communicated by cable retransmission in the same zone, by definition the communication is not made to a “new public”).

The reference to the notion of “direct reception zone” leads us further to the *remaining two other sources of information mentioned above*: the *results of the meetings of competent WIPO bodies* dealing with this issue and attended by representative of the governments of Berne member countries; *and the WIPO Guide to the Berne Convention*. There is a close interrelation between these two sources discussion of which may also reveal and explain the important differences between the old and the new versions of the WIPO Guide to the Berne Convention.

The objective of the old Guide is indicted in the Foreword by *Arpad Bogsch* the then Director General of WIPO:

²¹ Sam Ricketson: „The Berne Convention for the protection of literary and artistic works: 1886-1986”. Queen Mary College, 1986, p. 450.

²² Published by Oxford University Press, 2006, (hereinafter: Ricketson-Ginsburg), p. 734.

²³ Published by Oxford University Press, 2010.

²⁴ Pp. 346-327.

In 1976, the Conference of the World Intellectual Property Organization recognized the importance of cooperation activities related to copyright by strengthening the potential of developing countries through the dissemination of intellectual works and consequently decided to establish a Permanent Committee in this field. The aims of the Program are, in particular to promote the encouragement of intellectual creation, the dissemination of literary and artistic works, and the development of legislation and institutions in the fields of copyright and neighboring rights in the developing countries.

In the latter connection, the Permanent Committee responsible for keeping this Program under review noted with satisfaction that WIPO's activities included the preparation of a Guide to the Berne Convention for the authorities of developing countries.²⁵

This explains the nature and style of the Guide. *It was not supposed to be written as a scholarly study with detailed analysis, with precise identification of the sources used for its creation. It was intended to be as a general introduction to the Berne Convention* (as the Foreword points out, “[t]he sole aim of this Guide is to present as simply and clearly as possible, the contents of the Berne Convention”²⁶). The as-simple-as-possible style did not allow a thorough analysis of complex interpretation issues. It also followed from the objective and simplified style of the Guide that, in the comments, *it was not precisely indicated which statements consisted just in the interpretation of the text of the various provisions, which ones are based on the “preparatory work” and which ones are mere literary views.*

The Secretariat of WIPO, however, recognized that, in order to fulfill its obligations to duly administer the copyright and related rights conventions, it became necessary to carry out thorough analyses and discussions on the interpretation and application of the treaty provisions, the more so because new forms of utilization of works and new categories of works appeared. It was exactly during the decade following the publication of the old Guide – the 1980s – that such analyses and discussions took place in an extremely intensive manner by various committees of governmental experts. It was that decade which was the so-called “guided development period” of international copyright and related rights. The WIPO Secretariat’s objective with the series of studies and meetings was double: first, to offer well-founded guidance to WIPO member countries for the interpretation and implementation of the treaty norms, possibly also in the form of a Model Law applicable for both industrialized and developing countries and, second, as a summary of the results of the thorough analytic work, to publish a new Guide to the Berne Convention of a different kind as the old one; in the style of scholarly studies with precise indication of the various sources of interpretation accompanied by an updated Glossary. However, at the end of the 1980s and at the beginning of the 1990s, a new hectic period began in the international copyright relations with the TRIPS negotiations, with the emerging of the Internet the way we know it now and with the preparation of the WIPO Internet Treaties (the WCT and the WPPT). The WIPO Model Law project, after a couple of sessions of a Committee of Governmental Experts was abandoned and the creation and publication of a new WIPO Guide and Glossary was suspended; the latter was only published in 2003 after that the new WIPO Treaties had entered into force (in 2002).

²⁵ Old WIPO Guide, pp. 3-4.

²⁶ *Ibid*, p. 4.

One of the many topics discussed in the “guided development” period was the copyright and related rights status of *cable transmissions* (in the form of both cable-originated programs and cable retransmissions). This is a good example to show how thorough analysis took place to duly interpret the relevant international norms and to offer guidance for their appropriate interpretation. The studies and meetings on cable transmissions began already in 1977 on the basis of the joint decisions of the Executive Committee of the Berne Convention, the International Committee of the Universal Copyright Convention (UCC), and the Intergovernmental Committee of the Rome Convention. The Committees set up Subcommittees to deal with this topic which had several joint sessions and regularly reported to their mother Committees. In 1981, the Committees decided to extend the mandate of the Subcommittees “to the consideration of the desirability and the feasibility of arriving at internationally applicable principles and possible model provisions.”²⁷ The Subcommittees held two more joint sessions and at the second one, in December 1983, finally decided that had completed their “Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable.”²⁸ These governing bodies decided at their June 1985 joint sessions that with the adoption of the Annotated Principles the issues of cable transmissions had been duly settled and that adequate guidance was available for the interpretation of the relevant international norms. The report of the joint sessions reflected that the Committees noted

*the “Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable” discussed and adopted by the Sub-committees of the Committees and then by the Committees themselves in December 1983, which were sent to all States and organizations concerned and had been published in the meantime in the copyright periodicals of WIPO and Unesco*²⁹ (emphasis added).

The CJEU based its interpretation on comments in an old unofficial WIPO Guide prepared “as simply as possible” as a general information publication for the purposes of developing countries because – rightly enough – it considered that WIPO as the UN specialized agency in charge of administration of the Berne Convention is a reliable source. In view of this, *it is absolutely sure that the CJEU, if it had been informed of the Annotated Principles – adopted in 1983 on the basis of thorough studies, discussed by the representatives of the member countries, definitively confirmed in 1985, inter alia, by the competent governing body of the Berne Union and published by WIPO as guidance for the governments of the member countries of the Berne Union – certainly would have based its judgments on those Principles* (or at least it would have taken into account and would have indicated in the judgment the reasons for which it had agreed or had not agreed with the relevant principles). *The SGAE judgment shows beyond any doubt whatsoever that it was not the case; the Court had been left badly uninformed.* This is one more persuading proof that the preliminary ruling system is in an urgent need for revision and improvement.

The Annotated Principles include 38 principles with detailed notes (“annotations”) added to them in no less than 263 long paragraphs in which not only the text of the Berne Convention

²⁷ *Copyright* (WIPO’s monthly review), February 1982 issue, p. 72.

²⁸ *Ibid.*, April 1984 issue.

²⁹ *Ibid.*, September 1985 issue, p. 282.

is analyzed thoroughly but also the “preparatory work” as reflected in the records of the relevant Diplomatic Conferences.

The Principles – which due to the way they had been prepared and adopted, have *undeniable authority* – states not only that the text of Article 11(1)(ii) does not allow any interpretation according to which – beyond the condition that a retransmission is supposed to be done by an organization other than the original broadcaster – *the application of the right of retransmission might be subject to any other condition, in particular to the condition of “new public”*. The annotations state this (on the basis of a very detailed analysis of the “preparatory work” of Article 11bis(1) mentioned above in such clear terms:

Under copyright, the author has the exclusive right to authorize each and every distinct act of communication to the public; copyright is not concerned with the extent of the reception of transmissions of the work within a certain area... It is inconsistent with the concept of copyright to assume that only because authorization is granted to a broadcasting organization to broadcast the work, third persons became free to distribute by cable, within a certain zone, the work broadcast... Furthermore, *there is no legal basis for considering the author's right to authorize the communication by cable of his (broadcast) work as exhausted by the exercise of his exclusive right to authorize the broadcast of his work*; the Berne Convention explicitly recognizes, without any reference to “zones” or any other territorial restriction, a *separate* right to authorize any distribution by wire of broadcasts of works, if made by a person other than the original organization.³⁰

In the quotation, emphasis is added to the statement pointing out that the application of the criterion of “new public” would result in the exhaustion of the right of communication to the public when it is exercised through communication to a certain circle of the public – which would be an obvious conflict with the international norms.

The new and updated WIPO Guide to the Berne Convention is in accordance with these findings and makes it clear that no interpretation of Article 11bis(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 allowed 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 “new public” – which is not provided in the Convention.

The “new public” theory is used as part of the “established case law” of the CJEU in several preliminary rulings. Although, for the above-mentioned reasons, it is an erroneous concept, its application in concrete cases has not necessarily resulted in negative consequences from the viewpoint of the application of the rights involved (this was true also as regards the SGAE judgment). However this has not transformed the erroneous criterion into a correct one. It has remained a troubling element built-in the case law creating uncertainties and contradictions as well unnecessary complications when its consistent application would produce a result that the CJEU would not find appropriate. This is so much the case that, as it is discussed below, *in the TVCatch judgment*³¹, *the Court did some “spin-doctoring” to allow the application – correctly enough – of the right of communication in a case where, with consistent application of the “new public” theory, it would have hardly been possible.* (This

³⁰ Ibid., April 1984 issue, pp. 148-49.

³¹ Case C-607/11.

may offer a hope also in respect of the Swensson judgment. It is a good example what kinds of troubles the “new public” theory may create. The Court’s ruling might function as a basis for a well-balanced legal settlement concerning hyperlinking – *but only with the removal of the “new public” virus.*)

Limiting the application of the right of communication to communications made by “new specific technical means” – in conflict with the international norms and the EU directives which do not allow such limitation

It was interesting to see how the CJEU tried to circumvent its own “new public” theory in the *TVCatchup* case to adopt a ruling that seems to be basically appropriate as regards its impact on the application of the given component of a broad communication to the public provided in Article 8 of the WCT, Articles 10 and 14 of the WPPT and Article 3 of the Information Society Directive. This judgment is also relevant because – similarly to the Swensson case – it concerned the use of works through the Internet even if in a different way.

In the dispute, ITV claimed 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” theory, it was quite a relevant feature of TVCatchup's system that *its users were only allowed to watch those streamed broadcasts to which they were entitled to watch* in on the basis of a license valid *in the same country, the United Kingdom*. It was relevant too that TVCatchup's income was derived from advertising shown before the user could watch the streamed program (relevant because the aggregator services making available works through hyperlinks, like to one which was the plaintiff in the Swensson case, also obtain their income from advertisement money).

The High Court of Justice (England and Wales) (Chancery Division) referred the *following questions to the Court for a preliminary ruling*:

1. Does the right to authorise or prohibit a “communication to the public of their works by wire or wireless means” in Article 3(1) of [Directive 2001/29] extend to a case where:
 - (a) Authors authorise the inclusion of their works in a terrestrial free-to-air television broadcast which is intended for reception either throughout the territory of a Member State or within a geographical area within a Member State;
 - (b) A third party ([that is to say,] an organisation other than the original broadcaster) provides a service whereby individual subscribers within the intended area of reception of the broadcast who could lawfully receive the broadcast on a television receiver in their own homes may log on to the third party’s server and receive the content of the broadcast by means of an internet stream?

2. Does it make any difference to the answer to the above question if:
 - (a) The third party’s server allows only a “one-to-one” connection for each subscriber whereby each individual subscriber establishes his or her own internet connection to the server and every data packet sent by the server onto the internet is addressed to only one individual subscriber?
 - (b) The third party’s service is funded by advertising which is presented “pre-roll” ([that is to say,] during the period of time after a subscriber logs on but before he or she begins to receive the broadcast content) or “in-skin” ([that is to say,] within the frame of the viewing software which displays the received programme on the subscriber’s viewing device but outside the

programme picture) but the original advertisements contained within the broadcast are presented to the subscriber at the point where they are inserted in the programme by the broadcaster?

(c) The intervening organisation is:

- (i) providing an alternative service to that of the original broadcaster, thereby acting in direct competition with the original broadcaster for viewers; or
- (ii) acting in direct competition with the original broadcaster for advertising revenues?’

From the viewpoint of the “new public” theory, the first question was particularly relevant (the second one also concerned the concept of communication to the public but from another viewpoint) to which, in view of the CJEU’s previous “established case law” a nearly automatic negative response was expected. However, the Court surprised rightholders with a welcome affirmative answer. It avoided the obviously unacceptable consequences of the application of criterion of “new public” in the given case. The satisfaction of the rightholders still could not be cloudless for two reasons: first, the Court – on the basis of some quite unclear arguments – confirmed the “new public” theory as applied in the previous, although different, cases; and, second, it introduced a new criterion for the concept of communication to the public unknown in the international treaties and the EU directives: the “different technical means” theory.

Let us see first the Court’s response which may, when read alone, must have warmed up the rightholders’ hearts (hurray, the “new public” theory has been dropped!):

1. The concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC 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, must be interpreted as meaning that it covers a retransmission of the works included in a terrestrial television broadcast
 - where the retransmission is made by an organisation other than the original broadcaster,
 - by means of an internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server,
 - even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver.
2. The answer to Question 1 is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is funded by advertising and is therefore of a profit-making nature.
3. The answer to Question 1 is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is made by an organisation which is acting in direct competition with the original broadcaster.

When the rightholders’ also read the detailed analysis of the Court, first they could see statements with which they happily agreed. Such an (as previously in other judgments, including the one adopted in the SGAE case) emphatic *reference to Recital (23) of the Information Society Directive stressing that it requires broad interpretation of the concept of communication to the public:*

23 It follows, in particular, from recital 23 in the preamble to Directive 2001/29 that the author’s right of communication to the public covers any transmission or retransmission of a work to the public not present at the place where the communication originates, by wire or wireless means, including broadcasting. In addition, it is apparent from Article 3(3) of that

directive that authorising the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications of those works to the public.

Their *doubts* must have emerged for the first time *when they read 24 to 26*:

24 It follows that, by regulating the situations in which a given work is put to multiple use, the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question.

25 Those findings are, moreover, supported by Articles 2 and 8 of Directive 93/83, which require fresh authorisation for a simultaneous, unaltered and unabridged retransmission by satellite or cable of an initial transmission of television or radio programmes containing protected works, even though those programmes may already be received in their catchment area by other technical means, such as by wireless means or terrestrial networks.

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

The first reaction may have been that this is nothing less but the recognition that the “new public” theory should be withdrawn because it was in conflict with the EU directives. This impression may have seemed to be well-founded the more so because, as it discussed above, originally the theory was based on a comment in the old WIPO Guide to the Berne Convention concerning cable retransmission to which paragraph 25 referred as quoted above. The comment in the old Guide described the – at that time – typical situation where, through “cable distribution”, broadcast programs were communicated truly to additional (“new”) public. The Court did not interpret the text of Article 11*bis*(1) in the light of its “preparatory work” and other more decisive sources; it founded its “new public” theory on the understanding that communication to a new public is not just a typical example but a *sine qua non* element of the concept of communication to the public.

However, the rightholders probably had already some uncertain feelings when they saw the expression “*specific technical means different from that of the original communication*” as an apparent condition. Then, *when they reached paragraphs 37 to 39 their happiness abated* since they understood what the Court exactly had meant by it.

37 ... TVC contends that the retransmission at issue in the main proceedings does not satisfy the requirement that there must be a new public, which is none the less necessary within the meaning of the judgments in *SGAE* (paragraph 40), *Football Association Premier League and Others* (paragraph 197), and *Airfield and Canal Digitaal* (paragraph 72). The recipients of the retransmission effected by TVC are, it submits, entitled to follow the televised broadcast, identical in content, using their own television sets.

38 In that connection, it should be noted that the situations examined in the cases which gave rise to the abovementioned judgments differ clearly from the situation at issue in the case in the main proceedings. In those cases, the Court examined situations in which an operator had made accessible, by its deliberate intervention, a broadcast containing protected

works to a new public which was not considered by the authors concerned when they authorised the broadcast in question.

39 By contrast, the main proceedings in the present case concern the transmission of works included in a terrestrial broadcast and the making available of those works over the internet. As is apparent from paragraphs 24 to 26 above, each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public. In those circumstances, it is no longer necessary to examine below the requirement that there must be a new public, which is relevant only in the situations on which the Court of Justice had to rule in the cases giving rise to the judgments in *SGAE, Football Association Premier League and Others* and *Airfield and Canal Digitaal*.

Thus, the “new public” theory has been maintained where the same technology is used for subsequent transmissions; the right of communication to the public only applies for such transmissions if they take place through specific technical means different from that of the original communication.

The application of this new theory did not create any substantive problem for the application of the right of communication to the public in the TVCatchup case (just to the contrary, if also the response to the second question of the referring court is taken into account, the rightholders could have been quite satisfied). However, in the Swensson case, it turned up that the “specific technical means” theory is not sufficient to get the CJEU’s practice back into accordance with the international norms and the EU directives; the “new public” theory has remained the basic problem.

The Court *has not offered appropriate explanation* for this new theory the unfounded nature of which may be easily proved.

It is sufficient to take a simple look at Article 11bis(1) of the Berne Convention – which has been “built in” by reference into the WCT not only through the general referring provision in its Article 1(4) but also more specifically through its Article 8 on a broad right of communication to the public (implemented in Article 3(1) of the Information Society Directive).

Article 11bis(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, that is, by the same “specific means” as what is used for the original broadcast program*. There is no difference from the viewpoint of the applicability of this component of the right of communication to the public in accordance with its above-mentioned broad concept depending on the question of whether the subsequent communication is done by different technical means (in the case of Article 11bis(1)(ii), by wire) or by the same (in that case, by wireless means). This shows in an unequivocal manner that *the “specific technical means” theory is in conflict with international copyright norms and the EU rules implementing them; there is no element of those norms and rules or in their “preparatory work” that would support this new theory.*

Suggestions that the concept of the right of communication to communications might depend on profit-making purposes of the communications – in conflict with the international norms and the EU directives which do not allow such limitation

Certain suggestions appeared also in other CJEU judgments before, but the full development of the Court's position concerning the role of commercial, profit-making purposes from the viewpoint of the concept and right of communication to the public took place in the *Del Corso* judgment. The judgment is *not in accordance with the international norms and the EU rules for various reasons* (the basic one being that the concept of "public" is used in it erroneously); *in this paper only the issue of profit-making is discussed* since the way the Court has dealt with it has led to *another conflict* with those norms.

In *Del Corso*, several questions had been referred to the CJEU. From the viewpoint of the topic of this paper, *the fourth and fifth questions were relevant* which had been transformed by the Court in this way before dealing with it:

In those circumstances, the fourth and fifth questions of the referring court must be interpreted as asking, in essence, whether the concept of 'communication to the public' for the purposes of Article 8(2) of Directive 92/100 must be interpreted as meaning that it covers the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, for the benefit of patients of those practices and enjoyed by them without any active choice on their part, and whether such an act of transmission entitles the phonogram producers to the payment of remuneration.

The corresponding part of the Court's ruling read as follows:

The concept of 'communication to the public' which appears in Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and Directive 2001/29/EC 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 must be interpreted in the light of the equivalent concepts contained in the convention, the agreement and the treaty mentioned above [the Rome Convention, the TRIPS Agreement and the WPPT] and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property.

The concept of 'communication to the public' for the purposes of Article 8(2) of Directive 92/100 must be interpreted as meaning that it does not cover the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, such as the one at issue in the main proceedings, for the benefit of patients of those practices and enjoyed by them without any active choice on their part. Therefore such an act of transmission does not entitle the phonogram producers to the payment of remuneration.

In the ruling only the expression "free of charge" seems to refer to the question of whether or not profit-making purposes may have a role from the viewpoint of the concept of communication to the public. However, in the text of the judgment, the following may be found:

88 ...[I]n paragraph 204 of the judgment in *Football Association Premier League and Others*, the Court held that it is not irrelevant that a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature.

89 It follows that this must be all the more true in the case of the right to equitable remuneration provided for in Article 8(2) of directive 92/100 given its essentially financial nature.

90 More specifically, the Court has held that the action by a hotel operator by which it gives access to a broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit, since the provision of that service has an influence on the hotel’s standing and, therefore, on the price of rooms. Similarly, the Court has held that the transmission of broadcast works by the operator of a public house is made with the intention that it should, and is likely to, have an effect upon the number of people going to that establishment and, ultimately, on its financial results (see, to that effect, *SGAE*, paragraph 44, and *Football Association Premier League and Others*, paragraph 205).

91 It is thus understood that the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely ‘caught’ by chance.

92 It is in the light of those criteria in particular that it must be determined whether, in a case such as that at issue in the main proceedings, a dentist who broadcasts phonograms to his patients, by way of background music, is making a communication to the public within the meaning of Article 8(2) of Directive 92/100.

97 ... [I]t cannot be disputed that, in a situation such as that in the main proceedings, a dentist who broadcasts phonograms, by way of background music, in the presence of his patients cannot reasonably either expect a rise in the number of patients because of that broadcast alone or increase the price of the treatment he provides. Therefore, such a broadcast is not liable, in itself, to have an impact on the income of that dentist.

98 The patients of a dentist visit a dental practice with the sole objective of receiving treatment, as the broadcasting of phonograms is in no way a part of dental treatment. They have access to certain phonograms by chance and without any active choice on their part, according to the time of their arrival at the practice and the length of time they wait and the nature of the treatment they undergo. Accordingly, it cannot be presumed that the usual customers of a dentist are receptive as regards the broadcast in question.

99 Consequently **such a broadcast is not of a profit-making nature, and thus does not fulfil the criterion set out in paragraph 90 of the present judgment.** [Sic!!!]

To text of the last paragraph, not only the usual emphasis is added by using italics but triple emphasis also using bold letters and underlining due to its extremely erroneous nature. The truly substantive problem is not the fact that apparently the Court had mixed up the concepts of public communication of broadcasts with broadcasting since, in the given case, it is just a *terminological error* (although not just a simple wording lapse, since the same expression – “broadcasting” – is used through the judgment for the use of phonograms as background music through radio apparatus). (It is already a more serious error that the Court had not applied the concept of “public” appropriately and that it presented an interpretation that would eliminate related rights protection – but possibly also copyright

protection – concerning background music in general.) However, *it is a brutally toxic error that the Court limits the application of the right of public communication to communications of a profit-making nature*, the more so because it may be understood that this inexplicable limitation is applicable also for forms of communication to the public.

This is so obviously wrong that it is hardly necessary to elaborate on the reasons for people who know anything about copyright, and this paper is intended for such people. (It might be an interesting survey to find out how many university teachers would be so lenient that they would not fail a student if he or she dared to say such a thing at an intellectual property exam.) One may read 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), g(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. *Nowhere there is any indication whatsoever that the concept of “communication to the public” (and any subcategories thereof: broadcasting, rebroadcasting, retransmission by cable, making available to the public) might be understood or limited to “communication to the public for profit-making purposes”.*

The author of this paper tends to consider that, in the above-quoted – in certain respects, otherwise apparently justified – critical statements on the CJEU’s activity, there are some expressions that might be regarded too blunt. As discussed above, he is of the view that the majority of errors may be due just to the unfortunate aspects of the preliminary ruling system due to which it is “programmed” that the Court adopts rulings without duly be informed for which it would not be judicious just to blame the judges. However, having read the *Del Corso* judgment, he understands those who go so far as to make such kinds of comments – suitable to hurt the Court’s “institutional pride” – as these: “the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law,” “its decisions are based on sloppy argumentation that it ignores the will of the legislator, or even turns it into its opposite, and invents legal principles serving as grounds for later judgments.” The judges having adopted the *Del Corso* judgment do deserve this kind of condemnation by the former chief judge of the EU’s engine Member State.

This is the more so because, in this case, the non-specialized CJEU judges cannot even claim that they had not been duly informed on the specific legal implications of the case. They had been. The Advocate General’s opinions are not always helpful but, in this case, Advocate General Trstenjak warned the Court in due time that limiting the concept of “communication to the public” to “communication to the public for profit-making purposes” would be in conflict with the international norms and the EU legislation:

131. Furthermore, I am not convinced by the pleas that no communication to the public can be taken to exist because, in the present case, the service provided by the dentist is the primary service, and not the communication of the phonograms, and because the dentist acted without a profit-making purpose.

132. First of all, the existence of communication to the public does not depend on whether the user pursues a profit-making purpose.

133. The concept of communication to the public does not imply that it is dependent on a profit-making purpose.

134. Furthermore, not only does the connection with the abovementioned Article 8(3) of Directive 2006/115 militate against such a requirement, but also the connection with Article 5 of Directive 2001/29, to which Article 10(2) of Directive 2006/115 refers. Thus, Article 5(3)(a), (b) and (j) of Directive 2001/29 provides that Member States may provide for exceptions or limitations to the right of communication to the public provided they are in respect of certain privileged uses and no commercial purpose, or no commercial purpose going beyond the privileged activity, is pursued. It follows, conversely, that communication to the public can also exist where no commercial purpose or no profit-making purpose is pursued.

135. It is also not evident from *SGAE* that a profit-making purpose is a relevant factor. The Court did stress the profit-making purpose of the hotel operators. However, this does not mean that it regarded this as a mandatory requirement for communication to the public...

136. Furthermore, focusing on the profit-making purpose would appear to lead to difficult problems of delimitation. It would then be necessary to decide for each service whether the communication of a phonogram is sufficiently insignificant to be of secondary importance to the principal service.

137. Lastly, against the background of these arguments, the argument put forward by the Italian Government that a financial right like Article 8(2) of Directive 2006/115 may not be granted where the user does not pursue a profit-making purpose with the communication to the public must also be rejected. It is not clear to me why, in the example given of a political event, the author should have an exclusive right, but the phonogram producers and the performers should have no right at all. Furthermore, the absence of a profit-making purpose on the part of the user can be taken into consideration under Article 8(2) of Directive 2006/115 in assessing what remuneration is adequate for such use.

138. Secondly, I would like to point out, in the alternative, that a profit-making purpose can certainly be taken to exist in a case like the present one. Even though radio broadcasts to which patients in a dental practice listen are certainly not an essential part of the service provided by the dentist, it cannot be denied that they may have a practical benefit. It will, as a rule, be more pleasant for patients in a waiting room to listen to radio broadcasts than the noise of the drill from the treatment room. In addition, such broadcasts provide entertainment during the waiting times which generally occur in dental practices. The fact that the price of treatment is not dependent on whether or not phonograms are audible is, in my view, not capable of ruling out a profit-making purpose. In order to assume such a purpose, it is sufficient that there is an element of the service which is liable to improve the overall picture of the service from the patient's perspective. This seems to be the case on the basis of the above arguments.

Correct arguments. It is incomprehensible why the Court has not based its ruling on this wise advice (and, in fact, why apparently has not considered it seriously irrespective whether or not it agreed with it) and why it has adopted instead a catastrophically wrong judgment.

Right finding that the concept of communication to the public is not the same in the field of copyright as in the field of related rights, but on an erroneous basis – leading to a conflict with the international norms and the EU directives

There was another aspect of the *Del Corso* judgment to which it is worthwhile referring; namely *a theory according to which the concept of communication to the public differs according to whether the exclusive right of authors or the right to (single equitable) remuneration of performers and producers of phonograms is involved.*

To begin with, it should be noted that, *if the Court had stated that there are differences, it could have been correct.* This is so since, *in the case of copyright, the right of public performance and the right of communication to the public are two different exclusive rights,* while, *in the case of the rights of performers and producers of phonograms, the concept of communication to the public is broader, it also extends to those kinds of acts which are covered by the authors' right of public performance.*

However, *the Court did not speak about this truly existing difference; it did not even mention it. It has presented another theory* in the following paragraphs of the judgment:

74 It is clear from a comparison of Article 3(1) of Directive 2001/29 and Article 8(2) of Directive 92/100 that *the concept of communication to the public appearing in those provisions is used in contexts which are not the same and pursue objectives which, while similar, are none the less different to some extent.*

75 Under Article 3(1) of Directive 2001/29, authors have a right which is preventive in nature and allows them to intervene, between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such use. *On the other hand, under Article 8(2) of Directive 92/100, performers and producers of phonograms have a right which is compensatory in nature, which is not liable to be exercised before a phonogram published for commercial purposes, or a reproduction of such a phonogram, has been used for communication to the public by a user.*

76 It follows that Article 8(2) of Directive 92/100, on the one hand, requires an individual interpretation of the concept of communication to the public. The same applies as regards the identity of the user and the question of the use of the phonogram at issue.

77 On the other hand, as *the right under Article 8(2) of Directive 92/100 is exercised in the event of the use of a work, that right is clearly a right which is essentially financial in nature.*

It is clear from these paragraphs that the Court was of the belief that the concepts of communication to the public are not the same in the fields of copyright and related rights because authors enjoy exclusive rights, while performers and producers of phonograms only a right to remuneration.

It is difficult to understand why there would be any difference whatsoever as regards the concept of communication to the public. *The Court's theory is completely unfounded.*

Interestingly, the provisions of *the Beijing Treaty on the Rights of Audiovisual Performers (BTAP)* offer proofs that *this is the case.* Its Article 11 reads as follows:

Article 11. Right of Broadcasting and Communication to the Public

(1) Performers shall enjoy the *exclusive right of authorizing the broadcasting and communication to the public* of their performances fixed in audiovisual fixations.

(2) Contracting Parties *may* in a notification deposited with the Director General of WIPO declare that, *instead of the right of authorization* provided for in paragraph (1), *they will establish a right to equitable remuneration* for the direct or indirect use of performances fixed in audiovisual fixations *for broadcasting or for communication to the public*. Contracting Parties may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration.

(3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (2) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraphs (1) and (2) at all. (Emphasis added.)

If the CJEU's theory were correct, *not only the nature of the right* of broadcasting and communication to the public were changed when it would be reduced from an exclusive right to a right to remuneration *but also the concepts* of broadcasting and communication to the public. However, obviously it is not the case. The definitions of broadcasting and communication to the public under Article 2(c) and (d) of the BTAP apply equally in both cases (which otherwise, *mutatis mutandis*, are the same as the definitions of these concepts in Article 2(f) and (g) of the WPPT).

SWENSSON – CORRECT RESPONSE TO THE BASIC QUESTION:
HYPERLINKING IS (INTERACTIVE) MAKING AVAILABLE TO THE PUBLIC

Those who read the CJEU's response to the basic question referred to it on the copyright status of hyperlinking may only acclaim in choir: Kudos!; in French *Chapeau!*; in German, *Hut ub!*; in Spanish, *Bien hecho!*; in Italian, *Bravo!* ; or in Hungarian, *Le a kalappal!*

The dispute in the main proceeding was between the journalists whose articles were published both in the *Göteborgs-Posten* newspaper and on the *Göteborgs-Posten* website with their authorization and the operators of the website *Retriever Sverige* which provided its clients with a list of clickable Internet links to those articles (without authorization by and any payment for the journalists). The journalists brought an action against *Retriever Sverige* in order to obtain compensation but the Stockholm District Court rejected their application. The journalists appealed to the Svea Court of Appeal which then stayed the case and referred four questions of which the first basic one read as follows:

(1) If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive [2001/29]?

What may be found in paragraphs 14 to 23 of the judgment – with the exception of the reference to the incomplete concept of “public” discussed above, which, however, in the given case did not have real relevance – *is an adequate analysis*, as a result of which the

Court has answered the first question appropriately. This analysis deserves being quoted in quite a detailed manner:

14 By its first three questions [...] the referring court asks, in essence, 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.

15 In this connection, it follows from Article 3(1) of Directive 2001/29 that every act of communication of a work to the public has to be authorised by the copyright holder.

16 It is thus apparent from that provision 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' [...].

17 As regards the first of those criteria, that is, the existence of an 'act of communication', this must be construed broadly [...], in order to ensure, in accordance with, inter alia, recitals 4 and 9 in the preamble to Directive 2001/29, a high level of protection for copyright holders.

18 In the circumstances of this case, it must be observed that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works.

19 As is apparent from Article 3(1) of Directive 2001/29, for there to be an 'act of communication', it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity (see, by analogy, Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 43).

20 It follows that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of that provision.

21 So far as concerns the second of the abovementioned criteria, that is, that the protected work must in fact be communicated to a 'public', it follows from Article 3(1) of Directive 2001/29 that, by the term 'public', that provision refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons [...].

22 An act of communication such as that made by the manager of a website by means of clickable links is aimed at all potential users of the site managed by that person, that is to say, an indeterminate and fairly large number of recipients.

23 In those circumstances, it must be held that the manager is making a communication to a public.

Under the preliminary ruling system, unfortunately, the CJEU is not supported by thorough legal analyses prepared and submitted by *amici curiae*. Nevertheless, during the proceedings in front of the Court, two detailed opinions were prepared by well-known copyright experts which could have functioned as *amici curiae* submissions. One was the "Report and opinion on the making available and communication to the public in the internet environment –

focus on linking techniques on the Internet” (hereinafter: ALAI opinion)³² adopted unanimously by the Executive Committee of the oldest copyright NGO, the International Literary and Artistic Association (ALAI) and the other was the “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*”³³ published by a group of academics under the aegis of “European Copyright Society” (hereinafter: ECS opinion). The Executive Committee of ALAI responded by a definite *yes* and the ECS group by a “resounding *no*” to the above-quoted first question referred to the CJEU.

The CJEU *has not referred to either of these opinions, but is possible that it still took them into account to in a certain manner. If it did, concerning this basic question, it adopted the ALAI opinion and rejected the ECS opinion* (since the author of this paper is an honorary member of the ALAI Executive Committee, it certainly does come as a surprise if he adds: fortunately and rightly enough).

It does not seem necessary to rehearse the arguments of the ALAI opinion, but it is worthwhile drawing attention to that part thereof where the differences of various kinds of hyperlinks are analyzed:

[A]ctivities that communicate or make protected works available to the public may come about in many forms, now known or to be invented. What in principle matters is not how such a communication is effected, but rather that **(i)** *the act* of an individual person, directly or indirectly, **(ii)** has the distinct *effect* of addressing the public, irrespective of the tool, instrument or device that the individual has used to bring about that effect, and **(iii)** that elements protected by copyright or material protected by related rights thus become available to the public in a way that is encompassed by the discrete rights granted under copyright.

Clearly, there may be instances where hypertext links or inline links, as described above, can be used for the purpose of addressing a protected work or related subject matter to the public.

Hence, it is totally irrelevant if the public thinks, perceives or senses that it has been directed to another website or if it believes that the access to the protected materials happened on the website that it has logged on to. This is, as such, irrelevant for deciding whether a particular link causes communication to the public (makes the work available to the public) or not. What is decisive is the notion of the “public” and whether a making available or transmission covered by the discrete rights has taken place.

It is just as clear that such a result is not reached when the link does not make a specific protected material available, but merely works as a *reference* to a source where it may be possible to access it and where access to the specific work itself or otherwise protected material is not achieved.

On the other hand, links which lead directly to specific protected material, thereby using its unique URL, fall normally within the framework of a copyright use.

This kind of linking is thus a “making available” regardless of whether the link takes the user to specific content in a way that makes it clear to the user that she has been taken to a third-

³² Available at www.alai.org.

³³ Available at <http://ivir.nl>.

party website, or whether the linking site retains a frame around the content, so that the user is not aware that she is accessing the content from a third-party website.

It is worthwhile drawing attention to this because it is partly a response to the argument raised in the ECS opinion the essence of which is the view that, if linking were recognized as an act of making available to the public, it would be detrimental for the Internet. This is expressed, *inter alia*, in this way in the ECS opinion:

Although hyperlinking takes many forms and has multiple functions, there can be no doubt that it is the single most important feature that differentiates the Internet from other forms of cultural production and dissemination. Hyperlinking is intimately bound to the conception of the Internet as a network, and hyperlinks constitute paths leading users from one location to another. [...]

If hyperlinking is regarded as communication to the public, all hyperlinks would need to be expressly licensed. In our view, that proposition is absurd.

One of the problems of the ECS was that it did not duly differentiate between the various types of links as the ALAI Executive Committee did. However, the basic problem was the erroneous theory according to which no act of making available to the public takes place without actual transmission of a work or other protected material through the Internet. The origin of this error may have been a misinterpretation of the fact that, as a result of acts of making available to the public, transmissions truly take place usually. This, however, does not change another – and from the viewpoint of the concept of making available to the public, fundamental – fact; namely that the relevant provisions of the international treaties and the Information Society Directive provide for making available for transmissions. The plain text of these provisions makes it clear beyond any doubt whatsoever that the act takes place as soon as a work or other protected material is made available by the rightholder.

This is so in the same way as in the case of the exclusive right of distribution which, under Article 6 of the WCT and Articles 8 and 12 of the WPPT which applies for “making available to the public” of copies. The act of distribution takes place *as soon as copies are made available; it is not a further condition that the members of the public buy the copies* – even if they usually buy (although not necessarily all of them; but in respect of those copies which are not sold (yet) the act of distribution still has taken place).

From the viewpoint of the concept of availability, the same apply as regards the concept of publication. Under Article 3(3) of the Bern Convention, a work is published if “the availability of[...] copies has been such as to satisfy the reasonable requirement of the public.” In this case too, the *availability* of copies is sufficient, as it is pointed out on the basis of the analysis of the treaty text and its “preparatory work” in Sam Ricketson’s and Jane Ginsburg’s treaties:

The obvious case in point here is where a work is available[...], but there is no demand for it from that public, for example, where the copy of a work is a book and nobody asks for it, or a cinematographic work where nobody goes to a cinema to see it. In such circumstances, is publication deferred until such time as a demand for copies has arisen, and the 'reasonable requirements of the public' have, at that point of time, been satisfied? The wording of the definition indicates that it is the availability of copies that constitutes publication. Thus, if there is no public demand for copies, this should be irrelevant – the copies are available to meet any

demand that may reasonably be expected to exist, and the author's Berne coverage should not be prejudiced by the fact that there is none at all. What the reasonable requirements of the public are may differ widely according to the nature of the work, but the final words of the definition expressly take account of this fact. Thus, in the case of certain academic treatises, the demands of the public may be expected to be very small, and it may be perfectly reasonable for the publisher to make available only a small number of copies. Having done this, the status of 'published work' should not be denied the work, simply because no one chooses to buy the book.³⁴

It might be said that, in the case of making available to the public through the Internet, no distribution of copies takes place and thus what is true for the concept of distribution is not necessarily true for making available to the public. This argument may be regarded to be supported by the agreed statements concerning the above-mentioned provisions of the WCT and the WPPT on the rights of distribution and rental which limit to the concept of copies – from the viewpoint of these rights – to tangible copies. At the same time it should be noted that the reason for which the (from the viewpoint of legal characterization) neutral term of making available to the public had been worked out in the framework of the “umbrella solution” was to recognize the possibility of characterizing acts of making available not necessarily as communication to the public but also as distribution of copies. In any way, the fact that under the WIPO Treaties (as well as under the Information Society Directive) the right of distribution is limited to tangible copies does not influence the validity of the above finding on the concept of “availability”. The same applies to the definition of “publication;” its application in the digital online environment raises complex questions, but those do not concern either the issue of “availability” the way it is discussed above.

The treaties discussing the interpretation and implementation of the two WIPO Treaties confirm that the right of making available to the public takes place as soon as a work or other protected production is made available for interactive transmission; it does not depend on whether or not transmissions truly take place (in spite the fact that usually they do).

Jörg Reinbothe and Silke von Lewinski – who were among the most active negotiators at the 1996 Diplomatic Conference – state this as follows:

[T]he act of '*making available*' to the public for access covers the offering of works for access and extends to the entire transmission to the user, if such transmission takes place. Accordingly, *the mere establishment of a server which may be accessed individually by members of the public and at their choice regarding time and place constitutes the act of making available* under Article 8 WCT. *If a work is actually accessed, the whole act of communication is covered by the exclusive right*, including the offering of the work in a server and its entire transmission up to the terminal from which the member of the public gets access to the work. This interpretation is confirmed by the wording: *availability of the works is only accomplished when the work has been transmitted* to the member of the public so that he or she may access it from his or her terminal.³⁵ (Emphasis added, in particular to the words “only accomplished” to stress the similarity with the only accomplishment of the acts of distribution by actual buying of copies – not by the distributor but by the buyers of copies.)

³⁴ Ricketson-Ginsburg, p. 266.

³⁵ Jörg Reinbothe – Silke von Lewinski: „The WIPO Treaties 1996”, Buterwort – LeixNexis, 202, p. 108 (emphasis added; footnote left out).

The author of this paper – who, as Assistant Director General of WIPO and Secretary of the Diplomatic Conference and who played a decisive role in the working out of the “umbrella solution” with concept of making available to the public – has characterized the two elements of the concept the same way (the act of making available and its accomplishment by interactive transmission):

[U]nder Article 8 of the WCT and Article 3(1) of the Information Society Directive, the act of 'communication to the public' in the form of 'making available' is completed by merely making a work available for on-demand transmission. If then the work is actually transmitted in that way, it does not mean that two acts are carried out: 'making available' and 'communication to the public'. The entire act thus carried out will be regarded as communication to the public. Of course, it is not irrelevant from the point of view of legal consequences whether or not on-demand transmissions for which the work is made available are actually carried out and how many times, in which way and with what consequences. It is very relevant, for example, for the calculation of damages.³⁶

Sam Ricketson and Jane Ginsburg in their authoritative copyright treatise address this issue also directly from the viewpoint of Internet links. Although on the basis of somewhat different arguments, but they express the same kind of duly nuanced views on the application of the right of making available concerning various forms of links as the ALAI Opinion

The scope of the making available right[...] may encompass certain forms of indirect supplying of literary and artistic works. Consider the following scenario: a website aggregates links to other websites from which users can download unauthorized copies of recorded music. Some links are identified by the name of the music file; clicking on these links takes the user directly to another website and automatically downloads the named file from that website to the user's hard drive. Other links are identified by the names of the other websites; clicking on these sends the user to the website, from which she may elect to download a variety of files. The principal site does not directly send digital files of the recorded music to users who access the site. From the user's point of view, the experience of clicking on the first kind of link to acquire the file is the same, whether or not she knows that the file is coming from the site she contacted, or from some other site; either way, she contacts the first site and receives the file without the apparent further intervention of another website operator. In the second case, the user knows she is being taken to another site, from which she may download files of recorded music. In either case, the linked-to websites are making works available to the public in the same way that a direct-delivery website does. But, in either case, is the first-accessed site, by rerouting to the other sites, also 'making [the files] available' to the members of the public who contact the site?

The article 8 (and 10 and 14 under the WPPT) 'making available' right gives authors the exclusive right of allowing members of the public to access literary and artistic works (and recorded performances) 'from a place and at individually chosen by them'. The 'place' contemplated most likely refers to the place where the member of the public is located (for example, at home, Internet cafe). But the text might also be read to refer to the networked 'place', for example, website, that the user contacts in order to gain access to the work. Applying that interpretation, in the second case, the connection between accessing the first site and the communication of the work may be too attenuated, because the user knows that the site from which she is receiving the work is no longer the site she first contacted. The other

³⁶ Mihály Ficsor: „The Law of Copyright and the Internet”, Oxford University Press, 2002, pp. 496-99.

site becomes the place from which the user chooses to access the work. In the first case, by contrast, the place from which the user appears to be accessing the music is the site the user initially contacted, which is the only site she chose. Accordingly, though the source of the communication is ultimately another site, the user's selection would control. If so, then the WCT 'making available' right will reach acts certain of indirect infringement.³⁷

THE CJEU "SAVES THE INTERNET"

Joint application of the erroneous "new public" and "special technical means" theories

If the CJEU had stopped at the point of its statements in paragraph 21 and 22, the judgment might truly lead to interpretations that could have undermined the operation of the Internet in which links play an indispensable role. However, the referring court added *two more questions* to the above-mentioned basic one and *the Court responded to the three questions together*:

- (1) If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive [2001/29]?
- (2) Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
- (3) When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?

The ECS opinion, for the case that the CJEU had not accepted the position that linking does not qualify as communication (making available) to the public, suggested that the Court should still find that no acts of communication to the public takes place because the "new public" criterion is not fulfilled.

The CJEU has acted in that way and *it has applied not only the "new public" theory but also its Janus-faced "correction": the "special technical means" theory*. After the correct statement in paragraph 23 according to which using clickable links qualifies as communication (making available) to the public, the Court continues in this way:

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 (see, by analogy, *SGAE*, paragraphs 40 and 42; order of 18 March 2010 in Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 38; and *ITV Broadcasting and Others*, paragraph 39).

³⁷ Ricketson-Ginsburg, pp. 747-48.

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

28 Therefore, since there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceedings.

29 Such a finding cannot be called in question were the referring court to find, although this is not clear from the documents before the Court, that when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site.

30 That additional circumstance in no way alters the conclusion that the provision on a site of a clickable link to a protected work published and freely accessible on another site has the effect of making that work available to users of the first site and that it therefore constitutes a communication to the public. However, since there is no new public, the authorisation of the copyright holders is in any event not required for such a communication to the public.

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.

32 In those circumstances, the answer to the first three questions referred is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public, as referred to in that provision.

It is discussed above *why both the "new public" theory and the "special technical means" theory are in conflict with the relevant international norms and EU directives*. This part of the judgment – similarly to previous judgments based on these theories – is *badly founded*. .

THE CJEU' ATTEMPT AT ALSO SAVING COPYRIGHT –
WITH A CHANCE TO BE HELPFUL IN SPITE OF A DEFECTIVE CONSTRUCTION

The CJEU's judges could have hardly stopped here. Due to the current unfortunate regulation on the preliminary ruling system they may get into situations where they have to deal with cases in which complex legal issues have not been duly argued yet and where they are not supported by adequate information. They try to apply certain *general considerations based on their sense of justice supported by the principles of fairness, reasonableness and proportionality also where there is a specific "ready-made" settlement in the norms in forms*. The "new public" theory was adopted in this way. However, the fate of that theory also shows that the CJEU is ready to make corrections when the contradictory nature of its "settled case law" becomes evident. As analyzed above, the adoption of "special technical means" theory seemed to be such a "correction" trying to find a way out from the contradictions created by the erroneous "new public" criterion. It made it possible to rule that, in certain cases, the right of communication to the public is applicable also where there is new public. (It is another matter that, unfortunately, that theory was also in conflict with the international norms and the EU directives implementing them).

In *Swensson*, the Court has also made an attempt at trying to introduce a corrective criterion in the following way:

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.³⁸

Thus, the "new access" theory has gone through two corrections. The first one was that no new public is needed if the communication is made by different special technical means and now the second one is that even no special technical means is needed in case of communication through the Internet (the population of which is considered to be the same public) if access is somehow restricted. This seems to be the case even if the Court uses a new-public-theory-based language: "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."

The judgment does not elaborate on the meaning of the expressions "circumvent restrictions", "restrict public access put in place by the site" and an "intervention without which[...] users would not be able to access the works transmitted".

³⁸ Para. 31.

A plethora of comments have been published on the interpretation of these terms. Some of them identify restrictions with technological protection measures (TPMs) applied for specific systems, such as “paywalls,” others outline a more general concept of restrictions.

The language of the judgment – in particular the use of the word “circumvent” and a reference to the *ability* of access – *may truly be interpreted as to suggest that the Court might have meant the application of some kinds of technical measures*. However, it has not limited the concepts of “restriction” and “circumvention” in any manner. Thus, *any kind of measure which limits public access in any way may and should be understood to be covered*; not only “paywall” but any possible systems which restrict access in any way, including not only subscription systems explicitly mentioned in the judgment but also simple registration systems. This interpretation of the judgment is not only possible but *inevitable under the “established case law” of the CJEU which, in this respect, correctly enough recognizes* (and states, at least time and again) – by referring to Recital (23) of the Information Society Directive – that this right [the right of communication to the public as provided in Article 3(1) of the Directive] should be understood *in a broad sense* covering all communication to the public not present at the place where the communication originates.

If the Swensson ruling is interpreted in such a manner, it may make it possible for rightholders to apply certain business methods and licensing practice which could improve their chance for normal exploitation of their rights in the online environment. Their position may be strengthened in their relationship with “aggregators.” Newspapers such *Göteborgs-Posten* and its journalists may choose to make available their articles (or their abstracts) through the Internet in different forms: (i) allowing free clickable links to anybody (including aggregators); (ii) allowing access free of charge but only to those who – other than aggregators as *Retriver Sverige* and other commercial users – register (reserving in this way the possibility to obtain income indirectly, for example from advertisers); (iii) allowing access also to aggregators, etc. on the basis of a blanket license for a lump sum payment (also through possible collective management systems); or (iv) only allowing access through individual authorization.

HOW TO GET RID OF THE “NEW PUBLIC” THEORY AND STILL TO SAVE BOTH THE INTERNET AND COPYRIGHT?

As discussed above, the application of the “new public” criterion is in obvious conflicts with international treaties and the EU directives. Thus, even if the Swensson judgment may be interpreted and applied in a way that it could establish a chance for rightholders to be protected against others who try to “do business” through exploiting their works without remuneration, it does not mean that the right of communication to the public (along with its various “sub-rights”) may be applied in accordance with the above-mentioned norms.

The legal situation is crystal-clear. *Where the international treaties and EU directives implementing them provide for a right* (exclusive right or right to remuneration) of communication to the public as a restricted act, *that right* – in the absence of a specific exception or limitation – *must be applied*. *Only two conditions* have to be fulfilled: *it has to be a communication* (transmission, retransmission and, in the case of the making to the public form of the broader right of communication to the public, even making available for

interactive transmission) *and it has to be done to the/a "public"*; that is to an indeterminate number of potential recipients beyond the normal circle of a family and its closest social acquaintances irrespective of whether or not they receive the communication at the same place or at the same time or at different places and different times – and even irrespective of whether or not any of them truly receive the communication.

As analyzed above, *there is nothing in the text or the "preparatory work" of the above-mentioned norms that would allow providing for the exhaustion of the right of communication to the public* upon its exercise and thus allowing others to freely communicate the works or other objects of protection where it is not made to a "new public". Such confiscation of the right is not permitted irrespective of whether the new communication is made to the "same public" by different technical means (such as cable retransmission of a broadcast) or by the same means (such as rebroadcasting) The same applies to interactive making available works and other objects of protection through the Internet.

Would be the Internet put in danger if the "new public" theory were dropped and it were recognized – in accordance with the international treaties and the Information Society Directive – that, in the cases mentioned in the ALAI opinion, the use of a clickable link is always an act of online making available to the public? Hardly.

Various solutions may be *considered*.

The first one may be to interpret the free use in the absence of restriction of access the way it is outlined in the Swensson judgment *as an exception* to the exclusive right of making available to the public. However, there would be at least *too basic problems* with such a solution. The *first* one would be that introducing a new exception *would amount to the amendment of the EU law* which would go beyond the competence of the CJEU. As mentioned above, the Court is criticized by several experts due to its activism which in certain cases does not mean less than intrusion into the field of amending the *acquis*. Although in certain cases it may be disputable whether or not such a charge is well founded, *the introduction of a new exception by the Court would be obviously unacceptable* in view of the fact that *the Information Society Directive provides for an exhaustive list of exceptions and limitations*.

The *second problem* would be even weightier since providing that the right of making available to the public is lost on the Internet if the rightholders do not fulfill a condition (restricting the ability of access), *would consist in making the application of a right to a de facto formality*.

It may be said that the Information Society Directive does contain a provision on a possible exception to the right of making available to the public which is automatically applicable unless rightholders perform a certain condition. This is so since Article 5(3)(b) provides an exception, *inter alia*, to the right of communication to the public and the right of making available of published articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved. It would be needless denying that a note about reservation is a

formality. However, this is based on a strictly limited harmless exception to the principle of formality-free protection allowed under Article 10*bis*(1) inherited from the original 1886 text of the Berne Convention (that is, from the time when the principle was not laid down in the Convention) serving the interests of public information. *It cannot be extended to other uses and to other similar formalities.*

The *other solution* would consist in *recognition of the fact that quite frequently the rightholders more or less implicitly, but a clearly recognizable manner, express that they intend to make available their works or other productions freely for online use without the need for any authorization and payment of remuneration.* (Of course, in the case of the huge amount of works and other productions made available on the basis of Creative Commons licenses or with other notices clarifying free availability or accepting it by joining to certain online system, we cannot even speak about implicit authorization). In such cases, it would be anachronistic to speak about the infringement of the right of making available to the public because somebody else uses clickable links.

Of course, in case of such a possible solution *it would be necessary to work out the criteria to be applied to rule safely enough whether or not it may be found that an implied license is granted.* This is truly a field where the establishment of an appropriate case law would fit into the competence of courts in the EU, including the CJEU.

Perhaps, the *AFP v. Morel* decision adopted by the District Court of Southern New York³⁹ may be an example how this may work. The U.S. District Court analyzed the issue whether online making available a works on a social media website consists in granting an implied license. It is worthwhile reviewing the findings of the Court even if, in the given case, the unauthorized use of the works made available through the Internet had not necessarily involved exclusively subsequent online use.

The subject matter of the dispute was a set of photos taken by Daniel Morel, a professional photographer, during the January 2010 earthquake in Haiti. The author uploaded his photos on Twitpic, a Twitter-supporting application making them available for sharing. When he did so, he had to accept the Twitter Terms of Service (TOS), granting Twitter a "worldwide, non-exclusive, royalty-free license (with the right to sublicense)" to use the photos including making them available to its partners.

The access to the photos was not restricted by technological measures but Morel claimed authorship by the attributions of "Morel" and "by morelphoto". Not much time after the posting of the photos they were copied and uploaded by many others and they ended up also in the repertoire of AFP, the French news agency which then licensed them to various newspapers.

The District Court denied AFP's motion to dismiss copyright infringement claims finding that for subsequent uses of the photos the author' license would have been needed and for the purpose of the use by AFP no such license had been granted.

³⁹ 10.Civ.,2730 (WHP) of December 23, 2010.

The Court *specifically addressed the issue of a possible implied license*. It recognized that although certain provisions of the Twitter TOS such as the one on “encouraging and permitting broad re-use” *might have raised the impression of implied license*, the TOS terms *were ambiguous*. Since, under previous case-law precedent, it was *only possible to find the existence of a license when the terms of a license are clear*, it held that AFP *did not have an implied license*. That is, the reason for rejecting AFP’s defense was not that a clear *implied license* could not have been an appropriate basis for a successful defense but that, in the given case, *there had not been a sufficiently clear implied license*.

[End of paper]