

# Why copyright and linking can tango

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## Making things click

While our offline environment is all about mortar and bricks, online on the internet is all about clicks. Clicking away is what surfing the web is all about, everyday. Clicking on buttons, windows, but often also on links: hyperlinks, deep links, framed links and embedded links. Yet, the legal status of linking is unclear. No less than three cases are pending before the Court of Justice of the European Union (CJEU). The facts and questions in each case are different: from the admissibility of deep linking to news articles (*Svensson*), framed linking to streams of sports matches (*C More*), to embedded linking of a YouTube video (*BestWater*).<sup>1</sup> The theme and questions are the same: does linking fall within the scope of copyright protection? And, if so, does unauthorized linking constitute copyright infringement?

Those questions have stirred much debate, following an opinion from Bently and other European Copyright Society scholars on *Svensson*.<sup>2</sup> In short, this opinion argues that 'hyperlinking in general should be regarded as an activity that is not covered by the right to communicate the work to the public embodied in Article 3 of Directive 2001/29'. This conclusion is based on three arguments: (a) hyperlinks do not involve 'transmission' and such 'transmission' is a prerequisite for 'communication', (b) hyperlinks do not provide a communication 'of a work' and (c) hyperlinks do not involve communication to a 'new public'. This gives rise to a number of concerns.

## The Opinion of the European Copyright Society: some concerns

### Fair or fear?

Let's begin with the end in mind. What is the end-goal of copyright in today's digital age? A 'fair balance' of rights and interests between right holders and users. This follows directly from the Information Society Directive,

\* The author is not involved in any of the cases cited in this article. For completeness, the author discloses that he is currently acting for a right holder in a case pending before a lower instance court in The Netherlands in which one of the issues is whether the making available of (links to) internet streams constitutes copyright infringement. The author is grateful to Professors A A Quaedvlieg, J J C Kabel and J J Phillips for their comments and support. All errors and opinions are my own.  
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## This article

- This article discusses the legal status of links, in connection with the pending cases before the Court of Justice of the European Union in *Svensson*, *C More* and *BestWater*. Hyperlinks, deep links, framed links and embedded links are discussed. It focuses on the Opinion of the 'European Copyright Society' on the *Svensson* case. The Association littéraire et artistique internationale (ALAI) Opinion is also briefly discussed.
- This article proposes nine angles as part of the multi-factor test to determine whether linking is actionable under European copyright law: four policy arguments (harmonization, high-level protection, technology-neutral and authorization) and five factors ('making available', 'to the public', 'new public', 'intervention' and 'profit').
- The author concludes that properly balancing those nine factors can ensure that copyright and linking can tango, in step with existing policy goals and case law, allowing linking in some situations, while requiring separate authorization in others.
- The article was published on 3 Feb. 2014 on the JIPLP blog, in advance of the CJEU's decision on *Svensson*.

in recital 31.<sup>3</sup> What do we balance? The answer is in recital 3: 'fundamental principles of law and especially of property, including intellectual property, and freedom of

- 1 Case C-466/12 *N Svensson and others v Retriever Sverige AB*, 13 February 2014; Case C-279/13 *C More Entertainment AB v L Sandberg*, pending; Case C-348/13 *BestWater International GmbH v M Mebes, S Potsch*, pending.
- 2 L A F Bently et al, European Copyright Society, Opinion on The Reference to the CJEU in Case C-466/12 *Svensson*, 15 February 2013 ('the Opinion'). Available at [http://www.ivir.nl/news/European\\_Copyright\\_Society\\_Opinion\\_on\\_Svensson.pdf](http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf) (accessed 31 December 2013).
- 3 Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167, p 10.

expression and the public interest.’ In order to achieve such a ‘fair balance’, most intellectual property laws rely on four types of nuts and bolts to delineate the public and private domain. Copyright is no exception:

- First, threshold requirements: not everything we do or find on the web is protected under copyright. It needs to qualify as a ‘work’, resulting from an ‘intellectual expression’: articles, books, graphics, music, games and other content all need to possess a certain amount of ‘creativity’ to qualify for copyright protection.<sup>4</sup>
- Secondly, defining ‘scope of protection’. IP laws usually do this by listing which ‘use’ falls under ‘exclusive rights’. Copyright is no different. It contains three well-defined rights: (i) the right to reproduce works, (ii) the right to communicate and make available to the public and (iii) the right of distribution. Getting to grips with the second right is what the pending referrals before the CJEU are all about.
- Thirdly, limitations. Even if certain ‘use’ falls under an ‘exclusive right’, it only qualifies as infringement if it cannot benefit from statutory limitations. The Information Society Directive contains a long list of limitations, aimed at serving public interest and freedom of expression in today’s digital age. Private copying, educational and incidental use on and off the web, as well as use in press, citations and parody are all exempted.<sup>5</sup>
- Fourthly, principles: IP laws cannot exempt themselves from the rule of law. Even if there is a ‘work’ for which use falls under an ‘exclusive right’ and is not exempted by a ‘limitation’, this does not necessarily mean that right holders can stop such use. According to the European Court of Human Rights and the European legislator, injunctive relief is only possible if this is considered to be ‘proportionate’.<sup>6</sup> Similar restraints also apply to seeking monetary compensation: punitive damages are generally not imposed, at least not in continental Europe.<sup>7</sup>

It is this system of checks and balances that European copyright law is all about. Unfortunately, the European Copyright Society puts ‘fair balance’ last, not first. It is only mentioned on the final page of their Opinion.<sup>8</sup> Instead of giving a fair account of the checks and

balances above, the European Copyright Society offers fear, by suggesting that ‘if hyperlinking is regarded as communication to the public, all hyperlinks would need to be expressly licensed. In our view, that proposition is absurd.’<sup>9</sup> However the Opinion fails to acknowledge that even if certain types of linking are considered to fall under the right of ‘making available’, this does not necessarily amount to ‘infringement’ or require a licence—partly because such linking could benefit from one of the exemptions in Article 5 of the Directive (eg quotation) or because seeking an injunction in a particular case would be ‘disproportionate’. The European system of digital copyright mentioned above allows for far more flexibility and fairness than the Opinion tends to suggest.<sup>10</sup> Further, a large chunk of the content on the web is already made available with consent, often allowing any use, even outside the platform on which the content was initially posted. Embedded linking to content on YouTube is for example often based on individual settings allowing sharing. Users often also provide express consent by agreeing and marking their videos with a Creative Commons BY Licence.<sup>11</sup> This being so, it is clear that there is more to it than the gloomy scenario painted in the Opinion. The mere fact that (some types of) linking would fall under the right of ‘making available’ does not mean that this automatically amounts to ‘infringement’.

### One size does not fit all

The Opinion basically relies on two extreme positions, which can be summarized as (i) ‘one-size-fits-all’, (ii) ‘communication=transmission’. Both arguments are inconclusive.

First, ‘one-size-fits-all’. Linking techniques on the internet come in a wide range of shapes and forms, resulting in different ways in which content is made available and the author’s economic rights are impacted.

- Let’s touch on some basics first. Links are connections, enabling access from one web resource to another. A web resource can be, eg an HTML document, such as a webpage, but it can also be an image, a video clip, a sound bite, a program or an element within an HTML

4 See eg Case C-145/10 *Painer* [2011] ECR I-0000, paras 88–89.

5 Directive 2001/29, above, n 3, Arts 5(2)(b), 5(3)(a), (c), (d), (i) and (k).

6 *Ashby Donald and Others v France*, App. No. 36769/08, European Court of Human Rights, paras 34–45; Case C-461/10 *Bonnier Audio AB*, 19 April 2012, para 56; Case C-275/06 *Promusicae* [2008] ECR I-271, para 68; Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten* [2009] ECR I-1227, paras 28–29.

7 And at least with regard to fair compensation, Directive 2001/29, above, n 3, states in recital 35: ‘In certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.’

8 Bently et al, above, n 2, para 66.

9 Ibid, para 68.

10 See eg P B Hugenholtz and M R F Senftleben, ‘Fair Use in Europe. In Search of Flexibilities’, IViR Study (November 2011) p 29, concluding among other things that ‘the EU copyright *acquis* leaves considerably more room for flexibilities than its closed list of permitted limitations and exceptions *prima facie* suggests’.

11 YouTube, Creative Commons, <http://www.youtube.com/yt/copyright/creative-commons.html> (accessed 31 December 2013).

document.<sup>12</sup> And, yes, such content is often eligible for copyright, which is where copyright law kicks in. In linking syntax, the end points in a link are commonly referred to as ‘anchors’. A link points from the source of the link (‘the source anchor’) to a destination or target (‘the target anchor’).<sup>13</sup> The target can either be a resource of the same origin, for example within the same website (‘intra-links’) or of different origin, for example to a different website (‘cross-origin links’). In the average copyright case, the last category is the most relevant. The way how ‘source’ and ‘target’ interact and tango depends on the type of link involved.

- Some hyperlinks merely refer to other websites via a uniform resource locator (URL), either to the homepage (‘simple link’) or deeper in that website, to a specific webpage (‘deep link’). If such link is clicked or otherwise activated, the target page to which the link directs will open in a new window. The initial source page (on which the link was placed) will no longer be visible.<sup>14</sup>
- Other links involve situations 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. This involves, for example ‘embedded links’ and ‘framed links’. In such event, the ‘target’ content is displayed around the initial framework of the ‘source’ website, either directly as embedded content in the ‘source’ website (‘embedded link’) or as part of a frame (pop-up window) while the ‘source’ website is still (largely) visible (‘framed link’).
- The key difference between these categories is that simple links and deep links ‘push’ or redirect a user from one website to another. An embedded link does the opposite: it ‘pulls’ or retrieves content from another server, while the user stays on the same ‘source’ website. A similar user experience is generated by a framed link, with the user merely jumping to a pop-up window in the immediate surroundings of the ‘source’ website. Keeping in mind the linking syntax above, the differences can be summarized as follows:

Type of link	Process	Result
Simple link	[Source] → [Target <sup>HOMEPAGE</sup> ]	S → T <sup>HOMEPAGE</sup>
Deep link	[Source] → [Target <sup>WEBPAGE</sup> ]	S → T <sup>WEBPAGE</sup>
Embedded link	[Source] ← [Embedded Target]	S <sup>Embedded Target</sup>
Framed link	[Source] ↔ [Framed Target]	S ≈ Framed Target

12 W3, Links in HTML documents, para 12.1. Available at <http://www.w3.org/TR/html401/struct/links.html> (accessed 12 December 2013).

13 Ibid, para 12.1.

14 At least in most cases. It may depend on how the link is coded by the ‘linker’ and the browser settings of the user.

- Some try to blur the differences between the various types of links by alleging that a link is merely a ‘footnote’.<sup>15</sup> If such analogy shows anything, it must be that most forms of linking are not about placing footnotes. Old school lawyers and scientists know footnotes well. Let’s briefly think what a footnote entails. Properly considered, a footnote has three key characteristics: (i) the footnote in the ‘source’ page does not display the ‘target’ resource to which it refers; (ii) instead, retrieving the ‘target’ resource is only possible by going to a different location, for example another room in your office or a library around the block; (iii) a footnote is subordinate, it is not (part of) the main text or of the content provided in it.

Most links fail to tick those boxes. At best, only a simple hypertext link or such deep link via URL could qualify as a ‘footnote’. Other than that, the off-line ‘footnote’ analogy is often off-target. A deep link to an image or a song, a framed link to a stream or an embedded link to a video, are not ‘footnotes’. These links are more comparable to short-cuts for displaying content, allowing for pressing a button, which immediately displays the content, often in the same or immediate vicinity of the ‘source’ page on which the clickable link is placed. They are not subordinate ‘footnotes’ redirecting a user to a ‘target’ resource elsewhere. Framed links, and especially embedded links, are more about ‘press & play’, pulling in ‘target’ content from elsewhere, while the user stays in the immediate surroundings of the ‘source’ page.

- Although *Svennson* primarily involved deep links, the questions raised before the CJEU go beyond deep links. One of the questions in that case also touches on the differences between simple links and deep links on the one hand, and framed links and embedded links on the other:

[S]hould 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?

- Given these differences, it is puzzling that the European Copyright Society says that it is ‘unable to see’ why framed links should be treated differently for

15 Bently et al., above, n 2, paras 4–5, also depart from this analogy, *ibid*, fn 4 citing T Berners-Lee, ‘Axioms of web Architecture. Links and Law: Myths’ (April 1997). Available at <http://www.w3.org/DesignIssues/LinkMyths.html>, last accessed 20 January 2014.

copyright purposes from hyperlinking.<sup>16</sup> The differences mentioned above are plain to see.

- Other differentiators often surfacing in digital copyright cases, and put forward in *Svensson* before the CJEU, are also not acknowledged in the Opinion. For example, the Opinion does not consider it relevant whether ‘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’.<sup>17</sup> This is in sharp contrast with the more nuanced approach adopted by the German Supreme Court. The Opinion explicitly refers to the *Paperboy* decision of 2003.<sup>18</sup> There the Bundesgerichtshof (BGH) held that simple links or deep links are admissible if they involve links to a *legal* and *publicly available* source. This is based on the idea that, if a copyright owner posts a work on the internet without restricting access to it, it is made available with implied consent, and such copyright owner should not subsequently complain if somebody else is linking to such *legal* and *publicly available* works. Simple links, however, do not get *carte blanche*. This is apparent from the more recent *Session-ID* decision of the same court.<sup>19</sup> This ruling of 2010 builds upon *Paperboy* and explains the flipside: illicit hyperlinks gaining access to restricted sources by circumventing technical protection measures do violate the exclusive rights of the author. This balanced approach of the German Supreme Court was recently confirmed in *Best-Water*.<sup>20</sup> This decision clearly acknowledges the different ways in which the linking occurs as one of the relevant factors for determining whether such link constitutes a violation of the ‘making available’ right. It takes a three-tier approach, distinguishing between (a) simple links and deep links to legal and publicly available sources (*Paperboy*), (b) illicit deep links circumventing TPM’s (*Session-ID*) and (c) framed and embedded links. Although the Bundesgerichtshof referred the question on ‘embedded links’ to the CJEU, it expressly held that, according to its analysis of CJEU case law, placing an embedded link falls under the exclusive ‘making available right’ of the author.<sup>21</sup> With three Supreme Court decisions, outlining three categories, from one of the leading courts in Europe, this clearly disproves the ‘one-size-fits-all-approach’ with a score of 3:0.

16 Embedded links are not considered in the Opinion of Bently et al, above, n 2, probably because *Svensson* did not involve this type of linking. However, given the general wording of question 3 in *Svensson*, such embedded links also fall under that question. It is also for that reason that the *Bestwater* case on embedded linking was stayed to await the outcome on *Svensson*.

17 Second question in *Svensson*, above, n 1.

- Such a rigid approach is also difficult to reconcile with on-going technological developments. Even today, links are not solely operated through manual clicks, but can also be activated automatically. And under HTML5, set for release in 2014–16, links will only possess more functionality. Consequently, links are set to move even further away from the stodgy example of a ‘footnote’, and instead evolve from ‘press & play’ buttons to activation mechanisms seamlessly making content available from different servers or clouds. With footnotes moving over and the future here to come, the position of the ‘European Copyright Society’ is untenable.

### ‘Making available’ does not require ‘transmission’

The key argument advanced by the ‘European Copyright Society’ is that the general right of ‘communication to the public’ mentioned in Article 3(1) of the Directive should be narrowly understood as ‘transmission’. This is again an extreme position, as it ignores the concept of ‘making available to the public’ mentioned in the same provision. This touches on an important point of law, which is addressed in the first question raised before the CJEU in *Svensson*:

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/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?

The question above focuses on how to interpret Article 3(1) of the Information Society Directive. The Opinion argues that ‘in all cases a communication presupposes an act of “transmission”, a technical act of emission (giving rise to potential reception of the work by “the public”).’ This point heavily relies on recital 23 of the Directive. Based on this argument, the European Copyright Society concludes that ‘hyperlinks are not communications because establishing a hyperlink does not amount to “transmission” of a work, and such transmission is a pre-requisite for “communication”’.<sup>22</sup> This ‘communication=transmission’ argument is inconclusive. There is more to it than ‘transmission’ alone. A number of points are relevant here.

18 BGH I ZR 259/00—*Paperboy* (17 July 2003), pp 16–18, 21.

19 BGH I ZR 39/08—*Session-ID* (29 April 2010), paras 23–27.

20 BGH I ZR 46/12—*BestWater* (16 May 2013), paras 23–27.

21 Ibid, paras 26–27.

22 Bently et al, above, n 2, paras 6a and 10.

- The Information Society Directive was enacted in 2001. The relevant provision originates however in a treaty five years earlier: the WIPO Copyright Treaty (WCT) of 1996: this was basically adopted to digitize copyright law, to avoid that digital technology would oust traditional copyright legislation. One of the novel features of the WIPO Copyright Treaty, to ensure copyright gets to grips with the digital environment, was the introduction of the ‘making available’ right:<sup>23</sup>

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, *including the making available* to the public of their works *in such a way that members of the public may access* these works from a place and at time individually chosen by them.

(emphases added)

- The introduction of this ‘making available’ right is widely regarded as one of the main achievements of the WCT.<sup>24</sup> By extending the traditional right of ‘communication’ to the right of ‘making available’, the WCT enabled authors to authorize or prohibit the dissemination of their works in the digital space, regardless of the technological means involved.<sup>25</sup> Although it is true that the right of ‘making available’ was put under the umbrella of the ‘right of communication to the public’, this does not mean that ‘making available’ is confined to the traditional and narrow notion of ‘communication’, requiring a ‘transmission’. To the contrary, it was exactly because digital technologies, such as on-demand access, supersede traditional broadcasting means such as radio and TV, that such ‘transmission’ is not required: instead, it is the mere offering of access to such interactive transmission which triggers the ‘making available right’.
- The policy documents surrounding Article 8 WCT confirm that the relevant act under the ‘making available right’ is the provision of ‘access’. This follows from the Basic Proposal of 1996, which contained a similar provision in (then) Article 10:<sup>26</sup>

10.10 The second part of Article 10 explicitly states that communication to the public includes the making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. The relevant act is the making available of the work by *providing access* to it. *What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals.* It is irrelevant whether copies are available for the user *or whether the work is simply made perceptible to, and thus usable by, the user.*

- A more recent policy document on the WCT confirms that Article 8 does not extend only to ‘communicators’ or ‘transmitters’, but also to the persons which only make works accessible or available.<sup>27</sup>

Similar clarifications are needed regarding the concept of communication to the public. First of all, it should be accepted and clarified that the concept extends not only to the acts that are carried out by the communicators, the transmitters themselves (that is, to the acts as a result of which a work or object of neighboring rights is actually made available to the public and the members of the public do not have to do more than, for example, switch on the equipment necessary for reception), but also to the acts which only consist of making the work or object of neighboring rights accessible to the public, and in the case of which the members of the public still have to cause the system to make it actually available to them.

- The overarching theme from the above is that the umbrella notion of ‘communication to the public’ is not confined to the traditional notion of ‘transmission’, but also extends to a broader digital concept of ‘making available’ works by offering access. This also resounds in the Information Society Directive, containing a provision in Article 3(1) which closely resembles Article 8 WCT mentioned above:

Article 3. Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to

23 WIPO Copyright Treaty, 1996 (WCT), Art 8.

24 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press Oxford 2006) vol 1, 746 refer to ‘the WCT’s principal innovation’; J Reinbothe ‘The New WIPO Treaties: A First Resume’ (1997) 19(4) EIPR 173, also acknowledged by P B Hugenholtz and P Goldstein, *International Copyright* (Oxford University Press, Oxford) (2013) 335.

25 Ricketson and Ginsburg, above, n 24, 747.

26 WIPO, *Chairman of the Committees of Experts, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be considered by the Diplomatic Conference*, WIPO Doc. CRNR/DC/4, 30 August 1996, p 44, para 10.10 (‘WIPO Proposal’). Bently et al, above, n 2, para 21 fail to mention this para 10.10 only citing paras 10.15–10.16.

27 WIPO, *Copyright in the digital environment: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, WIPO/CR/KRT/05/7, February 2005, p. 13, para 56.

the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

- This is already apparent from the Commission Proposal, put forward only one year after the WCT was concluded:<sup>28</sup>

The second part of Article 3(1) addresses the interactive environment. It follows closely the pattern chosen in Article 8 WCT and implements it at Community level. The provision clarifies, in line with the results of the consultation exercise, that the ‘right of communication to the public’ includes the making available to the public of work, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. One of the main objectives is to make it clear that this right covers interactive ‘on-demand’ acts of transmission. It ensures legal certainty by confirming that the communication to the public is also pertinent when several unrelated persons (member of the public) may have individual access, from different places and at different times, to a work which is on a publicly accessible site.

As was stressed during the WIPO Diplomatic Conference, *the critical act is the ‘making available of the work to the public’, thus the offering [of] a work on a publicly accessible site, which precedes the stage of its actual ‘on-demand transmission’.* It is *not relevant* whether any person actually has retrieved it or not. The ‘public’ consists of individual ‘members of the public’.

- In summary, it is clear from the above that the broad umbrella provision of Article 3(1) does not merely cover the narrow traditional notion of ‘communication’ but also extends to the digital concept of ‘making available’, in which the mere *offering* of a work enabling on-demand access is sufficient. Both the texts of Article 3(1) and its preparatory documents above do not render this ‘making available’ right contingent on any requirement of ‘transmission’. To the contrary, the Community legislator expressly holds that the critical act is in the ‘making available’ or ‘offering’ of the work, which precedes the stage of its actual ‘on-demand transmission’. The Commission

also adds that it is irrelevant where such retrieval or transmission actually takes place.<sup>29</sup>

- The ‘communication=transmission’ argument advanced in the Opinion is therefore difficult to reconcile with the text and the basic tenets surrounding the ‘making available right’ in Article 3(1) of the Information Society Directive. It places too much emphasis on the traditional notion of ‘communication’, and too little on the fact that the umbrella provision of Article 3(1) also extends to a digital right of ‘making available’. It is puzzling that this ‘making available’ right, hailed as one of the major achievements of the WCT and expressly designed to get to grips with the digital environment, gets so little attention. The European Copyright Society knows well, from the same documents on which they rely, that the European Commission expressly considered the ‘critical act’ to vest in the making available of the work itself. It is immaterial whether such work is transmitted.
- Various sources in literature also contradict the position of the European Copyright Society, clearly indicating that ‘making available’ is indeed about ‘offering access’, in line with the *travaux préparatoires* above:<sup>30</sup>

- Ricketson and Ginsburg in *International Copyright and Neighbouring Rights*:<sup>31</sup>

But simply offering the work on an undiscriminating basis, so that any member of the general public may access the work, should come within the scope of the right. . . . It is not necessary that such offer be accepted: ‘making available’ embraces incipient as well as effected communications.

- Bechtold in *Concise European Copyright Law*:<sup>32</sup>

The right of making available to the public covers the act of providing a work to the public. . . . The author’s exclusive right applies irrespective of whether and how often the work is actually accessed. The mere possibility of the public accessing the work suffices.

- Von Lewinski and Walter in *European Copyright Law*:<sup>33</sup>

the online on-demand offering of protected subject-matter.’ See also IViR, *Study on the Implementation and Effect in Member States’ laws of Directive 2001/29/EC*, Final Report (2007), 25: ‘In line with Articles 8 WCT and 10 and 14 WPPT, the newly introduced right of making available essentially covers all kinds of online interactive offerings.’

28 European Commission, *Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society*, 10 December 1997, COM(97)0628—C4-0079/98—97/0359(COD), pp 25–26 (‘EC Harmonisation Directive Proposal’).

29 This is also reflected in the text of Article 3(1), recognized by the CJEU in Case C-306/05 SGAE [2006] ECR I-11519, para 43.

30 Although none of those studies dealt specifically with linking in connection with the ‘making available’ right, it is also telling that various Studies also acknowledge the ‘online on-demand offering’ to be the relevant element: see eg IViR, *Study on the Recasting of Copyright & Related Rights for the Knowledge Economy*, Final Report (2006), 45: ‘The right essentially covers

31 S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press Oxford 2006) vol 1, 746–47.

32 Bechtold in *Concise European Copyright Law* (2006), p. 361.

33 S Von Lewinski and M M Walter *European Copyright Law* (Oxford University Press Oxford 2010), para 11.3.30

The making available is accomplished in providing the possibility of interactively accessing the work or other subject matter offered by a content provider in a network. Similar to broadcasting, the making available is completed by the mere provision of the material on the net. It is not necessary, therefore, that members of the public in fact access the copyright material. The transmission itself is not governed by the making available right.

- Other references relied upon by European Copyright Society are hardly relevant: the mere fact that the court in *Premier League v Murphy* referred to ‘transmission’ is immaterial as this case did not deal with the ‘making available’ right, let alone linking, but instead involved the use of decoder cards in connection with broadcasting.<sup>34</sup> The Opinion also puts too much emphasis on recital 23 of the directive, which merely refers to ‘communication’, while failing to mention recital 24 and 25 on the right of ‘making available’.<sup>35</sup> The reference of Bently et al to the UK implementing provision of s 20(2) is also inconclusive: it fails to cite the provision in full, ignoring the fact that Article 20(2)(b) does contain an explicit reference to the right of ‘making available’.<sup>36</sup> Further, existing case law clearly shows that this does not preclude the UK courts from considering ‘linking’ to fall under the ‘making available right’ of Article 3(1) of the Directive.<sup>37</sup> In addition, the European Copyright Society fails to acknowledge that as part of the ‘umbrella solution’ adopted under the WCT, Member States were allowed to ‘implement the making available right through any exclusive right under domestic law’.<sup>38</sup> This explains the considerable degree of latitude in which Member States have adopted the ‘making available’ right in Article 8 WCT and 3(1) of the Directive. The Netherlands for example do recognize such right of ‘making available’ even though it is

not expressly mentioned in its legislation, while, for example, the German Copyright Act contains an explicit provision to that effect.<sup>39</sup> This latitude only reinforces the importance of the referrals in the three cases currently pending before the CJEU.

### Protect and serve?

Other aspects also give rise to concerns. Although the European Copyright Society claims to ‘promote their views of the overall public interest’, not all public policy or societal interests are equally acknowledged. The Opinion mentions a host of legitimate interests, such as freedom of expression and the freedom to conduct a business.<sup>40</sup> Yet it fails to acknowledge adequately other equally legitimate public policy interests which feature so prominently in the same Directive:

- If there is one buzzword which echoes so prominently in the recitals of the Information Society Directive, it must be ‘harmonization’.<sup>41</sup> Recital 6 says it all, emphasizing that without harmonization at a Community level, legislative activities at national level might result in significant differences in protection, leading to a re-fragmentation of the internal market and legislative inconsistency. Such harmonization is crucial for all stakeholders involved: from authors, performers, producers and industry to consumers, culture and the public at large.<sup>42</sup> Harmonization, not to the benefit of one and the detriment of all but to achieve a general and flexible legal framework,<sup>43</sup> with a fair balance for all.<sup>44</sup> The Directive therefore stipulates that harmonization contributes to achieving an internal market and also stimulates the creation and exploitation of creative content.<sup>45</sup> It also helps implement the four freedoms of the internal market<sup>46</sup> as well as substantial investment in creativity and innovation, and to help safeguard employment and encourage job creation.<sup>47</sup> Such harmonization across Europe also helps to ensure compliance with fundamental rights—

34 Bently et al., above, n 2, para 9; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and others v QC Leisure, K Murphy and others* [2011] ECR I-09083.

35 Bently et al., above, n 2, para 13.

36 Copyright, Designs and Patent Act 1988 (1988, ch. 48) CDPA, s 20(2) reads:

References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include (a) the broadcasting of the work; (b) *the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.* (emphasis added).

37 See eg *Twentieth Century Fox Film Corporation and others v Newzbin* [2010] EWHC 608 (Ch), para 125; *EMI Records Limited and others v British Sky Broadcasting Limited and others* (*Newzbin 2*) [2013] EWHC 379, paras 45–47; *Football Association Premier League Ltd v British Sky Broadcasting Limited and others* (*FirstRow*) [2013] EWHC 2058 (Ch), paras 26–44.

38 Ricketson and Ginsburg, above, n 24, 747

39 See eg D J G Visser, ‘Openbaar Maken: Communication to the Public’, in P B Hugenholtz, A A Quaedvlieg and D J G Visser (eds) *A Century of Dutch Copyright Law. Auteurswet 1912–2012* (Delex Amsterdam 2012) 225.

Urhebergesetz (Act of 09.09.1965, BGBl. I S. 1273 as last amended by Act of 01.10.2013, BGBl. I S. 3728), Art 19a, contains a partial codification of Directive 2001/29, above, n 3, Art 3(1), while it is subject to debate whether a more encompassing ‘making available right’ should also be read into Art 15(2) Urhebergesetz, as a so-called ‘unbenanntes Recht der öffentliche Wiedergabe’. See *BestWater*, above, n 20, para 12 and *Session-ID*, above, n 19, para 23.

40 Bently et al, above, n 2, para 3.

41 Directive 2001/29, above, n 3, recitals 1–4, 6–7, 9.

42 Ibid, recital 9.

43 Ibid, recital 2.

44 Ibid, recital 31.

45 Ibid, recital 2.

46 Ibid, recital 3.

47 Ibid, recital 4.

not only of property but also to ensure freedom of expression and the public interest, wherever you are.<sup>48</sup> The Opinion only briefly mentions ‘harmonization’ in recital 6, but fails to acknowledge the policy arguments in the other recitals mentioned above.<sup>49</sup>

- Secondly, ‘protection.’ This is another key policy objective in the Directive. It is mentioned for example in recital 4 and 9, referring to the need of ‘a high level of protection of intellectual property’, not as a means in itself. But because the European legislator feels that this is instrumental in so many ways, as it is considered ‘crucial to intellectual creation,’<sup>50</sup> ‘foster substantial investment in creativity and innovation’, which ‘will safeguard employment and encourage new job creation.’<sup>51</sup> In addition to ‘high’ protection, the Directive also requires such protection to be both ‘rigorous and effective’, considering this to be crucial for ‘safeguarding the independence and dignity of artistic creators and performers.’<sup>52</sup> ‘Adequate’ protection is also mentioned twice in the Directive and considered of ‘great importance from a cultural standpoint.’<sup>53</sup>

By not putting ‘linking’ under the umbrella of ‘making available to the public’, the European Copyright Society forces both creators and consumers of creative content to seek protection under the general laws of Member States which differ by country.<sup>54</sup> It is clear that such a solution is at odds with the policy objectives described above, resulting in lack of harmonization and legal certainty. Ignoring those policy objectives does not only affect right holders. It also deprives users of the ability to push back over-broad protection by being able to seek refuge under the many statutory limitations of Article 5 of the same directive. General laws are simply not designed to accommodate the kind of exemptions, our dedicated copyright laws provide.

## Network upside down

Instead of properly balancing all policy objectives involved, the Opinion emphasizes that ‘hyperlinking is intimately bound to the conception of the internet as a

network.’<sup>55</sup> This ‘network’ argument is inconclusive. The Directive itself already acknowledges the importance of the ‘network infrastructure’ (recital 4). Contrary to the Opinion, the European legislator considers this an argument for, and not against, a harmonized and high level of copyright protection, fostering ‘substantial investment’ in such network infrastructure, while also leading to ‘increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors.’<sup>56</sup> Secondly, the Opinion warns that regulating linking could ‘interfere with the operation of the internet’. This is hardly a conclusive argument. In the past, Europe’s technology-neutral IP laws have also regulated other important elements surrounding the internet, including for example domain names, keywords and streaming. Neither those laws nor the guidance provided in the case law of the CJEU have broken the internet.<sup>57</sup>

Another point raised by the Opinion is ‘access to information’. This was also already acknowledged upon drafting the Directive and follows from recital 22, which clearly states that ‘the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works’. There is no surprise here: this only confirms that freedom of information does not imply a free lunch. In this regard, it is also remarkable that the Opinion does refer to the right of ‘freedom of information’ but fails to acknowledge the equally fundamental rights of ‘(intellectual) property’ and ‘effective remedy’ mentioned in the same Charter.<sup>58</sup>

## Far and abroad

Although this is all about interpreting European Copyright law, the European Copyright Society relies heavily on faraway sources: from the USA as well as incidental references to Australia and Canada.<sup>59</sup> While there is nothing against contrasting EU law with foreign sources, this does require a proper comparison and explanation as to what extent such sources constitute persuasive and authoritative

48 Ibid, recital 3. Various exceptions and limitations are further elaborated on in *ibid*, recitals 31–35.

49 Bently et al, above, n 2, paras 60–62.

50 Directive 2001/29, above, n 3, recital 9.

51 Ibid, recital 4.

52 Ibid, recital 11.

53 Ibid, recital 10 and 12.

54 As Bently et al, above, n 2, para 62 consider Directive 2001/29, Art 3, to aim for ‘full harmonization’ and not allow ‘minimum harmonization’ (as suggested eg by the Dutch Supreme Court in *ECLI:NL:HR:2009:BH7602 Buma v Chellomedia* (19 June 2009), para 2.3), authors are not able to benefit from local copyright laws offering wider protection, but predominantly from e.g. local general laws (such as eg local rules against

unfair competition). Delineating the (specific) degree of harmonization intended by Art 3, is subject to the fourth question referred in *Svensson* to the CJEU (above, n 1).

55 Bently et al, above n 2, para 2.

56 Directive 2001/29, above, n 3, recital 4.

57 See eg with regard to keywords: Case C-558/08 *Portakabin* [2010] ECR I-6963; Case C-323/09 *Interflora* [2011] ECR I-08625 and, with regard to streaming, Case C-607/11 *TVCatchup*, 7 March 2013.

58 EU Charter for Fundamental Rights of the European Union (2000/C 364/01), Arts 11 and 17. Also recently described in A Tsoutsanis ‘Privacy and Piracy in Cyberspace: Justice for All’ (2013) 8(12) *JIPLP* 952.

59 Bently et al, above, n 2, refer in *fn*s 2–6, 9 and *eg* paras 5, 36, 39, 54, among others, to US, Canadian and Australian sources.

precedent, relevant to the points at hand. In the absence of any explanation, it is difficult to understand whether the decisions of distant courts contribute to the points of law which are currently pending before the CJEU.<sup>60</sup>

## Errors and omissions

It is also puzzling why the European Copyright Society went to great lengths to invoke arguments from far afield to support their position, but at the same time failed to mention other arguments closer at home which speak against it.

Let me give a few examples:

- As discussed above, many policy objectives which follow directly from the recitals in the same Directive are not mentioned in the Opinion.
- The European Copyright Society places great emphasis on the *travaux préparatoires* of the Information Society Directive in order to argue that any ‘communication’ requires ‘transmission’. Yet their citation from the 1997 Commission Proposal is selective, as it omits to disclose the immediately-following paragraph which points to the contrary.<sup>61</sup>
- The same occurs in relation to Article 8 of the WCT. The Opinion only cites paras 10.15–10.16 of the WIPO Basic Proposal to aid and add to its position, but fails to disclose the preceding paragraphs on the right of ‘making available’ in para 10.10 which speaks against it.<sup>62</sup>
- Standard literature, such as the authoritative handbooks by, for example, Von Lewinski, Ricketson, Ginsburg and Walter, are not mentioned.<sup>63</sup> These all cast significant doubts on many of the points advanced in the Opinion: Walter, for example, considers ‘making available’ a technology-neutral term, which should be

interpreted broadly and does not necessarily involve ‘transmission’.<sup>64</sup> In addition, Walter sheds light on the *Paperboy* decision invoked in the Opinion, holding that this ruling does not preclude the consideration that:

hyperlinking may itself constitute the making available of the content made access on the website of a third party or may be considered as a contribution to such making available in cases where the website pointed to infringes authors’ rights or related rights.

- The German Supreme Court recently confirmed Walter’s position in *BestWater*,<sup>65</sup> which only underlines the importance of this source. Bechtold in *Concise European Copyright Law* also disputes the rigid approach of the European Copyright Society, concluding instead that ‘transmission’ is not mentioned as a prerequisite for qualifying under ‘making available’. He casts significant doubts on the relevance on the Norwegian decision relied upon in the Opinion, emphasizing that ‘the Nordic decisions should only be used with caution when interpreting Articles 3(1) and (2)’.<sup>66</sup> None of this is mentioned by the European Copyright Society, even though it involves sources which deal directly with European Copyright law.

## The ALAI Opinion

The Opinion of the European Copyright Society is also in conflict with the more recent ALAI Opinion.<sup>67</sup> The ALAI takes a more nuanced approach, holding on the one hand that the making available right covers links that enable members of the public to *access* specific protected material, but on the other hand that it does not cover links that merely refer to a *source* from which a work may subsequently be accessed.<sup>68</sup>

There are two key differences between the Opinions:<sup>69</sup>

criteria and held that linking to radio streams by the defendant constituted ‘making available’ and thus copyright infringement.

64 M M Walter in M M Walter and S von Lewinski, *European Copyright Law. A Commentary* (Oxford University Press Oxford 2010) 983–85.

65 *BestWater*, above, n 20, paras 24–26.

66 Bechtold, above, n 63, 361.

67 Association littéraire et artistique internationale (ALAI) Executive Committee, ‘Report and Opinion on the Making Available and Communication to the Public in the Internet Environment—Focus on Linking Techniques on the Internet, Adopted Unanimously by the Executive Committee’ (16 September 2013) (‘ALAI Opinion’). Available at <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf> (accessed 31 December 2013).

68 *Ibid.*, 1.

69 A third difference is that the ALAI gives less weight to the requirement of a communication to a ‘new’ public, relying on the more recent decision of the CJEU in *TVCatchup*, above, n 57, in which this requirement was not considered to be always necessary. The Opinion of Bently et al. was unable to take this new development into account this decision only appeared subsequently.

60 See eg Ricketson and Ginsburg, above, n 24, 747 indicate in relation to WCT, above, n 23, Art 8, that the United States took a different approach at the 1996 Diplomatic Conference, arguing that the right of ‘making available’ be applied through the right to distribute copies.

61 *EC Harmonisation Directive Proposal*, above, n 28, 25–26, discussed below.

62 *WIPO Proposal*, above, n 26, p 44, para 10.10.

63 Ricketson and Ginsburg, above, n 24, 744–749; S von Lewinski *International Copyright Law and Policy* (Oxford University Press Oxford 2002), paras 17.72–17.80. Other relevant, and readily available, sources contradicting the position of the ‘European Copyright Society’ and which were not mentioned are: J Ginsburg, ‘The (New?) Right of Making Available to the Public’ in D Vaver and L Bently (eds), *Intellectual Property in the New Millennium, Essays in Honour of W.R. Cornish* (Cambridge University Press Cambridge 2004) 234–47. Available at <http://ssrn.com/abstract=602623> (accessed 31 December 2013); S Bechtold in Th Dreier and P B Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Alphen aan den Rijn 2006) 358 and 361. Even though one of the members of the European Copyright Society represented the defendant, the Opinion does also not disclose a relevant lower instance decision of the District Court The Hague in *Nederland.fjn*, IEPT20121912, AMI 2013/2 (19 December 2012) no. 4, p 84 in which the court applied existing CJEU

- It follows from the above that ALAI does not treat all types of links the same. The ‘one-size-fits-all’ approach advanced by the European Copyright Society is not accepted.<sup>70</sup>
- The ALAI considers mere ‘offering to the public of a work’ to be sufficient to trigger the ‘making available’ right. This is also what follows from the *travaux préparatoires* and literature cited above. Actual transmission is not required. According to the ALAI Opinion, ‘the “making available” right [therefore] encompasses all forms of on-demand access, whether or not the access results in a retention copy. Thus, it does not matter whether the member of the public obtains access to the work via a real-time “stream” or via the delivery to her computer or other device of a digital copy that she subsequently “opens” in order to see or hear the work.’<sup>71</sup>

Furthermore, the ALAI Opinion also signals that although (some?) links are an important part of the internet, this does not necessarily exempt them from copyright law.

## Copyright and linking: relevant factors

This brings us to the core question: how to reconcile ‘copyright’ and ‘linking’. Nine angles are relevant here, and will be outlined below. To the greatest extent possible, I will follow existing wording and considerations provided in existing legislation and CJEU case law. The nine angles below boil down to four policy arguments (harmonization, high level protection, technology-neutral, authorization) and five factors (‘making available’, ‘to the public’, ‘new public’, ‘intervention’ and ‘profit’).

## Harmonization and legal certainty

Directive 2001/29 aims to achieve a ‘harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property’ (recital 4). This is achieved, among other things, by the harmonization of the author’s right of communication to the public, including the making available to the public of their works, within the meaning of Article 3(1). This policy goal to achieve harmonization and increase legal certainty also follows from recitals 23 and 25.

In view of this, and given that Directive 2001/29 applies to all communications to the public of protected works, the Directive does not provide for minimal har-

monization.<sup>72</sup> Consequently, the need for uniform application of Community law and the principle of equality require that, where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with Directive 2001/29, they must normally be given an autonomous and uniform interpretation throughout the Community.<sup>73</sup>

## High level of protection

Directive 2001/29 makes clear that, in the information society, copyright and related rights play an important role as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content (recital 2).

Thus ‘any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property’ (recital 9).

Settled case law confirms that the principal objective of Directive 2001/29 is to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It also follows that ‘communication to the public’ must be interpreted broadly, as recital 23 in the preamble to the directive indeed expressly states.<sup>74</sup>

## Making available

Article 3 of that Directive, entitled ‘Right of communication to the public of works and right of making available to the public other subject-matter’, provides:

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

...

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

70 ALAI Opinion, above, n 67, 1.

71 Ibid, 3.

72 SGAE, above, n 29, para 30.

73 Verbatim citation from *ibid*, n 29, para 31. See, in particular, Case C-357/98 *Yiadam* [2000] ECR I-9265, para 26, and Case C-245/00 *SENA* [2003] ECR I-1251, para 23.

74 Verbatim citation from *TVCatchup*, above, n 57, para 20. See *SGAE*, above, n 29, para 36 and *Football Association Premier League*, above, n 34, para 186, also recognized in Case C-5/08 *Infopaq International* [2009] ECR I-6569, para 40.

The Directive does not define the concepts of ‘communication to the public’ or the ‘making available right’ referred to in the same provision. Thus its meaning and scope must be defined in the light of the context in which it occurs and also in the light of the objectives referred to above.<sup>75</sup>

Moreover, Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community.<sup>76</sup>

It follows from recital 15 that Directive 2001/29 serves to implement a number of obligations arising from the WCT. Indeed, Article 3(1) originates in Article 8 WCT. One of the aims of this Treaty was to ensure that copyright is not outscripted by the digital environment. To this extent, Article 8 introduced a ‘making available’ right under the umbrella of the concept of ‘communication to the public’. The introduction of this ‘making available’ right is widely regarded as one of the WCT’s main achievements.<sup>77</sup> Although the concept of ‘making available’ was put under the umbrella of the more general right of ‘communication to the public’, it has its own specific meaning.<sup>78</sup>

As explained in the Basic Proposal of the WIPO Copyright Treaty of 1996 which, without being legally binding, nevertheless assists in interpreting that concept, ‘the relevant act is the making available of the work by providing access to it.’<sup>79</sup> ‘Making available’ basically boils down to ‘making accessible’.<sup>80</sup> This is confirmed by the Commission Proposal of 1997, which refers to the WIPO Diplomatic Conference, holding that

the critical act is the ‘making available of the work to the public’, thus the offering [of] a work on a publicly accessible site, which precedes the stage of its actual ‘on-demand trans-

mission’. It is not relevant whether any person actually has retrieved it or not.<sup>81</sup>

It follows that ‘transmission’ is not required for an act of ‘making available’. The concept of ‘making available a work to the public’ precedes the stage of its actual ‘on-demand’ transmission. It is the offering of a work, enabling the public to be able to access such work, that is relevant,<sup>82</sup> it being irrelevant whether actual transmission occurs. This requirement does also not follow from recital 25 which merely recognizes the exclusive right of right holders to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. To this extent, Article 3(1) only requires that the ‘making available to the public’ occurs in such a way that members of the public ‘may’ access the work (see also *SGAE* para 43). Enabling access is required. Actual access, retrieval or transmission is not.

### Technology-neutral

Irrelevant is also the technical means or technology used in ‘making available’ such work to the public. In order to allow for a flexible legislative framework to respond adequately to new forms of exploitation and provide the necessary legal certainty as required under recitals 2 and 5, Directive 2001/29 is phrased in technology-neutral terms.<sup>83</sup> This also applies to the right of ‘communication to the public’, including the right of ‘making available’ described in Article 3(1).<sup>84</sup> Consequently, in general, providing a link to works may qualify as ‘making available’ to the public of their works if, by this provision, it occurs ‘in such a way that members of the public may access them from a place and at a time individually chosen by them’.

75 See *TVCatchup*, above n 57, paras 21–22; *SGAE*, above, n 29, para 34. See, in particular, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, para 50 and Case C-53/05 *Commission v Portugal* [2006] ECR I-06215, para 20.

76 Verbatim citation from *SGAE*, above, n 29, para 35. See, in particular, Case C-341/95 *Bettati* [1998] ECR I 4355, para 20 and the case law cited.

77 Ricketson and Ginsburg, above, n 24, 746 refer to ‘the WCT’s principal innovation’, which is also acknowledged by Hugenholtz and Goldstein, above, n 24, 335.

78 This also follows from Directive 2001/29, above, n 3, recitals 24 and 25, which separately addresses the ‘making available’ right.

79 WIPO *Proposal*, above, n 26, 44, para 10.10.

80 In *TVCatchup*, above, n 57, para 38 the CJEU already refers to ‘making accessible’.

81 *EC Harmonisation Directive Proposal*, above, n 28, 26.

82 Walter, above, n 64, para 11.3.30 confirmed by ALAI Opinion, above, n 66, 1: ‘The exclusive right of “making available” under the WCT and the implementing EU legislation covers the offering to the public of a work for individualized streaming or downloading; in addition, where it takes place, the actual transmission of a work to members of the public also is covered, both irrespective of the technical means used for making available.’; while also ALAI Opinion, above, n 67, 3: ‘Moreover, “making available” as set out

in WCT Article 8 necessarily encompasses not only the actual transmission of a work to members of the public, but especially the offering to the public of the work for individualized streaming or downloading, not merely the receipt of the stream or download.’

83 In 1996, the Legal Advisory Board advised the European Commission in its *Reply to the Green Paper on Copyright in the Information Society*, para 3.1 to ensure that ‘the European legislator should not focus on technological detail, but follow the normative approach inherent in the realm of copyright and neighbouring rights.’ Disclosed in IViR, Study on the Implementation and Effect in Member States’ laws of Directive 2001/29/EC, Final Report (2007), 23.

84 Walter, above, n 64, para 11.3.28: ‘The term “making available”, therefore is to be understood as technologically neutral’; Ricketson and Ginsburg, above, n 24, para 12.54: ‘... there could be no doubt that the communication to the public right was technologically neutral and all encompassing.’ Confirmed by ALAI Opinion, above, n 67, 1 and also *ibid*, 3: ‘Further, the phrasing of Article 8 WCT is clearly independent of any specific technical measure or method to accomplish communication.’ See also Von Lewinski, above, n 62, para 17.78: ‘The right of making available has been formulated in technically neutral terms, so that not only online uses are covered, but also uses carried out by satellite or other means.’

## Authorization

It follows from recitals 24–25 in the preamble to Directive 2001/29 that the author's right of 'making available to the public' covers all acts of making available of work to the public not present at the place where the act of making available originates. A similar approach also applies to the more general right of 'communication to the public', under recital 23. In addition, it is apparent from Article 3(3) of that directive that authorizing the inclusion of protected works in a 'communication to the public' or 'making available to the public' does not exhaust the right to authorize or prohibit other acts of communicating or making available those works to the public.

If follows that, by regulating the situations in which a given work is put to multiple use, the European Union legislature intended that each act of making available of a work which uses a specific technical means must, as a rule, be individually authorized by the author of the work in question (see in relation to making available works via internet streams, *TVCatchup* paras 23–24).

## To the public

In order to be categorized as 'making available to the public' within the meaning of Article 3(1) of Directive 2001/29, the protected works must be made available to a 'public' in such a way that members of the public may access such works, as described in that provision.

In that connection, it follows from the case law of the CJEU that the term 'public' in Article 3(1) refers to an indeterminate number of potential recipients, and implies, moreover, a fairly large number of persons (see, to that effect, *SGAE*, paras 37 and 38 and the case law cited). As regards that last criterion, the cumulative effect of making the works available to potential recipients should be taken into account, it being particularly relevant to ascertain the number of persons who have access to the same work at the same time and successively (*SGAE*, para 39). In that context, it is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time.<sup>85</sup>

The same applies to links. Although links establish one-to-one connections, this does not change their potential cumulative effect of an indeterminate number of potential persons having access to the same work at the same time, enabled by the same link. CJEU case law also

shows that the private or public nature of the place from where the work may be accessed is immaterial (*SGAE*, paras 48–54). It is therefore irrelevant whether links are only being clicked upon in the private context of the user's home. Further, 'restricted' access, for example with aggregator sites or link farms requiring users to register first, does not preclude a finding of making available 'to the public', as it still involves an indeterminate number of potential persons which may access the works offered by such aggregator site.

## New public?

Apart from requiring that a link involve the making available of works 'to a public', one wonders whether there also must be a 'new' public. Such a requirement has been imposed in various decisions of the CJEU, albeit only in relation to satellite broadcasting under the concept of 'communication to the public'. In those cases, a public is 'new' if it 'was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public'.<sup>86</sup>

In one of the first cases involving the 'making available' of works over the internet, the CJEU has made it clear that this requirement was only examined in connection to (unauthorized) broadcasting, for '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' (*TVCatchup* para 38).

The court subsequently (para 39) clarified that in cases concerning:

... the transmission of works included in a terrestrial broadcast and the making available of those works over the internet, ... 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 CJEU had to rule in the cases giving rise to the judgments in *SGAE*, *Football Association Premier League and Others* and *Airfield and Canal Digitaal*.

This approach taken by the court directly builds on the intention of the EU legislator that 'each act of making

<sup>85</sup> Verbatim citation of *TVCatchup*, above, n 57, paras 32–34. This factor is also acknowledged by the BGH in *BestWater*, above, n 20, para 17.

<sup>86</sup> *SGAE*, above, n 29, para 40; Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgou Theatikon kai Optikoakoustikon Ergon* [2010] ECR I-00037, para

38; *Football Association Premier League*, above, n 34, para 197 and Case C-431/09 *Airfield and Canal Digitaal* [2011] ECR I-09363, para 72.

available a work which uses a specific technical means must, as a rule, be individually authorized by the author of the work in question' (as discussed above).

Some have argued that this decision signals that the court has dropped the requirement of a 'new public' altogether.<sup>87</sup> I disagree. The court merely indicated that it is not necessary to examine whether a copyright owner actually authorized members of the public to also access works made available over the internet if this occurs under different technical conditions or means than the initial communication of those works to the original public.

Applying the above criteria to linking, this may provide for some flexibility in addressing different types of situations. Some scenarios could include the following:

- Providing a simple link or a deep link to a publicly accessible homepage containing a work does not provide access to a 'new' public, but to a public which was already considered by the copyright owner when he authorized that work to be placed on that home-page or webpage.<sup>88</sup>
- Some situations may also involve the making available of works through deep links which circumvent restricted access or technical protection measures imposed by the copyright owner. This includes for example content put behind a pay-wall, allocating 'session-IDs' to users upon registering to access such content. With illicit deep links circumventing such forms of restricted access, it is not necessary to determine whether the work is made available to a 'new' public, as this occurs under different technical conditions than those under the work was originally made available. The same would apply to links to illegal sources containing unauthorized free access to, for example internet streams of audio-visual content from terrestrial broadcasts (movies, TV shows): as this involves a specific technical means different from the original broadcast transmission, it follows from *TVCatchup* that providing access to such unauthorized re-transmission via internet streams requires separate and individual authorization and there is no question of the authors' rights being exhausted by any prior transmission. Even if it would not involve different technical means, it is clear that any link to illegal sources containing unauthorized

web resources involves the making available to a 'new' public as this wider public enjoying free access was not acknowledged by the copyright owner when the work was initially made available for specific use and members of the public elsewhere.

- In situations involving framed and embedded linking, it is also generally not necessary to determine whether the content made available addresses a 'new' public as the content is made available under different technical conditions, displayed in a different frame or environment than it was initially made available in. This does not necessarily mean that any embedded link is necessarily objectionable, as many established video platforms, such as YouTube, require anyone posting a video, under its default public video sharing settings, explicitly to allow others to also use, display and embed such content. While this provides for the necessary authorization in cases where the copyright owner posted such video and agreed to such licensing terms, this obviously does not apply in situations such as in *BestWater* where the copyright owner did not put the contested video on YouTube, or authorize that emplacement.<sup>89</sup>

The flexible approach above shows that not all linking is the same: its admissibility depends on a number of factors, which partly relate to the copyright owner and partly attribute to the person which makes the work available through a link.

### Intervention

Not everything is prohibited. Recital 27 stipulates that the 'mere provision of physical facilities for enabling or making a communication' does not in itself amount to a 'communication' within the meaning of Article 3. This does not, however, exempt linking enabling on-demand access to works. Ginsburg correctly points out this only excludes enabling achieved solely through the provision of 'physical' facilities, such as hardware infrastructure supplied by telecommunications companies and internet service providers who lobbied to get this exemption in the Agreed Statement of Article 8 WCT.<sup>90</sup>

It also follows from the case law of the court that a 'mere technical means to ensure or improve reception' of the original transmission in its catchment area does also not constitute a 'communication' within the meaning of

87 P B Hugenoltz (2013) NJ (42), p 5083, no. 444. Hugenoltz and also D J G Visser, 'Openbaar maken met ketchup' (2013) 11(2) *AMI*, 45–46 also consider the requirement of a 'new public' to be inconclusive and circular, basically arguing that this all boils down to whether the copyright owner authorized the initial use of his work. However, it is important to acknowledge a number of aspects: (i) the cases in which the CJEU applied this requirement primarily involved situations of broadcasting which generally only involves the making available of works through conditional

access, and thus inevitably conditional authorization. (ii) As explained in *TVCatchup*, the specific aim of the legislator is to indeed require individual and separate authorization for each transmission or retransmission.

88 See *Session-ID*, above, n 19, para 24.

89 *BestWater*, above, n 20, para 1.

90 Ginsburg, above, n 63, 8.

Article 3(1) of Directive 2001/29.<sup>91</sup> Internet streams making available works online were not considered to benefit from this exemption in *TVCatchup*, as such streams were not limited to merely maintaining or improving the quality of the reception of a pre-existing transmission, but instead were used for further transmission. If this applies to internet streams themselves, it equally applies to the links making such streams available.<sup>92</sup>

In contrast to the mere provision of the physical facilities or technical means described above, the court has made it clear that other acts in which works are communicated or made available to a (new) public for on-demand access, constitute the kind of ‘intentional intervention’ which falls under Article 3(1), requiring separate authorization by the copyright owner.<sup>93</sup>

The criteria outlined above may also apply to linking. Placing a simple link or a deep link to content available on a publicly accessible homepage or webpage may not constitute an intervention which is actionable under Article 3(1), as it does not reach a new public. Deep links circumventing technical protection measures inevitably involve some kind of intentional intervention. The same applies to framed and embedded linking in which content is made available under different technical conditions, displayed in a different frame or environment than it was initially made available in.<sup>94</sup> For example, in HTML code, embedding content requires creating an *iframe*, allowing for attributing height and width settings: how big and where the frame is placed is thus at the discretion of the person placing the embedded link, indicating an ‘intentional’ element in which the intervention of making available the work occurs.<sup>95</sup>

## Profit

A quick glance on the internet shows that in some cases the ‘intervention’ does not merely consist of incidental links to works elsewhere. Link farms and aggregator sites do quite the opposite: systematically providing links enabling access to content stored on servers elsewhere, is all they do. Such link farms often thrive on enabling access to counterfeited or pirated works, making significant profits

from advertising resulting from the traffic such link farm generates. Is such ‘profit-making’ nature a relevant factor for determining whether this constitutes an actionable act of ‘communication to the public’ under Article 3(1)?

In general terms, the court has already held that ‘it is not irrelevant that a “communication” within the meaning of Article 3(1) is of a profit-making nature (*Football Association Premier League*, para 204). However, it has also acknowledged that a profit-making nature is not necessarily an essential condition for the existence of a communication to the public (see, to that effect, *SGAE*, para 44).<sup>96</sup> The court therefore concluded in *TVCatchup* that a profit-making nature is not a conclusive factor for determining whether a retransmission (in that case through internet streams) is to be categorized as a ‘communication’ within the meaning of Article 3(1).<sup>97</sup>

This is correct, both in economic and legal terms. In economic terms, the mere fact that someone offering unauthorized content (an ‘infringer’) makes no profit does not change the author’s loss of, and entitlement to, fair compensation through separately authorizing and licensing such content. This fundamental aspect of (intellectual) property rights being entitled to protection and fair compensation follows directly from Article 17 of the Charter of Fundamental Rights of the European Union, as also already acknowledged by the CJEU in *Luksan*.<sup>98</sup> Furthermore, unlike, for example, trade mark law, copyright law does not operate on the premise of use in commerce, but rather aims to regulate, and harmonize, both the economic and moral rights vesting in creating works.

Although it is clear that copyright law does not require unauthorized use to be of a profit-making nature, it is obvious that piggybacking for profit is a far cry from fair use and is detrimental to the economic rights of the author which our copyright laws in general, and Article 3 in particular, aim to protect.

## Making things work

Let’s end with the objective which European copyright law seeks to achieve: a ‘fair balance of rights and inter-

91 *TVCatchup*, above, n 57, para 28 referring to *Football Association Premier League*, above, n 33, para 194 and Case C-431/09 *Airfield and Canal Digitaal* [2011] ECR I-09363, paras 74 and 79.

92 *TVCatchup*, above, n 56, para 27–30.

93 *Football Association Premier League*, above, n 34, para 198; *SGAE*, above, n 29, para 41; *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon*, above, n 86, para 37.

94 For example, in HTML code embedding content requires creating an *iframe*, in which the person can choose his height and width settings: how big and where the frame is placed is thus at the discretion of the person placing the link. See W3, ‘W3C Recommendation: The No-Frames Element’, <http://www.w3.org/TR/html4/present/frames.html#h-16.4.1> (accessed 31 December 2013).

95 In *BestWater*, above, n 20, para 21 the German Supreme Court already acknowledged that placing an embedded link constitutes such ‘intentional intervention’. The court (*ibid*, para 22) only expressed doubts in that particular case, whether embedding the YouTube video in questions, was also made available to a ‘new’ public.

96 Verbatim citation of *TVCatchup*, above, n 57, para 42.

97 *Ibid*, para 43.

98 Case C-277/10 *M Luksan v P van der Let* [2012] ECR I-0000, para 68 following the opinion of A-G Trstenjak of 6 September 2011, para 132–133. See also Tsoutsanis, above, n 58, 952.

ests' between right holders and users (recital 31). Balancing is indeed what the Information Society Directive is all about, not to the benefit of some, nor the detriment of all. The European legislator knows this well, by prominently mentioning this challenge in the third recital of the same directive, aimed at reconciling 'intellectual property, and freedom of expression and the public interest'. How to reconcile 'copyright' and 'linking' with those fundamental rights in today's digital environment? The way forward is not to reduce links to footnotes, impose 'one-size-to-all' or ignore the underlying legislative history of Article 3(1), which clearly considers 'offering access' to be the 'critical act' of the right of 'making available' in that same provision.

Enabling access is what links are about. That does not mean that providing any link is always actionable. The

mere fact that providing access to content through a link sometimes falls under Article 3 does not mean copyright owners can necessarily prohibit such use. The harmonized system in the Directive aims to balance the exclusive rights put under the umbrella of Article 3 against the statutory limitations in Article 5 and overarching fundamental rights which aim to provide the kind of breathing space our society needs, and deserves.<sup>99</sup>

The nine angles above show that under European copyright law copyright and linking can tango, in step with existing policy goals and case law, graciously allowing linking in some situations, while requiring separate authorization in others. Such tailored approach may provide exactly what copyright owners and users want: striking a fair balance, without choking creativity or the web.

<sup>99</sup> See eg Hugenholtz and Senftleben, above, n 10, 29 and 30: '[I]t is to be expected that the EU Charter, which expressly recognizes a catalogue of fundamental rights and freedoms including freedom of expression and information as a primary source of EU law, will in due course lead to more liberal readings of the Directive's catalogue of exceptions.' See also the recent study ordered by the European Commission: J-P Triaille et al, 'Study on the application of Directive 2001/29/EC on Copyright and Related

Rights in the Information Society. Part II: Exceptions in the Digital Environment' (16 December 2013) p 249: 'In this general frame, copyright exceptions are adopted to strike a balance between the rights and interests of copyright holders and of the public at large.' Available at [http://ec.europa.eu/internal\\_market/copyright/studies/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/studies/index_en.htm). (accessed 31 December 2013).