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SVENSSON AND THE CJEU'S "NEW PUBLIC" THEORY: WHAT THE E.U. MAY LEARN FROM THE U.S. TO AVOID JUDICIAL LAPSES

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I. INTRODUCTION

With a poet to the CJEU

Attila JÓZSEF, Hungarian poet (1905 – 1937)

JÓZSEF Attila: Érted haragszom, nem ellened
Érted haragszom én, nem ellened;
nosza szoritsd meg a kezem,
mellyel magosra tartalak álmaimban,
erősitsen az én haragom,
dehogy is bántson, kedves.

Attila JÓZSEF: Angry for and not against you *(translation: Katalin N. Ullrich)*
I am angry for and not against you;
come on, grasp my hands holding you high in my dreams,
my anger should make you stronger,
by no means hurt you, dear.

Exaggerated criticisms ? (1)

Opinion of an academic specialized in constitutional law:

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**.

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

Exaggerated criticisms? (2)

Opinion of the President of an important European NGO of practicing laywers in the field of intellectual property.

Declaraction of **Jochem Pagenberg, President of the European Patent Lawyers Association** (EPLA) on the idea (in the meantimem rejected) to choose the CJEU as the judicial forum of the unitary patent system of the EU:

> „**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.”
>
> (To be found at www.eplaw.org/Downloads/President's%Report.pdf.)

Exaggerated criticisms? (3)

Opinion of one of the ex-Presidents of the economically most important Member State of the E.U. Roman Herzog, ex-President of Germany (an outstanding constitutional lawyer) **on the CJEU**:

„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**."

(To be found at

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

Yes, exaggerated

- Exaggerated because even in some of the cases against which criticism is justified (such as in the SGAE and TvCatchup cases leading to Swenson – see below), **the intention of the CJEU was honest…**
- … and even **the results of the judgments were not necessarily negative** in the given concrete cases (just the contrary, for example, **from this viewpoint, the SGAE judgment can only be warmly praised).**
- The problem is that those judgments **were based on erroneous interpretations and wrong legal constructions with negative subsequent consequences.**
- However**, it would not be correct to blame the judges of the CJEU** for such errors committed in spite of their honest intentions and efforts**.**
- The explanation of such errors may be found in the **inadequate regulation of the competence and procedural rules of the Court.**
- This objective of this presentation **is to outline some modest ideas how such errors may be avoided.**

Problems that do exist (1)

The basic source of the problems: Article 267 of the TFEU:

„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.)

Problems that do exist (2)

- **The judicial system of the E.U. is much more centralized and federalist than the judicial system of the U.S.A. which is a federal state** (although the E.U. – fortunately – is not a federation).

- **The CJEU also functions as first-instance court –** but **without the possibility of appeal. At the same time,** the judgment of the CJEU has the effect of ***res iudicata*** **in all the Member States of the E.U**. There is **no healthy judicial hierarchy.**

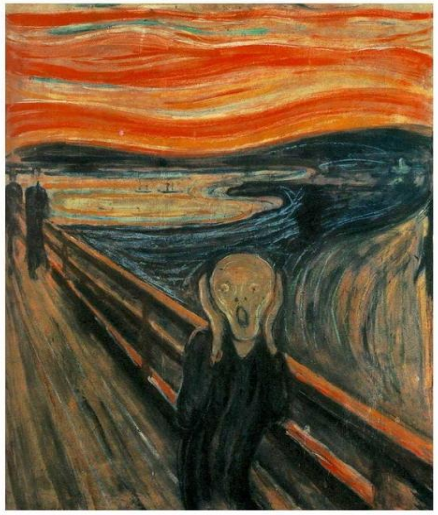
- The first-instance courts quite **frequently ask questions** from the CJEU **that a duly prepared judge** – or even a university student with good chance to pass an exam – **would have to be able to answer adequately** (and which **would certainly be answered by higher courts in the Member State without any difficulty**) **or simply stupid questions**.

Problems that do exist (3)

- As a result of the fact that the CJEU functions (i) as first instance court, (ii) as second-instance court, and time and again rarely (iii) as a real supreme judicial forum of the E.U., **it is inundated by a drastically big amount of preliminary questions** and **it is constrained to make constant Sisyphean efforts**.

- **It is very rare that the Supreme Court of the U.S.A. intervenes in copyright cases** (once in two or three years). In contrast, **the CJEU adopts copyright judgments very frequently;** nearly every month.

- The numerous and frequent cases to deal with **increases the danger of badly prepared and contradictory rulings**.



Edward Munch: The Scream

A (far from complete) list of CJEU judgments on the right of communication to the public:

2000, C-293/98, **Egeda/Hoasa**
2005, C-192/04, **Lagardère**
2006, C-306/05, **SGAE/ Rafael Hoteles**
2010, C-393/09, **BeSoft**
2011 C-403/08 & C-429/08, **Premier League**
2011, C-431/09 and C-432/09, **Airfield**
2011, C-283/10, **Globus Circus**
2011-135/10, **Consorzio Fonografici v. Del Corso**
2012, C-162/10, **Phonographic Performance Ltd**
2013, C-607/11, **ITV Broadcasting v. TVChatup**
2014, C-466/12, **Swensson et al v. Retriever Sverige**

Problems that do exist (4)

Alarming statistical comparison of the cases accepted by the U.S. Supreme Court and the CJEU:

- **In 2013, the CJEU completed 701 cases**, which meant **significant increase compared with 2012 when only 595 cases were completed**. At the same time, **699 new cases were referred to the CJEU**, representing further 10% increase. (Source: press release No. 34/14 del TJUE).

- In contrast, **the adoption of *writs of certiorari* by the U.S. Supreme Court is very rare**. **From 30 June 2011 to 2 July 2012,** the Court received **no less than 7.654 submissions and only adopted 63 *writs* (less than 0.9%!)** (source: http//dailywrit.com/2013/01/likelyhood-of-a-petition-being-granted/).

Problems that do exist (5)

- Due to the present unfortunate rules of the preliminary ruling system, **the CJEU has to deal with cases in which the legal issues have not been sufficiently debated and** – as a consequence – **the underlining legal constructions have not been duly developed** (as it takes place in a healthy judicial structure).

- **It is a dangerous source of erroneous judgments that the non-specialized judges of the CJEU are not adequatly informed**. Sometimes „**they try to reinvent the wheel**" in the sense that **they try to solve legal issues through improvised theories** based on what they consider appropriate from the viewpoint of some general principles of equity and rationality – **when**, in fact, **the solutions are available in a ready-made manner in the existing norms** that they are obligated to apply.

Problems that do exist (6)

- This is aggravated by the fact that **the rules of the prejudicial questions do not guarantee sufficiently participatory and transparent procedures**.

- **Only the parties concerned, the Commission, the Advocate General and some governments present legal arguments.**

- **The procedural institution of *amici curiae*** – which is an important guarantee in the U.S.A. for duly informed rulings by the Supreme Court – **is missing**.

Problems that do exist (7)

- For example, in the ***American Broadcasting Companies, Inc., et al*., v. *Aereo, Inc.,* case** – in which the U.S. Supreme Court ruled on 25 June 2014 that Aereo had infringed the right of communication to the public – **more than 10 *amici curiae* documents had been submitted**. And **just one** of the more than 10 was presented, among others, **by a number of interested organizations,** such as
  - CISAC, FIM, FIA, SCAPR, IFPI, FIAPF, Australian Copyright Council, British Copyright Council and various national societies and NGOs,

  and specialized experts of the topic such as
  - Jay Dougherty, Mihály Ficsor, Ysolde Gendreau, Justin Hughes, Marshall Leafer, Silke von Lewinski, Victor Nabhan and Barry Sookman.
- In the absence of sufficient sources of information and throrough legal analysis**, it is** in a way **programmed that the non-specialized and badly informed judges of the CJEU may adopt erroneous judgments**. **This is like a Russian roulette** sometimes with unfortunate victims.

II. AN EXAMPLE OF BADLY INFORMED CJEU JUDGMENTS: THE ERRONEOUS „NEW PUBLIC" THEORY AND THE ERRORS MADE IN TRYING TO „CORRECT" IT

The SGAE – TvCatchup – Svensson tryptich (1)

- In **SGAE** (case C-306/05), the CJEU **invented the „new public" theory in head-on crash with the Berne Convention and the WCT** in which there is no such criterion of the right of communication to the public and the right of making available to the public and by this **it also extended the theory of exhaustion of rights in a way which is in conflict with the international treaty.**
- In **TvCatchup** (case C-607/11), the Court **tried to correct it through the invention of the „special technical means theory" which is also in crystal-clear conflict with the plain language of the treaties**.
- In **Svensson** (case C-466/12), **the application of the „new public" theory would have led to abolishment of the right of making available right** for any works which has been uploaded on the Internet; the CJEU **tried to avoid this and also to „save the Internet" through inventing the „restricted access" theory in introducing by this a** (prohibited) **formality of protection.**

The SGAE – TvCatchup – Svensson tryptich (2)

- **For details, *see***
  - the **Opinion adopted by the ALAI Working Group** and uploaded on the www.alai.org; and
  - M. Ficsor: „**Svensson: honest attempt at establishing due balance concerning the use of hyperlinks – spoiled by the erroneous ‚new public' theory**"; paper to be found at www.copyrightseesaw.net.

- This presentation **only deals with the source of the erroneous „new public" theory as an alarming sign of how badly informed the CJEU judges may be.**

The source of the basic error (1)

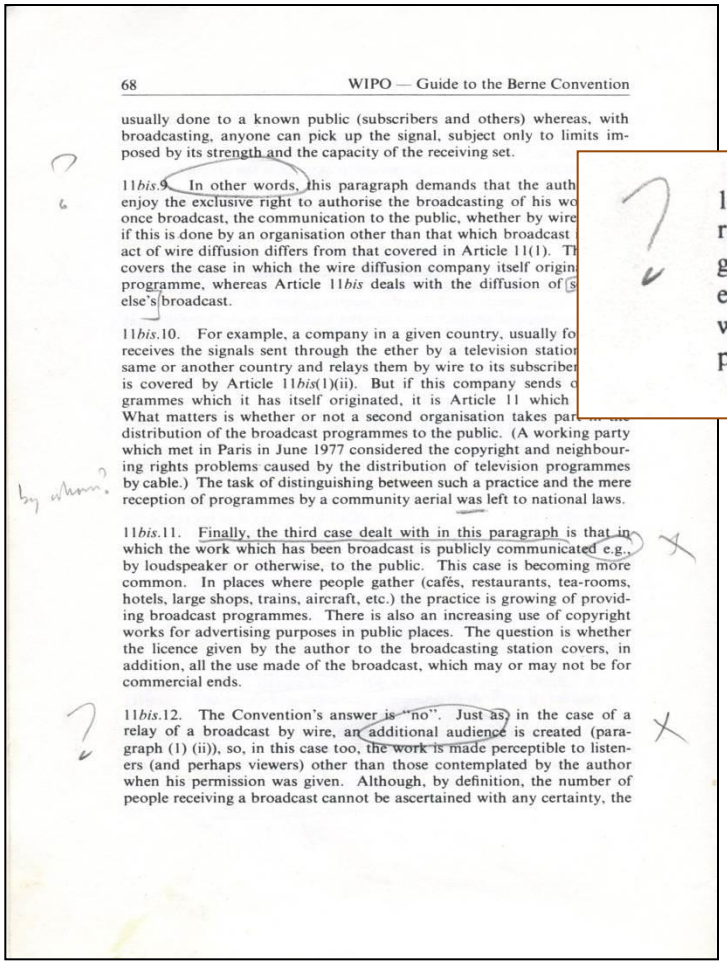
End of May 1985: „retreat" at the *Perle du Lac* restaurant to determine WIPO's copyright agenda for the next decade.

Participants: Arpad Bogsch, Director General**; Roger Harbin,** Head of Cabinet**; Claude Masouyé,** Director of Copyright Department**; Mihály Ficsor,** Director of Copyright Law Division**.**

The source of the basic error (2)

- **The problem**: **WIPO did not have any reliable publication** or other documents **that could have served as a guidance for the interpretation and application of the Berne Convention** .
- **There was an old „Guide to the Berne Convention"** published in 1978 **but, as its Foreword also stressed, it was only intended to be an introductory publication for developing countries** just in the process of establishing their copyright system and, in accordance with this, it had been **written is a very simple style** (by Claude Masouyé).
- For the „retreat", **Roger Harbin** (abbreviation: RH!) **had presented an extremely critical analysis of the Guide** full of penciled in remarks **pointing out how superficial it was and how many misleading statements it contained**. With reference to the „author" of the remarks and its negative nature, it was later referred to as the **„RH negative copy".**

The source of the basic error (3)



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usually done to a known public (subscribers and others) whereas, with broadcasting, anyone can pick up the signal, subject only to limits imposed by its strength and the capacity of the receiving set.

11*bis*.9. In other words, this paragraph demands that the auth enjoy the exclusive right to authorise the broadcasting of his wo once broadcast, the communication to the public, whether by wire if this is done by an organisation other than that which broadcast act of wire diffusion differs from that covered in Article 11(1). Th covers the case in which the wire diffusion company itself origin programme, whereas Article 11*bis* deals with the diffusion of s else's broadcast.

11*bis*.10. For example, a company in a given country, usually fo receives the signals sent through the ether by a television statio same or another country and relays them by wire to its subscribe is covered by Article 11*bis*(1)(ii). But if this company sends grammes which it has itself originated, it is Article 11 which What matters is whether or not a second organisation takes par distribution of the broadcast programmes to the public. (A working party which met in Paris in June 1977 considered the copyright and neighbouring rights problems caused by the distribution of television programmes by cable.) The task of distinguishing between such a practice and the mere reception of programmes by a community aerial was left to national laws.

11*bis*.11. Finally, the third case dealt with in this paragraph is that in which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the public. This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes. There is also an increasing use of copyright works for advertising purposes in public places. The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

11*bis*.12. The Convention's answer is "no". Just as in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the

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One of the great number of „negative" notes by „R.H." concerned paragraph 11*bis*.12.

The source of the basic error (4)

Paragraph 11*b*is.12 of the old Guide read as follows:

„11*bis*.12. … Just as in the case of a relay of a broadcast by wire, **an additional broadcast is created** (paragraph (1) (ii)), so, in this case too, the work is made perceptible to listeners (or perhaps viewers) other than those contempleted by the author when his permission was given... [T]he author thinks of his license to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle,… **an additional section of the public is enabled to enjoy the work** and it ceases to be merely a matter of broadcasting. The author is given control over this **new public performance of his work**."

The source of the basic error (5)

- „R.H.” stressed that this comment **may be understood as to suggest that for the applicability of the right of communication to the public a „new public” would be needed** which would be in crystal-clear conflict both with the text and with the negotiation history of the Convention as reflected in the records of the Diplomatic Conferences – and Arpad Bogsch agrred with it
- **Claude Masouyé reponded that**, of course, **he did not intend to suggest such kind of stupidity**. **Only an example was offered** for the developing country readers in the case of which the retransmission or the public communication truly resulted in the extension of the audience. **Even if, with certain efforts, it could be misunderstood, it did not follow from the text that a „new public” would be a condition**. He added that this turned out clearly from the last sentence which **did not speak about performance to a new public but about a new act of public performance**.

The source of the basic error (6)

- At the end of the weekend „retreat", **Dr. Bogsch decided as follows:**
  - **a series of committees of governmental experts** should be convened **to interpret the WIPO-administered conventions**;
  - **around the end of the 1980s or beginning of the 1990s, there should be two end results** of these meetings and parallel studies**: (i) a WIPO Model Law on Copyright** and **(ii) a new Guide to be written in an „academic style"** suitable to offer guidance for due interpretation.
- **The documents adopted by the committees made it clear that, for the application of the right of communication to the public, there is no need for a „new public"**.
- **At the end of the 1980s, a draft Model Law on Copyright had been discussed and was in an advanced stage** but, due to the TRIPS negotiations and the beginning of the preparation of what became later the WCT and the WPPT**, it was set aside and finally abandoned**.
- **The new Guide written in an academic style was only published in 2003 – and it does not include any comment which could be misunderstood as the old Guide**.

The unfortunate error – the Russian roulette produced a victim

- **In SGAE, the CJEU did not perform any interpretation of Article 11*bis*(1) of the Berne Convention** on the basis of its text and negotiation history (the so-called „preparatory work").
- **It based its interpretation exclusively on the old Guide, stressing that a WIPO publication is to be recognized as a reliable source of interpretation.**
- **They misunderstood the comments exactly the same way as Roger Harbin visualized it** in his „R.H. negative" remarks.
- **Apparently, there was nobody to warn the judges**
  - that it was just a **misunderstanding**;
  - that, if they wanted to trust themselves to WIPO documents, **they should have made use of the documents adopted by the competent bodies of the Berne Union**, and
  - that, **if they still wanted to use only the WIPO Guide to the Berne Convention, they should not have used the out-of-date one but the new Guide** published 25 years later.

III. CONCLUSIONS AND SUGGESTIONS

Conclusions

1. **No judicial activism!**
2. **Respect for Montesquieu!**
3. **Freedom for Sisyphus!**
4. **Healthy hierarchy!**
5. **No service for stupid questions!**
6. **Better informed rulings !!!!!**

Suggestions

- **National courts should be discouraged to use the „preliminary ruling" system wherever the legal situation is sufficiently clear to be able to adopt a judgment at national lavel.**
- **If the TFEU were amended for some reason, the possibility of prejudicial referral should be eliminated from Article 267 in cases where there is still a higher judicial forum in the Member State to which still appeal is possible.**
- **The CJEU should respect and apply more consistently the principles of subsidiarity and proportinality.**
- **With the objective of making the system of prejudicial rulings sufficiently participative and transparent and of guaranteer that duly informed judges adopt judgments, it would be necessary to introduce the possibility of submitting to the CJEU thorough legal analyses as „*amici curiae*" papers to the U.S. Supreme Court.**

THANK YOU FOR YOUR ATTENTION

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