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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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The presentation deals with Svensson *from two new angles; a much narrower one and a much broader one than the analyses so far published on it and on the CJEU's communication-rights saga. From a much narrower angle, because, it mainly focuses on the source of the erroneous "new public" theory. As by a close witness of how it happened, a kind of testimony is presented how the Court chose the wrong tree in what it believed – rightly – to be the reliable WIPO arboretum and then how it used the fruit torn from that tree for a purpose and in a way it should not have had to. The presentation also deals with these issues from a much broader angle; it compares certain key features of the E.U. and the U.S. judicial systems and points out those guarantees which, in the U.S., do protect the highest court from such undesirable lapses, while in the E.U. they are missing.*

DETAILED OUTLINE

The CJEU has dealt with the right of communication to be public in quite many (read: too many) cases, but its *Svensson* judgment[1] has trigged the most heated debates, the waves of which still seem to be far from dying away. This may not be a surprise because, in the ruling, the Court tried to clarify the copyright status of an indispensable means of using the Internet: hyperlinks.

A number of studies have been published on this judgment and the CJEU's numerous other rulings on the rights of communication to the public. The title of my previously published paper expresses the gist of what I think of this topic: "*Svensson – honest attempt at establishing due balance concerning the use of hyperlinks: spoiled by the erroneous 'new public' theory*"[2]. The essence of the opinion of the ALAI Working Group in which I have had the honor to participate (*inter alia*, with the said study) is practically the same.[3] The "new public" theory fully developed in *SGAE*[4] – in conflict with the Berne Convention (and equally

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[1] Case C- 466/12.

[2] *See* currently on the font page of my website www.copyrightseesaw.net.

[3] *See* www.alai.org.

[4] Case C-306/05.

with the TRIPS Agreement and the WCT) – was the "original sin", although its consequences were not felt immediately (since, in that case, it did become evident yet that it is an error to speak about *communication to a new public* when the right is about *a new act of communication to the public*). However, the symptoms of biting at the unhealthy fruit torn from a wrong tree was already felt in the *TVCatchup* case[5], and the CJEU tried to apply a cure by the "specific technical means" theory – which, unfortunately, was not in a friendly relationship either with the text and the "preparatory work" of the copyright treaties (it is sufficient to refer to the right of rebroadcasting of broadcast works covered both by Berne Article 11*bis*(1)(ii) and by the big "umbrella" of WCT Article 8). However, in *Svensson*, even the "specific technical means" theory was not of help anymore to neutralize the "new public" theory. The Court, which has found that the use of hyperlinks is an act of making available to the public in the sense of Article 8 of the WCT 8 and Article 3 of the Information Society Directive, has come up with a new idea again. The newly invented "restricted access" theory has been helpful "to save a Net" – the way as the judgment has been celebrated by many – and also offers some chance for copyright; chance which could be even better if "restriction" were not interpreted in a "restricted" way and if not only the use of technological measures but all cases were covered where it is clear that the rightholders' intention is to only allow restricted access. But there is a problem with this; and it is not a small and negligible one; namely that it seems to be in conflict with an even more important provision of the international treaties than Berne Article 11*bis*(1) and WCT Article 8; namely, with Berne Article 5(2). It has a penetrating smell of formality (in case of non-fulfillment of which the rightholders would lose their right of making available – contrary to the WCT and the Directive which do protect righholders from such a fate; so much that Article 3(3) of the Directive also contains an explicit provision for this purpose).

The source of all these troubles is that the CJEU has based its "new public" theory not on the analysis of the text of the relevant treaty provisions and, where necessary, on the "preparatory work" as it is prescribed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. It has based its ruling exclusively – those who check the text thoroughly will see that, although this is surprising, it is true: *exclusively* – on some superficial remarks in an old WIPO Guide to the Berne Convention published in 1978.[6] As the Preface to that Guide made it clear, it was not intended to be a thorough analysis but only a general introductory publication written "as simply as possible" for those developing countries which, at that time, were in the early stage of establishing their copyright system.[7] The old Guide used, as an example, a cable retransmission of broadcast programs to a segment of the public that, without it, would not be able to receivable them.[8] The CJEU settled the task of interpretation of the relevant treaty provisions by stressing that a WIPO Guide must be a reliable source and by deducing from the said out-of-date example the rule (contrary to the real rule under Berne Article 11*bis*(1)) that the right of communication to the public only applies where the communication is made to a new public. This unfortunate misunderstanding was the source of the "new public" doctrine in clear conflict with the international copyright treaties.

[5] Case C-607/11.
[6] „*Guide to the Berne Convention*"; WIPO publication No. 615 (E), 1978.
[7] *Ibid.*, pp. 3-4.
[8] *Ibid*., pp. 68-69.

At WIPO, after the publication of the 1978 Guide, an extremely intensive copyright program took place in the 1980s and the 1990s (for which Sam Ricketson coined the fitting expression "guided development period"[9]) in which I participated in a decisive manner – as Director and then Assistant Director General in charge of copyright – and the two key ultimate objectives of which were the preparation and publication of (i) a WIPO Model Copyright Law and (ii) a new Guide to the Berne Convention and the other WIPO-administered copyright treaties – not just for developing countries, but as the terms of reference stated, in an "academic style" in a way that it could serve as a general guidance for the interpretation of the treaties. The program ended up in a different way. The Model Law project was abandoned at the beginning of the 1990s when the international community began concentrating on the preparation of new treaties – adopted later as the TRIPS Agreement in 1994 and the two WIPO Internet Treaties (the WCT and the WPPT) in 1996. Nevertheless, the rich results of the "guided development period" – studies, meeting reports, guiding principles, recommendations, model provisions and the like – became available both as documents sent to all government and interested IGOs and NGOs and as published in the then monthly WIPO review "Copyright". Those documents and publications made it crystal clear what was obvious under the relevant norms of the international treaties; namely, that there was no acceptable basis whatsoever for any idea of interpreting the right of communication to the public as a right of communication to a new public (consisting in a *de facto* extension of the principle of exhaustion of rights to this right to which it cannot be extended). The new WIPO Guide[10] was finally only published in 2003, after that the WIPO "Internet Treaties" had also entered into force. The new Guide reflects the findings of the "guided development period" and the new developments having taken place since then and, of course, there are no remarks in it that could be misunderstood or misinterpreted as it was the case with the outdated Guide published a quarter of a century before. It does reflect what the competent governing bodies of WIPO have confirmed: the WIPO copyright treaties allow no room for any "new public" doctrine.[11]

The single most important – and most alarming – aspect of the CJEU's lapse with the "new public" theory is that it is obvious that the judges simply did not know about all these developments. They cannot be blamed for this; subsequently, they also made honest attempts at neutralizing the unacceptable consequences. Simply, nobody had informed them that, if they wanted to refer to a WIPO position as a reliable source, it was not that out-of-date old Guide published as a matter of general introduction for developing countries, but rather the documents adopted by competent WIPO bodies on the issue, and that, if they still preferred a WIPO Guide to the Berne Convention, there was a much more recent and thorough one corresponding to the treaty interpretation approved by the said WIPO bodies. It is sure that they did not know about all this because, if it were the case, they certainly would have presented some reasons for which they did not agree with the interpretation approved by the Executive Committee of the Berne Union and they used an age-old WIPO Guide instead of the new one with which WIPO, the "reliable source", had replaced it. There is no reference to anything like this in the judgment.

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[9] S. Ricketson: „*The Bern Convention for the protection of literary and artistic works: 1886-1896*", Kluwer, 1986, p. 919.

[10] „*Guide to the Copyright and Related Rights Treaties Administered by WIPO*", WIPO publication No. 891 (E), 2003.

[11] Ibid., *see* in particular pp. 74-78.

The E.U.'s judicial system – the basic "constitutional" rule of which may be found in Article 267 of the Treaty on the Functioning of the E.U. (TFEU) – seems to be at least as federal as (in fact, in certain aspects, even more than) the U.S. judicial system. Thus, their comparison seems to be justified. I submit that such lapses due to the absence of information for the highest judges are imaginable in the case of the Supreme Court of the U.S. (SCOTUS). As the statistics used in the presentation clearly show this, *writ of certiorari* interventions by the SCOTUS are much rarer (in comparison with the CJEU's preliminary rulings on copyright cases, extremely rarer). In the U.S., sufficient time is available for developing the legal position on an issue in the sense that the cases may go through a healthy judicial hierarchy, maybe also in parallel at various district and circuit courts with possibly differing decisions and, by the time the SCOTUS happens to take a case, there has been already lavish opportunities to express all possible relevant arguments and counter-arguments. In contrast, Article 267 of the TFEU allows even for the lowest level and least experienced judges to turn immediately to the CJEU as the highest judicial body, the ruling of which on the given issue then immediately becomes *res iudicata* for the entire E.U. In such a case, due to the absence of more thorough consideration of the case, it is easier to commit an error as it has happened with the unfortunate "new public" theory.

In the U.S. system, there is another important guarantee that all necessary information is available to the SCOTUS justices from outstanding experts suitable to shed light to all relevant legal aspects of a case; in addition to what the well-prepared clerks of the Court may produce on their own, usually also a number of *amici curiae* submissions are presented. In the cases where I have had some roles to participate, in particular in *Golan*[12] as a DoJ and USCO expert and, in the recent *Aereo*[13], as one of the several signatories of an *amici*, it was a lawyer' delight to be acquainted with the many well-documented and eloquent legal arguments (irrespective of whether or not I tended to agree with the conclusions thereof). Such a procedural means is badly missing in the E.U.'s preliminary ruling system. The relevant rules only ensure the availability of an overly limited scope of information sources, and the possible attempts at trying to submit some papers on the key legal aspects of a case are heavily filtered, and quite usually discouraged for politically considerations or just due to mere absence of understanding, by the governments of the Member States which may – but, in general, only surprisingly few do – participate in the CJEU procedures.

The E.U. should learn from the U.S. examples. It would be desirable to amend Article 267 of the TFEU by limiting not only the obligation but also the possibility, to the highest judicial body of a Member State, of submitting preliminary ruling requests to the CJEU – or, if such an amendment were difficult (as it seems to be), at least, to discourage such submissions by lower-instance courts. This would not only guarantee better developed cases reaching the highest E.U. judicial body, with less danger of disregarding certain decisive sources of interpretation, but it would also decrease the extremely high workload of the Court. The other desirable measure to produce better informed preliminary rulings would be the introduction and institutionalization of a U.S.-style *amici curiae* system.

[12] Golan v. Holder, 565. U.S._(2012)
[13] American Broadcasting Cos. v. Aereo, Inc, 573. U.S._(2014)

As regards the hyperlink conundrum, although the CJEU has made a honest and commendable attempt in *Svensson* at trying to establish an acceptable balance, it may hardly remain on the shaky basis of the triptych of three theories (the basic "new public" theory along with the "specific technical means" and "restricted access" theory used as escapes) which, for different reasons, are not in due accordance with the international norms. As suggested in my above-mentioned paper, an adequately construed implied license theory combined with available exceptions and limitations (such as what is foreseen in Article 10*bis*(1) of the Berne Convention and Article 5(3)(c) of the Information Society Directive) or possibly even a new duly calibrated one in accordance with the three-step test.

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