

Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines

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Abstract In recent years, the ability to make available, locate and access copyright protected content over the Internet has increased considerably. Some business models are directly aimed at linking or locating content already made available by other services. Such business models may create value for end users by making it easier to locate and find content on the Internet, but at the same time, they may be deemed to appropriate value from the rightholders or their service providers. In some cases, this has led to tensions and even litigations between the providers of these new business models and the rightholders or their service providers. These tensions are reflections of the underlying policy concerns inherent in the field of copyright law on the necessity to strike a fair balance between the protection of creative content and measures to foster its dissemination. This article will discuss, analyse and draw conclusions from two recent cases from the Court of Justice of the European Union on Internet linking and meta search engines, Svensson and Others and Innoweb, and relate them to the underlying policy concerns in copyright law.

1 Introduction

The Internet and the World Wide Web are some of the most important and profound creations of humankind. Among many Internet applications and services available today, information retrieval is very likely one of the two primary uses of the Internet. The possibility to *link* to and *search* for content on the Internet plays an important role for users to find and locate resources or content for a particular

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need.¹ Linking is intimately bound to the conception of the Internet as a network: it has even been held that linking is the single most important feature that differentiates the Internet from other forms of cultural dissemination.²

These technical developments and features could be seen in the light of basic copyright principles. In general, the primary role of the system of copyright norms established in the EU directives on copyright is to foster the production and dissemination of creative works.³ To a great extent, these norms build on norms established at international level, e.g. in the Berne Convention (BC),⁴ the WIPO Copyright Treaty (WCT)⁵ and the WIPO Performances and Phonograms Treaty (WPPT).⁶ The two latter instruments were adopted in response to the need to ensure that appropriate levels of protection were made available in the “digital environment”, at the time referred to as the “digital agenda”.⁷

The main or most significant EU directive, which also serves the purpose of implementing the WCT and the WPPT in a harmonised way at EU level, is directive 2001/29 on copyright in the information society.⁸ The dual aim to stimulate the production of creative works and at the same time foster their dissemination, *inter alia* in relation to technological developments, is enshrined in several of the recitals in the preamble to that directive.⁹ Similar statements are found in the

¹ Wu and Li (2004, p. 305), Olivás (2008, p. 537). Cf. de Beer and Burri (2014, p. 103), Strowel and Ide (2001, p. 404) and Ginsburg (2014, p. 147).

² See e.g. European Copyright Society (2014) (hereinafter: Opinion by the European Copyright Society on Svensson). Cf. Benkler (2006), Tsoutsanis (2014, p. 1), Udsen and Schovsbo (2006, p. 47) *et seq.* and Westman (2012, p. 800).

³ In this article, unless otherwise specified, the terms “copyright” or “work” also refer to so-called related or neighbouring rights.

⁴ Berne Convention for the Protection of Literary and Artistic Works, last revised in Paris on 24 July 1971, and amended on 28 September 1979.

⁵ WIPO Copyright Treaty (WCT), adopted in Geneva on 20 December 1996.

⁶ WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on 20 December 1996.

⁷ See e.g. Ficsor (2002), para 1.45 *et seq.*

⁸ Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁹ Recital 31 of directive 2001/29 holds that “A fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders and users of protected subject-matter must be safeguarded.” Cf. recital 4 which states that “A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.” See also recital 2 which holds that “[c]opyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content”.

preamble to the WCT¹⁰ and WPPT¹¹ and article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹² Hence, at its very core, the copyright system is concerned with the production and dissemination of creative content for the benefit of society and the need to strike a fair balance between these interests.¹³ This has been stressed by the Court of Justice of the European Union (CJEU) on several occasions.¹⁴

This balance of interests—or dual aim—of the copyright system in relation to linking and certain search engines has been brought to the fore in two judgements recently delivered by the CJEU. Depending on the interpretation of these cases, they will probably have a direct impact on how content is made available, located and accessed on the Internet, the development of new business models and indirectly also on the remuneration provided for authors and other actors in the creative sectors.

The first case, *Innoweb*,¹⁵ concerned the activities of a so-called dedicated meta search engine and its compatibility with the right of re-utilisation in article 7 of EU directive 96/9 on the legal protection of databases.¹⁶ The second case, *Svensson and Others*,¹⁷ dealt with linking to content protected by copyright on the Internet in relation to article 3.1 of EU directive 2001/29 on copyright in the information society. Considering the potential importance of the two cases, it is somewhat surprising that neither of the cases was subject to an opinion by the Advocate General. This is supposed to occur only in cases that do not give rise to a new point of law. At least *Svensson* concerned a topic with considerable differences of opinion, not

¹⁰ The preamble to the WCT includes the following statements: “Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments”, “Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention” and “Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works”.

¹¹ The preamble to the WPPT includes the following statements: “Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments”, “Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms”, and “Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information”.

¹² Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets out the goal to protect property under the Agreement for “the mutual advantage of producers and users of technological knowledge ... in a manner conducive to social and economic welfare”.

¹³ Axhamn (2013, p. 164).

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

¹⁵ Case C-202/12, *Innoweb BV v Wegener Media BV and Wegener Mediaventions BV*.

¹⁶ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ 1996 L 77, p. 20 (hereafter: the database directive).

¹⁷ Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*.

only among legal scholars but also between EU Member States; as regards both the issue of linking and general issues related to the interpretation of the notion of “communication to the public” as expressed in recent case law from the CJEU.

This article will describe and analyse the two cases and discuss their potential impact on how content is accessed, reused and made available on the Internet. The analysis and discussion will relate to the underlying need to strike a fair balance between the protection of creative content and its dissemination, inherent in many copyright cases and legislative copyright policy decisions.

2 Innoweb

Innoweb refers to a ruling from the CJEU following a request for a preliminary ruling by the *Gerechtshof te's-Gravenhage* (The Hague Regional Court, The Netherlands). The decision sheds light on how the *sui generis* database right, which dates back to 1996, applies to modern day meta search engines in the Internet advertising market—a phenomenon barely thought of 18 years ago when the directive was adopted. Thus, when reading the *Innoweb* case, one should have in mind that the underlying rationale of the *sui generis* right is to safeguard the position of makers of databases against misappropriation of the results of the financial and professional *investment* made in obtaining and collecting the contents of the database,¹⁸ *inter alia* by serving as a means to *secure the remuneration* of the maker of the database.¹⁹ This is reflected in article 7 of the directive, which relates the investment to acts carried out with the contents of the database:

Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

In addition, under article 7.5 of the same directive, which serves as a safeguard clause to ensure that the lack of protection of the insubstantial parts does not lead to their being repeatedly and systematically extracted and/or re-utilised,²⁰ it is not permissible to re-utilise insubstantial parts of the contents of a protected database where that re-utilisation is repeated and systematic, implying acts which conflict with a normal exploitation of that database or which unreasonably harm the

¹⁸ Recital 39 to the database directive.

¹⁹ Recital 48 to the database directive.

²⁰ See case C-203/02, *The British Horseracing Board and Others*, para 85 with reference to Common Position (EC) No 20/95 adopted by the Council on 10 July 1995 (OJ 1995 C 288, p. 14), point 14 of the Council’s statement of reason.

legitimate interests of the database maker. The objective of the *sui generis* right to protect investment is thus quite different from the objective of copyright, which is to protect subject matter that constitute an author's own intellectual creation.²¹

2.1 Background

Through its AutoTrack website (www.autotrack.nl), the Dutch company Wegener provided access to an online collection of advertisements for cars, together with a list, updated daily, of about 200,000 second-hand cars.²² The sellers were private individuals, car showrooms or garages. Approximately 40,000 of those advertisements were found only on autotrack.nl, while the other advertisements could be found elsewhere as well. With the help of the AutoTrack website search engine, users could carry out targeted searches for vehicles on the basis of various criteria.²³

Another company, Innoweb, ran GasPedaal, a dedicated meta search engine via its gaspedaal.nl website, and this too was devoted to car sales.²⁴ In its reasoning, the CJEU explained that a dedicated meta search engine is “dedicated” in so far as it searches only through specific websites, and it is “meta” in so far as it gets the search engines of those specific websites to do the searching and in this case to supply the results to the GasPedaal search engine.²⁵ According to the Court, the latter feature differentiates meta search engines from general (“web”) search engines such as Google or Yahoo, which are based on algorithms.²⁶

²¹ Cf. Article 3(1) of the database directive which holds that “databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection”. Similar statements are found for the copyright protection of photographs in article 6 in directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, and, as regards computer programs, in article 1.3 of directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version). Via case law from the CJEU, the requirement of “author's own intellectual creation” has been deemed to have general application also for other categories of works than databases, photographs and compute programs. See e.g. case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, paras. 30 to 51, case C-393/09, *Bezpečnostní softwarová asociace—Svaz softwarové ochrany v Ministerstvo kultury*, paras. 43–51, case C-403/08, *Football Association Premier League and Others*, paras. 96–100, and case C-145/10, *Painer*, paras. 85–99. For a discussion, see e.g. Rosati (2013).

²² Innoweb, para. 2. AutoTrack was a venture of Dutch/Belgian publisher De Persgroep.

²³ Innoweb, para. 8.

²⁴ Gaspedaal was a venture of Dutch publisher De Telegraaf.

²⁵ Innoweb, paras. 9 and 25.

²⁶ Innoweb, para. 24.

Although it most probably did not have an impact on the outcome of the case, it should, however, be noted that meta search engines are also based on algorithms. The difference between the algorithms used by ordinary search engines and algorithms used by meta search engines is that in the former case, the algorithms serve the purpose of compiling a physical database or catalogue of the web (“indexing”). Meta search engines do not index web pages; their algorithms serve the purpose of collecting the results from the selected search engines, merging them together and presenting them to the user.²⁷ Due to the enormous quantity of documents that the Internet contains, it is impossible that a single search engine index links the totality of the web. Therefore, by means of providing a unified interface for consulting a combination of different searchers, meta search engines serve the purpose of improving web search results.²⁸

Accordingly, a car search using GasPedaal enabled the user simultaneously to carry out searches of several collections of car advertisements listed on third-party sites, including AutoTrack. When a GasPedaal user searched for a particular type of car, GasPedaal translated the query into the format of the search engines of these websites. GasPedaal then retrieved data directly, i.e. in “real time”, from these websites and displayed the combined search results in its own layout to the user. A web page with the list of results showed essential information relating to each car, including the year of manufacture, the price, the mileage, a thumbnail picture and links to all the sources where the car could be found.²⁹

The total number of website advertisements searched through GasPedaal was around 300,000. GasPedaal daily carried out around 100,000 searches on the AutoTrack website, subjecting approximately 80 % of the various combinations of makes or models listed on the AutoTrack collection to search daily. In response to each query, however, GasPedaal displayed only a very small part of the contents of that collection, as the displayed data were determined on the basis of the criteria keyed into GasPedaal by the user.³⁰

On the view that Innoweb was compromising its *sui generis* right in relation to its database of car advertisements, Wegener brought an action for injunctive relief to protect its database right and, at first instance, succeeded in all essential respects. Innoweb appealed to the Gerechtshof te's-Gravenhage (Regional Court of Appeal, The Hague). The Court held that Wegener’s collection of car ads was a database, but did not consider this to be a situation in which the whole or a substantial part of that database was *extracted* in the meaning of article 7.1 of directive 96/9 on the protection of databases. Nor did the Court find the *repeated extraction* of insubstantial parts of the contents of that database to have cumulative effect in the meaning of article 7.5 of the same directive. However, the Court decided to stay the proceedings and to refer a total of nine questions to the CJEU

²⁷ Wu and Li (2004, p. 305), and Olivas (2008, p. 538). Cf. Innoweb, paras. 24 and 25.

²⁸ Olivas (2008, p. 537 ff).

²⁹ Innoweb, paras. 10 and 11.

³⁰ Innoweb, paras. 12 and 13.

for a preliminary ruling mainly related to the concept of *re-utilisation* in article 7.1 of directive 96/9. The Court of Appeal asked the CJEU whether Innoweb's acts constituted "re-utilisation" of the "whole or of a substantial part" of the contents of Wegener's database.³¹

2.2 *The Response of the CJEU with Comments and Analysis*

In answering the questions from the referring Court, the CJEU ruled that article 7.1 of directive 96/9 must be interpreted as meaning that an operator who makes available on the Internet a dedicated meta search engine re-utilises the whole or a substantial part of the contents of a database under article 7, where that dedicated meta engine

- i. provides the end user with a search form which essentially offers the same range of functionality as the search form on the database site,
- ii. "translates" queries from end users into the search engine of the database site "in real time", so that all the information on that database is searched and
- iii. presents the results to the end user using the format of its own website, grouping duplications together into a single block item but in an order that reflects criteria comparable to those used by the search engine of the database site concerned for presenting results.³²

The CJEU reached this conclusion by referring to previous case law, according to which the use, in article 7.2.b of directive 96/9, of the phrase "any form of making available to the public" indicates that the Community legislature attributed a broad meaning to "re-utilisation".³³ That broad construction is lent support by the objective pursued by the Community legislature through the establishment of a *sui generis* right.³⁴ As held by the CJEU in previous cases, that objective is to stimulate the establishment of data storage and processing systems which contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity.³⁵ To that end, the *sui generis* right under directive 96/9 is intended to ensure that the person who has taken the initiative and assumed the risk of making a substantial investment in terms of human, technical and/or financial resources in the setting up and operation of a database receives a return on his

³¹ Innoweb, para. 18.

³² Innoweb, para. 54.

³³ Innoweb, para. 33, with reference to Case C-203/02, *The British Horseracing Board and Others*, para. 51 and Case C-173/11, *Football Dataco and Others*, para. 20.

³⁴ Innoweb, para. 34, with reference to Case C-304/05, *Directmedia Publishing*, para. 32.

³⁵ Innoweb, para. 35, with reference to Case C-203/02, *The British Horseracing Board and Others*, paras. 30 and 31 and Case C-604/10, *Football Dataco and Others*, para. 34.

investment by protecting him against the unauthorised appropriation of the results of that investment.³⁶

According to the Court, GasPedaal was thus depriving AutoTrack of revenue which should have enabled AutoTrack to redeem the cost of its investment.³⁷ This was the case as GasPedaal was not limited to indicating to the user databases providing information on a particular subject³⁸ and because it ordered duplications into one item.³⁹ This, the Court stated, created a risk that the database maker would lose income,⁴⁰ a risk that could not be ruled out by force of the argument that it is still necessary, as a rule, to follow the hyperlink to the original page on which the result was displayed.⁴¹ The Court further held:

As the end user no longer has any need to proceed via the database site's homepage and search form, it is possible that the maker of that database will generate less income from the advertising displayed on that homepage or on the search form, especially to the extent that it might seem more profitable for operators wishing to place advertisements online to do so on the website of the dedicated meta search engine, rather than on one of the database sites covered by that meta engine.

As regards, furthermore, database sites displaying advertising, sellers—aware that, with the dedicated meta search engine, searches will be made simultaneously in several databases and duplications displayed—may start placing their advertisements on only one database at a time, so that the database sites would become less extensive and therefore less attractive.⁴²

It is thus important to bear in mind that the ruling concerned the activities made possible by Innoweb which occurred *prior* to the activities carried out by the end users, namely the actual searching of the databases. The actual search undertaken by GasPedaal in response to a query—including the presentation of the results to the end user—took place automatically, in accordance with the way in which the meta search engine had been programmed, without any intervention on the part of GasPedaal at that stage.⁴³ It was thus Innoweb's *offering* of the whole or a substantial part of Wegener's database that was *made possible* by the creation of Gaspedaal that the Court deemed deprived Wegener of potential advertising revenues which it would have used to recoup its investment.⁴⁴ The fact that only part of the entire database was actually consulted was held irrelevant as the entire

³⁶ Innoweb, para. 36, with reference to Case C-203/02, *The British Horseracing Board and Others*, paras. 32 and 46 and Case C-304/05, *Directmedia Publishing*, para. 33.

³⁷ Innoweb, para. 37, with reference to Case C-203/02, *The British Horseracing Board and Others*, para. 51.

³⁸ Innoweb, para. 39.

³⁹ Innoweb, para. 43.

⁴⁰ Innoweb, para. 41.

⁴¹ Innoweb, para. 44.

⁴² Innoweb, paras. 42 and 43.

⁴³ Innoweb, paras. 28 and 29.

⁴⁴ Innoweb, paras. 29 and 39–54.

database was in fact made available to the end user.⁴⁵ According to the Court, this practice by Innoweb came “close to the manufacture of a parasitical competing product”⁴⁶ and thus infringed Wegener’s right of re-utilisation.⁴⁷

The reasoning by the CJEU in *Innoweb* has been met by both praise and criticism by commentators. Some have held that as Innoweb’s service and similar business models are for the benefit of consumers, the law should not discourage it.⁴⁸ The decision might outlaw the operation of most socially beneficial websites that help consumers to compare prices or qualities of different goods offered on the Internet. It is thus not obvious that it is beneficial for the innovation policy of the EU to make the operation of such websites dependent on the mere tolerance of the “big players”, especially when smaller competitors are possibly the greatest beneficiaries of these comparison websites.⁴⁹

Others have stressed that the ruling in *Innoweb* will be of utmost importance for the digital publishing industry; it has been held to be “a strong incentive to develop quality data products without having to fear that these products will immediately be parasitized.”⁵⁰ Indeed, one of the reasons for creating the *sui generis* database right in the first place was the desire to increase the EU’s rate of producing databases—a desire which has so far not been borne out in practice: a fact that might be reversed by this decision.⁵¹

The ruling is quite detailed and fact-specific—concerning a dedicated meta search engine that gives the user essentially the same range of functionality as that on the underlying site, does searches in real time, blocks duplicated results and allows the user to rank the output. The tenor of the judgement, however, indicated that other “parasitical” web scraping will also be contrary to the *sui generis* right.⁵²

⁴⁵ Innoweb, paras. 46 and 47.

⁴⁶ Innoweb, para. 48.

⁴⁷ Innoweb, paras. 53 and 54.

⁴⁸ See e.g. Stepping on the GasPedaal (2013).

⁴⁹ Cf. Husovec, Does Innoweb hinder innovation on the web? posted on the Kluwer Copyright Blog on 20 Jan 2014. Available at <http://kluwercopyrightblog.com/2014/01/20/eu-does-innoweb-hinder-innovation-on-the-web/>. Last visited on 14 Apr 2014.

⁵⁰ See CJEU takes foot of the GasPedaal, then puts the boot in, posted on The 1709 Blog on 25 Dec 2013. Available at <http://the1709blog.blogspot.se/2013/12/cjeu-takes-foot-off-gaspedaal-then-puts.html>. Last visited on 14 Apr 2014.

⁵¹ Indeed, even the EU Commission has remarked: “Is *sui generis* protection therefore necessary for a thriving database industry...the empirical evidence, at this stage, casts doubt on this necessity”. See 2005 DG Internal Market and Services Working Paper; First Evaluation of Directive 96/9/EC on the legal protection of databases, 12 December 2005, p. 5.

⁵² Cf. Prinsley & Byrt, When is web-scraping of a database unlawful? posted on 7 Jan 2014. Available at <http://www.mayerbrown.com/When-is-web-scraping-of-a-database-unlawful-01-07-2014/>. Last visited on 20 Apr 2014.

However, anyone seeking to venture into the attractive territory of meta search should study the judgement carefully before deciding to throw in the towel.⁵³

In any case, even if there is logic inherent in the *Innoweb* case based on the *sui generis* right, a question that immediately springs to mind is how a similar situation, however, specifically focused on linking, is dealt with from a copyright perspective (See Footnote 49). This issue was subject to the CJEU's ruling in *Svensson* and is dealt with in the next section.

3 Svensson

The treatment of clickable Internet links (hyperlinks) under copyright law is important because they are found everywhere on the web, forming an essential part of the web's infrastructure by enabling access to information. Millions of hyperlinks are created and clicked on around the world on a daily basis, forming an integral component of e-commerce and day-to-day practice for businesses and consumers alike. Thus, the legal status of Internet links has been a widely discussed subject in recent times, pitting those⁵⁴ who consider links an act of communication to the public within the meaning of article 3.1 of directive 2001/29 against those⁵⁵ who argue that the creation of Internet links does not, strictly speaking, constitute an act of communication to the public. Article 3.1 stipulates:

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.

Recitals 23 and 25 to the directive serve as a means for the interpretation of article 3.1. Recital 23 holds that the directive “should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts”. Recital 25 holds that all rightholders recognised by directive 2001/29 should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive

⁵³ Cf. ECJ ruling on meta search engines strengthens position of database right holders available at <http://www.debrauw.com/newsletter/ecj-ruling-meta-search-engines-strengthens-position-database-right-holders/#>. Last visited on 20 Apr 2014.

⁵⁴ Cf. ALAI 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 Sept 2013. Available at <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf>. Last visited on 16 Apr 2014 (hereinafter ALAI Opinion on Svensson).

⁵⁵ See e.g. Opinion by the European Copyright Society on Svensson.

on-demand transmissions. Such interactive on-demand transmissions are “characterised by the fact that members of the public may access them from a place and at a time individually chosen by them”.

Article 3.1 builds on and serves to implement article 8 of the WCT in the European Union in a harmonised manner.⁵⁶ Moreover, article 3.1 of the directive must, so far as possible, be interpreted in a manner that is consistent with the obligations arising from the corresponding provision of WCT.⁵⁷

Whereas the first part of article 3.1 establishes a broad right of communication to the public, the second part (“making available”) refers to a specific type of communication to the public: a right to control individualised and interactive (*on demand*) uses of copyrighted works.⁵⁸ The introduction of the “making available” right is widely regarded as one of the main achievements of the WCT.⁵⁹ The phrase “may access” indicates that actual access to the work by a member of the public may occur at a later time, or not at all: a “transmission” is thus not required for an act of “making available”.⁶⁰ The right of “making available” thus differs from traditional “communications”, such as broadcasting and cable retransmission, in that it explicitly encompasses the mere *offering* to the public of a work.⁶¹ This includes individualised pay-per-view television services or online services providing streaming or downloading of music and films. Hence, the right of communication to the public in article 3.1 of the directive includes the act of making

⁵⁶ See recital 15 to directive 2001/29.

⁵⁷ See e.g. SGAE, para 35.

⁵⁸ Article 3.1 of directive 2001/29 is almost verbatim to article 8 WCT, which holds that “Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”. The first part of article 8 extends the coverage of the right of communication to the public in the Berne Convention from certain categories of works (see articles 11, 11bis and 11ter of the Berne Convention) to all categories of works. See von Lewinski (2008, paras. 5.138 and 17.107); Ricketson and Ginsburg (2006, para. 4.25); Goldstein and Hugenholtz (2013, p. 325).

⁵⁹ See e.g. Ricketson and Ginsburg (2006, para. 12.57) and von Lewinski (2008, para. 17.72).

⁶⁰ Cf. 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, para 10.10: “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...” See also von Lewinski (2008), para. 17.73 and ALAI Opinion on Svensson.

⁶¹ See e.g. Ricketson and Ginsburg (2006), para. 12.58, WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO, para. CT-86, Walter and von Lewinski (2010), para. 11.3.30, Ginsburg (2014), p. 147 *et seq.*

available online, an activity that presumes an active role on the part of the communicator and also a potential activity on the part of the consumer.⁶²

Strangely enough, up until recently, there had been no case before the CJEU on the interpretation of article 3.1 in relation to linking. The first case to reach Court on this matter was *Svensson*. In this case, the CJEU held that a website which redirected Internet users through hyperlinks to protected works which were already freely available online did not infringe copyright in those works. This was the case even if the Internet users who clicked on the link had the impression that the work appeared on the site that contained the link.

3.1 Background

The background to the case was the following. Retriever was a Swedish company that operated a website (Retriever, <http://retriever-info.com>) through which users were provided with hyperlinks to articles on other websites. *Svensson* and the other claimants in the main proceedings were all journalists who wrote articles published in the *Göteborgs-Posten* newspaper and on the newspaper's website, where they were freely accessible. Retriever provided hyperlinks to articles on the *Göteborgs-Posten* website without the permission of their respective authors.⁶³

It is not apparent from the available facts of the case how retriever created these links. i.e. if Retriever acted as an ordinary search engine by indexing the pages on the *Göteborgs-Posten* website and proved links to these website after an individual search by an end user. If this is the case, Retriever would be more akin to an “ordinary” search engine than a meta search engine.

The claimants brought an action against Retriever Sverige before Stockholms tingsrätt (the Stockholm District Court) in order to obtain compensation on the grounds that that company had made use, without their authorisation, of certain articles by them, by making these articles available to its clients. After losing in first instance, the claimants then brought an appeal against the judgement before Svea hovrätt (the Svea Court of Appeal). The Court of Appeal decided to stay the proceedings and to refer four questions to the CJEU for a preliminary ruling on the

⁶² Cf. 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, pp. 25–26: “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. ... 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”. See also Ricketson and Ginsburg (2006), para. 12.57 *et seq.*, Walter and von Lewinski (2010), para. 11.3.30 and ALAI Opinion on *Svensson*.

⁶³ *Svensson and Others*, para. 8.

interpretation of the notions of “communication to the public” and “making available to the public” in article 3.1 of directive 2001/29.⁶⁴

The first three questions posed by the Svea Court of Appeal concerned whether article 3.1 of directive 2001/29 must be interpreted as meaning that the provision, on a website, of clickable links to protected works available on another website constitutes an act of communication to the public as referred to in that provision, where, on that other site, the works concerned were freely accessible.⁶⁵ The fourth question concerned the meaning of the last sentence in recital 23; whether article 3.1 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.⁶⁶

3.2 *The Response by the CJEU with Comments and Analysis*

In answering the first three questions, the CJEU emphasised that it follows from article 3.1 of directive 2001/29 that *every* act of communication of a work to the public has to be authorised by the copyright holder.⁶⁷ However, an act of communication to the public requires both an “act of communication” of a work and the communication of that work to a “public”.⁶⁸

As regards the first of those criteria, the Court held that for there to be an “act of communication”, it is sufficient that a work is made available to *a public* in such a way that the persons forming *that public* may access it, irrespective of whether they avail themselves of that opportunity.⁶⁹ It followed that, in circumstances such as those in the case in the main proceedings, the provision of *clickable links* to protected works must be considered to be “making available” and, therefore, an “act of communication”, within the meaning of article 3.1.⁷⁰ Thus, it is not relevant whether there the work has been subject to a *transmission* or if it has been “made available”—i.e. merely offered—*on demand* in such a way that members of the public may access it from a place and at a time individually

⁶⁴ Svensson and Others, paras. 9–13.

⁶⁵ Svensson and Others, para. 14.

⁶⁶ Svensson and Others, para. 33.

⁶⁷ Svensson and Others, para. 15.

⁶⁸ Svensson and Others, para. 16, with reference to Case C-607/11, ITV Broadcasting and Others, paras. 21 and 31.

⁶⁹ Svensson and Others, para. 19, with reference to Case C-306/05, SGAE, para. 43.

⁷⁰ Svensson and Others, para. 20.

chosen by them. This is a dead end for the arguments that a communication always presupposes a transmission and that hyperlinking acts as a mere indication of source or reference.⁷¹

As regards the requirement of “public”, the Court held that it follows from article 3.1 that, by the term “public”, that provision refers to an *indeterminate number* of *potential* recipients and implies a *fairly large* number of persons.⁷² However, with reference to previous case law, the Court noted that “a communication concerning the same works as those covered by the initial communication and made ... by the same technical means, must also be directed at a *new public*, that is to say, at a public not taken into account by the copyright holders when they authorized the initial communication to the public”. [my emphasis]⁷³

The Court found that the initial communication (carried out by Göteborgs-Posten) targeted *all potential users*, as access to the Göteborgs-Posten website was not subject to any restriction (e.g. paywalls). Accordingly, the links provided by

⁷¹ See Hyperlinks, making available and the “new public”—or just a dead end? posted on the 1709 Blog on 14 Feb 2014. Available at <http://the1709blog.blogspot.se/2014/02/hyperlinks-making-available-and-new.html>. Last visited on 15 Apr 2014. This interpretation had been put forward in ALAI Opinion on Svensson and Rosén (2012), p. 163 *et seq.* Cf. Bentley and Sherman (2008, p. 151): “Most hyper-linking simply makes it easier to locate (and, if desired, access) works which are already available to the public, and it would be unduly constraining to require all links to be authorized.” Similar arguments are put forward by Litman (2001, p. 183) (“Referring to a copyrighted work without authorization has been and should be legal. ... Posting a hypertext link should be no different.”), de Beer and Burri (2014, p. 104) (“We ... stress yet again the critical role of hyperlinking for the working of the internet. In light of the case law, we think in particular that there has been no transmission, which is clearly a prerequisite for the communication to the public.”), and Aplin (2005, s. 151) (“It seems misconceived to say that [links] constitute making available ... all they have done is referred other users to where the files may be readily found.”). See also case law from the German Supreme Court in the Paperboy case, dated 17 July 2003, para. 42 (“A person who sets a hyperlink to a website with a work protected under copyright law which has been made available to the public by the copyright owner, does not commit an act of exploitation under copyright law by doing so but only refers to the work in a manner which facilitates the access already provided.”), and case law from the Norwegian Supreme Court in the Napster. no case, dated 27 January 2005, para. 47 (“It cannot be doubted that simply making a website address known by rendering it on the internet is not making a work publicly available.”) See further Opinion by the European Copyright Society on Svensson, e.g. at para. 40: “[A] hyperlink is a location tool, allowing a user to find where a work is”.

⁷² Svensson and Others, para. 21, with reference to Case C-306/05, SGAE, paras. 37 and 38, and ITV Broadcasting and Others, para. 32.

⁷³ Svensson and Others, para. 24, with reference to Case C-306/05, SGAE, paras. 40 and 42, and ITV Broadcasting and Others, para. 39. In this connection, it is significant that the CJEU does not find direct support for the interpretation the right of communication in relation to authors’ works in article 3.1 of directive 2001/29 in its case law concerning the right of communication to the public for certain neighbouring rights in article 8.2 of directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version). This case law includes e.g. case C-135/10, SCF, and case C-162/10, Phonographic Performance.

Retriever did *not* make the articles available to a *new public* and, therefore, there was no requirement for Retriever to obtain the journalists' consent.⁷⁴

By this, the Court thus seem to indicate that there is connection between the requirement of a "new public" in cases where the communication is carried out by the same technical means, whereas this requirement does not seem to be present if the technical means differ. This reasoning seems to be built on the three-tier model of communication to the public as set out in article 11*bis*(1) of the BC. This provision holds that authors have the exclusive right to authorise (i) primary broadcasts of their work, (ii) rebroadcasts by third parties and (iii) presentations of the original broadcast by loudspeakers and the like.⁷⁵ A requirement of "new public" in cases where the communication to the public is carried out by the same technical means seems to be present also in previous rulings by the CJEU. In any case, neither the BC nor any other international treaty on copyright defines the term "public". It may, however, not be defined too narrowly; the core potential of the rights must be safeguarded.⁷⁶

The case *SGAE*⁷⁷ involved the dissemination of satellite broadcasts to, inter alia, hotel guests in their rooms. The hotel was held to have carried out a type-(ii) communication to the public, separate from the original broadcasts. It was an independent act through which the broadcast was communicated to a new public (i.e. a different public from the one at which the original broadcast was directed).⁷⁸ This case was followed by *Airfield and Canal Digitaal*,⁷⁹ which involved the dissemination of encrypted satellite broadcasts to a satellite package provider's customers. The intervention by the satellite package provider was again held to be a separate type-(ii) communication to the public.⁸⁰ A type-(iii) communication to the public was considered in *Football Association Premier League and*

⁷⁴ Svensson and Others, paras. 25–32.

⁷⁵ Article 11*bis*(1) of the Berne Convention for the protection of literary and artistic works states that authors of literary and artistic works shall enjoy the exclusive right of authorizing: (1) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (2) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one; (3) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

⁷⁶ See also von Lewinski (2008), paras. 5.147 and 17.77 and Ricketson and Ginsburg (2006), paras. 12.02 and 12.41.

⁷⁷ Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*.

⁷⁸ *SGAE*, para 40: "It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11*bis*(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public".

⁷⁹ Joined cases *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) and *Airfield NV v Agicoa Belgium BVBA* (C-432/09).

⁸⁰ *Airfield and Canal Digitaal*, para. 82: "[A]ccordingly it must be found that the satellite package provider expands the circle of persons having access to the television programmes and enables a new public to have access to the works and other protected subject-matter".

Others,⁸¹ which involved the showing of satellite broadcasts on a television in a pub. The intervention by the pub owner was held to be a communication to a new public for the works comprised in the broadcasts.⁸² In *ITV Broadcasting and Others*,⁸³ which concerned the redistribution by an intermediary of terrestrial broadcasts on the Internet, the CJEU stated that each transmission or retransmission by a “specific technical means” may give rise to a separate communication to the public. As the communication to the (general) public over the Internet was carried out through a different technical means to the primary broadcast, the CJEU deemed that it was not necessary to consider whether it was a new public or not to find that it was a “communication to the public”.⁸⁴

Thus, the Court seems to apply a “new public” test only where the technical means of communication to the public is the same for the “re-communication” as for the original or primary communication (situations which might be referred to as “dependent” acts of communication of the public), whereas this is not necessary in cases where the technical means differ (“independent” acts of communication to the public). This interpretation finds support in the Guide to the BC, an interpretative document drawn up by WIPO which, without being legally binding,

⁸¹ Joined cases *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08).

⁸² *Football Association Premier League and Others*, paras. 192 and 197–199: “[A]s Article 11bis(1)(iii) of the Berne Convention expressly indicates, that concept encompasses communication by loudspeaker or any other instrument transmitting, by signs, sounds or images, covering—in accordance with the explanatory memorandum accompanying the proposal for a copyright directive (COM(97) 628 final)—a means of communication such as display of the works on a screen. ... That said, in order for there to be a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive in circumstances such as those of the main proceedings, it is also necessary for the work broadcast to be transmitted to a new public, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public. ... When those authors authorise a broadcast of their works, they consider, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. Where a broadcast work is transmitted, in a place accessible to the public, for an additional public which is permitted by the owner of the television set to hear or see the work, an intentional intervention of that kind must be regarded as an act by which the work in question is communicated to a new public. ... That is so when the works broadcast are transmitted by the proprietor of a public house to the customers present in that establishment, because those customers constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works”.

⁸³ Case C-607/11, *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*.

⁸⁴ *ITV Broadcasting and Others*, para. 39: “[T]he main proceedings in the present case concern the transmission of works included in a terrestrial broadcast and the making available of those works over the internet. ... [E]ach of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public. In those circumstances, it is no longer necessary to examine below the requirement that there must be a new public, which is relevant only in the situations on which the Court of Justice had to rule in the cases giving rise to the judgments in *SGAE, Football Association Premier League and Others* and *Airfield and Canal Digitaal*”.

nevertheless assists in interpreting that Convention,⁸⁵ the preparatory works to the BC,⁸⁶ and in legal scholarship.⁸⁷ It also finds support in a panel report settling a dispute between the European Communities and the USA on the compatibility of Sect. 110(5) of the US Copyright Act, with obligations in TRIPS. Section 110(5) in the US Copyright Act permitted, under certain conditions, the playing of radio and television music in public places (bars, shops, restaurants, etc.) without the payment of a royalty fee—i.e. communications to potentially “new publics”.⁸⁸

As regards the type of linking in question, the CJEU held that it did not matter if, when Internet users clicked on the link, the work appeared in such a way as to give the impression that it was appearing on the site on which that link was found, whereas in fact that work came from another site.⁸⁹ Thus, it would appear to be permissible to “deep-link”⁹⁰ or to “frame”⁹¹ to freely accessible content on another

⁸⁵ It is held in the Guide that when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author’s exclusive authorisation right. See WIPO (1978, pp. 68–69). The CJEU refers to this Guide in connection with the requirement of “new public” in SGAE, para 41.

⁸⁶ See Berne Convention Centenary (1986, p. 185) (referring to the discussions at the 1948 Brussels Revision Conference): “According to the explanatory memorandum prepared by the Belgian authorities and the Bureau of the Union, any broadcast aimed at a new circle of listeners or viewers, whether by means of a new emission over the air or by means of a transmission by wire, must be regarded as a new act of broadcasting, and as such subject to the author’s specific authorization. ... Consequently, the majority (12 votes to six) decided in favour of a Belgian proposal presupposing the intervention of a body other than the original one as a condition for the requirement of a new authorization”.

⁸⁷ See e.g. Westman (2012, p. 801 ff.), Tsoutsanis (2014, p. 13) and Ricketson and Ginsburg (Ricketson and Ginsburg 2006), para. 12.24 *et seq.* Cf. Kur and Dreier (2013, p. 299), de Beer and Burri (2014, p. 103), Rosén (2012, p. 164) *et seq.*

⁸⁸ See panel report, USA—Section 110(5) of US Copyright Act (WT/DS160/R, dated 15 June 2000), paras. 6.19–29, 6.131–134, 6.152, 6.173 with footnote 155, 6.175 and 6.206. This interpretation was also put forward by the European Community during the proceedings, see Communication, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, WT/DS160/5 concerning USA—Section 110(5) of US Copyright Act (WT/DS160/5, dated 15 April 1999), para 44, and the parties respective replies to Q4 on p. 112 and 174.

⁸⁹ Svensson and Others, paras. 29.

⁹⁰ Deep linking consists of using a hyperlink that links to a specific, generally searchable or indexed, piece of web content on a website, rather than the general home page as such. See e.g. Strowel and Ide (2001, p. 407), and Rosén (2012, p. 163).

⁹¹ At the time of writing (April, 2014), the CJEU is still to provide a preliminary ruling in Case C-273/13, C More Entertainment. C-348/13, a case which concerns, *inter alia*, framing. Framing is the juxtaposition of two separate web pages within the same page, usually with a separate frame with navigational elements. Framing is a method of presentation in a web page that breaks the screen up into multiple non-overlapping windows. Each window contains a display from a separate HTML file, for example, a web page from a different website that is fetched by automatically hyperlinking to it. See e.g. Strowel and Ide (2001, p. 407).

website.⁹² However, as the CJEU only gave a response in relation to “clickable” links, it is not clear what line is taken in regard to so-called inline or “embedded linking”,⁹³ as such links do not necessarily concern situations where the end user “clicks” on a link; the content is usually provided to the user without any activity carried out by him or her. As the content is provided to the user, it seems quite probable that such acts are also considered to constitute a “making available”.⁹⁴ However, a link which does not target a specific work, but merely works as a reference to a source from which it may subsequently be possible to access the work, is most probably not considered to make that work available to the public.⁹⁵

The CJEU went on to explain that if the link allowed users to *bypass restrictions* designed to limit access to a protected work to, for example, a website’s subscribers, those non-subscribing users would be a *new public* which was not taken into account by the copyright holders when they authorised the initial communication.⁹⁶ It would seem that the type of restriction the CJEU had in mind is a pay-wall. Paywalls are technological systems aimed at preventing users from accessing some of all contents of a given website without, e.g., paying a subscription fee.⁹⁷

⁹² This interpretation had been put forward in the ALAI Opinion on Svensson and the Opinion by the European Copyright Society on Svensson, paras 53–55. Cf. Ginsburg (2014, p. 148) and Svensson—it’s all about the “new public”, posted on the 1709 blog on 13 Feb 2014. Available at <http://the1709blog.blogspot.se/2014/02/svensson-its-all-about-new-public.html>. Last visited on 20 Apr 2014.

⁹³ Inline or embedded linking is the use of a linked object, often an image or a video, from one site by a web page belonging to a second site. The second site thereby has an inline link to the first site (where the object is located). See e.g. Strowel and Ide (2001, p. 407).

⁹⁴ At the time of writing (April, 2014), the CJEU is still to provide a preliminary ruling in case C-348/13, Bestwater, a case that has been stayed pending the decision in Svensson. The question referred is “Does the embedding, within one’s own website, of another person’s work made available to the public on a third-party website, in circumstances such as those in the main proceedings, constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC, even where that other person’s work is not thereby communicated to a new public and the communication of the work does not use a specific technical means which differs from that of the original communication?”

⁹⁵ See e.g. Ginsburg (2014, p. 148): “The latter kind of linking may be compared to pointing a potential bookstore patron to a shelf of books and identifying the requested work; the first kind offers to pull the requested book off the shelf and put it in the patron’s hands”. Similar arguments are put forward in ALAI Opinion on Svensson. See also Strowel and Ide (2001, p. 407).

⁹⁶ Svensson and Others, paras. 31. It is supposed that the CJEU wanted to defer the argumentation to the pending referrals, especially Case C-273/13, C More Entertainment.

⁹⁷ See e.g. Strowel and Ide (2001, p. 425): “[A]s the work is already available to the entire Internet community at the linked site’s web address, we cannot be dealing with a new act of making it available to the public. The link does not extend the work’s audience; surfers who access the work by activating the link can also consult the page directly (as long as they know its URL)”. See also Opinion by the European Copyright Society on Svensson, at para. 48(a): “It is well-known that material placed on the Internet without e.g. firewalls can be accessed from anywhere, and can be located using a range of search tools. Consequently, the copyright holder who authorises or permits such making available, must be assumed to contemplate the access to the work from anywhere. The creation of a hyperlink will thus not normally add to the public, as the targeted public is universal”.

Mere contractual restrictions seem to fall outside of the kinds of “restrictions” envisioned by the Court.⁹⁸

Although the requirement of “new public” appears to be a subjective criterion, rather than an objective requirement,⁹⁹ the CJEU stated affirmatively that the intention is given when the work is put openly on the Internet: a copyright holder who authorised an initial communication on the Internet of his or her content had in mind a “public” composed by “all Internet users [who] could have free access” to it.¹⁰⁰

One factor that might have led the Court to emphasise the criterion of “new public” in cases concerning dependent acts of communication may be the principle underlying the doctrine of *exhaustion* of rights: a rightholder should not be entitled to additional remuneration once he has realised the full economic value of his content by putting it on the market. Seen from this perspective, the notion of “new public” could be considered as building on similar “economic” considerations as the CJEU put forward in its judgement in *UsedSoft*.¹⁰¹ That case concerned *inter alia* the application of the principle of exhaustion to digital copies of computer software that had been bought and downloaded by customers of the Internet. The CJEU held that the owner of copyright in software cannot prevent a perpetual licensee who has downloaded the software from the Internet from selling his “used” license. Although the principle on “digital exhaustion” expressed in *UsedSoft* is most probably only relevant for computer software, *inter alia* because directive 2001/29 expressly stipulates that the exhaustion doctrine does not apply to the communication to the public

⁹⁸ See e.g. Post-Svensson stress disorder #2: What does “freely available” mean? posted on the IPKat blog on 7 March 2014. Available at <http://ipkitten.blogspot.se/2014/03/post-svensson-stress-disorder-2-what.html>. Last visited on 20 April 2014.

⁹⁹ See Post-Svensson Stress Disorder #1: Does it matter whether linked content is lawful? posted on the IPKat on 21 February 2014. Available at <http://ipkitten.blogspot.se/2014/02/post-svensson-stress-disorder-1-does-it.html>. Last visited on 14 April 2014. See also hyperlinks, making available and the “new public”—or just a dead end? posted on the 1709 Blog on 14 February 2014. Available at <http://the1709blog.blogspot.se/2014/02/hyperlinks-making-available-and-new.html>. Last visited on 15 April 2014.

¹⁰⁰ Svensson and Others, para. 26. Cf. ALAI Opinion on Svensson, where it is argued that linking to targeted content infringes the “making available” right if “the availability of the content, even if initially disclosed over the Internet with consent, otherwise clashes with the declared or clearly implied will of the rightholder. Accordingly, Courts should not introduce a general presumption of the rightholder’s consent to further communication to the public of what initially has been posted on the Internet with the rightholder’s consent, since this would amount to introducing an exception or limitation to the right, while general exceptions to the scope of the ‘making available’ right require legislative action”. Similar arguments are put forward by Rosén (2012, p. 166) *et seq.* Cf. Rognstad (2003, p. 472).

¹⁰¹ Case C-128/11, *UsedSoft*. See Riis, “Ophavsrettens fleksibilitet”, Nordiskt Immateriellt Rättsskydd, p. 139 *et seq.*

right set out in that directive,¹⁰² its economic rationale has strong similarities with the “restraint” on the exclusive right that has been introduced on the right of communication to the public by the requirement of “new public”.

Svensson deals only with links to content that have been authorised to be made available online by the rightholders. A reasoning *e contrario* based on the Court’s arguments seems to imply that if the copyright holder has *not* performed or authorised the initial communication, he or she would logically not have taken into account any public (at all). Consequently, if works have initially been made available on the Internet without the consent of the copyright holder, any subsequent act of communication of the infringing work—including hyperlinking to it—makes the work available to a new public. Thus, consent of the copyright holder in relation to content that is linked to on the Internet seems to be material in order to assess whether a link amounts to an act of communication to the public. This reinforces the argument that links are not merely references to a source, but rather constitute acts that are relevant from a copyright perspective.¹⁰³ It puts great responsibility on Internet users to make an assessment whether content that they link to has been put on the Internet with initial consent from the rightholders.¹⁰⁴

Finally, in response to the fourth question, the CJEU held that Member States do not have the right to give wider protection to copyright holders by broadening the concept of “communication to the public”. To allow this would lead to legislative differences between Member States, which was precisely what the directive in question

¹⁰² The rights of communication and making available to the public for authors and holders of neighbouring rights are set out in articles 3.1 and 3.2 of directive 2001/29. Article 3.3 holds that “[t]he 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”. Further, recital 29 to the directive states that “The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides”. The CJEU has also confirmed the view that it is apparent from article 3.3 of directive 2001/29 that authorising the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications of those works to the public. See case C-607/11, *ITV Broadcasting and Others*, para 23.

¹⁰³ Tsoutsanis (2014, p. 13). Cf. Litman (2001, p. 183): “Referring to an infringing work is similarly legitimate”.

¹⁰⁴ Hyperlinks, making available and the “new public”—or just a dead end? posted on the 1709 Blog on 14 Feb 2014. Available at <http://the1709blog.blogspot.se/2014/02/hyperlinks-making-available-and-new.html>. Last visited on 15 Apr 2014. See also Post-Svensson stress disorder #2: What does “freely available” mean? posted on the IPKat blog on 7 Mar 2014. Available at <http://ipkitten.blogspot.se/2014/03/post-svensson-stress-disorder-2-what.html>. Last visited on 20 Apr 2014. See also *Svensson—free to link or link at your risk?* posted on the Cybereagle blog on 18 Feb 2014. Available at <http://cybereagle.blogspot.se/2014/02/svensson-free-to-link-or-link-at-your.html>. Last visited on 20 Apr 2014.

sought to avoid.¹⁰⁵ The scope of this response remains to be seen, *inter alia* in relation to specific legislation introduced in some Member States to supplement copyright protection for certain acts of linking, e.g. in relation to news aggregation services.¹⁰⁶

4 Discussion and Conclusion

Beginning in the copyright sphere, the legal “novelty” of the concept of “new public” introduces the possibility for economic considerations to be taken into account when evaluating whether a specific act falls within the scope of the right of “communication to the public” in cases where the act of communication is carried out by the same technical means as the original communication. In such cases, it could be argued that the requirement of a “new public” introduces a “restraint” or even a “limitation” on the right of communication to the public, as not every communication to a public is deemed to fall within the scope of the right. However, as indicated, treating the conditions of “communication” and “the public” as separate criteria seems to be compatible with the scheme set out in the BC: and the lack of international harmonisation as regards the notion of “the/a public”. Viewed against this backdrop the “novelty” introduced by the CJEU is mainly related to the application of the criteria in other cases (such as the online environment) than the ones envisioned by the drafters of the Convention.

In a converging Internet environment, where more and more uses are carried out “by the same technical means”, the notion of “new public” will have a direct impact on the development of services based on content that has been already been made available online. The precise scope of *Svensson*, especially its application in situations where content has previously been made available online without restrictions, remains to be seen. From the reasoning of the CJEU in previous cases, the answer probably lies in an assessment of what the requirements are for a “new” or “subsequent” *communication*, especially whether “the same technical means” has been used as for the original communication. In this regard, *Svensson* and previous case law on the notion of communication to the public may be reflections of the CJEU’s view that the right of communication to the public has inherent limitations based on economic considerations similar to the principle of exhaustion. Such economic considerations seem to be a way for the Court to open up for more “nuanced”—one might even refer to them as “balanced”—assessments based on fair remuneration to the authors rather than a strict view that every communication to a public (regardless of whether the same technical means are used and whether it is the same public or not) constitutes a copyright-relevant act. In this way, there seem to be good arguments for holding that the Court has struck a fair balance between the protection of creative content and the

¹⁰⁵ *Svensson and Others*, paras. 33–41.

¹⁰⁶ Cf. An ancillary right over news to be soon introduced (also) into Spanish law? posted on the IPKat blog on 16 Feb 2014. Available at <http://ipkitten.blogspot.se/2014/02/an-ancillary-right-over-news-to-be-soon.html>. Last visited on 20 Apr 2014.

need to foster its dissemination. On the other hand, this nuanced approach means that much will be based upon the circumstances of each individual situation; this might not be the legal certainty sought after by Internet users, right holders or providers of online services based on content already made available via the Internet.

The “legal innovation” that constitutes the database *sui generis* right provides greater flexibility in *providing protection* against acts that harm underlying investment, and/or the possibility to recoup the investment in the creation of a database. It is noteworthy that the CJEU does not apply the “new public” criterion developed in copyright law to the database re-utilisation right. This is probably due to the fact that we are dealing with different kinds of rights with different subject matter for protection; creative works which are the result of original creativity and databases which are the result of a substantial investment. The potential for the *sui generis* right to protect investments may thus provide a safeguard against situations like the one on *Innoweb*, which could be described as akin to *unfair competition*.

It is clear from *Innoweb* that the Court did not consider the links generated to AutoTrack’s website to constitute the infringing acts; rather, it was the making available on the Internet of a dedicated meta search engine for translating queries into the search engines of the databases covered by the service of the meta search engine in question.¹⁰⁷ However, *Innoweb* makes plain that the “additional layer” of protection that was one of the main drivers behind the establishment of the *sui generis* right has been brought to fruition. Ironically, it has done so for a use and in a context (meta search engines) that was most probably not envisioned by the drafters of the database directive. From this perspective, the *sui generis* right—as a right supplementary to copyright—could well serve to cure some of the “unfair” effects of the concept of “new public” within copyright law in relation to certain uses of pre-existing content that is already publicly accessible online with the consent of the rightholder(s). This is not to say that this is the only valid purpose of the *sui generis* right, but rather as an indication that copyright and the *sui generis* right serve different purposes. *Innoweb* elucidates that there might be an important future for the *sui generis* right after all.

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¹⁰⁷ Cf. *Innoweb*, paras. 23, 39 and 54.

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