

# The use of hyperlinks in an online environment: putting links in chains?

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## Section I. Introduction

The development and evolution of information and communication technologies such as radio, television and the internet have without any doubt drastically influenced our society and created an environment of interconnectivity. From the perspective of copyright law, the modern, digitized society also poses new challenges for legislators. With many authorial works being published on the internet, the question arises: is the prior authorization of the rightholder required to hyperlink to a work available online? Considering this statement, this article provides an overview from an EU copyright law perspective of the right of communication to the public when applied to hyperlinks. Special attention will be given to the 'new public' criterion.

From 2014 onward, the Court of Justice of the European Union (CJEU) has ruled on a variety of cases with regard to the use of hyperlinks on the internet. Following *Svensson*<sup>1</sup>, case law of the CJEU suggests that while 'communication to the public of a work' needs to be authorized by the copyright owner, a hyperlink does not necessarily infringe the exclusive economic rights of the rightholder. The reasoning used by the court is founded on a criterion which entails that an 'act of communication' also needs to be directed at a 'new public'. The new public criterion was first utilized in *SGAE*<sup>2</sup> and subsequently restated in other cases.<sup>3</sup> By applying the new public criterion to *Svensson*,<sup>4</sup> the court took a rather flexible approach towards the use of hyperlinks.

On the one hand, the liberal reasoning of the court has a degree of attractiveness in light of our information society as it allows for internet users to hyperlink

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## This article

- Recent case law of the Court of Justice of the European Union (CJEU) has considered whether, and to what extent, linking to a copyright work can be considered as an act falling within the scope of article 3 of Directive 2009/29/EC. One of the decisive elements in this regard was the adoption of the 'new public' criterion by the CJEU in its *Svensson* decision. Although the reasoning used there suggests a liberal approach to hyperlinks, legal scholarship has expressed concerns over the arguments put forward by the court. In light of these developments, this article aims to provide an overview of the current legal status regarding the provision of hyperlinks in an online environment.
- Taking into consideration existing case law, the court has yet to elaborate on certain aspects of hyperlinking. For instance, it is unclear whether hyperlinks pointing to unlawfully made available works necessitate the permission of the rightholder. However, references for a preliminary ruling currently pending before the court may shed new light on this matter. With the freedom of internet users at stake, these new cases have the potential to alter significantly the online information society as we currently know it.

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1 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76.

2 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 40.

3 Judgment in *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai*, C-136/09, EU:C:2010:151, para 38; Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08, EU:C:2011:631, para 197; Judgment in *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Airfield NV v Agicoa Belgium BVBA*, C-

431/09 and C-432/09, EU:C:2011:648, para 72; Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147, paras 37–9; Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 24; Judgment in *BestWater International GmbH v Michael Mebes and Stefan Potsch*, C-348/13, EU:C:2014:2315, paras 14 and 18; Judgment in *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, C-351/12, EU:C:2014:110, para 31; Judgment in *Sociedade Portuguesa de Autores CRL v Ministério Público and Others*, C-151/15, EU:C:2015:468, para 21.

4 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76.

freely to a work given that the hyperlink does not aim at a new public. On the other hand, this reasoning is also subject to critique. For instance, legal scholars argue that the new public criterion leaves some questions unanswered and might possibly lead to situations of legal uncertainty.<sup>5</sup> However, two cases on this topic were referred to the CJEU in 2015: *GS Media*<sup>6</sup> and *Filmspeler*.<sup>7</sup> In view of these new cases it remains to be seen if the CJEU will adhere to its current course of action or if arguments stemming from the scholarly debate will be taken into consideration.

The article consists of four parts and is structured as follows. The first part sets out the general legal framework and will introduce the right of communication to the public. The second and third parts take a closer look at the two conditions under the right of communication to the public: an 'act of communication of a work' (Section III) and a 'communication directed at a public' (Section IV). The fourth and final part elaborates on the main elements of this article.

## Section II. The right of communication to the public

Especially relevant for hyperlinks is Article 3(1) of Directive 2001/29/EC (the InfoSoc Directive),<sup>8</sup> which encompasses the right of communication to the public. International instruments<sup>9</sup> do not provide a clear definition of this notion.<sup>10</sup> Nevertheless, the CJEU has

elaborated on the scope and interpretation of the right of communication to the public on numerous occasions. The court also confirmed that the right of communication should be interpreted as an autonomous concept of EU law.<sup>11</sup>

Following *SGAE*,<sup>12</sup> it has become clearer that the notion of 'communication to the public' requires the fulfilment of two cumulative criteria: (i) an act of communication of a work and (ii) a communication directed at a public.<sup>13</sup> However, if there has already been an authorized initial communication, any subsequent communication or retransmission will only fall under the scope of the right of communication to the public if a third condition is met. This third criterion entails that the communication needs to be directed at a 'new public'.<sup>14</sup> These conditions have been reiterated in subsequent CJEU case law.<sup>15</sup>

The right of communication of a work to the public was at the heart of the *Svensson* case before the CJEU in 2014.<sup>16</sup> The dispute in the main proceedings concerned whether hyperlinks on a website, pointing to newspaper articles that were freely available on another website, required the authorization of the copyright holder of the newspaper articles.<sup>17</sup> A clarification on this matter was highly anticipated by both legal academics and internet users. With hyperlinks forming an essential tool in internet browsing, the importance of this case should not be underestimated. It was up to the court to find an

5 L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 169; M. Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' [2014] 5 JIPITEC 251-252; M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 265.

6 *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc, Britt Geertruida Dekke*, C-160/15 (pending).

7 *Stichting Brein v Jack Frederik Wullems, currently trading under the name Filmspeler*, C-527/15 (pending).

8 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and neighbouring rights in the information society, OJ L 167, 10-19.

9 Bern Convention for the Protection of Literary and Artistic Works 1886, article 11 and 11bis; World Intellectual Property Organization Copyright Treaty 1996, article 8; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, article 3.

10 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 259.

11 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, paras 33-41.

12 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 40.

13 A. Moir, R. Montagnon and H. Newton, 'Communication to the Public: the CJEU Finds Linking to Material Already 'Freely Available' Cannot Be Restricted by Copyright Owners: *Nils Svensson and Others v Retriever Sverige AB* (C-466/12)' [2014] 36 EIPR 399; L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press,

2014) 161 *juncto* 165; S. Baggs and R. Alexander, 'Curtains Down on Popcorn Time: s.97A Takes Centre Stage' [2016] 38 EIPR 57-8.

14 L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 167; M. Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' [2014] 5 JIPITEC 250; M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 259.

15 Judgment in *Organismos Sillogikis Diacheirisis Dimiourgion Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai*, C-136/09, EU:C:2010:151; Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08, EU:C:2011:631; Judgment in *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Airfield NV v Agicoa Belgium BVBA*, C-431/09 and C-432/09, EU:C:2011:648; Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147.

16 T. Shapiro, 'CJEU rules on linking in Svensson' [2014] 237 MIP 21; S. C. Lim and W. Chik, 'Whither the Future of Internet Streaming and Time-shifting? Revisiting the Rights of Reproduction and Communication to the Public in Copyright Law after Aereo' [2015] 23 IJLIT 53, 69.

17 L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 163; M. Burri, 'Permission to Link: Making Available via Hyperlinks in the European Union after Svensson' [2014] 5 JIPITEC 250; P. Stevens, 'A Hyperlink Can Be Both a Permissible and an Infringing Act at the Same Time' [2014] 9 JIPLP 548; T. Targosz, 'The Court of Justice on Links: It is Allowed to Link. At Least in Principle' (*Kluwer Copyright Blog*, 14 February 2014) <<http://kluwercoyrightblog.com/2014/02/14/the-court-of-justice-on-links-it-is-allowed-to-link-at-least-in-principle/>> (accessed 22 January 2016).

equitable balance between, on the one hand, the exclusive economic rights of copyright owners and, on the other hand, the interests of internet users.<sup>18</sup>

Prior to the judgment in *Svensson*, legal doctrine discussed how the CJEU should rule on hyperlinks. The academic debate on this topic gave rise to very diverging and even controversial views.<sup>19</sup> Two prominent views regarding the use of hyperlinks will be discussed in this article. On the one hand, the vision adopted by the Association Littéraire et Artistique Internationale (ALAI),<sup>20</sup> and on the other hand, the Opinion of the European Copyright Society (ECS).<sup>21</sup> Both made efforts to provide guidelines for the CJEU on how to address the issue in *Svensson* and continued to do so following the judgment. The merits and shortcomings of these two legal theories will be addressed at different stages in this article. However, at this point it is worth noting where both theories stand on hyperlinks.

The ALAI puts a particularly strong emphasis on the notion ‘public’ and suggests that any hyperlink pointing directly to an authorial work—therefore bypassing the home page of a website—is not permitted without authorization of the rightholder.<sup>22</sup> According to the ALAI, such hyperlinks constitute a ‘making available’ within the meaning of Article 8 of the WIPO Copyright

Treaty. Additionally, the ALAI highlights that three elements should be present for there to be a communication to the public: (i) an act of communication carried out by an individual, (ii) the act has the effect of addressing a public and (iii) the act relates to a work protected under copyright law.<sup>23</sup>

The ECS suggests that hyperlinking should not be considered as a communication to the public at all. Three distinct reasons are invoked to support this claim: (i) a hyperlink in itself does not lead to a work being transmitted, (ii) a hyperlink does not *provide* the work itself, but it merely *points* to a work and (iii) a hyperlink does not meet the new public criterion in situations where the work is freely available<sup>24</sup> online.<sup>25</sup> A related point to consider is that the view of the ECS draws heavily on the notions ‘communication’ and ‘public’.<sup>26</sup>

The solution put forward in *Svensson* by the CJEU does not fully adhere to either of the two theories. Instead, the court meticulously followed its earlier case law on the right of communication to the public and applied the two-step reasoning from *SGAE*<sup>27</sup> to hyperlinks.<sup>28</sup> It first assessed whether the hyperlinks constituted an act of communication.<sup>29</sup> In the second step, the court examined if the hyperlinks entailed a communication to a (new) public.<sup>30</sup> In the wake of the

18 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, recital 31; T. Headdon, ‘An Epilogue to Svensson: The Same Old New Public and the Worms That Didn’t Turn’ [2014] 9 JIPLP 662, 664.

19 M. Burri, ‘Permission to Link: Making Available via Hyperlinks in the European Union after Svensson’ [2014] 5 JIPITEC 248; M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 263.

20 Association Littéraire et Artistique Internationale, ‘Report and Opinion on a Berne-compatible Reconciliation of Hyperlinking and the Communication to the Public Right on the Internet’ (*Association Littéraire et Artistique Internationale*, 17 June 2015) <<http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf>> (accessed 22 January 2016); Association Littéraire et Artistique Internationale, ‘Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet’ (*Association Littéraire et Artistique Internationale*, 16 September 2013) <<http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>> (accessed 22 January 2016); Association Littéraire et Artistique Internationale, ‘Opinion Proposed to the Executive Committee and Adopted at its Meeting, 17 September 2014 on the Criterion “New Public”, Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public’ (*Association Littéraire et Artistique Internationale*, 17 September 2014) <<http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>> (accessed 22 January 2016); J. Ginsburg and M. Janklow, ‘Hyperlinking and “Making Available”’ [2014] 36 EIPR 147.

21 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 Svensson’ (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016).

22 Association Littéraire et Artistique Internationale, ‘Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet’ (*Association Littéraire et Artistique Internationale*, 16 September 2013) <<http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>> (accessed 22 January 2016); M. Burri, ‘Permission to Link: Making Available via Hyperlinks in the European Union after Svensson’ [2014] 5 JIPITEC 249.

23 Association Littéraire et Artistique Internationale, ‘Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet’ (*Association Littéraire et Artistique Internationale*, 16 September 2013) <<http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>> (accessed 22 January 2016).

24 Note: in cases where a work is not freely available online, the European Copyright Society returns to their view that a hyperlink does not involve a communication of a work.

25 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 Svensson’ (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016).

26 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 Svensson’ (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016).

27 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 40.

28 M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 264.

29 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 17.

30 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 21.

judgment in *Svensson*, it will become clear that the use of hyperlinks is still susceptible to lead to situations of legal uncertainty.<sup>31</sup>

## Section III. An act of communication of a work

### § 1. Pre-Svensson case law

Predicated upon the statements made in *SGAE*,<sup>32</sup> the judgment in *Svensson*<sup>33</sup> indicates 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’. The CJEU had previously hinted at a broadly construed interpretation of an act of communication in *Football Association Premier League*.<sup>34,35</sup> Also, Recital 23 of the InfoSoc Directive provides a basic understanding of this concept and highlights that it ‘should be understood in a broad sense covering all communication to the public not present at the place where the communication originates’.<sup>36</sup>

By broadly interpreting Article 3 of the InfoSoc Directive, the CJEU signalled its intentions to adhere to the rationale of the Directive, namely to ensure a high level of protection for copyright holders.<sup>37</sup> Additionally, this broad interpretation also gave the CJEU some

leeway to consider whether future technologies would comprise an act of communication. While such extensive reading can favour copyright holders, it also creates difficulties with respect to delineating the boundaries of the right of communication to the public and might possibly lead to an overlap with other economic rights.<sup>38</sup>

### § 2. Hyperlinks and Svensson

Does hyperlinking constitute an act of communication of a work? In regard to this first criterion,<sup>39</sup> the court acknowledged that a hyperlink has the potential to communicate a work since it allows for a person clicking the link to directly access the work at any given time or location.<sup>40</sup>

By doing so, the court decided not to exclude hyperlinks in its entirety from the scope of Article 3(1) of the InfoSoc Directive and, therefore, implicitly rejected a part of the ECS Opinion.<sup>41</sup> Many authors have criticized the court’s reasoning based on the fact that a hyperlink is merely a locator tool which provides the online ‘address’ of a work but which does not communicate a work in itself.<sup>42</sup> Even though the ECS advocated for hyperlinks to be excluded from the scope of Article 3 of the InfoSoc Directive, it also pointed out that referring to copyright-infringing materials by means of a hyperlink could result in accessory liability<sup>43</sup> of the person providing such hyperlinks.<sup>44</sup> In this case,

31 M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 265.

32 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 43.

33 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, paras 20–22.

34 Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08, EU:C:2011:631, para 186; *Football Association Premier League Ltd v QC Leisure (No 2)* [2008] EWHC 1411 (Ch).

35 See also Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147, para 23 and *Dramatic Entertainment Limited and Others v British Sky Broadcasting Limited and Others* [2012] EWHC 268 (Ch); T Targosz, ‘The Court of Justice on Links: It is Allowed to Link. At Least in Principle’ (*Kluwer Copyright Blog*, 14 February 2014) <<http://kluwercopyrightblog.com/2014/02/14/the-court-of-justice-on-links-it-is-allowed-to-link-at-least-in-principle/>> (accessed 22 January 2016).

36 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, recital 23; In relation to the ‘public not present’ aspect, see Judgment in *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)*, C-283/10, EU:C:2011:772.

37 See, for instance, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, recitals 4 and 9.

38 S. Baggs and R. Alexander, ‘Curtains Down on Popcorn Time: s.97A Takes Centre Stage’ [2016] 38 EIPR 59; M. Burri, ‘Permission to Link:

Making Available via Hyperlinks in the European Union after Svensson’ [2014] 5 JIPITEC 247.

39 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, article 3(1); *EMI Records Ltd and Others v British Sky Broadcasting Ltd and Others* [2013] EWHC 379 (Ch); L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014), 161.

40 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 20.

41 M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 264.

42 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 Svensson’ (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016); L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 164; M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 264.

43 In relation to accessory liability, see for instance *Twentieth Century Fox Film Corp and others v British Telecommunications Plc* [2011] EWHC 1981 (Ch), para 113.

44 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 Svensson’ (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016); L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 169–70.

the knowledge of the perpetrator would play a significant role when determining liability.<sup>45</sup>

Excluding hyperlinks from the scope of copyright law would significantly benefit internet freedom. While such a scenario clearly favours internet users over copyright holders, the ECS's proposal to complement this strategy with an accessory liability regime could also provide the necessary means for copyright holders to protect their exclusive economic rights. Then again, one could argue that it remains unclear how exactly a judge has to assess the 'knowledge' criterion in case someone hyperlinks to copyright-infringing content.

Looking back at the reasoning of the court thus seems to suggest an inclination towards the vision of the ALAI. However, this is not entirely true as both the CJEU and the ALAI rely on a different understanding of 'making available'.

### § 3. Making available

#### A. The CJEU

The terminology used by the CJEU in *Svensson* gave rise to ambiguity, namely the confusion between 'making available' and 'communication' of a work.<sup>46</sup> *C-More Entertainment*<sup>47</sup> brought some clarification on this matter.

In that case the CJEU argued at paragraph 24 that 'making available' is part of the broader concept communication to the public as set forth in Article 3(1) InfoSoc Directive.<sup>48</sup> The court continued by stating that the concept of 'making available to the public' is also used independently in Article 3(2) InfoSoc Directive.<sup>49</sup>

The question arises how to determine a 'making available' in the context of an act of communication. Again, *C-More Entertainment* provides the answer: 'In order to be classified as an act of "making available to the public"

[in the sense of art. 3(2) InfoSoc Directive] an act must meet, cumulatively, both conditions set out in that provision, namely that members of the public may access the protected work from a place and at a time individually chosen by them.'<sup>50</sup> In the case at hand, the defendant had posted hyperlinks on his website which enabled internet users who clicked on the links to view a live online broadcast of Swedish ice hockey matches. In its reasoning, the court highlighted that the two cumulative conditions were not met, since a live internet broadcast does not allow for members of the public to access the work at a time individually chosen.<sup>51</sup>

#### B. ALAI

ALAI has adopted a more economic-based approach to hyperlinks, reliant on a different understanding of 'making available' in Article 8 of the WIPO Copyright Treaty.<sup>52</sup> In contrast with the CJEU, it interprets making available in a rather broad sense, encompassing 'every type of use of works of some economic relevance'.<sup>53</sup> Such thinking would unquestionably favour the position of copyright holders as it implies that the copyright holders should have the final say as to the particularities under which their authorial works are made available. Any act which could prejudice the rightholder's decision to make his work available will be considered an infringement of the right of communication to the public. In other words, solely the copyright holder is entitled to determine 'when, where and to which public'<sup>54</sup> his work will be communicated.<sup>55</sup> By doing so, the ALAI Opinion clearly steers towards offering 'a high level of protection for copyright holders' as mentioned in Recitals 4 and 9 of the InfoSoc Directive.

The economic reasoning of the ALAI is not entirely new.<sup>56</sup> For instance in *ITV Broadcasting*,<sup>57</sup> the CJEU

45 European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016).

46 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 20.

47 Judgment in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199.

48 Judgment in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199, para 24.

49 Judgment in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199, para 25.

50 Judgment in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199, para 25.

51 E. Rosati, 'Unauthorized Hyperlinks to Live TV Broadcasts not Infringements under the InfoSoc Directive' [2015] 10 *JIPLP* 582.

52 Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

53 Association Littéraire et Artistique Internationale, 'Report and Opinion on the Making Available and Communication to the Public in the

Internet Environment – Focus on Linking Techniques on the Internet' (*Association Littéraire et Artistique Internationale*, 16 September 2013) <<http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>> (accessed 30 April 2016).

54 Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

55 Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

56 Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

57 In the case at hand, television signals were being retransmitted over the internet. While the public in the initial communication includes television viewers, the court found that the public in the second communication on the internet was aimed at a new public, namely internet users; Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147.

clarified that if the act of communication takes place through means of a different communication method than the original communication by the copyright holder, it is no longer relevant to consider whether the secondary act of communication was aimed at a new public. Instead, *ITV Broadcasting* indicates that in such a scenario the determining factor would be to evaluate whether the secondary act of communication is capable of economically affecting or prejudicing the position of the copyright holder by extending the public. If the answer is in the affirmative, the communication requires the prior permission of the rightholder.

Arguments can certainly be found in support of a different reading of 'making available' in Article 8 of the WIPO Copyright Treaty, as put forward by the ALAI in its Opinion.<sup>58</sup> However, the practical implications of such reasoning cannot be overlooked. The requirement that every deep link or inline link would necessitate the permission of the copyright holder is, in the author's opinion, unworkable. First, innumerable websites already refer to online available works through means of deep links and inline links and thus would have to obtain (retroactively) the permission of the copyright holder or risk to be liable of copyright infringement. Secondly, acquiring the permission of the relevant rightholder might prove problematic in practice since the contact information of the author is often not displayed online. Thirdly, in cases where the prior permission to hyperlink cannot be obtained, it is important to notice that some websites contain such a large amount of subpages that it would be nearly impossible for an internet user to find the relevant work by navigating all the way from the homepage to the deeply nested page that contains the work. Admittedly, some of these issues can be resolved through means of a linking policy (which, for instance, could grant everyone permission to freely link to a website), but then again, questions can be raised over the workability of this approach and the legally binding force of a linking policy.

## § 4. Findings after Svensson

As mentioned above, the CJEU did not follow the economic-based approach of the ALAI. Instead, the economic interpretation method made way for the more technical concept of a 'new public', which will be discussed in the next section.

Taken altogether, the *Svensson* case suggests that electronic transmissions such as hyperlinking can fall under the scope of an act of communication on condition that the hyperlink makes a work available to a public and that it allows for the public to access the work at any given place and time.<sup>59</sup>

## Section IV. A communication directed at a public

### § 1. A public

Apart from an act of communication, the communication also needs to be directed at a public in order to fall under the scope of Article 3(1) of the InfoSoc Directive. The notion 'public' is contained in article 3 of the InfoSoc Directive and is subsequently interpreted by CJEU case law. In *SGAE*,<sup>60</sup> the court decided that the objective<sup>61</sup> of the InfoSoc Directive requires a broad interpretation of the term 'public'.<sup>62</sup> Following *Lagardère*<sup>63</sup> and *Mediakabel*,<sup>64</sup> it became clear that the term 'public' refers to an indeterminate number of potential recipients. Also, in *Del Corso*<sup>65</sup> the court took a variety of factors<sup>66</sup> into consideration to determine the public.

In cases which involve a secondary communication or retransmission of an initial communication, this public also needs to be a 'new public'. As concerns the new public criterion, the CJEU seems to align its arguments with those of the ECS,<sup>67</sup> confirming that a hyperlink does not meet the new public criterion in situations where the work is freely available online.<sup>68</sup>

58 Association Littéraire et Artistique Internationale, 'Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet' (Association Littéraire et Artistique Internationale, 16 September 2013) <<http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>> (accessed 30 April 2016).

59 *Football Dataco Ltd v Sportradar GmbH* [2011] EWCA Civ 330; L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 162.

60 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764.

61 See, for instance, recitals 4 and 9 of the InfoSoc Directive. Both set 'a high level of protection for copyright holders' as their primary objective.

62 K. Klafkowska-Waśniowska, 'Public Communication Right: Towards the Full Harmonisation?' [2013] 35 EIPR 751, 755.

63 Judgment in *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, C-192/04, EU:C:2005:475.

64 Judgment in *Mediakabel BV v Commissariaat voor de Media*, C-89/04, EU:C:2005:348.

65 Judgment in *Società Consortile Fonografici (SCF) v Marco Del Corso*, C-135/10, EU:C:2012:140.

66 Such as the number of recipients at whom the communication is directed at and the characteristics of the communication itself.

67 European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016).

68 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, paras 25–8.

## § 2. A new public

The new public concept was first utilized in *SGAE*<sup>69</sup> where the court found that it involves a communication to a ‘public that was not taken into account by the copyright holders when they authorised the initial communication to the public’.<sup>70</sup> This suggests that when the rightful copyright holder makes a work freely available online, he already has a public in mind which includes every internet user.<sup>71</sup> Consequently, the subsequent communication of the work through a hyperlink does not aim at a new public.<sup>72</sup> The new public criterion also appeared in subsequent CJEU decisions.<sup>73</sup>

When applied to hyperlinks, the CJEU ruled in *Svensson* that the new public criterion will not be met if the work communicated through a hyperlink is freely accessible online.<sup>74</sup> While in such a scenario the hyperlink can increase the amount of recipients of the work, these recipients do not differ from the public which the copyright holder initially had in mind when he made the work available.<sup>75</sup>

However, when a work is not freely accessible but instead, protected by restrictive measures such as a user authentication webpage or a paywall,<sup>76</sup> it is not allowed to circumvent the protective measures without the prior permission of the copyright holder.<sup>77</sup> In this case the communication would in fact be addressed at a new public.

*Svensson* also restates *ITV Broadcasting*<sup>78</sup> regarding the means of communication and the applicability of the new public criterion: ‘a communication [...] concerning the same works as those covered by the

initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at a new public.’<sup>79</sup> Note that a requirement of the communication taking place through the ‘same technical means’ as the initial communication is put in place in order for the new public criterion to apply. If different technical means are utilized to achieve the secondary communication—as was the case in *ITV Broadcasting*—then the assessment of the new public is irrelevant.<sup>80</sup>

This article will now take a closer look at some of the elements of the *Svensson* judgment.

### A. The public includes all internet users

The CJEU ruled for the first time that the new public criterion leads to excluding an ‘act of communication’ from the scope of the right of communication to the public.<sup>81</sup> An important step taken by the court to reach this conclusion was by establishing that the initial public comprises ‘all Internet users’,<sup>82</sup> who may freely access the work. Therefore, any hyperlink that subsequently points to a work which is already posted on the web and is freely accessible simply cannot reach a new public.

On the one hand, this broadly construed interpretation of the notion ‘public’ leads to a liberal approach to the use of hyperlinks. On the other hand, such analysis makes up a significant oversimplification of the situation and has the potential result of deteriorating the exclusive economic rights of the copyright holders. For instance, by systematically assuming that the public

69 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 40.

70 See also: Judgment in *BestWater International GmbH v Michael Mebes and Stefan Potsch*, C-348/13, EU:C:2014:2315 and Judgment in *Organismos Sillogikis Diacheirisis Dimiourgion Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etairai*, C-136/09, EU:C:2010:151.

71 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 26; P. Savola, ‘Blocking Injunctions and Website Operators’ Liability for Copyright Infringement for User-generated Links’ [2014] 36 EIPR 279, 280–281; P. Mariscal, ‘The Svensson Case and the Act of Communication to a New Public’ (*Kluwer Copyright Blog*, 21 February 2014) <<http://kluwercopyrightblog.com/2014/02/21/the-svensson-case-and-the-act-of-communication-to-a-new-public/>> (accessed 22 January 2016).

72 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 25.

73 Judgment in *BestWater International GmbH v Michael Mebes and Stefan Potsch*, C-348/13, EU:C:2014:2315, paras 14 and 18; Judgment in *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, C-351/12, EU:C:2014:110, para 31; Judgment in *Sociedade Portuguesa de Autores CRL v Ministério Público and Others*, C-151/15, EU:C:2015:468, para 21.

74 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 26.

75 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, paras 24–5.

76 See for instance Judgment in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199.

77 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 31; A. Moir, R. Montagnon and H. Newton, ‘Communication to the Public: The CJEU Finds Linking to Material Already “Freely Available” Cannot Be Restricted by Copyright Owners: Nils Svensson and Others v Retriever Sverige AB (C-466/12)’ [2014] 36 EIPR 399; G. Westkamp, ‘Hyperlinks, Circumvention Technology and Contributory Infringement—A Precarious Tale from German Jurisprudence’ [2006] 1 JIPLP 309; M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 268–70.

78 Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147, para 39.

79 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 24.

80 Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147, para 39; Sam van Velze, ‘Communication to a New Public? A Critical Analysis of the CJEU’s “New Public” Criterion in European Copyright Law’ (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016); M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 265.

81 M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 266.

82 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 26.

encompasses all internet users, it is not possible to distinguish specific subcategories of internet users. Some authors have pointed out that internet users may visit different websites according to their age, the language of the website, the popularity of the website and the website's content.<sup>83</sup> Such detailed considerations and analyses are not possible if the notion 'public' is already constructed at its maximum. Furthermore, by creating additional hyperlinks pointing to an authorial work, the online visibility of the work is unquestionably increased, which, in essence, leads to more potential viewers of the work. Therefore, it could be argued that the actual public is in fact larger than the public envisaged by the copyright holder when he initially communicated the work to the public.<sup>84</sup> However, as the law currently stands according to the CJEU, hyperlinking to works which are freely available online does not lead to a communication to a new public and, consequently, does not require the prior authorization of the rightholder.

i. Profit-making nature of the hyperlink. On some occasions, the CJEU also examined if the communication involves a profit-making nature in order to determine whether it should be considered as an act of communication to the public in the sense of article 3(1) of the InfoSoc Directive.<sup>85</sup> However, the significance of the profit-making nature in the CJEU case law seems to be rather limited, as the court lacks a consistent approach to this criterion.<sup>86</sup> While it was deemed relevant in

some cases, the assessment of the profit nature was completely neglected in other cases.

In paragraph 44 of the judgment in *SGAE*,<sup>87</sup> the court highlights that 'the pursuit of profit is not a necessary condition for the existence of a communication to the public'. Following *Football Association Premier League*,<sup>88</sup> it was said that the profit-making nature was 'not irrelevant' for there to be a communication. Also, in *ITV Broadcasting*,<sup>89</sup> the court stated that 'a profit-making nature is not necessarily an essential condition for the existence of a communication to the public'.

By not making any reference to the profit-making nature in *Svensson*, the CJEU seems to implicitly reject the thesis according to which the pursuit of profit is a relevant factor for the assessment of the legitimacy of a hyperlink.<sup>90</sup> Excluding the profit nature criterion from the scope of copyright law seems to be the recommended course of action in this scenario. Not only are problems regarding the evaluation of the profit nature avoided, arguments can also be found which suggest that additional hyperlinks pointing to a work might actually lead to higher earnings for the rightholders.<sup>91</sup>

ii. Types of hyperlinks. Additionally, *Svensson* also hints at the relevance of different types of hyperlinks.<sup>92</sup> At paragraphs 29–30, the CJEU suggests that the exact type of hyperlink—whether it is an ordinary<sup>93</sup> link, a deep<sup>94</sup> link, an embedded<sup>95</sup> link or a framed<sup>96</sup> link—does not play a role in the assessment of the 'new public' criterion.<sup>97</sup>

83 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 266–7.

84 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 266–7.

85 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 44; Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08, EU:C:2011:631, para 204; Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147, paras 42–3; Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

86 L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 169; M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 267; Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

87 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 44.

88 Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08, EU:C:2011:631, para 204.

89 Judgment in *ITV Broadcasting Ltd and Others v TV Catch Up Ltd*, C-607/11, EU:C:2013:147, paras 42–3.

90 L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 169; M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 267.

91 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 267.

92 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, paras 29–30.

93 An ordinary link points to the homepage of a website, for instance: '<http://www.example.com/>'.

94 A deep link points to a webpage that lies buried deeper within a website, for instance: '<http://www.example.com/news/recent/article123.html>'.

95 An embedded link is a link which refers to content on website X, but displays the entire hyperlinked content on website Y while still using the source material, hosting server and bandwidth of website X. For instance, a video uploaded on YouTube.com can be displayed on another website through means of an embedded link. If for some reason YouTube.com would remove the video, it would also become unavailable on the website which contains the embedded link.

96 A framed link allows for a website to display two separate webpages on one single page by using web design features such as frames and iframes. For instance, by using a framed link, website X could 'frame' a webpage of website Y. An internet user who then visits website X could consequently view a webpage of website Y on website X without having to navigate to website Y. As is the case with embedded links, if the original webpage goes offline on website Y, it will also become inaccessible on the framing website X.

97 P. Savola, 'Blocking Injunctions and Website Operators' Liability for Copyright Infringement for User-generated Links' [2014] 36 EIPR 279, 280–1; A. Moir, R. Montagnon and H. Newton, 'Communication to the

According to the court, the new public criterion cannot be compromised by the fact that internet users might be misled as to the origin of the work.<sup>98</sup> Thus, no prejudice to the right of communication to the public takes place if internet users are unaware of the fact that a website, having a hyperlink which redirects to an authorial work, gives the impression of containing that work, while in reality the work is located on—and merely pulled from—another website.<sup>99</sup> The court's thinking is quite audacious or even counterintuitive in this regard. However, it should be borne in mind that the copyright holder could still consider filing a claim on grounds of unfair competition or infringement of moral rights in order to preserve the integrity of his authorial works.<sup>100</sup>

The position in *Svensson* was later reaffirmed in *BestWater*,<sup>101</sup> a case which concerned an embedded link on a website that referred to an (unlawfully) uploaded advertising film on YouTube.<sup>102</sup> Regrettably, the court glossed over the fact that the video was initially made available without prior authorization of the copyright holder.<sup>103</sup>

Interestingly, a new reference for a preliminary ruling was submitted by the Supreme Court of the Netherlands in October 2015 in regard to the use of magnet links.<sup>104</sup> In contrast to other types of hyperlinks, magnet links do not directly point to a work on the internet, but only refer to cryptographic metadata information ('hash value') of such protected works.<sup>105</sup>

As for now, it remains to be seen how the CJEU will decide on this matter.

## B. Content criteria

Case law of the CJEU reveals, however, that in some scenarios a hyperlink is capable of communicating a work to a new public. In other words: the court confirms that the freedom to hyperlink is not absolute.<sup>106</sup> In its turn, this implies that a hyperlink necessitates the prior authorization of the rightholder in some cases.<sup>107</sup> Regrettably, no clear rules or guidelines on these limitations can be extrapolated from existing case law on hyperlinks. Needless to say that in practice, this grey area leads to legal uncertainty.

i. Accessibility of the work. *Svensson*<sup>108</sup> highlights that when a work is freely available, no communication to a new public takes place and thus no permission is required to hyperlink. It can be questioned what exactly is denoted by a work which is *not* freely available online.<sup>109</sup> A general understanding is given in the *Svensson* case itself.<sup>110</sup> More specifically, the understanding draws from statements made by the court in paragraph 31. This paragraph points out two peculiar requisites.

Firstly, it encompasses a situation where the copyright holder has wilfully made his work available on a website which harbours certain 'restrictive measures',<sup>111</sup>

Public: The CJEU Finds Linking to Material Already "Freely Available" Cannot Be Restricted by Copyright Owners: Nils Svensson and Others v Retriever Sverige AB (C-466/12) [2014] 36 EIPR 399; P. Mariscal, 'The Svensson Case and the Act of Communication to a New Public' (*Kluwer Copyright Blog*, 21 February 2014) <<http://kluwercopyrightblog.com/2014/02/21/the-svensson-case-and-the-act-of-communication-to-a-new-public/>> (accessed 22 January 2016); T. Targosz, 'The Court of Justice on Links: It is Allowed to Link. At Least in Principle' (*Kluwer Copyright Blog*, 14 February 2014) <<http://kluwercopyrightblog.com/2014/02/14/the-court-of-justice-on-links-it-is-allowed-to-link-at-least-in-principle/>> (accessed 22 January 2016).

98 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 267–8.

99 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 267–8.

100 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 267–8.

101 Judgment in *BestWater International GmbH v Michael Mebes and Stefan Potsch*, C-348/13, EU:C:2014:2315; *Bestwater- Beschluß*, BVerfGE IZR 46 / 12 vom 10. April 2014, <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2013&anz=89&pos=0&nr=67996&link=bes&Blank=1&file=dokument.pdf>> (accessed 23 January 2016).

102 G. Schmid, 'BestWater: framing no "communication to the public"' [2015] 2 JIPLP 82; E. Rosati, 'That BestWater order: it's up to the right-holders to monitor online use of their works' (*IPKat*, 27 October 2014) <<http://ipkitten.blogspot.co.uk/2014/10/that-bestwater-order-its-up-to.html>> (accessed 22 January 2016).

103 As to the practical implications of such unlawful making available of a work, see below at Section IV, §2, B, ii.

104 *Stichting Brein v Ziggo BV, XS4ALL Internet BV*, C-610/15 (pending); The following question was submitted to the CJEU: 'Is there a communication to the public within the meaning of Article 3(1) of the Copyright Directive by the operator of a website, if no protected works are available on that website, but a system exist [...] by means of which metadata on protected works which is present on the users' computers is indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof?'.

105 Judgment in *Stichting Bescherming Rechten Entertainment Industrie Nederland v Ziggo B.V. and XS4ALL Internet B.V.*, 14/02399, NL:HR:2015:3307, para 3.1.(x) <<http://deeplink.rechtspraak.nl/uitpraak?id=ECLI:NL:HR:2015:3307>> (accessed 21 January 2016).

106 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 268.

107 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 268.

108 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 26.

109 A. Bellan and E. Rosati, 'Post-Svensson Stress Disorder #2: What Does "Freely Available" Mean?' (*IPKat*, 7 March 2014) <<http://ipkitten.blogspot.co.uk/2014/03/post-svensson-stress-disorder-2-what.html>> (accessed 21 January 2016).

110 T. Ohta, 'The CJEU Hyperlinks Trilogy: Part III, C-279/13 C More Entertainment' (*IPKat*, 24 March 2015) <<http://ipkitten.blogspot.co.uk/2015/03/the-cjeu-hyperlinks-trilogy-part-iii-c.html>> (accessed 21 January 2016).

111 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 26.

that limit internet users from accessing the work. Secondly, it also requires that a hyperlink referring to such a work allows for any internet user to circumvent the measures put in place on the website.

However, the scope of those restrictive measures is unclear. Does this solely refer to technical measures on the website such as a paywall<sup>112</sup> or user authentication page? Or should legal measures such as a website linking policy or a mandatory pop-up window also be taken into account?

*C-More Entertainment*<sup>113</sup> addressed—although implicitly—the former. The facts of the case were already briefly mentioned above: the case concerned hyperlinks on a website which allowed internet users to view a live online broadcast of Swedish ice hockey matches. An important detail, however, was that these ice hockey matches were protected by a paywall and that the hyperlink effectively allowed for anyone to circumvent the paywall. The CJEU did not provide the Swedish court with a clear-cut answer on how to approach the paywall element in this case. Yet, by reading *Svensson* in conjunction with *C-More Entertainment*, it appears that hyperlinks which grant access to an authorial work by circumventing technical restrictive measures, such as paywalls and user authentication pages, have the effect of communicating the work to a new public.<sup>114</sup> As a result of this, such hyperlinks require the prior permission of the rightholder.

No clear response can be given as concerns the latter. The *Svensson* case does not address situations where, for instance, a website states in its terms and conditions that a communication of their work through means of a hyperlink is explicitly prohibited.<sup>115</sup> It is not unthinkable that problems could arise regarding the acknowledgement of such linking policy by internet users. Therefore, from a legal perspective, it remains questionable if a linking policy is legally enforceable against internet users.

Taken altogether, existing case law suggests that copyright holders have to resort to technical measures in order to limit the accessibility of their works online. Interestingly, the ECS points out in its Opinion that circumventing technical measures on a website should give rise to liability in any case.<sup>116</sup> Therefore, according to the ECS, a detour via the new public criterion is not required to arrive at the conclusion that authorization of the rightholder is mandatory when protective measures are put in place.<sup>117</sup>

ii. Lawfulness of the initial making available. It can be put to the question whether permission to hyperlink is required in case the initial making available of the work took place without consent of the copyright holder.<sup>118</sup> In other words, is it allowed to hyperlink to a work which is illegally published on the web? Two different views present themselves to this problem.

On the one hand, one might argue that in such a case the legitimacy of the hyperlink depends on whether prior authorization was given by the rightholder.<sup>119</sup> In order to arrive at this conclusion, one needs to start from the two cumulative conditions of a communication to the public set out in *SGAE*.<sup>120</sup> More specifically, by considering the ‘communication directed at a public’ criterion it seems that prior permission is indeed required. Since the copyright holder did not make the work available himself, it could be said that he did not intend to reach a public. Consequently, any unauthorized communication of the work by a third party involves per se a communication to a (new) public and should therefore require the permission of the rightholder. Pragmatically speaking, however, it is very likely that this approach will give rise to difficulties as to identify the persons posting the hyperlinks (eg the veil of anonymity created by internet forum communities, websites which make use of user-generated content).<sup>121</sup>

112 Judgment in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199.

113 Judgment in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199.

114 L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 168–9.

115 Y. Tanghe, ‘Europese Rechtspraak in Kort Bestek: Hof van Justitie – 13 februari 2014 en 5 juni 2014’ [2015] 29 *Rechtskundig Weekblad* 1154; A. Bellan and E. Rosati, ‘Post-Svensson Stress Disorder #2: What Does “Freely Available” Mean?’ (*IPKat*, 7 March 2014) <<http://ipkitten.blogspot.co.uk/2014/03/post-svensson-stress-disorder-2-what.html>> (accessed 21 January 2016); G. Smith, P. Sherrell and W. Smith, ‘CJEU Decision in *Svensson* – Hyperlinks to Freely Available Content are Permitted’ (*Bird & Bird*, 13 February 2014) <<http://www.twobirds.com/en/news/articles/2014/global/cjeu-decision-in-svensson-hyperlinks-to-freely-available-content>> (accessed 21 January 2016).

116 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*’ (*European Copyright Society*, 15 February 2013)

<<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016).

117 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*’ (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016); M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 *IRDI* 269–70.

118 A. Bellan and E. Rosati, ‘Post-Svensson Stress Disorder #1: Does It Matter Whether Linked Content is Lawful?’ (*IPKat*, 21 February 2014) <<http://ipkitten.blogspot.co.uk/2014/02/post-svensson-stress-disorder-1-does-it.html>> (accessed 22 January 2016).

119 M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 *IRDI* 271–2.

120 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764, para 40.

121 L. Bently and B. Sherman, *Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2014) 169.

On the other hand, arguments can also be found in favour of the freedom to hyperlink.<sup>122</sup> This view postulates that the legitimacy of a hyperlink does not depend on the lawfulness of the initial making available. Although the work is illegally made available to the public, the result would be that the work is freely accessible online. Thus, following *Svensson*,<sup>123</sup> no permission of the rightholder should be required to hyperlink to a work unlawfully made available online. Pursuant to this view, it is the act of making the work available online without the permission of the rightholder that leads to copyright infringement. In contrast, the legitimacy of hyperlinks which merely refer to works unlawfully made available is—in principle<sup>124</sup>—not at stake. This view closely resembles to the position put forward in the Opinion of the ECS.<sup>125</sup> From a practical point of view, this approach would certainly appeal to internet users as it has (i) the benefit of not impeding the usage of hyperlinks according to the lawfulness of the content to which the hyperlink refers and (ii) puts the focus on penalizing the initial instead of the secondary communication.

Regrettably, it is unclear where the CJEU stands on this matter. Noteworthy, however, is the fact that in 2015 two references for a preliminary ruling were made to the CJEU on this topic: *GS Media* and *Filmspeler*.<sup>126</sup> Both cases concerned the making available of a work by a third party which was not authorized by the relevant copyright holder. In April 2016 the Opinion by Advocate General (AG) Wathelet in *GS Media* was published.<sup>127</sup> The AG appeared inclined to follow the second approach (see below). Additionally, some domestic courts have already found that the lawfulness of the initial making available should not be taken into consideration when assessing the legitimacy of a hyperlink.<sup>128</sup>

### C. Pending cases before the CJEU

i. *GS Media*. The *GS Media*<sup>129</sup> reference involves Dutch journalism website *GeenStijl.nl* which had provided hyperlinks on their website pointing to file hosting service *Filefactory.com*. Internet users who clicked the hyperlink on *GeenStijl.nl* were able to download the leaked and unlawfully uploaded images of a Playboy photoshoot featuring Britt Dekker. The publisher of Playboy Netherlands, Sanoma Media, successfully brought a claim against *GeenStijl* for copyright infringement before the Amsterdam District Court, and subsequently before the Amsterdam Court of Appeal. *GeenStijl* appealed against the decision and the case was then submitted to the Dutch *Hoge Raad* (Supreme Court).

The Dutch *Hoge Raad* concluded that both *Svensson*<sup>130</sup> and *BestWater*<sup>131</sup> were not sufficiently clear in regard to assessing the lawfulness of the initial making available. It consequently decided to stay the proceedings and refer three questions to the CJEU for a preliminary ruling. With these questions, the *Hoge Raad* essentially seeks to ascertain whether a hyperlink pointing to an unlawfully made available work could possibly constitute a communication to the public.

The Opinion of AG Wathelet reveals some interesting deviations from the reasoning in *Svensson* and *BestWater*.<sup>132</sup> For instance at paragraph 41 of the Opinion, the AG assessed *BestWater* and highlighted that ‘the fact that the copyright holder did not authorise the initial communication to the public was not relevant for the purposes of Article 3(1) of Directive 2001/29’.<sup>133</sup> In regard to the criterion of ‘an act of communication of a work’, the AG then stated that this requires an *intervention* of the hyperlinker which is ‘vital and indispensable in order to benefit from or enjoy works’.<sup>134</sup>

122 M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 271–2.

123 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76, para 26.

124 It is not unthinkable that such a scenario could still lead to a secondary infringement of copyright law.

125 European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C-466/12 Svensson’ (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016).

126 M. Cock and B. Van Asbroeck, ‘Le critère du “public nouveau” dans la jurisprudence récente de la Cour de justice’ [2015] 4 IRDI 272–3; E. Rosati, ‘New CJEU Reference on Linking and Copyright: Is Streaming Unlawful Content an Infringement?’ (*IPKat*, 8 October 2015) <<http://ipkitten.blogspot.co.uk/2015/10/new-cjeu-reference-on-linking-and.html>> (accessed 21 January 2016); E. Rosati, ‘Linking to Infringing Content: The Story May Not Be Over’ (*IPKat*, 27 January 2015) <<https://ipkitten.blogspot.co.uk/2015/01/linking-to-infringing-content-story-may.html>> (accessed 21 January 2016).

127 Opinion in *GS Media*, C-160/15, EU:C:2016:221.

128 E. Rosati, ‘Greek Court Says that it Doesn’t Matter Whether the Content You Link to Is Lawful or Unlawful’ (*IPKat*, 3 October 2015) <<http://ipkitten.blogspot.co.uk/2015/10/greek-court-says-that-it-doesnt-matter.html>> (accessed 21 January 2016).

129 Judgment in *GS Media B.V. v Sanoma Media Netherlands B.V. and Others*, 14/01158, NL:HR:2015:841 <<http://deeplink.rechtspraak.nl/uitpraak?id=ECLI:NL:HR:2015:841>> (accessed 21 January 2016); D. Flint, ‘Intellectual Property Links or Rights?’ [2012] *Business Law Review* 265; W. Y. Lam, ‘GeenStijl v. Sanoma’ [2015] 15 *E-Commerce Law Reports* 29.

130 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76.

131 Judgment in *BestWater International GmbH v Michael Mebes and Stefan Potsch*, C-348/13, EU:C:2014:2315.

132 E. Rosati, ‘AG Wathelet: Linking to Unlicensed Content Should Not Be a Copyright Infringement Per Se’ (*IPKat*, 7 April 2016) <<http://ipkitten.blogspot.be/2016/04/ag-wathelet-linking-to-unlicensed.html>> (accessed 30 April 2016).

133 Opinion in *GS Media*, C-160/15, EU:C:2016:221, para 41.

134 Opinion in *GS Media*, C-160/15, EU:C:2016:221, para 57.

The AG subsequently drew a remarkable conclusion at paragraph 60:

hyperlinks posted on a website which direct to works protected by copyright that are freely accessible on another website cannot be classified as an ‘act of communication’ within the meaning of Article 3(1) of Directive 2001/29 since the intervention of the operator of the website which posts the hyperlink, in this case GS Media, is not indispensable to the making available of the photographs in question to users, including those who visit the GeenStijl website.<sup>135</sup>

Furthermore, the knowledge of the hyperlinker as to the unlawful nature of the work should not be taken into account.<sup>136</sup> AG Wathelet also rejected the applicability of the ‘new public’ criterion in this case (paragraph 67) and confirmed that the circumvention of restrictive measures, put in place on a website, still needs the authorization of the rightholder (paragraph 73).<sup>137</sup> In its closing remarks, the AG hinted at the rather surprising view that hyperlinks might possibly be excluded from the scope of copyright law.<sup>138</sup>

In conclusion, AG Wathelet opined in favour of a significant shift in legal thinking after *Svensson*<sup>139</sup> and *BestWater*.<sup>140,141</sup> The Opinion raises some valid points concerning the use of hyperlinks and also tries to address some of the weaker elements in the CJEU’s most recent reasoning. Although the Opinion is not legally binding upon the CJEU, it certainly carries valuable insights and persuasive authority with it that might influence the CJEU in its decision-making process.<sup>142</sup>

ii. *Filmspeler*. Shortly after the referral in *GS Media*,<sup>143</sup> the Dutch Midden-Nederland District Court also sought guidance from the CJEU in the *Filmspeler*<sup>144</sup> case. This case concerns a media player tool that contains hyperlinks to different streaming websites. Through the instalment of a third-party add-on, users are able to view all sorts of video streams of movies and television series uploaded without the permission of the relevant copyright holders. The company producing the media player decided to implement officially the add-on in their media devices. At the heart of the case is the issue whether the sale of media devices, containing hyperlinks which allow for users to view illegally uploaded video streams, constitutes a communication to the public.

### D. Critique on the ‘new public’ criterion

Although the ‘new public’ criterion has been featured in various cases before the CJEU, question marks can be put over validity of the criterion itself in consideration of international copyright provisions such as Article 8 of the WIPO Copyright Treaty,<sup>145</sup> Article 9 of the TRIPS Agreement<sup>146</sup> and especially Article 11bis of the Bern Convention.<sup>147,148</sup> Particularly, the ALAI strongly argued in their Opinions—dating both prior to and after the *Svensson* case—that the right of communication to the public does not require a communication to a new public.<sup>149</sup> Moreover, it is said that by requiring the public to be a ‘new’ public, an unlawful

135 Opinion in *GS Media*, C-160/15, EU:C:2016:221, para 60.

136 Opinion in *GS Media*, C-160/15, EU:C:2016:221, para 63.

137 Opinion in *GS Media*, C-160/15, EU:C:2016:221, paras 67 and 73.

138 Opinion in *GS Media*, C-160/15, EU:C:2016:221, paras 77–9.

139 Judgment in *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, EU:C:2014:76.

140 Judgment in *BestWater International GmbH v Michael Mebes and Stefan Potsch*, C-348/13, EU:C:2014:2315.

141 Court of Justice of the European Union, ‘Press Release No 37/16 – According to Advocate General Wathelet, the Posting of a Hyperlink to a Website which Published Photos without Authorisation Does Not in Itself Constitute a Copyright Infringement’ (*Curia Europa*, 7 April 2016) <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/cp160037en.pdf>> (accessed 30 April 2016); E. Rosati, ‘AG Wathelet: Linking to Unlicensed Content Should Not Be a Copyright Infringement Per Se’ (*IPKat*, 7 April 2016) <<http://ipkitten.blogspot.be/2016/04/ag-wathelet-linking-to-unlicensed.html>> (accessed 30 April 2016).

142 Court of Justice of the European Union, ‘Press Release No 37/16 – According to Advocate General Wathelet, the Posting of a Hyperlink to a Website which Published Photos without Authorisation Does Not in Itself Constitute a Copyright Infringement’ (*Curia Europa*, 7 April 2016) <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/cp160037en.pdf>> (accessed 30 April 2016).

143 Referral in *GS Media*, C-160/15.

144 Judgment in *Stichting Brein v Filmspeler*, C/16/372666 / HL ZA 14-204, NL:RBMNE:2015:7192 <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2015:7192>> (accessed 21 January 2016).

145 World Intellectual Property Organization Copyright Treaty 1996, article 8.

146 Agreement on Trade-Related Aspects of Intellectual Property Rights 1995, article 9.

147 Bern Convention for the Protection of Literary and Artistic Works 1886, article 11 and 11bis.

148 See also the WIPO Guide to the Bern Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 1978 and the Guide to the Copyright and Related Rights Treaties administered by WIPO and Glossary of Copyright and Related Rights Terms 2003.

149 Association Littéraire et Artistique Internationale, ‘Report and Opinion on a Berne-compatible Reconciliation of Hyperlinking and the Communication to the Public Right on the Internet’ (*Association Littéraire et Artistique Internationale*, 17 June 2015) <<http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf>> (accessed 22 January 2016); Association Littéraire et Artistique Internationale, ‘Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet’ (*Association Littéraire et Artistique Internationale*, 16 September 2013) <<http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>> (accessed 22 January 2016); Association Littéraire et Artistique Internationale, ‘Opinion Proposed to the Executive Committee and Adopted at its Meeting, 17 September 2014 on the Criterion “New Public”, Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public’ (*Association Littéraire et Artistique Internationale*, 17 September 2014) <<http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>> (accessed 22 January 2016).

limitation of the exclusive economic rights of copyright holders is put in place.<sup>150</sup>

Even though the CJEU did not follow the ALAI's reasoning, it is worth taking a closer look at the rationale of the Opinions. The starting point is the judgment in *SGAE*.<sup>151</sup> At paragraphs 40–1, the CJEU explicitly referred to Article 11bis(1)(ii) of the Bern Convention<sup>152</sup> and the interpretative and non-binding WIPO Guide 1978<sup>153</sup> in order to establish the new public criterion. On the one hand, a close reading of article 11bis of the Bern Convention does not give any indications as to needing the public to be 'new'. On the other hand, the WIPO Guide 1978 makes mention of a 'new public'. At first sight, this seems to imply that the new public criterion is compatible with article 11bis of the Berne Convention.<sup>154</sup> However, a historical and teleological interpretation of the WIPO Guide 1978 suggests otherwise.<sup>155</sup>

Historically speaking, it should be taken into account that the WIPO Guide 1978, at the time of writing, could not have possibly anticipated future technologies such as hyperlinking. Furthermore, albeit the WIPO Guide 1978 is an important interpretative document, it is not legally binding on the court. These two arguments combined might make a strong case for debating whether the new public criterion is genuinely appropriate, desirable or even reconcilable with our current information society.

Teleologically speaking, the relevant paragraphs in the WIPO Guide 1978 on Article 11bis of the Bern Convention concern a situation where a work is broadcasted via radio waves.<sup>156</sup> According to the WIPO Guide 1978, once the initial broadcast has taken place, any subsequent use of the work has the effect of making the work '[...] perceptible to listeners (and perhaps

viewers) other than those contemplated by the author when his permission was given'. In such a scenario, the secondary act of communication would require the permission of the rightholder since a 'new public performance of his work' takes place which has the effect of reaching new members of the public. Thus, according to the ALAI, the WIPO Guide 1978 merely states that permission of the rightholder is required for the secondary act of communication of the work (*new public performance*) and that it does not impose a new public requirement.<sup>157</sup>

Although the ALAI's reasoning has its own shortcomings (see above), a large school of thought has joined the ALAI in their view that there is no room for a 'new public' requirement under the right of communication to the public.<sup>158</sup> Some authors even suggest that the European legislator should take the initiative in regard to hyperlinks.<sup>159</sup>

## Section V. Concluding observations

According to the CJEU, a hyperlink can be considered as an act of communication to the public of a work when two cumulative criteria are met: an act of communication and a communication directed at a (new) public. A hyperlink pointing to a work requires the prior permission of the copyright holder when both conditions are fulfilled.

On the one hand, the CJEU's flexible approach to hyperlinks should be encouraged in light of our information society. On the other hand, numerous points of critique apply to the court's reasoning which simply cannot be overlooked. Especially issues surrounding legal uncertainty and the validity of the new public

150 Association Littéraire et Artistique Internationale, 'Opinion Proposed to the Executive Committee and Adopted at its Meeting, 17 September 2014 on the Criterion "New Public", Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public' (*Association Littéraire et Artistique Internationale*, 17 September 2014) <<http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>> (accessed 22 January 2016); J. Ginsburg and M. Janklow, 'Hyperlinking and "Making Available"' [2014] 36 EIPR 147.

151 Judgment in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:764.

152 Bern Convention for the Protection of Literary and Artistic Works 1886, article 11bis.

153 WIPO Guide to the Bern Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 1978.

154 Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

155 Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

156 WIPO Guide to the Bern Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 1978, s 11bis.11 and s 11bis.12.

157 M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 275; Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

158 European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' (*European Copyright Society*, 15 February 2013) <<http://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>> (accessed 22 January 2016); M. Cock and B. Van Asbroeck, 'Le critère du "public nouveau" dans la jurisprudence récente de la Cour de justice' [2015] 4 IRDI 275; Sam van Velze, 'Communication to a New Public? A Critical Analysis of the CJEU's "New Public" Criterion in European Copyright Law' (*Institute for Information Law*, 24 March 2016) <<http://www.ivir.nl/publicaties/download/1744>> (accessed 30 April 2016).

159 European Copyright Society, 'Answer to the EC Consultation on the Review of the EU Copyright Rules' (*European Copyright Society*, 5 March 2014) <<http://infojustice.org/wp-content/uploads/2014/03/ECS-answer-to-EC-consultation-on-copyright-Review.pdf>> (accessed 30 April 2016).

criterion prove problematic. While the former can be addressed rather easily in future case law of the CJEU, this cannot be said of the latter. In this respect, it is not surprising that new legal theories have surfaced and that the academic debate on whether to consider hyperlinks as an act of communication to the public of a work has rekindled.

Opinions of the ALAI and the ECS shed new light on the discussion and highlight valid concerns over the reasoning used by the court. Even though both theories are characterized by their own shortcomings, they should be credited for addressing some of the weaker elements in the CJEU's judgments.

At present, it is still unclear whether permission to hyperlink is required in cases where the lawfulness of the initial making available is disputed. Two new references for a preliminary ruling—*GS Media* and *Filmspeler*—are currently pending before the CJEU on this topic. As for now, it still remains to be seen how the CJEU will decide.

Interesting times lie ahead for copyright stakeholders. In light of new legal theories on hyperlinks, the critique addressed at the CJEU's current line of reasoning and pending referrals before the CJEU, it becomes clear that the last word on hyperlinks has not been told.