

# Permission to Link

## Making Available via Hyperlinks in the European Union after Svensson

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### A. Introduction

- 1 Digital technologies, online communications and electronic commerce have destabilized the global copyright system. The 1996 WIPO Internet Treaties – World Intellectual Property Organization Copyright Treaty (WCT)<sup>1</sup> and the WIPO Performances and Phonograms Treaty (WPPT)<sup>2</sup> – were an early response to this sea change, which subsequently triggered a wave of even further-reaching implementation actions, both nationally and in other venues.
- 2 The state of the political economy and geopolitical compromises during the negotiation of the WIPO Internet Treaties, however, made the agreements that were adopted fairly agnostic about certain details and deferred some of the hard questions to member states' law-makers who were tasked with implementing the treaties.<sup>3</sup> While the desire for certainty in international intellectual property (IP) law is understandable, especially for rights holders, leaving the resolution of complex or controversial questions to domestic law-makers and allowing the tailoring of law to economic conditions, technological developments and local priorities may ultimately be preferable to locking in premature or possibly ill-conceived international IP norms. Some eighteen years after the WIPO Internet Treaties were signed, this article looks more carefully at their implementation and interpretation
- in the EU. It examines one particular, and arguably less thematized, subset of rights and looks at the European law and practice of “making available” as a mode of communication to the public. The specific focus is on the recent case of *Svensson v. Retriever AB*,<sup>4</sup> brought before the Court of Justice of the European Union (CJEU) as a preliminary ruling with regard to making available via hyperlinking, which clarified some of the critical issues in this context.
- 3 There is no doubt that international law forms an important part of the context in which courts interpret and apply national legislation. In this sense, before turning to the specific case study, a look at the origins and contents of the WIPO Internet Treaties' provisions is essential – first, so as to understand their basic structure and flexibility, and second, to contextualize the evolution of the copyright regime and its incessant, albeit not necessarily successful, struggle to cope with the digital challenge.

### B. The Origins of “Making Available” in the WIPO Internet Treaties

- 4 The 1996 WIPO Internet Treaties were adopted as “special agreements” under the Berne Convention

on Artistic and Literary Works<sup>5</sup> and sought to modernize global copyright law and make it fit for the Internet age by providing “adequate solutions to questions raised by new economic, social, cultural and technological developments”.<sup>6</sup> Admittedly, the goal was fairly ambitious, especially as, at the time of the treaties’ adoption, the dynamics of the digital networked space were largely unknown and there was little or no understanding of the fundamental and often disruptive ways in which digital technologies would change the conventional modes of creating, distributing, accessing, using and re-using cultural content and knowledge.<sup>7</sup> The constituencies behind the treaties’ adoption, overrepresented by the entertainment industries,<sup>8</sup> were largely preoccupied with other implications of digital media, such as the ability to make perfect copies, or to distribute and consume copyrighted content without the limitations of distance and space.<sup>9</sup>

- 5 In sync with this inherent utilitarianism and despite the rhetoric of “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information”,<sup>10</sup> the WIPO “treaties were intentionally far less concerned with enabling new modes of creative enterprise than preserving the existing presumptions in favor of authorial prerogative”.<sup>11</sup> Overall, and with the benefit of hindsight, it appears that, “[g]iven the unrestrained versatility of innovation in the digital arena, the WIPO Internet Treaties have fallen considerably short in what was to be their central mission: namely, to provide a relevant and credible source of norms to facilitate knowledge creation in the global digital context”.<sup>12</sup> It is also evident that the impact of the WIPO Internet Treaties has long been overshadowed by national implementation initiatives and the emergence of further-reaching implementation models, notably that of the *Digital Millennium Copyright Act* (DMCA)<sup>13</sup> in the United States and the *Information Society Directive*<sup>14</sup> in the European Union (EU). Such models have also been replicated in subsequent preferential trade agreements in bilateral and regional fora, in particular where industrialized countries are partners to the deal.<sup>15</sup>
- 6 Scholarly literature offers extensive coverage of the WIPO Internet Treaties, their implementation and overall effect on the conditions for creativity in the digital networked environment, paying particular attention to the introduction of technological protection measures (TPMs) and the ban on circumventing such measures, which may, in effect, have limited the scope of fair use in digital media.<sup>16</sup> One change, however, has received comparatively less academic attention – that is, the expansion of copyright to cover merely “making available”, as opposed to copying or transmitting works and other subject matter.

- 7 This piece looks at this subset of rights as they may have crucial implications for creativity online and for the sustainability of the digital space itself.<sup>17</sup> We deem it also important, especially considering the fuzziness of some of the WIPO Internet Treaties’ norms, to conduct not only textual and conceptual analyses of these provisions but also a jurisprudential analysis that considers the treaties’ practical impact on the outcome of litigated cases. We hope in this manner to complement the existing literature.<sup>18</sup>
- 8 Making available is mentioned in two separate articles of the WCT – Articles 6 and 8.

#### Article 6

##### Right of Distribution

*(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.*

#### Article 8

##### Right of Communication to the Public

*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.*

- 9 The agreed statements accompanying Article 6 clarify that it applies, at a minimum, to copies that can be circulated as tangible objects. However, nothing prevents countries from applying the right of distribution *also* to intangible copies, as an additional and/or alternative means of providing authors the exclusive right to authorize the making available of their works.<sup>19</sup> The WPPT provides for similar protection of performers and record makers in Articles 10 and 14, respectively – under different headings, “Right of Making Available of Fixed Performances” and “Right of Making Available of Phonograms”.
- 10 A key point about these provisions is that the particular headings under which the treaties refer to making available are not that important. Indeed, the WIPO Internet Treaties provide for a flexible approach to making available – the so-called “umbrella solution” – which permits different domestic implementations through various new or existing rights or combinations of rights. “It is important *that* treaty member states protect making available, not *how* specifically they do so”.<sup>20</sup>

- 11 This constructive ambiguity facilitated an agreement between jurisdictions with different conceptions of the bundle of rights that constitute copyright, and could allow countries implementing the umbrella solution to choose to characterize making available as an authorization, communication, distribution, reproduction, or *sui generis* activity, or some combination of those possibilities.<sup>21</sup>
- 12 The following section looks at the case law of the CJEU on the qualification of communication to the public in general, and then pays particular attention to the long-awaited judgment in the Case C-466/12, *Nils Svensson and others v. Retriever AB*. This allows us to put the entire development of the EU case law on the topic into perspective, and to sketch out the potentially far-reaching repercussions for digital copyright law.

### C. “Making Available” in EU Copyright Law

- 13 The European Union has implemented the making available provisions of the WIPO Internet Treaties through the *Information Society Directive*. The relevant Article 3 thereof reads as follows:

#### Article 3

##### Right of communication to the public of works and right of making available to the public other subject-matter

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

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

- 14 Upon this basis, the CJEU has over the years sought to delineate the boundaries of the right of communication to the public and to establish a coherent interpretation across the Member States’ jurisdictions. Interestingly, prior to *Svensson*, it had

not encountered a case that dealt directly with the question of whether hyperlinking constitutes a communication to the public in the sense of Article 3 of the *Information Society Directive*; a number of other cases have nonetheless dealt with communication to the public through other technological means. In the following section, we summarize the court’s practice and, in this sense, also explain the jurisprudential context of *Svensson*.

### I. Relevant case law prior to *Svensson*

- 15 It is admittedly hard to write a clear summary of the CJEU’s practice on communication to the public, as there have been some disparities and issues that have yet to be clarified, especially as different cases refer to different technological platforms. An early seminal case in the jurisprudence is Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*<sup>22</sup> that concerned a hotel that made broadcasting signals available over the hotel’s closed network. There, the CJEU adopted a broad interpretation of “communication to the public” under the *Information Society Directive*. It argued that “while the mere provision of physical facilities does not as such amount to communication [...], the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive”.<sup>23</sup> Further, the Court pointed out that the “private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1)”.<sup>24</sup> In a more recent case, *SCF Consorzio Fonografici*, however, the CJEU maintained that the free-of-charge broadcasting of phonograms in private dental practices does not fall under the definition of “communication to the public”, as the number of persons was small, the music played was not part of the dental practice, the patients “enjoyed” the music without having made an active choice, and in any case patients were not receptive to the music under the dental practice’s conditions.<sup>25</sup> Equally important, the CJEU found in the case of *BSA* that the television broadcasting of a graphical user interface (GUI)<sup>26</sup> does not constitute communication to the public because the viewers are passive and do not have the possibility of intervening.<sup>27</sup>
- 16 Overall, despite some fuzziness in the case law, it appears that several elements must be present to establish a “communication to the public” in accordance with Article 3(1) of the *Information Society Directive*, which is, as we saw earlier, an almost *verbatim* implementation of Article 8 of the WCT.<sup>28</sup> First, there must be a “transmission” of a protected

work, although this transmission can happen irrespective of the technical means.<sup>29</sup> This has been made clear by the *Information Society Directive* itself, which explicitly states in the preamble that the, “... right [of communication to the public] 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”.<sup>30</sup>

- 17 Second, the communication must be an additional service that is not caught merely by coincidence by the users, and also aims at making some profit. Later case law has clarified, however, that “a profit-making nature does not determine conclusively whether a retransmission [...] is to be categorised as a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29”, nor is the competitive relationship between the organizations.<sup>31</sup>
- 18 Third, it appears that the courts require a “fairly large number”<sup>32</sup> of potential listeners or viewers. The Court has recently also clarified that a one-to-one service, such as streaming, qualifies, too, as it does not prevent a large number of persons of having access to the same work at the same time.<sup>33</sup>
- 19 There also has to be a so-called “new public”. In *SGAE*, the Court referred to Article 11 bis (1)(ii) of the Berne Convention and noted that the transmission is to be “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”.<sup>34</sup> The Court further specified in the case of *Football Association Premier League* that this is 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”.<sup>35</sup> It may well be that the original public is, in fact, broader than the new one (but it would not have had access without an intervention). This assertion has been maintained by a series of cases.<sup>36</sup>
- 20 In *Airfield* – a case concerning satellite package providers – the Court stressed that “[s]uch activity [...] constitutes an intervention without which those subscribers would not be able to enjoy the work’s broadcast, although physically within that area. Thus, those persons form part of the public targeted by the satellite package provider itself, which, by its intervention in the course of the satellite communication in question, makes the protected works accessible to a public which is additional to the public targeted by the broadcasting organisation concerned”.<sup>37</sup>
- 21 This last criterion, however, seems to depend on the facts of the case, as the most recent CJEU judgment

in *ITV Broadcasting Ltd & 6 Ors v TV Catchup*<sup>38</sup> shows. In this case, the CJEU stated that it was not necessary to examine the requirement for a “new” public. While the Court justified such an examination in older cases, such as *SGAE, Football Association* and *Airfield*, it found the analysis irrelevant to the case at hand. The CJEU stated that, “In those cases, the Court examined situations in which an operator had made accessible, by its deliberate intervention, a broadcast containing protected works to a new public which was not considered by the authors concerned when they authorised the broadcast in question”.<sup>39</sup> The present case, however, concerned the transmission of works included in a terrestrial broadcast and the making available of those works over the Internet. The CJEU found that “each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public”.<sup>40</sup> *TV Catchup* was a swift and confident judgment by the CJEU confirming the rights of broadcasters and clearly classifying online streaming as a restricted copyright category, which requires the right holders’ authorization.<sup>41</sup>

## II. Anticipating Svensson

- 22 Despite the evolution of the EU case law with regard to the scope of communication to the public, there was no clear-cut template applicable to all situations. It was, for instance, unclear how the different criteria that the CJEU has come up with related to each other,<sup>42</sup> and, even more critically for our discussion, how the test applies to hyperlinking, and whether hyperlinking qualifies as the copyright-relevant act of communication to the public. The academic discourse pending the decision of *Svensson* has been intense and often controversial. The European Copyright Society (ECS), which brings together renowned scholars to discuss and critically evaluate developments in EU copyright in an effort to promote the public interest, took the opportunity offered by *Svensson* to advise the Court on its legal classification of hyperlinking.<sup>43</sup> In particular, it suggested, based on the existing case law (but before *TV Catchup*), that hyperlinking should not be qualified as a communication to the public because (i) there is no transmission involved; (ii) even if transmission is not necessary for there to be a “communication”, the rights of the copyright owner apply only to communication “of the work”, and whatever a hyperlink provides, it is not “of a work”; and (iii) the “new public” requirement is not fulfilled.
- 23 This position has been endorsed by a large body of scholarly literature – based, on the one hand, on interpretation of the law and, on the other hand,

on considerations of the vital role of hyperlinks in the architecture and the functioning of the web.<sup>44</sup> Developments in other jurisdictions were also largely supportive of such a standing – for instance, the US jurisprudence provides a clear precedent with regard to Internet links,<sup>45</sup> and recent developments in Canada go in a similar direction.<sup>46</sup>

- 24 The International Literary and Artistic Association (*L'Association Littéraire et Artistique Internationale* – ALAI) also adopted an opinion on hyperlinking and how it affects the right of communication to the public.<sup>47</sup> The ALAI, however, made a different case. It argued that what really matters in finding a communication to the public is that, “(i) the act of an individual person, directly or indirectly, (ii) has the distinct effect of addressing the public, irrespective of the tool, instrument, or device that the individual has used to bring about that effect, and (iii) that elements protected by copyright or material protected by related rights thus become available to the public in a way that is encompassed by the discrete rights granted under copyright”.<sup>48</sup> The ALAI stresses the notion of the public and finds that links that lead directly to specific protected material, thereby using its unique URL, would fall within the framework of a copyright use. The ALAI deems this kind of linking to be a “making available” regardless of whether the link takes the user to specific content in a way that makes it clear to the user that he/she has been taken to a third-party website, or whether the linking site retains a frame around the content, so that the user is not aware that he/she is accessing the content from a third-party website. While this is a strong statement, the ALAI softens it somewhat by saying that a mere reference to a source where protected material can be accessed would not constitute a copyright-relevant act.<sup>49</sup> The ALAI also acknowledges the burden so placed upon actors on the Internet using hyperlinking, and deems that legislative or court action may find a different assessment appropriate.<sup>50</sup>
- 25 Next to settling these scholarly disputes and providing some legal certainty at the EU level, the decision in *Svensson* also appeared to be crucial with regard to addressing some divergences in Member States’ case law on hyperlinking and liability under copyright law. It is important to stress here that Article 3(1) of the *Information Society Directive* fully harmonizes “communication to the public” as one of the palette of economic rights of the copyright holder,<sup>51</sup> and thus also of how Article 8 WCT is to be implemented and interpreted throughout the EU. In contrast, while creating hyperlinks could trigger different types of liability, such as: (i) accessory liability, in particular with respect to knowingly facilitating the making of illegal copies;<sup>52</sup> (ii) unfair competition; (iii) moral rights’ infringement; or (iv) liability for circumvention of technological protection measures, only the latter has been subject

to harmonization at the European level, and thus falls within the CJEU’s competence.<sup>53</sup>

- 26 Three national court judgments appear important in the context of the present discussion. Two of them have not classified hyperlinking as a communication to the public. In Germany, the highest federal court (*Bundesgerichtshof*) found that the “paperboy search engine”, which searched newspaper websites and provided search results including hyperlinks to the original sources, did not constitute communication in the sense of German law and the *Information Society Directive*, and did not infringe copyright.<sup>54</sup> In the case of *Napster.no*,<sup>55</sup> the Supreme Court of Norway held that posting hyperlinks, which led to unlawful uploading of MP3 files, did not constitute an act of making the files available to the public. The Court dismissed the argument that the linking involved an independent and immediate access to the music. Additionally, it stressed that, “[i]t cannot be doubted that simply making a website address known by rendering it on the internet is not making a work publicly available. This must be the case independent of whether the address concerns lawfully or unlawfully posted material”.<sup>56</sup> The case was decided on the basis of secondary liability, which is not harmonized at the EU level, and referred to unlawful content of the target website, as well as to the knowledge of the person posting the particular link.<sup>57</sup>
- 27 These rulings, however, contrast with the Dutch decision in *Sanoma and Playboy v GS Media*.<sup>58</sup> There, the Dutch District Court vaguely referred to the existing EU case law on communication to the public and found that a company is liable for a communication to the public when that company puts a hyperlink on its website.<sup>59</sup> The Court found all three elements of the test (which it had itself extracted somewhat frivolously from the CJEU’s jurisprudence) – that is, an intervention, a (new) public, and the intention to make a profit – present. With regard to the first element, the Court stated that, “the placing of a hyperlink which refers to a location on the internet where a specific work is made available to the public is, in principle, not an independent act of publication. The factual making available to the public occurs on the website to which the hyperlink refers.” Yet, in that specific case, the website containing the photographs was not indexed by search engines, and the Court believed that in order to be able to see the pictures, users would have to type in the specific URL, so that without the additional intervention of hyperlinking, the public would not have had access to the photographs. The Court supported its view with the fact that the defendant’s website attracted substantial traffic (some 230,000 visitors per day) and the hyperlink had ensured that the public knew about the photographs even before they were published in the claimant’s magazine, *Playboy*. The Court also found that the criterion of “new public”

was fulfilled as initially only a very small audience had known about the series of photographs (not all of which had been published), and the placing of the hyperlink had enabled a large and indeterminate circle of people to find out about the series of photographs – a public other than the one the copyright holder had in mind when giving consent for the publication of the photo story.<sup>60</sup>

### III. The Judgment in Svensson

28 Against this backdrop, one can understand why *Svensson* was so eagerly anticipated and hotly debated, and what its significance for EU and national copyright law, as well as more broadly for access and use of works on the Internet, might be. Case C-466/12, *Svensson*, was referred to the CJEU by the Swedish Court of Appeal for a preliminary ruling, and the Court issued its judgment on February 13, 2014. In essence, it addressed one key question: whether putting a hyperlink on a website constitutes a “communication to the public” under the EU’s *Information Society Directive*.<sup>61</sup>

29 The claimants, Nils Svensson and a few other Swedish journalists, had written articles for a Swedish newspaper (*Göteborgs-Posten*) that published them in print, as well as made them available on the newspaper’s website. Retriever Sverige AB, the defendant in the case, offers a subscription-based service, whereby customers can access newspaper articles through the provision of a clickable link that directs clients to the third-party source – the original website where the requested content is freely accessible.<sup>62</sup> Svensson sued Retriever for “equitable remuneration”, arguing that Retriever had made his article available through the search-and-alert functions on its website. This, he maintained, falls within the copyright relevant acts of either communication to the public or the public performance of a work, neither for which he had given consent. Retriever denied any liability to pay equitable remuneration. Retriever’s basic argument was that the linking mechanisms do not constitute copyright-relevant acts, and therefore no infringement of copyright law occurred. The Swedish District Court rejected the claimants’ application. The applicants in the main proceeding then brought an appeal against the judgment of the District Court before the Swedish Court of Appeal, which referred the case for a preliminary ruling to the CJEU asking for a clarification on the interpretation of Article 3 of the *Information Society Directive*.

30 Fortunately, the CJEU was able to match the relatively simple facts of the case with a relatively straightforward decision. In a 42-paragraph-long judgment, and without an opinion of the Advocate General, the Court decided that “Article 3(1) of

Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’”.<sup>63</sup>

31 The Court did apply the test as developed in the case law, so far, and went through the different criteria of “act of communication” of a work and the communication of that work to a “public” that must be “new public”.<sup>64</sup> Following on from *SGAE*,<sup>65</sup> the Court found that for there to be an “act of communication”, it is sufficient, in particular, 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.<sup>66</sup> In this sense, the Court found that in the case before it, “the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’”.<sup>67</sup> It then went on to examine the criterion of “public” and while finding that the requirements of “an indeterminate number of potential recipients and [...] a fairly large number of persons” were satisfied,<sup>68</sup> it firmly stated that there needs to be a “new public,” too.

32 This new public that “was not taken into account by the copyright holders when they authorized the initial communication to the public”<sup>69</sup> was, however, not given in *Svensson*. The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could have free access to them.<sup>70</sup>

33 The court went on to clarify that this finding cannot be called into question, even when the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas, in fact, the work in question comes from another site,<sup>71</sup> thereby addressing indirectly the so-called “embedded” or “framed” links, as well.<sup>72</sup>

34 The case will be different, however, where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only. Then, the link constitutes an intervention without which those users would not be able to access the works transmitted, and all of those users must be deemed a “new public”. The Court stated that the copyright holders’ authorization would be required for such a communication to the public.<sup>73</sup> This is the case, in particular, where the work is no longer available

to the public on the site on which it was initially communicated or if it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorization.

- 35 Finally, the court addressed the fourth question asked by the Swedish Court: namely, whether it is possible for a Member State to give wider protection to authors' exclusive rights by enabling "communication to the public" to cover a greater range of acts than those provided for in Article 3(1). The Court ruled in the negative – EU Member States cannot deviate and extend the scope of protection for copyright holders further by broadening the concept of "communication to the public" to include a wider range of activities than those referred to in Article 3 of the *Information Society Directive*.<sup>74</sup> The Court weighted, in particular, the perils of legislative differences and legal uncertainty that would have triggered, while leaving aside the broader but certainly underlying questions of balancing between private and public interests and allowing for creativity in the digital space.

#### D. Conclusion: Permission to Link and Some Open Questions after *Svensson*

- 36 The preliminary ruling of the CJEU in *C-466/12, Svensson v Retriever AB*, addressed the question of whether hyperlinking constitutes communication to the public and what sort of copyright liability it triggers. It clarified the scope of Article 3(1) of the *Information Society Directive*, which fully harmonizes "communication to the public," thus also making clear how Article 8 WCT is to be implemented and interpreted throughout the EU. The judgment has made an important contribution to achieving a higher level of legal certainty, particularly against the backdrop of the rather fuzzy and, at times, unsettled practice of the CJEU with regard to communication to the public through other technological means, and the emerging national cases. The "new public" criterion appeared critical in the court's assessment. The finding that *Svensson* does not satisfy it permitted hyperlinking as a copyright-irrelevant act to operate as it presently does. In broader terms, this outcome accommodates both the essential functions of the Internet as a network of networks in the technical sense, as well as its function as a comprehensive cognitive database with substantial societal implications.
- 37 In the latter sense, the "permission to link" granted through *Svensson* is by no means trivial despite the relatively straightforward facts of the case. It enables future innovation on the Internet, which is not excessively focused on copyright holders. It

is in this sense evident that, although an important goal of resolving copyright issues is to protect right holders, courts also need to take into account the overall sustainability of the digital environment and protect broader public interests. Enhancing creativity in this sense may no longer mean ensuring absolute authorial control over digital content. Rather, creativity may increasingly require flexible systems that embrace hybrid collaborative modes and the new modes of peer production that characterize the networked information economy.<sup>75</sup> The drafters of the WIPO Internet Treaties discussed the possibilities that digital technologies might offer, but could not have been fully aware of all the deep societal effects of the Internet. For that reason, and very fortunately, the Treaties leave room for purposive interpretation, flexible implementation and sensible application.

- 38 *Svensson* is an affirmative reaction and an intimation as to how this may work. Its importance as a precedent has only been augmented by the more recently decided case of *BestWater*.<sup>76</sup> Similarly to *Svensson*, the latter stemmed from a request for a preliminary ruling, this time from the German Federal Court (Bundesgerichtshof), and concerned the interpretation of Article 3(1) of the *Information Society Directive*. The essential question asked was: "Does the embedding, within one's own website, of another person's work made available to the public on a third-party website [...] 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?"<sup>77</sup> Or, to put it in layman's terms, the question was whether we can embed videos available on other websites, such as YouTube, on our own websites. The facts of the case were slightly more complicated than those behind *Svensson*, and related to a dispute between a water filtering company, BestWater International, and two commercial agents working for a competitor. They had embedded a short advertising video on their website that was produced by BestWater but uploaded on YouTube, seemingly without BestWater's consent. BestWater claimed copyright infringement and asked for the removal of the video as well as for compensation.<sup>78</sup> After the video was taken down, the questions of the compensation and the trial costs remained relevant and the first and second instances decided them differently – the first court to the benefit of the BestWater, while the second to the benefit of the two agents, Mebes and Potsch (while distributing the trial costs between the parties).<sup>79</sup> BestWater took the case to the highest court, Bundesgerichtshof, and it referred the key "embedding" question to the CJEU.

- 39 The CJEU was rather swift and pragmatic in its approach, and this is despite the factual uncertainties with regard to whether there was a permission by the copyright owner for the distribution of the short film and in this sense communication to the public. The Court found notably that: "... the embedding of a protected work which is publicly available on a website in another website by means of a link using the framing technology, as was in the main proceedings at issue, does not by itself constitute communication to the public within the meaning of Article 3 (1) of Directive 2001/29, to the extent that the relevant work is neither communicated to a new public nor is it communicated using a specific technical means, which is different from that of the original communication".<sup>80</sup> The CJEU explicitly referred to *Svensson* and the therein used criterion of a "new public".<sup>81</sup> It clarified in addition the particularity of the framing technology, which while allowing access to a work, does not necessarily mean that the copyright protected work is made available to a new public.<sup>82</sup> The court went on to note that, "... if and to the extent that this work is freely accessible on the website to which the Internet link leads, there is an assumption that the copyright holders have, when they permitted this communication, considered all Internet users as the public".<sup>83</sup>
- 40 In this sense, one could say that *Svensson* has already been tested and its argumentation seems to hold. On the other hand, despite the substantially increased legal certainty, there are still a number of questions open and we should not be fooled into believing that the relationship between copyright liability and Internet links in EU law has been settled once and for all.
- 41 First, it is noteworthy that it was the "new public" condition that really saved the case. This is in contrast to more liberal interpretations, which argue that with hyperlinking no *transmission*, regarded as a prerequisite for the communication to the public, occurs,<sup>84</sup> and tend to agree with the German Supreme Court's reasoning in *Paperboy* that a hyperlink is a mere reference, comparable to a quotation, in particular as the operator of the target website still possesses full control over the making available of the works. Jane Ginsburg has furthermore argued that the so-applied "new public" condition can be conceived as a kind of implied license, and that this condition should then apply differently if the content on the source website is infringing – that is, if it should not have been made available to any public in the first place. Ginsburg argues that, if the content were infringing, there will have been no license, implied or otherwise.<sup>85</sup>
- 42 In addition, the "new public" criterion may be controversial as it may, in effect, instruct source website owners to install a paywall or other type of restricted access that would mean that any further hyperlinking happens to a "new public".<sup>86</sup> Also, as Ginsburg suggests, with the wider spread of aggregators, which in essence function as automated information generators,<sup>87</sup> the link aggregator may not be providing access to a public that would not otherwise have had access, but as a practical matter is increasing access for those members of the public who may otherwise have had difficulty finding the source websites. In this sense, she rightly asks whether the viewers of the aggregated content should not be considered as a "new public".<sup>88</sup> Numerous further questions with regard to advertising, remuneration, competition, and other types of embedded hyperlinks are as yet unanswered, and we are likely to see a more complex and nuanced case law emerging post-*Svensson*, as *BestWater already proves*.<sup>89</sup> For now, the permission to link remains.
- \* Mira Burri, World Trade Institute, University of Bern. Contact at mira.burri@wti.org. Elements of this article build upon previous work undertaken in collaboration with Jeremy de Beer of the University of Ottawa, J. de Beer and M. Burri, "Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada", *European Intellectual Property Review* 2 (2014), pp. 95–105. All mistakes in the present version are my own. All websites were last accessed on 15 September 2014.
- 1 *WIPO Copyright Treaty*, 20 December 1996, WIPO Publication No. 226, (1997) 36 ILM 65, entered into force 6 March 2002 [hereinafter WCT].
  - 2 *WIPO Performances and Phonograms Treaty*, 20 December 1996, WIPO Publication No. 227, (1997) 36 ILM 76, entered into force 20 May 2002 [hereinafter WPPT].
  - 3 R. L. Okediji, "The Regulation of Creativity under the WIPO Internet Treaties", *Fordham Law Review* 77:5 (2009), pp. 2379–2410.
  - 4 Case C-466/12, *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB*, Judgment of the Court of 13 February 2014, OJ (2014) C 93/12 [nyr].
  - 5 Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, revised at Paris, 24 July 1971 and as amended 28 September 1979, 828 U.N.T.S. 221. Article 20 of the Berne Convention allows its member states to enter into copyright agreements if "such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to [the] Convention". See Article 1(1) WCT; also Okediji, supra note 3, at pp. 2387–2392.
  - 6 WCT, Preamble, at para. 2.
  - 7 See e.g. Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006); J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, CT: Yale University Press, 2008).
  - 8 See e.g. N. W. Netanel, 'Why Has Copyright Expanded? Analysis and Critique' in F. Macmillan (ed), *New Directions in Copyright Law: Vol. 6* (Cheltenham, UK: Edward Elgar, 2007), pp. 3–34; D. J. Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World* (Abingdon, UK: Routledge, 2014).

- 9 Okediji, *supra* note 3.
- 10 WCT, Preamble, at para. 5.
- 11 Okediji, *supra* note 3, at p. 2381.
- 12 *Ibid.*, at p. 2380.
- 13 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) [hereinafter the DMCA].
- 14 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10 [hereinafter the Information Society Directive].
- 15 See e.g. U. Gasser, *Copyright and Digital Media in a Post-Napster World: International Supplement* (Cambridge, MA: Berkman Center for Internet and Society, 2005); A. Abdel Latif, “From Consensus to Controversy: The WIPO Internet Treaties and Lessons for Intellectual Property Norm Setting in the Digital Age”, in M. Burri and T. Cottier (eds.), *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012), pp. 367–395.
- 16 See e.g. Okediji, *supra* note 3; P. K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, Vol. 4, International Intellectual Property Law and Policy* (Westport, CT: Praeger Publishers, 2007); N. Lucchi, *Digital Media and Intellectual Property: Management of Rights and Consumer Protection in a Comparative Analysis* (Berlin: Springer, 2006).
- 17 L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008); J. Zittrain, *The Future of the Internet and How to Stop It* (New Haven, CT: Yale University Press, 2008); I. Brown and C. T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (Cambridge, MA: MIT Press, 2013).
- 18 See e.g. S. Fitzpatrick, “Copyright Imbalance: US and Australian Responses to the WIPO Digital Copyright Treaty”, *European Intellectual Property Review* 22:5 (2000), pp. 214–228; M. Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002); J. Reinbothe and S. von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (London: Butterworths LexisNexis, 2002); J. Ginsburg, “The (New?) Right of Making Available to the Public”, in D. Vaver and L. Bentley (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge: Cambridge University Press, 2004), pp. 234–247; A. Christie and E. Dias, “The New Right of Communication in Australia”, *Sydney Law Review* 27 (2005), pp. 237–262; D. Fewer, “Making Available: Existential Inquiries”, in M. Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), pp. 267–284; D. Carson, “Making the Making Available Right Available”, *Columbia Journal of Law and the Arts* 33 (2010), pp. 135–164.
- 19 Ficsor, *ibid.*, at pp. 499–500.
- 20 J. de Beer and M. Burri, “Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada”, *European Intellectual Property Review* 2 (2014), pp. 95–105 (emphasis in the original).
- 21 De Beer and Burri, *ibid.*
- 22 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, CJEU, Case C-306/05, [2006] ECR I-11519 [SGAE].
- 23 *Ibid.*, at para. 47, also in reference to Recital 27 of the *Information Society Directive*.
- 24 *Ibid.*, at para. 54. Similar conclusions have been reached in other cases: in *Organismos Sillogikis Diacheirisis Dimiourgou Theatrikon ki Optikoakoustikon Ergon v Divani Acropolis Hotel and Tourism AE*, CJEU, Case C-136/09, [2010] ECR I-37 [OSDDTOE], the CJEU said that a hotel owner who installs TV sets in hotel rooms that are connected to an antenna undertakes an act of communication to the public; in *Phonographic Performance (Ireland) v Ireland*, CJEU, Case 162/10, [2012] ECR I-0000 [Phonographic Performance (Ireland)], the same applied for a hotel operator who provided televisions and radios to which it distributed a broadcast signal, or other apparatus and phonograms in physical or digital form, which may be played on or heard from such apparatus. While the first case fell under the *Information Society Directive*, the second was under the *Rental and Lending Directive 2006/115/EC*. Also, in *Football Association Premier League v QC Leisure*, the Court held that the transmission of the broadcast works through a TV screen and speakers to the customers in a public house is covered by “communication to the public” (Joined cases *Football Association Premier League v QC Leisure*, Case C-403/08, and *Karen Murphy v Media Protection Services*, Case C-429/08, [2011] ECR I-0000 [Football League and Karen Murphy]).
- 25 *Società Consortile Fonografici (SCF) v Marco Del Corso Case*, C-135/10, [2012] ECR I-0000, at paras 90 et seq [SCF].
- 26 Graphical user interface (GUI) is a type of user interface that allows users to interact with electronic devices using images rather than text commands.
- 27 *Bezpečnostní Softwarová Asociace v Ministerstvo Kultury*, Case C-393/09, [2010] ECR I-13971 [BSA].
- 28 The Court said that Article 3(1) “is inspired by Article 8 of the WCT, the wording of which it reproduces almost verbatim” in *SCF, supra* note 25, at para. 72. The Court therefore considers Article 8 WCT as guidance on defining “communication to the public”. See *SGAE, supra* note 22, at para. 35; *Peek & Cloppenburg KG v Cassina SpA*, Case C-456/06, [2008] ECR I-2731, at para 31; *SCF, supra* note 25, at paras 51–55.
- 29 Joined cases *Football League and Karen Murphy, supra* note 24, at para. 193.
- 30 *Information Society Directive*, at Recital 23 (emphasis added).
- 31 *ITV Broadcasting Ltd & 6 Ors v TV Catchup*, Case C-607/11, [2013] ECR I-0000, at paras 43 and 46 respectively [TV Catchup].
- 32 *SGAE, supra* note 22, at paras 38–39.
- 33 *TV Catchup, supra* note 31, at para. 34.
- 34 *SGAE, supra* note 22, at para. 40; see also *OSDDTOE, supra* note 24, at para. 38.
- 35 *Football Association and Karen Murphy, supra* note 24, at para. 197; referring also to *SGAE, supra* note 22, at paras 40, 42, and *OSDDTOE, supra* note 24, at para. 38.
- 36 *SGAE, supra* note 22, at paras 41–42; Joined cases *Airfield and Canal Digitaal v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)*, C-431/09, and *Airfield NV v Agicoa Belgium BVBA*, C-432/09, [2011] ECR I-0000 [Airfield], at para. 79; *Football Association and Karen Murphy, supra* note 24, at paras 98–99.
- 37 *Airfield, ibid.*, at para. 79. The case was decided under *Satellite and Cable Directive* (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248/15). It concerned situations where the supplier of a digital satellite television service does not transmit its own programme but either receives the programme-carrying signals from a broadcasting station or instructs a broadcaster to transmit programme-carrying signals to a satellite from which they are beamed to subscribers to the digital television services. The CJEU decided that even indirect transmission requires authorization, unless the right holders have agreed beforehand with the broadcasting organization that the protected works will also be communicated to the public through that provider, and when the provider does not make those works accessible to a new public.
- 38 *TV Catchup, supra* note 31. *TV Catchup* (TVC) operates an online platform that retransmits intercepted terrestrial and

satellite TV channels, enabling subscribers to watch “near-live” television on their computers, tablets, mobile phones and other devices. TVC’s service is funded by advertising before the live stream is viewed, as well as by “in-skin advertising”. Several UK commercial broadcasters (including ITV, Channel 4 and Channel 5) brought proceedings before the English High Court contending that the streaming of their broadcasts is an unauthorised “communication to the public”. The High Court took the view that it was not clear from previous CJEU case law that there was a “communication to the public” under circumstances such as this where works are streamed to subscribers who are already entitled to access the original broadcast signals via TVs in their own homes, and referred this question to the CJEU. The English Court also asked whether it made a difference to the CJEU’s response if subscribers were only allowed a one-to-one connection to the TVC server, and whether the fact that TVC was acting in direct competition with the commercial broadcasters, both in terms of viewers and advertising revenues, should have any effect on the decision.

- 39 *Ibid.*, at para. 38.
- 40 *Ibid.*, at para. 39; see also paras 24–26.
- 41 Streamlining the practice in this regard after a somewhat different opinion expressed by Advocate General Kokott in the *Football Association* case, where she found that the FAPL’s copyright in the broadcast of live football matches had been exhausted. See joined cases *Football Association and Karen Murphy*, *supra* note 24, for the opinion of AG Kokott at para. 200.
- 42 A. Kur and T. Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Cheltenham, UK: Edward Elgar, 2013), at p. 299.
- 43 European Copyright Society, “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*” (15 February 2013), also published as L. Bently, E. Derclaye, G. Dinwoodie, T. Dreier, S. Dusollier, C. Geiger, J. Griffiths, R. Hilty, P. B. Hugenholtz, M.-C. Janssens, M. Kretschmer, A. Metzger, A. Peukert, M. Ricolfi, M. Senftleben, A. Strowel, M. Vivant, R. Xalabarder, “The Reference to the CJEU in Case C-466/12 *Svensson*”, *Cambridge University Legal Studies Research Paper* 6 (2013) [hereinafter ECS, “Opinion”].
- 44 See e.g. J. Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), at p. 183; T. Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (Oxford: Hart Publishing, 2005), at p. 151; L. Bently and B. Sherman, *Intellectual Property Law*, 3rd edn (Oxford: Oxford University Press, 2008) at p. 151.
- 45 ECS, “Opinion”, *supra* note 43, at pp. 10–11, citing *Perfect 10 v Google*, 487 F (3d) 701 (9th Cir 2007).
- 46 *Ibid.*, at pp. 8–9, citing *Crookes v Newton*, 2011 SCC 47, [2011] 3 SCR 269, at paras 26, 30.
- 47 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 September 2013.
- 48 ALAI, *ibid.* (emphasis in the original).
- 49 ALAI, *ibid.*, at p. 9.
- 50 ALAI, *ibid.*, at p. 10.
- 51 A. Ohly, “Economic Rights”, in E. Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Cheltenham, UK: Edward Elgar Publishing, 2009), pp. 212–241.
- 52 See e.g. *Brein v Techno Design* [2006] ECDR 21 (Netherlands); *Universal Music v Cooper* [2006] FCAFC 187 (Full Federal Court of Australia); *Napster.no* [2005] IIC 120 (Norway). See also Ohly, *ibid.*
- 53 ECS, “Opinion”, *supra* note 43, at p. 2.
- 54 *Ibid.*, at pp. 9–10, excerpting from *Paperboy*, Case I ZR 259/00 (17 July 2003), [2005] ECDR (7) 67, 77: “The Information Society Directive [...] has not changed the assessment of hyperlinks, as are in question here, under copyright law ... According to Art. 3(1) of the Information Society Directive Member States are obliged to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, 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 a time individually chosen by them. This provision refers to the use of works in their communication to the public. The setting of hyperlinks is not a communication in this sense; it enables neither the (further) keeping available of the work nor the on-demand transmission of the work to the user”.
- 55 *Ibid.*, at p. 10, citing *Tono et al v Frank Allan Bruvik d/b/a Napster*, (2006) IIC 120 (Supreme Court of Norway, 27 January 2005).
- 56 *Ibid.*
- 57 See also similarly, Amsterdam Court of Appeal, 15 June 2006, *BREIN v. Techno Design*, [2006] ECDR 21.
- 58 Stephen Vousden, “Case C-466/12, *Svensson* – Hyperlinks and Communicating Works to the Public” (20 January 2013), available at <http://eulawradar.com/case-c-46612-svensson-hyperlinks-and-communicating-works-to-the-public/>.
- 59 The defendant’s website had a hyperlink that directed users to a website in Australia. The Australian website had a set of copyright-protected photographs – a series of nudes of a person who appears on Dutch television.
- 60 Vousden, *supra* note 58.
- 61 The actual questions referred to in *Svensson*, are the following:
1. If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society?
  2. Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
  3. When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?
  4. Is it possible for a Member State to give wider protection to authors’ exclusive right by enabling ‘communication to the public’ to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society?
- 62 It should be noted that Retriever’s customers needed to log in to the website. Upon search, customers were then provided with a list of hyperlinks to relevant articles. Clicking on a hyperlink opened a new window, which showed the article’s text as retrieved from the websites of third parties.
- 63 *Svensson*, at para. 42.
- 64 *Svensson*, at paras 16, 24.
- 65 SGAE, *supra* note 22, at para. 43.
- 66 *Svensson*, at para. 19.
- 67 *Svensson*, at para. 20.
- 68 *Svensson*, at para. 21.
- 69 *Svensson*, at para. 24, by analogy to SGAE, *supra* note 22, at paras 40, 42, and OSDDTOE, *supra* note 24, at para. 39.
- 70 *Svensson*, at para. 26.
- 71 *Svensson*, at para. 29.
- 72 This has been relevant for a later case, Case C-348/13, *BestWater International Request* for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 June 2013 –

*BestWater International GmbH v Michael Mebes, Stefan Potsch*, OJ (2013) C 325/8; see next section below.

blog, available at <http://qmjip.wordpress.com/2014/02/14/case-c-46612-svensson-cjeu-saves-the-internet/>

- 73 Svensson, at para. 31.
- 74 Svensson, at paras 33–41, 42(2).
- 75 See e.g. Benkler, *supra* note 7; also J. E. Cohen, “Creativity and Culture in Copyright Theory”, *UC Davis Law Review* 40 (2007), pp. 1151–1205; J. E. Cohen, “The Place of the User in Copyright Law”, *Fordham Law Review* 74 (2005), pp. 347–374; Y. Benkler and H. Nissenbaum, “Commons-based Peer Production and Virtue”, *Journal of Political Philosophy* 14:4 (2006), pp. 394–419.
- 76 Case C-348/13, *BestWater International GmbH v Michael Mebes, Stefan Potsch*, judgment of 21 October 2014, nyr, text available only in German and French: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-348/13&td=ALL>
- 77 *Bestwater*, *supra* note 72.
- 78 *Bestwater* judgment, *supra* note 76, at para. 6.
- 79 *Ibid.*, at paras 7 and 8.
- 80 *Ibid.*, at para. 19 (author’s own translation). In the original: “...dass die Einbettung eines auf einer Website öffentlich zugänglichen geschützten Werkes in eine andere Website mittels eines Links unter Verwendung der Framing-Technik, wie sie im Ausgangsverfahren in Frage steht, allein keine öffentliche Wiedergabe im Sinne von Art. 3 Abs. 1 der Richtlinie 2001/29 darstellt, soweit das betreffende Werk weder für ein neues Publikum noch nach einem speziellen technischen Verfahren wiedergegeben wird, das sich von demjenigen der ursprünglichen Wiedergabe unterscheidet“.
- 81 *Bestwater* judgment, *supra* note 76, at para. 15.
- 82 *Ibid.*, at paras 17 and 18.
- 83 *Ibid.*, at para. 18 (author’s own translation). In the original: “Denn sofern und soweit dieses Werk auf der Website, auf die der Internetlink verweist, frei zugänglich ist, ist davon auszugehen, dass die Inhaber des Urheberrechts, als sie diese Wiedergabe erlaubt haben, an alle Internetnutzer als Publikum gedacht haben”.
- 84 See also ECS, “Opinion”, *supra* note 43.
- 85 J. C. Ginsburg, “Hyperlinking and Infringement: The CJEU Decides (sort of)”, *The Media Institute Blog Post*, 17 March 2014, at <http://www.mediainstitute.org/IPI/2014/031714.php>. In the concrete case of *Svensson* too, the national court will need to follow up and determine on remand whether the journalists’ articles were on the source websites with the journalists’ authorization, as this appears to be somewhat disputed. If the journalists had already invited the general public to view their articles without restriction, the “new public” criterion would not be met.
- 86 The issue of technical restrictions in the context of linking will be addressed in more detail in the CJEU’s upcoming decision in the Request for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 22 May 2013 – *C More Entertainment AB v Linus Sandberg* (C-279/13). See the comments of EU Law Radar, “Case C-279/13, *C More Entertainment – Skating on Thin Ice with Embedded Links in EU Copyright Law*”, 7 July 2014, available at <http://eulawradar.com/case-c-27913-c-more-entertainment-skating-on-thin-ice-with-embedded-links-in-eu-copyright-law/>
- 87 See e.g. P. Miel and R. Farris, *News and Information as Digital Media Come of Age* (Cambridge, MA: The Berkman Center for Internet and Society, 2008); also C. Sunstein, *Echo Chambers: Bush v. Gore Impeachment, and Beyond* (Princeton, NJ: Princeton University Press, 2001); E. Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (London: Viking, 2011)
- 88 Ginsburg, *supra* note 77.
- 89 See e.g. Pedro Malaquias, “Case C-466/12 *Svensson* – CJEU Saves the Internet”, *Queen Mary Journal of Intellectual Property*