

The requirement for a “new public” in EU copyright law

Stavroula Karapapa

University of Reading

Published in: *European Law Review*, 2017(1), 63-81

Abstract

This article is concerned with a doctrinal shift in the understanding of what amounts to an actionable communication of copyright works to the public. Recent rulings of the European Court of Justice hold that infringement takes place where a communication is addressed to a “new public”, i.e. a public that copyright holders had not taken into account when authorising the initial communication of the work. This newly developed doctrine develops a *sui generis* legal fiction that fundamentally changes the communication right; it both restricts and expands its scope in ways that were not foreseen when the right was first introduced in international law, European copyright law and the national laws of Member States. In its unnecessary complexity, the concept of the new public indicates that the extremely broad scope of the communication right is unworkable and counterproductive, thereby inviting a principle-based approach, according to which lawful and strictly private use ought to be exempt from infringement.

Keywords

copyright infringement, communication to the public, new public, hyperlinks, digital content, *Svensson*

Introduction

Digital content is one of the main drivers of digital economy growth. As the European Commission estimates in its 2015 Digital Single Market Strategy, 56% of European citizens use the internet for cultural purposes, with spending on digital entertainment and media likely to see double digit growth rates in the next five years.¹ With the increasing importance of access to digital content on business growth, electronic commerce and social welfare, a growing number of referrals have been brought before the European Court of Justice (ECJ) regarding the scope of the right of communicating copyright works to the public.

Enacted in the European Union by article 3 of the Information Society Directive² in implementation of the 1996 WIPO Treaties, the right of communication to the public is the prevalent form of legal protection afforded to authors and other rights owners for the online dissemination of their works. According to article 3(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.”

¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015) 192 final, at 2.4.

² 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, OJ L 167/10, 22.6.2001.

On the basis of the wording of this provision, *any* unauthorised act of communication or making available to the public amounts to infringement. In the digital context, however, the problem arises when third parties subsequently retransmit a work that has been initially communicated by the rightholders. For instance, content made available on a website may then be made accessible from another website, or via an email communication that includes a web link; a video uploaded on a hosting platform may be incorporated in other web pages; a broadcast signal may be extended from the point of reception to other points, from the air to the internet, or from one website to another, again, via hyperlinking. Do all these situations, which are essential for the functioning of interactive media and the internet, fall within the scope of the right to communicate works to the public?

When examining cases of such unauthorised retransmission of an initial communication to the public, the ECJ has found that infringement can be established where there is an unauthorised act of communication and that communication is addressed to a “new public”, i.e. an audience that was not taken into account by the rightholders when authorising the initial communication of the work. This newly elaborated concept³ introduces a multidimensional qualitative assessment in copyright infringement cases. The test for infringement does not rest on the public/private distinction, which traditionally served as the leading determinant of the scope of rights; rather, it relies on considerations over the rightholder’s legitimate interests in the commercial exploitation of the work, including the profit or not-for-profit nature of the subsequent communication of the work. The new public is therefore a *sui generis* legal fiction, which cannot be

³ Most recently affirmed by the Grand Chamber on 31 May 2016 in *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)* (C-117/15) EU:C:2016:379.

understood by reference to other areas of law,⁴ even within the contours of intellectual property law,⁵ and does not coincide with a commonsensical interpretation of the public. For instance, a hotel room that accommodates a couple of residents at a time qualifies as a private place for the purposes of fundamental rights protection, such as privacy, but those residing in it at a given time are considered to be a public audience when a broadcast signal is transmitted in the room.⁶ At the same time, while one would assume that internet users are, abstractly put, members of the public at large, placing hyperlinks on the internet – that would be accessible in principle to anyone in the world – may not amount to infringement where the content is placed freely available online with the consent of the rightholders.⁷

This article is concerned with the impact of the newly developed doctrine of the new public on the appropriate scope of the communication right and, thereafter, on copyright infringement. The development of the new public requirement

⁴ The concept of the public shifts through time and across various areas of law. Its definition rests heavily on the relevant context. In human rights and data protection, for instance, the public/private distinction is drawn by privacy or confidentiality considerations.

⁵ For instance, the concept of the public in copyright law and trade mark law may be taken to fundamentally differ: a critical factor in copyright is whether or not the public *has received* the work; in trade mark law, however, considerations include how the public *is likely to perceive* a sign. While in both cases the public is used to assess the scope of the right, in trade mark disputes the court is often required to use the relevant public in a higher state of abstraction, i.e. as a benchmark in its assessment of validity and/or infringement (see, e.g.: the absolute prohibition against descriptive signs, on the basis that they are incapable of fulfilling the essential function of a trade mark as an indication of origin, found in art. 7(1)(b) of Council Regulation (EC) 207/2009 on the Community trade mark, which is a factual question requiring the determination of whether the average consumer would perceive the sign as a description of the central characteristics of the goods or services applied for; and, infringement on the basis of a likelihood of confusion, found in arts. 9(1)(b), where the court carries out its assessment according to the perception of the relevant “public”, which is taken to be the reasonably well-informed, circumspect and observant average consumer of the goods or services at issue).

⁶ *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL* (C-306/05) EU:C:2006:764; *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis* (C-136/09) EU:C:2010:151 (Order of the Court); *Phonographic Performance (Ireland) Ltd v Ireland and Attorney General* (C-162/10) EU:C:2012:141.

⁷ See e.g. *Nils Svensson and Others v Retriever Sverige AB* (C-466/12), EU:C:2014:76.

changes the scope of the right by introducing – in certain limited instances, such as hyperlinking and framing – a waiver *erga omnes*. Although it has been argued that this can be seen as the unacceptable introduction of copyright exhaustion, which is not statutorily available by reference to the communication right,⁸ this article argues that the new public requirement can be read as developing an implied license argument.

I first discuss the legal nature of the copyright public as an inherent limitation to the scope of rights. I then move on to the recent shift in the conventional understanding of the communication right and the way in which the ECJ has raised the new public into an express prerequisite of infringement, indicating that the complexity in reaching certain outcomes challenges the credibility of copyright law and the sensible expectation of copyright users for clear, simple rules. In exploring how this doctrinal interpretation has impacted on the scope of infringement, I elaborate on the instances in which the new public can be read as introducing an implied license. Finally, I identify the categories of users that are likely to be a new public and those that cannot qualify as such from a principle-based perspective.

The “public” as an inherent limitation to the scope of rights: statutory language and beyond

Most rights in copyright law are addressed to the public, even indirectly. The Berne Convention, for instance, recognises the rights of ‘*public* performance’, of

⁸ See art 3(3) of Directive 2001/29/EC; see also Association littéraire et artistique internationale (ALAI) Opinion 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, adopted on 17 September 2014, at 9 et seq.; and, J. Rosén, ‘Chapter 12: How Much Communication to the Public Is ‘Communication to the Public?’ in I. A. Stamatoudi, *New Developments in EU and International Copyright Law*, Info Law Series, Volume 35 (Alphen aan den Rijn, Kluwer Law International: 2016) 331 – 350.

‘communication to the *public*’ and of ‘*public* recitation’.⁹ Articles 6(1) and 8 of the WIPO Copyright Treaty (WCT) provide for the right of making a work available to the *public*. Articles 10 and 14 of the WIPO Performances and Phonograms Treaty (WPPT) confer to performers and producers of phonograms respectively a right of making available their subject-matter to the *public* and article 15 of the same Treaty makes reference to a right of communicating the relevant subject-matter to the *public*. In a similar vein, the Information Society Directive provides a right of communicating works or, otherwise, making them available to the *public*¹⁰ and a right of distribution to the *public*.¹¹

Yet the meaning of the phrase “to the public” in copyright law is nowhere defined positively. Legislation explanatory documents instead offer negative definitions in that the private circle — being comprised of members of the immediate family and close social acquaintances — is excluded from its scope.¹² On the basis of this public/private distinction, certain activities will be legally significant once they reach the general public, but they are less likely to trigger infringement when they take place within a private circle. For instance, giving a copy of a work to a family member does not amount to distribution or rental.

⁹ See arts 11, 11bis, 11ter and 14; see also art 11, TRIPs Agreement.

¹⁰ Art 3.

¹¹ Art 4.

¹² See, e.g., Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19 July 2004, 15: “the immediate family circle and the closest social acquaintances” are not meant to be part of the public. See also, *Rafael Hoteles* (C-306/05) at [41].

Defining the private sphere in this context is a matter of doctrinal interpretation and many fact-specific parameters are factored in the test,¹³ even though the public is the essential constituent of the scope of the right.

That the concept of the public has remained elusive is largely to do with the fact that its definition tends to shrink or expand depending on the context.¹⁴ The number of the individuals involved is only indicative, there being an abstract assumption that the public “implies a fairly large number of persons”.¹⁵ Legal classification is guided by contextual variables, as national case law and the ECJ rulings indicate.¹⁶ These can include the relationship of the person/entity initiating the communication to the rightholder, or their relationship to the receiving audience.¹⁷ Moreover, the way in which the public is defined does not depend on the rights that are possibly infringed,¹⁸ even though the particularities of each mode of exploitation may be taken into account. Performance requires an element of spatial presence of the audience whereas electronic communication may be received from a place and at a time individually chosen by the rightholders. The copyright

¹³ S. Karapapa, *Private Copying* (London: Routledge, 2012), 49 et seq.

¹⁴ ALAI, “Report and Opinion on the Making available and communication to the public in the internet environment: focus on linking techniques on the internet” (2014) 36(3) EIPR, 149-154, 152.

¹⁵ *Società Consortile Fonografici (SCF) v Marco Del Corso* (C-135/10) EU:C:2012:140 at [84]. See also *Mediakabel BV v Commissariaat voor de Media*, Case (C-89/04) EU:C:2005:348 at [30]; *Lagardère Active Broadcast, v Société pour la perception de la rémunération équitable (SPRE) et al.* (C-192/04) EU:C:2005:475 at [31]; and, *Rafael Hoteles* (C-306/05) at [37] and [38].

¹⁶ See, e.g., *Società Consortile Fonografici (SCF) v Marco Del Corso* (C-135/10); *Teosto v A Taxi Driver* [2004] ECDR 3 (Finland) (where taxi clientele was found to be a public circle of recipients); *Sabab v British Car Center, A&M* 2006 (Belgium) (where the Belgian Supreme Court ruled that a group of four colleagues working together on a daily basis in a workplace accessible only to them is a private circle); Court of Appeal, 20 November 2007, Case 7196/2007 (Greece) (where the Greek Court of Appeal found that communication within the family or immediate social circle of the user is not public); Court of Appeal Aix-en-Provence, 5 September 2007, Case No 2007/501 (France) (where the Court of Appeal found that the private circle can consist only of family).

¹⁷ See, e.g., *Performing Rights Society v Rangers FC Supporters Club* [1974] SC 49, (UK).

¹⁸ M.M. Walter and S. Von Lewinski, *European Copyright Law: A Commentary* (Oxford: OUP, 2010) at 11.3.46.

public is hence a legal fiction, largely shaped by qualitative criteria and economic considerations.

The copyright monopoly going public

The concept of the public as an inherent constituent of rights was discussed in the English Courts over a century ago.¹⁹ For the purposes of public performances, an audience qualified as public where the relevant activity could whittle down the rightholders' statutory monopoly. I have elsewhere referred to this argument as the "monopoly" test,²⁰ due to its particular focus on considerations regarding the exploitation of the works. Most cases heard in the United Kingdom involved public performances: in *Ernest Turner*,²¹ the performance of music in a factory before 600 employees was held to be infringement for the purposes of the Copyright Act.²² Lord Greene opined that the "statutory monopoly" granted under copyright law would be largely destroyed if such performances were to be permitted, as rightholders would likely consider this audience to form part of the public. In *Duck v Bates*,²³ however, the performance of a dramatic piece in a hospital room before 170 nurses, attendants and other hospital workers free of admission charge was not found to be infringement. This was because the hospital was not a place for public entertainment and the performance would hence not harm the rightholder.

The heart of the principle rests on exploitation, and a performance is more likely to amount to infringement when it impacts on the copyright "monopoly". As

¹⁹ See, e.g., *Duck v Bates* (1883-84) L.R. 13 QBD 843, (UK).

²⁰ S. Karapapa, *Private Copying* (London: Routledge, 2012), 68.

²¹ *Ernest Turner Electrical Instruments v Performing Right Society* [1943] Ch. 167, 172-173, (UK); *Jennings v Stephens* [1936] Ch. 469, (UK); *Performing Rights Society v Rangers FC Supporters Club* [1974] SC 49, (UK).

²² UK Copyright Act 1911, ss. 1(2) and 2(3).

²³ *Duck v Bates* (1883-84) L.R. 13 QBD 843, (UK).

indicated in the *Rangers* case, at a birthday party the “use of a copyright work is not rebounding to the financial disadvantage of the owner of the copyright, since the selected audience is not employing the work under conditions in which they would normally pay for the privilege in one form or another.”²⁴ This marks a direct link between the copyright public and economic considerations, inherent in the exploitative nature of performance rights.

A similar principle to the one underpinning the “monopoly test” has been developed by the ECJ in a number of recent judgments by reference to the communication right. With its recent case-law, the ECJ has given meaning to the concept of the “public”, which features in the statutory language of article 3 of the Information Society Directive, and doctrinally transformed it into a new public, namely a central prerequisite for the application of the communication right.²⁵ The requirement of the “new public” marks a shift in the conventional understanding of copyright infringement as it stems from an extensive interpretation of the Berne Convention:²⁶ prior to the ECJ decisions, it was assumed that any unauthorised communication of works to the public amounts to infringement. It was not clear whether an unauthorised communication that reaches the same audience of the original communication amounts to infringement or not. As has now been clarified,

²⁴ *Performing Rights Society v Rangers FC Supporters Club* [1974] SC 49, (UK), at 59.

²⁵ Certain national Courts have already started applying the “new public” test. See, indicatively, *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), (UK). An interesting case that upholds the principle but not the full analysis of the new public criterion is *Ultrasoft Technologies Ltd v Hubcreate Ltd* [2016] EWHC 544 (IPEC), (UK).

²⁶ See art 11*bis*(1)(i), Berne Convention. See also E. Arezzo, ‘Hyperlinks and making available right in the European Union – what future for the Internet after Svensson?’ (2014) 45(5) IIC 524-555, 534; and, ALAI Opinion of 17 September 2014.

it is only when the subsequent communication reaches a new public that infringement can take place.²⁷

The new public as an express requirement for infringement: from *Rafael* to *Svensson*

The judicial trend started developing in *Rafael Hoteles*, back in 2006. The few referrals preceding this case dealt with satellite broadcasting in the context of Directive 93/83/EEC. Although these cases addressed the concept of public communication and the relevant broadcasting rights, it was not until *Rafael* that the concept of the public started gaining momentum in the determination of infringement at EU level. This was one of the first cases on the newly introduced public communication right under article 3 of the Information Society Directive²⁸ and the referring Court, the Audiencia Provincial de Barcelona, sought clarification on what the public is in the context of a communication to the public. Requesting insights as to whether installing TV sets in hotel rooms is included within the scope of this right, the questions expressly addressed the concept of the copyright public: does the fact that a hotel room is deemed to be a strictly domestic location mean that there is no communication to the public; and, does the fact that successive viewers have access to the work mean that a communication effected through a television set inside a hotel bedroom be regarded as public?

Successive publicity

²⁷ *Svensson* at [24].

²⁸ Before *Rafael*, the ECJ discussed the public communication right in two other cases, where it found that the term “public” refers to an indeterminate number of potential television viewers. See *Mediakabel* (C-89/04) at [30]; and, *Lagardère Active Broadcast* (C-192/04) at [31].

Taking off from the interpretational guidance offered in recital 23 of the Information Society Directive, according to which “communication to the public” must be interpreted broadly,²⁹ the Court adopted a correspondingly “general approach”,³⁰ taking into account customers that are present in hotel premises in a broad sense, i.e. not only customers residing in hotel rooms, and the fact that such customers tend to quickly succeed each other. This meant that “a fairly large number of persons are involved” that could qualify as a public for the purposes of article 3.³¹

This consideration on its own, however, did not make the test. Economic parameters were also taken into account. Taken separately, the residents of hotel rooms, that usually cannot exceed two people per room at a time, are of limited economic significance. It is the cumulative effect of making content available to hotel clientele that matters, especially because the initiation of the transmission is made by a broadcasting organisation other than the original one.³² “Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a *new public*,” the Court concluded.³³

Instead of focusing on the specific attributes that a group of persons should possess to qualify as a public audience, the emphasis was placed on the effects of an unauthorised communication on exploitation. It was only noted that, according to

²⁹ *Rafael Hoteles* (C-306/05) at [36].

³⁰ *Ibid* at [37].

³¹ *Ibid* at [38]; affirmed in *Mediakabel* (C-89/04)

³² See, e.g., art 11 *bis*(1)(ii), Berne Convention, referred to in both *Rafael* and *FAPL*.

³³ *Rafael* at [40], emphasis added. See contra *Svensson* (where the fact that a communication is initiated by an organisation other than the original one did not by default mean that the communication is addressed to a new public). Regarding the word “thus”, it has arguably been criticised as a *non sequitur*; see ALAI Opinion, 17 September 2014 at 11.

the Guide to the Berne Convention, an interpretative document drawn up by the WIPO in 1978, the public that the rightholders have in mind when authorising a broadcast is only “direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme”.³⁴

“According to the Guide, *if reception is for a larger audience, possibly for profit, a new section of the receiving public bears or sees the work* and the communication of the programme via a loudspeaker or analogous instrument *no longer constitutes simple reception* of the programme itself but is *an independent act through which the broadcast work is communicated to a new public.*”³⁵

Elaborating on the specific parameters of the communication, the Court further indicated that the absence of an intervention, through the provision of television sets, would mean that hotel customers would not be able to enjoy the broadcast work.³⁶ What matters, therefore, is that the public is offered a *possibility* to access the work,³⁷ irrespective of whether they actually access it or not. This places the emphasis on the “enabling role” of the communication,³⁸ which may be offered as an additional service with the aim of obtaining some benefit.³⁹

³⁴ Guide to the Berne Convention for the Protection of Literary and Artistic Works (Geneva: WIPO, 1978), at 69; *Rafael*, above, at [40]. See in this regard the criticism expressed in ALAI, Opinion of 17 September 2014, 16 et seq (stressing that the WIPO issued a newer version of the Guide in 2003, and, secondly, the old Guide considers retransmissions by loudspeakers).

³⁵ *Rafael* at [41] (emphasis added).

³⁶ *Ibid* at [42].

³⁷ *Ibid* at [43], emphasis added.

³⁸ ALAI, “Report and opinion on the making available and communication to the public in the internet environment: focus on linking techniques on the internet” (2014) 36(3) EIPR 149-154 at 152.

³⁹ This is empirically proven by the fact that hotels can charge more for rooms with TV facilities (or, the other way round, that hotel guests are willing to pay more for a room with TV).

The emphasis in *Rafael Hoteles* was primarily put on the meaning of communication as an act of exploitation and less so on the concept of the public. Three years later, when the *Divani Acropolis* order was issued,⁴⁰ this approach did not change and it was also held that hotel clientele is a new public. The same position was repeated in 2012, in *Phonographic Performance*.⁴¹ Although facts slightly differ, the issue remains the same: is the provision of television and/or radio sets in hotel rooms an act of communication to the public? The Court here stabilised its approach into three main criteria, which have thereafter become the doctrinal basis of assessing infringement of the communication right. First, there is an act of communication and the hotel operator has a central role in broadcasting of the protected subject-matter. Secondly, a potentially broad, and largely undetermined, number of people visit hotels and gain access to these broadcasts. This means that there is a communication addressed to a new public. Finally, broadcasting has a lucrative purpose: hotel clients choose to access the broadcasts and pay to gain access. On the basis of these conditions, the Court found that there is public communication for which equitable remuneration should be paid to the relevant rightholders.

The new public as an additional audience reached through a deliberate intervention

Although the new public was first discussed in *Rafael Hoteles*, it was not until *FA Premier League* that it was raised into an express requirement for infringement.⁴² It was explained that when authors authorise a broadcast of their works, they take into account solely the owners of TV sets who, either personally or within their

⁴⁰ *Divani Acropolis* (C-136/09).

⁴¹ *Phonographic Performance Ltd* (C-162/10).

⁴² *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd* (FAPL), joined cases (C-403/08) and (C-429/08) EU:C:2011:43 at [197]. An interesting discussion of this case is offered in T. Aplin, ‘Reproduction’ and ‘communication to the public’: rights in EU copyright law: FAPL v QC Leisure’ 2011 22(2) KLJ, 209-219.

own private or family circles, receive the signal and follow the broadcasts. Any set of users outside this circle is likely to be a new public. The case involved the broadcasting of football matches in a pub through the use of foreign decoding devices. Although the foreign devices were imported at a cheaper rate from Greece to the UK, and were used, in disregard of the broadcasters' will, outside the geographical area for which they had been issued, their importation was not found to be unlawful under article 56 TFEU. At the same time, because in *FA Premier League* it was the pub owner who transmitted works to its customers, those customers were found to be an additional public, which was not taken into account by the rightholders when authorising the broadcasting of their works.⁴³ The Court further stressed that "it is not irrelevant that a 'communication' within the meaning of article 3(1) of the Information Society Directive is of a profit-making nature".⁴⁴ This is because the transmission is liable to attract customers in the pub and it hence impacts on the number of customers in a way that generates financial profit for its owner.⁴⁵

It was only nine days after the *FA Premier League* case that the requirement that there ought to be a new public was repeated and expressly upheld. In *Airfield v SABAM*, and a parallel action involving *Agicoa*,⁴⁶ the ECJ decided that satellite platform operators may need to seek authorisation from rightholders to offer their

⁴³ *FA Premier League* at [199].

⁴⁴ *Ibid* at [204]. See also *Rafael Hoteles* at [44].

⁴⁵ *FA Premier League* at [205].

⁴⁶ *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* and *Airfield NV v Agicoa Belgium BVBA*, joined cases (C-431/09) and (C-432/09) EU:C:2011:648 . Although this judgment is in line with *Rafael* and *FAPL*, its implications are broader in the sense that it created the need for platform operators and also other programme aggregators to review their licensing agreements with content suppliers and collecting societies.

customers access to broadcast channels, since such an access is a separate act of communication to the public. Authorisation is required,⁴⁷ unless the rightholders have agreed with the broadcasters that protected works will also be communicated to the public through that provider “on condition, in the latter situation, that the providers’ intervention does not make those works accessible to a new public.”⁴⁸ The customers of the platform are likely to be a new public, i.e. a wider audience than that targeted by the original broadcaster. Recital 17 of Directive 93/83 indicates that the rightholders must be ensured an appropriate remuneration for communications to the public by satellite.⁴⁹ There is no need to obtain authorisation in cases involving limited intervention, such as the mere provision of physical facilities for enabling or making the communication.⁵⁰ The latter form of intervention, however, is not to be confused with the provision of devices that would allow decoding the encrypted communication: this constitutes an intervention without which the subscribers would not be able to enjoy the works broadcast, although physically within the caching area.⁵¹ Those subscribers form part of the public targeted by the satellite package provider itself. By its intervention, the operator makes the protected works accessible to a public, which is additional to the public targeted by the broadcasting organisation.⁵²

⁴⁷ According to art 2, Directive 93/83 copyright holders must authorise any communication of the protected works to the public by satellite.

⁴⁸ *Airfield* at [83] and [84].

⁴⁹ This takes account of all aspects of the broadcast, including its actual and its potential audience. See *Airfield* at [73]; See also *FA Premier League* at [108] and [110].

⁵⁰ *Airfield* at [74].

⁵¹ *Ibid* at [79]: the provision of facilities ensuring or improving reception of the original broadcast in its catchment area does not require previous authorisation from the rightholders concerned.

⁵² This is consistent with another, parallel judicial trend, whereby internet broadcasting is treated as different from “conventional” TV broadcasting (air, satellite, cable). See M. Borghi, ‘Chasing copyright infringement in the streaming landscape’ (2011) 42(3) IIC 316 et seq.

Another issue of critical importance was the profit-making purpose of the communication. An autonomous service was provided because the subscription fee was payable with a view to access the satellite communication rather than merely benefit from a technical service.⁵³ This autonomous service did not simply enable access to the communication of a single broadcasting organisation, but brought together a number of channels from various organisations in a new audiovisual product, with the satellite package provider deciding upon the composition of the package thereby created. The satellite package provider thus expanded the circle of persons having access to the television programmes and offered access to the protected works to a new public.⁵⁴

Same technical means

In the aforementioned cases, the ECJ examined situations where an operator had deliberately offered access to broadcasts containing protected works to a new public. What about making terrestrial broadcasts available online? In *ITV*, the proceedings concerned the transmission of works included in a terrestrial broadcast and their making available over the internet. Because these two acts must be authorised individually and separately from the relevant rightholders, there was no need to examine the requirement that there must be a new public.⁵⁵ The retransmission of the signal through an internet stream was technically distinct from the original communication,⁵⁶ and in this regard it was a new act of communication. It was immaterial whether the public reached would have been new or not as they gained access to a different mode of communication.

⁵³ *Airfield* at [80].

⁵⁴ *Ibid* at [81].

⁵⁵ *ITV v TV Catch Up Ltd* (C-607/11) EU:C:2013:147 at [39].

⁵⁶ See M. Borghi, (2011) 42(3) IIC 316 et seq.

The *ITV* case is important as it frames the contours of the new public requirement, which is to be taken into consideration only where the retransmission takes place through the same technical means and is thereafter subject to a single act of authorisation. With the emphasis on the mode of the transmission, the *ITV* case casts doubts as to the viability of the new public requirement as a determinant factor in deciding infringement of the communication right.⁵⁷ It is a satellite condition that stems from an expansive interpretation of the law. When, however, the transmission is not subject to a single act of authorisation and it has been initiated by the rightholders themselves without the implementation of an access restriction protocol, the new public requirement will become central – as in the case of hyperlinking and embedded links.

When internet users are not a new public

In *Svensson*,⁵⁸ perhaps one of the most controversial recent copyright cases of the ECJ,⁵⁹ the question was whether hyperlinks constitute an act of communication to the public within the meaning of article 3(1) of the Information Society Directive. The Court observed that there are two cumulative conditions that need to be met: first, there should be an act of communication; secondly, this communication should be addressed to a “public”.⁶⁰

With regards to the first condition, the Court took into account the broad construal that the communication right ought to ensure a high level of protection for

⁵⁷ See, in this regard, ALAI, Opinion of 17 September 2014, 19 et seq.

⁵⁸ *Svensson*, at [26]-[28].

⁵⁹ See, e.g., Pedro Malaquias, ‘Case C-466/12 *Svensson* – CJEU saves the internet’, Queen Mary Journal of Intellectual Property blog, available at <https://qmjip.wordpress.com/2014/02/14/case-c-46612-svensson-cjeu-saves-the-internet/> (accessed 31st October 2016); M. Burri, ‘Permission to Link: Making Available via Hyperlinks in the European Union after *Svensson*’, JIPITEC, 2014, 245.

⁶⁰ *Svensson* at [16].

copyright holders.⁶¹ There are only two paragraphs in *Svensson* addressing whether hyperlinking amounts to an act of communication,⁶² which is perhaps not the detailed discussion one would reasonably expect in the circumstances. Through an analogical application of *Rafael Hoteles*, communication was equated to making works 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”.⁶³ This brief passage led to the conclusion that “the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’”.⁶⁴

This preliminary conclusion is unworkable for two main reasons. First, *Rafael Hoteles* was premised on a substantially different factual background and mere reliance on analogy with no further analysis of the particularity of the act in question is problematic. Hyperlinks arguably do *not* amount to an act of communication, as their function is to merely signpost an electronic address.⁶⁵ The new WIPO Guide indicates that transmission of content is an important constituent of the scope of right.⁶⁶ By serving as “location tools”,⁶⁷ hyperlinks do not involve such a “transmission”, as they simply redirect users to materials that are

⁶¹ See *Svensson* at [19], where reference was made to *FA Premier League* at [193] and recitals 4 and 9 of Directive 2001/29/EC.

⁶² *Svensson* at [19]-[20].

⁶³ *Ibid* at [19].

⁶⁴ *Ibid* at [20].

⁶⁵ European Copyright Society, Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*, 15 February 2013 at [35] et seq.

⁶⁶ See in this respect the new WIPO Guide, 2003, at 49; also see *ITV* at [23]. See also *FA Premier League* at [193]; *OSA v Léčebné lázně Mariánské Lázně a.s.* (C-351/12) at [25]; Opinion of AG Bot in *Reba Training Gesellschaft für Sport- und Unfallrehabilitation mbH v GEMA* (C-117/15) EU:C:2016:109 at [47].

⁶⁷ European Copyright Society, Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*, 15 February 2013 at [40].

already made available.⁶⁸ In this light, *Svensson* deviates from the position that national Courts adopted on related questions.⁶⁹

Secondly, equating communication to an act of making works available by enabling access to them does not clarify the scope of the making available right. Sitting as a sub-unit of the communication right in article 3 of the Information Society Directive, the making available right has a seemingly distinct, yet oddly overlapping, scope. Indeed, by reference to the making available right, the new WIPO Guide indicates that “what is relevant is the *first* making available of the work to the public”.⁷⁰ If this is the case, however, hyperlinks cannot amount to an act of making available, in that this requires placing materials for the first time on the internet, namely uploading them into an interactive transmission system – not merely redirecting users to materials that are already made available. As acknowledged in

⁶⁸ *Ibid* at [9], et seq [35]-[40]. The *Svensson* principle also featured in the *BestWater* Order, a case involving embedded links, where the Court found (at [14]-[17]) that embedding, within one’s own website, of another person’s work made available to the public on a third-party website, through a link by use of the framing technique, does not by itself constitute communication to the public, insofar as the work concerned is neither directed to a new public nor communicated through specific technical means that differ from that used for the initial communication. (See also *Innoweb/Wegener* (C-202/12) EU:C:2013:850.) When *BestWater* was returned to the *Bundesgerichtshof*, the German Federal Supreme Court found that the link itself is not an act of publicly making available under German Copyright law, but an illegal public communication in the sense of art. 3 (1), Directive 2001/29/EC (“*The Reality II*”, BGH, I ZR 46/12, 9 July 2015). This might be due to the fact that the German Federal Court in an older decision held that linking does not amount to making available (*Handelsblatt Publishers Group v Paperboy*, [2005] ECDR 7; ZR 259/00 (Germany)).

⁶⁹ See *Handelsblatt Publishers Group v Paperboy* [2005] ECDR 7 (Germany); *Napster.no* (2006) IIC 120 (27 January 2005) (Norway), at [44]-[47]; *Sociedad General de Autores y Editores (SGAE) v Jesús Guerra Calderón*, Case no. 67/10, Commercial Court No. 7 of Barcelona, 9 March 2010 (unreported) (Spain); Misdemeanous Court of Kilikis, 965/2010 (Greece); *Home A/S v Ofir A/S*, Maritime & Commercial Court (Sø-og Handelsretten), 1 February 2006, v-108-99 (Denmark); Bundesgerichtshof, 29 April 2010, I ZR 69/08, *aff’d* in I ZR 140/10 of 19 October 2011 (Germany); *Paramount Home Entertainment International Ltd, et al v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), at [37] (United Kingdom).

⁷⁰ On the making available right see the new WIPO Guide, 2003, at 49: “what is relevant is the *first* making available of the work to the public”; IFPI, “The WIPO Treaties: ‘Making Available’ Right”, March 2003, 1: “Implementing legislation should cover the initial act of putting a work or phonogram on an interactive network, as well as any subsequent transmissions”.

the draft report of the European Parliament,⁷¹ “the ability to freely link from one resource to another is one of the fundamental building blocks of the Internet”. It is on this basis that the report calls for a clarification “that reference to works by means of a hyperlink is not subject to exclusive rights, as it does not consist in a communication to a new public”.⁷²

Without entering into a detailed analysis of the nature of the relevant rights, the Court in *Svensson* assumed that hyperlinks amount to an act of communication and moved on to assess whether this communication was directed to a new public. It held that when the retransmission of the same works as those covered by the initial communication takes place through the same technical means, it must be addressed to a new public to be infringing⁷³:

“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 therefore have free access to them”.⁷⁴

This meant that the rightholders—by not applying access restriction protocols—were assumed to have offered free access of the content to this public, comprised by “all internet users”. Simply put, there cannot be a new public for works that are freely available online.

⁷¹ European Parliament, Committee on Legal Affairs, Draft Report on the Implementation 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, 15 January 2015, 2014/2256(INI), point 15. See also in this regard *Crookes v Newton* [2011] SCC 47; [2011] SCR 269, at [34] (Arabella J).

⁷² *Ibid.*

⁷³ *Svensson* at [24].

⁷⁴ *Ibid* at [26].

An implied license reasoning?

Svensson has become the subject of controversy at scholarly⁷⁵ and policy level.⁷⁶ The way in which the Court applied the new public condition in *Svensson* has been argued to introduce a “waiver *erga omnes* (or at least, as to all members of the intended public)”⁷⁷ that has:

“the unfounded and illegitimate effect of exhaustion of the communication to the public right or, rather, the scope of that right is *reduced* by the court from the outset”.⁷⁸

Exhaustion is the legal principle according to which the rightholders’ control over any further distribution, sale, hiring, or loan of copies of works that have been placed on the market within the European Economic Area on their behalf or with their consent, e.g. by way of distribution to the public,⁷⁹ is “exhausted”.⁸⁰ The

⁷⁵ See, e.g., M.J. Ficsor, ‘*Svensson*: honest attempt at establishing due balance concerning the use of hyperlinks – spoiled by the erroneous ‘new public’ theory’, 2015, available online at <http://www.copyrightseesaw.net> (accessed 31st October 2016); J. Rosén, ‘Chapter 12: How Much Communication to the Public Is ‘Communication to the Public?’ in I. A. Stamatoudi, *New Developments in EU and International Copyright Law*, Info Law Series, Volume 35 (Alphen aan den Rijn, Kluwer Law International: 2016) 331 – 350; 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> (accessed 31st October 2016).

⁷⁶ European Parliament, Committee on Legal Affairs, Draft Report on the Implementation 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, 15 January 2015, 2014/2256(INI), at point 15.

⁷⁷ ALAI, Opinion of 17 September 2014, at 16.

⁷⁸ *Ibid* at 15-16. Also see in this respect M.J. Ficsor, ‘*Svensson*: honest attempt at establishing due balance concerning the use of hyperlinks – spoiled by the erroneous ‘new public’ theory’, 2015, available online at <http://www.copyrightseesaw.net>, at 1.2.3 (accessed 31st October 2016).

⁷⁹ See, e.g., *Music-Vertrieb Membran v GEMA* and *K-Tel International v GEMA*, Joined Cases (C 55/80 and C 57/80) EU:C:1981:10; *Deutsche Grammophon v Metro* (C 78/70) EU:C:1971:59.

⁸⁰ Art 4(2) of the Information Society Directive; *Laserdisken ApS v Kulturministeriet* (C-479/04) at [21]. The American counterpart of copyright exhaustion is the “first-sale” doctrine (Copyright Act of 1976, 17 USC §109).

Information Society Directive clearly states that exhaustion does not apply to electronic communications, even though there is no such express indication in the WIPO Treaties the Directive implements.⁸¹ The important implication of this express exclusion is that the scope of the public communication right under the Directive, which in any case ought to be interpreted broadly,⁸² offers a very wide authorial entitlement, subject to the limitations expressly listed in article 5(3). This has become a source of controversy, not only because it creates a schism in the modalities of issuing hard and electronic copies to the public, but also because it does not make allowance for the creation of second-hand markets for digital goods, like those legally possible with regards to tangible copies.⁸³

Although *Usedsoft*⁸⁴ raised some expectations that exhaustion applies in the online context too, by affirming that the resale of used software online is legal, it was explicitly drafted as *lex specialis*, applicable only to software but not to digital content in general. Two recent decisions of German Courts affirmed this, by refusing to accept the applicability of this principle with regards to categories of content not

⁸¹ Art. 3(3) of the Information Society Directive. The signatory countries are left with the discretion to apply the principle of exhaustion “after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author”. See also art 6 WCT and art 8 WPPT.

⁸² Recital 23.

⁸³ See S. Karapapa, ‘Reconstructing copyright exhaustion in the online world’ (2014) 4 IPQ 304-322.

⁸⁴ *Usedsoft GmbH v Oracle International Corp* (C-128/11) EU:C:2012:407. See D. Naylor and E. Parris, ‘After ReDigi: contrasting the EU and US approaches to the re-sale of second-hand digital objects’ (2013) 35(8) EIPR 487-490; T.-E. Synodinou, ‘The principle of technological neutrality in European copyright law: myth or reality?’ (2012) 34(9) EIPR 618-627; E. F. Schulze, ‘Resale of digital content such as music, films or ebooks under European Law’ (2014) 36(1) EIPR 9-13; See also *Aleksandrs Ranks and Jurijs Vasīlevičs v Finanšu un ekonomisko nozīgumu izmeklēšanas prokuratūra and Microsoft Corp.* (C-166/15) EU:C:2016:762, where the Court of Justice held that “Article 4(a) and (c) and Article 5(1) and (2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning that, although the initial acquirer of a copy of a computer program accompanied by an unlimited user licence is entitled to resell that copy and his licence to a new acquirer, he may not, however, in the case where the original material medium of the copy that was initially delivered to him has been damaged, destroyed or lost, provide his back-up copy of that program to that new acquirer without the authorisation of the rightholder.”

included in the Computer Programs Directive,⁸⁵ and there is a very restrictive position also taken in the *Allposters* case.⁸⁶

Although bearing a similar effect, *Svensson* does not introduce exhaustion.⁸⁷ This case—although not expressly stating it—echoes an implied licence rationale. An implied license is often seen as a declaration of intent:⁸⁸ a particular conduct may be deemed lawful where rightholders have created the impression that third parties acting in good faith are implicitly authorised to carry out an otherwise infringing activity. Although of minor significance when it was first developed, the implied license doctrine became more relevant with digitisation and the internet, owing to the common perception that internet users have wider access to openly available content and rightholders are expected to be familiar with the particularities of this environment when deciding to upload their materials freely online.⁸⁹

Different legal systems have developed a similar, yet distinct approach to implied licenses. In Anglo-American copyright, an activity will be considered as implicitly licensed if it falls within the scope of the initial authorisation. By contrast, the German approach is broader, as it also covers instances where the rightholders

⁸⁵ *Landgericht Bielefeld*, 4 O 191/11, 5 March 2013; *Oberlandesgericht Hamm*, 22 U 60/13, 15 May 2014.

⁸⁶ *Art & Allposters International BV v Stichting Pictoright* (C-419/13) EU:C:2015:27; also see Opinion of AG Cruz EU:C:2014:2214.

⁸⁷ See contra, ALAI Opinion of 17 September 2014; J. Rosén, ‘Chapter 12: How Much Communication to the Public Is ‘Communication to the Public?’ in Irini A. Stamatoudi, *New Developments in EU and International Copyright Law*, Info Law Series, Volume 35 (Alphen aan den Rijn, Kluwer Law International: 2016) 331 – 350.

⁸⁸ G. Spindler, ‘Bildersuchmaschinen, schranken und konkludente einwilligung im urheberrecht. Besprechung der BGH-Entscheidung ‘Vorschaubilder’’, 9 *Gewerblicher Rechtsschutz und Urheberrecht* 789-791, 2010, cited in T. Pihlajarinne, 702. Also see A. Cruquenaire, ‘Electronic agents as search engines: copyright-related aspects’ (2001) 9 *IJL&IT* 327, 334 et seq.

⁸⁹ T. Pihlajarinne, ‘Setting the limits for the implied license in copyright and linking discourse – the European perspective’ (2012) 43(6) *IIC* 700-710, at 701.

failed to take positive steps to ensure that an activity remains prohibited.⁹⁰ For instance, in cases involving content made available online by the relevant rightholders and crawled by search engines without authorisation, German Courts found that rightholders had given their implied consent for these works to be made available in online searches. This was either because they had not applied technical measures to prevent crawling, i.e. the systematic browsing and copying of web pages for purpose of indexing and search,⁹¹ or because they had optimised their website to attract more users.⁹²

Svensson seems to affirm that rightholders cannot have a viable claim of infringement, unless they have taken active steps, such as access restriction mechanisms, in delimiting the circle of potential recipients of a communication. This does not cover the act of communication as such but its intended recipients at a certain point in time.⁹³ It is not truly a “waiver *erga omnes*”. Even if rightholders make their works available freely online at some point in time, they may later change their mind and those accessing the work freely could become a new public.

⁹⁰ It can be said that the Anglo-American approach is to interpret the possibility of an implied license positively, i.e. as broadening the scope of initial authorisation, whereas the German approach is based on a negative construal, i.e. what has not been prohibited will be included within the scope of the license.

⁹¹ Bundesgerichtshof, 19 October 2011, I ZR 140/10 (*Vorschaubilder II*) (Germany); Alain Strowel and Vicky Hanley, ‘Secondary Liability for Copyright Infringement with regard to Hyperlinks’, in Alain Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar: Cheltenham, 2008), at 88.

⁹² Court of Appeal of Jena (Oberlandesgericht Jena), 2 U 319/07, 27 February 2008, *Kommunikation und Recht* 2008, 301 (Germany); also see Bundesgerichtshof, 12 May 2010, I ZR 121/08 (*Sommer unseres Lebens*) (Germany); Bundesgerichtshof, 11 March 2009, I ZR 114/06 (*Halzband*) (Germany).

⁹³ Since hyperlinking will be unlawful if the rightholders apply restriction measures *ex post*, it remains to be seen what the implications on this ruling will be. Will this introduce, for instance, an indefinite obligation to “monitor” hyperlinking by cross-referring to the original source? E. Arezzo, ‘Hyperlinks and making available right in the European Union – what future for the Internet after Svensson?’ (2014) 45(5) IIC 524-555, 543-548.

This effect of the *Svensson* case is more akin to an affirmation of an implied license than copyright exhaustion. Indeed, the Court of Justice itself seems to align to such reasoning in *GS Media*.⁹⁴ Referring to *Svensson* and *Bestwater*, the Court held that:

“as soon as and as long as that work is freely available on the website to which the hyperlink allows access, it must be considered that, where the copyright holders of that work have consented to such a communication, they have included all internet users as the public...”⁹⁵

This did not seem to apply to GS Media, however. Unlike *Svensson* and *BestWater*, the content was available without the consent of the rightholders. GS Media published an article, including part of a photograph and ending with the following words: ‘And now the link with the pics you’ve been waiting for.’ By clicking on a hyperlink, readers were directed to an Australian data-storage website called Filefactory.com, on which another hyperlink allowed them to download a file in zip format containing 11 files in pdf format, each of which contained one of Sanoma’s photographs. GS Media refused to remove the hyperlink in question, despite Sanoma’s demands, and later on they published two further articles featuring new hyperlinks to Dekker's photographs. Sanoma was successful in their claims before the Amsterdam District Court and the Amsterdam Court of Appeal. The Dutch Supreme Court stayed proceedings and referred a number of questions relating to the lawfulness of hyperlinks to the Court of Justice.

According to the Court of Justice, central in the finding of infringement of the communication right was the profit-making nature of the activity, as a determinant

⁹⁴ *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker (GS Media)* (C-160/15) EU:C:2016:644.

⁹⁵ *Ibid* at [42].

factor in establishing that the website had knowledge of the infringing activity.⁹⁶ As the Court noted, it cannot be inferred either from *Svensson* or from *BestWater* that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded from the concept of communication to the public within the meaning of article 3(1) of the Information Society Directive.⁹⁷ Rather, those decisions confirm the importance of such consent under that provision, as the latter specifically provides that every act of communication of a work to the public is to be authorised by the copyright holder.⁹⁸ Interestingly, the Court also stressed that if there is no new public, there will be no communication to the “public” where the works to which those hyperlinks allow access have been made freely available on another website with the consent of the rightholder. Indeed, in his Opinion, the AG stressed that:

“the criterion of a new public is applicable only where the copyright holder has authorised the initial communication to the public. Since there is no such authorisation in the main proceedings, the criterion of a ‘new public’ is not applicable.”⁹⁹

What makes the new public really «new»?

⁹⁶ The *GS Media* reasoning was upheld in a Swedish case: *Rebecka Jonsson v Les Éditions de l’Avenir S.A.*, Attunda Tingsrätt, 13 October 2016.

⁹⁷ See, however, the position of AG Wathelet on this matter at [88], according to whom:

“Article 3(1) of Directive 2001/29 must be interpreted as meaning that a hyperlink to another website on which works protected by copyright are freely accessible to the public, which facilitates or simplifies users’ access to the works in question, does not constitute a ‘communication to the public’ within the meaning of that provision.”

⁹⁸ *GS Media* at [43].

⁹⁹ *Ibid* at [67].

The concept of the new public judicially frames the limits of the communication right towards a principle-based approach, centred around the very exploitative nature of the right. What the “new” public does is to further our understanding of the communication right by developing a doctrinal interpretation of its appropriate scope. It restricts and expands the scope of online copyright infringement at the same time, and in this light it fundamentally changes the scope of the right, serving as a doctrinal filter in assessing infringement.

Whereas an unauthorised communication on its own will likely amount to infringement if it needs to be subject to separate authorisation, the finding that no new public was involved will serve as a defence. There will be no new public either because the communication in question does not need to be separately and individually authorised by the rightholders or because the circle of recipients reached by an unauthorised activity has implicitly been licensed by the relevant rightholders. This is, for instance, what *Svensson* instructs. At the same time, a communication reaching a circle of persons exceeding the audience originally targeted by the relevant rightholders is likely to be infringement, irrespective of the fact that it took place under the same technical means with the original communication. This is because it is assumed that the authorisation given does not only cover the act of communication as such but it also restricts the audience it is meant to reach. This was, to an extent, the case in *Rafael* and *FA Premier League*.

The challenging aspect in *Svensson* is not the twist in the interpretation of the new public requirement as an inappropriate limit to the communication right;¹⁰⁰ what is truly controversial is that hyperlinking was found to amount to an act of

¹⁰⁰ According to the ALAI in its Opinion of 17 September 2014, the new public requirement is in conflict with arts 11(1)(ii), 11*bis*(1), 11*ter*(1)(ii), 14(1) and 14*bis*(1), Berne Convention; art 8, WCT; arts 2, 10, 14 and 15, WPPT; and, art 3, Information Society Directive.

communication, despite the fact that placing hyperlinks arguably involves no actual transmission of content. This creates the impression that a de facto “exhaustion” rule applies, although this is not the case as there was no communication of content in the first place. As a bookstore assistant cannot be found liable for infringement of the distribution right by helping customers find a book on a shelf, hyperlinks should be exempt from infringement because there is no communication of the work. Yet, in any event, it is not the exhaustion principle that would potentially give hyperlinks immunity; it cannot apply to every act of hyperlinking because not all of them are equally “innocent” and there are kinds of hyperlinks that may entail the retransmission of content. What would have offered a viable criterion, however, would have been a clarification of what an actionable communication entails.

It is in this light that reliance on the new public requirement may result in unnecessary complexity and legal uncertainty. Although the economic rationale underpinning the new public requirement is part of a principle-based approach, featuring in similar cases involving other exclusive rights, *Svensson* makes reference to the new public requirement taking off from a dubious premise, namely that hyperlinks amount to an act of communication. It is the reasoning of the decision that is controversial, not its outcome. In this light, the complicated logic of the new public requirement challenges the credibility of the law, as satellite conditions ought to be inserted in the test of infringement, e.g. the requirement of the “same technical means”.¹⁰¹ This may lead to unpredictable outcomes, in that the indeterminate body of internet users is in principle a far larger circle of recipients than residents of hotel bedrooms or a pub’s clientele. Unlike what happens in the borderless web, the spatial element of an establishment delimits the use *ab initio*, no

¹⁰¹ALAI, Opinion of 17 September 2014, at 2.

matter the fact that it is open to the general public. The test for infringement is, hence, not based on a simple rule that would match sensible user expectations and it becomes difficult to tell which communications amount to infringement or not. This generates unnecessary legal uncertainty, challenging the credibility and the legitimacy of EU copyright law.

The “same old” public?

The complicated logic of the new public requirement could be overcome if reference was made to specific sets of users who do not fall under the public the rightholders had in mind when authorising the initial communication. From a principle-based perspective, there are two kinds of audiences that do not fall under the authorial public. First, there are private users and, secondly, there are those who have gained lawful access to the content with the express or implied authorisation of the rightholders. In both these instances, economic considerations are paramount: private users are those to whom the rightholders cannot have a reasonable expectation of licensing further copies of works and lawful users are those who have already bought or gained lawful access to the copies. Although bearing the same legal result, these kinds of users differ in one central aspect: lawful users are part of the public but they have already received authorisation, and private users do not need to receive authorisation, as they are not part of the public in the first place.¹⁰²

Lawful users are not a new public

¹⁰² Digital communications seem to challenge this assumption to a large extent. As Ginsburg has observed in 95/6 *Colum. L. Rev.*, 1995, at 1477-78: “the entire concept of 'private copying' makes little sense in a world where the work is predominantly marketed directly to the end users[,] . . . and the market for, or 'normal exploitation of,' the work will by and large be the private copying market.”

The owners of a copyright work, or those who have lawfully purchased access to it are the public that the authors had in mind when authorising a specific use. Issuing copies of a protected work to these lawful owners or possessors cannot amount to infringement. This has been affirmed in the *FA Premier League* case, where it was stressed that when authors authorise a broadcast of their works, they take into account solely the owners of TV sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. The public that the authors have in mind when authorising the transmission consists primarily of those having a lawful entitlement over the communication, either because they have bought the work or gained access to the content by the original rightholders or authorised parties. It would be only when the specific act of communication exceeds this public that an additional circle of recipients is reached and hence authorisation is necessary.

The same principle can also be found in US jurisprudence. In *Aereo*,¹⁰³ for instance, the question was whether a technologically complex service allowing its subscribers to watch television programs over the Internet amounts to an act of public performance within the meaning of §101 of the US Copyright Act. Because performances were capable of being perceived by one and only one subscriber at a time, Aereo denied allegations of infringement, arguing that the transmission did not reach the public. Although there is no definition of “the public” in the US Copyright Act, same as under EU copyright law, it is there specified that an entity performs protected works publicly when it does so at “any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” This was not found to be the case in *Aereo*. The

¹⁰³ *American Broadcasting Companies, Inc. et al, Petitioners v Aereo, Inc., FKA Bamboom Labs, Inc.*, 573 U. S. ____ (2014) 1.

Supreme Court held that Aereo communicated the same contemporaneously perceptible images and sounds to a large number of people who were unrelated and unknown to each other. What is more, the Supreme Court stressed that the “public” does not need to be situated together, spatially or temporally. It was thus held that Aereo transmitted a performance of the protected works to the public, as per the so-called transmit clause.¹⁰⁴

Drawing further insights on the concept of the “public”, the Supreme Court defined it to mean “a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted.”¹⁰⁵ What the Supreme Court found was that the question whether a set of persons qualifies as “public” often depends upon their relationship to the underlying work. In explaining this point, they gave the example of a valet parking attendant; returning cars to their owners was not an offer “to the public”. This is not the case, however, with a car dealer who sells cars to persons lacking a pre-existing relationship to the cars and who can reach the public at large.¹⁰⁶ An analogy was therefore drawn to an entity that transmits a performance to individuals acting as owners or possessors, which is not addressed “to the public”, and other operators, like Aereo, that transmit performances to a large number of paying

¹⁰⁴ See *ibid* at 14. The transmit clause (17 U.S.C. Section 101) defines public performance as follows:

“To transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable or receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”

¹⁰⁵ *Ibid* at 16.

¹⁰⁶ *Ibid*.

subscribers lacking a pre-existing relationship to the works.¹⁰⁷ These subscribers would qualify as a new public under European law.¹⁰⁸

In excluding lawful users from the concept of the public, it is important to stress that these are not only those who have actually purchased the protected works, or those benefiting from a particular exception or limitation,¹⁰⁹ but also those who have gained access to those works from the rightholders or with their consent. This is the case with content made available online with no access restrictive mechanisms in place, as in *Svensson and Bestwater*.¹¹⁰ Lawful users are hence those having received express authorisation and those who have been given free access to the works from the rightholders, such as through an implied licence.

Private users

Because infringement occurs when unauthorised communication of works reaches the public, certain activities that are carried out within a private circle may be excluded from infringement. This typically includes the immediate family and the closest social acquaintances.¹¹¹ In drawing the line between private and public uses, the distinction heavily depends on qualitative considerations, including—but not limited to—commercial or economic factors. One of the leading questions is

¹⁰⁷ *Ibid* at 15.

¹⁰⁸ It ought to be noted that the relationship between the user and the work under EU law is more nuanced, as the mere fact that a user owns a copy of a work is immaterial if a subsequent communication of the same work in a different format takes place. See in this regard the *ITV* case.

¹⁰⁹ See, e.g., *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* (C-360/13), EU:C:2014:1195 at [59].

¹¹⁰ Even in cases where access protection is enabled, there are policy reasons why users of content services should benefit from unfettered access within the borders of the EEA, as the phenomenon of geo-blocking indicates. See in this respect the Digital Single Market strategy, 6 May 2015.

¹¹¹ See in this regard the WIPO Glossary of 2003 on the concept of the “public”; see also Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19 July 2004, 15.

whether rightholders can have a reasonable expectation to sell, or license access to, more than one copy of their works to a private set of users. It is not clear, however, whether the newly developed doctrine of the new public impacts on the permissibility of private uses and, if so, to what extent. With the prominence given to the new public factor in considerations of infringement, it is likely that the distinction between private and public audiences is no longer fully reliable.

The problems in the private/public distinction lie in cases where an audience qualifies neither as abstractly public nor as private.¹¹² Essential in drawing the line here is the relationship that those initiating the transmission, or the rightholders, have with these users, rather than the relationship of the users with the work.¹¹³ The determinant factor is whether the communication reaches a portion of the public that was not envisaged by the rightholders when authorising an act of communication. It is a matter of doctrinal interpretation to assess how a particular factual background affects the classification of the public involved, and because the central point of assessment on the basis of statutes is the public, it is sufficient for an audience to simply not qualify as such.

Such a question was discussed in *Del Corso*:¹¹⁴ was a dentist playing background music in his practice liable for infringement for broadcasting protected subject-matter to the public? The fourth question on which the Corte d'Appello di Torino sought clarification was whether the free-of-charge broadcasting of phonograms

¹¹² See e.g. *American Broadcasting*, 573 U. S. ____ (2014), 14. See also in this regard *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muзикologilor din România - Asociația pentru Drepturi de Autor (UCMR - ADA)* (C-283/10) EU:C:2011:772 at [40] and [41].

¹¹³ S. Karapapa, *Private Copying* (London: Routledge, 2012) 65 et seq.

¹¹⁴ *Del Corso* (C-135/10) EU:C:2012:140.

within dental practices engaged in professional economic activity constitutes public communication within article 3(2)(b) of the Information Society Directive.

The Court stressed that there was an intentional communication through the deliberate intervention of the dentist and that the audience was not merely “caught by chance” in listening to phonograms,¹¹⁵ but asked whether such a communication was addressed to the public. As the Court acknowledged, the public communication right contained in article 3(1) of the Information Society Directive “refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons”.¹¹⁶ Explaining the “indeterminate” nature of the public, the Court referred to the interpretative guidance offered in the WIPO glossary, which defines the concept of public communication as:

“making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group”.¹¹⁷

The number of individuals to which such a communication is addressed matters, but there is a certain *de minimis* threshold to be assumed, i.e. one excluding from the concept “groups of persons which are too small, or insignificant”.¹¹⁸ A dentist’s clientele is not large or significant because the patients have appointments one at a time and because it is unlikely that they listen to the same phonograms. They are also a “very consistent group of persons and thus constitute a determinate circle of

¹¹⁵ *Ibid* at [93] and [94]. See also *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* (C-393/09) EU:C:2010:816.

¹¹⁶ *Del Corso* at [84]. See also *Mediakabel* (C-89/04) at [30]; *Lagardère* (C-192/04) at [31]; and, *Rafael Hoteles* (C-306/05) at [37] and [38].

¹¹⁷ *Del Corso* at [85].

¹¹⁸ *Ibid* at [86].

potential recipients”.¹¹⁹ Hence the fact that they succeed each other does not weigh heavily.¹²⁰ Finally, it was stressed that, unlike pubs and hotels, broadcasting phonograms in a dental practice does not impact its standing and financial benefits in that the dentist cannot expect a rise in the number of patients because of that broadcast alone, or charge a higher price for his service.¹²¹ This latter point, along with the fact that *Del Corso* was a case on neighbouring rights,¹²² marks the difference from the public involved in hotel rooms and public houses.

The *Del Corso* case is a rather relevant precedent for cases where there is a communication *in* public that does not amount to a communication *to* the public and hence to infringement. The grounds for acquitting such a use from infringement rest on the lack of public character and profit-making purpose in the use.¹²³

Conclusion

The requirement that there ought to be a communication to a new public for infringement to be established is an autonomous concept of EU copyright law. Limited by the specificity of the cases that have been brought before the Court, this newly developed doctrinal condition has profound implications on the scope of copyright infringement on the internet. It can both expand and restrict the confines of the communication right, essentially shaping it in directions that were not foreseen when the right was first introduced. It is no longer a new, unauthorised act

¹¹⁹ *Ibid* at [95].

¹²⁰ *Ibid* at [96].

¹²¹ *Ibid* at [97].

¹²² *Ibid* at [74]-[77]; also *OSA v Léčebné lázně Mariánské Lázně a.s.* (C-351/12) at [35].

¹²³ This seems to be an enlarged version of the private copying defence found in art 5(2)(b) Information Society Directive, according to which reproductions made for private use and a non-profit purpose are exempt from infringement.

of communication to the public that amounts to infringement, there must also be a further communication of the work addressed to a new public.

This doctrinal shift of the focus on the assessment of infringement does not work well in all cases and can lead to unpredictable outcomes. National Courts have already started applying the new public requirement reaching a variety of outcomes¹²⁴ and the number of referrals to the Court of Justice for clarification is growing.¹²⁵ It can be read, for instance, as introducing an implied license argument in cases where rightholders have made content freely available online, in that hyperlinking or framing from third parties does not reach a new public and is hence beyond the control of the relevant rightholders.

The ambiguity that surrounds the newly introduced test for assessing infringement of the communication right is perhaps to be attributed to the counterproductive and ill-construed scope of the communication right in the first place. The right has

¹²⁴ “*Viasat*”, Supreme Court of Estonia, 3-2-1-50-13, 29 May 2013, (Estonia), (authors shall have no right to claim royalties from the satellite service provider if the broadcasting organisation has already paid royalties and no “new public” has being created as a result of providing satellite-TV services); *Estonian Authors Society v AS Viasat*, Tallinn Circuit Court, 2-11-17594, 28 February 2014, (Estonia), (encryption of TV signals and sale of decryption cards was not considered to be sufficient for establishing a “new public”); *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), (UK), (mere provision of a hyperlink did not clearly fall under the scope of “communication to the public”, however the combined effect of uploading content to a host site and providing a link did amount to such communication; the case thoroughly addressed the new public criterion); *1967 Ltd v British Sky Broadcasting Ltd* [2014] EWHC 3444 (Ch), (UK), (there was copyright infringement by both UK users and operators of file-sharing websites, insofar as there was communication of copyright works, the communication was to the public, and the act of communication took place in the UK); “*TV sets in hotel rooms*”, Court of Appeal of Lisbon, 163/14.8YHLSB.L1-6, 27 December 2014 (repeating *Rafael*); “*Hotel rooms*”, Supreme Court, 649/2013, 9 April 2013, (Greece) (repeating *Rafael*); *NSE v Stichting BREIN*, Court of Appeal of Amsterdam, ECLI:NL:GHAMS:2014:3435, 19 August 2014, (Netherlands), (the new public was used as a defence by a Usenet service provider but it was not upheld by the Court).

¹²⁵ See, indicatively, Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 18 November 2015 — *Stichting Brein, Other parties: Ziggo BV and XS4ALL Internet BV* (C-610/15); Request for a preliminary ruling from the Rechtbank Midden-Nederland (Netherlands) lodged on 5 October 2015 — *Stichting Brein v Jack Frederik Wullems, currently trading under the name Filmspeler* (C-527/15); Opinion of AG Wathelet on *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker* (C-160/15).

an extremely broad scope and overlaps with the reproduction right, in the sense that acts of communication often involve copying. Even in the limited instances where this is not the case, as with certain types of hyperlink, the right can still be infringed. If, however, every act of communication is to be infringement and there are no defining criteria as to what amounts to an actionable communication, essential functions of the online environment and user freedom are significantly curtailed. Although it would be clear and unambiguous to say that every unauthorised act of communication to the public amounts to infringement, such a broad construal is unworkable and could have the dangerous effects of the broadly defined reproduction right, which has to be read in conjunction with its various limitations for its scope to be properly understood.

This is not to say that the multifaceted requirement of the new public in and of itself is appropriate in assessing what an actionable communication is, as it lacks the clarity and simplicity that makes good law. Its complexity—mainly because of its dependence on a number of additional conditions, all of which have a doctrinal standing but do not expressly feature in statutory language—challenges the credibility and legitimacy of copyright, which does not seem to align with reasonable user expectations for simple, understandable rules.

Despite the uncertainty that comes with it, the requirement of the new public urges for the rethinking of the appropriate scope of the otherwise extremely broad communication right and invites a principle-based approach in examinations of infringement by shedding the focus on one of the essential internal constituents of the right, without which no act of copyright exploitation can achieve its primary purpose: the public.

Uncertainty related to the new public requirement could be overcome if reference was made to sets of users that fall outside the authorial public to which communications are addressed, e.g. lawful users and private circles. For such circles of users, content retransmission cannot be new, hence, not impacting on exploitation, i.e. the main objective the right aims to achieve.