

Communication to a New Public?

Three reasons why EU copyright law can do without a ‘new public’

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Abstract

This article critically examines the ‘new public’ test in EU copyright law, which was developed by the CJEU interpreting the right of communication to the public in cases of retransmission and hyperlinking. As the authors seek to demonstrate, this test is flawed for at least three reasons: historical, conceptual and economic. EU copyright law can do well without a ‘new public’ test.

Keywords: copyright, communication to the public, new public, Berne Convention, hyperlinking, aggregation

1. Introduction

Of all the economic rights granted to authors under EU copyright law, the right of communication to the public clearly stands out. Shaped by the 1996 WIPO Copyright Treaty, and introduced into EU copyright law in 2001 with the Information Society Directive (InfoSoc Directive), the right of communication to the public protects authors and other copyright holders against “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” (art. 3(1) InfoSoc Directive).

Following its introduction and implementation into the national copyright laws of the Member States, the new right has rapidly developed into a core economic right – protecting right holders against an array of wired and wireless electronic uses, varying from traditional radio broadcasting to peer-to-peer file sharing. The new right has also given rise to a growing, and increasingly confusing body of jurisprudence by the Court of Justice of the European Union (CJEU) regarding cases of unauthorised retransmission and aggregation of copyright protected works. Central to the Court’s case law on retransmission is the doctrine of a ‘new public’. According to the Court, acts of retransmitting works – e.g., by way of a hotel television service – are restricted acts only insofar as retransmissions reach a ‘new public’, “that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public”.¹

This ‘new public’ criterion, which the Court has reiterated and further developed in a string of decisions, including several controversial cases concerning hyperlinking, raises important questions regarding the scope of copyright protection and the internal consistency of EU copyright law. This article critically examines the ‘new public’ test, and seeks to demonstrate that it is flawed for at least three reasons: historical, conceptual and economic. As the authors will conclude, European copyright law can do quite well without a ‘new public’.

The article begins by placing the right of communication to the public in an international and EU copyright law context (section 2). Section 3 discusses the development of the ‘new public’ doctrine in the case law of the CJEU. Section 4 critically examines the ‘new public’ test from a historical, conceptual and economic perspective. Finally, section 5 argues why European copyright law can well do without a criterion of ‘new public’, and offers conclusions.

¹ CJEU 7 December 2007, no C-306/05 (*Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*) (hereafter referred to as “SGAE”), para. 197.

2. Right of communication to the public in international and EU copyright law

The right of communication to the public plays a central role in today's information society. First introduced in the Berne Convention in several specific provisions, it was developed into a general right of communication to the public in the WIPO Copyright Treaty (WCT) of 1996.² This, in turn, formed the basis for its EU equivalent in Article 3 of the InfoSoc Directive. This section briefly discusses the genesis of the communication right, from Berne via Geneva to Brussels.

2.1. International copyright law

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)³ of 1886 is the oldest, and most important multilateral copyright treaty in the world. The treaty warrants national treatment of foreign right holders, and obliges its contracting parties – currently 169 states – to guarantee a spectrum of minimum rights to eligible foreign right holders.⁴

The Berne Convention does not however provide for a single, overarching right of communication to the public. Instead, the Convention follows a rather fragmented approach. The rights of communication to the public in the Berne Convention can be divided into two categories. Firstly, the convention provides for a right of communication to the public covering any type of communication, but only for performances of dramatic, dramatico-musical and musical works (Article 11), recitations of literary works (Article 11ter) and adapted cinematographic works (Article 14(1)(ii)). Secondly, the convention provides for a general right of broadcasting in Article 11bis in respect of all types of works. This right includes broadcasting, rebroadcasting, communication to the public by wire of broadcasted works and public communication by loudspeaker of broadcasted works. The provision does not explain the notion of 'broadcasting' because at the time of the drafting, legislators believed that the term was "known to everyone".⁵

The broadcast right applies when a work is made available to the public by way of broadcasting; whether the public actually receives or watches the broadcast is deemed irrelevant.⁶ Regarding the right to rebroadcast, Article 11bis(1)(ii) includes an additional requirement, namely that the broadcast is retransmitted by "an organisation other than the original one". The original broadcast organisation is allowed to rebroadcast the work as much and as widely as it wants to, but if another, independent organisation rebroadcasts a work, authorisation of the right holder is required.⁷

In Berne's communication rights, the notion of 'public' plays an important role. However, it is not further defined, so Contracting States have discretion to interpret this notion in their national laws. From the literature it follows that the notion of 'public' should be interpreted as the opposite of 'private' and, therefore, communications to a closed circle of family and friends are probably excluded from the scope of the exclusive.⁸ Commentators also admonish that the notion should not be interpreted too narrowly in such a way that it

² WIPO Copyright Treaty, Geneva, December 20, 1996.

³ Berne Convention for the Protection of Literary and Artistic Works, Paris 24 July 1971.

⁴ P. Goldstein & P.B. Hugenholtz, *International Copyright, Principles, Law, and Practice*, Oxford: Oxford University Press (2013), 3rd edition (Goldstein and Hugenholtz 2013), at 48.

⁵ Documents 1985 (1951), 114-15 and 286-7. In today's online society this notion is less clear, for example does on-demand online transmission fall within the scope of broadcasting or communication to the public by wire? See also, S. Ricketson & J.C. Ginsburg, *International Copyright and Neighbouring Rights; The Berne Convention and Beyond*, Volume I, New York: Oxford University Press (2006), 2nd edition (Ricketson and Ginsburg 2006), at 742; J.C. Ginsburg, "The (new) right of making available to the public", in David Vayer & Lionel Bently, *Intellectual Property in the New Millennium, Essays In Honour Of William R. Cornish*, Cambridge: Cambridge University Press (2004), 234-247 (Ginsburg 2004), at 241-242.

⁶ Claude Masouyé, "Guide to the Berne Convention for the Protection of Literary and Artistic Works", Paris Act 1971, Published by the World Intellectual Property Organisation, Geneva 1978 (Guide 1978) (Masouyé Guide 1978), at par 11bis3 at 66.

⁷ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College, Kluwer (1987) (Ricketson 1987), at 449.

⁸ Ricketson 1987, at 432-433.

undermines the core potential of the communication to the public right, prejudicing the legitimate interest of the author.⁹

As new communication technologies emerged in the latter part of the 20th Century, the specific provisions of the Berne Convention – never revised after 1971 – began to show serious lacunas, especially with the arrival of the Internet in the 1990's.¹⁰ For example, while transmissions online do fall within the scope of the right to communicate a work to the public by wire protected under Articles 11(1)(ii), 11*bis*(1)(ii), 11*ter*(1)(ii) and 14(1)(ii) of the Berne Convention, this right applies only to specific subject matters, not including for example works of visual arts or computer programmes.

In addition, questions arose regarding on-demand transmissions, i.e. transmissions where the public is able to choose the place and time of reception of a copyright protected work. Should these transmissions be part of the distribution right, the communication to the public right or should a new 'making available' right be introduced?¹¹

In order to address these issues, a new multilateral copyright agreement, the WIPO Copyright Treaty (WCT), was adopted in 1996. Article 8 of the WCT provides for a general right of communication to the public, applicable to all types of subject matters, which includes a 'making available' right for on-demand transmissions.¹² According to Article 8 'any communication' by wire or wireless means is protected. This technologically neutral definition extends the scope of the communication right beyond traditional broadcasting and cable (re)transmission to cover all sorts of digital transmissions and possible future forms of communication.¹³ While Article 8 of the WCT is broadly drafted, it only applies to communications of which a public is not present at the place of transmission. Public performances are therefore excluded, and remain subject to the provisions of the Berne Convention and national copyright law.

2.2. EU copyright law

In 2001, the EU adopted the Information Society Directive (InfoSoc Directive), the most far-reaching harmonizing directive in the field of copyright law.¹⁴ One of the centrepieces of the Directive is Article 3, which protects the general right of communication to the public, including the making available right, in terms that resemble those of Article 8 of the WCT. Article 3(1) reads as follows:

“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.”

According to this definition the right of communication to the public *includes* the right of making available to the public, which is sometimes perceived as a separate right. Note however that the right of making available is a

⁹ Ricketson 1987, at 433; S. von Lewinski, *International copyright law and policy*, New York: Oxford University Press (2008) (Von Lewinski 2008), at 151.

¹⁰ Ricketson and Ginsburg 2006, at 717.

¹¹ The idea of a general right of communication to the public, including a right to make available online, was first advanced in an EC-commissioned study by P. Bernt Hugenholtz, 'Intellectual Property Rights on the Information Superhighway', Report to the Commission of the European Communities (DG XV), August 1994, available at <http://www.ivir.nl/publicaties/download/1760>.

¹² Article 8 of the WCT reads: “Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising 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.”

¹³ Ricketson and Ginsburg 2006, at 745.

¹⁴ I. Stamatoudi & P. Torremans, *EU Copyright Law, A Commentary*, Cheltenham/ Northampton: Edward Elgar Publishing (2014) (Stamatoudi and Torremans 2014), at 397; T. Dreier & P.B. Hugenholtz, *Concise European copyright law*, Alphen a/d Rijn: Kluwer Law International (2006) (Dreier and Hugenholtz 2006), at 355.

separate right only for holders of neighbouring rights that do not enjoy a general right of communication to the public.¹⁵

The recitals of the directive explain that this right is to be interpreted broadly. It covers “all communication to the public not present at the place where the communication originates”, and applies to “any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.”¹⁶ The directive does not however clarify the notion of ‘public’. According to the Explanatory Memorandum, this should be interpreted in consistence with the objectives of the directive.¹⁷ Thus, it has to be construed in a broad manner in order to provide a high level of protection for the author,¹⁸ while at the same time serving the other stated purposes of the Directive, such as the development in the information society, striking a fair balance between right holders and users of works and enhancing legal certainty.¹⁹ The CJEU has developed several definitions and criteria to clarify the notion, which was – according to the CJEU – necessary to guarantee a uniform and equal application of the right of communication to the public.²⁰ One of these criteria is that of the ‘new public’.

Table 1.

	Legal framework	Article(s)	Communication Right
International	Berne Convention (BC)	Art. 11(1)(ii)	Any communication to the public of performance (dramatic, dramatico-musical and musical works)
		Art. 11bis(1)	(i) Broadcasting (ii) Rebroadcasting (ii) Communication by wire of broadcasted works (iii) Communication by loudspeaker
		Art. 11ter(1)(ii)	Any communication to the public of recitation (literary works)
		Art. 14(1)(ii)	Public performance and communication to the public of film (cinematographic adaptations)
	WIPO Copyright Treaty (WCT)	Art. 8	Communication to the public, including making available
EU	Information Society Directive (InfoSoc Directive)	Art. 3(1)	Communication to the public, including making available

3. CJEU case law on “new public”

3.1. An opinion in *Egeda*

The notion of a ‘new public’ was developed by the CJEU to assess whether acts of retransmission of copyright protected works qualify as (separate) acts of communication to the public within the meaning of European copyright law. In 1999, Advocate General La Pergola was the first to apply this criterion in *Egeda*, a case

¹⁵ Art. 3(2) InfoSoc Directive. See Articles 10 and 14 of the WIPO Performances and Phonograms Treaty, Geneva, December 20, 1996.

¹⁶ Recital 23 of the InfoSoc Directive; Stamatoudi and Torremans 2014, at 409; Dreier and Hugenholtz 2006, at 360; Walter and Von Lewinski 2010, at 958.

¹⁷ Explanatory Memorandum InfoSoc Directive, at 25 par 1.

¹⁸ Recitals 9 and 10 of the InfoSoc Directive; M. Walter & S. von Lewinski, *European Copyright Law*, Oxford: Oxford University Press (2010) (Walter and Von Lewinski 2010), at 988.

¹⁹ Recitals 2, 7 and 31 of the InfoSoc Directive.

²⁰ *SGAE*, at para 31.

concerning the retransmission of broadcast signals to private hotel rooms.²¹ The question before the Court was whether such retransmission constituted a communication to the public within the meaning of the Satellite and Cable (SatCab) Directive. According to the Advocate General the Directive did not provide a proper legal basis for answering this question; the Berne Convention, however, did. In this context he pointed out that Article 11*bis*(1)(iii) BC, which protects communications to the public of broadcast works via loudspeakers or other analogous means, might be a useful instrument to interpret the notion of ‘public’. This article, he continued, should be interpreted on the basis of the 1978 Guide to the Berne Convention (1978 Guide), a non-binding guide of the World Intellectual Property Organization (WIPO) that sets out how the provisions of the Berne Convention are to be interpreted.²² Based on his reading of the Guide, Advocate General La Pergola argued that when an author authorises broadcast use of a work, he only considers direct users, which are “the owners of reception equipment who, either personally or within their own private or family circles, receive the programme.”²³ According to the Advocate-General, this meant that if the reception of a broadcast signal is for a larger audience – possibly for profit – an act is an independent communication to a new public, which is subject to the author’s exclusive authorisation right.²⁴ On the basis of this interpretation, the Advocate-General opined that “the Convention lays down the principle that the author must authorise all secondary use of the broadcast work if this gives rise to independent economic exploitation for financial profit by the person responsible [...] and also relates to the economic importance of the new public [...]”²⁵

Thus, Advocate-General La Pergola introduced an economically inspired ‘new public’ test to assess whether an act is a separate act of communication to the public. He concluded that hotel guests are indeed such a ‘new public’ and that, therefore, the retransmission required separate authorisation of the right holder. However, the CJEU did not follow La Pergola’s opinion but merely held that it was not competent to answer the question and interpret the notion of ‘public’ because the SatCab Directive does not provide substantive rules on a right of cable retransmission.²⁶ The CJEU did acknowledge that this might change after the InfoSoc Directive, which at the time of the Court’s decision was not yet adopted, entered into force.²⁷

3.2. Introducing the ‘new public’ test in SGAE

The ‘new public’ test was introduced in EU copyright law many years later, in 2006, in the case of *SGAE*, which similarly concerned retransmission of broadcast signals to private hotel rooms.²⁸ This time, Article 3(1) of the InfoSoc Directive formed the basis of the preliminary questions, thereby providing the CJEU a legal basis for interpreting the notion of ‘public’. Both Advocate General Sharpston, who issued an opinion in this case, and the CJEU agreed that this notion was to be interpreted in light of Article 11*bis*(1)(ii) of the Berne Convention, which protects retransmissions of broadcasted works if such works are communicated ‘by an organisation other than the original one’. As opposed to her colleague La Pergola, AG Sharpston and the CJEU did not however apply subparagraph (iii). In her opinion AG Sharpston explained that the criterion “‘by an organisation other than the original one’, used in Article 11*bis*(1)(ii) of the Convention, was adopted as a ‘purely functional’ distinction: the option of requiring a fresh authorisation whenever a retransmission ‘procured a fresh circle of listeners’ was deliberately rejected. Nonetheless, that seems to be the essence of the provision’s effect.”²⁹ Hence, according to the Advocate-General that test effectively had the same meaning as the ‘new public’ requirement. Here she referred to the 1978 Guide,³⁰ strikingly citing the same section of the Guide that AG La Pergola had referred to in his opinion, a section that explains subparagraph (iii) and not subparagraph (ii) of Article 11*bis*(1). On the basis of this (mis)interpretation, AG Sharpston concluded that Article 3(1) of the InfoSoc Directive implies a ‘new public’ test.

²¹ Opinion AG La Pergola 9 September 1999, no C-293/98 (*Egeda*), see CJEU 3 February 2000, no C-293/98 (*Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)*) (hereafter referred to as “*Egeda*”).

²² Masouyé Guide 1978, para 11*bis*.11 en 11*bis*.12.

²³ Opinion AG La Pergola (*Egeda*), at para 20.

²⁴ Opinion AG La Pergola (*Egeda*), at para 20.

²⁵ Opinion AG La Pergola (*Egeda*), at para 24.

²⁶ *Egeda*, at para 29.

²⁷ *Egeda*, at para 28.

²⁸ *SGAE* and Opinion AG Sharpston 13 July 2006, C-306/05 (*SGAE*).

²⁹ Opinion AG Sharpston (*SGAE*), at para 50.

³⁰ Opinion AG Sharpston (*SGAE*), at para 50.

The CJEU came to a similar conclusion. Following Article 11*bis*(1)(ii) of the Berne Convention and the 1978 Guide, the CJEU held that a ‘new public’ is required for a retransmission to constitute a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. In line with AG Sharpston’s opinion, the CJEU also mixed up the two subparagraphs of Article 11*bis*(1) and cited a wrong section of the 1978 Guide. Nonetheless, the CJEU applied the ‘new public’ test and defined it as “a public different from the public at which the original act of communication of the work is directed”.³¹ In the case at hand, according to the Court the hotel guests to which the television programs were retransmitted did amount to a ‘new public’.

The CJEU however made no reference to the “economic importance” of the ‘new public’, which according to La Pergola was a relevant requirement. Also, the Court failed to mention the revised version of the Guide, which was published in 2003 several years prior to the Court’s decision.

3.3. A ‘new’ criterion is born

Despite these questionable considerations regarding the ‘new public’, *SGAE* became a landmark decision for the interpretation of Article 3(1) of the InfoSoc Directive and formed the basis for many later decisions. The criterion of a ‘new public’ became an important requirement, defined in later case law as “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”.³² In light of this, in *Premier League* the CJEU held that customers in a public house, such as a bar or restaurant, are a ‘new public’ if a work is broadcast by means of a television set.³³ In the line with this decision *OSA*, the CJEU held that patients of a spa establishment are a new public when they watch a broadcast work in the private rooms of the spa, whereas in the more recent *Reha Training* the Court similarly held in respect of the patients of a rehabilitation operating television sets in its waiting and training rooms³⁴

The criterion also played a role in cases interpreting other copyright directives. In *Airfield*, the CJEU applied the ‘new public’ test to assess whether a particular act requires authorisation of the right holder under the SatCab Directive. According to the CJEU, authorisation is required when a work is received by “a public wider than that targeted by the broadcasting organisation”.³⁵ In this case, the CJEU concluded that the subscribers of a satellite package provider that bundles and further redistributes television channels, are a ‘new public’ relative to the original public of the broadcasts.

3.4. *TVCatchup*: ‘new technical means’

Thus the ‘new public’ test became a recurrent requirement in EU copyright law in cases of retransmission. However, the CJEU acknowledged that the criterion is not absolute and created an intriguing nuance in the *TVCatchup* case.³⁶ *TVCatchup*, an online rebroadcasting service, allowed its users to watch via the Internet near-simultaneous streams of television broadcasts in the United Kingdom, on condition the users could show a valid

³¹ *SGAE*, at para 40, 42.

³² CJEU 18 March 2010, no C-139/09 (*Organismos Sillogikis Diacheirisis Dimiourgou Theatikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai*) (hereafter referred to as “*OSDD*”), at para 38; CJEU 4 October 2011, nos C-403/08 and 429/08 (*Football Association Premier League Ltd, NetMed Hellas SA and Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen / Karen Murphy v Media Protection Services Ltd*) (hereafter referred to as “*Premier League*”), at par 197; CJEU 13 October 2011, C-432/09 (*Airfield NV, Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Airfield NV v Agicoa Belgium BVBA*) (hereafter referred to as “*Airfield*”), at para 76; CJEU 27 February 2014, no C-351/12 (*OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*) (hereafter referred to as “*OSA*”), at para 32.

³³ *Premier League*, at para 19; A. Woods, “The CJEU’s ruling in Premier League pub TV cases – the final whistle beckons: joined cases Football Association Premier League LTD v QC Leisure (C-403/08) and Murphy v Media Protection Services Ltd (C-429/08)”, *European Intellectual Property Review* 2012, 34(3), at 203-207 (note)(Woods 2012 (note)).

³⁴ *OSA*, at para 40; CJEU 31 May 2016, Case C-117/15 (*Reha Training*), at para. 60-61.

³⁵ *Airfield*, at para 76.

³⁶ CJEU 7 March 2013, Case C-607/11 (*ITV Broadcasting Ltd, ITV 2 Ltd, ITV Digital Channels Ltd, Channel 4 Television Corporation, 4 Ventures Ltd, Channel 5 Broadcasting Ltd and ITV Studios Ltd v TVCatchup Ltd*) (hereafter referred to as “*TVCatchup*”).

TV license.³⁷ Thus, recipients of TVCatchup's live streams were already entitled to receive the original broadcasts on broadcast television, which suggested that the online service did not reach a 'new' public. Consequently, if the 'new public' criterion were to be applied, right holders would have been unable to prohibit these online retransmissions.

The CJEU however held that the 'new public' criterion did *not* apply in this case where a work is communicated "under specific technical conditions, using a different means of transmission", that is, the Internet as opposed to the original terrestrial broadcast. According to the Court, "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. In those circumstances, it is no longer necessary to examine below the requirement that there must be a new public, which is relevant only in the situations on which the Court of Justice had to rule in the cases giving rise to the judgments in *SGAE, Football Association Premier League and Others* and *Airfield and Canal Digitaal*."³⁸

Apparently, according to the CJEU, the retransmissions in *SGAE, Premier League* and *Airfield*, did not take place "under specific technical conditions, using different means of transmission." This however can hardly be true. For example, in *SGAE*, the primary transmission was a terrestrial broadcast received by the hotel's main aerial, while the retransmission of the signal was done by means of a hotel cable network. And in *Premier League*, the primary act of transmitting the works at issue was by way of satellite transmission, while the secondary transmission occurred on television screens placed in a public bar. Were these retransmissions not done under "specific technical conditions, using different means of transmission"?

It is unclear under which circumstances the 'new public' and the 'different means of transmission tests are applicable.³⁹ The TV Catchup decision also raises the question whether the Court's technology-based test is actually materially different from its 'new public' criterion. According to Cock and Van Asbroeck it might well be that retransmitting works using different technical means merely creates a legal presumption that there is communication to a new public.⁴⁰

3.5. The extended 'new public' in *Svensson*

While *TVCatchup* may have limited the scope of the 'new public' criterion, *Svensson* gave it a new twist and extended it to secondary acts of 'making available'. Before *Svensson*, the criterion was only applied in cases regarding secondary 'transmissions' of broadcast signals.⁴¹ Accordingly, it could have been argued that the criterion only applied to secondary acts of communication, which require a transmission, and not to secondary acts of making available. However, after *Svensson* this distinction no longer seems to apply.

Svensson concerned the question whether a hyperlink to a protected work is a communication to the public – a highly controversial question that has led to an extensive and continuing debate on the role of hyperlinks in copyright law.⁴² The problem with hyperlinks is that either outcome might have negative implications. If every hyperlink to a protected work would amount to a communication to the public subject to the right holders' prior

³⁷ S. Baggs & S. Hansson, "What's the catch? The CJEU judgment in *ITV v TVCatchup*", *European Intellectual Property Review* 2013, 35(6), at 363-365 (note) (Baggs and Hansson 2013 (note)), at 363-364.

³⁸ *TVCatchup*, at para 39.

³⁹ S. Depreeuw, *The variable scope of the exclusive economic rights in copyright*, Information Law Series, The Netherlands: Kluwer Law International (2014) (Depreeuw 2014), at 464.

⁴⁰ M. Cock and B. Van Asbroeck, "Le critère du « public nouveau » dans la jurisprudence de la Cour de justice », IRDI 2015-4, 259-278 at 276.

⁴¹ See *SGAE, Premier League, OSDD, Airfield* and *OSA*.

⁴² Lionel Bently et al., "European Copyright Society, Opinion on The Reference to the CJEU in Case C-466/12 *Svensson*", 15 February 2013 (European Copyright Society 2013); Alexander Tsoutsanis, "Copyright and linking can tango", *Journal of Intellectual Property Law & Practice* 2014, 9(6), at 495-509 (Tsoutsanis 2014); ALAI Executive Committee, "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 on 16 September 2013 (ALAI 2013).

authorisation, this would clearly have disastrous consequences for the functioning of the World Wide Web.⁴³ On the other hand, if hyperlinks would under no circumstances amount to an infringing act, the objective of the InfoSoc Directive to provide a high level of protection for authors might be compromised. Given the importance and complexity of the issue, it is surprising that the CJEU came to its decision without an opinion of an Advocate General.⁴⁴

According to the CJEU, a hyperlink to a protected work provides “direct access” to the work and therefore qualifies as an “act of communication”.⁴⁵ A hyperlink also communicates a work to a ‘public’ because the Internet users having access to the link are “an indeterminate and fairly large number of recipients”.⁴⁶ However, in order to qualify as an act of communication to the public, a work has to be communicated to a ‘new public’, that is a public that “has not been taken into account by the copyright holder when it authorised the initial communication to the public.”⁴⁷ According to the CJEU, hyperlinks to works freely available online do not satisfy this requirement. All Internet users are able to access works freely available on the Internet, and are deemed to be “part of the public taken into account by the copyright holders when they authorised the initial communication.”⁴⁸ A hyperlink to such a work will, according to the CJEU, not expand the group of recipients.⁴⁹ In other words, all Internet users are deemed to be part of the same (potential) public.⁵⁰

The CJEU further specified that a hyperlink to a protected work does constitute a communication to the public – and satisfy the ‘new public’ test – if it links to a restricted or secured work, by “circumventing restrictions put in place by the site on which the protected work appears in order to restrict public access”.⁵¹ In these circumstances, the hyperlink constitutes an intervention without which the Internet users would not have been able to access the work and a ‘new public’ is reached. According to the CJEU, this applies to all types of hyperlinks: simple, deep, embedded and framed hyperlinks.⁵²

Following *Svensson*, the CJEU issued two further decisions regarding the role of hyperlinks in copyright law. Both in *BestWater* and in *C More*⁵³ the Court held on to its reasoning in *Svensson*. Apparently, the CJEU has made the ‘new public’ criterion an integral and decisive requirement of Article 3(1) of the InfoSoc Directive, which is applicable to both the communication and the making available right.

A highly anticipated, still pending referral is the case of *GS Media*, which concerns the debated question whether a hyperlink to unlawful content is a communication to the public.⁵⁴ In this case, Geen Stijl, a Dutch blog known (and feared) for its controversial, provocative and often unsavoury blog posts, placed a hyperlink to copyright

⁴³ Alain Strowel & Vicky Hanley, “Secondary liability for copyright infringement with regard to hyperlinks”, in Alain Strowel, *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Cheltenham/ Northampton: Edward Elgar Publishing Limited 2009, 71-109 (Strowel and Hanley 2009), at 71; Emanuela Arezzo, “Hyperlinks and making available right in the European Union – What Future for the Internet after *Svensson*?”, *IIC* 2014, 45(5), 524-555 (Arezzo 2014), at 530.

⁴⁴ E. Rosati, “Luxembourg, we have a problem: where have the Advocates General gone?”, *Journal of Intellectual Property Law & Practice* 2014, 9(8), at 619 (Rosati 2014), at 619; J.M.B. Seignette, “Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB”, *Intellectuele Eigendom & Reclamerecht* 2014, 59 (note) (Seignette 2014 (note)).

⁴⁵ CJEU 13 February 2014, no C-466/12 (*Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB*) (hereafter referred to as “*Svensson*”), at para 18-19.

⁴⁶ *Svensson*, at para 22

⁴⁷ *Svensson*, at para 21, 24.

⁴⁸ *Svensson*, at para 26-27.

⁴⁹ *Svensson*, at para 27-28; Seignette 2014 (note).

⁵⁰ *Svensson*, at para 26-27; Seignette 2014 (note); Arezzo 2014, at 19; P. Stevens, “A hyperlink can be both a permissible and an infringing act at the same time”, *Journal of Intellectual Property Law & Practice* 2014, 9(7), at 548-549 (note) (Stevens 2014 (note)), at 548-549; G. Predonzani, “Connecting Hyperlinks to Copyright Law”, *European Law Reporter* 2014, 2, at 34-41 (note) (Predonzani 2014 (note)), at 38-39.

⁵¹ *Svensson*, at para 31.

⁵² *Svensson*, at para 29; A.R. Lodder, “Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB”, *Computerrecht* 2014, 75 (note) (Lodder 2014 (note)).

⁵³ CJEU 21 October 2014, no C-348/13 (*BestWater International GmbH v Michael Mebes and Stefan Potsch*); CJEU 26 March 2015, no C-279/13 (*C More Entertainment AB v Linus Sandberg*).

⁵⁴ Dutch Supreme Court 9 January 2015, no 14/01158, NJB 2015/748 (*GS Media BV v Sanoma Media Netherlands BV*) (hereafter referred to as “*GS Media*”).

protected nude pictures of a Dutch starlet, which were posted unlawfully on an Australian web server.⁵⁵ The main question referred to the CJEU in this case is whether the *Svensson* holding also applies to hyperlinks pointing to works posted online without the copyright holder's permission. Interestingly, the opinion of AG Wathelet in *GS Media*, which was issued on 6 April 2016, radically departs from *Svensson* and its progeny, by arguing that placing a hyperlink is not an "indispensable intervention without which [the] users could not enjoy the works", and therefore does not qualify as an act of communication. Whether or not a (new) public is reached would thus be irrelevant. The Court's pronouncement in this case is expected in the second half of 2016.

4. Critique of the 'new public' criterion

4.1. Historical: misinterpreting the Berne Convention

In light of the way the 'new public' requirement has emerged in EU copyright jurisprudence, i.e., based on a misunderstanding of Article 11*bis*(1) of the Berne Convention, it is not surprising that the legality of the criterion is disputed.⁵⁶ Indeed, in our opinion the test is difficult to reconcile with the Convention. In 1948, it was explicitly rejected by the Brussels Revision Conference, and replaced by another, more functional requirement that is included in the current text of Article 11*bis*(1)(ii) of the Berne Convention, namely that of 'another organisation than the original one'.

One of the main issues of contention during the Brussels Conference was the retransmission of broadcast signals. Different proposals were discussed relating to the question whether or when such a retransmission amounted to a new act of communication to the public and thus would no longer be part of the initial communication. Belgium suggested that a new act of communication to the public arises if a rebroadcast "procure[s] a fresh circle of listeners"⁵⁷ – in other words, if a broadcast reaches a 'new public', authorisation of the right holder would be required. This proposal led to negative responses, the main argument being that the criterion would be impracticable; it would be (very) difficult to distinguish between an 'original' and a 'new' public.⁵⁸ Monaco, the Netherlands and Luxembourg proposed instead to focus on the 'organisation' making the (re)broadcasting as the decisive factor.⁵⁹ Belgium then came with a new proposal, in which the 'new public' criterion was replaced with the requirement of the "organisation other than the original one". This implied that a new act of communication to the public would arise if a work is communicated by an organisation other than the organisation that conducted the initial communication. This criterion would be easier to apply in practice because the identity of the retransmitting organisation can usually be easily ascertained.⁶⁰ The Subcommittee on Broadcasting and Mechanical Instruments of the Brussels Revision Conference adopted the Belgian proposal by 12 against 6 votes.⁶¹ The Brussels Revision Conference thus rejected a test of 'new public' as part of Article 11*bis*(1)(ii) of the Berne Convention.

As opposed to EU law, the provisions of the Berne Convention are not subject to an overarching system of judicial review. Interpretation of international law follows the rules of the Vienna Convention on the Law of Treaties.⁶² However, national laws and case law may provide examples of how the provisions of the Berne Convention should be interpreted. Indeed, several national courts have in the past interpreted Article 11*bis*(1)(ii)

⁵⁵ Kamiel J. Koelman, "Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v Retriever Sverige AB", *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2014, 3, at 87-89 (note) (Koelman 2014 (note)).

⁵⁶ ALAI Executive Committee, "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", proposed to the Executive Committee and adopted at its meeting, 17 September 2014 (ALAI 2014); ALAI Executive Committee, "Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the Internet", adopted by the Executive Committee on 17 June 2015 (ALAI 2015); M.J. Ficsor, "Svensson: Honest attempt at establishing due balance concerning the use of hyperlinks - spoiled by the erroneous "new public" theory", 5 May 2014, available at http://www.copyrightseesaw.net/archive/?sw_10_item=63 (Ficsor 2014); J. Rosen, "The CJEU 'new public' criterion? National judges should not apply it, says Prof Jan Rosen", 15 April 2015, available at <http://ipkitten.blogspot.nl/2015/04/the-cjeu-new-public-criterion-national.html> (Rosen 2015).

⁵⁷ *Documents* 1948, at 266. Ricketson 1987, at 448.

⁵⁸ *Documents* 1948, at 289, in Gerard J.H.M. Mom, *Kabeltelevisie en auteursrecht*, Koninklijke Vermande, Lelystad (1990) (Mom 1990), at 23.

⁵⁹ *Documents* 1948, at 289, in Mom 1990, at 22.

⁶⁰ Ricketson 1987, at 449.

⁶¹ *Documents* 1948, at 290, in Mom 1990, at 23.

⁶² Articles 30-33 of the Vienna Convention on the Law of Treaties, Vienna on 23 May 1969.

of the Convention in cases of cable retransmission. Belgian, Dutch and Swiss supreme courts all came to the conclusion that the only conditions for Article 11bis(1)(ii) BC to apply are that a communication is made (1) to a public, and (2) by an organisation other than the original one.⁶³ Following the legal history of Article 11bis(1)(ii), the courts held that there is no room for other requirements. The Supreme Courts in the Netherlands and Switzerland even explicitly rejected the ‘new public’ criterion. These authoritative judicial decisions strongly suggest that the CJEU’s ‘new public’ test has no basis in the Berne Convention.

Although the documents of the Brussels Revision Conference and the national judgments relate to Article 11bis(1)(ii) of the Berne Convention, which protects the right to rebroadcast and to communicate a broadcast work to the public by wire, the same arguments can be raised against applying the ‘new public’ test in other cases of retransmission. For each communication, it will be difficult if not impossible to make a functional distinction between an ‘original’ and a ‘new’ public, even more so on the Internet where such distinctions are not merely impracticable, but practically non-existent.

4.2. Conceptual: mixing scope rules and contractual rules

As explained in section 3, the CJEU has defined the ‘new public’ as “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”.⁶⁴ Applying this self-developed test the CJEU has held that a ‘new public’ is reached in case a television broadcast is screened to the customers of a public house (i.e. restaurant or bar) or to the patrons of a spa establishment or a rehabilitation centre,⁶⁵ not however in case a hyperlink points to a work that is freely available online.⁶⁶

Although the ‘new public’ doctrine has its origins in the valid argument that authors have a right to control uses of their works on *distinct markets*,⁶⁷ the way in which the test is currently framed by the Court is confusing and essentially flawed. The ‘new public’ test links the scope of the (secondary) communication right to the authorisation by the authors for the initial (primary) act of communication. It thus introduces a subjective – either contractual or mental – element in the definition of the exclusive right. Following the CJEU’s interpretation, an act of secondary communication to the public occurs whenever the authors’ permission for the initial act of communication does not extend to the secondary act, or rather – in the imprecise parlance of the Court – if this secondary act ‘was not taken into account’ by the author.

This makes the CJEU’s ‘new public’ conceptually unsound. The exclusive rights protected under copyright are absolute rights that apply to, and can be enforced against third parties. Like property rights, these rights should be crafted in precise and objective terms, the meaning of which ought not depend on contractual dealings or right holders’ intentions that cannot normally be known by third parties. Note that in the EU copyright licenses are not recorded in public registers or otherwise publicized, in the same way as trademark and design right licenses.⁶⁸

By linking the scope of the right of communication to a subjective element, the ‘new public’ test lacks legal certainty. Moreover, the test as phrased by the Court is essentially circular.⁶⁹ Whether or not an author ‘takes into account’ acts of subsequent retransmission in his initial permission allowing primary transmission, will largely depend on the legal qualification of such secondary act. If it is not deemed an independent restricted act,

⁶³ Dutch Supreme Court 30 October 1981, no 11.739, NJ 1982, 435, Auteursrecht 1981/5:100, RIDA 112 (1982):168 (*Amstelveense Cable I*); Dutch Supreme Court 25 May 1984, no 12.281, NJ 1984, 697, AMR 1984/3:62, AA 1986: 628, GRUR Int. 1985:124 (*Amstelveense Cable II*); Belgian Supreme Court 3 September 1981, Pas, 1982, I, 8, GRUR Int 1982: 448 (*Coditel / Cine Vog Films*); Swiss Supreme Court 20 January 1981, GRUR Int. 1981: 404 (*SUISA/Rediffusion SA*); Swiss Supreme Court 20 January 1981, GRUR Int. 1981: 642 (*ORF/PTT en Rediffusion SA*).

⁶⁴ *Premier League*, at para 197; *Organismos*, at para 38; *Airfield*, at para 76; *OSA*, at para 32.

⁶⁵ See cases mentioned in footnotes 35-37.

⁶⁶ *Svensson*, at para 27-28;

⁶⁷ See AG La Pergola; see also Depreeuw 2014, p. 466.

⁶⁸ See, for example, art. 22(5) of the EU Community Trademark Regulation: ‘On request of one of the parties the grant or transfer of a licence in respect of a Community trade mark shall be entered in the Register and published.’

⁶⁹ See also D. Visser, “Openbaarmaken met Ketchup”, *AMI* 2013-2, p. 41-51, at 45.

he need not, and will not, ‘take it into account’. Whether or not a new public is or was ‘taken into account’ by the right holder should, therefore, not play a role in delineating the right of communication to the public.

Nevertheless, whether a ‘new public’ is actually addressed by an act of retransmission may – and in practice often will – play a role in determining the amount of remuneration contractually due to the right holder. Also, in so far as a right holder has clearly ‘taken into account’ retransmission to a new public, this might imply prior authorisation. Conversely, if a contract between right holder and user clearly rules out retransmission outside the private circle, this will also have contractual ramifications. These contractual considerations should however be clearly distinguished from and not be confused with the scope of the exclusive right of communication.

4.3. Economic: exhaustion on the Internet

The ‘new public’ criterion also seems to be at odds with Article 3(3) of the InfoSoc Directive, which incorporates the ‘non-exhaustion’ rule: the right of communication to the public cannot be exhausted. This rule reflects early case law of the Court of Justice. In *Coditel I* – a case concerning cross-border cable retransmission of broadcast television programs – the Court held that the broadcasting right at issue was not subject to exhaustion.⁷⁰ This rule was, much later, codified in the InfoSoc Directive in Recital 29 and Article 3(3). As a consequence, within the limits set out by law, authorisation of the right holder is required each time a work is communicated or made available to the public.⁷¹

The principle underlying exhaustion is that right holders should not be able to exploit a work once he has realised the full economic value of the work by putting it on the market.⁷² It would inhibit the Internal Market if a right holder were able to further control a work once he has exploited its distribution right. The exhaustion principle applies to the distribution right, but *not* to the right of communication to the public. According to Recital 29 of the InfoSoc Directive “[t]he question of exhaustion does not arise in the case of services and on-line services in particular”.⁷³ The right holder should be able to control each communication to the public, including the ability to make a work available to the public.⁷⁴

With the rise of digital technology and digital goods, the question has arisen whether the exhaustion principle applies similarly in the online world. This question was central to the *UsedSoft* case, which concerned the sale of ‘used’ licenses for the download of software programmes. According to the CJEU, the distribution right of a computer programme is exhausted once the right holder sells the license to download and use the programme to another party for an unlimited time. Whether or not the *UsedSoft* exhaustion doctrine also applies outside the realm of the Computer Programs Directive, however, remains uncertain.

Carried to the extreme, the ‘new’ public criterion developed by the CJEU effectively would imply a rule of exhaustion of the communication right.⁷⁵ This becomes particularly clear in the case of *Svensson*, where the CJEU considered that all internet users are potential recipients of online – freely available – communications, and therefore part of the same ‘public’. Once a work has been communicated freely on the internet, the requirement of a ‘new public’ rules out any further acts of (secondary) communication to the public online, since no ‘new public’ will be reached. The right holder may preserve the right to oppose unauthorised reproductions or communications to the public by ‘different technical means’, but on the internet the right of communication to the public is effectively exhausted.

⁷⁰ CJEU 18 March 1980, no C-62/79 (*Coditel I*) (hereafter referred to as “*Coditel I*”).

⁷¹ Explanatory Memorandum, at 27 para 4.

⁷² P. Bernt Hugenholtz, “Adapting copyright to the information superhighway”, in: P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Den Haag/Londen/Boston: Kluwer Law International 1996, 81-102, at 95-99.

⁷³ Recital 29 of the InfoSoc Directive.

⁷⁴ This conclusion was already drawn in EU’s Green Paper on copyright in the information society. The Commission suggested that exhaustion should not apply to intangible means of transmission, also known as services. This suggestion is later adopted in case law of the CJEU and the InfoSoc Directive.

⁷⁵ ALAI 2014; ALAI 2015; Ficsor 2014; Rosen 2015.

5. Conclusion: no need for a ‘new public’.

In conclusion, the ‘new public’ test is flawed for at least three reasons: historical, conceptual and economic. Moreover, in our opinion the right of communication to the public can operate perfectly well without a ‘new public’ requirement. International and European copyright law already provide robust criteria to distinguish retransmissions that are covered by the right of communication, from those that are not; a ‘new public’ test is not necessary to make this distinction.

Like other core notions in copyright law, the right of communication to the public is, essentially, a normative concept, which should be defined and interpreted in accordance with its goals or rationales. For the rights harmonized by the InfoSoc Directive these goals are fivefold. The directive aims, first, to be consistent with international law, in particular with the WCT and the Berne Convention.⁷⁶ Secondly, its stated goal is to provide a high level of protection for right holders,⁷⁷ as is emphasized in many decisions of the CJEU.⁷⁸ The third objective is to foster digital and technological developments and to create a favorable environment for innovation, especially in the online world.⁷⁹ The fourth and fifth objectives of the directive are enhancing legal certainty, by harmonizing the different copyright laws in Member States, and striking a fair balance between right holders and users of a work.⁸⁰ This fair balance is generally reflected in the provisions regarding exceptions and limitations.

As the previous discussions show, the ‘new public’ test developed by the CJEU has its origins in economic reasoning. According to AG La Pergola, the right of communication to the public ought to protect any “independent economic exploitation for financial profit” – in other words: authors should be given control over each separate market where their works are being used. This – in the opinion of the authors of this article, correctly – reflects the aim of the InfoSoc Directive to guarantee that authors or performers “receive an appropriate reward for the use of their work”.⁸¹ ‘Independent exploitation’, however, does not imply a criterion of ‘new public’. Works may be ‘exploited’ in many different ways, by different media on distinct markets, while at the same time aiming for, or even reaching, precisely the same ‘public’. This is indeed a typical feature of modern-day’s multimedia market place, that the ‘public’, i.e. consumers, wish to consume, and pay for usage of the very same works offered by many different media and in multiple formats: on broadcast television, on dvd’s, via Netflix, on cable, on mobile platforms, etcetera. While all these distinct services communicate to the same ‘public’, they are acts of “independent economic exploitation for financial profit” – and should be treated accordingly under copyright law. Whether a ‘new’ public is actually reached by a service, should be irrelevant to a finding of copyright infringement. What should be decisive is whether the service *exploits* the work by extracting substantive economic value from the use of the work.

This essentially economic test is reflected in art. 11*bis*1(ii) of the Berne Convention, which covers “any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one”. It is also in line with the more nuanced approach of the CJEU in the *TVCatchup* case, which distinguishes separate means of communication (i.e. separate media) rather than separate audiences.

Whether or not a protected act of communication to the public occurs in cases of retransmission should, therefore, be determined on the basis of the following criteria. In the first place, as the CJEU has consistently held, there should be an ‘act of communication’, which includes – according to the CJEU – acts of (re)transmission and making available. In the second place, a ‘public’ (i.e. a ‘fairly large number of people’ outside the scope of a closed circle of family and friends) should be reached. In the third place, the ‘intervention’ should be done by another than the original communicating party.

⁷⁶ Recital 15 of the InfoSoc Directive.

⁷⁷ Recital 9 of the InfoSoc Directive.

⁷⁸ See e.g. *Premier League*, at para 186, and *Svensson*, at para 17.

⁷⁹ Recitals 2 and 5 of the InfoSoc Directive.

⁸⁰ Recitals 7 and 31 of the InfoSoc Directive.

⁸¹ Recital 10 of the InfoSoc Directive.

Applying these three criteria to the retransmission cases so far decided by the CJEU would lead to exactly the same results – without however the need to resort to the ‘new public’ test. Hotel and spa television would still amount to separate acts of communication to the public, as would screening football matches in pubs or in training centres, streaming broadcast television over the internet, and transmitting bundles of television channels to subscribers of a satellite package.

Rigorously applying the same set of criteria (act of communication; public; other organization), to acts of hyperlinking to copyright protected content, requires a more delicate analysis. However, as we shall see, here too we can do without a ‘new public’ test. A hyperlink generally reaches a ‘public’ because internet users can be regarded as a “fairly large number of people, which do not belong to the same closed circle of family and friends”. A hyperlink may also be deemed an ‘intervention’ by another party than the one initially placing the work online. The crucial issue with hyperlinks is the first criterion, the ‘act of communication’. According to the CJEU, both ‘intentional interventions’ and the provision of ‘direct access’ amount to acts of ‘communication’. However, this analysis overlooks the fact that Article 3(1) is framed as a right of communication, which in our opinion implies a more active communicative act than simply providing direct access to a work. Even though the right of communication encompasses a right of making works available online, this right should not be expanded into a general right of providing ‘access’ to a work. Such a broad interpretation would confuse the communication right with other exploitation rights such as the distribution and lending right, and would, for example, imply that a public library commits an act of communication when it “allows access to its collection or reading rooms.”⁸²

Like more traditional forms of communication to the public, the right of making available online requires an active intervention on the part of the ‘communicator’. Indeed, this is already implicit in the words *making available*. According to the European Copyright Society, such an active intervention would, for example, be the “placing the work into an electronic network or system from which it can be accessed”.⁸³ Absent such an active act, there is no act of communication. In line with the Society’s opinion, Advocate-General Wathelet opining in the *GS Media* case concludes that a hyperlink amounts to an act of making available only if it is an ‘indispensable intervention’, that is, if it is the only way by which the work(s) at issue can be accessed.⁸⁴

In light of this, the authors of this article would not consider an ordinary hyperlink an ‘act of communication’ because it merely provides access to a work. There is no active intervention and thus no ‘act of communication’, even if the hyperlink facilitates connecting the work to its audience. By implication, there is no need for the corrective criterion of a ‘new public’ (not being reached) – as applied by the CJEU in *Svensson* – to exempt hyperlinks from the scope of the communication right. By contrast, if the posting of a hyperlink does have the effect of opening up a work to a public, for example by providing direct access to a work behind a paywall, this could be qualified as an act of communication to the public because there is an active intervention.

In neither situation would a ‘new public’ test be needed. In other words, removing the ‘new public’ test would increase legal certainty, without materially affecting the scope of the communication right. Dropping the ‘new public’ test, and focussing more on relevant media uses, does beg the – highly contentious – question of content aggregation. As right holders – especially, but not exclusively in the realm of newspaper publishing – do not fail to point out, aggregation creates new markets for copyright protected content. Why should these new markets not be controlled by the communication right, or perhaps give rise to a special right of remuneration?⁸⁵ Although

⁸² European Copyright Society 2013, para 26.

⁸³ See European Copyright Society 2013, para 35; Arezzo 2014.

⁸⁴ See AG Wathelet 6 April 2016, C-160/15 (*GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*) (hereafter referred to as (*GS Media*)), para 73.

⁸⁵ See High Council for literary and artistic property (France), Report of the mission on the revision of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, December 2014, available at <http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-relative-a-l-avenir-de-la-directive-2001-29-Societe-de-l-information>. See also Matthias Leistner, „Reformbedarf im materiellen Urheberrecht: Online-Plattformen und Aggregatoren“, ZUM 2016, 580.

the authors of this article acknowledge that such claims might be justifiable, we believe that the other aims of the InfoSoc Directive, in particular to foster digital and technological developments, would militate against such an expansive interpretation of the communication right. Instead, we suggest seeking remedies for clearly parasitic or otherwise unfair forms of aggregation in the law of unfair competition. While this body of law is, for the time being, largely unharmonized, the Unfair Commercial Practices Directive might already provide a remedy against certain forms of ‘unfair hyperlinking’. For example, a framed or embedded hyperlink would probably amount to an unfair practice if it leads internet users to believe that a work originates from another website than where the work is originally posted – but only in a business-to-consumer relationship.⁸⁶ At the purely national level the law of unfair competition or similar doctrines may provide additional remedies for right holders against services that systemically, and with intent or negligence, ‘link’ users to works made available illegally.⁸⁷

In our opinion, rather than stretching the right of communication to the public beyond its original scope and intent, it would be better for the EU legislature – not the CJEU – to develop appropriate harmonized rules of unfair competition law that protect right holders and intermediaries against unfair ‘linking’ practices, while leaving the integrity of the world wide web intact.

⁸⁶ European Copyright Society 2013, para 57.

⁸⁷ For example, the Court of Appeal of Amsterdam ruled in *GS Media* that GeenStijl did not infringe copyrights, but commit an unlawful act (tort). See Court of Appeal of Amsterdam 19 November 2016, ECLI:NL:HR:2015:841(*GS Media B.V. v. Sanoma Media Netherlands B.V.*).