

# **Copyright in the Digital Age**

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**CONCEPT AND RIGHT OF COMMUNICATION TO THE  
PUBLIC – NEW DEVELOPMENTS IN THE CJEU’S CASE LAW**

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**I. THE ERRONEOUS „NEW PUBLIC”  
THEORY: FROM HOTEL ROOMS TO  
HYPRLINKS - HONEST ATTEMPTS  
TO CORRECT IT (WITH MIXED  
SUCCESS)**

# The *SGAE* – *TvCatchup* – *Svensson* tryplich

- In *SGAE* (case C-306/05), the CJEU invented the „new public” theory in **obvious conflict with the Berne Convention and the WCT** in which there is no such criterion of the right of communication to the public and the right of making available to the public and by this **it also extended the theory of exhaustion of rights in a way which is in conflict with the international treaties.**
- In *TvCatchup* (case C-607/11 ), the Court tried to correct it through the **invention of the „special technical means theory”** which is also in conflict with the plain language of the treaties.
- In *Svensson* (case C-466/12 ), the application of the „new public” theory would **have led to abolishment of the right of making available right** for any works which has been uploaded on the Internet; the CJEU **tried to avoid this and also to „save the Internet”** through inventing the „restricted access” theory in **introducing by this a (prohibited) formality of protection.**

# The Berne Convention is clear: no criteria of „new public” in case of retransmission

- **Article 11bis (2) of the Berne Convention:** [a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing:... 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”**; (Emphasis added)
- The retransmission or rebroadcasting may be made **to the same public**; it may be made **to a part of the same public only**, it may be made **to the same public or a part thereof along with a public not covered** by the original broadcast), and it may be made **truly to a new public**. All these cases are covered without any doubt whatsoever by Article 11bis(1)(ii) of the Berne Convention.
- The right covers **any new act of communication or retransmission to the public** , and **not only communication or retransmission to a new public**.

# „New public” – the source of the unfortunate error

- In the **SGAE judgment** (Case C-306/05), the **CJEU did not perform any interpretation of Article 11*bis*(1) of the Berne Convention** on the basis of its text and negotiation history (the so-called „preparatory work”).
- **It based its interpretation exclusively on the old WIPO Guide published in 1978 as an introductory paper for developing countries – stating that a WIPO publication is to be recognized as a reliable source of interpretation.**
- **Apparently, there was nobody to warn the judges**
  - that they had **misunderstood an example as a definition.**
  - that, if they wanted to trust themselves to WIPO documents, **they should have made use of the several documents adopted by the competent bodies of the Berne Union after 1978, and**
  - that, **if they still wanted to use only the WIPO Guide to the Berne Convention, they should not have used the out-of-date one but the new Guide published in 2003, that is 25 years later.**

# ***TvCatchup*: honest attempt of correction by the „specific technical means” theory – but in contradiction with Berne**

In *TvCatchup* (case C-607/11 ) judgments the CJEU has stated as follows:

**The concept of ‘communication to the public’,... must be interpreted as meaning that it covers a retransmission of the works included in a terrestrial television broadcast**

- where the retransmission is made **by an organisation other than the original broadcaster,**
  - **by means of an internet stream** made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server, [„because it is a retransmission by another „specific technical means”]
  - **even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver.** [that is, there is no „new public”] (Emphasis added.)
- **But the Berne Convention makes it clear that retransmission by the same technical means to the same public – that is not necessarily a new one – is equally covered:** under Article 11*bis*(1)(ii), there is an **exclusive right of rebroadcasting** (which is obviously done by **the same technical means as broadcasting**).

# ***Svensson*: honest attempt to „save” both copyright and the Internet – but by introducing a formality (and eliminating all business methods, except one?)**

In *Svensson* (case C-466/12 ), the CJEU rules as follows:

**Article 3(1) of Directive 2001/29/EC... [on the right of communication – and making available – to the public] on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’, as referred to in that provision.**

- **The application of the „new public” and „specific technical means” theories would have led to abolishment of the right of making available right for any works which has been uploaded on the Internet; the CJEU tried to avoid this and also to „save the Internet” through inventing the „restricted access” theory -- introducing by this a (prohibited) formality of protection.**
- **As a result, no other business method would be possible but making available works with restricted access (the concept of which was not duly clarified).**

# Ideas to get rid of *Svensson's „Procrustes bed”*

- **Using existing exceptions** (such concerning quotations or the use of articles, etc. on political, economic or religious topics) .
- Working out and adopting a well-established **new exception** in harmony with the three-step test under Article 5(5) of the Information Society Directive.
- **Interpreting „restriction of access”** as the condition introduced by the court to avoid exhaustion of the right of making available to the public (which, otherwise, is not allowed by the international treaties and the Information Society Directive) – considered by several commentators as being reduced to technological protection („paywalls”) – **in a more open-ended way to include any clear forms of prohibition of making available of the works or objects of related right by others (in particular for directly or indirectly commercial purposes) without authorization.**
- To avoid a solution that may qualify as a formality, to **apply the implied license doctrine** in a fine-tuned way.



# The strange *BestWater* order

## Order of the CJEU in the BestWater case (C-348/13)

The embedding of a protected work which is publicly accessible on a website in another website by means of a link and using the framing technology, as in the case of dispute of the main proceeding [BY THE COMPETITOR FOR ITS OWN COMMERCIAL PURPOSES OF THE Rightholder!] by itself does not constitute communication to the public within the meaning of Article 3 (1) of Directive 2001/29 to the extent that the relevant work is neither communicated to a new public nor is it communicated using a specific technical means which is different from that of the original communication. (Unofficial translation, since the order is only available in French and German.)

- **The Court** settled the case by a simple order – rather than by a judgement – because it **considered it obvious on the basis of the „settled case law“**.
- In fact, what is obvious is that under the international treaties and the EU directives, **neither a „new public“ nor a „specific technical means“ is a condition** of the concept and right of communication to the public under the international treaties and the Information Society Directive.

**II. HOPE FOR THE REPLACEMENT  
OF THE „NEW PUBLIC”, „SPECIFIC  
TECHNICAL MEANS”, „RESTRICTED  
ACCESS” TRPTYCH WITH THE  
TANDEM OF THE IMPLIED LICENSE  
DOCTRINE AND INNOCENT  
INFRINGEMENT DEFENSE**

# Some corrections in *GS Media*

In the *GS Media* case (Case C-160/15) another chamber of the CJEU has made **certain corrections in contrast with the previous case law of the Court**. The summary of the judgement reads as follows:

Article 3(1) of Directive 2001/29/EC... must be interpreted as meaning that, **in order to establish whether** the fact of posting, on a website, **hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’** within the meaning of that provision, **it is to be determined whether** those links are provided **without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature** of the publication of those works on that other website **or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.** (Emphasis added.)

# Opening for the application of the of implied license doctrine and innocent infringement defense?

- In **paragraph 42 of the *GS Media* judgement**, the CJEU has indicated the following reason for which the right of communication to the public is not applicable where owners of rights make available a work or object of related rights online freely (without restricting access to it): „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.”
- **Is there any basis whatsoever for „considering” such consent of the copyright holders where they clearly state the opposite (not necessarily along with a „paywall”) on their websites** (for example – on the basis of their rights of authorization or prohibition – they clearly prohibit the use of their works through other websites for direct or indirect commercial purposes)?
- **GS Media has raised the possibility of applying the implied license doctrine and the innocent infringement defense („a person who did not know or could not reasonably have known”) – instead of the „new public”, „specific technical means” and „restricted access” theories.**

# ***Soulier*: chance to replace the „new public” theory with the implied license doctrine? (1)**

In *Soulier* (Case C-160/15), the CJEU has quite clearly referred to an implied license basis of its *Svensson* judgment:

34 ...[S]ubject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, **any use of a work carried out by a third party without... prior consent must be regarded as infringing** the copyright in that work (see, to that effect, judgment of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraphs 24 and 25).

35 Nevertheless, Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that **those provisions also allow that consent to be expressed implicitly**. (Emphasis added.)

For the reference to *Svensson* in this context, see the following slide:

## ***Soulier*: chance to replace the „new public” theory with the implied license doctrine? (2)**

### ***Soulier*:**

In paragraph 36, the Court has referred to *Svensson* as an example of the application of implied licenses in this way: **“the Court held that, in a situation in which an author had given *prior, explicit and unreserved* authorisation to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public.”**

# THANK YOU

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