HYPERLINKING: CASE C-466/12 *SVENSSON AND OTHERS* AND ITS IMPACT ON SWEDISH COPYRIGHT LAW

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1. INTRODUCTION

Hyperlinking, i.e. a reference to content on the Internet that the reader can directly follow, e.g. by clicking,[1] is intimately related to the conception of the Internet as a *network*, as hyperlinks constitute paths leading users from one location to another. Any legal regulation of hyperlinking thus has the potential to interfere with the operation of the Internet, and therefore with access to information, and freedom of expression.[2]

This article is based on the author's presentation held at a seminar at the conference *20 Years of Swedish Legal Integration in the EU: A Two-way Street*, organized by the Swedish Network for European Legal Studies in February 2015. The seminar focused on the impact of case law from the Court of Justice of the European Union (CJEU) on national copyright law.[3] This article will concentrate on one of the themes discussed at the seminar: the interpretation provided by the CJEU on a specific right in copyright[4] law – the right of *communication*

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1 See, *e.g.*, Westman, "Länkning som upphovsrättslig överföring till allmänheten?" in Svensk Juristtidning 2012 p. 800.

2 Cf. ALAI Report and Opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet, available at http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf.

3 Together with doctoral candidate Daniel Westman, the author convened and moderated a panel discussion on EU Copyright. The panelists were Karin Cederlund, Partner and Attorney-at-law at Sandart & Partners, Professor Jan Rosén, Stockholm University and Jur. Dr. Ulrika Wennersten, Lund University.

4 In this article, unless otherwise specified, the terms "copyright" or "work" also refer to so-called related or neighbouring rights.

to the public – in relation to hyperlinking. As developed in this article, the interpretation of the right of communication to the public provided by the CJEU does not only reflect the need to *balance* the rights of authors and other right holders' interests in relation to other – often competing or opposing – public interests.[5] It is also an example of the increased importance of case law from the CJEU as a source of law at the expense of traditional, national sources such as national preparatory works, and established case law from the Swedish Supreme Court. It is recognized that the existence of the CJEU and the effect of its case law make the relationship between norms in directives and national law fundamentally different from the relationship between norms in international treaties and national law.[6] Thus, the development of the right of communication to the public from its recognition in international and EU law, via its implementation at national level, brings to the fore interesting methodological themes.

2. HYPERLINKING AND THE RIGHT OF COMMUNICATION TO THE PUBLIC

2.1 General

In the field of law we are from time to time faced with challenges which do not easily find a satisfactory solution within the current legal framework, at least unless one thinks in untraditional ways. Handling hyperlinks under current copyright law has been held to constitute such a challenge. Legal scholars have been discussing the issue ever since it appeared with the birth and popularisation of the Internet over two decades ago.[7]

Hyperlinks are generally held to be the basic tools for navigating and finding content on the Internet, irrespective of whether the links are manually or auto-

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5 Cf Axhamn, "Internet Linking and the Notion of 'New Public'" in Nordiskt Immateriellt Rättsskydd 2014 p. 110 *et seq*.

6 See, *e.g.* Axham, "Striving for coherence in EU intellectual property law", in Liber Amicorum Jan Rosén (forthcoming).

7 See, *e.g.*, Rognstad, "Linking – a Gordian knot of copyright law", in Liber Amicorum Jan Rosén (forthcoming), Rosén, "Ansvar för utnyttjanden av skyddade prestationer i nätverk. Noteringar i anslutning till Högsta domstolens prövning av länkning till MP3-filer" in Svensk Juristtidning 2000 p. 805 *et seq*., Rosén, "Länkning till streamade TV-program – immaterialrättsligt skydd eller fri access på nätet", Medie- och upphovsrätt, skrifter utgivna av Juridiska fakulteten vid Stockholms universitet nr 78, 2012, p. 162 *et seq*., Rognstad, "Opphavsrettslig ansvar for linker på Internett. Noen betraktninger i lys av norsk Høyesteretts dom i Napster.no-saken" in Nordiskt Immateriellt Rättsskydd 2005 p. 344 *et seq*., Schovsbo & Udsen, "Ophavsrettens missing link?" in Nordiskt Immateriellt Rättsskydd 2006 p. 47 *et seq*., Torvund, "Enerett til lenking – en keiser uten klær" in Nordiskt Immateriellt Rättsskydd 2008 p. 417 *et seq*., Westman, "Länkning som upphovsrättslig överföring till allmänheten?" in Svensk Juristtidning 2012 p. 800 *et seq*., and Axhamn, "Internet Linking and the Notion of 'New Public'" in Nordiskt Immateriellt Rättsskydd 2014 p. 110 *et seq*.

matically generated – in the latter case by way of search engines. Millions of hyperlinks are created and clicked on around the world on a daily basis, forming an integral component of e-commerce and day-to-day practice for business and consumers alike. Indeed, the very point of posting content – such as texts, pictures, music and audiovisual material – on the Internet is to draw on the immense possibilities of dissemination that this distribution channel has to offer – and from this point of view it makes good sense to allow links to the material. In addition, freedom of expression speaks in favour of allowing links for reference purposes. Against this backdrop, there is a strong case for holding links outside the scope of the exclusive rights in copyright law, but the picture is not clear-cut.[8]

The core of the challenge is the scope of the right holders' economic rights, specifically whether linking may be considered as an act of *communication to the public*. Pursuant to article 8 of the WIPO Copyright Treaty (WCT)[9] and article 3 of the EU directive 2001/29 on copyright in the information society,[10] authors are provided with the exclusive right of "communication to the public", of their works, which includes the so-called "making available right". Article 3(1) of directive 2001/29 builds on and serves the purpose to implement article 8 of the WCT in the EU in a harmonized manner.[11] Hence, article 3(1) of the directive must, as far as possible, be interpreted in a manner that is consistent with the obligations arising from the corresponding provision of the WCT.[12]

To be more specific, article 3(1) of directive 2001/29 submits that Member States "shall provide authors with the exclusive right to authorize 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." The article is supplemented by recitals 23 and 25 in the preamble to the directive. Recital 23 holds that the directive should "harmonise further the author's right of communication to the public", that "this right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates", and that "this right should cover any such transmission or retransmission of a work to the

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8 Ibid.

9 WIPO Copyright Treaty (WCT), adopted in Geneva on December 20, 1996. The treaty was approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

10 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 2001 L 167, p. 10).

11 See recital 15 to directive 2001/29.

12 See, for example, Case C-306/05 SGAE, ECLI:EU:C:2006:764, paragraph 35. The SGAE case is commented on an analysed by Axhamn, "EG-domstolen tolkar begreppet överföring till allmänheten" in Nordiskt Immateriellt rättsskydd 2007 p. 148 *et seq*.

public by wire or wireless means, including broadcasting." Further, it is held that "this right should not cover any other acts." Recital 25 holds that all right-holders recognized by directive 2001/29 should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmission. Such interactive on-demand transmissions are "characterized by the fact that members of the public may access them from a place and at a time individually chosen by them."

If posting or generating links may be considered as acts of communication to the public, linking as such is "potentially infringing" in the sense that it would only be legal to the extent that there are grounds for justifications, either because the right holder has (explicitly or impliedly) consented to the links or because they are covered by exceptions or limitations to the exclusive rights.[13] If linking on the other hand is not considered as an act of communication to the public, the linker has no (direct) liability for copyright infringement. A drawback with this reasoning is that its point of departure depends on an "either/or" assessment based on the classification of the "nature" of the act, regardless of its effects.[14]

Some national courts[15] and legal scholars[16] have argued that links are mere *references* to the content in question, and as links as such do not "transmit" any content it does not involve any act of communication to the public. Conversely, it has been submitted that this view does not take into account that a link is not merely a reference but also a tool for *accessing* specific content.[17] In other words, it has been argued that the right of communication to the public, which – as

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[13] See, *e.g.*, Westman, "Länkning som upphovsrättslig överföring till allmänheten?" in Svensk Juristtidning 2012 p. 807 *et seq*.

[14] Rognstad, "Linking – a Gordian knot of copyright law", in Liber Amicorum Jan Rosén (forthcoming), with references.

[15] See, *e.g.*, the judgment of the German Supreme Court of 17th July 2003 in the so-called "Paperboy" decision (I ZR 259/00), where the court held at para 42: "A person who sets a hyperlink to a website with a work protected under copyright law which has been made available to the public by the copyright owner, does not commit an act of exploitation under copyright law by doing so but only refers to the work in a manner which facilitates the access already provided." See also the judgment of the Norwegian Supreme Court in the so-called Napster.no case, dated 27 January 2005, where the Court held at para. 47: "It cannot be doubted that simply making a website address known by rendering it on the internet is not making a work publicly available."

[16] See, *e.g.*, Opinion of the European Copyright Society, The Reference to the CJEU in Case C-466/12 Svensson available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326, Schovsbo & Udsen, "Ophavsrettens missing link?" in Nordiskt Immateriellt Rättsskydd 2006 p. 55, Torvund, "Enerett til lenking – en keiser uten klær" in Nordiskt Immateriellt Rättsskydd 2008 p. 423, and Aplin, Copyright Law in the Digital Society, 2005, p. 151.

[17] See, *e.g.*, Rognstad, "Opphavsrettslig ansvar for linker pa Internett. Noen betraktninger i lys av norsk Høyesteretts dom i Napster. no-saken" in Nordisk Immateriellt Rättsskydd 2005 p. 355, and Rognstad & Bing, "Søkemotorer på Internett i opphavsrettslig belysning" in Nordisk Immateriellt Rättsskydd 2012 p. 354.

indicated above – includes the right of making available to the public of works in such a way that members of the public may access the works from a place and at a time individually chosen by them, encompasses also the mere *offering* to the public of a work, e.g. for an individualized streaming or downloading.[18]

The question of whether linking should fall within the scope of the exclusive rights provided to right holders, and whether there is a general "either/or" solution or a more nuanced solution, is an example of a general need in copyright law and policy to strike a fair balance between authors' and other right holders' interests and (often) competing public interests – and to agree on how to do so.[19]

In any case, however important from a practical perspective the regulation of hyperlinking may be, directive 2001/29 did not provide any clear answer or even indication on whether the act of linking should fall inside or outside the author's exclusive rights. The general right of communication to the public provided for in the directive was flexible – or ambiguous – enough to lead to different interpretations and national implementations in the laws of the Member States.[20] In Sweden, for example, the right was implemented with the ambition to, as far as possible, safeguard the status quo and legal certainty for right holders.

2.2 Implementation into Swedish law

The right of communication to the public was implemented into Swedish law, via amendments to the Swedish Copyright Act (SCA),[21] entering into force on July 1, 2005.[22] Before the implementation, the SCA did not provide for an explicit right of "communication to the public". The relationship between the "new" right and certain related existing exclusive rights in Swedish copyright law was discussed in the preparatory works to the amendments to the CA.[23]

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[18] ALAI Report and Opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet, available at http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf.

[19] See, *e.g.*, Axhamn, "Internet Linking and the Notion of 'New Public'" in Nordiskt Immateriellt Rättsskydd 2014 p. 110 *et seq*.

[20] For a general discussion on conceptual divergences as a result of the EU legislative process, and the role of the CJEU in the strive for coherence in EU intellectual property law, see Axhamn, "Striving for coherence in EU intellectual property law", in Liber Amicorum Jan Rosén (forthcoming).

[21] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, in English "Act on Copyright in Literary and Artistic Works" – here referred to as the "Swedish Copyright Act" (SCA).

[22] Swedish statute book (Svensk författningssamling), SFS 2005:359.

[23] Memorandum by the Ministry of Justice (departementspromemoria, Ds) 2003:35, Swedish Government bill (Regeringsproposition) 2004/05:110, and Report by the Committee on Civil law (Lagutskottets betänkande) 2004/05:LU27.

As is well known, in Sweden (as well as the other Nordic countries) preparatory works – especially statements in Government bills – have traditionally been regarded as constituting important sources of law, or at least as important means of interpretation.[24] Nowadays it is, however, established both by the Swedish legislature and obligations flowing from EU law itself that where a national court is called upon to interpret national law, whether the provisions in question were adopted before or after the directive concerned, it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter. This applies notwithstanding any contrary interpretation which may arise from the preparatory works for the national rule.[25]

However, while recognizing the reduced importance of national preparatory works,[26] the preparatory works to the implementation of the right of communication to the public provided quite detailed guidance on the scope and meaning of that right. As a starting point, it was held that the introduction of an explicit right of communication to the public (*överföring till allmänheten*) did not alter the scope and content of the general exclusive right of "tillgängliggörande för allmänheten" – up till then covering the rights of public performance (*offentligt framförande*), public exhibition (*offentlig visning*) and distribution (*spridning*) – already provided to authors by Swedish copyright law.[27] Rather, the introduction was to be understood as a mere "re-alignment" of the broader right of "tillgängliggörande för allmänheten" into *four* distinct rights – communication to the public, public performance, public exhibition and distribution – instead of the previous *three*. In the main, the introduction of an explicit right of communication to the public had the effect of a reduced scope of the right of public performance: certain acts – *communications to a public not present at the place where the communication originates* – up till then covered by the right of public performance, would after the implementation of the directive instead be covered by the right of communication to the public.[28] As

[24] See, for example, Strömholm, "Legislative Material and Construction of Statutes: Notes on the Continental Approach" in Scandinavian Studies in Law Vol 10, 1966, p. 173 *et seq*.

[25] See Case C-371/02 Björnekulla Fruktindustrier, ECLI:EU:C:2004:275, paragraph 13 and Swedish Government bill (Regeringsproposition) 1994/95:19 p. 529. Cf Swedish Government bill (Regeringsproposition) 2001/02:121 p. 193.

[26] Swedish Government bill (Regeringsproposition) 2004/05:110, p. 71 *et seq*.

[27] Swedish Government bill (Regeringsproposition) 2004/05:110, p. 67: "[D]et [är] inte fråga om att genom införande av det nya begreppet överföring till allmänheten utvidga upphovsmannens ensamrätt. … "[B]egreppet tillgängliggörande för allmänheten, dvs. det begrepp som reglerar de yttre gränserna för upphovsmannens ensamrätt i denna del, [kommer] alltjämt att ha samma innebörd som tidigare. De distansöverföringar som kommer att benämnas överföring till allmänheten har alltså även tidigare ingått i upphovsmannens ensamrätt till tillgängliggörande för allmänheten. Det skapas med andra ord inte nu någon ny rättighet som inte har funnits tidigare."

[28] Swedish Government bill (Regeringsproposition) 2004/05:110, p. 69: "Förslaget medför inte

regards the delineation between acts of "public performance" and acts of "communication to the public", the main element being the requirement of *distance* between "the public" and "the place where the communication originates", the preparatory works made several attempts to indicate where this line was to be drawn. It was, for example, submitted that the right of communication to the public would cover traditional acts of broadcasting and new forms of making available of a work on demand via a website or otherwise via the Internet. Conversely, the right of communication to the public would *not* cover situations where a work is communicated or performed to a public present at the same location (as where the communication or performance originates), such as the staging of a play to a live audience or the playing of music – live or recorded – in a public space or a location otherwise open to the public, such as a restaurant. These situations would instead be covered by the (non-harmonized) right of public performance.[29] The statutory provision implementing article 3(1) of directive 2001/29 – article 2, paragraph 3 section 1 of the SCA – was drafted close to the wording of the directive:

> "The work is being made available to the public in the following cases… 1. When the work is being communicated to the public. This is deemed to include any making available of the work to the public by wire or wireless means that occurs from a place other than that where the public may enjoy the work. Communication to the public includes also acts of communication that occur in such a way that members of the public may access the work from a place and at a time individually chosen by them."[30]

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någon ändring i upphovsmannens övergripande rätt att göra verket tillgängligt för allmänheten. Vad som däremot behöver göras är vissa justeringar och preciseringar av det inbördes förhållandet mellan överföring till allmänheten, offentligt framförande och offentlig visning."

[29] Swedish Government bill (Regeringsproposition) 2004/05:110, p. 70 *et seq.*: "Överföringsrätten skall inte träffa förfoganden som består i att ett verk görs tillgängligt för allmänheten som kan ta del av verket på den plats där det aktuella förfogandet sker. Utanför förfogandet överföring skall alltså falla t.ex. uppförandet av en pjäs eller uppspelning av musik, levande eller inspelad, i en offentlig lokal. Detsamma skall gälla för situationer då det som görs tillgängligt för en närvarande allmänhet är något som föregåtts av en överföring, t.ex. när verk tillgängliggörs för allmänheten via en radio, TV-apparat eller dator uppkopplad mot Internet i exempelvis en restaurang eller annan offentlig lokal. I dessa situationer sker förstås en överföring i ett led, men restaurangägaren som tillgängliggör t.ex. musik i restaurangen via radion, TV-apparaten eller datorn gör inte en överföring till allmänheten, utan ett offentligt framförande."

[30] Translation provided by Henry Olsson, available at http://portal.unesco.org/culture/en/files/30264/11418280643se_copyright_2005_en.pdf/se_copyright_2005_en.pdf. The original Swedish language version reads "Verket görs tillgängligt för allmänheten i följande fall: 1. När verket överförs till allmänheten. Detta sker när verket på trådbunden eller trådlös väg görs tillgängligt för allmänheten från en annan plats än den där allmänheten kan ta del av verket. Överföring till allmänheten innefattar överföring som sker på ett sådant sätt att enskilda kan få tillgång till verket från en plats och vid en tidpunkt som de själva väljer."

It was also submitted in the preparatory works that prior national case law on the notion of "public" ("allmänheten"), would have continued relevance for the interpretation of what would constitute a "communication to a public", *inter alia* because the concept of "the public" was not defined in the directive and because during the negotiations the Member States had agreed that this concept was not harmonized by the directive:

> "Direktivet definierar inte begreppet allmänheten, och ger inte heller några kriterier för denna bedömning. Den frågan ankommer således på nationell rätt att reglera. Detta rådde det enighet om, såväl mellan medlemsstaterna som mellan medlemsstaterna och kommissionen, under direktivförhandlingarna."[31]

It was submitted *in passing* in the preparatory works that the CJEU might have to interpret the concept of "the public" if a Member State would interpret the concept in a way that would run counter to the purpose of the directive.[32] However, the mechanism of preliminary rulings – as a vehicle for harmonized interpretation – was not referred to as such. This might be a symptom of the fact that, at that period in time, it was generally uncommon for Swedish courts to ask for preliminary rulings from the CJEU.

The scope of the right of communication to the public in relation to *internet linking* received much attention in the preparatory works.[33] With reference to previous national case law on the application of the right of public performance, it was held that the scope of the right of communication to the public included certain linking activities, at least so-called *deep linking* – i.e. the use of a hyperlink that links to a specific piece of web content on another website, without providing any information to the user that the content resides on another website. In contrast, what was referred to as mere "reference linking", described as a hyperlink which indicates to the user that the content resides on another website, was deemed not to be covered by the act of communication of the public. Also in this instance, the preparatory works included a caveat that the scope of the right of communication to the public in article 3(1) of the directive as applied to acts of deep linking might be subject to future interpretation by the CJEU. It was however submitted that even if the CJEU would hold that deep linking did not constitute a communication to the public within the meaning

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31 Swedish Government bill (Regeringsproposition) 2004/05:110, p. 73.

32 Swedish Government bill (Regeringsproposition) 2004/05:110, p. 73.

33 Swedish Government bill (Regeringsproposition) 2004/05:110, p. 70 *et seq*., with reference to Supreme Court case NJA 2000 s. 292 (Olssons länkar, NIR 2000 p. 487). The case has been commented on and analysed by Torvund, "Enerett til lenking – en keiser uten klær" in Nordiskt Immateriellt Rättsskydd 2008 p. 433, Rognstad, Opphavsrett, 2009, p. 183 *et seq*., Levin, Lärobok i immaterialrätt, 10 uppl., 2011, p. 183 *et seq*., Westman, "MP3-målet i HD – rättsläget kring länkning fortfarande oklart" in Lov&Data nr 62 2000, p. 16 *et seq*., and Westman "Länkning som upphovsrättslig överföring till allmänheten?" in Svensk Juristtidning 2012 p. 810 *et seq*.

of article 3(1) of directive 2001/29, Swedish law could provide a *wider* right of communication to the public to also encompass also such activities. Thus the Swedish legislature deemed that article 3(1) provided merely for minimum harmonization:

> "När det gäller ensamrättigheternas utformning ställer emellertid direktivet inte upp några hinder mot att ge upphovsmännen längre gående ensamrättigheter än vad direktivet kräver. Det innebär alltså att i den mån svensk rättspraxis ger mer långtgående rättigheter till upphovsmännen än vad direktivet skulle kräva gäller denna svenska rättspraxis även i fortsättningen. Även om EG-domstolen skulle anse att de handlingar som bedömdes i rättsfallet NJA 2000 s. 292 inte skulle vara att anse som en överföring i direktivets mening kommer alltså rättsfallet att var relevant vad gäller de yttre gränserna för ensamrätten enligt svensk rätt. Den enda skillnaden blir alltså att denna typ av förfoganden fortsättningsvis blir att bedöma som överföring till allmänheten i stället för offentligt framförande."[34]

The preparatory works to the implementation of directive 2001/29 into Swedish law have been praised by legal scholars as being of a high quality and an excellent "source of law".[35] In addition, the leading commentary on the SCA refers almost verbatim to the preparatory works.[36] This might be due to the fact that the legislature put great emphasis on trying to fit the provisions of the directive, including article 3(1) of the directive, into national law in a way that as far as possible preserved the equilibrium and legal certainty which had developed in national law over a long period of time. One way to do this was to provide detailed explanations and guidelines in the preparatory works implementing the directive, although this method received criticism in the legal doctrine from some legal scholars.[37] As soon as the CJEU began to provide preliminary rulings on the interpretation of the directive, the ambitions of the Swedish legislature to provide for legal certainty have rather had the opposite effect. It is interesting that two important cases from the CJEU on the interpretation of the directive in relation to Internet linking originate from Swedish courts.

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[34] Swedish Government bill (Regeringsproposition) 2004/05:110, p. 71.

[35] See, for example, Rosén, Upphovsrättens avtal, 2006, p. 28: "Denna digra men samtidigt väl genomarbetade proposition kan matcha 1960 års proposition vad gäller kvaliteter som allmän rättskälla på området".

[36] Olsson, Upphovsrättslagstiftningen. En kommentar, 2009 (3rd ed.).

[37] See, *e.g.*, the comments provided by Stockholm University on the first draft proposal (departementspromemoria, Ds 2003:35) on the implementation of directive 2001/29 into Swedish law, as referred to in Swedish Government bill (Regeringsproposition) 2004/05:110 p. 69. See also Rognstad, "Opphavsrettslig ansvar for linker på Internett. Noen betraktninger i lys av norsk Høyesteretts dom i Napster.no-saken" in Nordiskt Immateriellt Rättsskydd 2005 p. 369 *et seq*. and Westman, "Länkning som upphovsrättslig överföring till allmänheten?" in Svensk Juristtidning 2012 p. 815. Cf Schovsbo & Udsen, "Ophavsrettens missing link?" in Nordiskt Immateriellt Rättsskydd 2006 p. 50.

2.3 Case law from the CJEU

The right of communication to the public in article 3(1) of directive 2001/29 has been interpreted by the CJEU in several cases concerning requests for preliminary rulings from national courts: *SGAE*,[38] *Football Association Premier League and Others*,[39] *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*,[40] *Circul Globus Bucureşti*,[41] *ITV Broadcasting and Others*,[42] *OSA*,[43] *Svensson and Others*[44] and *BestWater International*.[45] In addition, the specific right of "making available" provided for certain holders of so-called neighbouring rights in article 3(2) of directive 2001/29 has been interpreted by the CJEU in *C More Entertainment*.[46] Also, the adjacent right of communication to the public provided for certain holders of neighbouring rights in article 8(2) in directives 92/100/EC[47] and 2006/115/EC[48] has been interpreted by the CJEU in *SCF*[49] and *Phonographic Performance (Ireland)*.[50] Moreover, the right of communication to the public via satellite broadcasting as provided

[38] Case C-306/05 SGAE, ECLI:EU:C:2006:764 (concerning works communicated by means of television sets installed in hotel rooms).

[39] Joined Cases C-403/08 and C429/08 Football Association Premier League and Others, ECLI:EU:C:2011:631 (concerning, *inter alia*, communication of works to the public in public houses).

[40] Case C-136/09 Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon, ECLI:EU:C:2010:151 (concerning, *inter alia*, works communicated by means of television sets installed in hotel rooms).

[41] Case C-283/10 Circul Globus Bucureşti, ECLI:EU:C:2011:772 (concerning *inter alia*, the concept of "communication of a work to a public present at the place where the communication originates").

[42] Case C-607/11 ITV Broadcasting and Others, ECLI:EU:C:2013:147 (concerning, *inter alia*, "live streaming" and broadcasting by a third party over the internet of signals of commercial television broadcasters).

[43] Case C351/12 OSA, ECLI:EU:C:2014:110 (concerning, *inter alia*, transmission of works in a spa establishment).

[44] Case C-466/12 Svensson and Others, ECLI:EU:C:2014:76 (concerning, *inter alia*, Internet links giving access to protected works).

[45] Case C-348/13 BestWater International (concerning internet linking by means of "framing" technique).

[46] Case C-279/13 C More Entertainment, ECLI:EU:C:2015:199 (concerning direct broadcast of a sporting fixture on an internet site).

[47] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p. 61–66.

[48] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, 27.12.2006, p. 28–35.

[49] Case C-135/10 SCF, ECLI:EU:C:2012:140 (concerning, *inter alia*, the concept of communication to the public of phonograms broadcast by radio in a dental practice).

[50] Case C-162/10 Phonographic Performance (Ireland), ECLI:EU:C:2012:141 (concerning, *inter alia*, installation in hotel bedrooms of televisions and/or radios to which the hotelier distributes a broadcast signal).

for in directive 93/83/EEC[51] has been interpreted by the CJEU in *Airfield and Canal Digitaal*.[52]

It is not possible, in the context of this article, to provide a full overview of this case law. Instead, and in line with the purpose of this article, I will focus on the interpretation of the right of communication to the public in article 3(1) of directive 2001/29 in relation to so-called Internet linking. The leading case in this area is the *Svensson and others* (hereafter: Svensson) case. The next section will provide a description and analysis of this case, followed by a section on the two other cases from the CJEU dealing with Internet linking, *BestWater International* and *C More Entertainment*.

2.3.1 Svensson and Others

The Svensson case was based on a request for a preliminary ruling concerning the interpretation of article 3(1) of directive 2001/29. The request had been made in proceedings between Mr Svensson, Mr Sjögren, Ms Sahlman and Ms Gadd, all journalists and applicants in the proceedings at national level, and Retriever Sverige AB (Retriever) concerning compensation allegedly payable to them for the harm they considered they had suffered as a result of the inclusion on Retriever's website of clickable Internet links (hyperlinks) redirecting users to press articles in which the applicants held the copyright.

The journalists had written press articles that had been published in the Göteborgs-Posten newspaper and on the Göteborgs-Posten website. Retriever operated a website that provided its clients with lists of clickable Internet links to articles made available on other websites, including articles on the Göteborgs-Posten website. It was common ground between the parties that those articles were freely accessible on the Göteborgs-Posten newspaper site. The journalists argued that if a client clicked on one of those links, it *was not* apparent to him that he was redirected to another site in order to access the work. By contrast, Retriever argued that it *was* clear to the client that, when he clicked on one of those links, he was redirected to another site.

The journalists brought an action against Retriever before the Stockholms tingsrätt (Stockholm District Court) in order to obtain compensation on the ground that Retriver had made use, without their authorisation, of certain newspaper articles authored by them, by making them available to its clients. By judgment of 11 June 2010, the Stockholms District Court rejected their application. The journalists then brought an appeal against that judgment

[51] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21.

[52] Joined Cases C-431/09 and C-432/09 Airfield and Canal Digitaal, ECLI:EU:C:2011:648.

before the Svea hovrätt (Svea Court of Appeal). Before that court, the journalists claimed, *inter alia*, that Retriever had infringed their exclusive right to make their respective works available to the public, in that as a result of the services offered on its website, Retriever's clients had access to the applicants' works. Retriever contended, in defence, that the provision of lists of Internet links to works communicated to the public on other websites did not constitute an act liable to affect the copyright in those works. Retriever also contended that it did not carry out any *transmission* of any protected work; its action was limited to *indicating* to its clients the websites on which the works that were of interest to them were to be found. In those circumstances, the Svea Court of Appeal decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

1. If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of article 3(1) of directive [2001/29]?
2. Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
3. When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?
4. Is it possible for a Member State to give wider protection to authors' exclusive right by enabling communication to the public to cover a greater range of acts than provided for in article 3(1) of directive 2001/29?

Interpretation of the notion of communication to the public in article 3(1) of directive 2001/29

The CJEU grouped together the first three questions, which in essence asked whether article 3(1) of directive 2001/29 must be interpreted as meaning that the provision, on a website, of clickable links to protected works available on another website constituted an act of communication to the public as referred to in that provision, where, on that other site, the works concerned were freely accessible.

The CJEU began its reply to the first three questions by stating that it followed from article 3(1) of directive 2001/29 that *every act of communication of a work to the public has to be authorised by the copyright holder*, and that the concept of communication to the public includes two *cumulative criteria*: an "act

of communication" of a work and the communication of that work to a "public".[53]

As regards the first criteria, the CJEU held – with reference to its previous case law – that the notion of (an act of) communication must be construed *broadly*, in order to ensure a high level of protection for copyright holders as stressed in, *inter alia*, recitals 4 and 9 in the preamble to the directive.[54] For there to be an "act of communication" it is sufficient that a work is made available to a public in such a way that the persons forming that public *may* access it, irrespective of whether they avail themselves of that opportunity.[55] The Court then observed that the circumstances of the present case were such that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, afforded users of the first site *direct access* to those works. These circumstances was sufficient for the Court to assess that such provision of clickable links to protected works had to be considered to be "making available" and, therefore, an "act of communication", within the meaning of article 30.[56]

As regards the criteria of "public", the CJEU also referred to its previous case law and held that it referred to *an indeterminate number of potential recipients* and *implied a fairly large number of persons*.[57] With reference to the circumstances in the case at hand, the Court then held that an act of communication such as that made by the manager of a website by means of clickable links was aimed at *all potential users of the site managed by that person*, that is to say, an indeterminate and fairly large number of recipients. In other words, the manager was deemed to be making a communication to "a public".[58] However, and also referring to previous case law, the CJEU stressed that in order to be covered

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[53] Case C-466/12 Svensson and Others, paragraph 16, with reference to Case C-607/11 ITV Broadcasting and Others, paragraphs 21 and 31.

[54] Case C-466/12 Svensson and Others, paragraph 17, with reference to Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others, paragraph 193. Recital 4 to directive 2001/29 holds that "[a] harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors." Recital 9 submits that "[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large."

[55] Case C-466/12 Svensson and Others, paragraph 19, with reference to Case C-306/05 SGAE, paragraph 43.

[56] Case C-466/12 Svensson and Others, paragraphs 18 and 20.

[57] Case C-466/12 Svensson and Others, paragraph 21, with reference to SGAE, paragraphs 37 and 38, and ITV Broadcasting and Others, paragraph 32.

[58] Case C-466/12 Svensson and Others, paragraph 23.

by the concept of "communication to the public", a communication concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore *by the same technical means*, must also be directed at a "new public", that is to say, at "a public that was not taken into account by the copyright holders when they authorised the initial communication to the public."[59] Thus, the CJEU held that making available of works by means of a clickable link, under the circumstances in the case at hand, did not lead to the works in question being communicated to a "new public": 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*.[60] In other words, where all the users of another site to whom the works at issue had been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter were deemed to be potential recipients of the initial communication and, therefore, to be part of the public taken into account by the copyright holders when they authorised the initial communication.[61] Therefore, since there was no "new public", the authorisation of the copyright holders was not required for a communication to the public such as that in the national proceedings.[62]

The CJEU then clarified that this finding could not be called into question were the national court to find that when Internet users clicked on the link at issue, the work appeared in such a way as to give the impression that it appeared on the site on which that link was found, whereas in fact that work came from another site. Thus, that additional circumstance in no way altered the conclusion that the provision on a site of a clickable link to a protected work published and freely accessible on another site had the effect of making that work available to users of the first site and that it therefore constituted a communication to the public. However, since there was no *new public*, the authorisation of the copyright holders would not be required for such a communication to the public.[63]

Further, the CJEU submitted that where a clickable link made it possible for users of the site on which that link appeared to circumvent *restrictions* put in place by the site on which the protected work appeared in order to restrict public

[59] Case C-466/12 Svensson and Others, paragraph 24, with reference to SGAE, paragraphs 40 and 42; Order of 18 March 2010 in Case C-136/09 Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon, paragraph 38; and ITV Broadcasting and Others, paragraph 39.

[60] Case C-466/12 Svensson and Others, paragraphs 25 and 26.

[61] Case C-466/12 Svensson and Others, paragraph 27.

[62] Case C-466/12 Svensson and Others, paragraph 28.

[63] Case C-466/12 Svensson and Others, paragraphs 29 and 30.

access to that work to the latter site's subscribers only, and the link accordingly constituted an intervention without which those users would not be able to access the works transmitted, all those users would be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation would be required for such a communication to the public. The Court held that this would for example be the case where the work was no longer available to the public on the site on which it was initially communicated or where it was henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation.[64]

The level of harmonization of article 3(1) of directive 2001/29

In essence, by its fourth question the Svea Court of Appeal asked whether article 3(1) of directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a *wider range of activities* than those referred to in that provision. The CJEU began its reply to this question by stressing that it followed from recitals 1, 6 and 7 in the preamble to the directive that the objectives of the directive were, *inter alia*, to remedy the legislative differences and legal uncertainty that existed in relation to copyright protection. Acceptance of a proposition that a Member State may give wider protection to copyright holders by laying down that the concept of communication to the public also includes activities other than those referred to in article 3(1) would have the effect of creating legislative differences and thus, for third parties, legal uncertainty. Hence the CJEU stressed that article 3(1) could not be construed as allowing Member States to give wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.[65]

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[64] Case C-466/12 Svensson and Others, paragraph 31.

[65] Case C-466/12 Svensson and Others, paragraphs 34 to 37. Recital 1 to directive 2001/29 holds that "[t]he Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives." Recital 6 submits that "[w]ithout harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences

The Court submitted that this conclusion was not affected by the fact that article 20 of the Berne Convention[66] stipulates that the signatory countries may enter into "special agreements" among themselves with a view to granting copyright holders more extensive rights than those laid down in that Convention. This is so because when an agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Union law, the Member State must refrain from adopting such a measure.[67] The Court stressed that as the objective of directive 2001/29 would be undermined if the concept of communication to the public were construed as including a wider range of activities than those referred to in article 3(1) of that directive, a Member State must refrain from exercising the right granted to it by article 20 of the Berne Convention.[68]

Comparing the interpretation provided by the Swedish legislator in the preparatory works to the national implementation of directive 2001/29 on the right of communication to the public with the interpretation by the CJEU on the same issue, it is clear that the CJEU not only provides a different interpretation on the scope of the right and the level of harmonization provided by the directive. The CJEU also employs a different (legal) *methodology* than the Swedish legislator when interpreting the provision and its level of harmonization. Thus, as indicated above, the ambition of the Swedish legislator to provide legal certainty by issuing detailed interpretations on the meaning of the right of communication to the public in the national preparatory works, has rather had the opposite effect – especially if right holders, users, legal practitioners and courts are under the impression that they can rely on the statements in such documents.

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and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights." Recital 7 stresses that "[t]he Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented."

66 Berne Convention for the Protection of Literary and Artistic Works of 1886, last revised at Paris 1971 and amended in 1979.

67 Case C-466/12 Svensson and Others, paragraphs 38 and 39, with reference to Case C-277/10 Luksan, paragraph 62.

68 Case C-466/12 Svensson and Others, paragraph 40.

2.3.2 Subsequent case law on Internet Linking: BestWater International and C More Entertainment

The *BestWater International* case[69] was a preliminary ruling on the interpretation of the right of communication to the public in article 3(1) of directive 2001/29 in a case concerning the so-called "framing" technique. Basing its reasoning on the *Svensson* case, the CJEU held that the mere fact that a protected work, freely available on an internet site, was inserted into another internet site by means of a link using the "framing" technique cannot be classified as "communication to the public" within the meaning of article 3(1), since the work at issue was not transmitted to a "new public" or communicated via a specific technical method different from that of the original communication.

The *C More Entertainment* case was a preliminary ruling on the interpretation of article 3(2) of directive 2001/29. The request had been made in national proceedings between C More Entertainment AB and Mr Sandberg concerning the placing by him on an internet site of clickable links by which means internet users could gain access to a live broadcast, on another site, of ice hockey games without having to pay the sum asked by the operator of the other site. The question to be responded to by the CJEU was whether Member States may "give wider protection to the exclusive right of authors by enabling 'communication to the public' to cover a greater range of acts than provided for in article 3(2) of directive 2001/29?".[70] The CJE held that article 3(2) must be interpreted as not precluding national legislation extending the exclusive right of the *broadcasting organisations* referred to in article 3(2)(d) as regards acts of communication to the public which broadcasts of sporting fixtures made live on internet may constitute, provided that such an extension does not undermine the protection of copyright.[71]

2.4 Discussion in legal doctrine

The CJEU's interpretation of the right of communication to the public in article 3(1) of directive 2001/29, especially the reference to "new public", has been described as a "limitation/carve-out … intended to come to the rescue of the 'open Internet'" as it allowed the CJEU at once to re-affirm the broad reach of the right to include the mere *offering of access*, while avoiding the apparent consequence of the application of that right to acts of linking.[72] Although this inter-

[69] Case C-348/13, BestWater International.
[70] Case C-279/13, C More Entertainment, paragraph 21.
[71] Case C-279/13, C More Entertainment, paragraph 37.
[72] ALAI Report and Opinion on a Berne-compatible-reconciliation of hyperlinking and the communication to the public right on the internet, available at http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf.

pretation had been provided by some scholars already at the time of the adoption of the 2001/29 directive,[73] it has been much criticized by other scholars, *inter alia* for not complying with international treaty obligations in the field of copyright. The argument is that the doctrine of "new public" introduces a limitation, almost akin to a "digital exhaustion", on the right of communication to the public, which has no support in the international norms.[74]

Conversely, other scholars have stressed that the notion of "new public" has some support in the preparatory works[75] to the Berne Convention and a WIPO Commentary[76] on that Convention. In addition, as it is generally held that as the notion of "public" is not defined at international level, it has been left to Contracting parties to define it at national level – and that the CJEU's "introduction" of the notion of "new public" may well be within its competence.[77]

As regards the practical implications of the "theory" on "new public", some scholars have argued that the main difference between the "reference approach" and the CJUE's "new public approach" is that links circumventing restrictions are covered by the exclusive rights under the latter approach but not the former.

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[73] See, *e.g.*, Strowel & Ide "Liability with regard to hyperlinks" in Columbia Journal of Law and the Arts, 2001, p. 425.

[74] See, *e.g.*, Rosén & Granmar, "Länkning på internet – EU-domstolen i konflikt med internationell rätt", in Svensk Juristtidning 2015, p. 352, and ALAI Report and Opinion on a Berne compatible-reconciliation of hyperlinking and the communication to the public right on the internet, available at http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf. See also Rosén, "Unionsdomstolen på kollisionskurs med internationell upphovsrätt" in Nordiskt Imateriellt Rättsskydd 2014 p. 660 *et seq*.

[75] See Berne Convention Centenary: The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986, published by the International Bureau of Intellectual Property, 1986, p. 185 (referring to the discussions at the 1948 Brussels Revision Conference): "According to the explanatory memorandum prepared by the Belgian authorities and the Bureau of the Union, any broadcast aimed at a new circle of listeners or viewers, whether by means of a new emission over the air or by means of a transmission by wire, must be regarded as a new act of broadcasting, and as such subject to the author's specific authorization. … Consequently, the majority (12 votes to six) decided in favour of a Belgian proposal presupposing the intervention of a body other than the original one as a condition for the requirement of a new authorization."

[76] It is held in the WIPO Guide to the Berne Convention that when the author authorizes the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the program. According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the program via a loudspeaker or analogous instrument no longer constitutes simple reception of the program itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author's exclusive authorization right. See WIPO Guide to the Berne Convention, WIPO, Geneva, 1978, p. 68–69.

[77] Cf Axhamn, "Internet Linking and the Notion of 'New Public'" in Nordiskt Immateriellt Rättsskydd 2014 p. 110 *et seq*., and Axhamn, "Striving for coherence in EU intellectual property law", in Liber Amicorum Jan Rosén (forthcoming), with references.

Thus, the doctrine of "new public" brings with it an element of *fairness*.[78] In addition, the new public approach seems, at least on the face of it, to imply that links to *illegally uploaded content* are acts of communication to the public. This viewpoint is based on the contemplation that the definition of a "new public", according to the CJEU in *Svensson*, is a "public that was not taken into account by copyright holders when they authorized the initial communication to the public". Since the copyright holders did not authorize the initial communication in said situation, an *a contrario* inference implies that the communication is made to a new public.[79] Future case law will show whether this implication is correct.[80]

3. CONCLUDING DISCUSSION

The right of communication to the public, as set out in article 3(1) of directive 2001/29, has had an interesting development from its introduction at international and EU level, via its implementation into national law and subsequent interpretations by the CJEU. From a copyright perspective, it is a classic example of how not only the legislator but also the courts need to strike a fair balance between the right holders' interests and competing interests of the public at large, often between the interest of stimulating creative content and the interest of dissemination of this content or access to it. Even if the theory of "new public" had been put forward by some legal scholars before the *Svensson* case, it is clear that the Court has been quite innovative in its interpretation – going against the advice of the predominant view in legal scholarship.

From a more general and methodological perspective, the *Svensson* case and subsequent case law on the right of communication to the public in relation to acts of Internet linking are examples of when statements in national preparatory works can be quite unhelpful when the national legislature tries to "preserve" the national legal order. Statements in the preparatory works regarding the scope of the right of communication to the public provided by article 3(1) of directive 2001/29 as applied to Internet linking and the level of harmonization provided by that provision, proved to be incorrect with the first preliminary rul-

[78] Cf Axhamn, "Internet Linking and the Notion of 'New Public'" in Nordiskt Immateriellt Rättsskydd 2014 p. 110 *et seq*.

[79] Rognstad, "Linking – a Gordian knot of copyright law", in Liber Amicorum Jan Rosén (forthcoming), with references.

[80] See pending case C-160/15 GS Media BV, request lodged on April 7 2015, where one of the questions referred by the Dutch Supreme Court (Hoge Rad) is whether there is an act of "communication to the public" within the meaning of article 3 of directive 2001/29 "if anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder".

ing from the CJEU. It is thus inspiring that the Svea Court of Appeal felt independent enough to put forward questions on preliminary ruling to the CJEU.