

The Restricted Act of Making Available and Communication to the Public in the European Union

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In retrospect, perhaps the most significant innovation to have been introduced into the law of copyright and related rights by the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty of 1996 was the new restricted act of “making available to the public” for both copyright in the strict sense and for related rights in sound recordings and fixations of performances, although for copyright such restricted act is also included within the broader restricted act of “communication to the public”. Enacted in the European Union by Directive 2001/29/EC on the Copyright in the Information Society, this type of restricted act has been the subject of more case law at the Court of Justice of the EU than any other provision of this Directive, which has in turn been the subject of more case law than all other EU copyright and related rights Directives together. This article reviews how such case law has developed, and how the Court of Justice has sought to modify its initial formulation of this type of restricted act in the context of its application to various activities on the Internet.

Keywords: Copyright, related rights, TRIPs Agreement, WIPO Copyright Treaty, WIPO Performers and Phonograms Treaty

European Union legislation on the Restricted Acts of Making Available and Communication to the Public

In retrospect, given the ever increasing significance of streaming over the Internet as a method of content delivery, perhaps the most significant innovation to have been introduced into the law of copyright and related rights by the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty of 1996 was the new restricted act of “making available to the public”. This restricted act applied to both copyright in the strict sense and related rights in sound recordings and fixations of performances, although for copyright such restricted act is also included within the wider restricted act of “communication to the public”. Enacted in the European Union by Article 3 of Directive 2001/29/EC on the Copyright in the Information Society,¹ the new restricted act has been the subject of more case law at the Court of Justice of the EU (CJEU) than any other provision of the Directive, which has in turn been the subject of more case law than all other EU copyright and related rights Directives together.² This article reviews how such case law has developed, and how the Court of Justice has sought to modify its initial formulation of this

type of restricted act in the context of its application to various activities on the Internet, such as ‘linking’ and ‘framing’.

Article 3 of Directive 2001/29/EC, mandating the implementation within the EU of such restricted act, extended the protection provided for by the 1996 Treaties also to fixations of audiovisual performances, films and broadcasts, but otherwise follows closely the wording of the Treaties:³

Right of Communication to the Public of Works and Right of Making Available to the Public other Subject-Matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;

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(b) for phonogram producers, of their phonograms;
 (c) for the producers of the first fixations of films, of the original and copies of their films; and
 (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in Paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Although this makes clear the difference of approach as between copyright and related rights in that the restricted act of ‘making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them’ is expressed to be encompassed by the restricted act of ‘communication to the public’ as to copyright, it does not, unlike the corresponding Article in the 1996 WIPO Copyright Treaty,⁴ manifest any recognition that the expression ‘communication to the public’ already had widespread use in a number of other specific contexts in copyright law.

Recitals 23 to 27 to the Directive provide some background to this provision:

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all right-holders recognised by this

Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

Recital 27 reflects the agreed statements in the 1996 Treaties as to the scope of the corresponding Articles of such Treaties that provide for such restricted acts.

As expressed in both the Directive and the Treaties, such wording, as to copyright, elaborates on the wording of Articles 11 and 11 *bis* of the Berne Convention by specifying that “communication to the public by wire and wireless means” includes “the making available to the public of their works (for example, on the Internet).

The Initial Phase of the CJEU Case Law on the Restricted Act of Making Available and Communication to the Public

The scope of Article 3 of Directive 2001/29/EC was first addressed by the CJEU in Case C-306/05 *SGAE v Rafael Hoteles*⁵ in which the issue whether the installation in hotel rooms of television sets to which a satellite or terrestrial television signal is sent by cable constitutes an act of ‘communication to the public’. The CJEU held that it did so as such actions went further than the mere provision of physical facilities:

“1. While the mere provision of physical facilities does not as such amount to communication within the meaning of [Directive 2001/29], the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive.

2. The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29.”

The Court recognised that Recital 23 of the Directive obliged it to interpret the restricted act broadly but observed, perhaps in an effort to place some potential boundaries on its scope, that “such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.”

This “new public” mantra was subsequently applied in Joined Cases C-403/08 *Football Association Premier League and ors v QC Leisure and others* and C-429/08 *Karen Murphy v Media Protection Services*,⁶ to hold that Article 3 covers transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house, in Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai*⁷ (another hotel case) and more recently, in Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA) v Léčebné lázně Mariánské Lázně, a.s.*⁸ to hold that communication to the public covers, the intentional distribution of a signal by a spa establishment which is a business by means of television or radio sets in the bedrooms of the establishment’s patients.

Other cases however have concerned the expression “communication to the public” in contexts other than Article 3(1), and the CJEU has cautioned that there may be differences in its scope depending on such context. This is exemplified by its judgements, given on the same day, in Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso, intervening party: Procuratore generale della Repubblica*⁹ and Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland and another*.¹⁰ Both concerned what is now Article 8(2) of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property.¹¹ This requires Member States to “provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this

remuneration is shared between the relevant performers and phonogram producers.” In Case C-135/10 *Società Consortile Fonografici (SCF)* the CJEU noted [at Paragraph 74] that the concept of “communication to the public” appearing in Article 8(2) of Directive 2006/115/EC and Article 3(1) of Directive 2001/29/EC was “used in contexts which are not the same and pursue objectives which, while similar, are none the less different to some extent.” Having held that the concept of ‘communication to the public’ which appears in the two Directives “must be interpreted in the light of the equivalent concepts contained in [the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the TRIPs agreement and the 1996 (WIPO) Performances and Phonograms Treaty] and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property it went on to hold that the concept of “communication to the public” for the purposes of Article 8(2) “does not cover the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, such as the one at issue in the main proceedings, for the benefit of patients of those practices and enjoyed by them without any active choice on their part” and that “therefore such an act of transmission does not entitle the phonogram producers to the payment of remuneration.” In contrast, in Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland and another* the Court held that “a hotel operator which provides in guest bedrooms televisions and/or radios to which it distributes a broadcast signal is a ‘user’ making a ‘communication to the public’ of a phonogram which may be played in a broadcast for the purposes of Article 8(2)” which was obliged to pay equitable remuneration under Article 8(2) for the broadcast of a phonogram, in addition to that paid by the broadcaster. It held that this obligation to pay equitable remuneration extended also to “a hotel operator which provides in guest bedrooms, not televisions and/or radios to which it distributes a broadcast signal, but other apparatus and phonograms in physical or digital form which may be played on or heard from such apparatus.” Thus the provision of such facilities in hotel bedrooms is a ‘communication to the public’ for the purpose of both Article 3(1) of Directive 2001/29/EC and Article 8(2) of Directive 2006/115/EC,

whereas the playing of background music to patients in dental practices does not, at least for the purposes of Article 8(2) of Directive 2006/115/EC, even though given the specific reasoning of the CJEU, which took account of the cumulative effect of the activity in issue in assessing whether the “new public” threshold was achieved, the result under Article 3(1) of Directive 2001/29/EC might be expected to be the same.

Another decision of the CJEU which, whilst not concerned with Article 3(1) of Directive 2001/29/EC, adopted the “new public” mantra in analysing whether or not there was “communication to the public”, this time in the context of Article 2 of Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission¹² was Joined Cases C-431/09 *N V Airfield, B V Canal Digitaal v SABAM* and C-432/09 *N V Airfield, B V v AGICOA Belgium BVBA*.¹³ Indeed on this occasion the Court went so far as to incorporate the expression in its conclusions, by which it held that under this Article a satellite package provider must obtain authorisation from the right holders concerned for its intervention in the direct or indirect transmission of television programmes, “unless the right holders have agreed with the broadcasting organisation concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider’s intervention does not make those works accessible to a new public.”

Eighteen propositions as to the scope of the restricted act of communication to the public, drawn from the above case law (along with Case C-607/11 *ITV Broadcasting Ltd and ors v TVCatchup Ltd*,¹⁴ discussed below, and two decisions on Article 3 of Directive 2001/89/EC which did not however concern the “new public” issue)¹⁵ and helpfully instancing the specific Paragraph in each such decision that provide the basis for such proposition are set out in the judgment of the English Court in *Paramount Home Entertainment International Limited and others v British Sky Broadcasting Limited and others*.¹⁶

CJEU Case Law on the Restricted Act of Making Available and Communication to the Public as Applied to Various Activities on the Internet

The cases discussed above all concern what might be characterised as traditional modes of content

distribution, notably broadcasting. In contrast Case C-607/11 *ITV Broadcasting Ltd* concerned transmissions over the Internet and presented a challenge to the analysis in such previous cases and in particular their emphasis on the “new public” test as a necessary element of the restricted act of communication to the public. The activity in issue was the 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. The challenge that this presented to the “new public” mantra lay in the fact that such subscribers were within the area of reception of that terrestrial television broadcast and so might lawfully receive the broadcast on a television receiver. An alternative test had to be developed, which the Court achieved by holding [at Paragraphs 24 to 26] that “communication” includes any retransmission of the work by a specific technical means different from that of the original communication and [at Paragraph 39] that where there is a communication using a different technical means to that of the original communication, it is not necessary to consider whether the communication is to a new public.

In so doing the CJEU contrasted [at Paragraph 38] the situation in those cases “in which an operator had made accessible, by its deliberate intervention, a broadcast containing protected works to a new public which was not considered by the authors concerned when they authorised the broadcast in question” with the present situation which concerned [at Paragraph 39] “the transmission of works included in a terrestrial broadcast and the making available of those works over the Internet...each of [which] 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 holding that such retransmission is a “communication to the public”, within the meaning of Article 3(1) of Directive 2001/29/EC, the Court also held that such answer is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is funded by advertising and is therefore of a

profit-making nature, or by the fact that a retransmission, is made by an organisation which is acting in direct competition with the original broadcaster.

In two subsequent cases, C-466/12 *Svensson and ors v Retriever Sverige AB*¹⁷ and Case C-348/13 *BestWater International GmbH v Michael Mebe & Stefan Potsch*,¹⁸ concerning the status of respectively linking and framing on the Internet, the CJEU has returned to placing reliance on the “new public” mantra in order to find that neither activity, in relation to a work that is ‘freely available’ on another website, constitutes a ‘communication to the public’ within the scope of Article 3(1) of Directive 2001/29/EC. Thus in Case C-466/12 *Svensson* (in which it also concluded that Article 3(1) precludes 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) its conclusion was expressed as follows:

1. Article 3(1) of Directive 2001/29/EC ..., 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.

Its conclusion in Case C-348/13 *BestWater International* was expressed similarly:

The mere fact that a protected work, freely available on an internet site, is inserted into another internet site by means of a link using the ‘framing’ technique, such as that used in the case in the main proceedings, cannot be classified as ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29/EC ... since the work at issue is not transmitted to a new public or communicated by a specific technical method different from that of the original communication.

In Case C-466/12 *Svensson* the Court started its analysis at Paragraph [16] by observing, basing itself on Case C-607/11 *ITV Broadcasting Ltd*, that “the concept of communication to the public includes two cumulative criteria, namely, an ‘act of communication’ of a work and the communication of that work to a ‘public’. As to the first of these criteria, which it construes broadly, it held [at Paragraph 20] that “the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’. It went on

to conclude that this was also an act of communication to the public as it is directed to an “indeterminate and fairly large number of recipients”. Meeting these two criteria was not however in itself sufficient as the Court went on to observe, [at Paragraph 24] that “it is settled case-law, in order to be covered by the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, 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.”

The Court concluded that making available the works concerned by means of a clickable link did not lead to the works in question being communicated to a new public, its reasoning [at Paragraph 27] being that:

“where all the users of another site to whom the works at issue have 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 must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.”

However, it also qualified this reasoning at Paragraph [31] to explain those circumstances in which the provision of such a link might constitute a communication to the public within the meaning of Article 3(1):

“...where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must 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 is required for such a communication to the public. This is the case, in

particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation."

The CJEU's reliance in Case C-466/12 *Svensson* on the "new public" criterion to sanction the provision on a website of clickable links to works freely available on another website has been characterised as "problematic" in an Opinion adopted by ALAI (Association *Litteraire et Artistique Internationale*) on 17 September 2014¹⁹ and which also criticises the "specific technical means" criterion. The Opinion, which was drafted by an ALAI Study Group consisting of eminent copyright academics, traces the origins of the 'new public' criterion and sets out in detail the basis for its criticism of this as a criterion, which it summarises as follows:

The "new public" criterion developed in the CJEU's case law construing the exclusive right of communication to the public is in conflict with international treaties and EU directives. Initially articulated in the offline environment to justify application of the right of communication to the public to certain retransmissions of television broadcasts, the criterion, as also subsequently applied by the court, is inconsistent with the communication to the public right of the Berne Convention and the WIPO Copyright Treaty *et al.*, as well as with provisions of the 2001 Information Society Directive. As applied in *Svensson*, the "new public" criterion has the effect of inappropriate exhaustion of the exclusive right of communication to the public of works which their authors or other right-owners have made available over generally accessible websites. Moreover, to the extent that *Svensson* indicates that the "new public" criterion will not apply if restrictions accompany the work's making available, the decision risks establishing an obligation to reserve rights or protect works etc. by technical protection measures, in violation of the Berne Convention's prohibition of formalities that condition the exercise of exclusive rights.

It would thus appear that the criterion of the "new public", which guided much of the Court's early case law in this area, and which the CJEU has already accepted in Case C-607/11 *ITV Broadcasting Ltd* does not provide a sufficient criterion in and of itself, may not survive unscathed.

Conclusion

Although the CJEU, when interpreting provisions in EU legislation that are also found in the national legislation of EU Member States, has had little difficulty in providing these with autonomous definitions that are independent of national interpretations, it has at least in so doing generally been informed by such national interpretations. In the field of copyright and related rights, and in contrast to the well-established restricted acts of reproduction and distribution, it has lacked such context, when interpreting the scope of the new restricted act of making available as set out in Article 3 of Directive 2001/29/EC. Moreover the inclusion of the restricted act of making available under the broader umbrella of the restricted act of communication to the public for copyright works has served only to confuse such analysis, especially as the expression 'communication to the public' has the potential to take on subtly different meanings depending on the context in which it is used.

Given the increasing importance of the restricted act of making available in a world in which streaming over the Internet becomes an ever more prevalent means of content provision it is unfortunate that the much of the early case law of the CJEU as to the restricted act of making available and communication to the public was developed in the context of more traditional means of content provision. It is thus likely that despite the relatively large number of references to the scope of the restricted act of making available to the CJEU to date, we have still only just seen their start, as it seems hardly conceivable, whatever one may think about their respective outcomes, that the underlying reasoning of the CJEU as set out in Case C-607/11 *ITV Broadcasting Ltd*, Case C-466/12 *Svensson* and Case C-348/13 *Bestwater* can be its last word on such issues.

References

- 1 Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society - OJ L 167 22.06.2001 p. 10.
- 2 In the period to the end of 2014 there were 52 references to the CJEU under the various Directives relating to copyright and related rights, of which 33 were under Directive 2001/29/EC, and of which 11 directly relate to Article 3.
- 3 For authors of copyright works, this is, by Article 8 of the WIPO Copyright Treaty "... 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.” By Articles 10 and 14 of the WIPO Performers and Phonograms Treaty this is, for performers and for producers of phonograms respectively “the exclusive right of authorising the making available to the public of their [performances fixed in phonograms/phonograms], by wire or wireless means, in such a way that members of the public may access them from a place at a time individually chosen by them.”
- 4 Article 8 of the WIPO Copyright Treaty commences by saying that it is “[w]ithout prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention”, all of which Articles include the expression ‘communication to the public.’
 - 5 Case C-306/05 *SGAE v Rafael Hoteles* – 7 December 2006.
 - 6 Joined Cases C-403/08 *Football Association Premier League and ors v QC Leisure and others* and C-429/08 *Karen Murphy v Media Protection Services* - 4 October 201.
 - 7 Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etairai* - 18 March 2010.
 - 8 Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA) v Léčebné lázně Mariánské Lázně, a.s.* – 27 February 2014.
 - 9 Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso, intervening party: Procuratore generale della Repubblica* – 15 March 2012.
 - 10 Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland and another* – 15 March 2012.
 - 11 Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property – OJ L 376 27.12.2006 p. 28.
 - 12 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 L248 6.10.93 p.15.
 - 13 Joined Cases C-431/09 *N V Airfield, B V Canal Digitaal v SABAM* and C-432/09 *N V Airfield, B V v AGICOA Belgium BVBA* -13 October 2011.
 - 14 Case C 607/11 *ITV Broadcasting Ltd and ors v TVCatchup Ltd* - 7 March 2013.
 - 15 These other two decisions uncontroversially confirmed certain limits to the scope of the restricted act under Article 3 of Directive 2001/29/EC. It was confirmed that it relates only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work, in Case C-283/10 *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)*, (CJEU 24 November 2011), a case which concerned the playing of music in a circus, which was instead the subject of the separate, but unharmonised restricted act of public performance. Case C-393/09 *Bezpečnostní Softwarová Asociace v Svaz Software Ochrany* (CJEU 22 December 2010), concerning a graphic user interface, held that there could be no communication to the public where the viewers have no access to an essential element which characterises the work.
 - 16 *Paramount Home Entertainment International Limited and Others v British Sky Broadcasting Limited and Others* [2013] EWHC 3479 at [12].
 - 17 Case C-466/12, *Svensson and ors v Retriever Sverige AB* - 13 February 2014.
 - 18 Case C-348/13 *BestWater International GmbH v Michael Mebe & Stefan Potsch* – 21 October 2014.
 - 19 *Opinion Proposed to the Executive Committee and adopted at its meeting, 17 September 2014 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”,* <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>. ALAI had previously adopted, before the decision of the CJEU in Case C-466/12 *Svensson*, a *Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet - Adopted Unanimously by the Executive Committee 16 September 2013*, <http://www.alai.org/assets/files/resolutions/making-available-right-report-opinion.pdf> and arguing in favour of linking being treated as ‘communication to the public’ within the meaning of Article 3(10 of Directive 2001/29/EC but with links to works that were freely available being addressed under doctrines of licence. A different view was however held by another group of eminent copyright academics, the European Copyright Society, who had urged, inter alia, that linking not be treated even as communication in *The Reference to the CJEU in Case C-466/12 Svensson* (15 February 2013). University of Cambridge Faculty of Law Research Paper No. 6/2013, SSRN: <http://ssrn.com/abstract=2220326> or <http://dx.doi.org/10.2139/ssrn.2220326>.