

# CJEU as a legislator in its own right?

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## 1. Introduction

At the Max-Planck-Institute in Munich, almost forty years ago, we had reason to discuss authors' rights before a backdrop of German and Nordic legislative measures as well as decisions of the courts in each country or region, noting that those sources of law often adhered to the same patterns of legal thinking and had an essentially homogeneous basis. Swedish (and Nordic) civil law had as its main source the German Civil Code (*Bürgerliches Gesetzbuch*), and Nordic intellectual property law was heavily influenced by German legal thinkers like *Kohler*. German and Nordic intellectual property court practice continued to deliver highly qualified statements on intrinsic legal matters, thereby offering clarification and understanding not least in the complex area of copyright and related rights. Swedish law on authors' rights generally has been nourished by many judgments handed down by the Supreme Court of Sweden, thus establishing a solid and dynamic body of norms based on the principles laid down in statutory law by the legislator.

As of 1 September 2016, there is a new Swedish court structure especially for intellectual property and market/competition law, making the Stockholm district court of first instance also the special court for all IP and market law cases in Sweden, called PMD,<sup>1</sup> and the Svea Appeal Court (also in Stockholm), the final special appeal court, now called PMÖD.<sup>2</sup> An appeal to the Supreme Court of Sweden will still be possible, but only if the PMÖD so decides. The aim of this reform is to strengthen the knowledge and expertise of the judges handling complex intellectual property and market law phenomena and to expedite the procedures before the courts. Hence, in IP Law,

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Sweden may currently be said to have two precedent courts: the Supreme Court and the PMÖD.

However, in the broad field of copyright there has been a remarkable eruption of decisions during the last ten years from the European Union Court of Justice, the CJEU, which has changed vital elements of copyright law in the narrow sense of the term.<sup>3</sup> This is not merely the result of the rapidly growing number of judgments in the field, due to frequent requests for preliminary rulings on copyright issues generally under Article 267 TFEU. It also follows from the ambition of the CJEU to actually accomplish more than *interpretations* of EU law, its undisputable mandate; beyond this, CJEU judgments nowadays often show an ambition to readily accomplish “effective” solutions for the “modern” internet and digitized markets, hereby applying far beyond what could reasonably be called interpretational efforts.

Hence, it seems fair to call the CJEU pro-active, at least in the field of copyright, in its current judgments sometimes leaving the EU *acquis communautaire* aside, thus stipulating *new legal positions* or construing copyright proper in a new way, neither supported by the given directives or contradicting them, nor following relevant international treaties in the field, such as the Berne Convention (also part of EU law), the TRIPs Agreement or the WIPO treaties WCT and WPPT.<sup>4</sup>

Several CJEU judgments demonstrate the aforesaid, but to follow up on this task a small number of illustrative examples from the copyright arena will be discussed below, mainly concerning the basic right of *communication to the public*, as formulated in Article 3 of the Infosoc Directive.

The CJEU's self-imposed role as a “legislator” emerges clearly from its recently introduced criterion of a “new public” when framing the basic right of communication to the public, e.g. in its judgments of 13 February 2014, Case C-466/12, ECLI:EU:C:2014:76, *Svensson* (decided upon a preliminary ruling requested by the Svea Court of Appeal in Stockholm), closely related to the CJEU decision of 8 September 2016, C-160/15, ECLI:EU:C:2016:221, *GS Media*, just as in its judgment of 16 November 2016, C-301/15, ECLI:EU:C:2016:878, *Soulier*. Those decisions, and several others of the

<sup>3</sup> The CJEU's decisions have continuously clarified many intrinsic matters, but very much at random, depending on questions and claims posed or furthered by national courts for preliminary rulings.

<sup>4</sup> Article 1(4) of the WIPO Copyright Treaty provides that Contracting Parties are required to comply with Articles 1 to 21 of the Berne Convention. Cf. CJEU C-138/16, ECLI:EU:C:2017:218, *AKM*.

CJEU, have created a labyrinthic order in the field of the rights of making available and communication to the public within the framework of authors' rights, copyright and related rights, also by introducing *knowledge* of a perpetrator and his *financial purpose* as prerequisites for the existence of the right of communication to the public, and by introducing a formalized norm for *implicit consent*. As a result the right of communication to the public has been narrowed, certainly not following from what is set out in Article 3 of the Infosoc Directive.

## 2. “New Public” – the Svensson case and others

The criterion of a “new public” was introduced in the SGAE decision, sometimes referred to as the Rafael Hoteles case, and can also be observed in a number of other CJEU cases aside of the already mentioned judgments.<sup>5</sup> But it is more clearly stated in the Svensson judgment (if ever clearly stated in any CJEU judgment). Yet the CJEU subsequently confirmed this statement, for example in the BestWater decision,<sup>6</sup> where linking in the form of *frames* displayed on the user's screen was also found to be communication to the public.

Firstly, the CJEU makes clear that the right does not depend on the user having caused a “transmission” to the public through the link; it suffices that the link has *enabled* the public to access to the work, no matter whether or not the offer has been availed of. The mere *offer* to the public of this opportunity, i.e. putting the link in place, thus potentially enabling access to the work to which the link points, is enough to trigger an act of communication to the public. Not a single factual ‘transmission’ of a work to the public must necessarily have happened via the link.<sup>7</sup> This statement was obviously necessary although Article 3 of the Directive 2001/29 makes it perfectly

<sup>5</sup> See C-306/05, *SGAE*, ECLI:EU:C:2006:764; C-135/10, *Del Corso*, ECLI:EU:C:2012:140, C-607/11, *TV Catch Up*, ECLI:EU:C:2013:147, and C-348/13, *BestWater*, ECLI:EU:C:2014:2315. Further, the Swedish Supreme Court of Justice initiated the preliminary ruling of the CJEU in C-279/13, ECLI:EU:C:2015:199, *C More Entertainment*, also of some interest in this context.

<sup>6</sup> See reference in note 5.

<sup>7</sup> Compare the statement of the European Copyright Society, built on the assumption that factual ‘transmission’ must be a part of an act of communication to the public, something a linking measure seemed not to factuate; see The European Copyright Society – Opinion on the reference to the CJEU in Case C-466/12, *Svensson*, dated 15 Jan. 2013, [http://www.ivir.nl/news/European\\_Copyright\\_Society\\_Opinion\\_On\\_Svensson.pdf](http://www.ivir.nl/news/European_Copyright_Society_Opinion_On_Svensson.pdf).

clear, among other things, that availability *on-demand* is part of the right of communication to the public, meaning that such communication may come about although not a single individual of the general public has ever accepted the offer to access specific protected material being made available via a link. The CJEU states at (20):

“It follows that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’, within the meaning of that provision.”

Deep links and framing links make the referenced work, i.e. each work contained on the website, apart from the homepage itself (when considered itself a protected work) or any work constituting part of the home page, available to the public, and therefore require authorization in the absence of an exception or limitation. Such links offer the works to the public in a manner enabling the public to access the targeted works at a place and time chosen by them. Those who furnish these kinds of links make it possible to bring the works directly to the computer or device screens of the user, or to download them directly to the computer or device without further intermediation.<sup>8</sup> There is, as a matter of principle, a communication to the public of potentially protected material, but solely by the linked-to site, since another step is needed on the host site before the user can access the specific work (technically by using its URL) via the link, which would require authorization.<sup>9</sup>

<sup>8</sup> The CJEU’s decision on the scope of the distribution right, *C-516/13, Dimenzione Direct Sales v. Knoll Int’l*, 13 May 2015, similarly affirms that the offer to commit an act that would infringe the author’s exclusive distribution right is itself considered to be an act of distribution; it is not necessary that the copy actually change hands. (‘Eu égard aux considérations qui précèdent, il convient de répondre aux questions posées que l’article 4, paragraphe 1, de la directive 2001/29 doit être interprété en ce sens qu’il permet à un titulaire du droit exclusif de distribution d’une œuvre protégée de s’opposer à une offre de vente ou à une publicité ciblée concernant l’original ou une copie de cette œuvre, quand bien même il ne serait pas établi que cette publicité a donné lieu à l’acquisition de l’objet protégé par un acheteur de l’Union, pour autant que ladite publicité incite les consommateurs de l’État membre dans lequel ladite œuvre est protégée par le droit d’auteur à en faire l’acquisition.’)

<sup>9</sup> If the linker knows that the content on the linked-to page is infringing, the linker may be a contributory infringer, but would not be directly liable for a violation of the right of communication to the public. This text merely notes the possibility of liability under theories of secondary infringement but does not further explore that possibility.

When the CJEU approaches the second criterion, that of the ‘new public’ as defined in the *Svensson* and *BestWater* decisions, things get problematic. This is because the CJEU offers a legal construction with reference to some of its earlier decisions,<sup>10</sup> meaning that the exclusive right of communication would merely be valid when a link makes a work available to a ‘new public’ relative to the one already addressed on the internet by the same technique and with the consent of the right holder. Such a *reduction* of the right of communication to the public conflicts with international copyright law and the EU *acquis*, as further addressed below. Obviously, what the CJEU has stated about the first criterion, making links a typical act of communication, is severely reduced if the public addressed by the link has to be new relative to those potentially already addressed or ‘taken into account’ by the right holder via the freely accessible website to which a link points.

All potential visitors to an openly accessible website therefore constitute the public *taken into account* by the copyright holders ‘when they authorized the initial communication.’ This is plainly expressed by the CJEU in *Svensson* at (26):

“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.”

Hence, if a link is placed to a targeted file containing protected material without any form of restriction, such as pay-walls, technological protection or coded doors to be passed by the visitor, all visitors from *the global internet* are part of that public taken into account by the right holder when they initiated the availability of that protected material on a website on the open Internet.<sup>11</sup>

The brutal effects of this factual limitation on or exhaustion of the right of communication to the public are not particularly eased by those restrictions, or limits, on the introduced limitation itself, expressed by the CJEU at para. (31) of the *Svensson* decision.

<sup>10</sup> Cases C-306/05, *SGAE*, C-135/10, *Marco del Corso* and C-607/11, *TV Catchup*.

<sup>11</sup> See Association Littéraire et Artistique International, Report and Opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the internet, <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>, ALAI 15 September 2015.

This statement by the CJEU, supplemented by, e.g., the *TV Catchup* decision, thus invalidates the criterion of a “new public” in at least these four situations:

- (i) When linking measures circumvent technical restrictions.
- (ii) When a link points at a work no longer available to the public on the site on which it was initially communicated.
- (iii) When a work is offered by limited access on the initial website, authorized by the right- owner, but available on another website without authorization.
- (iv) When communication is not done with the same ‘specific technical means’.

According to the *GS Media* decision, see below, the CJEU arrives at other restrictions or mixed conclusions in those respects.

As for the fourth restriction, noted under (iv) above, it concerns a communication not effected by the same ‘*specific technical means*’ as the initial one. It was dealt with somewhat indirectly in the *Svensson* and *BestWater* cases, but it primarily follows from the *TV Catchup* decision. In the *TV Catchup* case the CJEU actually supplemented the criterion of a ‘new public’ with the introduction of the ‘specific technical means’ criterion, thereby introducing a new criterion for the concept of communication to the public that is unknown in the international treaties and the EU directives.

Like the *Svensson* case, the *TV Catchup* judgment concerned the use of works through the Internet, albeit in a different way. In the dispute, ITV claimed that *TV Catchup* had infringed the copyright in its broadcasts by communicating them to the public through a process of electronic transmission (in the form of streaming). From the viewpoint of the criterion of a ‘new public’, a highly relevant feature of *TV Catchup*’s system was that its users were allowed to watch only those streamed broadcasts that they were entitled to watch on the basis of a licence valid in the same country, the United Kingdom. It was also relevant that *TV Catchup*’s income derived from advertising displayed before the user could watch the streamed programme, just like the aggregator services making available works through hyperlinks as the plaintiff in the *Svensson* case did, also obtaining their income from advertisement money.

In the *Svensson* case, the ‘specific technical means’ criterion could not restore the right of communication to the public, because the Court consid-

ered that the same means – the Internet – were employed to access the original website whether through direct implementation of the site’s URL or by following a hyperlink to the copyrighted content on the site, stated in (24).

The CJEU’s findings in *TV Catchup*, abandoning the criterion of a “new public” when the communication is by a different technical means, alleviate some of the problems of treating a ‘new public’ as a limiting factor, but in fact reveals the incoherence of the CJEU’s erroneous derivation of that criterion from the *old WIPO Guide*’s discussion of 11*bis*(1)(iii).<sup>12</sup> The nature of the communication at issue in the *old WIPO Guide* was by definition by a different technical means: an initial radio transmission retransmitted by loudspeaker. As the *old WIPO Guide*’s commentary indicates, the initial over-the-air communication was to private homes, the retransmission by loudspeaker is to places open to the public. Different technical means are employed to reach publics in different places. Under the CJEU’s reading, the nature of the public is irrelevant if the communication is by a different technical means. But in that case, the criterion of a ‘new public’ becomes meaningless in the very example which served as the foundation for the introduction of that criterion, because that example in fact involved different technical means.

A ‘different technical means’ criterion also contravenes the text of the Berne Convention. Article 11*bis*(1)(ii) of the Berne Convention provides for an exclusive right not only for retransmission by cable but also for rebroadcasting which means retransmission by wireless means, and thus, accordingly by the same ‘specific means’ as those used for broadcasting. Still, the Berne Convention provides for two separate rights and thus recognizes that there are two separate acts. It makes no difference whether the subsequent communication is made by different or by the same technical means, that is to say – in the case of Article 11*bis*(1)(ii) – by wire or by wireless means.

This shows unambiguously that the ‘specific technical means’ criterion conflicts with international copyright provisions on the scope of the minimum rights of communication to the public and making available to the public as well as the EU rules implementing them. There is no element of those provisions or of their ‘preparatory work’ that would support it.

Somewhat ironically, the CJEU’s own evaluation of the circumstances in the *Svensson* case was also erroneous; if correctly understood, they would have led to a preserved right of communication to the public, also by the new

<sup>12</sup> See *infra* for more details.

standards construed by the CJEU, as there were in fact *restrictions* on access in that case, thus a new public was addressed via the links concerned.<sup>13</sup>

### 3. The GS Media case – further limitations on the right of communication to the public

As noted above, *Svensson* left at least two questions unresolved: (i) what if the linked-to site is not authorized? And (ii) what kind of “restrictions” on the authorized site would result in unauthorized links reaching a “new public”?<sup>14</sup> Furthermore, what if the work is available only to a restricted public e.g. due to technical protection measures (TPM), passwords or pay-walls.<sup>15</sup>

Following the *Svensson* decision, one would contend that a “new public” would by definition be addressed if hypertext links pointed to works posted on the internet as a form of *piracy*, thus without permission from the copyright holders, as the public thereby addressed would by no means be part of the public taken into account by the copyright holders (as they definitely had not “authorized the initial communication”), see *Svensson* at para. 27.

However, in GS Media at para. 55, the CJEU concludes that “Article 3(1) of Directive 2001/29 must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of that provision, it is to be determined whether those links are provided *without the pursuit of financial gain* by a person who *did not know or could not reasonably have known* the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed” (emphasis added).

The CJEU thus further narrows the right of communication to the public, meaning that if a person provides a link to a work posted illicitly on the

<sup>13</sup> At a closer look, the CJEU’s judgment obviously was built on a misunderstanding of the actual circumstances of the national case, as the CJEU seems to have understood the linking measures to have led to fully and openly accessible works on the website in question; in fact, during the period under which the links were working, those links pointed at works by *Svensson et al.* which were, after an initial period of thirty days, merely accessible for those who had a special *access code* (subscribers to the newspaper), thus no longer available for the general public.

<sup>14</sup> Cf. *Svensson* at para. 31.

<sup>15</sup> Cf. *Svensson* at para. 16 and 31.



internet, there is no communication to the public if that person did not know or could not reasonably have known the illegal nature of the initial posting. If such a link was provided in the “the pursuit of financial gain” a rebuttable presumption of knowledge arises.

This new standard fundamentally alters the nature of the communication right away from a strict liability property right, with regard to which neither knowledge nor profit motives are hitherto considered elements of the claim. The conditions the court introduces are not only new, but also very uncertain. First, what constitutes actual or constructive knowledge? Second, what is “the pursuit of financial gain” that triggers a presumption of knowledge?

Those two different issues, introduced by the CJEU in the GS Media decision, will be further explored here, insofar as links to an *illicit source* website are concerned.

#### *Introduction of a knowledge standard*

With respect to the first question, does a negative inference of ignorance arise if no financial motive underlies the furnishing of the link? Absent that motive, must the copyright owner show that the linker knew or should have reasonably known not only what work(s) the link directed users to, but also that the source site was unauthorized? What kind of evidence triggers actual or constructive knowledge of an illegal source?

With respect to profit-motivated links, what evidence will rebut the presumption of knowledge? GS Media in para. 51 indicates that rebutting the presumption of knowledge will in fact be easy, because “when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead...”.

But, if automated processes supply the links, will the linker still be deemed to have the requisite knowledge? And if the processes are automated and implemented by an internet service provider, would the necessity to check the legality of the source site run afoul of the eCommerce Directive’s Art. 15 preclusion of a service provider’s duty to monitor? Does the court’s reference to “the person who posted such a link” imply more direct human agency than might be attributed to an automated process? It should be noted here that GS Media involved links selected by the defendant entrepreneurs.

*Financial gain criterion*

Regarding the second new element of liability, we may recall that this for-profit criterion used by the Court as a prerequisite for the existence of a communication to the public conflicts with the Berne Convention, which has no such requirement. We must underline here the necessity of a broad interpretation of the for-profit criterion. The presumptive liability of for-profit businesses for linking to illicitly posted material should not be restricted to the commercial status of the link itself, such as pay-per-click models. One must rebut a narrow interpretation and instead urge that the linker's "pursuit of financial gain" be assessed with respect to the linker's enterprise as a whole, rather than to the challenged links alone. It is appropriate to engage the liability of for-profit entities who are aware of or are willfully blind to the illegality of the sites to which they direct end-users.

It can be recalled that in the CJEU cases *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, at paragraph 205, and *SCF Consorzio Fonografici*, C-135/10, EUC:2012:140, at paragraphs 90 and 91, it was considered, in the context of the "profit-criterion", that the transmission could have an effect on the number of people going to the "establishment" (a pub, hotel etc.). In the present context, the "establishment" would be the *website* or *service* providing the link. This in turn should 'ultimately' have an effect on the financial results of the establishment. The CJEU therefore clearly addresses the *indirect benefits* of the service, for neither the pub nor the hotel held in those cases to have engaged in communications to the public directly charged fees for access to the signals.

More recently, the CJEU was even more explicit in the *Reha* decision, C-117/15, ECLI:EU:C:2016:379. It stressed, with reference to *SCF Consorzio Fonografici*, that in assessing the profit-making nature, the 'receptivity' of the public was relevant. Were the profit-making nature relevant only for a paying service, that criterion of 'receptivity' would clearly be redundant. Furthermore, *Reha's* rehabilitation center *charged no direct fees* for the tv-programmes that the patients could follow; it was considered to be a service of a profit-making nature because it had an impact on the establishment's standing and attractiveness, thereby giving it a competitive advantage.<sup>16</sup>

Accordingly, the profit-making nature criterion evoked in *GS Media* – while still very problematic because it undermines the exclusivity of the right

<sup>16</sup> See *Reha* at para. 63.

of communication to the public by derogating from the principle of strict liability – should be interpreted consistently with previous judgments.

4. The Soulier decision – under what circumstances is access to the initial source website “unrestricted”? Implicit consent and the enjoyment and exercise of exclusive rights.

Under *Svensson*, making a work available without restriction means that subsequent access to the source website by means of linking does not bring the work to a “new public”. As a result, it becomes important to determine what kinds of restrictions on the work’s initial lawful disclosure will mean that the work is being communicated to a “new public” if a subsequent linker ignores or overrides those restrictions.<sup>17</sup> *Svensson* referred to “access restrictions” (at para. 18), and to the “circumvention of 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” (at para. 31). The Court appears to be contemplating technological restrictions on access – might other restraints, either contractual or declaratory, also constitute “restrictions” which, if overridden or disregarded, could subject the linker to liability?

The CJEU’s decision in *Soulier* invalidating a 2012 French law on mass digitization, which presumed the authors’ and publishers’ consent unless they opted out of a book scanning regime, offers an analysis of the conditions for implying consent to exploitation acts under copyright law. Although at first glance far removed from controversies involving hyperlinking, *Soulier* cited *Svensson* in its discussion of *implied consent*. At paragraph 36 the Court states:

Thus, in a case in which it was questioned about the concept of a ‘new public’, the Court held that, in a situation in which an author had given prior, explicit and unreserved authorization to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorized the communication of those works to the general

<sup>17</sup> It may be ambiguous after *GS Media* whether unrestricted access to the source website means that providing subsequent access to unauthorized sites does not communicate the work to a “new public” because the initial unrestricted lawful posting already covered the entire Internet public.

internet public (see, to that effect, judgment of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraphs 25 to 28 and 31.”

In order to determine what kinds of restrictions might preserve authors’ rights to object to linking, it therefore becomes important to ascertain, per *Soulier*, what, the object of the *Svensson* authors’ implied consent was.

*Soulier* concerned, in essence, whether Article 2(a) and Article 3((1) of Directive 2001/29 must be interpreted as precluding national legislation that gives an approved collecting society the right to authorize the reproduction and communication to the public, in digital form, of out-of-print books, while allowing the authors of those books or their successors in title an “opt out” option to oppose or put an end to that practice at the terms set out in legislation. Notably, the CJEU also held that such an interpretation is supported by the Berne Convention, Articles 1 to 21, with which the European Union is required to comply pursuant to Article 1(4) of the WIPO Copyright Treaty, to which the European Union is a party, and which Directive 2001/29 is intended to implement as stated especially in recital 15 thereof.

Further, we may also note that the CJEU considers it important to emphasize that the rights guaranteed to authors by Article 2(a) and Article 3(1) of Directive 2001/29 are *preventive in nature*, in the sense that any reproduction or communication to the public of a work by a third party requires the *prior consent* of its author.<sup>18</sup> As Article 2(a) and Article 3(1) of Directive 2001/29 do not specify how prior consent of the author must be expressed, the CJEU holds that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly, but also allow that consent to be expressed *implicitly*.

Referring directly to the *Svensson* decision, in particular to paragraphs 25 to 28 and 31, the CJEU thus held that the author in that case could essentially be regarded as having authorized the communication of the works in question to the *general internet public*, following from prior explicit and unreserved authorization granted to a newspaper publisher to publish cer-

<sup>18</sup> Hereby the CJEU refers to, concerning the right of reproduction, judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 57 and 74, and of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 162, and, concerning the right of communication to the public, judgments of 15 March 2012, *SCF Consorzio Fonografici*, C-135/10, EU:C:2012:140, paragraph 75, and of 13 February 2014, *Svensson and Others*, C-466/12, EU:C:2014:76, paragraph 15.

tain articles on the website in question, without making use of technological measures restricting access, hence with the effect of *implied* consent.

However, the circumstances in which such implicit consent can be admitted must be “strictly defined”, namely “in order not to deprive of the effect the very principle of the author’s prior consent”, *Soulier* at paragraph 37.

It therefore appears that conditions subsequent to the work’s initial lawful disclosure are ineffective to preserve rights against linking. On the other hand, a website restriction that denied access to the work until the user clicked his agreement to contractual terms that included a prohibition on deep or framing links may constitute an effective restriction under *Svensson-Soulier*, because it makes the work inaccessible until the user assents to the contractual conditions. In other words, the author permits the work to be communicated only to those members of the public who undertake to comply with the conditions on initial access.

Thus, it is possible, even under *Svensson-Soulier*, to preserve rights against linking while maintaining an open access website – open in the sense that every member of the public may access the site, and may receive a communication of its content for free – so long as the author imposes technologically or contractually enforceable limitations before any member of the public may receive a communication of the work.

## 5. Concluding remarks

In this article we have demonstrated how the CJEU, in the realm of copyright, has repeatedly assumed the role of a legislator so as to afford authors new (reduced) legal positions, hence also more space insofar as the users are concerned, surely in a Solomonic ambition to balance interests on the biggest media market of our times, namely that of the global internet. It has been said that the CJEU is driven to this, firstly, by the notion of “saving the internet” from an overbearing copyright construction, meaning that the massive flow of information on the internet, its high level of automation, cannot cope with latent claims for copyright clearance,<sup>19</sup> and, secondly, that

<sup>19</sup> Cf. The opinion of the GA Melchior Wathelet in the *GS Media* case of 7 april 2016, ECLI:EU:C:2016:221, para. 78–79.

the CJEU simply cannot accept the comparatively slow machinery of the EU legislator.<sup>20</sup>

Whatever the motives, we must conclude that the CJEU has construed materially as well as principally new and complex legal figures in the already overtaxed copyright law, which certainly does not crave further complexity. This is done (i) by narrowing the right of communication to the public by introducing the criterion of a “new public”, (ii) by declaring the right of communication to the public to be framed by the users’ *knowledge* and (iii) *financial gain*, and (iv) by the introduction of formalized *implicit consent*.

Those trips of the CJEU to the territory of the EU legislator would be easier to accept if they led to effectively practical and fair results. But that is hardly the case. Just as bad is that those novelties of the CJEU’s pen have created a legal labyrinth to be overcome by lawyers forced to work with the right of communication to the public. It is likely that thorough work by a mandated legislator under common democratic principles and with a more holistic approach would have produced something better. One may wish for a new directive on communication to the public or, possibly, an amendment to Directive 2001/29.

<sup>20</sup> Cf. Marcella Favale, Martin Kretschmer and Paul C. Torremans, Is there an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice, *The Modern Law Review* (2016) 79(1)MLR31-75.