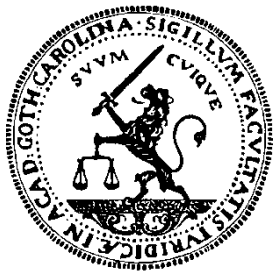

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Linking to a 'New Public': Parallels with the Principle of Exhaustion

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Contents

Summary

The rise of the Internet over the past few decades has had a massive impact on the protection on the protection of copyright in this new digital environment. Both international and EU policymakers have attempted to build a framework of copyright law which can adapt to this environment as well as continuing to function in the traditional one. One of the most significant steps toward this objective was the establishment of the exclusive right of communication to the public, which covers many of the actions taken in relation to IP-protected works on the Internet.

Linking holds a particular place of importance on the World Wide Web, and has become one of the essential building blocks that make the Internet widely accessible network of information and knowledge that it is today. Therefore its relationship with copyright has been somewhat controversial. In recent case-law, the Court of Justice of the European Union (CJEU) has aimed to attain the dual objectives of settling the uncertainty surrounding the relationship between linking and copyright and of course doing so in such a way that affords adequate protection to rightholders while also respecting the special position linking holds in the online environment. To do so, the Court has established that linking does indeed fall under the right of communication to the public, but with the caveat that it will only constitute infringement if it reaches a 'new public' not contemplate by the rightholder.

This rule essentially means that once a rightolder has authorised communication of their work on the Internet, they forfeit the right to prevent further communications of that same work through linking. Numerous parallels might be drawn between this new, specific rule and the existing, more general principle of exhaustion of right under EU law. Exhaustion has traditionally been excluded from application on the Internet, meaning that this similarity is potentially problematic. Recent case law and further analysis, however, suggests that there may be more scope for exhaustion online than initially believed.

Nonetheless, the comparison between the linking as a communication to a new public and the principle of exhaustion highlights some underlying flaws in the copyright system.

Preface

I would like to extend my thanks to the Law Faculty at Lund University for allowing me the opportunity to take part in the Masters Programme in European Business Law, as well as all the academic, administrative and general staff for all their teaching, encouragement and support over these past two years.

This programme was not my first time studying at Lund, and I would like to thank the Erasmus exchange programme for introducing me to this University back in 2012.

Especially heartfelt thanks go to Ulf Maunsbach , whose support has been instrumental to my successful completion of this degree. From encouraging me to apply for the Masters programme back when I was an exchange student, to his excellent supervision during my work on this thesis, Ulf has been one of the most influential teachers I have had throughout my academic career, and for this I will be forever grateful.

Nicola Harvey, June 2015

Abbreviations

ALAI	Association Littéraire et Artistique Internationale (International Literary and Artistic Association)
CJEU	Court of Justice of the European Union
EU	European Union
IP	Intellectual Property
IPR	Intellectual Property Right(s)
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty

1. Introduction

Modern copyright law aims to be 'technology neutral' in response to the emergence of the digital age, yet the development of the copyright framework in online environments has shown that the transition from analogue to digital copyright protection has been far from seamless. This is particularly true when it applies to the practice of linking, where the exclusive right of communication to the public is naturally at odds with the fact that this particular form of communication forms such a fundamental building block that allows the Internet to function.

The recent CJEU ruling in *Nils Svensson and Others* v *Retreiver Sverige AB*[1] aims to establish a clear position on the legality of linking from a copyright perspective and to strike an appropriate balance between the protecting rights of IP owners while still respecting the free dissemination of content that uniquely defines the internet.

While the substantive balance struck by the court in *Svensson* is relatively unproblematic, the mechanism used to reach it has raised certain questions relating to the functioning of copyright law on the Internet. Significant amounts of commentary have been devoted to discussing the effects of *Svensson* and in particular its 'new public' rule, which forms the key factor in this balancing act. One particular aspect of this rule which writers have alluded to is the potential overlap between this rule and the wider IP law principle of exhaustion. While some have referred to the rule as a 'back door' means of introducing exhaustion into online environments, others have dismissed the notion that they are in any way similar. Yet this issue has never been properly analysed on its own merits and the discussion has been paid little more than lip service thus far.

Traditionally, policymakers have been rather adamant in their adherence to the notion that the principle of exhaustion does not apply in online situations. However, that the divergence of opinions exists suggests that we must now re-examine whether this traditional position still remains entirely true.

[1] Case C-466/12 *Nils Svensson and Others* v *Retreiver Sverige AB* [2014] ECDR 9
[2] Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the

1.1 Purpose and Research Questions

The purpose of this essay then is to draw a comparison between the regulation of linking set down by the CJEU in *Svensson* and the principle of exhaustion, and to examine the implications of such a comparison within the framework of EU copyright law more broadly.

To do this, the following questions will be addressed:

How does the copyright framework aim to adapt itself to online situations?
What is the relationship between copyright and linking in particular?
What does the 'new public' requirement in *Svensson* add to EU law, and how does it relate to the objectives of online copyright law more generally?
Is there scope for the application of exhaustion online?
To what extent might the 'new public' requirement be viewed as an expression of the exhaustion principle for linking, and why is this problematic with regards to the coherence of copyright law?

1.2 Delimitations

This essay is primarily focused on EU law, and is therefore not concerned with national or international copyright regimes. Given the pluralistic nature of the EU legal system, it is necessary that there will be some discussion of international instruments and national case law, but only to the extent that they are relevant for contextualising or otherwise further understanding the EU laws.

Similarly, this essay will be focussed on copyright in online environments specifically, trade marks, patents and designs are outwith the scope of this essay except insofar as they inform wider principles of IP that also apply to copyright. More specifically, the focus of this essay is the exclusive right of communication to the public. Other rights conferred to IP holders are mentioned in passing, but are not fully within the scope of this essay as they do not pertain to linking within EU copyright law.

Within the context of copyright and linking, there are also specific issues relating to the regulation of search engines. These will not be discussed in this essay, which is concerned with the regulation of linking more generally.

The discussion of exhaustion in particular will be within the context of the intra-European exhaustion that is employed under EU law. It is feasible that issues of international exhaustion may be relevant to discussions about the Internet, but they will not be covered in this essay

1.3 Method and Materials

This essay largely takes a legal positivist view of its subject matter. The law is examined as it currently is and how it is applied in reality. In line with this the law will be viewed alongside the practical factors which will affect its real world functioning. Legal norms will be analysed by reference to their origins and underlying principles, but ultimately assessed using an effect-based approach. This will allow a comparative examination of specific rules and principles, not only in their conceptual and normative origins, but also on the basis of their functional similarities and differences.

This essay is written from the perspective of EU Law, both in terms of the EU copyright laws and exhaustion as an EU concept, and therefore employs a strictly European method. The pluralistic nature of the EU legal system means that other legal sources, such as international treaties or national case law may also have to be analysed. This will be done strictly from the point of view that they pertain to the development or understanding of EU law.

The materials used reflect the legal dogmatic method and the hierarchy of sources within EU law. The analysis is based around the interpretation and application of positive EU law including EU legislation, in particular the so-called InfoSoc Directive,[2] and CJEU case law, with minimal references to the recitals of relevant Directives. The international instruments which inform said EU legislation and case-law will also be examined. Preparatory works, guidelines and other 'soft law' materials from EU sources have not been employed. The

[2] Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, OJ 2001 L167/10

purpose and intent of the relevant legislation and case law is generally readily apparent and without ambiguity from those sources themselves, therefore the use of 'soft' EU instruments as a supplement has been deemed unnecessary. Doctrinal writings will, however, be utilised throughout to provide background and support this essay's analysis.

1.4 Outline

The second chapter of this essay introduces the background of copyright in online environments and the agenda of technological neutrality, while the third chapter describes the unique features of linking which make it particularly complicated to regulate and introduces the general copyright issues it poses. The fourth chapter goes into greater detail on the 'new public' rule which has formed the key aspect of how linking is regulated under EU copyright law since the *Svensson* ruling, and compares this application of the rule to its origins. The fifth chapter discussed the principle of exhaustion, exploring its origins an underlying rationales before going on to analyse its position vis a vis the regulation of copyright on the internet. Finally, chapter six presents a comparison between the 'new public' rule and the exhaustion principle, and discusses some of the problems that the overlap may raise. Following this, the concluding chapter attempts to assess these issues within the wider scheme of the copyright framework as it has emerged throughout the essay, and talks about what this means for the 'technology neutral' objective.

2. Copyright on the Internet

2.1 Background

Technological development, particularly the rise of the Internet, has had a profound effect on the creation and use of literary and artistic works[3], therefore it is only natural that the copyright laws which protect these works would have to adapt to this new environment. The particular nature of the Internet[4] makes regulation of copyright somewhat challenging.[5] Rather than create a new framework of protection solely for this environment, IP policymakers have striven to adapt existing principles of copyright and authors rights to be 'technology neutral'[6]. In doing so, they aim to create a copyright framework 'independent of the dynamics of technological shifts in an ever changing and dynamic media environment'.[7]

One of the major complications relating to online distribution is that the distinction between the various rights conferred by copyright protection becomes somewhat unclear. For example, in the analogue world, the right of distribution and the right of reproduction are two distinct facets of copyright. In the online environment, distribution and copying are for all intents and purposes the same thing, which can complicate the ways in which these two previously distinct rights should be protected. It becomes especially problematic in cases where the rights are held by different people or entities.[8] It is for this reason that new instruments have been created in order to address these problems and reframe the rights granted to copyright holders in a more technologically neutral manner.

[3] WIPO Copyright Treaty, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166, preamble
[4] P. Samuelson, "Digital media and the law', Communications of the ACM, (1991) Vol 34. Issue 10, pg 23
[5] V. Van Coppenhagen, "Copyright and the WIPO Copyright Treaty, with specific reference to the rights available in a digital environment and the protection of technological measures" (2002) 119 S African LJ 429, pg 430
[6] Association Littéraire et Artistique Internationale (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/assets/files/resolutions/making-available-right-report-opinion.pdf
[7] ALAI report
[8] *Public consultation on the review of the EU copyright rules*, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf, pg 8

2.2 Legislation and Treaties

The primary instruments which aim to create this 'technology neutral' copyright regime are the WIPO Internet Treaties:[9] the WCT and WPPT.[10]

The WCT was introduced in 1996 and entered into force in 2002 in order to deal specifically with the rights of copyright holders in a 'digital environment'.[11] It is said to be a 'watershed moment' in international copyright law[12] that has heralded a drastic shift in how copyright is regulated in the modern world. This Treaty, in addition to the rights already contained in the Berne Convention, grants authors the rights of distribution,[13] rental[14] and communication to the public.[15] It also provides protection for technological measures used by authors to prevent unauthorised access to their works.[16]

In the EU, these implementation of these treaties can be found in a number of pieces of legislation. By far the most significant of these, however, is the InfoSoc Directive.[17] As such, this Directive and the WCT are very closely related. In accordance with the 'technology neutral' goal, this Directive covers the whole field of copyright, albeit with a 'particular emphasis on the information society'.[18] For that reason it can be seen as the closest thing we have yet seen to a unified European copyright code[19] and a large step towards the goal of creating a technologically neutral copyright law.

Other important pieces of EU legislation include Directive 2009/24/EC on the Legal Protection of Computer Programs[20] (the 'Computer Programs Directive'), which brings computer programs within the scope of 'literary works' within the meaning of the Berne

[9] G Tritton, *Tritton on Intellectual Property Law,* 4th edn by R Davis et al, Sweet & Maxwell, London, 2014, pg 887
[10] WIPO Performances and Phonograms Treaty, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295578
[11] Summary of the WIPO Copyright Treaty (WCT) 1996, available at http://www.wipo.int/treaties/en/ip/wct/summary_wct.html
[12] G. Dinwoodie, "The WIPO Copyright Treaty: A transition to the future of international copyright lawmaking?", *Case Western Reserve Law Review,* (2007) Vol. 57, Issue 4, 751-766, pg 753
[13] WCT, Article 6
[14] WCT, Article 7
[15] WCT, Article 8
[16] WCT, Article 11
[17] A Savin, *EU Internet Law,* Edward Elgar Publishing, Cheltenham, 2013, pg 124
[18] Savin, pg 125
[19] Tritton, pg 886
[20] Directive 2009/24/EC on the legal protection of computer programs, OJ 2009 L111/16

Convention[21] in accordance with Article 4 of the WCT, and governs their protection under EU copyright law. This directive takes a slightly different approach to copyright in online environments than the InfoSoc Directive due to its more specific subject matter. The nature, significance and implications of these differences will be examined in some detail in Chapter 5.

2.3 The Right of Communication

Most discussion of copyright in online environments centres around three distinct rights: reproduction,[22] communication to the public[23] and distribution.[24] Of these, the right of communication to the public, also known as the right of 'making available', is by far the most significant from the point of view of interned-centred discussions, to the point where it is also known as the 'internet right'.[25] 'Making available' is a broader term. 'communication to the public' is one that came about specifically for the internet,[26] although its broad, technology-neutral application is considered a 'cornerstone of the digital agenda'.[27]

Article 8 of the WCT provides the original expression of this right as follows:

"Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing 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.[7]"

At the EU level, it is found in Article 3 of the InfoSoc Directive, and most importantly Article 3(1), which states:

[21] Berne Convention for the Protection of Literary and Artistic Works (as amended), available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698, Article 2
[22] InfoSoc Directive, Article 2
[23] InfoSoc Directive, Article 3
[24] Tritton, pg 886
[25] *ibid*, pg 887
[26] ALAI report
[27] Van Coppenhagen, pg 451

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.

In essence, therefore, this is the right of copyright holders to control whether, and under what conditions, their works are exposed to the public eye. The 'at a time and place individually chosen by them' wording is of particular relevance to online communications, as the nature of the internet allows users to access online content at their own discretion and is not dependent on, for example, the timing of a television broadcast or the possession of a physical copy. Early commentators have noted that the right of communication "implies something more than the user being an object of distribution"[28] but rather involves a degree of interaction.[29] This means that the right of communication to the public still stands, and is indeed specifically tailored to situations, where there is such discretion on the part of the recipients of the copyright content, as is often the case on the Internet.

The exact definition and scope of this right has largely been developed by the CJEU,[30] with some guidance provided by the preamble to the InfoSoc Directive, which suggests a broad interpretation of Article 3 that includes all communication to the public where the public is not present at the source of the communication and includes any act of transmission including broadcasting.[31]

2.4 Communication in the CJEU

The landmark case in developing the communication right in Europe was *Socieded General de Autores y Editores de España (SGAE) v Rafael Hotels,*[32] known colloquially as *SGAE* or the *Spanish Hotels* case. This case is not concerned with online infringement, but rather with the use of measures by hotel owners to make copyright-protected television programmes

[28] Van Coppenhagen, pg 439
[29] *ibid*
[30] Tritton, pg 897
[31] InfoSoc Directive, Recital 23
[32] Case C-306/05 *Socieded General de Autores y Editores de España (SGAE) v Rafael Hotels* [2006] ECR I-11519

viewable in the hotel's bedrooms.[33] Nonetheless, it has become extremely influential in developing the communication right and is therefore indispensible to any analysis of copyright on the internet.

From the case law, it has been established that 'communication' refers to when a work is "made available by a transmission in such a way that persons may access it",[34] and that it is not necessary for anyone to have *actually* accessed it (that they have the possibility to do so is sufficient).[35] 'Making available' has also been said to mean 'offering access'; it is not restricted to actual transmissions.[36] This latter aspect once again demonstrates how perfectly tailored the communication right is to the online world, even coming out of a case that does not concern the Internet at all. The communication will be deemed to be to 'a public' when it is made to a 'fairly large' but indeterminate number of people.[37]

SGAE forms the basis for all subsequent developments by the CJEU on the definition and scope of the communication right. Subsequent cases such as *Organismos*,[38] *Premier League*,[39] *ITV Broadcasting*,[40] *BSA*,[41] *OSA*,[42] and *Svensson* have refined it even more[43]. *Svensson* will be discussed in detail in following chapters, which will examine how this right and other aspects of copyright protection have been developed within a more specific internet-based context.

[33] P. Gershlick, "ECJ rules that showing TV programmes in hotel rooms amounted to communicating broadcasts to the 'public' – SGAE v Rafael Hoteles SA, European Court of Justice", available at http://www.mablaw.com/2007/01/ecj-rules-that-showing-tv-programmes-in-hotel-rooms-amounted-to-communicating-broadcasts-to-the-%E2%80%98public%E2%80%99/
[34] Tritton, pg 898, *SGAE* para 43
[35] *SGAE*, para 43, *Svensson*, para 18
[36] J. C. Ginsburg and M. L. Janklow, "Hyperlinking and "Making Available"", (2014) EIPR, 36(3), 147-148, pg 147
[37] *SGAE*, para 37
[38] Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon* v *Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai* [2010] ECR I-0037
[39] Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* v *QC Leisure and Others* [2001] ECR I-09083
[40] Case C-607/11 *ITV Broadcasting Ltd* v *TV Catchup Ltd*
[41] Case C-393/09 *Bezpecnostni Softwarova Asociace – Svaz Softwarove Ochrany* v *Ministerstvo Kultury [2011] ECR 102*
[42] Case C-351/12 *Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA)* v *Léčebné lázně Mariánské Lázně a.s* [2014] ECDR 5
[43] See also: Tritton, pp 898 – 900, for a detailed timeline of the development of the communication right in the CJEU

3. Analysis on Linking and its Copyright Implications

This chapter narrows down the discussion on copyright on the Internet to the specific action of linking, which has been one of the more controversial talking points as a potential source of IP infringement.

3.1 Introduction to Linking

Linking is one of the fundamental features of the World Wide Web, to the point where many users simply consider it a straightforward part of everyday life. The terms 'link' and 'hyperlink' are often used interchangeably, though there is a distinction to be drawn between 'hypertext links' and 'inline' links.

A hypertext link is a clickable link that, from the perspective of the user, refers them from one page on the Internet to another.[44] The clickable portion of the link may be in the form of text (usually in a different colour from surrounding text in order to distinguish it) or an image.[45] In technological terms, these links work by sending a request to the server on which the relevant page or file is stored and that file is then sent to the user to be accessed on their browser.[46] Within hypertext links it is also possible to distinguish 'reference' or 'surface' links, which direct the user to a homepage, from 'deep links', which direct to a specific page other than the homepage within a site.[47]

Inline linking is where image or video files are 'displayed on the page where the link is placed'.[48] As these types of links automatically integrate the linked content with the linking page, there is no need for users to click to access this content, nor is there any need for them to be directed away from the initial page. Many users don't necessarily consider this to be 'linking' as such, as it does not direct them away from the initial web page and it is not always so immediately apparent that the content is from a different source. The simplest and

[44] T. Headdon, "An epilogue to *Svensson*: the same old new public and the worms that didn't turn", (2014) Journal of Intellectual Property Law and Practice, 9(8), 662-668, pg 662
[45] E. Arezzo, "Hyperlinks and making available right in the European Union – what future for the Internet after Svensson?", IIC 2014, 45(5), 524-555, pg 526
[46] ALAI report
[47] Arezzo, pg 526
[48] ALAI report

most common form of inline link is displaying images. A more obvious example of inline linking is embedding videos hosted on YouTube[49] onto other sites.[50]

It is possible to combine hypertext linking and inline linking, as is the case where the link is accessed by clicking on an image rather than text.

'Framing' is sometimes considered a type of inline linking, in that it allows the linked content to be accessible from the linking page, rather than opening a new window or tab.[51] It allows the linked content to be displayed within a 'frame' which makes it accessible from the initial web page while still being clear that it is a link to another source. This type of linking is commonly seen on social media where users share links with their friends or followers.

Finally, one can distinguish between internal linking, where the linked content is contained on the same domain as the linking page, for example a home page which contains links to its sub-pages, and external linking, where the linked content is found elsewhere, for example the results on a search engine.[52] There may be some overlap between the two in cases where the owner of a file uses an external domain to host their content and then link to it from their own pages, such as embedding videos they have uploaded onto YouTube.

By default, any content which is placed on the Web may be accessed via a link placed on another page.[53] Owners of web content can however set up measures to prevent or restrict access to content. This can reduce the effectiveness of linking by, for example, redirecting links to their sub pages to instead go to the homepage, thus preventing deep linking, blocking users from certain sites from accessing their files,[54] or preventing their image files from displaying on other domains through inline links (often instead displaying a placeholder image containing a warning against such actions). On the other hand, links may be set up in such a way as to circumvent certain restrictions to access. The most obvious example of this is where one hyperlinks to a page or file that the owner for whatever reason has not made readily available to users on their site. Another (more widely frowned upon and explicitly prohibited by the WCT) example is where a link is constructed in such a way as to

[49] www.youtube.com
[50] ALAI Report
[51] Arezzo, pp 526 - 527
[52] *ibid*, pg 525
[53] P. Honkasalo, "Links and copyright law", *Computer Law and Security Review* (2011), 258-266, pg 258
[54] ALAI Report

'circumvent technological protection measures set up by the file owner'.[55] While there is some controversy over whether linking per se is relevant from a copyright perspective, most agree that this latter example should constitute and infringement where IP protected content is concerned.

While many of the functions of the Web would still be possible without links, by instead providing web addresses to pages and files which the user can then search themselves,[56] linking is nonetheless a fundamental feature of the Internet.[57] It has streamlined the process of finding and accessing online content to the point where it is now widely considered indispensible.[58] It also forms one of the essential building blocks of online locations. Internal linking, for example, allows users to be directed from a home page to various specific subpages,[59] without which the notion of a 'web site' as a single coherent entity as opposed to simply a number of pages with a similar heading would be inconceivable. Additionally inline linking of images and other non-text content is essential for web design. External linking, meanwhile, becomes the connection between websites, allowing users navigate through pages and information in various locations and generating traffic for sites.[60] Search engines, the primary means through which users find online content, in particular rely on linking for their very functioning.[61]

3.2 Linking and Copyright

Given how essential linking is, it would be highly problematic if it were to be outlawed or too stringently regulated,[62] nonetheless this does not necessarily mean that there is a 'right to link' which prevents it from being subject to any legal intervention.[63] Linking does therefore still raise certain implications for copyright and other IPR.

[55] ALAI Report
[56] *ibid*; Arezzo, pg 528
[57] Arezzo, pg 524
[58] *ibid*, pg 528
[59] *ibid*, pg 526
[60] I. Silverman, "Linking and framing: fundamental legal issues", *the Copyright & New Media Law Newsletter*, Vol 17 (2013) Issue 2, 7-9, pg 7
[61] Arezzo, pg 524
[62] Silverman, pg 7
[63] Headon, pg 662

It should also be noted that linking is the main form of dissemination of information on the Internet, and therefore is often beneficial to the owner of said content rather than harmful. There have been instances where national courts have taken this into account in deciding that content which does not harm the IPR owner's legitimate interest should not be punished, even where it might otherwise have constituted infringement.[64] That being said, this rationale has not gained widespread support, and the CJEU has taken a different approach.

3.2.1 Linking as an 'incidental infringement' vs linking as an infringement per se

An important distinction in the discussion of linking and copyright is whether the content being linked to is itself infringing. Courts have consistently been more strict in regulating links to infringing content. In these cases the infringement that stems from the link can be said to be incidental to the underlying infringement. The cases where the content itself has been published online lawfully are arguably the purest cases of linking per se interacting with copyright, and therefore perhaps more crucial to the discussion on if and when linking can infringe IPR. This becomes very relevant in *Svensson*, where the distinction is drawn between content that is 'freely available',[65] and that which is not. Chapter 4 of this essay will analyse the importance of linking as an 'incidental' action and the copyright implications thereof.

3.2.2 The different types of linking

A hyperlink can be copyright-relevant in two ways: where the file or page to which the user is directed via the link contains copyrighted material, and where the clickable text or image itself is subject to copyright (such as a news headline[66]).[67] Much of the discussion surrounding linking and copyright, including this essay, tends to focus more on the former case.

In cases where the original content is non-infringing, the vast majority of the discussion concerns external links (since linking to ones own content could not possibly be an infringement). Internal links only become relevant where one commits an infringement by

[64] *Megakini.com* v *Google Spain,* No 172/2012
[65] *Svensson*, para 32
[66] *The Newspaper Licensing Agency Ltd & Others* v *Meltwater Holding BV & Others* [2011] EWCA Civ 890
[67] Arezzo, pg 257

placing protected content somewhere on one's site. Linking internally to it from another page may then constitute a further infringement.

One of the concerns with external linking other than surface linking is that it may cause confusion by leading users to believe that the page or site containing the link is the actual origin of the content. This was one of the issues in *Svensson*, where the applicants alleged that "if a client clicks on one of those links, it is not apparent to him that he has been redirected to another site"[68] and in the third question the CJEU was asked whether "any distinction [should] be drawn between a case where the work, after the user has clicked on the link, is shown in such a was as to give the impression that it is appearing on the same website".[69] This question draws some parallels with trademark law, where likelihood of confusion is a key factor in establishing infringement: in this case the likelihood of confusion between internal and external links. This aspect of trademark law is closely related with its consumer protection rationale, which is much less present in copyright. In *Svensson*, the court clearly asserted that this particular factor 'in no way alters the conclusion'[70] of whether a particular link is infringing or not.

Similarly, framing is not treated any differently from hyperlinking even where the content is presented as part of the 'linkers' own page.[71] There may be some implications with regard to passing off or unfair competition,[72] but as far as copyright infringement is concerned there is little practical difference.

So ultimately it seems that the different kinds of links are not really relevant from a copyright point of view. The goal of technological neutrality means that the right of communication is independent of the technical measure used to make it available.[73] The copyright relevance of links is based on the fact that they make content available, precisely how they do this is not part of that relevance.

[68] *Svensson*, para 8
[69] *Svensson*, para 13
[70] *Svnesson*, para 30
[71] Case C-348/13 *BestWater International GmbH* v *Mebes*; A. Moir et al., "Communication to the public: the CJEU finds linking to material already "freely available" cannot be restricted by copyright owners: Nils Svensson and Others v Retriever Sverige AB (C-466/12)", EIPR 2014, 36(6), 399-400, pg 400
[72] Moir pg 400
[73] ALAI Report

3.2.3 The rights in question – communication

In more extreme cases, clicking on a link to infringing content has been deemed an infringement of the reproduction right,[74] but under Article 5(1) of the InfoSoc directive such an act of 'temporary reproduction' is usually permissible.[75] There also exists authority from other national jurisdictions for the view that linking does not constitute a reproduction at all.[76]

As discussed above, most questions concerning copyright on the Internet centre around the 'communication to the public' or 'making available' right, and linking is no exception.

Art 8 of the WCT covers 'any act' of making a work perceptible to the public,[77] so in theory it could include linking. Nonetheless, there has been much disagreement over whether linking can be considered a 'communication to the public' at all, and if it is under what circumstances. This was the position of the European Copyright Society, whose Opinion on *Svensson* concludes that "if hyperlinking is regarded as communication to the public, all hyperlinks would need to be expressly licensed. In our view, that position is absurd.".[78] It is apparent that requiring the authorisation of the IPR holder for each and every link to their protected content would not be feasible, given the status of linking as something of an 'essential facility[79]' of the Internet.

In the national courts, this was first addressed in the *Shetland Times*[80] case, prior to the entry into force of the WCT and the InfoSoc Directive. It is readily apparent that the court in this case was not prepared to deal with analysing copyright law from an internet-based perspective, and ultimately took the view that a website should be regarded as a cable programme within the meaning of s7(1) of the Copyright, Designs and Patents Act 1988. Linking to such content was therefore at least grounds for the granting of an interim injunction. This approach is regarded as the equivalent of what would now be regarded as a 'communication to the public'.[81]

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[74] *NLA* v *Meltwater*
[75] Hokasalo, pg 258
[76] *Algemeen Dagblad BV/Eureka Internetdiensten (Kranten.Com),* 2002 ECDR 1, p 13 (Neth)
[77] ALAI Report
[78] L. A. F. Bently et al, "European Copyright Society Opinion on the Reference to the CJEU in Case C-466/12 *Svensson",* available at http://ssrn.com/abstract=2220326, pg 16
[79] Arezzo, pg 525
[80] *Shetland Times Ltd* v *Wills*, 1997 SC 316
[81] Honkasalo, og 259

An alternative view was taken by the German courts in *Paperboy*,[82] which held, on similar facts to *Svensson*, that "normal linkage does not infringe any of the exclusive rights of the right holder, provided that the destination anchor of the link is not itself illegal".[83] Linking is not regarded as a communication to the public as merely facilitates pre-existing access.[84] Similarly, in Canada the Federal Court has held that linking does not constitute copyright infringement where the content itself is not infringing.[85]

3.2.4 Linking as communication – the CJEU's approach

While the appropriateness of classifying a link as a 'communication to the public' might be debated[86], recent case-law from the CJEU has made its position on the matter quite clear.

Decided in early 2014, *Svensson* has quickly become the leading case on the legality of linking from a copyright perspective. Mr Svensson, along with his fellow applicants, was a journalist whose articles were published in Göteborgs-Posten (GP), both in newspapers and online. The defendant was a website operator whose site offered users links to various news articles found throughout the web, including to Mr Svensson's articles in GP. Mr Svensson and company alleged that in doing so, Retriever Sverige had made these articles available to its users and therefore infringed the authors exclusive right of communication to the public.[87]

The Court in this case applied a two part test: stating that the communication right consists of the 'act of communication' and the 'public' to whom the communication is being made as cumulative criteria.[88]

In the first part of the test, the CJEU settled the controversial question over whether linking constitutes an 'act of communication', pointing out that a link to protected content 'affords

[82] BGH I ZR 259/00
[83] Honkasolo, see note 15
[84] *ibid*, pg 260, citing *Paperboy* pp 42-43
[85] Silverman, pg 7
[86] EU Law Radar, "Case C-466/12, Svensson – hyperlinks and communicating works to the public", available at http://eulawradar.com/case-c-46612-svensson-hyperlinks-and-communicating-works-to-the-public/
[87] *Svensson*, para 8
[88] Svensson, para 16, citing *ITV Broadcasting*

users of [the site on which the link is placed] direct access to those works'.[89] Given the broad construction of 'act of communication', as it is written in Article 3(1), which the Court had previously deemed appropriate in order to ensure a high level of protection for copyright owners,[90] this led to the conclusion that the provision of links does indeed constitute an 'act of communication'.[91]

In the second part of the test, the Court looks at the requirement that the 'act of communication' is made to a 'public'. The existing definition of a 'public' for the purposes of Article 3(1) under CJEU jurisprudence stipulates that the 'public' must constitute and indeterminate, and fairly large number of potential recipients of the protected content,[92] which is clearly the case when a link is made available to all the potential users of a web site.[93] While the Court could have simply left it there, it instead went on to qualify this reasoning by adding an additional 'sub-criterion' to this part of the test by stipulating that the communication must be directed specifically at a 'new public' which was not taken into account by the copyright holder when they initially published the content.[94] Chapter 3 of this essay will examine the 'new public' requirement specifically in greater detail.

The subsequent *BestWater* case follows the approach taken by the CJEU in *Svensson*. This case concerns framing rather than providing a clickable hyperlink. As mentioned above, the technology neutral approach means that the different types of links pose the same copyright issues, and therefore this case was treated in the same way as *Svensson*. As BestWater's video was freely available to all Internet users on YouTube, the embedding of the content on the defendant's website did not reach any sort of 'new public' and was therefore not deemed to be an infringement.[95]

The *Svensson* approach has not been without its controversy, the issue being that it seems to take for granted that linking is a communication and doesn't really give a whole lot of analysis and justification for it[96], ignoring the concerns of the likes of the European

[89] *Svensson*, para 18
[90] *Svensson*, para 17, citing previous cases.
[91] *Svensson*, para 20
[92] *Svensson*, para 21, citing previous cases
[93] *Svensson*, paras 22-23
[94] *Svensson*, para 24
[95] *BestWater*, para 19
[96] Arezzo, pg 539

Copyright Society and commentators. For better or worse, however, this is indisputably the position of EU copyright law as it currently stands, and therefore our analysis must proceed on the assumption that linking does, indeed, constitute a communication to the public.

4. The 'New Public' Requirement

In this chapter we will examine and analyse the 'new public' criterion as it emerged from *Svensson*. This will be done firstly by examining the development of the prior case law relating to the 'new public', then by comparing this with *Svensson's* application of the rule, and finally by exploring the implications thereof. This requirement is probably the most notable aspect of the judgement as it effectively qualifies the right to communication to the public in a way that was not necessarily anticipated by the legislation.

4.1 New Public Rule

The 'new public' requirement is a particularly European concept. It was created by the CJEU as part of its ongoing interpretation and development of the communication right as it is contained in Article 3(1) of the InfoSoc directive. The rule stipulates that for there to be a 'communication to the public' for the purposes of copyright infringement, that communication must not only be made to any 'public', within the definition used by the CJEU, but it must also be a public that was not taken into account by the copyright holder at the time when they authorised the original communication of the work.

The notion of the 'new public' is not entirely novel to *Svensson*, but it its this case that solidified its position as a limitation on the communication right, and its relevance in online situations.

4.2 Origin and Development

4.2.1 Historical Development

The first mention of the 'new public' in CJEU case law was in the *SGAE* case, where it was defined as 'a public different from the public at which the original act of communication of the work is directed'.[97]

[97] *SGAE*, para 40

In this case, the public that the copyright owner had intended to receive the initial communication can be quite clearly defined as those who own or otherwise lawfully have access to the reception equipment which can receive the broadcasts of the protected content.[98] Therefore, the clientele of a hotel constitute a new public which was not in contemplation of the copyright holder when they authorised the initial broadcast.[99] This version of the 'new public' criterion serves to strengthen the copyright holders degree of protection. By dividing up the 'public' in such a way, the exclusive right of 'communication to the public' can be separated into multiple acts of communication, each of which must be individually authorised by the copyright owner.

Over time, the 'new public' rule has become a standard feature of CJEU case law regarding potential infringements of the communication right. *Premier League*[100] applies the 'new public' criterion in the same manner as *SAGE*. In *Airfield NV*,[101] the court held that one communicates a work to a 'new public' when one "expands the circle of persons having access to the [protected work]".[102]

ITV Broadcasting represents the first significant development in how the 'new public' rule is applied since *SGAE*. In this case, the alleged infringers, TVC, ensured that the content broadcast on their streaming service could only be accessed by viewers who were legally entitled to watch said content in the United Kingdom by virtue of their television license.[103] The issue in this case was that, unlike in *SGAE* and other previous cases, it was not immediately apparent that there was a 'new public' as the streams were only made available to those already entitled to watch the content on television.[104] The 'circle of persons having access' therefore was unchanged. Nonetheless the CJEU held that, since it is apparent that the InfoSoc Directive intended that each transmission of a work through a different specific technical means should be individually authorised by the rightholder,[105] the streaming online of terrestrial television programmes must be considered a 'communication to the public'[106]

[98] *SGAE*, para 41
[99] *SGAE*, para 42
[100] *Premier League*, para 197
[101] Joined cases C-431/09 and C-432/09 *Airfield NV, Canal Digitaal BV* v *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* [2011] ECR I-9363
[102] *Airfield NV*, para 77
[103] *ITV Broadcasting*, para 10
[104] *ITV Broadcasting*, para 37
[105] *ITV Broadcasting*, para 24
[106] *ITV Broadcasting*

even where that public is made up of the same people as the recipients of the initial broadcast.[107]

In terms of the development of the 'new public' rule, this case can be viewed in two ways. One view is that the 'new public' requirement is dispensed with in cases which concern communications by different technical means.[108] This is consistent with the wording of the *ITV Broadcasting* judgement, in which the CJEU states that the 'new public' is "not relevant"[109] in such cases. Another, perhaps more convoluted, view is that the 'technical means' forms an additional factor to the 'new public' rule, which is to say that communicating the public through a different technical means is another form of 'new public', and the rule is not only defined by reference to the people who make up the public.[110]

4.2.2 How is *Svensson* different?

It is notable that the cases concerning the 'new public' in the past have largely turned around similar facts relating to television broadcasts. One of the primary reasons why *Svensson* is considered a landmark case is that it is the first to incorporate this rule into a wholly (as opposed to the partially-online situation in *ITV Broadcasting*) online context. This case is therefore the perfect opportunity to put the 'technology-neutral' qualities of this particular aspect of the communication right to the test. Since this case is exclusively concerned with online communications, both within the initial communication and the 'new' communication, the issue of separate technical means as in *ITV Broadcasting* does not arise.

In this case the CJEU defines the 'new public' rule, in similar terms to the previous cases which it refers to as "settled case-law",[111] as "a public that was not taken into account by the copyright holders when they authorised the initial communication to the public".[112] It is apparent from this that the Court certainly intended their application of the rule in this case to be a continuation of that which was developed in earlier cases. Further analysis, however, makes it clear that while the 'new public' in *Svensson* appears *prima facie* similar to the

[107] *ITV Broadcasting*, para 39
[108] Headdon, pg 664
[109] *ITV Broadcasting*, para 39
[110] Tritton, pg 900
[111] *Svensson*, para 24
[112] *Svensson*, para 24

previous version of the rule, its effects on the scope and nature of the communication right are rather drastically different.

The judgement in *Svensson* ultimately was there was no 'new public' in this case as Mr Svensson had already placed his work on a freely accessible website, meaning that any internet users could access it at a time and place chosen by them if they so wished, and therefore all internet users were part of the public contemplated by Mr Svensson when he authorised his works for online publication.[113] When content is made freely available, it is deemed to have been communicated to anyone who may have access to it, which is to say anyone who has access to the Internet, regardless of whether they actually do access the content. This makes it very difficult to communicate to a 'new public' of Internet users. If the 'initial public' means users of the Internet generally, then that effectively includes everyone who has access or might at some point have access to the Internet. The simple fact then is for the vast majority of linking cases the 'new public' will not exist by virtue of the fact that the 'initial public' already includes everyone.[114]

Looking from the starting point that linking is a communication to the public, and therefore within the exclusive rights of the copyright holder, the 'new public' requirement massively narrows the scope of the communication right with respect to links. The reason for this is that the 'new public' relates very closely to the premise that the public can be fragmented. In *SGAE*, for example, the public could clearly be divided between those who own the technology to receive the broadcast of the copyrighted works and those who do not. The 'new public' requirement gave legal force to this factual distinction by granting the rightholder the ability to control the initial communication to each fragment on a separate basis, with the trade-off that they can no longer control subsequent communications within one of those fragments after they have made use of this right initially. With regards to linking, on the other hand, it is impossible to divide the public when everyone has the ability to access the initial communication. If the public cannot be factually divided, then the aspect of the 'new public' requirement that gives legal force to the division becomes meaningless. Therefore the trade off of losing the right to control subsequent re-communications within an initial public and

[113] *Svensson*, para 26; Headdon, pg 664

[114] Of course 'everyone' is perhaps a misnomer, as those without Internet access would not be part of the initial public in this case, but their since lack of Internet access also means that they cannot receive communications through linking there is no way they could form a 'new public' either. These people are therefore entirely outwith the scope of this analysis.

having greater control over initial communications to different parts of the public disappears, and only the loss of protection (compared to a situation where linking is considered a 'communication to the public' but not subject to the 'new public' requirement) remains.

The large degree of difference between the two situations highlights why the 'new public' criterion in *Svensson* in particular is so significant: it is not simply the case that an existing rule can be applied to both situations, the particularities of online communication have forced it to evolve into something rather substantially different from what it was in *SGAE*, to the point where it actually has the opposite effect on the degree of copyright protection. Two conclusions can be taken from this: firstly, that the 'new public' rule is *not* technology neutral, and secondly that its application in *Svensson* constitutes a *de facto* novel addition to EU copyright law.

4.3 When is there a 'new public'?

By definition, the idea of a 'new public' presumes the existence of an 'old' or 'existing' public. Therefore, communication to a 'new public' will usually mean that there has been an existing communication. In the cases from which the rule evolves, the act of 'communication to a new public' itself is incidental to the initial act of communication: In *SGAE* the initial communication was the broadcast of television programmes to the owners of the appropriate reception equipment[115] and the incidental communication was the transmission of said broadcast into the hotel bedrooms.[116] In *ITV Broadcasting*, the initial communication was the terrestrial broadcast of television shows and the incidental communication was the streaming of those broadcasts online. In *Svensson*, the initial communication was the posting of articles on the GP website and the incidental communication was the linking to those articles from Retriever Sverige's site. In these cases, for there to be a 'new public' it seems there must be an incidental communication, and that there also must be something particular about said incidental communication to substantially distinguish it from the initial communication.

While it was clear that a 'new public' was not present, and could not be present on the facts of *Svensson*, this should not be taken to necessarily mean that there can never be a 'new

[115] *SGAE*, para 41
[116] *SGAE*, para 42

public' in linking cases.[117] If there are additional factors present in the relevant communications, then it is possible that a link can reach a 'new public'. This is important to remember as the fact that the vast majority of links will not constitute a 'communication to a new public' would make their very classification as a 'communication to the public' appear redundant. The existence of these exceptions means that the application of the rule to linking does make normative sense, even if their scope and effectiveness is actually very small.

There are three main situations where linking may constitute 'communication to a new public'.

4.3.1 When the link is used to circumvent blocking measures

The CJEU points out in *Svensson* that there is likely to be a 'new public' where a clickable link enables users to bypass measures designed to restrict access to the original site on which the content was posted, as such a link would "[constitute] an intervention without which those users would not be able to access the works transmitted".[118]

In *Svensson*, both parties agreed that the protected content was 'freely available' to all Internet users, to which the CJEU frequently referred when giving its judgement.[119] What this effectively means is that communication to a 'new public' is impossible since the initial public already includes everyone that the new public possibly could. The relevance of the 'new public' rule with respect to linking then is largely confined to situations where the link is used as a means of circumventing protection measures.

Effectively, if there are measures put in place to restrict access to copyright content, this means that the rightholder has intended to limit the number of people who have access to said content. For example, a login screen which restricts access to those who have signed up to the website, possibly including payment.[120] Unlike in the case where the content is freely available, the 'initial public' no longer includes everyone, so the existence of a 'new public' once again becomes possible. A link which aims to get around these restrictions would make

[117] Headdon, pg 665
[118] *Svnesson*, para 31
[119] *Svensson*, para 14
[120] Headdon, pg 665

it possible for internet users who are not members of the initial public to gain access to content which they would otherwise not be able to.[121] This would be 'communication to a new public', meaning that the permission of the copyright holder would be required[122] or else it would constitute an infringement.

This is another example of how the 'new public' rule makes the law follow the facts: the legal restriction on linking is closely intertwined with the technical restriction, as the former is only present when the latter is.[123] Rather than providing a distinct area of protection, then, this rule simply grants legal backing *de facto* protections that already exist.

It is here that the weakness of the protection afforded by *Svensson* to these situations begins to become apparent, not because it is simply an enforcement of practical protection but because in that capacity it is largely redundant. Emanuela Arezzo notes that using linking as a means to circumvent blocking measures would constitute an infringement anyway even in the absence of the *Svensson* ruling, as the "mere act of circumvention of a technological protection measure placed to protect the copyright content"[124] is explicitly outlawed by both the WCT[125] the InfoSoc Directive.[126]

4.3.2 When the initial communication was unauthorised

Our analysis of the 'new public' criterion so far has largely counted on the notion that the initial communication was made legitimately, ie. made or authorised by the copyright holder. In those situations, we can clearly see how the secondary communication itself is treated for the purposes of assessing copyright infringement. However, there also exist situations where the secondary communication is also the secondary infringement, as the initial communication itself was made without the consent of the right holder. These situations may also constitute a case where 'communication to a new public' is considered to be present.

[121] Arezzo, pg 543
[122] L. Anthony, "Communicating copyright works – when you can and can't link to websites", Ent LR 2014, 25(4), 159-161, pg 160
[123] Headdon, pg 665
[124] Arezzo, pg 543
[125] WCT, Article 11
[126] InfoSoc Directive, Article 6

The rationale here is that the 'initial public' is only valid if the initial communication is authorised. The definition of the 'new public' relies on a public that the rightholder did not have in contemplation when they authorised the initial communication, then it follows that if the rightholder did not authorise the initial communication, then they cannot possibly have had any public in contemplation. Since there is no initial public, any public to which subsequent communications are made must be regarded as a 'new public' and "then all acts of communication to a public must be infringements".[127]

This aspect of the rule is not novel to linking, but has also been present in the commentary surrounding *SGAE*. While this issue is not expressly covered in the case itself, writers have regarded it as "the only realistic interpretation".[128] This same rationale seems to remain relevant in *Svensson*, in which the CJEU "clearly states that the authority of the rightholder is key".[129]

Commentary on recent case law does perhaps cast doubt on this interpretation, with some commentators appearing to take the view that *BestWater* is authority for the proposition that linking to any freely available content, even where said content was made available unlawfully, is not an infringement as the incidental communication does not communicate it to a 'new public'.[130] In that case, the copyright holder asserted that the initial communication was made without their consent[131], yet the CJEU did not seem to regard this as relevant.[132] Ruth Hoy disputes this assessment, pointing out the importance of the authorisation of the rightholder in *Svensson's* definition of the 'new public'. In her view "the CJEU does seem to only say in *BestWater* that linking to freely available content will not be a communication to a 'new public' where the copyright owners have allowed the original communication. It follows that linking to or embedding to content that was originally posted without the authorisation of the right holder should constitute infringement".[133]

[127] Tritton, pg 899, note 574
[128] *ibid*
[129] R. Hoy, "Internet blicking injunctions are alive and well in the post Svensson world", Ent LR, 2015, 26(2) 44-47, pg 46
[130] Hoy, pg 46
[131] *BestWater*, para 4
[132] L. Mazzola, "BestWater practice for linking or framing content: BestWater International Gmbh v Michael Mebes and Stefan Potsch", Ent LR, 2015, 26(2), 56-57, pg 57
[133] Hoy, pg 46

While the court has not definitively addressed this issue, it does seem likely that linking to content which has been made available illegally does indeed constitute an infringement, albeit in a somewhat different manner from the point of view of the 'new public' rule. This is a rather different situation from the previous analysis whereby it was the particular circumstances of the incidental communication which led to it communicating the work to a 'new public', either by widening the circle of people who have access to the content or by granting them access through a different technical means, thereby resulting in an infringement. In this situation the incidental communication is no different than it was in *Svensson* itself, but rather it is the particularities of the original communication that give rise to the infringement. The incidental communication is guilty by association. Rather than an natural result of the 'new public' rule, this is perhaps more analogous to the orthodox interpretation of *ITV Broadcasting* in that it allows the 'new public' to be dispensed with due to other circumstances which justify prohibiting the alleged infringer's conduct.

4.3.3 Where initial authorisation is revoked

A related but distinct situation is where content is made freely available online with the authorisation of the rightholder, but then subsequently removed or made subject to blocking measures. The Court in *Svensson* referred specifically to this as an example of where a link would constitute an intervention without which users would not be able to access the relevant content.[134] This is, in theory, something of a concern for those who support greater freedom on the internet and for linking in particular, since it can mean that a link which is lawful one day may cease to be such the next day without any notice.[135] This problem is should not be overstated though, since the technical realities of linking mean that a link placed to content which is no longer readily available will simply become a 'dead' link, ie. not return any result when clicked, rather than directing the user to the content in an infringing manner.[136]

4.4 Conclusions

It can be said that the protection afforded by classifying linking as a communication is, from a practical standpoint, actually quite weak. In the rare, exceptional cases in which the 'new

[134] *Svensson*, para 31
[135] Headdon, para 665
[136] *ibid*

public' rule does not preclude the link from being viewed as an infringement, it is more often than not redundant. Looking back on the earlier discussion of linking as an infringement per se vs. linking as an incidental infringement, the current EU framework means that the 'new public' rule only really accounts for the latter. Legally, there does not appear to be much distinction, but from a factual perspective, the 'new public' rule means that linking can only really be deemed an infringement when it is incidental to an existing infringement, either from the third party who places content online illegally or continues to maintain it online after it has been taken down by the rightholder, or from the person posting the link in circumventing blocking measures.

The right of communication to the public insofar as it pertains to linking has not only been officially recognised by the CJEU, but at the same time has been drastically qualified, to the point where the exception is vastly stronger than the rule

The obvious goal of the CJEU in this case is to strike a fair balance between the interests of right holders and the freedom of Internet users. The balance they reach is from a practical very pro-user, but is reached in a very roundabout way that seems to come from a more pro-rightholder stance. This leads to a somewhat curious situation in which, by coming to the rather controversial view that linking is a 'communication to the public', the CJEU has in practical terms reached a result that would be more satisfactory to those who advocated against linking being deemed copyright-relevant than those who were in favour of it.

5. Analysis of Exhaustion

In order to make a thorough comparison between the 'new public' requirement and the principle of exhaustion, we must also examine the facets and rationales behind exhaustion in greater detail. This chapter takes a step away from the discussion on linking, and will look at the principle of exhaustion as it currently exists in EU law.

5.1 What is it? Basic Intro

"By this act [of putting a product on the domestic market], the effect of the protection afforded conferred by the [IPR] is exhausted. The proprietor who has manufactured the product and has put it in the market under this protection which excludes competition from other parties, has enjoyed advantages which the [IPR] confers upon him and has thus exhausted his right."[137]

When a product has been placed on the market within the EU, or any other relevant territory, the owner of IPR connected to that product cannot use their IPR to restrict further sale of that product anywhere within that territory. This is because their IPR is held to be 'exhausted'.[138]

The principle of exhaustion, also known as the 'first sale doctrine'[139] or the doctrine of consent[140] serves as a restriction on the practical scope of IPR. This doctrine is what makes it possible to resell items which are protected by IPR, such copies of books, films and other copyrighted materials or products made with patented technologies. It is integral to the functioning of 'second hand' markets,[141] as well as parallel trade.

[137] C. Stothers, "Patent Exhaustion: The UK Perspective", available at http://fordhamipconference.com/wp-content/uploads/2010/08/Christopher-Sothers-Patent-Exhaustion.pdf, pg 1, citing *Guajakol-Karbonat* (Reichsgericht, 26 March 1902) – believed to be the origin of the term 'exhaustion'
[138] Joined Cases C-15/74 and C-16/74 *Centrafarm BV* v *Sterling Drug Inc and Winthrop BV* [1974] ECR 1147, Written observations submitted to the Court, para 1
[139] L Felier, "Birth of the first-download doctrine – the application of the first-sale doctrine to internet downloads under EU and US copyright law", Journal of Internet Law, 2012, 16(4), pg 1
[140] Tritton pg 652, for example, calls it this
[141] Felier, pg 1

Bellamy and Child summarises the jurisprudence of the CJEU and defines two conditions for the application of exhaustion: that the goods are put on the market, and that the IPR holder consented to the goods being put on the market.[142]

5.2 Why does it exist? Origins and justification

The principle of exhaustion is recognised in numerous legal systems, each with its own rationale and conception of the doctrine. This section will look at a few of these various views on exhaustion, paying particular attention to its origins and rational within the EU legal system. In national systems, it has typically been justified through the property law rationale,[143] while in some it is linked more closely with the notion of Implied License. In EU law, the exhaustion doctrine developed as part of the Internal Market law.

5.2.1 Property Law

The property law justification for exhaustion generally does not operate as a distinct rationale for the doctrine's existence, rather it can be found in almost all legal systems which recognise exhaustion and operates alongside other justifications. The precise nature of the property law rationale can vary with differing systems of property, but the general basis of it is that the right of ownership of an item includes the right to dispose of that item however the owner may choose, particularly by selling it. This naturally conflicts with the IPR owners exclusive right of distribution and therefor exhaustion exists as a way or reconciling the two.

Analysis of the property view of exhaustion tends to emphasise the distinction between the IP protected material and the goods in which they are contained in order to highlight their separate ownership:[144] the text of a novel belongs to the author, the paper and ink belong to the store, library or consumer.

[142] C. Bellamy and G. D. Child, *Bellamy and Child – European Union Law of Competition*, 7th Edn by V. Rose and D. Bailey (eds), Oxford University Press, Oxford, 2013, pg 682
[143] S. Karapapa, "Reconstructing copyright exhaustion in the online world", IPQ 2014, 4, 307-325, pg 308
[144] *ibid*, pg 308

5.2.2 Implied License

In some legal systems such as the UK,[145] exhaustion has been linked to the notion of Implied License, where putting the product on the market for the first time is taken as tacit consent for the further circulation of that item. This notion of exhaustion dates back to 1817 case of *Betts* v *Willmott.*[146] It is somewhat linked to the property law view in that it is based on the presumption that once someone has purchased an item they obtain the right to do with it what they wish,[147] but goes further by asserting that because of this presumption the IPR holder must therefore be clear and explicit to justify a claim that they have not given a license to the seller to do so.[148]

This view of exhaustion has the potential to be broader than the property law based conception, since it is not necessarily liked to ownership it can cover other rights than just sale and distribution, such as the right of communication. Although this analysis is purely theoretical, and there has yet to be a case that has used the implied license reasoning to apply exhaustion in such a way.

5.2.3 Internal Market

Within the EU, the doctrine of exhaustion arose through the application of the right to free movement to applications of IP rights which were perceived to be unduly restrictive of the four freedoms, particularly free movement of goods. It is an attempt at a compromise between the functioning of the internal market with the upholding of the exclusive rights of intellectual property holders.

Exhaustion as an EU concept was developed by the CJEU through a series of cases, most significantly *Deutsche Grammophon*[149] and *Centrafarm.* It is often discussed as part of a trifecta of principles alongside existence vs. exercise and specific subject matter.[150] While the notion of existence vs. exercise had already existed within the EU in relation to Article 101

[145] Stothers, pg 4; T. Terrell, Terrell on the Law of Patents, 17th edn, by R. Miller et al, Sweet & Maxwell, London, 2011, pg 468
[146] (1871) LR 6 ChApp 239
[147] *Betts* v *Willmott*, para 245
[148] ibid
[149] Case C-78/70 *Deutsche Grammophon Gesellschaft GmbH* v *Metro SB Grossmarkte GmbH & Co KG* [1971] ECR 487
[150] See, for example, Tritton, pg 1106

TFEU,[151] *Deutsche Grammophon* was the first case to apply it in connection to Article 34.[152] Therefore, the internal market view of exhaustion can be seen to be very closely linked to the notion of existence vs. exercise.

Under Article 34 TFEU, restrictions on the free movement of goods within the internal market are prohibited, subject to certain justifications. This can be somewhat problematic when it comes to the application of IPR. (Certain Treaty provisions make it clear that EU Law is not competent to interfere with property rights including IPR). In an attempt to alleviate this conflict the CJEU in *Consten and Grundig* created the existence vs. exercise doctrine, which stipulates that while the EU may not rule on the questions of the existence of IPR, it may regulate their exercise in order to ensure that EU law is upheld. It is on the basis of this distinction that the CJEU were able to introduce exhaustion to EU law.[153]

The notion of EU-wide exhaustion as opposed to the national exhaustion which already existed in many EU Member States is crucial to the principle of exhaustion as an EU concept, as its main objective is to prevent the fragmentation of markets. In *Deutsche Grammophon*, the Court notes that "it would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a member state, in such a way as to prohibit the sale in that state of products placed on the market by him or with his consent in another member state solely because such distribution did not occur within the territory of the first member state."[154]

Where a patentee, or other IPR holder, can put the product on the market for the first time, a restriction of its further circulation is not necessary to ensure to 'guarantee the essence of the exclusive rights flowing from the parallel patents'[155]. This rationale fits with the conception of intellectual property as a 'moral right' and a 'right to remuneration', in that having the exclusive right to place the product on the market for the first time and to be remunerated for the first sale is deemed sufficient in order for the IPR to be recognised as the creator of their work and to obtain remuneration suitable to their effort in creating it. However, the ability to

[151] Case C-56/64 *Etablissements Consten SA and Grundig-Verkaufs-GmbH* v *EC Commission* [1966] ECR 299; Case C-24/67 *Parke Davis & Co* v *Probel* [1968] ECR 55
[152] Tritton, pg 1107; Bellamy and Child, ch 9
[153] *Deutsche Grammophon,* para 11
[154] *Deutsche Grammophon*, para 13
[155] Tritton pg 1120

further restrict circulation of the product on the second hand market goes beyond what is necessary to ensure that the IPR holders moral and economic rights are recognised and in fact would lead to double benefits[156]. This is problematic in itself as it goes beyond what is considered 'fair remuneration', but also clearly constitutes a disproportionate restraint on trade within the internal market.

5.3 Exhaustion on the Internet.

5.3.1 Generally

As with many things related to copyright law, the doctrine of exhaustion has had to be re-examined in light of the rise of the Internet as a means of communicating and distributing protected materials.

The default position is that the principle of exhaustion does not apply to the distribution of digital goods.[157] What this means in practice is that the right holder retains control of every communication of their work, even between users after it has been placed on the market.[158] The consequence of this is that there cannot be a second-hand market for goods distributed digitally.[159]

Much of the issue with the application of exhaustion to digital forms of distribution is the practical differences compared to analogue copies. A physical item can only exist in one place at one time, and remains a single item no matter how long it has been in distribution. Digital goods meanwhile are not distributed by passing from one person to another, but rather by copying their data from one device or server to another.[160] From a copyright perspective this means that distribution and reproduction are, for all intents and purposes, the same thing, and while the exclusive right of distribution may be subject to exhaustion, the right of reproduction is not.

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[156] N. Lawnickzak, "A European Perspective", in H. H. Lidgard and J. Atik (eds) *The Intersection of IPR and Competition Law*, Lund, 2007, pg 66

[157] Note that 'digital goods' refers to goods which are *wholly* comprised of data, such as e-books or music downloads. It does not cover the sale of physical goods through digital means, such as online shopping for items which are then delivered, nor does it refer to digital data contained within physical items such as CDs and DVDs.

[158] Karapapa, pg 308

[159] *ibid*, pg 307

[160] Karapapa pp 309-310

Since the transfer of ownership of physical copies is not at issue online, it naturally follows that the 'first sale' doctrine cannot logically apply. Indeed this does seem to be the approach taken by the EU legislators in drafting the InfoSoc Directive, which states explicitly that the exclusive right of communication will not be exhausted.[161] The recitals to said Directive state that exhaustion does not apply to 'on-line services', and draws distinction between online distribution and CD-ROMs in which the IP is contained in a tangible medium.[162]

The justification for this appears to be based on the notion that copyrighted works distributed over the internet are not 'sold' as such, as there is no transfer of property of a tangible item, but rather made available under license.[163] This distinction can feel somewhat artificial from certain perspectives, particularly as it regards consumer products such as books or music: few people will see paying to download an album as opposed to buying it on CD as a substantially different transaction. The Advocate General in the *UsedSoft* case also notes that this distinction makes it very easy to circumvent the principle of exhaustion simply by structuring transactions as licenses rather than sales.[164]

The property law view of the exhaustion principle supports this rationale. It draws a distinction between the IPR and the physical object in which is its contained.[165] It is the ownership rights in the physical object that exhaust the IPR. Without those rights, there is no conflicting right for the IPR to be balanced against so exhaustion is not needed.

The primary distinction for the applicability of the exhaustion principle is therefore tangibility.[166]

This tangibility requirement can be considered problematic as more and more media move from analogue to digital distribution: music downloads can be considered the successor to CDs in the same way that CDs are the successor to cassette tapes and vinyl records. From that perspective, treating downloads differently than other forms of distribution may seem functionally arbitrary.

[161] InfoSoc Directive, Article 3(3)
[162] InfoSoc, Recital 29
[163] Feiler, pg 16; Karapapa pg 308
[164] Case C-128/11 *UsedSoft GmbH* v *Oracle International Corp*, Opinion of Advocate General Bot, para 59
[165] Karapapa, pg 308
[166] *ibid*, pg 308 - 311

Another issue with this approach is that while it is in line with the property law view of exhaustion, it does not fit quite so neatly with other conceptions of the principle. In particular, exhaustion at an EU level was not based on property law at all, but rather was coined by the courts to prevent IPR from being used to partition of markets. If such a restriction on the circulation of physical goods is considered an unjustified restriction on free trade, it naturally follows that the same restriction on digital goods (which, as mentioned above, are often considered to be functionally the same thing by consumers) is equally inappropriate. This particular issue is not unique to exhaustion on the Internet. The case of *Merck* v *Primecrown*[167] has been criticised for "[elevating] the principle of [exhaustion] to a cast-iron hard principle without due regard to its origins".[168] Therefore it would appear that there is a rather pervasive discord between the origins and rationales behind the principle of exhaustion and its current application within the EU.

Despite this, there has been a clear consensus among legislators, at international and EU levels that the tangibility requirement should be abided by and that exhaustion does not apply online. The Agreed Statements on Articles 6 and 7 of the WCT that the term 'copy' being subject to the right of distribution (and therefore potentially to exhaustion) refers exclusively to 'fixed copies that can be put into circulation as tangible objects'.[169] Similarly, the recitals to the InfoSoc Directive states that the right of distribution relates to works incorporated in a 'tangible article'[170] while explicitly excluding the application of exhaustion to 'on-line services'.[171] On the whole, it seems to be very widely taken for granted that exhaustion should not, and therefore does not, apply online.

More recently, however, certain exceptions to this rule have popped up which may suggest there might be justification in principle for the wider application of the exhaustion principle online after all.

[167] Case C-267/95 *Merck & CO Inc* v *Primecrown Ltd* [1996] ECR I-6285
[168] Tritton, pg 1122
[169] Agreed Statements concerning the WIPO Copyright Treaty, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295456
[170] InfoSoc Directive, recital 28
[171] InfoSoc Directive, recital 29

5.3.2 The first-download principle - *UsedSoft*

One of the earliest and most notable examples of exhaustion making its way into online transactions can be seen in the case of *UsedSoft* v *Oracle International*[172] in which the CJEU created what has come to be known as the 'first-download doctrine'. This rule relates specifically to software rather than copyrighted materials online generally, which the Court holds is governed not by the InfoSoc Directive, but by the Computer Programs Directive. Nonetheless, the Computer Programs Directive provides that Computer Programs shall be protected by copyright 'as literary works within the meaning of the Berne Convention',[173] therefore the various principles of copyright law may be seen through its application.

Unlike the other instruments relating to copyright on the Internet, exhaustion is included in the Computer Programs Directive. Article 4(1) of this Directive explicitly states that the first sale of a copy of a computer program within the EU will exhaust the copyright holders distribution right in that copy.

One of the most interesting parts of this judgement rides on the interpretation of the word 'copy'. From a basic reading of the word it would seem that this Article is intended to apply the principle of exhaustion in the conventional manner including the requirement of tangibility, in line with WCT and by the InfoSoc Directive, as discussed above. In addition the *UsedSoft* case notes that the drafters of the Directive probably did not intend to regulate or contemplate online distribution of computer programs.[174]

In this case, however, the CJEU points out that Article 4(2) the Computer Programs Directive does not actually draw a distinction between tangible and intangible copies, and there is therefore no reason to assume that the provision is limited to CD-ROM or DVD copies.[175] The justification for this diverging interpretation is that the Computer Programs Directive constitutes a *lex specialis* in relation to the IndoSoc Directive,[176] yet there seems little reason why this must in principle be so. Much of the rationale that the Court applies to computer programs could just as validly be argued for other literary works but for the fact that it is

[172] Case C-128/11 *UsedSoft GmbH* v *Oracle International Corp.* [2013] Bus LR 911
[173] Computer Programs Directive, Article 1(1)
[174] *UsedSoft*, para 32
[175] *UsedSoft*, para 55
[176] *UsedSoft*, para 56

precluded by the relevant legislation. The distinction therefore, begins to look somewhat arbitrary.

Of related and equal significance is the fact that the Court takes a broader interpretation of the word 'sale' than is traditionally seen in discussion of exhaustion. The CJEU held that in situations such as the one at issue in this case, there is little real difference between a user downloading a program in exchange for a fee and one purchasing a copy of the program in CD-ROM or some other physical medium, therefore online distribution can indeed constitute a 'first sale'.[177] The Court also agreed with the Advocate General's view that the conventional narrow interpretation undermines the exhaustion principle by making it too easy to circumvent.[178]

This is the exact opposite to the position taken by the InfoSoc Directive and the WCT. Since this case is based on a different piece of legislation, there is no direct contradiction. However, it does lead to wider inconsistency regarding the scope and application of the exhaustion principle. And it certainly raises the possibility that the principle on the whole may be prone to wider application than provided for in the InfoSoc Directive

This case, therefore, strikes at the very heart of the primary justifications for exhaustion not applying online. Even if one interprets the case as simply an exception to the general rule or specific to its own facts, that such an exception should be made indicates that the principle of exhaustion is important enough on its own merits that its application should be valued over slavish adherence to the tangibility requirement and the strict definition of 'sale'.

What this case highlights, therefore, is that while the conventional approach to copyright in online environments precludes the application of the exhaustion principle, the less restrictive approach that the Computer Programs Directive allows that there is a principled justification for giving broader scope to the exhaustion principle, and the argument that its application to online activities is infeasible or irreconcilable with its defining aspects becomes significantly weakened. What we see is that there is some acceptance in principle that exhaustion can and should apply online, albeit restricted to the legislation which allows for this.

[177] *UsedSoft*, para 48
[178] *UsedSoft*, para 49

6. Exhaustion v New Public: A Comparison

There are a number of parallels which can be drawn between the 'new public' rule as it has emerged from *Svensson* and the wider principle of exhaustion. This may be problematic given that the communication right which is subject to the 'new public' rule is contained in Article 3 of the InfoSoc Directive, which explicitly excludes the application of exhaustion.[179]

This chapter will examine some of these similarities, as well as the crucial differences between the two with the aim of ascertaining just how connected they really are, both functionally and in principle.

6.1 Similarities

Some commentators have seen the new public rule as a 'back door' way of introducing exhaustion to online situations[180] but as stated above, very little further analysis has been conducted into this assertion.

"Once the right holders have authorised the initial communication, their entitlement to control the retransmission of the same content through the same technical means and to the same audience ceases to exist. This takes us back to the very core of the exhaustion doctrine."[181]

The key similarity is that both these rules relate to subsequent actions taken in relation to copyright protected content following an action made by or authorised by the rightholder. Exhaustion is dependent on the work having been put into circulation initially, only subsequent circulation can be subject to exhaustion. Similarly, the 'new public' relies on their being an 'initial public'. *Svensson* frequently refers to the actions authorised by the rightolder as an 'initial communication'. Linguistically speaking, it is easy to see the parallels between this and a 'first communication' principle equivalent to that of the first sale.

[179] InfoSoc Directive, Article 3(3)
[180] Karapapa, pg 323
[181] *ibid*

A further parallel can be drawn between the 'market' in the first sale doctrine and the 'public' in the communication right. Both represent the indeterminate bodies of consumers and other third parties who will receive the copyrighted content. An important aspect of IP law is that IPR allows rightholders to control how these third parties are exposed to their content, and it is implicit that such exposure should occur in order for IP to be properly utilised. Therefore these bodies of third parties are crucial to a proper assessment of any IPR.

In the case of exhaustion, once goods are placed on a market the rights become exhausted within that market, meaning that anyone within that market is entitled to buy or sell those goods without the authorisation of the right holder. The right is considered exhausted for the market as a whole, not merely the persons within it who happen to come into contact with the specific goods. The rightholder does, however, maintain the right to first sale in other markets. Similarly, when content is communicated to a public, the right to control subsequent re-communication to anyone within that public becomes extinguished (arguably, exhausted), even if those specific individuals did not actually receive the initial communication, while the right to communicate to a *new* public remains the exclusive purview of the rightholder.

6.2 Common Ground – Implied License

It must also be noted that both of these rules have also drawn comparisons with the doctrine of implied license. The relationship between implied license and exhaustion has already been discussed above.

As far as the communication right and the 'new public' is concerned, it is the notion of content being made freely available without restriction measures that have become the focus of implied license comparisons.[182] This comparison is not purely theoretical, as implied licence has been used by national courts[183] as the basis for the application of copyright to linking.

[182] Arezzo, pp 540-542
[183] I ZR 69/08 (*Vorschaubilder*)

In more abstract terms, the notion of a public that was or was not 'taken into account by the rightholder' has been said to suggest that the second part of the 'communication to the public' test is a subjective one. "This has potentially made the copyright holder's consent a crucial factor in determining who formed the initial 'public' for the purposes of the initial communication of the work".[184]

There are numerous practical similarities between the exhaustion principle and the 'new public' rule, to the point where it is not unthinkable to view them as functionally the same basic idea. Combined with the conceptual bridge between them offered by the implied license comparison, one begins to see a very clear overlap between the two.

6.3 Problems with this overlap

If the 'new public' rule were to be viewed as an application of the exhaustion principle, however, this would not be without its problems.

While one can plausibly treat the market and the public as equivalent entities, it is more difficult to equate the actions of sale and communication, which have always been formulated as distinct rights. The doctrine of exhaustion has always concerned itself primarily, if not exclusively, with sales and to transplant it to another right would not be wholly appropriate. While there is some precedent for this to be found in the 'first download' rule that emerged from *UsedSoft*, it is important to remember that the Court and other policymakers have been very adamant that this is a *lex specialis* born out of the strong functional similarities between digital distribution of computer programs and traditional sales. It is therefore highly unlikely that introducing 'back door exhaustion' was the intention of the court in *Svensson*.

6.3.1 Article 3(3)

Even if we are to accept that the argument that exhaustion 'should not' or 'cannot' apply online is flawed, the fact that it 'does not' apply still remains settled law in all but certain very specific circumstances, since the very provision upon which the 'new public' is based explicitly excludes the application of exhaustion.

[184] A. Baker, "EU Copyright Directive: can a hyperlink be a "communication to the public"" CTLR 2014, 20(4), 100-103, pg 102

One of the biggest problems with treating the 'new public' rule as an expression of the exhaustion principle is that this analysis faces direct opposition from the vast majority of copyright policymakers, who have ardently refused to recognise or enable any application of exhaustion online, except in the case of computer programs which is regarded as a *lex specialis*.

More tangibly, this is problematic because it is inconsistent with the InfoSoc Directive, which forms the vary basis for the communication right. Article 3(3) states:

> 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.*

This means that, according to legislation, exhaustion does not and cannot apply to the right of communication. Any communication made or authorised by the right holder will not exhaust their exclusive right to control subsequent communications. Yet nonetheless, *Svensson* does mean that the right to control subsequent communications to the same initial public is extinguished upon the making of an initial communication. To say that the right is 'extinguished' or 'no longer applicable' rather than 'exhausted' seems purely semantic. Therefore it is entirely possible that *Svensson* is in fact incompatible with Article 3(3).

This then leads us to the situation where the application of Article 3 is inherently self-contradictory. If the 'new public' is part of 3(1), then it is in effect introducing a situation that is functionally almost identical to that which 3(3) exists solely to prevent. It follows that the only consistent interpretation of Article 3 is one by which the 'new public' rule also does not apply online, which would mean acknowledgement of what has been established above: that the 'new public' rule is not technology neutral. Under this model, if linking were to continue to be regarded as a communication to the public this would mean that each individual link would be required to be authorised by the rightholder of the content being linked to, assuming that content is protected by IPR. This situation is, as previously stated, "absurd" and does not appropriately reflect the balance of interest between the rightholder and the freedom of the internet. This in turn would mean that the InfoSoc Directive, as properly interpreted by the CJEU, has failed to provide an adequate framework for the protection of copyright in online environments.

It may be then that the approach taken by the German court in *Paperboy*, whereby linking is not regarded as a communication to the public but can only be considered an infringement if the link directs to already illegal content, is a more appropriate means of reaching the same substantive result.

6.3.2 Historical Dissonance

There is also the issue that the 'new public' rule, in its similarities with the exhaustion principle, is irreconcilable with its historical origins in *SGAE*. While this is less damning than the potential inconsistencies with Article 3(3) of the InfoSoc Directive, it does potentially undermine the reasoning that the court used to reach its decision in *Svensson*.

The original application of the 'new public' rule was in fact the exact opposite of exhaustion: It was specifically designed to enable fragmentation of the 'public' in order to strengthen the IPR holders rights, while exhaustion (at least in the EU) was designed to prevent fragmentation for the benefit of the internal market. From this perspective, the 'new public' cannot be the same thing as exhaustion because of those origins. The CJEU could not possibly have had exhaustion, or something with an equivalent effect to exhaustion, in mind when they devised this rule.

As mentioned preciously, the 'new public' as it applies to *Svensson* and the 'new public' in its original versions are also in many ways opposites of each other, so it follows that *Svensson's* 'new public' more closely resembles an online version of exhaustion than it does an online version of the old 'new public' rule. But if you treat the rules as separate, this means that *Svensson*'s version really is entirely novel, which was probably not the court's intention, and the reasoning behind its introduction is fundamentally flawed.

This leads to the situation where the 'new public' in *Svensson* doesn't really sit well within the existing framework. It is not problematic that the same rule can have different results in different situations, though this case where the fundamental purpose of the rule is the exact opposite of itself is more than a little odd. That *Svensson*'s 'new public' rule is based on a rule that is entirely unlike exhaustion does not seem like sufficient justification for its existence especially where it might otherwise be incompatible with Article 3(3).

7. Conclusion

Ultimately, however, the equation of the 'new public' rule with the exhaustion principle only really works at rather high levels of abstraction. Policymakers and legislation continue to be adamant that exhaustion does not apply online and that *UsedSoft* is a *lex specialis*. Therefore they will continue to deny that the 'new public' rule is an application of exhaustion at all, as opposed to a simple aspect of the communication right which is what it was intended to be.

There are enough similarities to suggest that the new public rule does not sit entirely right with the explicit exclusion of exhaustion contained in Article 3(3) of the InfoSoc Directive. Yet similar issues can be taken with the the *lex specialis* of *UsedSoft*, which still doesn't fit entirely well with the assertion that exhaustion does not apply online anyway, since it doesn't convincingly stem from a substantive difference in circumstance but simply that the Computer Programs directive did not exclude it when every other copyright instrument did. Furthermore, the 'new public' rule itself was born out of an earlier version of itself even though that earlier version was functionally the exact opposite. Therefore, the parallels between the 'new public' and exhaustion are not any more problematic than other existing aspects of the copyright regime and is probably not that irreconcilable with Article 3(3).

However, it does speak of a few kinks in the copyright system whenever it interacts with online environments, which suggests that perhaps the framework of copyright is flexible enough to function on the internet but perhaps not as elegant in its technological neutrality as it aims to be.

In summation, this examination of the *Svensson* ruling in relation to the principle of exhaustion is unlikely to undermine the framework of copyright regulation within the EU, however it does demonstrate some existing flaws and particularities within the system. Copyright aims to create a technologically neutral set of laws in order to adapt itself to online situations, and the *Svensson* ruling follows that objective in such a way as to provide a very satisfactory balance between the competing interests of rightolder protection and internet freedom by using exiting rules from the analogue world as a basis to create new ones. It aims to clarify the relationship between copyright linking in a normative sense by establishing that linking does, indeed, constitute a communication to the public while effectively using the

‘new public’ rule as a counterbalance this in order to achieve an optimum level of protection. It is in the application of the exhaustion principle, however, that these flaws become apparent. The practical overlap between the ‘new public’ requirement and the exhaustion principle is made apparent through the analysis in this essay, and is difficult to reconcile in principle with the current copyright rules which are overly restrictive on exhaustion. There does exist far greater scope in principle for further application of the exhaustion principle online than is currently recognised, which may be more consistent within itself as well as more compatible with the notion of technological neutrality, though the full implications of this would have to be further explored. The problems posed by these particular aspects of the current system are nonetheless not to be overstated. The ‘new public’ rule as it is might not fit in perfectly within the existing norms of the copyright system, but it does provide a nice balance between respect for the importance and freedom of linking while protecting rightholders from genuinely objectionable communications of their work.

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