



# Building the Digital Single Market ‘by Proxies’

## Making Sense of the CJEU Copyright Case Law on Hyperlinking (?)

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# Outline

- 1) Hypothesis : Digital Single Market and Teleological Approach
- 2) Exhaustion and Safeguard of the Specific Subject Matter of IP
- 3) The 'New Public' in relation to the Specific Subject-Matter of Copyright
- 4) Fixing *Svensson* with the 'Fair Balance' principle
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## 1) Hypothesis : Digital Single Market and Telological Approach

# The CJEU and the interpretation of Copyright Law

- CJEU Judges : aiming at consistency
  - Systematic interpretation of directives, notional approach (Malenovsky 2012, Lenaerts 2015)
- Scholars criticism : reaching no consistency
  - « (...) inconsistency of the court's case law makes it hard to speculate on its future direction (...) » (Derclaye 2014)
- **Consistent or not?**

# In search of consistency

- **Hypothesis : CJEU interpretation of copyright case law is driven by a teleological approach aiming at building the Digital Single Market (DSM)**
  - DSM as a goal
    - = goal of secondary law
      - See in general EU Commission Communication, « A Digital Single Market Strategy for Europe » (COM(2015) 192 final) and recent Directive (EU) 2019/790 (DSM Directive)
    - = extension on the internal market = goal of primary law
      - Fundamental goal of the Treaty (art. 3, § 3 TUE)
      - Legal basis for directives and case law prior harmonisation (*infra*)



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## 2) Exhaustion and Safeguard of the Specific Subject Matter of IP

# Reconciling the internal market and nat'l IP rights

- CJEU case law prior harmonisation

- Free movement : **safeguarding the specific subject-matter of IP rights**

- See ECJ, 8 June 1971, *Deutsche Grammophon c. Metro-SB-Großmärkte*, aff. 78/70 (neighbouring rights)

- « (...) although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. **Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property.** » (§ 11)

- See also ECJ, 20 janvier 1981, *Musiek-Vertrieb Membran c. GEMA*, aff. jointes 55/80 et 57/80 (copyright)

- Harmonisation : **exhaustion** rule

- Art. 4(2) Directive 2001/29/EC (InfoSoc Dir.) : exhaustion of distribution right
  - But art. 3(3) Infosoc Dir. : no exhaustion of right of communication to the public

# Reconciling the internal market and nat'l IP rights

- The specific subject-matter of copyright

- CJEU, 4 October 2011, *Football Association Premier League*, joined cases C-403/08 and C-429/08

« (...) the **specific subject-matter** of the intellectual property is intended in particular to ensure for the right holders concerned protection of the **right to exploit commercially** the marketing or **the making available** of the protected subject-matter, by the grant of licences in return for payment of remuneration. » (§ 107)

« (...) the specific subject-matter of the intellectual property **does not guarantee** the right holders concerned **the opportunity to demand the highest possible remuneration**. Consistently with its specific subject-matter, they are ensured (...) only **appropriate remuneration** for each use of the protected subject-matter (...) » (§ 108)

« (...) In order to be appropriate, such remuneration must be reasonable in relation to the economic value of the service provided. In particular, it must be reasonable **in relation to the actual or potential number of persons who enjoy or wish to enjoy the service** (...) » (§ 109)





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### **3) The 'New Public' in relation to the Specific Subject-Matter of Copyright**

# ‘New Public’ and ‘Safeguard of the Specific Subject-Matter of Copyright’

- **‘New Public’**

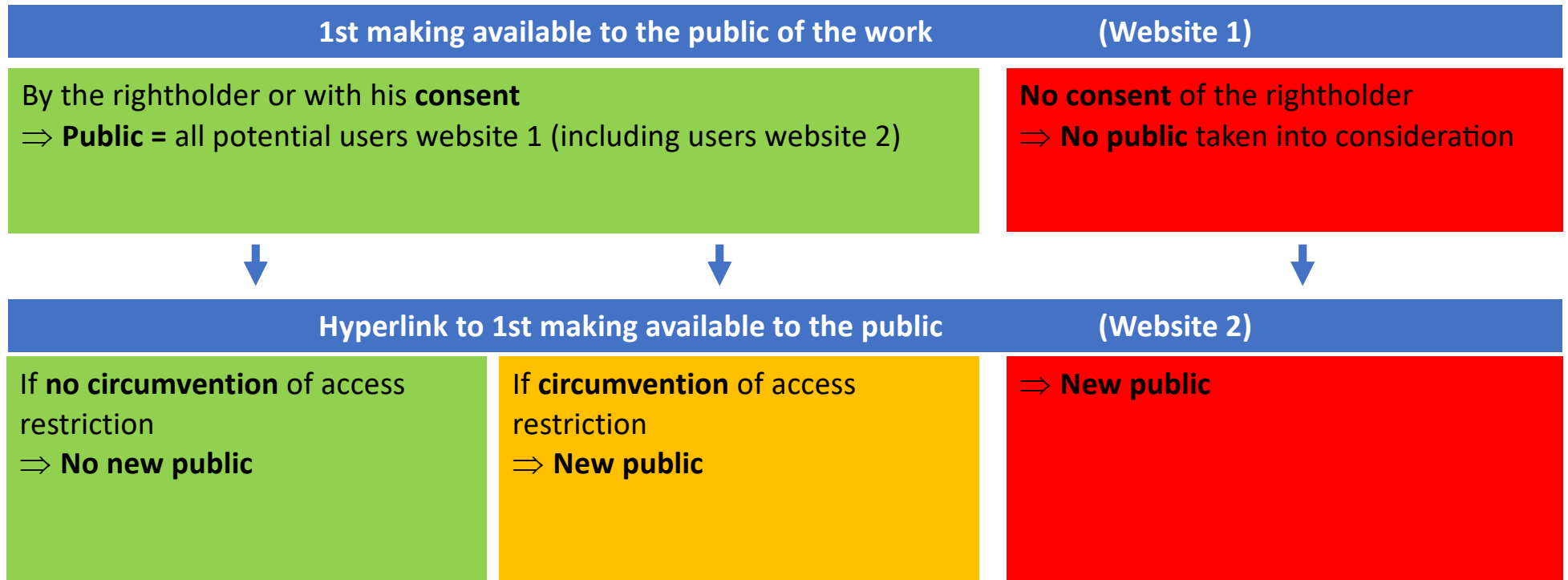
- « (...) a **public that was not taken into account by the copyright holders when they authorised the initial communication to the public (...)** » (see e.g. CJEU, 13 February 2014, *Svensson*, C-466/12 § 24)

- In relation with the **‘Appropriate Remuneration’** (see CJEU, *Football Association Premier League*, C-403/08 and C-429/08 )

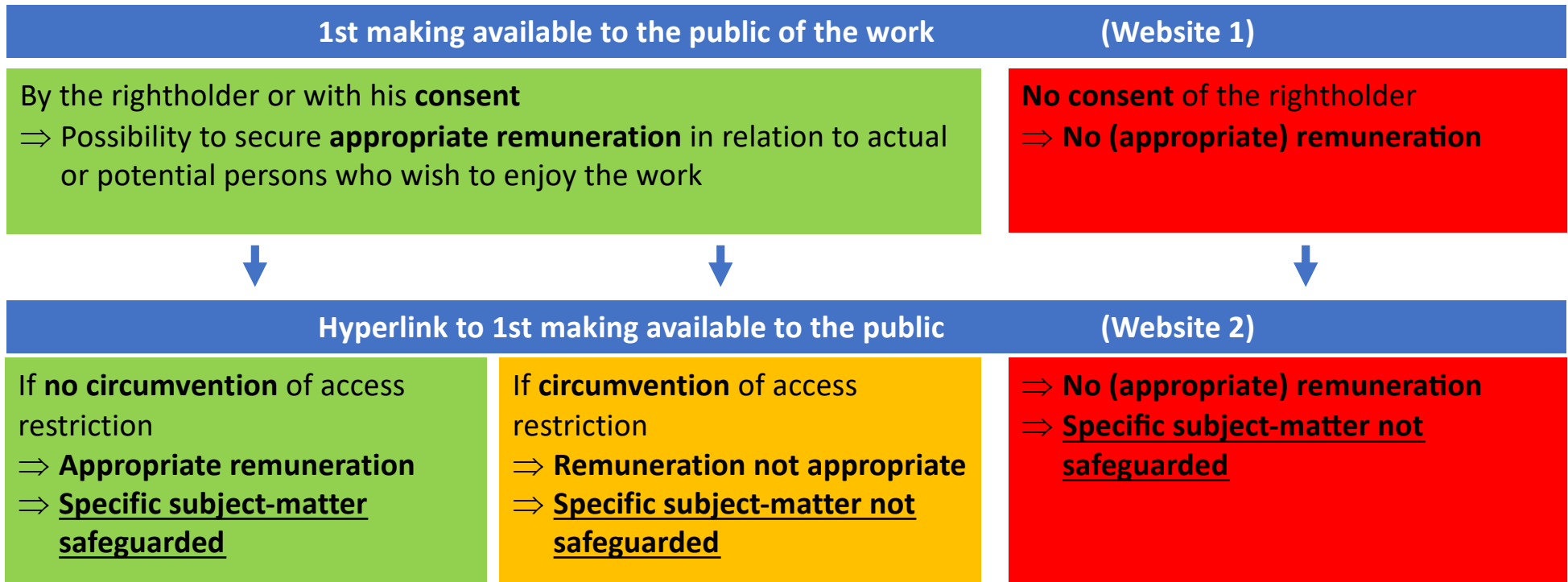
- Reading hyperlinking case law in the light of the **‘Safeguard of the Specific Subject-Matter of Copyright’**

- CJEU, 13 February 2014, *Svensson*, C-466/12
  - CJEU, 7 August 2018, *Renckhoff*, C-161/17
  - CJEU, 8 September 2016, *GS Media*, C-160/15

# Svensson (New Public)



# Svensson (Specific Subject-Matter of Copyright)



## Renckhoff (New Public)

1st making available to the public of the work

(WEBSITE 1)

By the rightholder or with his **consent**

⇒ **Public of this 1st communication** = all potential users website 1 (including users website 2)



2<sup>nd</sup> making available to the public (reproduction + hyperlink)

(WEBSITE 2)

**No consent** of the rightholder

⇒ **No public** taken into consideration **of this 2<sup>nd</sup> communication**

⇒ **New public**

⇒ « **To hold that the posting on one website of a work previously communicated on another website with the consent of the copyright holder does *not* constitute making available to a **new public would amount to applying an exhaustion rule to the right of communication**** » (§ 33)

⇒ >< art. 3(3) InfoSoc Directive

## *Renckhoff* (Specific Subject-Matter of Copyright)

1st making available to the public of the work

(WEBSITE 1)

By the rightholder or with his **consent**

⇒ Possibility to secure **appropriate remuneration in relation to that particular communication**



2<sup>nd</sup> making available to the public (reproduction + hyperlink)

(WEBSITE 2)

**No consent** of the rightholder

⇒ **No (appropriate) remuneration for that particular communication**

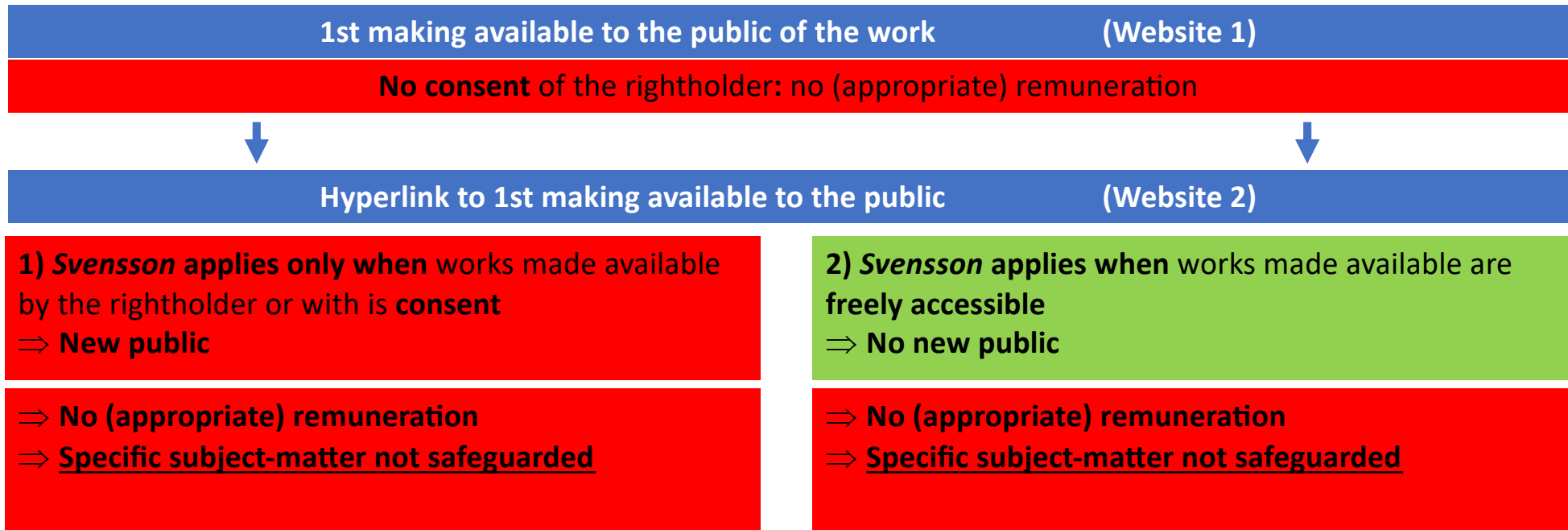
⇒ **Specific subject-matter not safeguarded** (need for rightholder's control)

⇒ « (...) that rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his work (...) even though (...) the **specific purpose of the intellectual property** is, in particular, to ensure for the rightholders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment of an **appropriate reward for each use of the protected subject matter** » (§ 34)



#### 4) Fixing *Svensson* with the 'Fair Balance' principle

# GS Media (New Public; Specific Subject-Matter of Copyright)



⇒ Communication should be subject to control of the rightholder in order to safeguard the specific subject-matter, but...

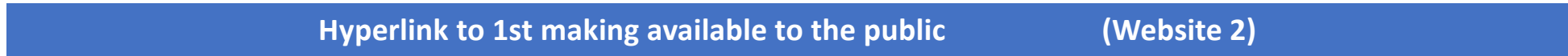
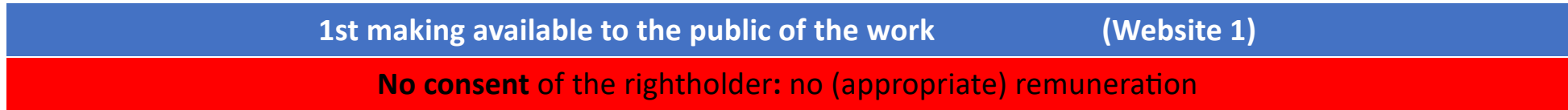


## *GS Media*, in search of a fair balance

- ... but on the one hand
  - « (...) **internet** is in fact of **particular importance to freedom of expression and of information**, safeguarded by Article 11 of the Charter, and that **hyperlinks contribute to its sound operation** as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information. » (§ 45)
  - « (...) it may be **difficult**, in particular **for individuals who wish to post such links, to ascertain** whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, **whether the copyright holders of those works have consented to their posting** on the internet (...) » (point 46)
- .... and on the other hand
  - **Copyright protection** (art. 17(2) EU Charter of Fundamental Rights)
    - **Not absolute** (CJEU, 24 November 2011, *Scarlet Extended c. SABAM*, C-70/10, § 43)
    - But must be **effective** (CJEU, 27 MArch 2014, *UPC Telekabel Wien c. Constantin Film Verleih et Wega Filmproduktiongesellschaft*, C-314/12, § 63)

⇒ **Conflicting fundamental rights -> Fair balance** (CJEU, *Promusicae*, C-275/06)

# GS Media, in search of a fair balance



**1) Svensson applies only when** works made available by the rightholder or with is **consent**  
 ⇒ New public

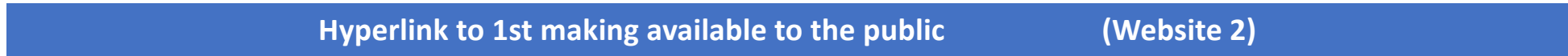
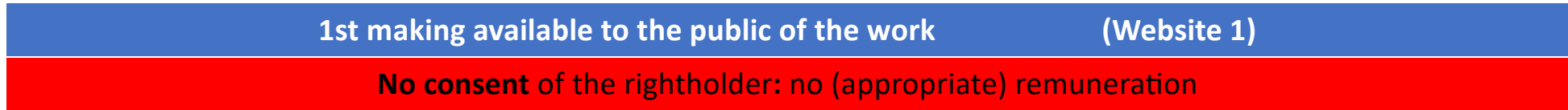
**Copyright > Freedom of expression and information of individuals**  
 ⇒ No fair balance

**2) Svensson applies when** works made available are **freely accessible**  
 ⇒ No new public

**Freedom of expression and information > Effective protection of copyright**  
 => No fair balance

⇒ 3rd way CJEU

# GS Media, in search of a fair balance



3) **Not for profit** ( $\approx$  individual)  
⇒ No knowledge (presumption)  
⇒ **No communication** to the public

⇒ **Freedom of expression and information of individuals safeguarded**  
⇒ **Rebuttable presumption = Effective protection of copyright**

3) **For profit** ( $\approx$  non individual)  
⇒ Knowledge (presumption)  
⇒ **Communication** to the public

⇒ **Effective protection of copyright**  
⇒ **Rebuttable presumption = Freedom of expression and information of individuals safeguarded**

⇒ **Fair Balance**



## 5) Conclusion : Building the Digital Single Market 'by Proxies'

# Hyperlinking, Exhaustion and the Digital Single Market

- The copyright holder cannot oppose to hyperlinking to a first making available of a work on Internet, freely accessible without access restriction, made by the rightholder or with his consent
  - // similar to exhaustion
- Exhaustion rule = limitation to the territoriality of national copyright protection
  - Fosters the internal market / Digital Single Market
- Consistent reasoning building upon case law on safeguarding the specific subject matter of IP
  - 'New Public' and 'Fair Balance' as proxies



Thank you for your attention !

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Read more (in French) : J. Cabay, “La Cour de justice, le droit d’auteur et le marché unique numérique : voyage intertextuel au pays des hyperliens”, in N. Berthold (ed.), *Droit de la propriété intellectuelle – Actualité législative et jurisprudence récente de la Cour de justice de l’Union européenne*, Bruxelles, Larcier, 2019, pp. 51-82