

# For whom the copyright scale tips: has the CJEU established a proper balance of rights with its GS media case judgement?

Petar Radosavljev<sup>[1]</sup>

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## ABSTRACT

The paper examines liability issues which arise in the process of hyperlinking to a material that represents an infringement of the copyright. The main question of the paper is whether the newly established practice of treating hyperlinking as secondary liability in certain cases, set by the Court of Justice of the European Union (CJEU), allows for an appropriate balance of rights between hyperlink providers and copyright holders. An analysis is provided regarding the current state of the public communication right and its impact on the balance of pertinent rights. The paper also highlights a couple omissions made by the Court in deliberating this judgement, chiefly the exclusion of the right to conduct business from the balancing exercise. The key focus of this paper is on the recent case of the CJEU, C-160/15 - *GS Media BV v Sanoma Media*, however, the paper also draws on the previous case law of the CJEU and corresponding cases from US jurisprudence.

**Keywords:** secondary liability; hyperlinking; copyright infringement; right to property; right to conduct business; freedom of expression and information; ISP liability; GS Media case; Svensson case; BestWater case

## 1. INTRODUCTION

Is the hyperlink provider supposed to be liable for the content it hyperlinks to? Particularly, should it be liable for hyperlinks pointing to content unlawfully uploaded by a third party? The Court of Justice of the European Union (CJEU) has recently addressed this issue in the *GS Media case*.<sup>[2]</sup> It delivered a judgement determining that liability in such cases exists. The CJEU delineated two different situations in which liability can be attributed to the hyperlink provider:

1. when the hyperlink provider does not pursue profit; and
2. when the hyperlink provider pursues profit.

The first case draws the liability in cases where the hyperlink provider knows or ought to know about the illegality of the content it hyperlinks to. The second one automatically establishes the liability of the hyperlink provider.

The CJEU reasoned that in this scenario the hyperlink represented an unauthorized communication of the work to the public. This article's aim is to analyze the validity of such argumentation. The main focus of this analysis will be on the established balance of pertinent rights in *GS Media case*. The second section of this article will dive into the origins of the issue of hyperlink liability. The *Svensson case*<sup>[3]</sup> established the practice that hyperlink provision should be assessed as a potential communication of the work to the public, while the *BestWater case*<sup>[4]</sup> followed suit. This section will provide an understanding in regards to the reasoning of these judgements. The third section will be dedicated to the reasoning of the *GS Media case* and its impact on the issue of hyperlinking. The first part of this assessment will be pointed at the newly established test which determines whether or not the provision of a hyperlink attracts liability. The second part will reassess the values and circumstances surrounding the balancing exercise of the fundamental rights found in the *GS Media case*. Here, the emphasis will be put on four omissions of the balancing test made by the CJEU:

1. failure to recognize the plurality of hyperlink providers;
2. exclusion of the right to conduct business from the test;
3. an unrecognized protective mechanism established through the *UPC Telekabel Wien case*<sup>[5]</sup>; and
4. the inability of the CJEU to acknowledge already established market practices of online hosting service providers.

The final section will deliver a prediction regarding the freedom of expression based on the previously elaborated subject and conclude this discussion.

## 2. THE SVENSSON CASE

The issue of liability concerning hyperlinking was firstly assessed by the CJEU in the *Svensson case*. National jurisprudence in EU was inconsistent when dealing with the provision of hyperlinks before the CJEU delivered a ruling in this case. The main problem was in the definition of the nature of hyperlinking. Some national courts determined that hyperlinking represented a primary infringement in the form of communicating the work to the public. Other courts provided that the provision of hyperlinks could attract only secondary liability of the hyperlinker.

The Swedish Supreme Court ruled that the provision of hyperlinks to works might constitute making that work available to the public in the *Olsson case*.<sup>[6]</sup> The court held that, by allowing the general public to download copyrighted works through the provision of hyperlinks, Olsson had made an active action that was necessary in order for the work to be made available through the use of the hyperlinks to the public.<sup>[7]</sup>

Contrary to this position, the German Federal Court deliberated in the *Paperboy case*<sup>[8]</sup> that the setting of deep links did not infringe upon the new right of making a work available to the public.<sup>[9]</sup> Its rationale was that the hyperlinks which contained only the addresses of the pertinent work did not themselves contain any part of those works and provided merely access to the said works on a different website where they had previously already been accessible to the general public.

In the *Napster.no case*<sup>[10]</sup> the defendant was held liable for infringement of public communication right by the court of first instance on the grounds that it provided direct links to the infringing music files. However, in the final instance, the Norwegian Supreme Court decided that the provision of hyperlinks could not be deemed as making the work available to the public; however it found Napster.no liable for copyright infringement on account of liability for contribution.<sup>[11]</sup>

This division in opinions of National Courts disabled the proper functioning of the internal market as set by the InfoSoc Directive.<sup>[12]</sup> The issue was finally presented to the CJEU in the *Svensson case*. The CJEU determined that the hyperlinking issue would be analysed under the institute of public communication right. This in turn eliminated any legal uncertainties that surrounded this question up until this point. The case revolved around the fact that the Respondent operated a website which provided its clients with lists of hyperlinks to articles published on other websites. Some of those hyperlinks lead to the Applicants copyrighted articles. The Applicants claimed that their copyright was infringed upon by the actions of the Respondent. The articles in question were previously made available to the general public without restrictions by the Applicants.

In assessing whether the provision of hyperlinks amounts to a public communication, the CJEU used an established test which determines that in order for some action to be deemed as a communication of the work to the public it needs to fulfil two cumulative criteria:

1. There needs to exist *an act of communication of the work* itself; and
2. There needs to exist a communication of that work to *the public*.<sup>[13]</sup>

As regards the first prong of the test, the CJEU reiterated previously established precedent that the act of communication should be construed broadly.<sup>[14]</sup> InfoSoc Directive establishes a high level of protection for copyright holders and it is thus of a paramount importance that the rights granted to the copyright owners are interpreted broadly.<sup>[15]</sup>

This condition was successfully met in the *Svensson case*, since the Respondent provided users with direct access to the work in question. The CJEU then considered the second prong of the test regarding the notion of the public.

It is an established case law interpretation that the InfoSoc Directive refers to the term *public* as an indeterminate number of potential recipients and implies a fairly large number of persons.<sup>[16]</sup> Since all the visitors of the Respondent's website had an opportunity to access

protected works through the hyperlinks placed on this website this condition was successfully met and communication to the public was made.

However, having in mind the previously settled case-law, such communication, which concerns the same works as those covered by the initial communication, must be made through the use of different technical means in order to be regarded as a communication to the public.<sup>[17]</sup> The Court established that since both the initial communication and the provision of hyperlinks had been conducted through the use of Internet then this criterion had not been fulfilled.

This put an emphasis on the criterion whether the initial communication had been directed at a new public. This concept of a new public refers to the public not taken into account by the copyright holders at the moment of the authorization of the initial communication to the public.<sup>[18]</sup>

The CJEU found that this condition had not been met. The reasoning for this conclusion was that the content in question was previously available on the applicant's website to the general public without any restrictions. The public that could access the works through the Respondent's website was indeed taken into account by the applicants when they authorized the initial communication to the public.

Accordingly, the CJEU reasoned that the provision of a hyperlink in this case did not amount to the communication of the content to the public. But, the Court clearly emphasized that this analysis was conducted on the premise that the content in question was put online with the authorization of the copyright owner.<sup>[19]</sup> It further stressed that if there had been no consent regarding the pertinent content, a different reasoning might have been acknowledged.

This approach was later reaffirmed in the *BestWater case*.<sup>[20]</sup>

### 3. THE *GS MEDIA* CASE

The *GS Media case* took on a delicate question. Do hyperlinks that point to content which was previously uploaded online without the authorization of the copyright holder infringe upon the public communication right or not?

The CJEU was presented with a case where the Respondent, an online magazine, was repeatedly providing hyperlinks to the content that had been placed online without the authorization of the Applicant. The content in question was firstly uploaded to an online hosting service website and made available to download through a link. This link was available to everyone without any restrictions.

The Applicant demanded that the Respondent remove the hyperlink in question, but the Respondent did not comply. The Respondent claimed that because it had not placed the content online it was not liable for the content itself; rather the liability was solely on the person who uploaded it in the first place.

The CJEU approached the issue on the grounds set in the *Svensson* and *BestWater* cases. It reaffirmed that the communication to the public had to be interpreted broadly.<sup>[21]</sup> However, it also acknowledged that its interpretation of the public communications right might interfere with the balance of fundamental rights established through the provisions of the InfoSoc

Directive.<sup>[22]</sup> Following the presentation of these conditions the CJEU then executed a reassessment of the balance of fundamental rights influenced by its decision.

For this reason this chapter will be divided into two subsections, the first one will be dealing with the test portion of the judgement and the second one with the balancing exercise executed by the CJEU.

### 3.1. THE TEST

The test delivered by the Court has three prongs. The first one refers to the control that the hyperlink provider has over the access to the subjected content through the use of hyperlinks. The second one concerns the definition of a public and is essentially the complete test found in the *Svensson case*. Finally, the third prong explains how a financial element affects the nature of the hyperlink in question.

The first criterion will be met if two conditions are satisfied. Firstly, the hyperlink provider must act with full knowledge that she allows access to the protected work when hyperlinking to it.<sup>[23]</sup> And secondly, that the end users would not be able, in principle, to access the said work, if it were not for the provision of that particular hyperlink.<sup>[24]</sup> The Court continued to the next condition and delivered the same understanding of the notion of public as provided in the *Svensson case*. The concept of the public is determined as an indeterminate number of potential viewers and implies, moreover, a fairly large number of people.<sup>[25]</sup> The CJEU then reiterated additional aspects of this definition of public. In the first place, the public communication right will be infringed upon if the technical means through which the work is made available to the user are different than the ones originally used to communicate the work.<sup>[26]</sup> And secondly there will be an infringement present if the work is introduced to a 'new public,' a concept defined in the second section of this paper.<sup>[27]</sup>

Finally, the CJEU determined that the existence of financial gain to the hyperlink provider will influence the existence of the infringement of the public communication right. The exclusion of financial gain allows for a rebuttable assumption that the hyperlink provider did not know and could not have reasonably known about the illegality of the content.<sup>[28]</sup> Provision of hyperlinks in this case would not constitute an infringement of the public communication right. However, if the hyperlink provider is made aware of that fact, through the notification of the right holders for instance, such provision of a hyperlink will be deemed as a communication to the public and therefore it will infringe upon the copyright.<sup>[29]</sup>

In a situation where provision of a hyperlink is carried out for profit, a rebuttable assumption will stand that the infringement exists.<sup>[30]</sup> *GS Media case* provided a new interpretation of the public communication right. This was necessary as the facts of the case demanded a proper definition of the right based on the pertinent circumstances. It is important to note that the two cases that previously dealt with the issue of hyperlinks did not incorporate such an elaborate definition of public communication right. Broadening of the test demanded the reassessment of balance among colliding fundamental rights. The next subsection will provide the CJEU's conclusion on this reassessment and will enumerate the omissions made during this reassessment.

### 3.2. BALANCING OF RIGHTS

In *GS Media case* the Court held that the balance should be struck between the copyright holders' right to property and the fundamental rights of end-users - freedom of expression

and of information.[31] The right to property states that “[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.”[32] No one can be deprived of this right, except in certain cases, where the public interest demands it or it has been prescribed by the law.[33] On the other hand, freedom of expression, as enshrined by the Charter, dictates that everyone will have the right to hold opinions and to receive and impart information and ideas.[34]

Neither one of these rights is absolute. In situations “where several fundamental rights are at issue, the Member States must, when transposing a directive, ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the applicable fundamental rights protected by the European Union legal order.”[35]

The Court has been pretty one-sided when it exercised the balance between the right to intellectual property on one side and freedom of expression and of information on the other. It provided arguments that according to the Recitals 9 and 10 of the InfoSoc Directive copyright holders are supposed to enjoy a high level of protection since this is one of the main goals of the directive and that based on that protection they are entitled to an appropriate reward.[36] The reason for this is that proper protection of intellectual property “will foster substantial investment in creativity and innovation.”[37] Given the multitude of ways that copyrighted content may be infringed upon over the Internet and the annual loss of 3 billion dollars of the motion picture industry due to piracy in potential worldwide revenue,[38] there is no reason not to provide copyright holders with high protection. However, it should be noted that such protection must be appropriate.

The balancing exercise conducted by the CJEU was incomplete. It seems that the Court persisted with the premise provided in the Recital 3 of the InfoSoc Directive and pointed its attention only to the two colliding rights – the right to property and freedom of expression and of information. The author of this paper maintains that there are four omissions made by the Court:

1. failure to recognize the plurality of hyperlink providers;
2. exclusion of the right to conduct business from the test;
3. an unrecognized protective mechanism established through the *UPC Telekabel Wien* case;[39] and
4. the inability of the CJEU to acknowledge established market practices of online hosting service providers.

Not taking into consideration these criteria can lead to serious imbalance between the colliding rights. This is especially the case where the rights and freedoms colliding are so intertwined. A similar issue to the one found in the *GS Media* case was at the centre of the US Supreme Court ruling in the case of *Harper & Row Publishers, Inc. v. Nation Enterprises*.<sup>[40]</sup> In this case a news magazine published excerpts of Gerald Ford's forthcoming but as yet unpublished memoirs, on the pretence that it had been in the interest of the freedom of expression to publish certain facts from these memoirs immediately. The Court determined that by doing so, the magazine infringed upon the copyrighted material since pertinent information was bound to be released within a certain time-frame after the publication of the article.<sup>[41]</sup> The Court emphasized that copyright furthered freedom of expression by providing rights that enable independent writers and artists to make a living from their expression.<sup>[42]</sup>

In cases which concern copyright, another aggravating circumstance is that if the proper balance is not established, even the overprotected right can be deteriorated by such decision. The copyright protection is enacted in order to protect innovators and foster innovation.<sup>[43]</sup> However, human creativity is always in a sense built upon previous works of previous creators. Provision of an overprotective mechanism to the copyright holders could trigger a counter-productive effect which would harm creativity and innovation<sup>[44]</sup> by limiting access to copyrighted content to the wealthy elite.<sup>[45]</sup> Therefore, copyright can be considered an agent of freedom of expression, but its overprotection can be detrimental to itself, as well as freedom of expression and of information.

The paper will now consider the aforementioned omissions and their impact on the proper balance of the fundamental rights.

### 3.2.1. CONDUCT OF BUSINESS

It is appropriate to consider the first two omissions together, since both of them relate to the potential of a business activity. The error made by the CJEU can be described as both legal and empirical. Failure to bring the right to conduct business into the equation can be described as a legal mistake, while disregard of the plurality of hyperlink providers of different financial and organizational standings can be deemed an empirical error.

This subsection will firstly deal with the legal aspect of this omission and will then consider the empirical side of the argument as well.

#### 3.2.1.1. LEGAL ASPECTS

The CJEU concluded in the *Scarlet Extended* case that “*in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.*”<sup>[46]</sup>

It is an established trend that the right to conduct business is incorporated into the evaluation of the balance of fundamental rights when dealing with the issues of intellectual property.<sup>[47]</sup> This is logical, as there is no hierarchy between this right and the rights taken into consideration by the Court in the *GS Media* case. Furthermore, all three have been deemed not to represent absolute rights.

Recent case-law in intellectual property law suggests that all three of these rights must be adequately assessed when determining the proper balance of rights. In the *Scarlet Extended* case, the CJEU considered the effects that proposed measures would have on the Respondent’s right to conduct business. In this case the Court addressed the issue of peer-to-peer illegal sharing of protected works. The Applicant in this case was a management company which represented authors, composers and editors of musical works in authorizing the use of their copyright-protected works by third parties. The Respondent was an ISP which provided Internet access to the primary infringers.

The Applicant proposed certain measures that were supposed to be implemented by the Respondent in order to prevent further infringement. After assessing the proposed measures, submitted by the Applicant, the CJEU concluded that they were unnecessarily complicated and costly.<sup>[48]</sup> On these grounds it concluded that the measures in question would seriously infringe upon the respondent’s right to conduct business and a fair balance among fundamental rights would not be established.

This approach was upheld in *McFadden case*[49]. Here the Respondent provided free wireless internet access to its customers without any security measure. One of the users had, unbeknownst to the Respondent, uploaded a music file which infringed upon the copyright of the Applicant. When assessing whether the Respondent was liable in the secondary degree the CJEU took into consideration its right to conduct business as well as the Applicant's right to property. The CJEU weighed different interests in this case and arrived at the conclusion that the least restrictive measure was that of password protection.[50] It reasoned that the users of the Respondent's free Internet access would be less inclined to infringe upon copyright if they were obligated to provide some personal information when asking for a password to log in.

Finally, the CJEU also considered the right to conduct business in its analysis in the *UPC Telekabel Wien case*[51]. In this case the Applicants demanded that the Respondent, an ISP, should block access to a webpage of a third party who was infringing on Applicants' copyright. The third party was providing access to the content that had been uploaded without an authorization of the copyright holder. Applicants sought an injunctive relief when the Respondent did not comply with their request. The Court assessed the issue from the aspects of the right to property, freedom of expression and information and the right to conduct business. This analysis provided a conclusion that the injunction would not affect the balance of the fundamental rights and that it was appropriate.

In the *GS Media case* the CJEU did not take this approach. It only took into consideration two colliding fundamental rights - freedom of expression and information, and the right to property. The first one was attributed to the hyperlink provider and its freedom of expression. The second one was ascribed to the copyright owners.

The CJEU clearly adhered only to the interpretation of the Recital 3 of the InfoSoc Directive which suggests that the balance of rights will be established between the freedom of expression and the right to property. What the CJEU failed to recognize was the use of the word 'especially' next to the use of the aforementioned rights. This suggests that these two rights are of the highest importance when determining the overall balance of fundamental rights; however it does not exclude other rights from being added to the equation.

It is therefore strange that the CJEU does not take into consideration the right to conduct business. The Respondent's ability to conduct business was clearly affected by the measure deliberated by the Court, since it imposed additional burden to the Respondent's business model.

The Respondent's link aggregation model depends on linking to content provided by other Internet users. This business model has been present for years, for example 'Yahoo! News' was launched in 1996 and has been using link aggregation since then.[52] The use of hyperlinks is essential to the functioning of the Web. It is thus not uncharacteristic that a business model that uses hyperlink aggregation has been established. The CJEU previously upheld that every business entity had the right to "freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it." [53]

The right to conduct business through the use of the hyperlinks is compatible with this assertion. Previous to the *GS Media* judgement there was no precedent that attached any liability to the provision of hyperlinks leading to content that is freely accessible to general public. Therefore, hyperlink provision was available for free use as a technical resource. The aggregation business model that stemmed from this premise was thus completely legitimate.

In *UPC Telekabel Wien* the CJEU considered how the imposed measures to protect copyright owners would influence the ISP and impact the right to conduct business. It was stated that the measure in question “constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions.”<sup>[54]</sup>

Therefore, imposition of liability on the hyperlink providers who gain profit from their actions must affect their right to conduct business, since it is in direct opposition to their business plan. Because of this the right to conduct business cannot be avoided when balancing the fundamental rights.

### **3.2.1.2. EMPIRICAL ERRORS**

The CJEU has developed approaches to some of the different issues surrounding the liability of the hyperlink providers. It rightly assessed that it will be difficult for hyperlink providers to ascertain whether or not the content is copyrighted, and that this task is further complicated because of the existence of sub-licenses surrounding the issues of copyright.<sup>[55]</sup> Finally, the CJEU acknowledges the burdensome nature of hyperlinks which is the changeability of content to which they provide access.<sup>[56]</sup> The webpage content that a hyperlink points to can change over time and so the hyperlink provider has to constantly check for the updated versions of the webpage to which it refers. The CJEU also appreciates the concerns raised by the German, Portuguese and Slovak Governments and the European Commission, that the automatic recognition of hyperlinks to illegally placed content as communication to the public will represent a serious limitation on the freedom of expression and of information.<sup>[57]</sup> However, the CJEU did not completely take these matters into consideration when deliberating on the balance of fundamental rights. It seems that the CJEU considered only the Respondent as the benchmark infringer and left other sorts of hyperlink providers out of the analysis.

It is safe to presume that smaller entities, such as bloggers, do not have the necessary resources to conduct a proper analysis of the legality of content placement. The Respondent in this case is a well-established Dutch magazine which is expected to have the means to carry out such an examination, but its characteristics cannot represent a set standard for all entities present online that hyperlink to different content. Yet, this is exactly what this judgement declares. The inability to conduct swift and proper examination of the content’s source can lead to chilling of the freedom of expression and to market failure.

Smaller entities will be inclined to refrain from hyperlinking to certain content for which they have no clear indication whether it has been posted legally. This will in turn lead to the chilling effect on their speech. According to a study conducted at Oxford, called the Mystery Shopper Test, a major UK ISP was asked to remove a webpage which hosted allegedly infringing copyright material.<sup>[58]</sup> The content in question had been in public domain for some time. The final result was that the webpage was removed without any protest by the ISP. The conclusion that the Oxford researchers arrived to was that “the current regulatory settlement has created an environment in which the incentive to take down content from the Internet is higher than the potential costs of not taking it down.”<sup>[59]</sup> This shows that even large entities, capable of conducting a proper analysis, shy away from such conduct and comply with copyright take-down notices. It can thus not be expected that entities, unable of making such assessment, would act differently for fear of being prosecuted.

The other side of the coin points to the fact that the richer hyperlink providers, with teams dedicated to conduct a proper analysis of the content's source, will have a head start when delivering news. The amount of time necessary for these entities will be considerably shorter and they would be granted a sort of an exclusive scoop, based only on their monetary ability. Such practice disables smaller entities and start-up companies with lower financial power to compete with established behemoths such as Google News and others.

This phenomenon is similar to the issue of Zero-rating practices of ISPs. Zero-rating practice involves content providers that pay certain fees to ISPs so that their services would be excluded from users' monthly bandwidth caps. In this scenario a user will opt for the zero bandwidth selection of Content Provider set by an ISP and disregard other Content Providers' services available online.<sup>[60]</sup> The content that will mostly be accessed among users is that of the Content Provider which achieves the best deal with the ISP. Start-up companies are thus unable to follow suit and are found in a difficult position to compete with the zero-rated services.

Therefore, the effects of the *GS Media case* ruling go directly against the EU's Digital Single Market agenda. The Digital Single Market is said to "create opportunities for new start-ups and allow existing companies to grow and profit within a market of over 500 million people."<sup>[61]</sup> By not being able to hyperlink freely, start-up companies, among others, will be deprived of the opportunity to compete with the existing companies with sufficient resources. This will create a stale environment for new services in the EU and degrade its efforts to compete with the USA in the ICT industry field.

### 3.2.2. AN ALREADY ESTABLISHED PROTECTION

As previously stated the CJEU considered intermediary liability of a Respondent ISP with regard to illegally placed content, in the *UPC Telekabel Wien case*. The infringed material was available for streaming or to download on a third party website. The issue at hand was whether the ISP was secondarily liable for the primary infringement. The basis for this was that it provided Internet access to its users and thus to the material in question. The copyright holders, the Applicants, claimed that according to the Article 8(3) of the InfoSoc Directive, the Respondent corresponded to a notion of an intermediary. Based on this notion it should comply with the national court's interim measure. Applicants demanded that the Respondent blocked the access to the pertinent webpages where the infringements occurred. The type of the injunction granted by the Appeal court was of an 'outcome injunction,'<sup>[62]</sup> since it corresponded to the *Erfolgsverbot*, a mechanism found in Austrian procedural law. It "allows the judge to require that the defendants achieved a certain result without specifying the measures that should be taken for that purpose."<sup>[63]</sup> Since the defendant would not comply with this request, the case was referred to the CJEU. The Court in turn decided that the Respondent should, indeed, be regarded as an intermediary within the meaning of the Article 8(3) of the InfoSoc Directive. According to that conclusion it is obligated to take appropriate measures in order to protect the rights of the copyright holders.

Two conditions were attached to the measures in question:

1. It should not "unnecessarily deprive internet users of the possibility of lawfully accessing the information available;"<sup>[64]</sup> and
2. It should be effective in "preventing unauthorised access to protected subject-matter."<sup>[65]</sup>

If the second condition was impossible to meet, the measures were supposed to at least make it difficult for Internet users to access the pertinent content and to seriously discourage them from accessing such content.<sup>[66]</sup> The Court had previously taken into consideration the impact such a decision would have had on the related rights, those being the freedom to conduct a business and the freedom of information of internet users. Based on the reasoning that the injunction in question was an outcome injunction, it did not infringe upon the freedom of the Respondent to conduct its business.<sup>[67]</sup> Furthermore, the interim measure allowed the Respondent to avoid liability by proving that it had taken all reasonable measures to block the pertinent content.<sup>[68]</sup>

The CJEU determined that since the measures deployed by the Respondent were to be strictly targeted, it should not influence the information that the internet users were normally able to access and which was lawfully present online.<sup>[69]</sup> Therefore, freedom of expression and information would not be diminished. The CJEU further established a back-up protection of this freedom when it determined that “*the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.*”<sup>[70]</sup>

Finally, the CJEU acknowledged the fact that the enforcement of this type of injunction would not lead to a complete cessation of the copyright infringement, since the Respondent might apply certain reasonable measures, which would devoid it of liability, but which would not be successful in preventing further infringements.<sup>[71]</sup> However, the Court referred to *Scarlet Extended case*, which maintained that the right to intellectual property was not inviolable and should not for that reason be absolutely protected.<sup>[72]</sup>

It is impossible to provide a protective mechanism that would disable further infringement of copyrighted material online. There are always ways through which individuals can access such content. The protective mechanisms provided in *UPC Telekabel Wien* and *GS Media case* both have flaws and can be circumvented. The approach in *GS Media case* disables posting of hyperlinks that lead to infringed content. But the content itself and the location of it is still available online. Through the use of search engines, end-users are able to pinpoint the content and access it directly. This measure makes it more difficult for individuals to reach pertinent content, but it does not eliminate access to it. The *UPC Telekabel Wien* method leaves hyperlinks intact, but it disables access to the webpage the hyperlink leads to. The webpage in question is thus blocked to the customers of the ISP. This too does not erase content from online world it just makes it harder to reach. Through the use of circumvention tools, blocked webpages can be accessed.<sup>[73]</sup>

In conclusion, there is no bulletproof method that will provide absolute protection to the copyright owners. But then again there need not be one, as copyright is not an absolute right. The pursuit of perfect protection of copyright can lead to the chilling effects on freedom of expression as it has been discussed.

### 3.2.3. FILTERING SYSTEMS

Finally, the CJEU did not recognize the protection given to the copyright holders through the copyright protection policies of online hosting service providers.

It is stated in the facts of the *GS Media case* that at the Applicant’s request the hosting service (filefactory.com) removed the files infringing upon copyrighted material.<sup>[74]</sup> Therefore the copyright owners have an option to request direct deletion of files at their source.

Furthermore, according to the settled CJEU's case law online services are obligated to prevent future specific and clearly identified infringements of an intellectual property right.<sup>[75]</sup> This means that once the infringement has been detected the online service is obligated to disable future infringements through the upload of the same file.

In practice many of the file hosting services use MD5 or SHA-1 hash values filtering systems.<sup>[76]</sup> These values represent a fingerprint to each file that is or has ever been created. They are generated based on the information the file consists of and are the same for the same copies of the file. The filtering system works when such values of files that are known as infringement are compared to the newly uploaded files. In case of a match, the file is automatically blocked or deleted.<sup>[77]</sup> When the file with the same hash value is uploaded to a file hosting service it is immediately blocked and will not be uploaded due to the copyright policy of the website in question.

YouTube, the world's biggest video sharing website, has implemented the Content ID filtering system. Content ID presupposes that copyright owners provide YouTube with protected materials. These are then converted into fingerprint files which are used to detect complete and partial visual or audio matches and disable future uploads of infringing material or find existing infringement previously undetected.<sup>[78]</sup> Through Content ID YouTube is able to detect infringing materials more efficiently, with the assistance of content owners. A symbiotic connection is generated that provides convenience to both sides. Copyright owners benefit from this system through one of the options they are presented with; Content ID allows the content owner to delete video, mute its sound, monetize the video by running ads against it or track the video's viewership statistics.<sup>[79]</sup> On the other hand YouTube is exculpated from liability of copyright infringement.

Therefore, copyright owners are provided with some protection even through the use of automatic filtering solutions. The hyperlink provider can even represent a good asset to the copyright owner in a sense that it pinpoints the exact location where the infringement is found so that the copyright owner does not need to spend its resources searching the Internet for the infringing files. In the situation where the file hosting service does not implement any sort of filtering mechanism the copyright owner is always presented with the option of blocking the website's pertinent page as elaborated in the previous section.

## 4. CONCLUSION

It is estimated that the motion-picture industry alone has faces an annual loss of 3 billion dollars in potential revenue on account of online copyright infringement.<sup>[80]</sup> It is thus the imperative that the copyright owners receive the high level of protection InfoSoc is set to provide.

However, online every protection mechanism has its flaws and can be circumvented in different ways. Every protection mechanism enumerated in the previous section of this paper can be nullified. The protection granted through the blocking of a whole webpage by an ISP can be circumvented with the use of proxies or VPNs. The filtering mechanisms present with file hosting services can be easily outmanoeuvred with simple tweaks of the file. Even the presumed liability of the hyperlink providers who pursue profit can be evaded through the setting of a non-profit website which would provide hyperlinks towards the infringing content, thus removing the rebuttable presumption of knowledge. This provides for solid argumentation that the imposed measures by the CJEU in *GS Media* case are appropriate.

However, it is my conclusion that with this ruling the balance of fundamental rights has not been established.

The CJEU might have prescribed an adequate measure in regards to the Respondent in the *GS Media case*. The Respondent is a highly successful online magazine with sufficient resources to conduct proper research in relation to the origin of the content it hyperlinks to. The problem is that other entities have not been included in this analysis. The freedom of expression and of information is thus severely deteriorated because of the chilling effect this decision enables.

The CJEU only scratched the surface of the problem. Its balancing exercise did not include all the pertinent rights. It seems that the CJEU did not move much further from the analysis of the Recital 3 of the InfoSoc. The emphasis is put on the protection of the right to property, freedom of expression and of information suffered.

Liability should be imposed on hyperlink providers when they are pointing towards the infringing content, however, not at the cost of diminishing freedom of expression. Ms. Wathelet, Advocate General, stated in her opinion of the *GS Media case* that there should be no difference in assessing content that has been placed online with or without consent of the copyright owner.<sup>[81]</sup> If the CJEU upheld this reasoning the test from the *Svensson case* would be applied to the *GS Media case* and no liability would be imposed on the Respondent in this case. Perhaps a better solution would have been that the CJEU did not make a distinction between entities that pursue profit and those which do not. Were this the case, the take down notice system would be upheld and there would be no leverage present on the side of the hyperlink providers with better financial standings. This would assure no detriment to the freedom of expression through the chilling of the speech.

In the current scenario presumed liability means that the active role in detecting infringing copyrighted content is shifted from the copyright holders to the hyperlink providers. This provides a great protective mechanism for the copyright owners, but hampers the spreading of information over the Internet.

Thus the final conclusion is that although the ruling of the CJEU has its merits it does not establish a proper balance between fundamental rights and it should be remedied in the near future.

- [1] Petar Radosavljev, Legal advisor at Law office “Matic”, Zrenjanin, Serbia: [petar.radosavljev@gmail.com](mailto:petar.radosavljev@gmail.com)
- [2] C-160/15 - *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644
- [3] C-466/12 - *Nils Svensson and Others v Retriever Sverige AB*, ECLI:EU:C:2014:76
- [4] C-348/13 - *BestWater International GmbH v Michael Mebes and Stefan Potsch*, ECLI:EU:C:2014:2315
- [5] C-314/12 - *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, ECLI:EU:C:2014:192.
- [6] *IFPI Sweden v Tommy Olsson*, no. B 413-00, Stockholm Supreme Court 2000.
- [7] Rosén, J. (2002) “Server Copyright Liability – Notes on the Swedish Act on Liability for Intermediaries and two Recent Decisions of the Swedish Supreme Court”, Stockholm Inst. for Scandinavian Law, 147, 147 n.1, p. 157.
- [8] *Verlagsgruppe Handelsblatt GmbH v Paperboy*, Bundesgerichtshof No 1 ZR 259/00, 17 July 2003, [2005] ECDR 7
- [9] Stemplewitz, J. (2004) “BGH I ZR 259/00 - Legality of Deep Links”, Miller/Zumbansen (eds), Annual of German and European Law 2004, retrieved from [http://www.cgerli.org/fileadmin/user\\_upload/interne\\_Dokumente/Judgments/bghizr25900.htm#n4](http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Judgments/bghizr25900.htm#n4), para. 2-3.
- [10] *Tono and others v Frank Allan Bruvik d/b/a Napster*, Hr-2005-00133-A, Rt-2005-41 (Supreme Court of Norway, 27 January 2005 - Docket No. 2004/822)
- [11] *Napster.no case*, para. 62.
- [12] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJL 167 , 22.6.2001, p. 10 (InfoSoc directive), Rec. 6.
- [13] *Svensson*, para. 16.
- [14] *Svensson*, para. 17.
- [15] *Ibid.*
- [16] C-306/05 - *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, EU:C:2006:764, para. 37 and 38.
- [17] *SGAE*, para. 42.
- [18] *SGAE*, para. 40 and 42.
- [19] *Svensson*, para. 31.
- [20] *BestWater*, para 19.

- [21] *GS Media*, para. 30.
- [22] *GS Media*, para. 31.
- [23] *GS Media*, para. 35.
- [24] *Ibid.*
- [25] *GS Media*, para. 36.
- [26] *GS Media*, para. 37.
- [27] *Ibid.*
- [28] *GS Media*, para. 47.
- [29] *GS Media*, para. 49.
- [30] *GS Media*, para 51.
- [31] *GS Media*, para. 31.
- [32] Charter of Fundamental Rights of the European Union, 2010/C OJ L 83/02, 30.3.2010, p. 389, (The Charter), Art. 17.
- [33] *Ibid.*
- [34] The Charter, Art. 11.
- [35] C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU.*, EU:C:2008:54, para. 68
- [36] *GS Media*, para. 30.
- [37] InfoSoc, Recital 4.
- [38] De Vany, A.S. and Walls, W.D. (2007) "Estimating the Effects of Movie Piracy on Boxoffice Revenue", *Rev Ind Organ* (2007) 30: 291. doi:10.1007/s11151-007-9141-0, retrieved from <<http://link.springer.com/article/10.1007/s11151-007-9141-0>>, p. 292.
- [39] C-314/12 - *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, ECLI:EU:C:2014:192.
- [40] *Harper & Row, Publishers, Inc., et al. v. Nation Enterprises, et al.* 471 U.S. 539, (1985), 105 S. Ct. 2218; 85 L. Ed. 2d 588.
- [41] Samuelson, P. (2002) "Copyright and Freedom of Expression in Historical Perspective", Berkeley Law Scholarship Repository, 1.1.2002, retrieved from <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1048&context=facpubs>>, p. 319.
- [42] *Ibid.*

[43] InfoSoc, Rec. 4.

[44] Bohannon, C. and Hovenkamp, H. (2012) *Creation without Restraint: Promoting Liberty and Rivalry in Innovation*, Oxford University Press, New York, USA, p. 34.

[45] Lessig, L. (2008) *Remix - Making Art and Commerce Thrive in the Hybrid Economy*, Bloomsbury, London, United Kingdom, p. 25.

[46] C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, EU:C:2011:771, para. 45.

[47] See cases *Scarlet Extended*, *UPC Telekabel Wien* and C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, EU:C:2016:689.

[48] *Scarlet Extended SA*, para. 48.

[49] C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, EU:C:2016:689, para. 82, 88-91.

[50] *McFadden*, para. 96

[51] *UPC Telekabel Wien*, para. 47

[52] Baker, L., (2006) "Yahoo Visual Timeline 1996-2006", retrieved from <<https://www.searchenginejournal.com/yahoo-visual-timeline-1996-2006/3306/>>.

[53] *UPC Telekabel Wien*, para. 49.

[54] *UPC Telekabel Wien*, para. 50.

[55] *GS Media*, para. 46.

[56] *Ibid.*

[57] *GS Media*, para. 44.

[58] Edwards, L. and Waelde, C. (2009) *Law and the Internet*, third edition, Hart Publishing, Portland, USA, p. 75.

[59] See discussion in C. Ahlert, C. Mardsen and C. Yung, "How Liberty Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation," cited at <<https://web.archive.org/web/20060112005536/http://pcmlp.socleg.ox.ac.uk/text/liberty.pdf>>.

[60] A research has been conducted by the CTIA showed that more than 90% of users would be more likely to watch content from start-up companies if it does not count against their monthly limit, its results can be found at this location <<https://www.techdirt.com/blog/wireless/articles/20160407/06231734122/wireless-industry-survey-everybody-really-loves-zero-rating.shtml>>.

[61] "Digital single market - Bringing down barriers to unlock online opportunities", <[https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en)>.

[62] Angelopoulos, C. (2014) “CJEU in UPC Telekabel Wien: A totally legal court order...to do the impossible” retrieved from <<http://kluwercopyrightblog.com/2014/04/03/upc-telekabelwien/>>.

[63] Ibid.

[64] *UPC Telekabel Wien*, para. 64.

[65] Ibid.

[66] *UPC Telekabel Wien*, para. 63.

[67] *UPC Telekabel Wien*, para. 50-51.

[68] *UPC Telekabel Wien*, para. 53.

[69] *UPC Telekabel Wien*, para. 56.

[70] *UPC Telekabel Wien*, para. 58.

[71] *UPC Telekabel Wien*, para. 58 and 59.

[72] *Scarlet Extended SA*, para. 43.

[73] Majumder, S. “Access blocked websites by your ISP”, retrieved from <<https://www.isaumya.com/access-blocked-websites-isp/>>.

[74] *GS Media*, para. 12.

[75] C-324/09 *L’Oréal SA and Others v eBay International AG and Others*, para. 126 and 144.

[76] Yannikos, Y., Schluesser, J., Steinbach, M., Winter, C. and Kalman, G. (2013) “Hash-Based File Content Identification Using Distributed Systems”, Gilbert Peterson; Sajeet Sheno. 9th International Conference on Digital Forensics (DF), Jan 2013, Orlando, FL, United States. Springer, IFIP Advances in Information and Communication Technology, AICT-410, pp.119-134, 2013, Advances in Digital Forensics IX. <10.1007/978-3-642-41148-9 8>. <hal-01460625>, retrieved from <<https://hal.inria.fr/hal-01460625/document>>, p. 123.

[77] Anthony, S. (2014) “How Dropbox knows you’re a dirty pirate, and why you shouldn’t use cloud storage to share copyrighted files”, retrieved from <<http://www.extremetech.com/computing/179495-how-dropbox-knows-youre-a-dirty-pirate-and-why-you-shouldnt-use-cloud-storage-to-share-copyrighted-files>>.

[78] “How Content ID works” YouTube video retrieved from <<https://youtu.be/9g2U12SsRns>>.

[79] Ibid.

[80] De Vany, p. 292.

[81] Opinion of Advocate General Wathelet delivered on 7 April 2016 (1), Case C-160/15 - *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*, EU:C:2016:221, para. 63.