Hyperlinking, making available and copyright infringement: lessons from European national courts

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ABSTRACT

This paper examines whether the provision of hyperlinks may constitute communication to the public by violating the author's exclusive 'making available' right. The assessment is accomplished through a comparative study of European case law, in particular, by discussing principles expressed in national case law, as well as in landmark CJEU cases, such as *Svensson* and *GS Media*. The analysis aims to show that European national courts, in their large majority, have concluded that hyperlinking is not an act of communication to the public. However, acts of infringement by means of hyperlinking have been generally captured under provisions and doctrines on indirect liability, such as contributory infringement or authorisation. I will argue that national laws on indirect liability, coupled with the provision against circumvention of technological measures, are sufficient to determine liability in cases where copyright infringement takes place via hyperlinking. This makes the discussion on whether hyperlinking is a direct infringement of the communication right largely speculative.

Keywords: hyperlinking; hyperlinks; making available right; communication to the public; Svensson; copyright; copyright infringement

INTRODUCTION

Over the last twenty years, the dramatic popularity of the internet has transformed it into an interactive and user-oriented space filled with vast amounts of information and digital content, capable of being shared among its users. The carriers of these amounts of information on the World Wide Web, which is one of the most widely used services of the internet, are websites consisting of numerous individual webpages, which contain text, image and sound. Equally significant and functional components of webpages are hyperlinks which have the ability to connect webpages together or even direct users to downloadable digital files. In this respect, hyperlinks have played a central role in shaping the world of the internet as a networks infrastructure and transforming the way people find and share information. [2]

Hyperlinks may be considered to have by nature an inherent capability of infringing copyright, [3] this being, however, a debatable matter. For example, issues for copyright infringement may arise where a link directs to content which is released online without the author's consent. In this sense, the paper focuses on the potential of hyperlinks to infringe copyright by specifically examining whether hyperlinks may constitute communication to the public and whether the provision of hyperlinks constitutes a direct copyright infringement by violating the author's exclusive 'making available' right. [4] The assessment is accomplished through a comparative study of European case law, in particular, by deducing legal arguments from national cases which were adjudicated before the *Svensson* [5] case and discussing principles expressed in *Svensson* itself, in order to draw conclusions about the treatment of hyperlinking with regard to copyright infringement and liability.

The analysis will show that European national courts, in their large majority, have concluded that hyperlinking is not an act of communication to the public. However, acts of infringement by means of hyperlinking have been generally captured under provisions and doctrines on indirect liability, such as contributory infringement or authorisation. I will argue that national laws on indirect liability, coupled with the provision against circumvention of technological measures, are sufficient to determine liability in cases where copyright infringement takes place via hyperlinking. This makes the discussion on whether hyperlinking is a direct infringement of the communication right largely speculative.

This paper is divided into five parts; firstly, it explains the nature and different categories of hyperlinks; secondly it considers the communication and 'making available' rights which are embodied the Information Society Directive [6] ; thirdly, it discusses case law that has been concerned with hyperlinking before the *Svensson* case was decided by the European Court of Justice (hereafter CJEU); fourthly, it discusses the principles contained in the *Svensson* and *GS Media* judgments; and, finally, it discusses the effects of *Svensson* and provides recommendations as to the establishment of liability arising from the provision of hyperlinks.

HYPERLINKS AND THEIR CATEGORIES

Hyperlinks constitute a fundamental tool for programmers to build websites and for users to navigate the Web. [7] Moreover, hyperlinking has nowadays become crucial for the provision of online services, such as search engines, news aggregators and social network sites through which users are able to share content by using hyperlinks. Hyperlinks have a double dimension, both functional and visual. [8] With the term 'hypertext link' a technician of the web will mean the hypertext markup language (HTML) containing the instruction to type in the browser in order to get to a certain web resource. Beyond this 'functional' dimension, links also have a visual dimension. Typically, they appear as a set of words constituting the domain name of the webpage or it may even be a small image or a single word, usually underlined and highlighted, signalling that it can be clicked on. [9]

There are various categories of hyperlinks that have attracted judicial attention; these are 'surface', 'deep' and 'embedded' links. A surface link redirects the user to the homepage of another website, whereas a deep link redirects to a secondary page of a website bypassing the homepage. An embedded or 'in-line' link brings the content, which can be an image, an audio-visual file, an mp3 file and so on, from a different website and integrates it into the page being viewed, giving the impression that the content belongs to the viewed page. This particular type of link is activated automatically by the browser, making the content visible on the viewed page without the user's intervention. A similar effect is obtained by means of the so called 'framing' technique, which consists in dividing the screen into parts to display content of other webpages in them. Instead of opening and being visible in a new window, the user can see the content of the linked-to page in a frame on the same webpage. Surface and deep links open a new window displaying the linked content and revealing the source uniform resource locator (URL). However, with embedded and framing links the linked content appears in the same page and the source URL may or may not be revealed. [10]

THE RIGHT OF COMMUNICATION AND THE 'MAKING AVAILABLE' RIGHT

Article 3(1) of the Information Society Directive states that "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." The wording of Article 3(1) of the Information Society Directive was influenced by that of Article 8 of the WIPO Copyright Treaty [11] . A literal comparison of these two provisions suggests that Article 3(1) of the Information Society Directive aims to implement the 'making available' right of Article 8 of the WIPO Copyright Treaty which was an important innovation that extended the author's exclusive right to the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them (interactively - on demand). [12]

The rationale of Article 3(1) of the Information Society Directive is to harmonise the author's right of communication to the public within the EU member states [13] and to introduce into European legislation the 'making available right' for authors, performers, phonogram producers, producers of the first fixation of films and broadcasting organisations. [14] Accordingly, the aim is to strengthen the right holders' privileges in the digital environment, giving them the power to control new forms of individualised online dissemination of their works such as new interactive and on-demand services [15] and

overcome the legal uncertainty regarding the level of protection of acts of on-demand transmission of copyright works over networks by providing for harmonised protection. [16]

It is evident from the literal comprehension of the provision in Article 3(1) of the Information Society Directive that the making available right is included in the right of communication. Furthermore, the right of communication needs to be construed broadly to encompass all transmissions of the work to the public by wire or wireless means, [17] while the making available right needs to be interpreted consistently with the communication right. [18] Both rights are understood to require a distance element, in the sense that the public, to which the work is communicated, is not present at the place where the original act of communication takes place. Transmission originates in one place and is received in another. [19] The specificity of making available is that this right covers situations where the enjoyment of the work takes place on an individual basis, with the actual transmission of the work being an individual communication as the content is transmitted in the exact moment the user chooses. [20] Members of the public can access the work from their terminal, at home, in their office, on their mobile device, and at a time chosen by them.

In order to determine whether an act falls within the scope of the making available right, it is irrelevant whether the act causes an actual enjoyment of the work or not. As the CJEU has explained, what matters is the act of intervention which makes a work available to the public in such a way that members of the public may access it. [21] Similarly, as expressed by the Association Littéraires at Artistique Internationale (ALAI), what is crucial in the making available right is that the work has been put in a position to be *potentially* accessed by the public at large, regardless of whether any member of the public *actually* access the work or not. [22]

However, although the *enjoyment* of the work is not a condition for determining infringement of the making available right, *transmission* of the work is crucial to understand the contours of both the communication and the making available rights. [23] As indicated by the language of the norms that define those rights, transmission of the work is a sine qua non of communication to the public and distinguishes from other forms of exploitation of work such as public performance, where it is required that the public is present where the communication takes place. [24] The intention of the Information Society Directive was that the right of communication should cover any transmission or retransmission of a work to the public. [25] In addition, the equivalence of the terms 'communication' and 'transmission' is confirmed in the preparatory documents of the WIPO Copyright Treaty, which explain that communication always involves transmission and that the term 'communication' was maintained, as it was used in all the relevant provisions of the Berne Convention. [26] The same conditions should apply logically to the making available right, insofar as this right must be interpreted consistently with the communication right.

Bearing in mind what a hyperlink is, we will now turn to the views of scholarship about hyperlinking. Scholarship has become polarised on whether hyperlinking constitutes communication to the public; one side believes that some types of hyperlinks are communication to the public, while the other side supports that they are not.

In more detail, the ALAI supports that deep links and framing links make a work available to the public, as they offer the works to the public in such a way that members of the public may access them at a place and time chosen by them. These links make it possible to bring the work directly to the computer or device screens of the user or to download it directly to the computer or device. By contrast, a surface hyperlink to the home page of a website hosting

the work is not itself a communication of a specific work to the public, as what is communicated is not the work directly, but the homepage of the website from which a user needs to act further in order to access a work. [27] Therefore, in the ALAI's view the making available right covers hyperlinks that enable the public to access specific protected material, while it does not cover those that only refer to a source from which a work may subsequently be accessed. [28]

On the contrary, the European Copyright Society (ECS) supports that hyperlinking is not an act of communication to the public. Hyperlinks may be a form of intervention, but they do not transmit a work. They only provide information as to the location of a work, as they simply redirect users to content made available by third parties, where the communication actually takes place. Otherwise put, a hyperlink is a form of citation to a copyright work, [29] and citation is not only outside the scope of exclusive rights, but it is also in itself a right that members of the public are entitled to. [30] In addition, the ECS supports that, even if a hyperlink is regarded as communication, it is not to a new public, as the link does not extend the work's audience; furthermore, whatever a hyperlink provides is not "of a work", whereas the right covers only communication to the public "of a work". [31]

EUROPEAN CASE LAW BEFORE *SVENSSON*

National courts have been concerned with the issue of hyperlinking in a number of occasions. However, opinions have been conflicting due to the lack of clear guidance by European legislation or the CJEU. Moreover, the examined cases for the purpose of this paper were concerned with various linking activities which took place in different factual backgrounds. [32] In this section relevant national case law that was decided prior to *Svensson* will be examined, in order to highlight specific legal concepts that emerge from it. In particular, case law from the U.K., France, Germany, the Netherlands, Belgium, the Czech Republic, Austria, Spain, Italy, Greece, Norway and Sweden has been selected, in order to examine how different jurisdictions in Europe have addressed the issue of hyperlinking as communication to the public. It should be noted that a few of the cases had been decided before the introduction of the Information Society Directive. [33]

The case of *Shetland Times v Wills* [34] in the U.K. was probably the first one in Europe to consider the lawfulness of deep linking. The claimant published the Shetland Times in print and online. Dr Wills operated the Shetland News website and provided deep links to articles of the Shetland Times which bypassed the banner advertisements of the Shetland Times' front page. It is worth noting that the Shetland Times did not actually challenge the principle of linking per se; instead, Shetland Times challenged the display of its headlines and the bypassing of its home page which caused loss of advertising revenue. Finding that copyright infringement was arguable, the Court of Session in Edinburgh held that the incorporation by the defendants in their website of the headlines provided at the claimants' website constituted an infringement. However, the Court also stated that the information is actually being sent by the claimants on whose website it has been established. The fact that the information is provided to the caller by his accessing it through the defendants' website does not result in the defendants being the ones sending the information. In the end, the dispute was settled out of court. Hyperlinking was declared non-infringing, provided that each link was acknowledged as "A Shetland Times Story", displayed the Shetland Times logo and linked to the Shetland Times online home page.

In the recent U.K. case of *Paramount v Sky* [35], the claimant film studios, which owned the copyright in films and television programmes, targeted with their application two websites

which provided access to them. The websites, although not hosting the content, ensured that it was comprehensively categorised and searchable. Users of the websites were provided with clickable hyperlinks which enabled them to view a stream of the chosen content hosted by a third-party website. The sources of the content varied; a copy captured from a broadcast for television programmes, a copy from Blu-Ray disc or DVD for films or even a copy from inside a cinema hall. The evidence provided suggested that almost all the content was likely to be protected by copyright. The claimants asserted that copyright was infringed, firstly, by communicating the works to the public [36] , and, secondly, by authorising further infringement by users. [37] Arnold J explained that

> "[…] it is arguable that the mere provision of a hyperlink is not enough to constitute communication to the public […]" [38]

However, as it was clear from the evidence that defendants acts constituted more than merely provision of links to the content on the host sites (for example, they also uploaded the content to the host site) the combined effect of these acts was held to amount to 'communication to the public', even if the mere provision of a link did not. An injunction was granted to the claimants pursuant to s. 97A of the Copyright, Designs and Patents Act 1988, as it was proven that the defendants had actual knowledge that their websites were being used to infringe copyright. The defendants were also found to have authorised the communication to the public by the users, and therefore infringed copyright in that way, as well. [39]

In France, the case of Dijonscope concerned two French local daily newspapers which are distributed in the regions of Saône-et-Loire and Côte d'Or in print and electronic form. [40] When the electronic version is archived, access to the articles is possible in exchange for a fee. Dijonscope operate an online newspaper which is presented as "independent, incorruptible and discrete" on their website. Two to three times per week Dijonscope publish on their site a rubric with the title "Review of the web" providing clickable hyperlinks to the articles published by other newspapers, including the claimant newspapers. Arguing that Dijonscope proceeded to this reproduction without their permission and refused to cease despite formal notice, the claimants brought an action before the District Court of Nancy, which held that providing links to other newspapers' articles in the form of a weekly review does not constitute communication to the public; placing the links at the public's disposal only enables the public to view the websites on which communication takes place. [41]

The case of *Paperboy* [42] is one that reached the German Federal Supreme Court (*Bundesgerichtshof*). Here the defendant operated a search engine which specialised in searching news articles published online. When search words were entered, the search engine browsed several online versions of newspapers made available to the public on websites that were not access protected. The results were presented in the form of a list of deep links that led the user directly to the article. The *Bundesgerichtshof* held that providing a deep link to copyright content already made available without any technological restrictions is not copyright infringement and, specifically, not a violation of the making available right. [43] This was because hyperlinking to a website could not be considered as a copyright infringing act because the link only made it easier to lead internet users to an already published work. Thus, according to the Court, the search engine neither stored the work itself nor transmitted it to the users. [44]

A Dutch case, involving a blog on scandalous revelations called GeenStijl, was heard by courts in all instances too. In 2011, the blog featured an article about leaked photographs of a Dutch reality television star. These photographs were meant to be published in an upcoming edition

of a magazine. The article on GeenStijl included a hyperlink which directed visitors to the leaked content on a third party website. Sanoma, the publisher of the magazine, managed to have the photos removed from the third party website. Later, the blog updated with a new article and provided a new link to another third party website on which the photos were available. The photographs were removed from that website as well, but by that time the photographs had already spread across the internet and new hyperlinks were being posted continuously. The case was brought before the District Court of Amsterdam, which ruled that posting the hyperlinks to the copyright-protected photographs constituted copyright infringement, as the hyperlinks constituted a communication to the public. Nevertheless, the Appeal Court of Amsterdam disagreed with the District Court and reached the conclusion that GeenStijl's hyperlinks do not constitute copyright infringement because the internet is an open communication network which is freely accessible to anyone. Furthermore, the Court took the view that the person placing a work on the internet in such a way that it is accessible to the public is the one who communicates that work. A hyperlink to a work which has been communicated to the public at another location on the internet, would not be much different from using a footnote in a book or in an article to refer to another published work. The case went on to the Dutch Supreme Court [45] and was referred to the CJEU [46] after the *Svensson* judgment. [47] The Advocate General pointed out in this case that hyperlinks which are placed on a website and which link to protected works that are freely accessible on another site cannot be regarded as an 'act of communication' within the meaning of Article 3 of the Information Society Directive. [48]

In Belgium, substantive proceedings were initiated against Google due to the titles and snippets of Belgian newspaper articles included in its Google News service. Copiepresse started proceedings and obtained a judgment against Google in 2006. Google then made a further application to have the claim dismissed, resulting in the judgment of the Belgian Court of Appeal, where there was extensive discussion on who copies and communicates the works, Google or the end-users. [49] The Court found that Google makes cached copies on its servers and then allows end-users to view the cached copy by providing a hyperlink to that copy. Therefore, clicking on the link of cached copies on Google's servers was held to amount to communication to the public. In addition, the court found that Google News does not confine itself to placing hyperlinks but reproduces significant sections of the news articles. The outcome of the case was that Google was ordered to remove news articles from the cached links on its Google Web and Google News. [50] This case resembled partly the facts of the German *Paperboy* case, with the only difference that in the latter the search engine did not keep any cached copies in its servers. [51] These cases are illustrative examples of two courts taking opposing views with regard to hyperlinks provided by news search engines.

In the Czech Republic, a young man was prosecuted and found guilty of copyright infringement by all court instances, as he was operating a website and providing embedded links to pirated movies that were hosted elsewhere. The Czech Supreme Court held that a mere posting of an embedded link that links to copyright-protected material must be regarded as communication to the public and, therefore, as a direct copyright infringement. [52]

On another occasion, the Austrian Supreme Court held that the mere implementation of a hyperlink was not deemed to be a reproduction of images. [53] The specific case concerned the preparation of professional digital photos, which the claimant offered to make in exchange for a fee. The offer of the claimant referred to the general terms and conditions of his website, according to which the name of the photographer should be acknowledged. The defendant accepted the offer and the claimant prepared the photographs of the defendant's hotel, who then submitted them to a web-designer, in order to have them placed on his website which

was linked with a tourist website. The web-designer uploaded several of the claimant's photographs on the defendant's website, without acknowledging the claimant as photographer. Consequently, this led to the photos being downloaded by users of the tourist website. The Court held that if the photographer agreed to the online distribution, links to the photo are permissible and that hyperlinks do not constitute reproduction of the copyright-protected images.

Furthermore, in the Spanish case of Sharemula.com, a website publishing links allowing users to download movies, music and software, the Provincial Court of Madrid ruled that the website was operating legally. The Court of Madrid concluded that the provision of links does not constitute communication to the public and that indexing torrent files cannot be viewed as copyright infringement. The linked pages are not reproduced nor is their content stored. Linking is only a way of facilitating the users' access to another site. On the discussion about whether the website had knowledge of where the links redirected, the court found that Sharemula did not have 'effective knowledge' about where the link redirected the users. Nevertheless, on the different types of links, the Court discussed that a 'simple' (surface) link does not constitute an act of communication, but only facilitates finding the location of the webpage where the communication takes place, whereas deep links, links to torrent files and framing links may potentially create issues, as they can cause damage to rights of third parties. [54]

In Italy, it is generally accepted that the provision of hyperlinks should not be regarded as direct, but as contributory infringement. [55] The opinion of AGCOM [56] reflects this position, according to which

> "[…]whereas links and torrents do not constitute transmission nor communication to the public of the work, and hence cannot be considered as direct copyright infringement, they may still be relevant as contributing to those infringements […]". [57]

Similarly, in the case of *RTI v Sofri* where a blogger included hyperlinks in an informative article about how to watch for free live streams of football matches whose copyright belonged to RTI, the court said that including the names of websites that unlawfully broadcast RTI's audio-visual products appears to make a significant facilitating contribution towards the perpetration of unlawful behaviour by third parties and that removing the links would not affect the blogger's freedom of expression. [58]

In criminal proceedings, the Court of Kilkis in Greece held that administrator of a website, who categorised and indexed Greek films and series according to various search criteria and provided links to them, was not liable, as he did not reproduce nor publicly performed nor communicated the content. His website only provided links that redirected to other websites where the films and series were stored and the user chose the website on which the streaming would take place. The Court also held that the collected data were public information, in the sense that internet users could find the films or series directly if they were aware of the URL without any intervention from the administrator. [59]

The following case, decided by the Norwegian Supreme Court, is also an interesting one, where the appellants had maintained two legal bases for their claims; firstly, that hyperlinking as such must be regarded as an act of making available to the public and, secondarily, that hyperlinking to illegal mp3 files constitutes contributory infringement to the infringement of the uploaders which was not disputed. The Court rejected the first claim, holding that

hyperlinking that leads to unlawfully uploaded files is not necessarily an act of making available to the public. In its obiter, the Supreme Court stated that

> "if hyperlinking is to be regarded as making available to the public under copyright law, then this must be so regardless of whether the material being linked to is of a legal or illegal nature."

However, the Court relied on the secondary claim and found in favour of the appellants, an association of right holders' organisations and record producers, holding the respondent liable for linking to illegal mp3 files on Napster's website, on the basis of contributory liability. [60]

In addition, Swedish courts' approach towards hyperlinking can be illustrated in the case of C More Entertainment v Sandberg. C More Entertainment broadcasts live ice hockey matches on its website in exchange for a fee. The defendant created links to C More's broadcasts enabling the paywall put in place to be circumvented; therefore, internet users could access the live broadcasts via those links for free. The District Court of Hudiksvall at first instance found that defendant was guilty of copyright infringement, as the creation of deep links to a webpage with live streaming of such content was found to constitute an act of communication to the public. The case was appealed and reached the Supreme Court, which took the view that it does not follow from either the wording of the Information Society Directive or the case law of the CJEU that the insertion of a hypertext link on an internet site constitutes an act of communication to the public. [61]

To summarise, the examined cases brought before the domestic European courts prior to *Svensson* have various factual backgrounds and were concerned with different linking activities, such as deep linking, framing links, linking to torrent files, linking to live streams and so on, respectively. Only in few instances it was found that hyperlinking is a direct infringement of the communication right. In the majority of cases, national courts held (expressly or implicitly) that hyperlinking is not direct infringement, although some courts offered alternative bases of liability, such as unfair competition, authorisation and, most notably, contributory liability. [62]

Direct liability occurs where any of the exclusive rights of the copyright holder (reproduction, communication to the public, public performance, etc.) are violated. Generally and for the purposes of the present discussion, indirect liability occurs when anyone who knows or should have known that he or she assists or contributes to direct infringement of the exclusive rights by another person. [63] The difference between the two types of liability is important and can have a significant impact on both claimants and defendants, as hyperlinking activities without knowledge that the linked-to work is unlawfully placed on the internet can be excluded from liability, with defendants bearing the burden of proof of having (or not) the required level of knowledge.

SVENSSON AND ITS AFTERMATH

The judgment of the CJEU on *Svensson* was delivered in February 2014. The applicants were all journalists who wrote press articles that were published in the Göteborgs-Posten newspaper and website. Retriever Sverige operates their own website that provides its clients with lists of clickable links to articles published by other websites. The journalists brought Retriever before the Stockholm District Court claiming that Retriever made available to its clients certain articles without their authorisation. Furthermore, the journalists contended that it was not apparent to the users that by clicking on the links they were being redirected to another site in order to access the work, therefore, giving the false impression that the works belonged to Retriever's website. In June 2010, the Stockholm District Court rejected their application. The journalists then brought an appeal before the Svea Court of Appeal claiming that Retriever had infringed their exclusive right to make their works available to the public. Retriever alleged that the provision of links to works which were communicated to the public on other websites did not constitute an act infringing copyright, as Retriever did not perform any transmission of the protected works and it simply indicated where those works could be located.

The Svea Court of Appeal decided to stay the proceedings and sought a preliminary ruling by the CJEU, asking, inter alia, whether the provision of a clickable link is a communication to the public within the meaning of Article 3(1) of the Information Society Directive and whether the answer to this question is affected when the work to which the link refers is on a website whose access is restricted or restricted-free. [64]

The CJEU in *Svensson* explained that the concept of communication to the public includes two cumulative criteria, a) an act of communication of a work and b) the communication of that work to a public. [65] The starting assumption of the Court was that the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication'. [66] According to the Court, an act of intervention is sufficient to constitute an act of communication; in particular, it is sufficient that a work is made available to a public in such a way that the persons forming that public may access it. [67] The concept of communication must be construed broadly, as referring to any transmission of the protected work, irrespective of technical means or process used. [68] Furthermore, the protected work must in fact be communicated to a public. The term 'public' refers to an indeterminate number of potential recipients and implies a fairly large number of persons. [69] Moreover, according to the Court, communication is required to be directed at a 'new public' which is an additional public not taken into consideration by the right holders when they authorised the initial communication, as it had been previously considered in other cases. [70]

In *Svensson*, the public targeted by the initial communication consisted of all potential visitors of the Göteborgs-Posten website, since access to the works on that website was not subject to any restrictive measures and all internet users could have free access to them. Therefore, the users of the Retriever website did not form a new public, as per the definition provided by previous settled case law. Drawing the principle from *Svensson*, where all the users of a website to whom the works have been communicated by means of a clickable link could access those works directly on another website on which they were initially communicated, the users of the latter must be deemed to be potential recipients of the initial communication and taken into account by the copyright holders when they authorised the initial communication as being part of the public. [71] In such occasions, there is no 'new public' and, as a result, the authorisation of the copyright holders is not required for the communication. [72]

However, the situation is different where access restrictions have been implemented on the initial site and a link makes it possible for users to circumvent these restrictions. All these users form a new public which was not initially taken into account by the copyright holders when they authorised the initial communication and, accordingly, authorisation of the copyright holder is required. [73]

Consequently, since making available works by means of a clickable link does not lead to the works being communicated to a new public where there is no circumvention of access restrictions, Article 3(1) of the Information Society Directive is interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public.

Later in the same year, the CJEU issued its judgment on *BestWater*, which involved a water filtration systems company, as the copyright holder of a short promotional video on environmental pollution which was uploaded to YouTube allegedly without their consent. The two defendants subsequently made the video available on their respective websites using the framing technique. The claimant maintained that the video was made publicly available without their consent and brought action before the district court of Munich. Eventually, the case ended up in the Federal Court of Justice, which, due to its implications for European copyright law, was unable to take a final decision and referred the case to the CJEU. The CJEU directly referred to *Svensson* and held that embedding within a website a work made freely available to the public on a third-party website, by means of a clickable link using the framing technique, does not by itself constitute communication to the public within the meaning of Article 3(1) of the Information Society Directive, insofar as the work concerned is neither directed at a new public nor communicated by using specific technical means that differ from that used for the initial communication. [74] In order to be communication to the public, the CJEU reiterated the Svensson principle of communication to a 'new public' through circumvention of access-restrictive measures and added one more criterion, the use of different technical means. [75]

Indeed, both *Svensson* and *BestWater* may have left unanswered questions, one of which is specifically whether linking to copyright works is regarded as an infringement, if those works were made available without the consent of the right holder in the first place. A national case that referred to both CJEU judgments was that of the Athens Court of First Instance in Greece, which held that there is no infringement when linking to content that has already been made freely available, even without the authorisation of the right holder. [76] This particular case applied *Svensson* with regard to those links that redirected users to works uploaded by the rights holders, i.e. links to official websites or YouTube channels and *BestWater* for those links that were uploaded and made available by third parties without authorisation from rights holders. The Court held that

> "...it was proven that some of the hyperlinks directed to websites whose administrators did not have the right holders' permission to communicate the works. But this is not significant since the claimant only placed the links to those works that were already available to users." [77]

It is worth noting that the sole criterion to determine copyright infringement, according to the Athens Court, was the circumvention of access restrictions, which was not found to have taken place.

However, the Dutch Supreme Court in the *GS Media* case reached the conclusion that the *Svensson* and *BestWater* judgments did not provide enough guidance as to whether it is an act of communication to the public within the meaning of Article 3(1) of the Information Society Directive, when linking to content freely accessible online, but which was previously communicated to the public without the consent of the copyright holder. [78] This case was referred to the CJEU and will be discussed in the following section.

THE *GS MEDIA* CASE

Most importantly, with regard to the recent case of *GS Media*, the CJEU repeated the two criteria of previously settled case law, a) act of communication and b) communication to a new public, and added two more cumulative criteria in order to find liability, a criterion of knowledge of the possible illegal nature of the original source, which refers to the defendant's state of mind, and a criterion of profit-making nature of the hyperlinking website. [79]

Firstly, it emphasised the vital role of the user and the deliberate nature of his/her intervention, who makes an act of communication when he/she intervenes, in full knowledge of the consequences of their action, to give access to a protected work to their customers. In the absence of such an intervention, in particular, their customers would not be able to enjoy the work. [80] When the person who intervenes knew or ought to have known that the hyperlink they posted provides access to a work illegally placed on the internet, then the provision of that link constitutes a communication to the public. Secondly, the CJEU emphasised that it is relevant that a communication is of a profit-making nature [81] and that it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead. Therefore, it is presumed that that posting occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. [82] The threshold for the knowledge criterion is set relatively high by the CJEU, as full knowledge is required.

GS Media operated the website and provided hyperlinks to the files containing the photographs at issue for profit, while Sanoma had not authorised their publication on the internet. GS Media was found to be in full knowledge of the illegal nature of that publication; therefore, GS Media made a 'communication to the public' within the meaning of Art.3(1) of the InfoSoc Directive.

This ruling closed a huge gap by answering the question when and under which circumstances linking to infringing content constitutes an act of communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. The Court did not follow the suggestions of AG Wathelet not to qualify hyperlinks as an act of communication, but, rather, added to the expanding list of elements that constitute an act of communication to the public. [83] Oddly, the Court noted that it is possible for copyright holders to inform the person posting the hyperlink of the illegal nature of the publication of the protected work on the internet and to take action against them if they refuse to remove that hyperlink. [84] This may imply a notice and take down procedure similar to the one in the context of intermediaries' secondary copyright liability. [85]

Lastly, *GS Media* has raised further questions that could be relevant for discussion, such as, should both knowledge and/or financial gain be required; where should the standard of knowledge be set?

LIABILITY FOR HYPERLINKING: BARKING UP THE WRONG TREE?

As seen earlier, *Svensson* suggests that providing links to content that has been uploaded without the copyright holder's consent may give rise to direct liability by infringing the communication right, whenever the communication is directed to a new public. In this effect, a hyperlinker is placed in the same position as the one who makes a work available, i.e. who uploads a work online without the authorisation of the copyright holder in the first place. Subsequently, it may be seen as posing a duty of always ensuring that linking activity does not lead to infringing content. [86] However, requiring authorisation for all links may seem unduly restrictive for internet users.

In *Svensson*, the CJEU was concerned with direct infringement and focused its analysis on the somewhat obscure and confusing concept of the 'new public'. As it has been argued by recent literature, the concept of 'new public' as it has been developed by the CJEU creates legal uncertainty and is not necessary in the analysis of the right of communication. [87] The 'new public' doctrine, however, has the effect of creating an overlap between the scope of communication to the public of Article 3 and the scope of Article 6 about the protection against the circumvention of effective technological measures. The circumvention of access-restrictive measures that the CJEU devised in the 'new public' analysis could fall within the scope of Article 6, so long as these measures are 'effective'. And technological measures are deemed to be effective in a broader sense to include situations where the use of the protected work is controlled by the right holders through the application of an access control or protection process. [88] Therefore, linking activities circumventing technological measures put in place for the protection of copyright works could fall within the scope of Article 6 of the Information Society Directive, without the need to resort to the 'new public' criterion. [89] In the examined national cases which found liability on the basis of the communication right, the same result could have been accomplished by applying Article 6 of the Information Society Directive.

Furthermore, *Svensson* was an unexploited chance to set the scene for one particular aspect of the anticipated copyright reform, the harmonisation of secondary liability. [90] The examined cases of national courts across Europe were concerned with various linking activities, which took place in varied contexts. [91] Most cases, on the basis of direct liability, accepted that hyperlinking is not communication to the public, expressly or implicitly, with some exceptions, while some cases provided alternative reasons for liability. For example, the legal basis that the English High Court depended on for finding liability in *Paramount v Sky* was that of authorisation, which is derived from tort law. [92] As mentioned earlier, the Court found that the defendants authorised infringing activities by third parties and, further, that they had actual knowledge that their services were being used to infringe copyright. Furthermore, the Dutch Supreme Court found that Geenstijl had breached a duty of care in the sense that, despite being aware that communication to the public of the photographs was unlawful, it provided the hyperlinks and facilitated access to them. Likewise, the Norwegian Supreme Court found that hyperlinking to illegal mp3 files constituted contributory infringement to the direct infringement. Similarly, the Italian cases relied on contributory liability. The prevailing approach in continental Europe and the U.K. is the requirement of knowledge. Of course, different notions exist in different countries, as it was explained earlier, but with a similar meaning, pointing towards indirect liability.

There is no doubt that the operator of a website which contains illegal content infringes the author's right of communication to the public. Where a link is provided that redirects to such

illegal content, liability can be incurred for contributory infringement, i.e. by encouraging users to access the unlawful content or by facilitating access to it. In the examined cases where communication was found, the same result could have been achieved, had indirect liability been applied. It is suggested, therefore, that liability for hyperlinking would be best treated under the general umbrella of indirect liability, in particular, that the provision of hyperlinks may lead to indirect liability when there is knowledge that the linked-to content is unlawful and the link is facilitating access to that unlawful content. Therefore, cases concerned with hyperlinking could have a starting point that the provision of hyperlinks to a copyright work is not communication to the public, as they do not transmit the work themselves, but simply redirect to a different location where the communication takes place. Moreover, if the right of communication in Article 3 was related to transmission, hyperlinking would by default not be covered by the communication right's scope. Most importantly, by employing indirect instead of direct liability, each linking activity could be placed in its respective context, thus, excluding from liability those links that are provided without knowledge that the linked-to content is unlawful and only including those links that knowingly facilitate access to unlawful content.

Even though the CJEU expanded the notion of direct liability in GS Media, by doing so, it introduced a new subjective element of indirect liability, i.e. knowledge, which has no room in the analysis of direct liability. It can be argued that this case further highlights and supports the argument that direct liability does not suit the treatment of hyperlinks, as it introduces indirect liability notions through the back door.

APPENDIX (*CASES BEFORE INFORMATION SOCIETY DIRECTIVE)

Countries	Pre-Svensson Cases	Links	Communication?	Other Torts
UK	Shetland Times Ltd v Wills (1996) Paramount v Sky (2013)	Deep linking Surface / deep linking	Yes (reproduction & communication)* Arguably not	- Authorisation (yes)
FR	StepStone France v OfiR France (2000) Dijonscope (2010)	Deep linking Deep linking	No* No	- -
DE	Paperboy (2003) AnyDVD (BGH 2010)	Deep linking Surface linking	No (no circumvention) No (freedom of speech)	Unfair competition (no) -
NL	PCM v Eureka Internetdiensten (2000) GeenStijl v Sanoma (App. 2013)	Deep linking Deep linking	No (no circumvention)* No	Database right (no) Breach of duty of care (yes)
BE	Google v Copiepresse et al. (2011)	Link to cached copies	Yes (reproduction & communication)	-
CZ	Czech Supreme Court (8 Tdo 137/2013)	Embedded link	Yes	-
AT	R. v Vorarlberg Online (2001) Oberster Gerichtshof, 21.12.2004	Deep linking Deep linking	Yes* No	Unfair competition (yes) -
ES	Sharemula (2008)	Links to P2P files	No	Contributory infringement (no)
IT	Sky v Telecom, Trib. Milan 20.4.2010 RTI v Sofri, Trib. Rome 16.07.2013 Delibera AGCOM 680/13/CONS (2013)	Surface / deep linking Links to live streaming Links	- - No	Contributory infringement (yes) Contributory infringement (yes) Contributory infringement
GR	Athens F.I. Court Decision 4042/2010 Magistrate's Court of Kilkis 965/2010	Framing Links	Yes No	- Criminal offence (no)
DK	home A/S V. Ofir A-S (2006)	Deep linking	No	Unfair marketing practices (no)
NO	Napster.no (2005)	Linking to MP3 files	Most likely not	Contributory infringement
SE	Public Prosecutor v Olsson (2001) District Court of Hudiksvall (2010)	Linking to MP3 files Deep linking to streams	Yes (distribution)* Yes	- -

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[69] SGAE , 37, 38

[70] Svensson , 24, 25; SGAE, 40, 42; Case C-136/09 Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia [2010] ECR I-00037, 38; For the inconsistency of the 'new public' criterion with international treaties, see ALAI Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public (17 September 2014)

[71] Svensson, 27

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