

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Casimir Lilius

**THE CORROBORATING COEXISTENCE OF COPYRIGHT
AND HYPERLINKS. THINK BEFORE YOU LINK?**

Bachelor's Thesis

Supervisor: Pawan Dutt

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I declare that I have compiled the paper independently
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Casimir Lilius

(signature, date)

Student code:

Student e-mail address:

Supervisor: Pawan Dutt

The paper conforms to requirements in force

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ABSTRACT

Hyperlinking is a core function of the internet, creating an interconnected web that disseminates information. In a knowledge-based economy, copyright owners expect a wider form of legal protection and even arguing that the use of hyperlinks should be inside this scope. The European Court of Justice has tried to clarify the issue through its case law and especially in interpreting the intellectual property concept of ‘communication to the public’ as provided for in Article 3 of the Directive 2001/29/EC. The hypothesis of this thesis is that widening of copyright protection is not needed in regard to hyperlinks. This would entail that there would be no broadening of the notion of communication to the public within the meaning of Article 3(1) of the Directive 2001/29/EC.

ABBREVIATIONS

ALAI	Association Littéraire et Artistique Internationale
CJEU	Court of Justice of the European Union EU
ECS	European Copyright Society
INFOSOC	Directive 2001/29/EY on the harmonization of certain aspects of copyright and related rights in the information society
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organisation
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty

1. INTRODUCTION

The landmark decision concerning hyperlinking and copyrighted material was that of *Svensson v. Retriever Sverige*, which was a culmination point for such previous cases as C-306/05 - *Sociedad General de Autores y Editores de España v Rafael Hoteles SA* (hereafter SGAE). Subsequent cases embarked on further elaboration on how the principle derived from the *Svensson* case could be applied for example on embedded hyperlink as it was the case in C-348/13 - *BestWater International (Bestwater)*. In C-607/11 - *ITV Broadcasting and Others (ITV)* different technological means was raised as an issue in the C-279/13 - *C More Entertainment (C more)* case delved on the issue of the legitimacy of distributing third party content by means of hyperlinks and circumventing restricted access. *GS Media* in turn supplied in turn an array of new criteria that gave precision in evaluating which interventions using hyperlinks were of illegal nature, without judging linking as an outright infringement of copyright. In all, the nature of the intervention and the connected circumstances play an overarching role.

This research may seem as a myriad of cases, which is very much due to the careful approach of the Court of Justice of the European Union (CJEU). The obvious reason for this is the avoidance of making too far-reaching decisions that would imperil future legal twists in areas that are intertwined, especially when it is connected to a balanced development of the Information Society.

Technology affects economics and economics affects regulation. By bearing this in mind, the judgments of the CJEU have tried to strike a balance between the rights of copyright holders and freedom for information online. A restrictive *modus operandi* towards linking activities in itself has also on the whole counterproductive for all concerned parties if the exchange of new ideas and inventions are stifled in an information economy. The aspect of freedom of expression online is another constitutive concern that cannot be brushed aside lightly without serious consequences.

Grasping the inner workings of the internet and its implications with respect to copyright, is a key factor in the understanding linking. An extremely splintered national legal framework built around a fickle and everchanging online setting is maybe not up completely up to the challenge to respond to a global knowledge economy where the scope of copyright is put to the test.

This is why the Information Society Directive, Directive 2001/29/EC, aims to harmonise the author's right of communication to the public and with the supportive interpretation of the CJEU

through more overriding clear objective terms without falling into too intricate and detailed technology-based legal constructions.

1.1. Aim of the research

Recent cases in the European Court of Justice have sought clarity by defining what constitutes an infringing act in the course of using hyperlinks on the internet. Therefore, the aim of this thesis is to provide a clearer view of the relation and boundaries of copyright on the internet through criteria established in EU law and the presented case law. The aim of the research and its main question in short is to answer: Does hyperlinking constitutes an infringement of copyright? In what way does a hyperlink so to say make available/ communicate to a public and does it mean that hyperlinking transmits a work and as should be put more firmly under the scope of copyright. The thesis hypothesis is that widening of copyright protection is not needed in regard to hyperlinks. This would of course entail that connecting communication to the public too firmly to hyperlinks should not be done. If linking is not in itself infringing, which other circumstances must be considered as limiting elements so as to be of an unlawful nature? What relevant criteria need to be met that the public communication right is infringed when a hyperlink is used? How far and in what direction should the protection of the related copyright issues go?

The consequences of more rigidly restrictive criteria to the use of hyperlinks in relation to copyright could have stagnating effect on the future development of the constitute parts of World Wide Web and would go against the fundamental idea of a functioning Single Market. In trying to avoid this, the CJEU has created carefully definitions that can be understood as broad or obscure. The aim of this thesis is as described in the case law at hand to draw comparison between the regulation of linking and linking techniques and asses their impact in the current state. Primary insight will be the interpretation of making available and of the rights of communication supported by criteria used in CJEU's judgments. The constitutive concept is the communication to the public as defined in Article 3(1) of the Infosoc Directive 2001/29/EC¹ stating:

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

¹ OJ L 167, 22.6.2001, p 10–19.

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 European Council adopted in May 2019 the Directive on Copyright in the Digital Single Market (2016/0280(COD)), but will be outside the scope of this research as it has just recently been passed and has not been adequately researched by legal scholars.

1.2. Research methodology

The essay will use a qualitative, traditional legal doctrinal approach (“rechtsdogmatik”) and comparative approach. The comparative element will also be used in a critical and analytical approach vis-à-vis the conclusions of the Court judgements and the academic viewpoints. In the first phase, the author examined the accessible sources which are the Court judgements from the European Court of Justice and which have been deferred by Court judgements from National Courts. National cases and international instruments are mainly used to give interpretive context to EU law and as such will be the main focus of the research. Most important of these is the Inso Directive which in itself is a result of international treaties. Also, secondary sources such as journals, opinions and text books will be supplement and complement this research. The CJEU case law will take up and apply concepts such as communication and public, making available, communication to the public, transmission, retransmission, technical means, freely accessible and a new public. These will be further on elaborated and explained through the presented cases.

1.3. The crucial position of Hyperlinks and the internet Hyperlinks and the internet

A Hyperlink is a highlighted word, text or a picture in a document or on a webpage that, by clicking, redirects the user to another web page and thus serves as a reference to data. The whole World Wide Web consists of hyperlinks that link to countless Web pages and files to each other and function as the primary tool of navigation. Linking on the internet is a basic component to the functioning of the internet, without which the access to a wide array of material on the internet would not be possible.

The several forms of linking, the used terms, that are characterised by the different techniques, such as: Standard hyperlinks that are clickable pointers (e.g. text, thumbnail or other format) that once clicked cause the web browser to redirect or ‘push’ the user to another (target) page. A URL (Uniform Resource Locator) called colloquially a web address, is the unique identifier used to refer to other online resources. This can either be the main or home page (surface linking) or a subpage or resource (deep linking).² Such links were addressed by the CJEU in *Svensson*. Inline linking or Embedded links are links where the browser transparently fetches material (e.g., an image or another web page) and displays it as part of the current source page.³ Here, the content is stored in a certain website but is pulled and embedded in the source website, where it appears to users. This type of linking to a YouTube video is the subject of the *Bestwater International* case.

Framing links preserve the original web page address even when linking to foreign pages and display it in such a way that it appears part of the linking site, i.e., within a ‘frame’, such as a pop-up window, and without the need to open a new browser window. The act of pulling content to the vicinity of the source page makes framing similar to embedded linking.⁴ The legal status of framed links to internet streams of sports matches is the subject of the *C More Entertainment* case.

Standard hyperlinks are clickable pointers, e.g., text, thumbnail or other format, that once clicked cause the web browser to redirect or push the user to another target page.⁵ This can either be the main or home page, surface linking, or a subpage or resource, deep linking. Such links were addressed by the CJEU in *Svensson*.

Inline or Embedded links are links where the browser transparently fetches material (e.g., an image or another web page) and displays it as part of the viewed [source] page’. Here, the content is stored in a certain website but embedded’ in the source website, where it appears to users as a part of it.⁶ This type of linking to a YouTube video is the subject of the *Bestwater International* case.

² Strowel, A. Liability with Regard to Hyperlinks, 24 Colum. -VLA J.L. & Arts 403, 2001, p 409.

³ Tsoutsanis, A., Why copyright and linking can tango. *Journal of Intellectual Property Law & Practice*, Vol. 9, No. 6, p 497 (2014).

⁴ Tsoutsanis (2014), *ibid*.

⁵ Wassom B. D, Copyright Implications of "Unconventional Linking" on the World Wide Web: Framing, Deep Linking and Inlining, 49 Case W. Res. L. Rev. 181 (1998).

⁶ Leung, D., What's All the Hype about Hyperlinking: Connections in Copyright Intellectual Property Brief, p 62 (2016).

2. LEGAL CONTEXT OF COPYRIGHT

2.1. International and EU copyright

Copyright has traditionally been an issue of for the national legislator to deal with and still today there is no uniform international copyright law. This has very much to do with the fact that historically there has not been before modern history mass production and copying that had a large scale economic meaning as today⁷ Variation in copyright law and enforcement diverged from country to country lead to the creation international conventions and agreements that guarantee a minimum level of protection.

One of the oldest and most influential copyright agreements is the Berne Convention (1886-1971) for the Protection of Literary and Artistic Works, which adopted in 1886.⁸ It has been modified several times and the most current and updated version of the agreement is the Paris Act of 1971 and is administered by the World Intellectual Property Organization, (WIPO)⁹. The Berne Convention is the corner stone for copyright protection in WIPO and has function as an example for other subsequent international agreements.

The Convention main idea is that that each of the contracting countries shall provide automatic protection for works first published in other countries and should grant copyright without formality and without registration.¹⁰ Also, Contracting States shall be entitled to a level of protection that is the same as National Rights holders in other Member States. There is also according to the convention a minimum level of protection that is required in the national law of Member States.¹¹

The Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS Agreement, is another agreement of WIPO dating from 1995. As a specialised agency under the United Nations, it has as its aim to promote the creation of intellectual property which advances economic growth.

⁷ Seville, C., EU Intellectual Property Law and Policy, Second Edition, p 7-8.

⁸ Bently, L., Intellectual Property Law, 3rd Edition. p 40-41, (2008).

⁹ Masouyé, C. Guide to the Berne Convention for the Protection of Literary and Artistic Works. Geneva, WIPO (1978).

¹⁰ Witten, I.B., How to Build a Digital Library, 2nd Edition (2009).

¹¹ Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886).

TRIPS gives a stronger legal protection than the Berne convention by overseeing the operation of the agreement, interpretation of provisions and offering dispute settlement procedures.¹²

Other following WIPO agreement that that supplements the Berne Convention are The WIPO Copyright Treaty (WCT) that has a special aim to face the challenge brought up by the digital technology and communications and especially the online environment that became a critical subject in the 1990s. The agreement underlines the right of communication to the public which is the right to authorize any communication to the public. The WCT repeats some of the content of TRIPS but goes somewhat further in certain areas than TRIPS and the Berne Conventions.¹³

The following treaty of the so-called WIPO internet treaties, is the Performances and Phonograms Treaty (WPPT) and deals with intellectual property rights of two categories of beneficiary, performers and producers. The right of making available is also mentioned in WPPT article 14 and also in WCT article 8, which concerns the right to authorize the making available copyright protected works to the public.¹⁴ The authorisation right is clear in WCT article 8 that specifies that “the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”¹⁵ Plainly said, the ‘making available’ is an exclusive right for the owner of a creative work to authorise or prohibit the spreading of their work in through the internet.¹⁶ The ALAI opinion stated on the right of “making available does not only include the transmission but also “covers the offering to the public of a work for individualized streaming or downloading” and that “it applies when the work is accessible for members of the public, irrespective of whether and how often it is actually accessed”.¹⁷

Directive 2001/29 /EC deal with the issue of harmonization of certain aspects of copyright and related rights in the information society, or Infosoc which has its roots in WCT and WPPT. The

¹² *Trips: council works, Council for TRIPS*. Available online: https://www.wto.org/english/tratop_e/trips_e/intel6_e.htm (8 May 2019).

¹³ Seville, C. *supra nota* 7 p 12.

¹⁴ Reinbothe, J. *The WIPO Treaties on Copyright - A Commentary on the WCT, the WPPT, and the BTAP* (2015) p 380.

¹⁵ World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (1996) .

¹⁶ The World Intellectual Property Organization (WIPO) Treaties: ‘Making Available’ Right (2003).

¹⁷ ALAI; REPORT and OPINION on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet (2013).

purpose of the Directive is to coordinate and transpose the provisions of these two above mentioned two international treaties.¹⁸ In line with this with these obligations, Article 3(1) of the Infosoc Directive grants authors a general exclusive ‘right to authorise or prohibit any communication to the public of their works. Article 3 (1) Copyright Directive is quite literally taken from article 8 WCT Authors have the right to make their work available to the public in a place and at a time specifically chosen by them. The same Directive also states that its covers acts that do involve a “transmission” or a “retransmission” of a work.¹⁹

The purpose of the Directive, is also create a viable balance between the authors' rights to their works in relation to digital environment and rapid development. Furthermore, the public concern related to the use copyrighted works must also be met in regard to protecting other fundamental rights.²⁰ This relates to the idea that over-implementing the of copyright protection can have other detrimental effects. The Directive *raison d'être* of harmonizing effect on the single market must take note these two very often conflicting aspects.

The Infosoc Directive is more wide-ranging than the international treaties and the for clarity it leans heavily on European Court of Justice. The CJEU has the dynamic function of responding through requests for primary rulings in the questions that the changes that a digital economy has brought forth. The aim of harmonising has of course resulted in that no other area of private law has been in such a extent made more commonly European than IP law.²¹

CJEU's central role within the framework of the EU legal order is describe in Article 19 of the Treaty on European Union (TEU), Articles 251 to 281 of the Treaty on the Functioning of the European Union (TFEU). The Court gives rulings on cases brought before it and interprets the law (preliminary rulings), which is for example used to determine whether a national law is compatible with EU law, national Courts in EU member states are required to ensure EU law as interpreted by the CJEU are properly applied.

CJEU has had through its case law a central role copyright in its interpreting the notion of ‘communication to the public’, which has as a concept been generally a very challenging concept

¹⁸ Aplin, T. *Intellectual Property Law: Text, Cases, and Materials*; 3rd Edition (2016).

¹⁹ OJ L 167, *supra nota* 1 p 8.

²⁰ van Velze, S.C., *Communication to a New Public? A Critical Analysis of the CJEU's ‘New Public’ Criterion in European Copyright Law*, p 75 (2015).

²¹ Pila, J. *European Intellectual Property Law*, p 39 (2016).

to comprehend. The SGAE was of the first milestone cases in developing the understanding of the concept and when infringement may occur. It was later followed by the Svensson case going more thoroughly in to what communication will be considered to be to a public and defining the scope of the communication right. A crucial point in reached by the Court in its judgments is also the development of the criterion of new public. It can be said that the CJEU functions here as creating an autonomous and uniform interpretation of the diverging national interpretations that should clarify and complete the meaning of Directives, such as the Infosoc.²² Much debate of course continues on the issue of how satisfactory these interpretations are and in which degree they conform to the previously established norms set by international treaties.

²² Lodder, A.R. EU Regulation of E-Commerce, A Commentary, p 61 (2017).

3. COMMUNICATION TO THE PUBLIC

3.1. C-306/05 SGAE

In the first half of 2003, Sociedad General de Autores y Editores de España (SGAE) brought an action against Rafael Hotels SA, who played ambient background music and displayed television content on the Hotel's television sets. SGAE, as the main performance rights organisation in Spain, claimed that Rafael had acted unlawful even if owner received legally the received stream of TV programs²³. The Spanish Supreme Court chose to refer the case to the European Court of Justice with the following questions:

"(1) Are television sets in Hotel rooms which receive a signal an act of communication to the public which is covered by the harmonisation of national laws protecting copyright provided for in Article 3 of Directive 2001/29?

(2) Does it infringe copyright protection as referred to in Directive [2001/29] when televisions in private Hotel rooms receives an earlier received signal by the by the Hotel and is it a communication to the public in the regards to the mentioned Directive

(3) Does it have any bearing that there are guests coming one after another in the Hotel bedrooms and are they a deemed to be a public in relation to acts of communication to the public provided for in Directive 2001/29²⁴

The Court deliberation on the first and third questions is intended answer to whether television broadcasts to a Hotel guests are to be regarded as a communication to the public in regard to Article 3(1) of Directive 2001/29? The Court points out that the concept of the “communication to the public” is not further specified in the Infosoc Directive. This in turn has the led to substantial

²³ Bonadio, E. The High Court rules on ‘communication to the public’ and infringement of copyright in broadcasts. *Journal of Intellectual Property Law & Practice*. Vol 6, No 4. 219-221(2011).

²⁴ CJEU C-306/05 SGAE (2006).

uncertainty for national Courts.²⁵ The CJEU went further in elaborating that the essence of the Directive is that communication to the public must be given a broad interpretation. This according to the Court, should provide a high level of protection. It should of course not follow, according to the Court, that Member States are free to define the scope themselves, as it needs to be harmonised. This expectantly entails more legal certainty which is essential for a functioning Internal Market. The Court also notes later on that uniform application is central to Community law and no references to national legislation can be made by the Court.

The Court goes on to note that even if the Hotel rooms have a private dimension does not exempt it from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29. In *SGAE*, the Court presents and specifies the requirement for a new public, a concept which we are going to see is that is crucial in the future judgment in the *Svensson* case the Court believes that in the case of a permit to communicate a work to the public, the author only authorises the communication to a direct user. The Court refers to previous cases and holds that a ‘public’ refers to an unspecified number of possible television viewers.²⁶ If communicated more widely, a fairly large number as the Court phrases it, these people shall be considered a new audience. In connection to this there is also the cumulative effect, mentioned by the Court of the successive clients occupying the rooms and that have access to protected media.²⁷ What the Court also adds that the environs of a Hotel are very conducive to a profit-seeking and as such intellectual property owners must be guaranteed satisfactory returns for their economic investment.²⁸ Here the Court connects an economic argument to a situation where communication to the public arises. The income of the Hotel is affected by the additional services they provide, so the advantage received from this is not disputed.²⁹

By establishing the basis of assessment for where the limit for a permitting a communication to the public, the Court proceeds to apply it. The Court quickly finds that guests in the Hotel constitutes this new audience and is according to the Article (1) (ii) of the Berne Convention. The Court believes that it is enough for the work to be made available in such a way that the guests can gain access to it, even if they do not have actually to do so.³⁰ By asserting this, the Court says that even if a mere possessing the capability required for receiving the transmissions in itself is not

²⁵ Angelopoulos, C. Communication to the public and accessory copyright infringement. *The Cambridge Law Journal*. Vol 76, No 3. 496-499 (2017).

²⁶ C-306/05, *supra* nota 24 p 16.

²⁷ C-306/05, *ibid* para 3.

²⁸ C-306/05, *ibid*, para 12.

²⁹ C-306/05, *ibid*, para 44.

³⁰ C-306/05, *ibid* para 15.

enough to constitute a communication to the public. Still communication must be a supplementary service, not just received by odd chance ³¹ So, the retransmission of broadcast signals to private Hotel rooms constitutes an illegal transmission, regardless of how it is done. The method used to transmit the signal is irrelevant for there is still a communication to the public. ³²

The judgment underlines the importance of “the public” and “the new public and goes in to the specifics of what are the requirements for a new public. The Court also holds that the concept of word ‘public’ refers to an unspecified number of possible television viewers. Having set up this requirement with the guidance of the Berne Convention, the boundary has also been defined for what falls within the permission given by an author when he or she transmits his work to an audience. The introduction of the new public theory has also been met with opposition, claiming that is in conflict with the Berne Convention and the WCT and as setting up a novel concept not mentioned the international treaties. So, when of retransmission on a broader scale was missing technically, the CJEU when into introducing the new public conception, the notion of enlarged amount of potential viewers due to the intervention of a third party.³³ Advocate General Verica Trstenjak noted especially about the SGAE cases decision, that the decision should have voiced more clearly that the new concept introduced on the Community level was not linked with pre-existing concepts in international law.³⁴

Perhaps the most important thing to learn from the judgement is the fact that the audience the transmission touches does not actually have to partake of the information. It is enough that they can potentially do it, i.e., the work is made available. The Court cites Article 3(1) of Directive 2001/29 and Article 8 of the WIPO Copyright Treaty in underlining that authorisation by the copyright holder is a requirement when a work made accessible to the public. The Court signals that it is of utmost importance that it be viewed in the right context of the case. In a Hotel, it is a fairly limited crowd consisting of Hotel guest, but potential viewers, is underlined and a public means a large number of people of significant economic interest. So, supplying of signals is enough and is still made available to the public, even if the guests are not tuning in to the particular television broadcast. Receiving the signal in the confines of a Hotel is enough. Even if it is in this

³¹ Burri, M. Permission to Link: Making Available via Hyperlinks in the European Union after Svensson. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)* Vol. 5, No. 3, 245-255 (2014).

³² C-306/05, *supra nota* 24 p 16.

³³ Arezzo, E. Hyperlinks and Making Available Right in the European Union: What Future for the Internet after Svensson? *International review of industrial property and copyright law* Vol. 45, No. 5. 524-555 (2014).

³⁴ *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, T. M. C. Asser Press. p 881-895 (2013).

private sphere, the place of the communication is not relevant and falls inside the article 3(1) of the Infosoc Directive. The Court elaborates further that the Hotel was indispensable in the facilitating the intervention, without which the Hotel guests could not have had any access³⁵. In this case it was not the case that transmission of the broadcasted content to the customers by using technical means to enhance reception of the originally broadcasted work.³⁶ Hereby CJEU establishes that the proprietors use of television sets is a ‘communication to the public’ with in the definition the of Article 3(1) Directive.

3.2. C-607/11 - ITV Broadcasting

TVCatchup provided to its visitors a free streaming broadcast that was also freely available via standard landlines, making it possible access to the same broadcasts which one would have legally with a regular television license and television set. The Internet television retransmission service meant that you had access to live third-party broadcasts. In the general terms and conditions provided on their website, TVCatchup required that their users confirmed that they had paid the television license fee. Furthermore, geo-blocking technology was put in place, which meant that TVCatchup made the live-stream content only available in the UK.

TVCatchup made use of technology that made it possible to convey the broadcasts to its users by downloading the signals broadcasted by ITV, which were intercepted and transferred to their servers. These intercepted signals were compressed for transmission to a user-friendly format. TVCatchup did not store the intercepted material and when no requests where made the near-simultaneous broadcasts where removed. The content that had been sent through TVCatchups services belonged to ITV and it brought proceedings against TVCatchup.

The British High Court stayed the proceedings and referred the following questions to the CJEU:

³⁵ Peguera, M. Hyperlinking under the lens of the revamped right of communication to the public. *Computer Law & Security Review*. Vol. 34, No. 5, 1099-1118. p 1107 (2018).

³⁶ C-306/05, *supra nota* 24 p 16, para 42.

1. Does the right to authorise or prohibit a “communication to the public of their works by wire or wireless means” in Article 3(1) of Directive 2001/29 extend to the following:

(a) authors authorise the inclusion of their works in a terrestrial free-to-air television broadcast which is intended for reception in Member States throughout the territory or a geographical area; and

(b) a third party, not the original broadcaster, provides a service meaning that individual subscribers who could lawfully receive the broadcast on a television may log on to the third party’s server and receive the content of the broadcast by means of an internet stream?

2. Does it make any difference:

a) if the third party’s server allows only a “one-to-one” connection;

b) the third party’s service is funded by advertising or

(c) the intervening organisation is acting in direct competition with the original broadcaster?³⁷

Court judgement in the introduction of the case affirms the principles established in SGAE by explaining what is meant by communication in the context of the Directive. The Court goes on to remind that the authorisation via technical means, does not exhaust the right to authorise other forms of communication of that work to the public. The Court asks whether the use of different technology other than that used by the copyright holder could imply unauthorised communication? The Court considers that Article 3 (3) of the Infosoc Directive, states that authorisation for public disclosure does not negate the right to prohibit or permit other transmissions and Articles 2 and 8 of Directive 93/83, which require new authorisation for the retransmission of new works.³⁸ So does a retransmission through the use of new technologies requires separate authorisation by the author? The Court acknowledges that there is an exception to the rule that individual authorisation of retransmissions is required. Retransmission which the securing of reception or an improving, does not require a separate permit from the copyright holder. If the circumstance fit the previously described conditions, it does not constitute a separate transmission. The Court further argues that, according to the same reasoning used in the SGAE, the work must actually have been communicated to a public, a new one and an implied fairly large number of persons. In the

³⁷ CJEU C-607/11, ITV (2013).

³⁸ C-607/11, *supra nota* 37 *ibid*, para 25.

assessment of this criterion, the Court stated that it didn't consider it was needed for TV broadcasts that were re-transmitted through the internet.³⁹ The facts of the case made it easier for CJEU to dispense away with a new public in the case and did not deal with it.⁴⁰

The public as defined in SGAE as all potential viewers who have seen the broadcast simultaneously. In the present case, however, it was rather the case that all potential viewers could share the same broadcast simultaneously by logging on to its server. Since everyone who claimed to have a TV license and who had access to the internet could take part of the broadcast, TVC claimed that in this case it was not a new audience, according to the criterion that the European Court of Justice stated in the SGAE. According to the Court's finding in paragraphs 24 to 26 of the case, it is considered that, since the transmission is through a broadcast on the Internet and the original transmission has been through terrestrial broadcast, each of the broadcasts concerned must, as a rule, have separate permissions from the original author.⁴¹

It is the new transmission and re-transmission of a work using a specific technical means that constitutes communication. The Court finds that if three criteria need to be present, as in this case, then a retransmission of the communication to the public can be established. If a retransmission is available on the Internet via streaming, and the recipients have been able to access the same broadcast via a terrestrial television network, the person who sent the copyrighted content on the internet commits a copyright infringement. TVCatchup had of course argued that there was no new public and CJEU judged in that the specific technical means was different from that of the original communication thus considered to be a communication. In their defence they also raised the issue of mere provision of technical means does not mean communication to the public as it could be as well receive by other means i.e., watching normally the television set. TVCatchup had also argued that it only offered its services in the United Kingdom to people with television licenses. At this point of time EU law was notably based on the notion that management of copyright rights and effective supervision was supported best by territory-based protection and territory-based supervision.⁴² The Court reviewing the facts concluded that TVCatchup was an intervening organisation giving substitute service to that of the original broadcaster and as such directly competition with the original broadcaster. The judgement also makes reference to recital

³⁹ Meale, D. Premier League 1, Internet pirates 0: sports streaming website the latest to be blocked. *Journal of Intellectual Property Law & Practice* Vol. 8, No. 11, 821-823, p 822 (2013).

⁴⁰ Arezzo (2014), *supra nota* 33 p 18.

⁴¹ C-607/11, *supra nota* 37 *ibid*, para 39.

⁴² Rosati, E. CJEU on communication to the public and national systems of collective rights management. *Journal of Intellectual Property Law & Practice* Vol. 9, No. 8, P 630-631 (2014).

23 in the preamble to Directive 2001/29 that the “author’s right of communication to the public covers any transmission or retransmission of a work to the public not present at the place where the communication originates”.⁴³ The ruling also made it clear that it was quite apparent from Article 3(3) Infosoc that if one authorises the adding of protected works in a communication to the public it does not end the exhaustion of a copyright owner to approve or prohibit other communications of those relevant material to the public.⁴⁴

What one should note is that where SGAE was more about traditional media, cable television, the Court is directing its attention to the fact that the use and consequences of newer media such as the internet must also be considered a communication. The Court applied the same standard as in SGAE, but the consequences of the decision had other implications. Now broadcasters and websites streaming real time content free to air broadcasts could have the legality of unauthorised transmissions in the crosshair. The gist of the decision by the CJEU was in relation to the before mentioned that a retransmission to the public within Article 3(1) of the Directive is present as a different technical means, i.e., different technology, used in distribution of the broadcast and that it does not come from the original broadcaster.⁴⁵

TVCatchup had shown video advertising messages before streaming the television programs, but the profit-making nature was still considered a non-essential element.^{46, 47} In the case of Marco Del Corso C-135/10 it for the CJEU to rule that there was no communication to the public when no a dentist clinic played background music was judged not to be of profit making nature as the clients were very limited.⁴⁸ The economic argument was thus not further continued as in line with the additional benefits as considered in the SGAE case.

⁴³ C-607/11, *supra nota* 37 p 20, para 18 (2c).

⁴⁴ C-607/11, *ibid*, para 23.

⁴⁵ C-607/11, *ibid*, para 40.

⁴⁶ Hilde Van den, B. & Karen, D. Pitfalls and Obstacles of Media Policymaking in an Age of Digital Convergence: The Flemish Signal Integrity Case. *Journal of Information Policy* Vol 4, 444-462, (2014).

⁴⁷ Quintais, J. P. Untangling the hyperlinking web: In search of the online right of communication to the public. *The Journal of World Intellectual Property* Vol. 21 No.5-6, 385-420 (2018).

⁴⁸ CJEU C-135/10, *Società Consortile Fonografici (SCF)* (2012) para 96, 99, 101.

4. THE REGULATION OF LINKING

4.1. C-466/12, Svensson

The Swedish company Retriever Sverige had a website that provided clickable hyperlinks to copyright protected articles and The Swedish Göteborgs-Posten newspapers website was one of these. Four journalists (Mr Svensson, Mr Sjögren, Ms Sahlman and Ms Gadd) who had written articles that had been published in a way that they were freely accessible on the newspaper's internet site. Now they as copyright holders claimed damages for copyright infringement arguing they should have given authorisation before the articles were communicated to the public. Many national courts in Europe had similarly case pending involving linking where the case details varied accordingly.⁴⁹ The defendant Retriever argued from a technological perspective that the linking mechanism used is in itself outside copyright issued and cannot therefore infringe any rights, but Stockholms tingsrätt, District Court, rejected this claim.^{50,51} The Svensson case finally reached the Swedish Court of appeals which in turn stayed the proceedings and referred the case to CJEU, with the following questions:

- (1) Does it constitute communication to the public within the meaning of Article 3(1) of the Infosoc Directive if someone else which is not the owner of copyrighted material supply a clickable link to the copyright holders' website?
- (2) Is the evaluation under question 1 changed by the fact that the material is somehow restricted or not?
- (3) When taking into account the evaluation in question 1, is there a difference between the cases when the work, after the user clicks on the link, is presented on another web page or when the work is presented after the user's click in a way that gives the idea that it is coming into sight on the same web page?

⁴⁹ Arezzo (2014), *supra nota* 33 p 18.

⁵⁰ Burri (2014), *supra nota* 31, p 17.

⁵¹ Minero, G. Are hyperlinks covered by the right to communicate works to the public? The Svensson case. Vol. 4 (2014).

(4) May Member State widen protection to authors' exclusive right by making it possible by the communication to the public to extended scope then provided for in Article 3(1) of the Infosoc Directive?'.⁵²

The first three questions are lumped together by The European Court of Justice. As affirmed in in the SGAE and in the ITV that communication the public must be given a broad interpretation.⁵³ This means that, as a link gives the user direct access to a work on another website should be considered to constitute a transmission as meant in the Infosoc Directive. Similarly, it was also confirmed that authors have the exclusive right to allow or prohibit any communication to the public of their work. The CJEU refers to the criterion set in both SGAE and ITV and goes on to say that an act to be considered a communication to the public, it must reach a public that is defined, as according to Article 3(1), an undetermined number of potential viewers. The Court refers in reference to transmitting to ITV case and declares that since the transmission has been done with use of the same technology, not with an alternate new one, through the internet as the original transmission, it is considered to be permissible.

The concept of a new public as mentioned in the judgment in SGAE case, refers to the public not taken into account by the copyright holders at the moment of authorisation of the initial communication to the public. Here it is affirmed as previously that it is sufficient that a work is made available, even in cases of clickable links, so that the public may at will access it, regardless of their intention to act or not. The Court notes, that Article 3(1) decrees that every act of communication to the public must be authorised by the copyright holder. It is furthermore noted that from the before mentioned article that there is in the concept of communication to the public two cumulative criteria in concept of communication to the public which comprise of an 'act of communication' of a work and the communication of that work to a public.⁵⁴

The Court goes on to is to raise the requirement of a new public, meaning an audience that was not taken into account by copyright holder when the original communication was authorised.⁵⁵ The Court promptly underlines the circumstances of the particular circumstance of the case, concluding that the works in question have already been communicated to a public, without any prior restrictions and could be accessed by anyone, thus relieving any obligation of seeking

⁵² CJEU C-466/12, Svensson (2014).

⁵³ C-466/12, *ibid*.

⁵⁴ C-466/12, *ibid*, para 16.

⁵⁵ C-466/12, *ibid*, para 24.

renewed authorisation.⁵⁶ The Court finds thus that making available through clickable links to the works in question does not mean that the works are communicated to a new audience. There were no restrictions on the newspapers website and therefore all users had free access to the web page. Even if the impression of the user is that the clickable hyperlink is a part of the webpage it is displayed, is not of importance. The circumstance would have been very different, if a barrier such as a paywall would have restricted the access. Any access in the before mentioned scenario would mean a circumvention of the technical barrier, which would infringe the authors right to give his consent to the use of his work. This would meet the definition of a new public, not envisioned by the copyright holder. The Court also noted that the aforementioned is also pertaining to a work which no longer available to the public on site on which it was initially communicated and is consequently provided only at that particular time to a restricted public.⁵⁷ ALAI Opinion on Svensson took this so called post-making-available approach as a meagre consolation in decision it fundamentally disagreed with.⁵⁸ The report was noticeable irked by the fact that right holders in the Svensson case may not make use of communication to the public right to making available after it has been made already earlier freely accessible on the internet.⁵⁹ It also considered the new public and technical means notions to be at odds with international law, especially Berne Convention.⁶⁰ It viewed the new public” criterion toothless as the opinion it did not robustly guarantee the right to authorise acts.⁶¹ This may well be the case if the application of the notion is as difficult as many cases has shown to be On the other hand this should be construed was a good thing for a the viewpoint that the vast part of hyperlinking is legitimate. ALAI in contrast would like to expand making available to links and this widen copyright protection and that would include and prioritise prior authorisation by the copyright holder. The European Copyright Society (ECS) gave also an opinion and considered that hyperlink could be seen as an intervention but is not a communication to the public and dose in itself not transmit the copyrighted content.^{62, 63}

A noteworthy observation is of course that that classically copyright holders have had the right to control detailed aspect of the scope of the consent. In the online world copyright material without technical restrictions seems in the arguments given, in the Courts rational in this case, to lose the

⁵⁶ C-466/12, *ibid*, para 26.

⁵⁷ C-466/12, *supra nota* 52 p 24, para 31.

⁵⁸ ALAI (2013), *supra nota* 17 p 14, p 22.

⁵⁹ ALAI (2013), *ibid*, p 15.

⁶⁰ ALAI (2013), *ibid*, p 20.

⁶¹ ALAI (2013), *ibid*, p 22.

⁶² Papadaki, E., Hyperlinking, making available and copyright infringement: lessons from European national Courts. Vol. 8. No 1, 1-21 (2017).

⁶³ Opinion on the Reference to the CJEU in Case C-466/12 Svensson, European Copyright Society, available online: <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/> (9 May 2019).

traditionally given prerogatives given to copyright owner to effectively control their rights.⁶⁴ So CJEU focuses more on a technical concept of new public preferring not to take the economic viewpoint recommended by ALAI.⁶⁵ Significantly what then seems to be missing is CJEU's elaboration in more detail what these without technical restrictions are other than paywalls.⁶⁶

Hyperlinking is a core functionality of the Internet and if any decision that would have stated that hyperlinking as a requires prior and separate consent, would have crippled the essential fluidity of the internet. In regard to different types of linking and how the access to the material is restricted was not yet raised by the Court. Hyperlinking is just one the forms of linking and embedding them has technically and visually bit of different characteristics. CJEU did not in the this mentioned case take up the subject of embedding/framing.⁶⁷ The BestWater deals with the issue of embedded links, which raises the question if it in anyone differs from hyperlinks is there a bigger risk of copyright infringement. Many authors on the subject of copyright have moreover forewarned that a too technical-based approach to the issue could result in inconsistent outcomes. Furthermore, some linking techniques most like embedded content, would be especially at risk.⁶⁸ It is no surprise if a large array of linking need to be every time taken separately in to consideration, which in turn forces the Courts to create an increasing number of criteria to untangle the web. That has made many Courts and scholars convinced that communication to public should not be mixed with hyperlink as it does not transmit a work.⁶⁹

The concept of a "new public" online aims to provide expectantly a wider copyright protection and also establishing restrictions on further availability of the work.⁷⁰ It is still to be regarded of equal legal importance that right holders have primarily the possibility of making available material online. Making available so to say supplements by the need of authorisation the concept of the new public. It can also be recalled that also before this newly minted criterion of the new public judgments had referred to transmission.

⁶⁴ Headdon, T. An epilogue to Svensson: the same old new public and the worms that didn't turn. *Journal of Intellectual Property Law & Practice* Vol. 9, No. 8, 662-668 (2014).

⁶⁵ Koolen, C. The use of hyperlinks in an online environment: putting links in chains? *Journal of Intellectual Property Law & Practice* Vol. 11, No. 8, 585-598. (2016).

⁶⁶ Mezei, P. Enter the matrix: the effects of CJEU case law on linking and streaming technologies. *Journal of Intellectual Property Law & Practice* Vol. 11, No. 10, 778-794. (2016).

⁶⁷ Schmid, G. BestWater: framing no 'communication to the public'. *Journal of Intellectual Property Law & Practice* Vol. 10, No. 2, 82-83. (2015).

⁶⁸ Arezzo (2014), *supra nota* 33 p 18.

⁶⁹ Axhamn, J. Hyperlinking: Case C-466/12 Svensson and Others and its impact on Swedish Copyright Law. *Europarättslig tidskrift* Vol. 18 No. 4, 847-866 (2015).

⁷⁰ Sharipo, T. CJEU rules on linking Svensson. *Managing Intellectual Property* (2014).

4.2. C-348/13, BestWater

BestWater International GmbH, a German firm that manufactured water filtering systems, had produced a video commercial that was published according to them on Youtube without their consent. Two of BestWater competitors had then proceeded through a framing technique, to embed the link to the commercial and show the video on their own websites. The displayed video material was not stored or even uploaded by the competitors, only streamed on their webpage. To access the video in the user had to click the embedded link to start the stream from Youtube.

The Bundesgerichtshof Court requested a preliminary ruling from the CJEU and requested a preliminary ruling on the interpretation of Article 3 (3) of the Infosoc Directive and asked the following:

In regard to the communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC is the embedding technique on a website using a copyright holder material made available to the public on a third-party webpage and no specific technical means have been deployed that would be different than the original communication?^{71, 72}

The verdict is as short as the Court used a brief procedure, deducing from existing case-law, which is set out in Article 99 of the Rules of Procedure of the European Court of Justice. The Court refers to the concept of communication to the public as interpreted in the Svensson case as the relevant standard for establishing if a communication to the public has occurred. By this it is meant that if a transmission is made with the same technology as the original transmission there is no infringement. Just inserting freely available copyrighted material into another internet page take use of “framing” technique does not alter the end result.⁷³ So, with pre-existing case law in made the Court consequently argues that using embedding does not lead to the material being communicated to a new audience.

In embedding the only difference is the way it is displayed that one may assume it is part of the website. The CJEU argued that this form of display does not integrally differ from other links as the material never leaves the original source. In the judgment the claim by Bestwater that its

⁷¹ CJEU 348/13, BestWater (2014).

⁷² General Wathelet. 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: 221* (2016).

⁷³ Axhamn (2015), *supra nota* 69 p 26.

material had been unlawfully uploaded to Youtube, was not taken up by the Court. Neither did circumstances such as making available to the public on a third-party website reach more concrete guidelines. Much clarification was expected from More to the questions that were left unanswered in the Bestwater Case. In Svensson and in BestWater the CJEU did not deal with direct liability in situation in which the link used takes the user to copyrighted material on the target website.⁷⁴ The C More cases judgment does not specifically concern the legal status of hyperlinks, but there is still some interest in briefly dealing with the Court case. Especially, the treatment concerns the extent of the scope of Article 3 (2) of the Infosoc Directive. In the BestWater case we can see that using of framing technology is considered just a different way of using a links online.

⁷⁴ Saw, C. L. Linking on the Internet and copyright liability: A clarion call for doctrinal clarity and legal certainty. *International Review of Intellectual Property and Competition Law*. Vol. 49, No. 5, 536-564. (2018).

5. TECHNICAL BREACHES

5.1. C-279/13, C More

C More Entertainment is a pay television channel that among its programs broadcasts live ice hockey matches on its website for paying visitors. Linus Sandberg had clickable links on his website circumvented a pay wall which made it visitors to watch C More Entertainment ice hockey matches for free and thus denying television operators financial compensation.⁷⁵ C More contacted Mr. Sandberg and asked him to remove the links. Mr. Sandberg did not proceed to remove the links in question. The case eventually came before the Högsta domstolen, the Swedish Supreme Court.

Questions referred to the CJEU by the Swedish Supreme Court:

In regard to the notion communication to the public, within the meaning of Article 3(1) 1 Infosoc, include actions to make available on a webpage so it is accessible to the public via clickable link. to material which is broadcast by the owner of the copyrighted material in that work?

Is it of some note how the linking is performed and applicable to answering question 1; and if means of entry is restricted?

In regard to Article 3(1) of the Infosoc can Member States extend the scope of protection to the exclusive right of copyright holders by making it possible to cover a larger extension of acts than provided for in Infosoc with ‘communication to the public’

In regard to Article 3(1) of the Infosoc can Member States extend the scope of protection to the exclusive right of authors by making it possible to cover larger extent of acts than provided for in Infosoc with ‘communication to the public’.⁷⁶

The question one, two and four had already been previously referred to CJEU in the Svensson Case. Svensson Case established that hyperlinks to a copyright material already made available on another freely accessible website does not constitute an infringement. The Swedish Supreme Court

⁷⁵ Axhamn (2015), *supra nota* 69, p 26.

⁷⁶ CJEU C-279/13, C More (2015).

decided to withdraw questions 1-4 as they were answered by the decision in the Svensson case that had just arrived from the CJEU.

The judgment does not really per se take issue with the legality of links in copyright issues or even hyperlinking. The Court elaborated on the “making available to the public” is meant to refer to interactive on-demand transmissions and as the public cannot make use of it by choosing the occasion or spot, the cumulative criteria of Article 3(2) of the Infosoc Directive is not applicable.⁷⁷ The facts of the case can so to say be construed as acts of communication to the public, but not acts of making available.

What the CJEU also clarified, was that Member States should be able to give far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public. The CJEU also held that member states may give broadcasters exclusive right by authorising or prohibiting the making available of sport fixations of their broadcasts to the viewers.⁷⁸ Particularly in situations where it is being done against payment of some kind of an entrance fee in accordance with the Rental Directive 2006/115/EC, art. 8.⁷⁹ This before mentioned fee is often connected to some form requirement of technical protection, such as a paywall or other similar technical measures as was already previously mentioned in the SGAE and Svensson cases.

In the final part of the judgement the Court underlines that article 3(2) of Directive 2001/29 is not a hindrance for Member States to impose more stricter laws to safeguard exclusive rights.⁸⁰ In the Svensson case the CJEU judged article 3(1) of Directive 2001/29 should not enable Member States to give wider protection to copyright holders as this would only precipitate legal confusion.⁸¹

The Court did not give much clarity in the questions of circumventing restricted access to protected works. The European Copyright Society has reasonably argued that hyperlinking in normal circumstances should not be regarded as an act of communication (or making available) to the public under Art. 3(1), but should be viewed differently where one to act knowingly and directly infringing copyrighted material.⁸² Not only can this be a very systematic effort conclusive to profit

⁷⁷ C-279/13, *supra nota* 76 p 29, para 25, 26.

⁷⁸ C-279/13, *ibid*, para 28.

⁷⁹ C-279/13, *ibid*, para 8.

⁸⁰ C-279/13, *ibid* para 37.

⁸¹ C-466/12, *supra nota* 52 p 24, para 37, 38.

⁸² Favale, M., Kretschmer, M. & Torremans, P. C. Is there an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice. *The Modern Law Review* Vol. 79, No. 1, 31-75. (2016).

seeking, such as aggregator, that by providing links gives access to content placed on other sites.⁸³ Thus German Federal Court of Justice viewed that all links are not the same and that framing can be a very different in use and are could be seen as being more infringing.⁸⁴

5.2. C-160/15, GS Media

Television presenter, Britt Dekker. Then a popular news site operated the GS Media published hyperlinks to the locations of the photos. The hyperlink referred Internet users to an independent data hosting site storing the pictures which at that time had not yet been officially published by Sanoma. When users clicked on the link, they got access to the nude photographs which had been uploaded to the site without the consent of the copyright holder. The site relied heavily on scandalous leaks of copyright-protected works from which it made profits.⁸⁵ How Playboy Photos Compromised EU Copyright-Rendas Sanoma requested that GS Media remove the links, but did not comply, hence Sanoma proceeded with a claim for copyright infringement against GS Media. The original hosting site of the material had also been given a notice by Sanoma and but in this case took action by removing the material in question.

In the proceedings in Netherlands, Sanoma had claimed that the above-described action constituted, as defined in the Svensson case, a communication to the public in line with Article 3 (1) of the Infosoc Directive. The Dutch Gerechtshof, Court of Appeal, concluded that without the hyperlinks the material could not have been easily located by internet users in general. The Hoge Raad der Nederlanden, the Dutch Supreme Court, took as main point of contention whether the making available online by a third party, oblivious or not, without consent of copyright holder is an act of communication.

The referred questions to the CJEU for a preliminary ruling were:

"1) (a) Is there a " communication to the public "within the meaning of Article 3 (1) Infosoc, if any person other than the copyright holder, by means of a hyperlink on a web site such as the on

⁸³ Saw (2018) *supra nota* 74, p 27.

⁸⁴ German Federal Court of Justice. Question referred to CJEU for preliminary ruling on lawful nature of "framing" under copyright law – "The Reality". *Journal of Intellectual Property Law & Practice* Vol. 6, No. 4, 219-221. (2013).

⁸⁵ CJEU C-160/15, GS Media (2017).

controlling it, refers to a public website operated by a third party on which the work has been made available to the public without the copyright holder's permission?

b) Does the answer to the above question mean whether the work has not previously been published to the public in any other way with the copyright holder's consent?

c) Does it matter whether the provider of the hyperlink knows or should know that the copyright owner has not given his consent to the work being provided on the site referred to in question 1a by a third party and, as the case may be, or should it know that the work has not been earlier communicated to the public in any other way with the consent of the copyright holder?

(2) (a) In the event that Question 1 (a) is to be answered in the negative, then in any case it is a transfer to the public, or it could it be viewed as a communication to the public, if the public online can find the site to which the hyperlink goes, and thus the work, but not without difficulty, so that the provision of the hyperlink makes it much easier to find the work?

b) Does the answer to question 2 have a bearing on whether the provider of the hyperlink knows or should know that the site to which the hyperlink leads to is not easily reachable to the public at large online? 3) Are there other aspects to be taken into consideration when answering the question of whether to be a communication to the public is being made by means of a hyperlink on a website access to a work which has not previously been communicated to the public by the copyright holder's permission?⁸⁶

In this more extensive CJEU judgment the text that is fairly substantial and establishes several criteria, much more than in the previous a bit more careful Court deliberation. The Court starts reminding that right conferred upon right-holders under Article 3 (1) of the Information Directive includes an exclusive right, which should mean that consent is required⁸⁷. The right-holder can intervene and prohibit the actions or plans of conducive to making copyrighted material public without authorisation. This aforementioned is Article 8 of the WIPO Copyright Treaty 1996 (WCT),² Article 3(1) of the Infosoc Directive that mandates EU Member States to “provide authors with the exclusive right to authorize 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 CJEU went on and confirmed also that that the provision of a hyperlink to

⁸⁶ C-160/15, *supra nota* 85 p 31.

⁸⁷ C-160/15, *ibid.*

a work lawfully and freely accessible on a third-party website does not fall within the scope of Article 3(1) of the Infosoc Directive. The Svensson Case is also touched upon by the Court and concludes that a 'communication to the public' requires both requisites, an 'act of communication' of content and a 'public'.

The Court notes that the internet is of great importance and reiterates as in previous cases that restricting all non-consensual published material on the internet would be too restrictive and would lead to weakening of freedom of expression and of information. The knowledge aspect was also raised and the duty of checking out the legality of all the linked sources was connected to an individualised assessment based on relevant circumstances. What this means is that the liability for linking to works published without prior consent is linked to a reasonable knowledge standard.⁸⁸ If a rights holder finds a link that leads to such unauthorised material, he can inform the person or entity and thus raise the question illegally published material. This action is commonly known as “notice & action” concept. The motives of the hyperlinked is also an important issue and the Court notes that seeking profit should place a higher demand on the provider of the link. The profit itself is by the Court seen as an indicator of the knowledge that the act is illegal. So, what have here, are criteria of an act of communication to the public that is new and that it has been done in full knowledge of illegality and at the same time being profit seeking. The linker is put in a position to refute and prove in a situation of “*probatio diabolica*” that they were ignorant of the facts⁸⁹. In this case it was beyond doubt that Sanoma had not issued any authorisation to go and publish the pictures in question⁹⁰. This was as in line with Court reasoning connecting the general idea of the preventative nature of the right of communication to the public⁹¹. So, when seeking profit, the linker should take special care of checking legality of the material he will be placing on the site. From this of course it followed that means that a subjective element is included in the trial, which is not recognized from previous linking practices.

⁸⁸ Savola, P. EU Copyright Liability for Internet Linking. *Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC)*. Vol. 8 No. 2, 139-150. (2017).

⁸⁹ Rendas, T. How Playboy Photos Compromised EU Copyright Law: The GS Media Judgment. *Journal of Internet Law* Vol. 11 (2017).

⁹⁰ Klaris, E., Bedat, A. Copyright liability for linking and embedding: an E.U. versus U.S. comparison and guide (2018).

⁹¹ Peguera (2018), *supra nota* 35, p 18.

What is still left unanswered is if a new public can be concluded if there was no prior authorisation. Here the Advocate General asserted that a “new public” should be applied in situations where the initial communication of the work to the public was unauthorised.⁹²

Advocate General Melchior Wathelet gave his non-binding assessment of the GS Media case. In essence it leaned more towards an interpretation favouring freedom of exchange of information and noting the negative effect that harsh restrictions on linking could have on the Single Market, which is at the core of the InfoSoc Directive. The Advocate General Wathelet proposed that the judgment in Svensson that pertained to hyperlinking as an act of communication should be reassessed and stated that if material is freely accessible on another website it simply makes it easier to find the work in question.⁹³ By this we can conclude that the Advocate General sees hyperlinks as mere references and that a hyperlink can never be conducive to a copyright infringement. His opinion introduces the concept of indispensability and regards the making available by GS as not constituting an indispensable action.⁹⁴

Even if the fact as in the GS Media case of he knew or ought to have known and was not authorised in his action, it should still not be deemed as an infringing act. Wathelet cites the BestWater ruling in and remarks that the case did not take up the subject of the absence of authorisation by the copyright holder.⁹⁵ There is also a reference to the Hoge Raad der Nederlanden’s observation that both Svensson and BestWater cases do not conclusively state that if a communication to the public takes place even if it has been previously published but without proper authorisation.⁹⁶

The Advocate General sums up in the end of his opinion that Article 3(1) of Directive 2001/29 must be interpreted as meaning that a freely available non-authorised hyperlink should not be viewed as an act of communication to the public. Within the meaning of that same provision the awareness factor of the act is not important and that facilitating or simplifying access to freely accessible copyrighted material not previously published is not a communication to the public.

So clearly the Advocate General takes a position that is favourable to GS Media and the uploading sites online. In both potential infringements done by either the one sharing the hyperlink on the online webpage or the uploader, should not according to this opinion be liable. In reference to the

⁹² General Wathelet (2016), *supra nota* 72 p 27.

⁹³ General Wathelet (2016), *ibid*, para 63.

⁹⁴ Tanghe, Y., Copyright Protection in the Digital Era: Hyperlinking and the Right of Communication to the Public. The GS Media Case. European Papers. Vol 1, No 3, 1215-1224 (2016).

⁹⁵ General Wathelet (2016) *supra nota* 72 p 27, para 42.

⁹⁶ General Wathelet (2016) *ibid*, para 19.

Bestwater case the uploading of the copyrighted video material was never specifically elaborated that could have given further guidance in establishing liability.

The main opinions made by the General Advocate was not applied by CJEU in its ruling. CJEU's more right-holder friendly the ruling still has left many questions left in the dark such as the individualised assessment criterion The CJEU's individualised criterion in establishing the scope of infringement could be applied in so many ways. There narrow approach would be that where a person could be deemed as an infringer, only for the directly linked component or broad approach for the total content of the webpage and even broader approach of being even liable for clickable links to other online content on other websites.⁹⁷ Lastly the question regarding how the vague standard of knowledge is used is still very open.⁹⁸ The duty of care in taking the precaution of controlling the material if it is copyright protected that constitutes a 'communication to the public' to say the least quite challenging. The only criterion given, is the gaining this knowledge through notification is one element in defining liability, but other clarification has not yet been adequately defined.

In summary cases such as Svensson (C-466/12), ITV (C-607/11), C More (C-279/13) and now finally GS Media (C-160/15), there are two very important cumulative conditions defined, which is firstly a deliberate intervention and secondly a communication to the public either as new public or using specific technical means.⁹⁹

⁹⁷ Savola (2017), *supra nota* 88 p 33.

⁹⁸ Papadaki (2017) *supra nota* 62 p 25.

⁹⁹ Quintas (2018), *supra nota* 47 p 21, p 388.

SUMMARY

Before the SGAE judgment there was not a very clear understanding of the concept of ‘communication to the public’ and how to apply it.¹⁰⁰ It was notably the both the concept of public and communication that gained more clarity and also the notion of new public was first touched upon.¹⁰¹ The Court held that an ‘‘act of communication’’ must be interpreted broadly’’ and that ‘‘it is sufficient that the work is made available to the public in such a way that the persons forming that public may access it’’. The concept of public was defined in the words of the judgment as fairly high number of potential viewers. Furthermore, it emphasised the need for authorisation of the authors when making a work accessible to the public and that a new public became relevant when the retransmission of signals was separate then the public of the first broadcast. The technique used was also viewed as immaterial in the retransmission. The issue retransmission was also taken up in the ITV Case where television broadcast was simultaneously shown, over the internet. The technical intervention was not seen as a minor signal improving retransmission but a communication to the public within the meaning of the Directive Article 3(1) Infosoc and in direct competition with the original broadcast. The judgment significantly underlined the rights of broadcasters and that internet streams are of such a nature that it should be authorised by the relevant copyright holder.

Svensson was in turn the first case to concern mainly the online and hyperlink questions. For this reason, Svensson would be of a nature that comes close the daily activity of regular internet user and thus easily evoking a wider debate. Even the famed creator of the of the World Wide Web took issue with Svensson case and argued that hypertext linking should not be regulated by Infosoc and should be viewed as something likening it to simple footnote.^{102, 103, 104}

In the Svensson case hyperlinks was not deemed an infringement, but a feature that was relevant to its core functions. In the Judgment the CJEU make it clear that the works in question were freely available material on the internet and that it furthermore had no technical restrictions

¹⁰⁰ van Echoud, M., *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*. Information Law Series 19 (2012).

¹⁰¹ C-306/05, *supra nota* 24 p 16, para 40.

¹⁰² Berners-Lee, T. *Axioms of Web Architecture. Links and Law: Myths* (1997). Available online: <https://www.w3.org/DesignIssues/LinkMyths.html> (9 May 2019).

¹⁰³ Berners-Lee, T. *Commentary on Web Architecture Links and Law* (1997). Available online: <https://www.w3.org/DesignIssues/LinkLaw> (9 May 2019).

¹⁰⁴ Mezei (2016), *supra nota* 66 p 26, p 779.

restricting access. In *Svensson* it was held by the Court by positing that there was no communication to a new public and also that the same technology was used as in the original communication. The new public was argued as a continuation and development of the communication right as pursuant to Article 3(1) of the *Infosoc Directive*. This new public notion was not with received with approval in all corners and was held as novel construction by ALAI and in its opinion repudiated new public criterion as not in line with international treaties. ALAI also offered viewpoint that could be characterised a strict defence of copyright by stating a hyperlink is not just a reference. It should then be more viewed as something that should line itself with a notion that prior authorisation by copyright holder.

The *Bestwater* case concerned embedding and acknowledges, as what had been confirmed with *Svensson*, that embedding or framing copyrighted content in many aspects no different than hyperlinks. The requirement being of course that it has been made freely available for anyone to access and therefore cannot be viewed copyright infringement. The case would obviously differ if copyrighted material would be available to anyone via a hyperlink or by framing and the content would be circumvented. This would be the new public the Court referred, that is in nature a communication to a larger group outside the copyright holders target group.

The crucial aspect the Court leaves more open in *Bestwater* is if an embed or framed shown in the public domain without consent is permitted. In *Svensson* and *Bestwater* the technical means of the initial communication was the same and so the copyright infringement was judged through evaluating if a new audience had been reached. The *Bestwater* could of case did not need to answer the question of circumventing technical restriction of access, but only establishing that embedding is another means of linking, as in *Svensson*. The CJEU did not answer in *BestWater* other questions that could have given more guidance.

In the *C More* case the CJEU answered that the Article 3(2) of *Directive 2001/29* relates to interactive on-demand transmissions and, so there was an act of communication to the public, but not an act of making available. Compared to the facts in the *ITV* case, the question of specific technical means did not arise but in both instances the streaming was not communicated to a new public. The case could have gone a bit further and tackle the issue of circumventing technical restrictions, paywalls, but decided not to answer it. In both the *C More* and the *ITV* case broadcasting organisations exclusive rights, making available to the public in article 3(2)(d) of the *Infosoc Directive* was affirmed. It was principally in the *ITV* that the CJEU added a caveat in

reminding that it was paramount it should not risk the functioning of the Internal Market that stands at the very core of the Infosoc Directive.

The request for a preliminary ruling in the GS media case when back to the basic question of culpability of sharing a hyperlink without the copyright holder authorisation. Here the Article 3(1) of Directive 2001/29 gained two more criteria, namely knowledge and pursuit of financial gain, to assess if an act constitutes a ‘communication to the public’ within the meaning of that provision. This as earlier discussed have not been widely applied in case law and thus they lack clarity in how they will be measured and applied. The notion notice and takedown as duty of care seems a bit more straightforward and anchored in the described circumstances of the discussed cases where the has been asked to remove links to copyright protected material online. Whether CJEU has in the GS Media Case succeeded to balance between copyright holders right and fundamental rights is something that future cases will have to show.

What still also unanswered in this new economic interpretation through the criterion of financial gain, is the use of embedded material in way that muddles the original source of the material and is taken out of context which makes it possible to show it in a way not envisioned by the copyright holder. This goes on to show that there is a difference in how linking can be displayed and that they can be used in very unforeseeable ways. In this instance the pursuit a profit is maybe not enough adequate and would need added criteria besides that of knowledge in judging a potential culpable act. Much stronger than individualised assessment of knowledge that amounts to indirect liability is of course the direct liability established in case is the uploading unpublished material without permission of the owner of copyrighted material.¹⁰⁵ It may be added that the CJEU in the GS media case highlighted the aggravating circumstances of an intervention done in full knowledge of the consequences of such an illegal action. So, in line with Svensson the CJEU judged that it is in accordance with Article 3(1) of Directive 2001/29 an ‘act of communication’ can be deemed relevant if it is made available, even if they do not take use of it. The more conclusive to a less stringer tension between hyperlinks and copyright was made by General advocate Wathelet who advocated that the norm making available in Svensson should be discounted and that the action by GS Media was not indispensable. This interpretation by the General advocate would mean that hyperlinks are only footnotes and even in the case that they direct to unlawfully uploaded content cannot infringe copyright.

¹⁰⁵ Papadaki (2017) *supra nota* 62 p 25.

CONCLUSION

Hyperlinking is an important and indispensable part of the Internet, providing easy access to the vast amount of information accessible on the Internet. WIPO Internet Treaties was one of the first to react to the changes within an information society economy by providing a framework of basic rights for copyright holders. In its review of the Single Market the Commission highlighted the free movement of knowledge and innovation in the 21st century as the "Fifth Freedom" in the single market copyright exceptions have tried to strike a balance between the rights and interests of copyright holders and of the public at large and the furthermore emphasis of dissemination of knowledge products.¹⁰⁶

Many are frustrated with the out of pace of EU case law and in contrast to the fast-racing technological developments of recent time. Can the gap be ever breached? It is naturally this challenging path to tread for the CJEU in its effort to defining more clearly the right of communication to the public. Naturally there cannot be an all-in-one solution that could possibly cover all scenarios, even if defenders of stricter copyright expect a wider scope from the concept of communication to the public. An exclusion of links and communication to the public would naturally mean that hyperlinking cannot be judged as a direct liability.¹⁰⁷

The aim of the Information Society Directive has been to see too that the rights of copyright holders are taken into account in an online world stitched together through hyperlinks. Various assessments have been given to the question if hyperlinking can be construed as communication to the public and its relevance has been a read thread in this thesis. For now, the road map provided are essential criterion that help assess in determining the existence of a communication to the public under Article 3(1) Infosoc which for now are: an act of communication, to a new public, circumvention of restrictions, knowledge of illegality and the pursuit a profit. The danger in trying to make too many precise criteria in assessing the illegality of hyperlinking is that it strangulates free

¹⁰⁶ Ullrich, H. TRIPS plus 20 - From Trade Rules to Market Principles. (2016).

¹⁰⁷ Axhamn (2015), *supra nota* 69, p 25 p 850.

navigation of the internet. Hyperlinking is still in the reach of Article 3(1) of the Infosoc Directive in some circumstances as earlier described, and especially so if the criterion of new public is deemed present. As previously discussed, ALAI took the position that the new public notion is more of demerit. This was due to the observation in ALAI's report that it is easy hard to apply in cases and as such is actually the reason why the existence of a new public criterion could be viewed as striking some form of balance for all stakeholders involved. Another ameliorating fact constraining the above-mentioned concept was of course if copyright holder already permitted widespread circulation of the content.

If again copyright owner rights would be expanded in a way that would require that authorisation, would put many hyperlinks legitimate stance in to question. The General Advocate Wathelet opinion on hyperlinks has strong merits, especially when it comes to not intertwining copyright and providing hyperlinks. It is a convincing argument that hyperlinking should not be qualified as a communication to the public and it also viewpoint that the author heavily leans too. Even if the CJEU did not endorse the general advocates opinion in this, it made a special effort in the judgment of the GS Media case in underlining the importance to freedom of expression and of information. The Svensson and Bestwater cases could still be considered a sort of defence of hyperlinks from which flows indirectly that hyperlinks do not need to amount to copyright issues in themselves. What Svensson and BestWater cases provide, is that hyperlinking is not in common usage by the public online in conflict with copyright. What ultimately is required is that there would be no broadening the notion of communication to the public within the meaning of Article 3(1) Infosoc Directive. It is easy to criticise the CJEU for being half-hearted in its decisions, but much has to do with its trying guaranty, with its step-by-step pragmatic way, that authors exclusive are respected without endangering the functioning of the internet through limiting hyperlinks.

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