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The Court of Justice on Links: It is Allowed to Link. At Least In Principle.

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The Court of Justice delivered its highly anticipated decision on linking. A breath of relief is allowed: linking seems to be legal. But when one looks a little closer, disturbing things begin to emerge.

First things first. The decision in Case C-466/12, resulting from a request for a preliminary ruling from a Swedish court (Nils Svensson and others v Retriever Sverige AB) comes to the conclusion that providing on a website a link to another website, where a copyright work is "freely available", does not constitute an 'act of communication to the public' in the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights. Consequently linking is not copyright infringement. The facts of the case seem to be nothing out of the ordinary. The applicants were journalists whose articles were published on a website of a paper (Göteborgs-Posten) they worked for. They were thus available to everyone who has internet access and visits this website. The defendant in national proceedings operated a service selecting articles available on the internet based on a particular client's needs and provided the client with the list of links to such publications. There was some dispute between the parties whether the defendant's clients, when clicking on the provided links were aware that they were being redirected to another website or had the impression they stayed on the website of the provider of the service. Probably what is meant is some form of framing or embedding.

It would be difficult to argue that the result is unexpected. Neither the reasoning behind it should come as a surprise. But perhaps it should. In fact, the reasons given by the Court are rather simple. It goes like this:

• Step 1: the concept of communication (act of communication) must be construed broadly as this is required to achieve "a high level of protection for copyright holders". In consequence, for an 'act of communication', 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 (whether they do so is immaterial). If so, linking is an "act of communication".

• Step 2: an act of communication must be to the public. Links communicate what is linked to to all potential users, the number of which is indeterminate and fairly large. Linking is therefore communicating to the public.

• Step 3 may be explained by quoting par. 24 of the decision: " None the less, according to settled case-law, in order to be covered by the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, a communication, such as that at issue in the main proceedings, concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public." When a link is provided to a "freely accessible" webpage there is no new public, because the public targeted by the initial communication is not limited and therefore encompasses also those who could access the work by clicking a link.

Linking is therefore saved at the very last moment, because only the third obstacle to banning it serves its purpose, though only conditionally. Communication is not to the public because it has not been addressed to a new public. It has not been addressed to a new public because there were no restrictions as to the accessibility of the webpage the link directed to. However, to quote par. 31, "where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public."

Because of the way the decision is explained, the 'framing' part of the questions answers itself. Whether users think they are redirected to another website or not has no bearing upon the issue of the "new public".

Since the Svensson case has been widely associated with linking it would be understandable to overlook the last question the Swedish court asked and the answer to it given by the CJ EU. The court namely decided that Member States may not provide wider protection to copyright holders by defining the concept of communication to the public more broadly than art. 3 (1) of the Copyright Directive. This issue is perhaps even more fundamental for national copyright law systems than the problem of linking.

It is fairly easy to observe that the objective criterion of whether there is a new public

understood as persons who, at a given time, could not access a work, but for a link can easily lead us where we probably should not follow. For example let us assume one places a link to a publicly accessible website with an article or a photo. Later, however, the website ceases to be freely available, though the link still redirects correctly. Copyright infringement is not a subjective concept. Once this happens, the person who put the link is starting to infringe and there are legal systems that provide claims for damages even in the case of the so-called innocent infringements. Whether there is knowledge of infringement or negligence may matter for the available sanctions, but suddenly the number of objectively understood infringements rapidly grows. It is even more interesting when a copyright work has been communicated illegally. It is not always easy to be aware of this, but, one should assume, if one links to a work that has not been made available by the rightholder, one surely addresses those who were "not taken into account by the copyright holders when they authorised the initial communication to the public." The question then arises: would this apply always when a link redirects to a work communicated illegally, i.e. regardless of the fact whether the same work has been communicated by the right holders on other websites, or only when the work in question has not been yet communicated to the public at all.

The Svensson decision will be certainly analysed from all possible angles, its practical implications included, but I will allow myself to bring up one aspect, at first sight probably boring, i.e. theoretical foundations of copyright law and copyright rights as exclusive rights. The CJ UE approached the problem of linking from the perspective the preliminary questions suggested, i.e. the making available right and its boundaries. Because the Court had already dealt with the scope of this right in other judgments it probably seemed logical to follow the previous case law. It is useful to notice, however, that the idea of a "new public" may have dual purpose as far as the scope of rights and the question of infringements are concerned. The most obvious application of the "new public" condition is to allow splitting rights wider in scope into smaller fragments, so that their exploitation (and profits) can be maximised. In this role the concept is not new and has been used in many legal systems for example to establish whether a DVD is a distinct way of using a work from a VHS. It is however always assumed this is done against the background of rights the existence of which leaves no doubt (e.g. reproduction, selling copies, rental). The question then is not whether (following our brick and mortar example) manufacturing DVDs falls under copyright protection but who is authorised, for example whether a contract between the manufacturer and the right holder covers this form of exploitation. The second function of the "new public" is to define the scope of the original right and this is what the CJ EU is trying to do. Here the new public criterion operates on a different level. It separates acts constituting use of copyright works and thus requiring permission from acts that lie outside the scope of copyright law. If the only difference between what is allowed and what is not as regards the use of a copyright work already communicated on the internet is the new public, it should be then allowed to post already communicated works on one's own website (not only linking to them). Of course in such a case there would probably have to be some reproduction involved, once however the taking-over process is completed, the making available right cannot be infringed and injunctions should be denied. The only way for the rightholder would be to remove the work from his or her website, so as to make it "unavailable" as then the

"new public" would appear.

What is more it is very unclear whether the Court's understanding of the "new public" in Svensson is compatible with its understanding in the invoked hotel cases (SGAE and Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon) or the ITV Broadcasting case. Let us stay for a while in a hotel and consider par. 26 and 27 of the Svensson decision:

26 The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them.

27 In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.

It appears the reason why there is no new public in Svensson is that everyone who can click the link could theoretically access the work in another way (directly at source, so to speak). But does this not apply to the hotel cases as well? After all any hotel guest could watch the same TV show in another place. Just like because of links, the overall potential public does not increase, perhaps apart from foreign tourists. If a guest decided not to travel but to stay at home, the potential public would be the same as far as the numbers are concerned. There is of course one difference – if I have access to the internet I could theoretically visit the original website from the same place, whereas being in a hotel I cannot be at home at the same time, but to complicate the matters further in par. 26 the Court speaks of the public "targeted" by the initial communication. The public targeted by a broadcast for example could be also understood as everyone where the broadcast is accessible. Besides, "targeting" is something the right holder does and so his perspective should be decisive. This is a thin line indeed, especially if one recalls that in hotel cases (e.g. SGAE) it was said hotel customers were new public because without the hotel's "intervention" "its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work." The customer thus could theoretically enjoy the work, but the circumstances were such that without the hotel's provision of a TV set it would not have been probable (in other words would have been very unlikely). This is a factual assessment that may not be so different in many linking cases. For example if a link on a popular website redirects to an obscure website it can be said, on a factual level, that otherwise customers of the popular website "would not, in principle, be able to enjoy the work". What it is all about is simply the difficulty (and effort required) of finding another source of enjoying the same work.

The concept of communication seems to have evolved as well. In Svensson the Court is of the opinion that this term must be understood broadly in order to achieve a high level of protection of copyright (not much legal finesse in this part) and then proceeds

to state that provision of a link affords direct access to a work and therefore is an act of communication (par. 18-19). It is interesting to compare this explanation with the previously accepted theory, according to which applying "mere technical means to ensure or improve reception of the original transmission in its catchment area does not constitute a 'communication' within the meaning of Article 3(1) of Directive 2001/29". One wonders why, since there must be surely persons who, without such technical means could not access the work (for example because the signal would be too weak). If there are such persons, applying technical means mentioned above "affords them access".

There will be much wiser people pondering all of the above, I am certain, but it is too tempting not to ask: why couldn't the CJ UE just say providing a link where there are other ways of access is not an act of communication (where there are no other ways of access, the problem is more complicated, and would require further discussion). It would have been so much simpler. I find it also rather disconcerting that the legality of linking hangs on a thin thread of a "new public", something internet users may not always be able to establish.

It is also impossible not to notice that the perspective of the making available right has completely removed from the Court's view the possibility that perhaps linking (also when a website is not "freely available") could be preferably dealt with based on some reasonable concept of secondary liability. One of the obvious advantages would be that such liability is usually dependent on fault. It is true there are no harmonised grounds of secondary (indirect) liability in Europe (only fragmentary provisions), but if the Court stretches what has been harmonised too far the "European Copyright Law" will be a horrible contraption.

This leads us to the second answer the Court has given, namely that Member States are precluded from understanding the scope of the concept of communication to the public in a wider way than provided in art. 3 (1) of the Copyright Directive (in other words wider than the CJ EU understands it). The rationale is clear (the objective of Directive 2001/29 would be undermined), but the consequences are profound. The Court treats the Directive 2001/29/EC as if it were a directive of maximum harmonisation, at least as far as the scope of exclusive rights is concerned. Since the directive covers three basic rights (reproduction, distribution and communication to the public), it would mean that with respect to these crucial instruments Members States cannot offer more protection. The impact on national copyright law may be quite unexpected. There are different ways national law may approach the problem of how to define the scope of copyright. One is to provide for specific rights, the sum of which constitutes the scope of protection. What is outside the scope of such rights (regardless of whether they are defined as broad framework rights or a large number of more specific rights) is outside the scope of copyright. The other way is to establish a principle that any use of a copyright work (apart from exceptions and limitations) is covered by the sphere of exclusivity, and specific rights are only emanations of this fundamental concept. The second option no longer seems possible for what purpose would it have to exclude a certain form of exploitation from a defined right (such as the right of communication to the public) only to grant a right of the same scope but different name. Whether the current EU law really justifies such far-reaching consequences is doubtful, but the CJ UE seems to have chosen this path.

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