

Kluwer Copyright Blog

A new chapter in the linking saga

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GS Media – the questions

The ‘linking saga’ initiated by the Svensson decision of the CJEU back in 2014 has taken a new turn with today’s GS Media judgment. Of course, it would be more appropriate to call it a ‘communication to the public’ saga, but I suspect that the origin of the Svensson decision and the underlying threat of ‘paralysing the internet’, should linking be found infringing, is at least partly responsible for the confusion, which in my highly subjective view (the GS Media decision lends credence to subjective factors, so I feel justified) has been only aggravated by the court’s latest contribution. I would argue that the [GS Media decision](#) is the most conspicuous example to date of the CJEU’s continuous efforts to ignore what has been left of a sound copyright theory. Unfortunately, it offers very little in return.

The preliminary questions asked by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) revolved around one major issue, i.e. whether a person posting a link to a website on which a copyright work is illegally available is communicating this work to the public. The exact phrasing went like this: *“If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the right holder, does that constitute a “communication to the public” within the meaning of Article 3(1) of Directive 2001/29?”*. The Hoge Raad included in its other question the role of the subjective intent of the ‘hyperlinker’. (*“Is it important whether the ‘hyperlinker’ is or ought to be aware of the lack of consent by the right holder for the placement of the work on the third party’s website mentioned in 1(a) above and, as the case may be, of the fact that the work has also not previously been communicated, with the right holder’s consent, to the public in some other way?”*).

Other cases about linking

In [Svensson](#) the CJEU stated that linking could be perceived as a form of communication to the public, but added that for this to happen a new public had to be targeted. Consequently, if a work was freely available online, linking was not communication to the public (it was not an act of using the work in a way relevant for copyright law). The decision was questionable and the invented criterion of the new public raised enormous doubts. One of the controversies the Svensson decision immediately caused was the legal assessment of linking to works that have been made available on the internet without the consent of the right holder (illegally). The rationale behind the judgment did not rule out that such links could be a primary infringement. In the Svensson decision the court

clearly suggested that a link circumventing some restriction of access, and thus leading the user to a work that had not been intended for such a use by the copyright owner could be considered infringing. When a work is put online illegally, it may be argued that the right holder could not accept such a use and thus a link would address a public the owner had not anticipated.

In [Bestwater](#) the court, at least according to some commentators, considered the legality of the material irrelevant for the question whether a link is a communication to the public. The decision (order), not preceded by an Advocate General's opinion, could be however probably better understood as overlooking the problem. In the meantime, the 'new public' criterion has become essential for other copyright cases. Despite a rather critical position by the Advocate General Bot in his opinion for the [Reha Training Case](#), the court remained essentially within the Svensson boundaries. Any case involving these issues made it nevertheless abundantly clear that the Svensson approach keeps bursting at the seams as soon as a tiny twist of the original set of facts occurs. This is not only limited to linking, but could be observed in practically all cases revolving around the right of communication to the public. TV in a hotel room is a form of communication, but a radio at a dentist's is not. Allegedly this was about proportionality and *de minimis*, but in reality one can suspect each new case made it obvious the results according to the just established criteria could be regarded as unfair. So new factors kept being introduced and among them allusions to the profit-making or fault (knew or should have known). For a continental lawyer from a civil law system it is at best puzzling if copyright should remain an absolute, property-type kind of right. In most such systems it is easy to separate the very infringement (objectively assessed) from the applicable remedies (some of which could require fault, i.e. damages). In other words, if I use a copyright work and I have neither the right holder's consent, nor the option to invoke a copyright exception or limitation, I infringe. This does not have to mean I will always have to pay damages; just that the infringement would have to be stopped.

The danger of Svensson, in my view, stemmed from the fact that linking could relatively easily be a *primary* copyright infringement. It would be perfectly possible to argue (and the Advocate General Wathelet agreed) that linking is not using a copyright work and thus not an act of communication to the public at all. A link posted with the knowledge that a work to which it leads has been made available illegally could be tackled by secondary liability. Secondary liability is usually a flexible concept and it may easily accommodate subjective factors, something a theory of copyright the way it has been practiced in a country like Poland (I believe many other member states could be listed here, such as Germany) for almost 100 years (the first Polish copyright statute was enacted in 1926) cannot do. Even though this approach (broadly speaking, of course) had been suggested by the [Advocate General](#) in his opinion, the CJEU decided to disregard his advice. It is baffling that the CJEU does not seem to understand the major source of confusion caused by Svensson and its progeny was its departure from some basic concepts of copyright theory many (probably most) members states still accept. It is possible that a new brilliant theory can successfully replace an old and battered one. For this to work, one would, however, usually expect the new theory to be introduced by those highly competent in the field it relates to, who have thought everything through and have consciously come up with a new solution. Picasso once said he could paint like Raphael at a young age and only later taught himself to paint like a child. A bon mot for sure, but one stressing that if you want to be revolutionary, you should know very well what came before you. Only then is your revolution credible. It can be safely said the CJEU has never been a copyright Raphael. Unfortunately, it has not become a Picasso, either.

The GS Media decision

In the GS Media decision the court confirmed that “it cannot be inferred either from the judgment of 13 February 2014, Svensson and Others, (C-466/12, EU:C:2014:76) or from the order of 21 October 2014, BestWater International, (C-348/13, not published, EU:C:2014:2315) that posting, on a website, hyperlinks to protected works which have been made freely available on another website, but without the consent of the copyright holders of those works, would be excluded, as a matter of principle, from the concept of ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29. Rather, those decisions confirm the importance of such consent under that provision, as the latter specifically provides that every act of communication of a work to the public is to be authorised by the copyright holder.” To counter the effects of this statement the court turns to the subjective conditions of liability. The following paragraphs are crucial:

“Indeed, such a person, by making that work available to the public by providing other internet users with direct access to it (...) does not, as a general rule, intervene in **full knowledge of the consequences** of his conduct in order to give customers access to a work illegally posted on the internet. *In addition*, where the work in question was already available with unrestricted access on the website to which the hyperlink provides access, all internet users could, in principle, already have access to it even the absence of that intervention.” (emphasis added)

“In contrast, where it is established that such a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.”

Communication to the public is consequently a deliberate (knowledge that the work has been made available illegally) or negligent (“should have known”) intervention enabling (better to say: facilitating) third party access to a copyright work. Even in these two paragraphs there is a contradiction. The phrase “in full knowledge of the consequences” may only refer to a deliberate conduct. “Should have known” is not full awareness of all consequences of one’s actions. If someone should have known, it means he or she did not know and hence could not have been fully aware!

To provide icing on the cake of judiciary law-making, there is a rebuttable presumption (a question for a legal ground for this discovery is a moot point) that a person posting a hyperlink “for profit” knows the legal status of the copyright work to which the link directs (such a person should carry out “the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, **so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder**. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.”).

To sum up, communication to the public is a deliberate or negligent intervention facilitating third party access to a copyright work, and it is presumed that a person objectively facilitating access when acting for profit acts deliberately. Liability is thus based on fault and fault may be presumed.

The number of questions this raises is really huge. For example: what does it mean “for profit”? It would seem that to the CJ EU “for profit” stands for commercial activity, thus introducing to

copyright law a concept common in many jurisdictions with regard to industrial property rights (patents, trademarks) that can be infringed only in commerce.

Assessment

I understand this approach may be called ‘creative’ or ‘novel’ or maybe even ‘controversial’. I think none of these adjectives really works. I would argue ‘arrogant’ is the most apposite description. To disregard dozens (maybe even hundreds) of years of copyright theory despite all the critique and even despite the Advocate General’s opinion and to offer a concoction of incoherent concepts does not deserve to be called creative. Let us take a look at a few consequences the GS Media decision would entail (remembering of course that should by now know they haven’t been set in stone). The consequence being the direct result of Stevenson I cannot fathom to this day is the ‘exhaustion’ of the communication to the public right. The problem is not that linking to a freely available content is not an infringement (usually), but that even placing a copyright work on one’s website, without the owner’s consent, and making it available to the public, is not communicating this work to the public, because there is no new public! Where does this for example leave advertising-based business models?

The expropriation of works made available for free may be unfair, but it is at least clear. The GS Media decision compromises this clarity; however dubious it was. The legality of any link should be decided on a case by case basis, while investigating the state of mind of the ‘hyperlinker’. Yes, a ‘non-profit hyperlinker’ may expect that the standard of evidence required to prove he at least “should have known” will protect him most of the time (but not always and case law in various members states will surely differ), but professional businesses are expected to check all the links all the time! So much for “saving the internet”. The facts of the GS Media case leave no room for doubt that no matter how uncertain the “for profit” condition may seem, it refers to the overall operations of the website owner and not a specific link. GS Media did not directly charge its viewers for watching the infringing photographs. It sufficed that it was a business operated for profit. Even a freely accessible website (earning its revenues exclusively from advertising) must be therefore considered a “for profit” operation and thus presumed to know whether the content to which it links is legal or not.

The communication to the public right has thus become what German or Austrian lawyers will recognise as a ‘movable system’ (*bewegliches System*). Several criteria and the interplay between them, analysed on a case by case basis, will decide whether a work is communicated to the public. The factors to be included belong to completely different orders (the amount of people, profit, fault, different technical means, etc.). Some implications may not have been recognised, yet, but perhaps a general question about the future of copyright would be warranted. Why limit ourselves with this revolution to the communication to the public? Should not reproduction and distribution depend on whether a person making a copy or putting it on the market “knew or should have known”? After all, the freedom of expression and of information – the only argument the court uses to introduce the need for a subjective element – cannot be limited to the communication right. The GS Media case was a perfect opportunity for the CJEU to gracefully mend some of its least successful attempts at redefining copyright theory. I am afraid it is less and less likely this will ever happen.

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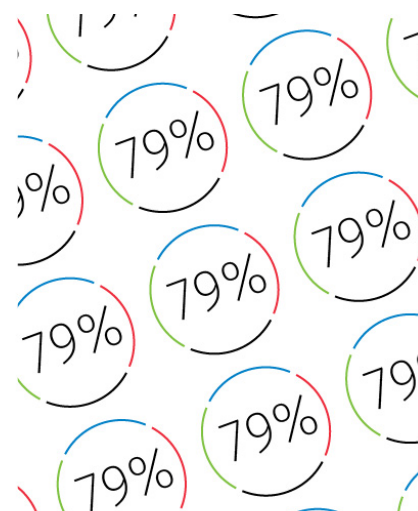
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