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Hyperlinking under the lens of the revamped right of communication to the public

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ABSTRACT

For more than a decade now, the right of communication to the public has been developed and interpreted by the CJEU, leading to a complex set of criteria that must be analysed on a case-by-case basis. When confronted with the copyright status of hyperlinking, the Court built upon that background in a string of cases that ended up reshaping the traditional contours of the exclusive right. The practice of linking, an essential element of the Internet and a crucial tool for any online activity carried out by entities and individuals, is now affected by the new scope of the communication to the public right, with direct consequences on the liability hyperlinkers may incur. This article will examine the status of the Court's case law to provide insights that may facilitate its interpretation and application. It will consider in particular how hyperlinkers are exposed to liability and which duties of care result from the Court's approach. It will also examine how the new understanding of hyperlinks from a copyright perspective may be relevant in the context of the proposed Directive on Copyright in the Digital Single Market.

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1. Introduction

Hyperlinks are ubiquitous on the Internet. Millions of Internet users routinely post links to social networks or other platforms. Search engines return long lists of hyperlinks as search results after user queries. Websites show links to useful resources online for the users to click on. Websites also use less perceptible forms of links, such as inline links, which are automatically executed by the browser to integrate parts of the page that come from different sources. Webpages may also include embedded links–for instance, to insert a YouTube video which will be displayed within the context the webpage—, or resort to some other forms of framed links. Image and video search engines may also use embedded links to show the images or videos on their search platform. Other business models rely heavily on links as well, including news aggregators, platforms offering curated internet radio streams, or websites providing download links to copyrighted content hosted somewhere else. Hyperlinks are crucial for accessing valuable content on the Internet and, as such, they are key to exercising the right to freedom of expression and information, recognised in Art. 11 of the Charter of Fundamental Rights of the EU. They are also used to facilitate massive access to copyright infringing content.

In October 2012, by means of a reference for a preliminary ruling made by a Swedish court of appeal in the *Svensson*

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case,[1] the Court of Justice of the European Union (CJEU) was asked to clarify whether the provision of a link to a copyrighted work might constitute a 'communication to the public' within the meaning of the InfoSoc Directive.[2] Implicit in this question was another crucial one. Namely, whether a hyperlink may meet the needed threshold condition of being an 'act of communication' in the first place – irrespective of whether it may ultimately amount to a communication 'to the public' in the sense of that Directive.

On the one hand, an answer in the negative would situate any instance of linking outside the scope of the exclusive right of communication to the public. Thus, a provider of a hyperlink to unauthorized copyrighted content could not be deemed to infringe that right and could only be held liable under the different national law doctrines on indirect liability. On the other hand, an answer in the affirmative could potentially have serious overreaching effects. If any link were to be deemed as involving an 'act of communication,' there would be a risk of converting daily routine acts by millions of users into direct copyright infringements, which would negatively affect freedom of expression and would arguably not respect the balance the InfoSoc Directive seeks to achieve between the rights and interests at stake.

In the *Svensson* judgment, handed down in 2014, the CJEU answered that fundamental underlying question with a resounding yes, holding that, in the circumstances of the case, "*the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication'*."[3] This answer was bound to bring about remarkable consequences in the way the CJEU conceives the right of communication to the public.

To be sure, in the same judgment the CJEU limited the potential impact of that conclusion by holding that, despite being an 'act of communication', "*the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public'*,"[4] on the grounds that such communication does not reach a 'new public'.[5] Nonetheless, *Svensson* opened the door to a reconceptualization of that right, something that would be apparent in CJEU's subsequent rulings in this field. Already in *Svensson*, the Court broadened the scope of this act of exploitation to include situations that could be better characterized as indirect copyright infringement. This was eventually followed by the inevitable consequence of importing into the equation the subjective condition of knowledge about the illegality of the linked content,[6] which is at odds with the longstanding notion of primary copyright infringement as an objective act of exploitation. In this way, the CJEU has come to reshape the contours of the right of communication to the public, effectively conflating the notions of direct and indirect copyright infringement, in a string of cases that show an effort to provide broad protection to right owners while somehow trying to protect providers of hyperlinks from a disproportionate risk of liability.

This case law affects businesses and individuals regarding their ability to place links online, as well as rightsholders' enforcement capabilities. It is also influencing how national courts are addressing the issue of copyright liability for hyperlinking. However, it also goes beyond the provision of links. As it ultimately reinterprets the very notion of communication to the public, other instances not involving hyperlinks may be also impacted by the new approach.[7] In the legislative front, the proposal for a Directive on copyright in the Digital Single Market[8] tackles the business model of news aggregators, where hyperlinks play a key role, proposing a new related right for press publishers. In addition, the proposal relies on the notion of communication to the public for establishing new obligations on content sharing platforms, where hyperlinks are not involved, but where the new notion of communication to public may nonetheless play a role.

This article's purpose is twofold. First, it aims at providing specific insights into the Court's reasoning and conclusions, which may help both to dispel some misunderstandings and to facilitate an appropriate interpretation of the CJEU's criteria by the interested parties and by national courts. To that end, the article will engage in an in-depth analysis of the legal reasoning followed by the Court when addressing the copyright status of hyperlinks, in the broader context of the Court's case law on the right of communication to the public. Second, the article will consider the consequences of this case law on hyperlinkers' liability. In this regard, it will first explore the interplay of the revamped right of communication to the public with the liability exemptions set out in the E-Commerce Directive. Next, the article will consider some duties of care hyperlinkers' should observe to avoid liability under the fault-based system that results from the Court's approach. Finally, the article will examine the implications of the Court's interpretation of the communication to the public right with regard to the Proposed Directive on Copyright in the Digital Single Market.

[1] Reference for a preliminary ruling from the Svea hovrätt (Sweden) lodged on 18 October 2012, Nils Svensson et al v Retreiver Sverige AB (Case C-466/12).

[2] Directive 2001/29 of the European Parliament and of the Council, on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 OJ (L 167) 10 (EC).

[3] CJEU, Case C-466/12, Nils Svensson et al v Retriever Sverige AB, Judgment of 13 February 2014, ECLI:EU:C:2014:76 (*Svensson*), para 20.

[4] *Svensson*, C-466/12, para 32.

[5] *Svensson*, C-466/12, para 30. *See* Julia Hörnle, 'Is linking communicating?' [2014] 30 CLSR 439.

[6] *See* CJEU, Case C-160/15, GS Media BV v Sanoma Media Netherlands BV, Judgment of 8 September 2016, ECLI:EU:C:2016:644 (*GS Media*), para 55.

[7] *See* Advocate General Campos Opinion, Case C-161/17, *Renckhoff*, 25 April 2018, ECLI:EU:C:2018:279.

[8] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market. COM/2016/0593 final, Brussels, 14.9.2016.

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