

Client Alert

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Copyright: Europe Explores Its Boundaries European Court Rules That Hyperlinking May Constitute Copyright Infringement

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The Court of Justice of the European Union (CJEU) has ruled that, in certain circumstances, the act of posting a hyperlink to copyrighted works without the author's consent may constitute copyright infringement. The crucial test may be the degree of knowledge of the infringing nature of the linked material: and the court ruled that such knowledge would be presumed if the link-poster stands to make a financial gain from posting the links.

For right-holders, this decision will be welcomed as it opens a new door to effective enforcement in Europe against potential infringement. For everyone else, it raises a practical headache when posting hyperlinks to online material. Ultimately, the case demonstrates once again the challenge that the courts have in trying to balance the rights of copyright holders with the functionality of the Internet.

THE DISPUTE

The case of *GS Media v Sanoma* concerns a Dutch news website, *GeenStijl*, which published an article relating to a Dutch TV personality. The article included a hyperlink to leaked photographs from a *Playboy* photo-shoot published on a third-party website. *Sanoma*, the publisher of *Playboy*, asked *GS Media* to remove the hyperlink. *GS Media* failed to respond, and subsequently *Sanoma* succeeded in removing the images by contacting the third-party website directly. Not long afterwards, *GeenStijl* published another article with a hyperlink to a different site, which enabled the viewing of the same photos. That third-party site also removed the photos after being approached by *Sanoma*. However, *GeenStijl*'s users then started sharing links on the news website's forum, allowing access to the photos from different sources.

Sanoma brought proceedings against *GS Media* for copyright infringement and, on appeal, the Supreme Court of the Netherlands asked the CJEU to clarify a number of points of EU copyright law. In particular, the CJEU was asked in what circumstances posting a hyperlink to protected works that are freely available on another website without the copyright owner's consent constitutes a "communication to the public" within the meaning of Article 3(1) of the EU Copyright Directive (2001/29).

Under Article 3(1) of the Copyright Directive, authors have the exclusive right to authorise or prohibit any communication to the public of their works. If the posting of a hyperlink constitutes a "communication to the public", then this will constitute copyright infringement if done without the author's consent.

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THE JUDGMENT

The CJEU ruled that, in order to determine whether posting links on a website constituted a “communication to the public” (and, therefore, a copyright infringement), it was necessary to determine whether the poster of the link knew, or could have been reasonably expected to know, that the works had been posted without the copyright holder’s consent. Such knowledge would be presumed when the links were provided for the purpose of making financial gain (unless such presumption could be rebutted).

In the 2014 case of *Svensson* (previously [discussed](#) on our [Socially Aware](#) social media legal blog), the CJEU held that posting a hyperlink to a source where the copyright works are already available does not constitute a “communication to the public” because the content is already freely available on the Internet. It would only become a “communication to the public” if the copyright content was communicated to a “new public”. In that case, the CJEU decided that no “new public” was reached by placing of links on a website.

The CJEU distinguished the decision in *Svensson* on the basis that the *GS Media* case concerned a situation where the copyright holder did not authorise its material to be published – whereas, in *Svensson*, the copyright content was freely available with the right-holder’s consent on a third-party website.

The CJEU also recognised that the Copyright Directive seeks to strike a balance between freedom of expression and public interest on the one hand, and the effective protection of copyright holders’ intellectual property on the other. Taking account of the value that hyperlinking brings to the smooth functioning of the Internet and the exchange of information on networks, it’s clear that the CJEU was keen to differentiate between different categories of users.

In the case of “ordinary” Internet users, they should not be expected to examine linked content for infringement. Therefore, copyright infringement will only take place if such user knew, or should have known, that the content was infringing. However, where the poster posts the links for profit, the poster should be expected to carry out checks prior to linking to ensure that the linked content is not infringing.

Interestingly, in coming to this decision the CJEU has reached a different conclusion than one of its top advisors. In April 2016, the Advocate General recommended that the CJEU depart from *Svensson* and hold that hyperlinks to freely available websites were not a communication. This approach would have given no recourse to the rights-holders.

IMPLICATIONS

In this case, the CJEU has tried to preserve the delicate balance of the EU Copyright Directive by placing the greatest burden on commercial link-posters. However, even non-for-profit organisations and consumers may now be held liable for copyright infringement if they have knowledge that the content is infringing. In doing so, the CJEU has arguably created a new “secondary infringement” regime.

For not-for-profit organisations and consumers, the good news is that the posting of a hyperlink to infringing content does not, in itself, constitute a copyright infringement. The bad news is that we are likely to see European rights-holders begin to apply the practice of issuing notice and takedown notices to parties who post links to infringing websites, in addition to the infringing websites themselves.

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For commercial posters, the case introduces diligence burdens beyond simply responding to notice and takedown notices. Given the presumption of knowledge introduced by this ruling, prior to posting a hyperlink, organisations will need to evaluate whether they are gaining any financial profit from posting the link. It's not clear how profit would be interpreted, and so we expect that this test will be the subject of further scrutiny in due course. For example, does it mean that the poster has to profit from the link itself, or could it mean profiting from the website on which the link is posted (e.g., would a website that contains advertising be enough)? The organisation will then need to determine the ultimate source of the hyperlinked material, investigate whether the content is copyright protected or not and, if it is, whether the rights-holders consented to the content being shared.

However, the process does not end there. After the hyperlinks have been posted, the poster will need to monitor the linked website for any change of content. The poster of the hyperlink may be held liable for copyright infringement if the previously harmless content on the linked website has been replaced by content that is copyright protected, and the rights-holder did not consent to the their works being published.

For rights-holders, the ruling will be welcomed as it provides them with wider recourse to protect their intellectual property and take action against those who direct others via hyperlink to infringing content.

CONCLUSION

Hyperlinks have been around a long time, and the European courts are still struggling to work out how they can be balanced with the rights of copyright holders. Two years after *Svensson* and, in an attempt to provide clarity, the CJEU has now introduced a concept of knowledge into the mix. No doubt this is not the last time the CJEU will be asked to address the topic. Watch this space.

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