COPYRIGHT ISSUES PERTAINING TO LINKING, FRAMING AND BROWSING ON THE INTERNET

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Abstract

This dissertation was written as part of the LL.M in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

The spectacular growth of the Internet has brought providers and users closer in both the commercial arena and private homes. Users employ search engines to find websites of interest, with linking, framing and browsing facilitating navigation from one webpage to another. These most attractive but also most problematic tools promote free access to information, and thus freedom of speech, but also create the risk of copyright infringement. In this context, the Court of Justice of the European Union (CJEU) has recently issued some interesting, yet controversial rulings in its attempt to clarify the complexity of conceptual definitions involved in linking, framing and browsing, as well as interpret EU copyright law. By doing so, the CJEU applied new criteria and construed the concept of exclusive rights of authors more or less restrictively depending on the actual facts of each case. However, what prevailed, it was the resounding victory of common sense. If this were not the case, then there would be the unsatisfactory and impractical consequence that internet users would not be able to link and browse on the internet without the copyright owner’s consent. To this end, one can only welcome the efforts of the CJEU in harmonizing EU copyright law. Taking into consideration that a correct balance between, on the one hand, strong protection of intellectual property rights so as to encourage creativity and investment and, on the other hand, the public interest in not allowing the monopoly or exclusive rights to extend too far, lies at the very heart of intellectual property law, the CJEU’s role in shaping EU copyright law was fundamental.

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Keywords: internet, copyright, CJEU, harmonization, balance

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PREFACE

During the past several years, the World Wide Web has observed two significant changes: (i) its popularity and use have literally exploded and (ii) it has become a place of substantial commercial activity. This being the case, certain practices by authors of websites and pages have been attacked as violative of other’s intellectual property rights or entitlements. These practices include “linking”, “framing” and “browsing”, which, despite promoting free access to information and thus, freedom of speech, raise concerns in the field of copyright law as far as the application and extension of the exclusive rights of authors.

The aim of this dissertation is to highlight the copyright issues pertaining to linking, framing and browsing by presenting, initially, the main aspects of copyright law and specifically the Information Society Directive (2001/29/EC) and afterwards by summarizing and criticizing the most recent case law of the Court of Justice of the European Union (CJEU). In particular, chapter I will attempt to clarify the complexity of conceptual definitions which are involved in linking, framing and browsing and the main problems of copyright law that these practices create, while chapter II will outline and interpret the fundamental exclusive rights of copyright pursuant to the Information Society Directive and essentially the exclusive right of reproduction and the right of communication to the public. Chapter III will introduce the recent case law of the CJEU, by starting from Svensson, C More Entertainment AB and BestWater cases which served as background decisions for the judges to apply the theory of “new public” and “the communication to the public by same technical means” in linking and framing cases to end up to the most recent discussed GS Media case and the Meltwater case in order to evidence how complicated the treatment of this territory of law is. Finally, in the conclusion, this dissertation will attempt to assess the CJEU’s role in shaping EU copyright law and whether and to what extent the CJEU succeeded in balancing the different interests at stake.
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INTRODUCTION

Despite its brief history, the internet has grown exponentially and is accessed by individuals and business alike; a host of content providers, from local charities and government departments to multinational businesses, present information over the internet in an attempt to inform users or entice customers. Users add the internet to their armoury whether communicating with others by email or web chatting, or whether searching for reliable information or the best deals available.¹

The Internet, also known as the Web, is structured by a vast collection of interconnected digital documents called webpages. Each webpage has a unique address, namely the Uniform Resource Locator (URL)², which functions much like a phone number. URLs are often long and therefore, easy to type incorrectly. However, it is not necessary to know every URL. Direct links from one webpage to another enable users to surf or browse, without having to memorize long lists of addresses.³

There are, basically, three ways users can access webpages. These include access via links, through sites that frame other sites’ pages and with the aid of a software tool, i.e. the web browser.

Links represent a fundamental instrument for programmers to build websites and for users to navigate the web. Thanks to links, websites interrelate to one another, thus making it possible for users to gather, with a simple click, information scattered around several locations on the web.⁴ Unlike linking, framing enables a website to make external websites visually perceptible embedded in a frame and surrounded by the host website’s information. In this case, the referenced content is automatically displayed on the page invoking the content and is made accessible without any further

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² A Uniform Resource Locator (URL), commonly informally termed a web address, is a reference to a web resource that specifies its location on a computer network and a mechanism for retrieving it. A URL is a specific type of Uniform Resource Identifier (URI) (that is, a string of characters used to identify a resource), although many people use the two terms interchangeably. A URL implies the means to access an indicated resource, which is not true of every URI. URLs occur most commonly to reference web pages (http), but are also used for file transfer (ftp), email (mailto), database access (JDBC), and many other applications, https://en.wikipedia.org/wiki/Uniform_Resource_Locator.


act on the user’s side. Finally, browsing allows someone to access third parties’ websites and view, search and retrieve their content.

Notwithstanding their attractiveness, linking, framing and browsing raise several copyright issues, which have been subject to controversy to this very day. For example, when an image link instructs the visiting users to follow the link and retrieve information from an official site, this retrieved information is grouped together in a new page and presented to the user as part of the same site. Although none of the images is stored within the new page, the resulting page arguably creates a new derivative work based on those pre-existing images. Such a link that frames the linked page, by substantially changing its original appearance, infringes the copyright of the author, if created without license. In addition, copyright legislation confers on the owner the exclusive right to reproduce, issue copies of, perform, broadcast or adapt the work. The parameters of these rights are well established in the real world, but the analysis of digital copyright raises the issue of so-called random access memory (RAM) copies. In the cyber world, whenever the information is retrieved, the digitized work is reproduced and/or stored in computer memory; the storage might be in RAM or in temporary cache files on magnetic media. Onward transmission on the internet might involve several intermediary machines as packages of information are routed and re-routed before they reach their final destination. Accordingly, providing the work is substantive enough to attract copyright and the copying involves the taking of a substantial part, both the use of links as point of reference and the transmission or display of webpages might infringe the copyright owner’s exclusive rights.

To this end, even though linking, framing and browsing prove to be an excellent example of end-user conduct in the information society as they give rise to speedy and effective use of Internet., they may raise concerns with regard to various forms of liability for copyright infringement. That is to say, it is susceptible to grant access to content with a custom path even without prior consent of the entitled parties. Finding a balance among interests of different stakeholders is indispensable in this regard.

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This not only concerns a meaningful distinction between various web techniques but also the creation of harmony between copyright and other rights, or as the case may be, fundamental rights.
CHAPTER I: BASICS ON LINKING AND BROWSING

1. LINKING: DEFINITION AND LEGAL IMPLICATIONS

As stated above, linking represents the first of the three most common ways of accessing the web content. A link is an electronic address written into a webpage that points to another location on either the same or a different page, at either the current or a remote site on the internet. Essentially, a link in the form of text or a graphic is a shortcut to scrolling on the screen or typing in the Uniform Resource Locator (URL) of a document already posted somewhere on the internet. This being the case, linking allows a website user to visit another location on the Internet. By simply clicking on a live word or image in one webpage, the user can view another webpage elsewhere in the world, or simply elsewhere on the same server as the original page.

The links can be divided on the basis of:

- **Depth** – *surface and deep linking*: while surface linking connects only to the home page of a site, deep linking bypasses the home page and goes straight to an internal page within the linked site. This leads to diversion of traffic from the main home page.

- **Visibility** – *normal* and *embedded linking*: while normal links are visible to the user as a traversal between two documents, an embedded link, i.e. images, embedded objects and background sounds and images which are part of a given document, divert the user without his or her apparent knowledge to a different location when he or she clicks on the said object.

- **Programming** – *hypertext reference linking* and *image linking*: while the hypertext reference link instructs a browser to stop viewing content transmitted from one location and begin viewing that of another, an image link instructs a visiting browser to supplement the text on the current page with an image contained in a separate image file. This can also be used to navigate to a different location on the same site or to a different site altogether. Again, a user following a hypertext link is usually aware that he has “changed pages” from the different appearance of the newly accessed page or from the change in the URL address display in the web browser.

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Linking is an attractive and powerful tool used on the net, which promotes free access to information. It proves to be an excellent example of end-user conduct in the information society as it gives rise to speedy and effective use of Internet. The Executive Committee of the ALAI has noted that “generally speaking, hypertext links make it easier for the user to search the internet, as he or she can click on the link instead of copying and pasting or writing the relevant web address. This is an improvement upon merely providing its factual address, i.e. information on the name of the file and where it is stored. Consequently, links facilitate availability, although users can also access the desired works through other means”. Similarly, the attraction of linking is in the ability to access information that would otherwise take considerable time to trace while it allows the user to determine the depth of his or her enquiry; the more links activated, the deeper is the exploration of the content.

Although linking is the driving force of the internet, it may give rise to several copyright issues. For instance, deep-linking, as overpasses a site’s home or front page by connecting a user directly to secondary material of another site, may amount to an infringement of copyright in the secondary material. Similarly, an embedded link, as encompasses a reference to content from another website, the secondary material appears to be content originating from the first site. In this respect, such links may violate the author’s right to display or communicate their work to the public, as they do not require a copy to be made of the linked material. Accordingly, surface linking might raise concerns about both direct and indirect liability, when the linked website contains either material that has been uploaded without the authors’ consent or tools facilitating the unauthorized retrieval of copyright content.

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12 The International Literary and Artistic Association (ALAI) is an independent learned society dedicated to studying and discussing legal issues arising in connection with the protection of the interests of creative individuals, http://www.alai.org/en/presentation.html.
2. FRAMING: DEFINITION AND LEGAL IMPLICATIONS

Related to linking is the practice of framing, which takes place whenever a link placed within a certain webpage, instead of opening a new browser window leading to the linked page, permits users to see the content of the linked page within the former website, displaying it within a frame.\(^{17}\)

Framing is a method of organizing the visual display of the information either composed or retrieved; it is the HTML\(^{18}\) command splitting the screen into smaller windows or frames. Each frame occupies a different portion of the screen and functions independently of the other, thus enabling the user to simultaneously view as many webpages as there are frames. The simplest example would be there the screen is split vertically, whereby the left window displays the index and the right shows the detailed contents. By clicking on a section of the index on the left, the linked text or image is displayed on the right, but without upsetting the appearance of the window on the left.\(^{19}\)

Framing enables a viewer to see the screen split in several smaller windows. Each window is displayed on a separate portion of the screen and functions independently to display an individual webpage. This enables the user to maximize the possibilities of his computer when surfing the web.\(^{20}\) Framing, as such, is of no legal concern unless the author of a site frames contents of another site into his own website, creates a new page and eliminates the advertising or other content including the site identifier from the page. In such a case, it gives rise to liability for infringement of intellectual property. In particular, when a user clicks on a framed URL, the user’s browser transmits the content of the selected URL and the content appears within the portion of the screen designated as its frame. The legal implications are similar to that of linking. The consumer is likely to believe that some endorsement is in fact provided by the original websites to the framed one and might indicate the same to be a derivative work.\(^{21}\)

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\(^{18}\) HTML is the standard markup language for creating Web pages.


3. BROWSING: DEFINITION AND LEGAL IMPLICATIONS

Browsing is related to the access in webpages of other owners and viewing of their content. In this way, multiple temporary copies are created on the screen of the user’s computer and in the “cache memory” of the hard drive of that computer.

Browsing the internet requires the participation of the content provider, who may or may not be the author or copyright owner, the internet service providers whose servers function as host and/or access providers and the user. Particularly, the content provider posts the information on a host server. The page posted may consist of text, images or sounds and may contain a variety of links to files on the same or different servers. When the user requests a page by writing the URL or activating a link, the user’s access server contacts the host and having received a copy of the page from the host server, makes a temporary copy of the file requested before transmitting the same to the user. In turn, the user’s computer makes a temporary copy in its RAM in order to display the contents on the screen. The keeping of temporary copies in RAM of pages visited in order to allow the user to revisit those pages without having to recall the texts or images from the host server might invoke caching. So far, the host retains a permanent temporary copy, the access server makes a temporary copy in order to transmit and the user makes a temporary copy to view or to obviate the need for further requests regarding the same page. If unauthorized, hosting will infringe copyright.

There has not been any uniform jurisprudence by the courts of the EU Member States on the aforementioned issues. The Court of Justice of the European Union (hereinafter CJEU) has recently dealt in a number of cases with the issues above and we shall discuss those cases later on this paper. We shall now turn to outlining the

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22 Caching (etymologically related to French "cacher": to hide) is the automatic creation of temporary copies of digital data (in a "cache") in order to make the more readily available for subsequent use. On the internet, caching emulates bandwidth whereas it reduces congestion on popular websites. Although caching is a sine qua non to the internet’s survival and continuing growth it is equally clear that caching has the potential of negatively affecting the interests of authors and rightholders in documents cached. Caching may result in the supply of “stale” documents, if caches are not regularly refreshed. Also, caching may prevent content providers from collecting potentially valuable usage data by setting “cookies” that track consumer behavior. Finally, caching may undermine conditional access services, if subscriber-only documents are left in caches for all to retrieve, Hugenholtz, P. B. (2000) Caching and copyright: the right of temporary copying. *European Intellectual Property Review*, pp.1.

European copyright law in relation to the fundamental exclusive rights of holders and exceptions to those rights.
CHAPTER II: THE INFORMATION SOCIETY DIRECTIVE (2001/29/EC)

1. AN OVERVIEW

On April 9, 2001, the Directive on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter the Information Society Directive)\(^24\) was adopted. The Directive, which had to be implemented by the Member States by December 22, 2002, had two principal aims. First, to bring further harmonization to European copyright law in relation to fundamental exclusive rights of copyright and exceptions to those rights and secondly, to implement the two 1996 World Intellectual Property Organization Treaties on Copyright and on Performances and Phonograms. To achieve its goals, the Information Society Directive provided for the following: (1) the harmonization of three fundamental exclusive rights, these being the reproduction right, the communication to the public right and the distribution right (Articles 2, 3 and 4); (2) the introduction of an exhaustive list of copyright exceptions, all of which are optional except one, subject to the three-test step (Article 5); and (3) the introduction of obligations to protect circumvention of technical measures, designed to prevent infringement of copyright and the removal of rights management information (Articles 6 and 7).\(^25\)

2. THE REPRODUCTION RIGHT

Recital 21 of the Information Society Directive emphasizes the necessity to define the concept of reproduction in conformity with the acquis communautaire\(^26\) and in a broad sense in order to ensure legal certainty within the internal market". The broad definition of the reproduction right is provided in article 2 of the Information Society Directive requiring Member States to "provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part...". The reproduction right is expressed to be for authors in respect of their works, performers in respect of their performances, phonogram producers in


\(^26\) The Community acquis or acquis communautaire sometimes called the EU acquis and often shortened to acquis, is the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law. The term is French: acquis meaning "that which has been acquired or obtained", and communautaire meaning "of the community", https://en.wikipedia.org/wiki/Acquis_communautaire.
respect of their phonograms, film producers of the first fixations of films in respect of originals and copies of their films and for broadcasting organizations in respect of fixations of their broadcasts, whether transmitted by wire or air, including cable and satellite transmissions.\textsuperscript{27}

However, to counterbalance such a broad definition (i.e. any form of permanent and temporary copying) the Information Society Directive provides in article 5(1) a mandatory exception specifying that temporary acts of copying are to be exempted from the scope of reproduction right when they are: “transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject matter to be made and which have no independent economic significance…”\textsuperscript{28} This exception will be discussed further below.

3. THE COMMUNICATION TO THE PUBLIC RIGHT

3.1. Content, scope and interpretation

The communication to the public right protects the transmission and distribution of copyright works other than in physical form to members of the public not present at the place where the communication originates. It covers communication to the public of copyright works via online means of distribution, such as the internet or by broadcasting. There is no definition in the Information Society Directive of what is a public or private communication, though it is clarified in Recital 27 of the Directive that merely providing the physical facilities for enabling or making a communication does not in itself comprise a communication.\textsuperscript{29}

In the case of Broadcasting Ltd and others V TV Catchup Ltd (No 2) (Case C-607/11)\textsuperscript{30}, the CJEU noted that Directive 2001/29 does not define the concept of


\textsuperscript{30} Case C-607/11 \textit{ITV Broadcasting Ltd and others v TV Catchup Ltd (No 2)}. Court of Justice of the European Union (2013).
“communication” exhaustively. Thus, the meaning and scope of that concept must be defined in the light of the context in which it occurs and also in the light of the principal objective of the Directive to establish a high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of the communication to the public. It follows, then, that “communication to the public” must be interpreted broadly, as Recital 23\textsuperscript{31} in the Preamble of the Information Society Directive expressly states.

In order for “communication to the public” to take place, some sort of “transmission” (or retransmission) is necessary. As it is characterized by a distance element in the sense that the transmission originates from one place and is received in another, the right of communication to the public shall include TV and radio broadcasting, Internet TV and radio, simulcasting, webcasting, streaming, near-video-on-demand (NVOD), pay-per-view, near-on-demand-pay TV, pod-casting as well as cable and online transmissions in general.\textsuperscript{32}

Indeed, article 3.1 of the Information Society Directive gives authors an exclusive right to permit any communication of their works by wire or wireless means, including making them available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them (e.g. online, on-demand services). However, the right of performers, record and film producers and broadcasters are limited under article 3.2 only to acts of making available their performances, phonograms, films and broadcasts in such a way that members of the public may access them from a place and at a time individually chosen by them. Accordingly, record and film producers are not given control over the broadcast of their works other than through on-demand services.\textsuperscript{33}

\textsuperscript{31}“This Directive should harmonize further the author’s right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts”, Recital 23 of the Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.


3.2 The making available right: content and components

The Information Society Directive categorizes the right of making available to the public as one component of a more general right of communication to the public. In particular, article 3 of the Information Society Directive introduces the right of “making available to the public” for authors and for the four types of related rights holders regulated in EU law, i.e. performers, phonogram producers, producers of the first fixations of films and broadcasting organizations.34 The right to make available is limited to methods of interactive users, of availability on demand. It applies when the work is accessible for members of the public, irrespective of whether and how often it is actually accessed. Examples include offering for download or streaming of a work from an online store or a pay-per-view television channel, as much as offering (sharing) music or video files over a peer-to-peer file-sharing television.35

The concept of “making available” set out in article 3.1 of the Information Society Directive necessarily encompasses not only the actual transmission of a work to members of the public, but especially the offering to the public to access the work on demand. The phrase “may access”36 indicates that actual access to the work by a member of the public may occur at a later time or not at all.37 The right covers the offering to the public of a work for individualized streaming or downloading; in addition, where it takes place, the actual transmission of a work to members of the public also is covered both irrespective of the technical means used for making available. In essence, what matters is that the act (i) is performed by an individual person (ii) directly or indirectly has the distinct effect of addressing the public, irrespective of the tool used

36 Authors of literary and artistic works shall enjoy 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. Article 3.1 of the Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.
by the individual, and (iii) concerns subject matter protected by copyright or related rights.\footnote{Association Littéraire et Artistique Internationale (2014) Report and Opinion on the making available and communication to the public in the internet environment: focus on linking techniques on the Internet. \textit{European Intellectual Property Review}, pp.1.}

3.3 Principle of exhaustion

Both the making available right and the right of communication by wire or wireless means are not subject to the principle of exhaustion.\footnote{See Art. 3(3) of the Information Society Directive.} The circumstance that the making available right is not subject to exhaustion bears two significant consequences. On the one hand, it entails that, once certain copyright content is uploaded on the internet, this act of making it available does not exhaust the holder’s right to further disseminate the work through a different communication medium, such as by cable or satellite. On the other hand, it further implies that if and when users who enjoy works made available on the interest also download them on tangible equipment, they cannot further distribute such copies in the digital environment without express authorization, as such action would violate copyright holder’s making available right.\footnote{Arezzo, E. (2014) Hyperlinks and making available right in the European Union – what future for the Internet after Svensson? \textit{International Review of Intellectual Property and Competition Law}, pp.6.}

3.4 The notion of “public”

In order for the right of communication to the public or the making available right to take place, it is essential that the act of transmission reaches a number of persons that can be qualified as the public. The notion of “public” is not defined in the Information Society Directive or any other relevant EU legal instrument, however, extensive case law of the CJEU has dealt with it.

Basically, the idea of public must be understood as covering all environments implicating a substantial number of persons beyond the confines of family circles and close friends. This means that copyright relevant communication may occur at any place where a substantial number of persons outside of a normal family circle and its social acquaintances are gathered. This embraces all places which are “open” to the public without restrictions, other than generally applicable restrictions such as an admission fee or a membership card imposed on the public at large. Hence communication acts, like performance or display, in public as well as semipublic
places, such as bars, clubs, hotels, lodges, factories and schools subject to more specific entry conditions, may also constitute communications to the public.\footnote{Association Litteraire et Artistique Internationale (2014) Report and Opinion on the making available and communication to the public in the internet environment: focus on linking techniques on the Internet. \textit{European Intellectual Property Review}, pp.4.}

However, the notion of the public contemplated by these exclusive rights does not presume a physical gathering of people in the same place to jointly enjoy the work, but rather presupposes a fragmented notion of the public. Works broadcast by wire or wireless means, as well as works made accessible on the internet, exhibit the peculiar feature that they are generally received by single users and experienced in the privacy of their homes. In any case, what is essential for this requirement to be met is that the act of transmission is performed in such a way as to potentially reach an indeterminate but fairly large number of potential viewers. What is important is not the (economic) relevance of the single user, but the cumulative effect created by the number of people who simultaneously or in succession may access the work.\footnote{Arezzo, E. (2014) Hyperlinks and making available right in the European Union – what future for the Internet after Svensson? \textit{International Review of Intellectual Property and Competition Law}, pp.5.}

The CJEU has decided that the concept of communication to the public within the meaning of article 3(1) of the Information Society Directive covers a retransmission of the works included in a terrestrial television broadcast, where the retransmission is made by an organization other than the original broadcaster and by means of an internet stream made available to the subscribers of that other organization who may receive that retransmission by logging on to its server, even though those subscribers are within the area of reception of that terrestrial broadcast and may lawfully receive the broadcast on a television receiver. Further, the CJEU noted that communication to the public was neither influenced by the fact that retransmission is funded by advertising and is therefore of a profit-making nature, nor by the fact that the retransmission was made by an organization which is acting in direct competition with the original broadcaster.\footnote{See \textit{TVCatchup} (2013) Bus. L.R 1020 at (42)-(44). It should be observed that the CJEU in \textit{Premier League and Murphy} (2012) Bus. L.R. 1321 at (204), found it “not irrelevant” that communication within the meaning of art. 3 (1) of Directive 2001/29 is of a “profitmaking nature”. In its \textit{TVCatchup} decision the CJEU reduces this; a profit-making nature of a communication is “not necessarily an essential condition for the existence of a communication to the public”; (2013) Bus. L.R 1020 at (42).}
4. COPYRIGHT EXCEPTIONS

4.1 The mandatory exception for temporary copying

Pursuant to article 5(1) of the Information Society Directive “temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independence economic significance, shall be exempted from the reproduction right provided for in Article 2”.

The article 5(1) temporary copying exception is the sole mandatory counter – balance to the broad definition of reproduction right. The article 5(1) conditions are cumulative, so non-compliance with any of them will mean that the act falls outside the exception and as they derogate from a general right, the conditions must be interpreted strictly. It contains a number of terms which are not defined clear in EU legislation. However, the Recitals to the Information Society Directive give some further guidance in relation to the policy behind and interpretation of this exception.44

Apart from Recitals 4, 9 and 31 that defend the high level of protection of intellectual property and the safeguard of rights and interests between the different categories of rightholders and users of protected subject-matter, Recital 33 provides that this exception covers browsing of content as well as acts of caching (e.g. the temporary storage of digital data to make the transmission of data easier and avoid network congestion by too much data being transmitted at the same time). However, it does not make it clear that browsing is actually permitted as it states that the conditions of Article 5(1) must still be met.45 Recital 33 also expands on what “lawful use” in part (b) of the fourth condition means, stating that: “A use should be considered lawful where it is authorized by the rightholder or not restricted by law”. A use can therefore be lawful even if not authorized by the right owner provided that such a use is not unlawful in itself. This permission for lawful uses is an extremely important element of article 5(1), as it serves to ensure that acts which where lawful in the non-

digital world are not rendered unlawful in the digital world simply because temporary copies are an inherent part of the operation of digital technology.  

### 4.2 The optional exceptions

In article 5 sub-paras 2 and 3 of the Information Society Directive there is a list of twenty optional exceptions from the reproduction and communication to the public rights, whose application is left entirely to the discretion of the individual Member States. The list is exhaustive, so any existing exception which does not fall within the exhaustive list has to be removed or modified and no new exceptions may be introduced unless they fall within the listed exceptions.  

The exhaustive character of this list is clarified under Recital 32 of the Information Society Directive, which states expressly that “this Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future”.

### 4.3 The three-step test

Article 5(5) of the Information Society Directive provides that the exceptions and limitations in sub-paras 5(1)-(4) “shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.  

This provision is regarded as essential by copyright holders and, more in general, by the creative industries insofar as it confines the implementation of exceptions and limitations to special cases which do not conflict with a normal exploitation of the protected work and do not cause an unreasonable prejudice for the legitimate interests of the copyright holder. In short, the test makes sure that exceptions and limitations do not end up affecting unreasonably (i.e. excessively) the market for the copyrighted work. What is still unclear, is whether the test should be

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regarded just as a set of (mandatory) requirements for Member States that codify their own national exceptions under their laws or also (and most important) as a binding test for national courts when they evaluate and apply the exception stemming from article 5 of the Information Society Directive.48

CHAPTER III: CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. LINKING

1.1 THE SVENSSON CASE (C-466/12)⁴⁹

On February 13, 2014, the CJEU handed down its judgment on the application of Directive 2001/29/EC to hyperlinking answering essentially the question of whether the act of linking, by anyone other than — nor authorized by — the copyright holder, may amount to a violation of the making available right as introduced in national laws pursuant to article 3(1) of the Information Society Directive.⁵⁰

1.1.1 The facts of the case

The case involved Nils Svensson and three other Swedish journalists whose press articles were published in the Goteborgs-Posten newspaper and on the newspaper’s freely accessible website. As holders of copyright in their written works, Mr. Svensson and the other journalists brought an action before the Swedish courts against Retriever Sverige AB, a Swedish website providing hyperlinks to the articles. The claim for compensation was dismissed at first instance by the Stockholm District Court, a decision that Mr. Svensson and his colleagues appealed to the Svea Court of Appeal in Stockholm, which in turn, referred various questions to the CJEU.

1.1.2 The referral

The main issue examined by the CJEU was whether the inclusion on a company’s website of clickable links redirecting users to works freely available on another website constitutes an “act of communication to the public” within the meaning of Article 3(1) of the Information Society Directive.⁵¹ ⁵²

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⁴⁹ Case C-466/12 Nils Svensson v Retriever Sverige AB, Request for a preliminary ruling from the Svea hovrätt (Sweden), lodged on 18 October 2012.


⁵² The questions that were referred to the Court of Justice are set out below:

(1) “If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of the Copyright Directive?

(2) Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
1.1.3 **The judgment**

"An act of communication"

The CJEU concluded that article 3(1) of the Information Society Directive requires two cumulative criteria: first, an “act of communication” of a copyright work and, secondly, the communication of that work to a “public”.

Specifically, the CJEU mentioned that the notion of an “act of communication” must be construed broadly, referring to any transmission of the protected works, irrespective of the technical means or process used to transmit them. In addition, it held that an “act of communication” occurs when a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity.\(^{53}\)

**Communication to a “new public”**

In assessing whether a protected work has been communicated to a “public”, the CJEU introduced the theory of the “new public”, namely a public that was not taken into account by the copyright holders at the time the copyright work was published on the internet initially. Thus, since the original communication of the applicants’ press articles (undertaken with their consent) allowed free availability to all users of the internet, there was no communication to a “new public”.\(^{54}\) In addition, the fact that the material

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(3) When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?

(4) Is it possible for a Member State to give wider protection to authors’ exclusive right by enabling communication to the public to cover a greater range of acts than provided for in Article 3(1) of the Copyright Directive?\(^{54}\)

\(^{53}\) See para 19 of the Svensson judgment: “As is apparent from Article 3(1) of Directive 2001/29, for there to be an “act of communication”, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity (see, by analogy, Case C-306/05 SGAE (2006) ECR I-11519, paragraph 43)”.

appeared to the user to be on the defendant’s site rather than on the originating site did not alter this conclusion. \textsuperscript{55}

However, the CJEU held that the use of hyperlinks would be directed to a new public (and hence in breach of the communication right) if their use circumvented restrictions on the originating site which had been put in place to protect works and restrict public access, since these users would not have been contemplated (“taken into account”) by the copyright holders when originally posting their works on such a site.\textsuperscript{56}

\textbf{1.1.4 Conclusions}

In summary, in the Svensson case the CJEU confirmed that providing a hyperlink to a copyright-protected work is an act of communication to the public for copyright purposes, i.e. it potentially infringes copyright. However, to infringe, the hyperlink must direct a “new public” to the work, that is to say, a public that was not taken into account by the copyright holder at the time the initial communication was authorized. Therefore, as a matter of copyright law, the owner of a website may, without the authorization of the copyright holders, redirect internet users, via hyperlinks, to copyright works available on a freely accessible basis on another site, but if the protected work is not available on a freely accessible basis (for example because of access restrictions), then, if the hyperlink enables users to circumvent any restrictions, the act of hyperlinking would infringe the copyright in the work.\textsuperscript{57}

\textbf{1.1.5 Implications of the CJEU’s judgment}

Undoubtedly, the CJEU’s judgement in the Svensson case is ground-breaking, as it almost inevitably immunizes linking from copyright liability. However, four separate issues have been heavily disputed by commentators.


\textsuperscript{56} Ibid, p.1.

Is it linking communication/making available to the public?

The first issue is the total imbalance in the time and space the CJEU devoted to analyzing the two constituent elements of the making available right, that is to say, the transmission of the work and the way a work is accessed.

In particular, the CJEU’s reasoning started with the clear-cut assertion that the provision of clickable link leading to a protected work must be deemed an act of communication and it quickly moved to access the element of “new public”. In other words, the idea that linking is regarded as an act of communication of copyrighted content, which is a statement of crucial relevance in the legal assessment of linking practices, was not explained by any in-depth legal reasoning. The Court only asserted that if linking has the effect of making the work available in such a way that the public may access it, it then constitutes an act of communication.58 59 60

Is the theory of “new public” correct?

The second issue that the CJEU held in the Svensson case was the concept of the “new public” defined it as the public that was not taken into account by the copyright holders when they authorized the initial communication to the public. This definition involves an apparently subjective test, making the copyright holder’s consent a crucial

59 The Executive Committee of the ALAI has stated that ‘links which lead directly to specific protected material, thereby using its unique URL, fall normally within the framework of a copyright use. This kind of linking is thus a “making available” regardless of whether the link takes the user to specific content in a way that makes it clear to the user that she has been taken to a third-party website, or whether the linking site retains a frame around the content so that the user is not aware that she is accessing the content from a third-party website”, Mezei, P. (2016) Enter the matrix: the effects of the CJEU’s case law on linking and streaming technologies. Journal of Intellectual Property Law and Practice, pp.11.
60 The European Copyright Society has argued – prior to the publication of the Svensson ruling -that linking may not be regarded as communication of copyrighted content, since data transmission is a prerequisite for that use. The Society has opined that under the text of InfoSoc Directive and its preparatory documents, the CJEU’s former jurisprudence and domestic court decisions, communication to the public requires an act of intervention on the part of the person providing transmission. This intervention means that the protected content is transmitted to the receiving party by wire or wireless means. In case of linking, however, transmission of the work does not take place, the link only “directs” to the recourse location of the content, Bently, L., Derclaye, E., Dinwoodie, B.G., Dreier, Th., Dussolier, S., Geiger, C., Griffiths, J., Hilty, R., Hugenholtz, P.B., Jansses, M.C., Kretschmer, M., Metzger, A., Peukert, A., Ricolfi, M., Senftleben, M., Strowel, A., Vivant, M., Xalabarder, R. (2013) The Reference to the CJEU in Case C-466/12 Svensson. Legal Studies Research Paper Series, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326, pp.2-6, 151.
factor in determining who formed the initial public for the purposes of the initial communication of work.\textsuperscript{61} This, in turn, raises the question whether, in cases where the initial communication to the public was not authorized by the copyright holder (so that the initial communication was itself an infringing act), it is not possible to say that any later communication is to a “new public”, since the copyright holder could not have “taken into account” any public in respect of the initial (illegal) communication. As such, it is likely that demonstrating a communication of a copyright work to an “new public” will not be an absolute requirement in all cases involving hyperlinks to copyright works post-Svensson but will apply only where the copyright holder has in fact authorized the initial communication of the work to a freely available website.\textsuperscript{62}

**Similarities with the Implied License Doctrine**

The reference to the circumstance that the protected work had been released to the public with no restriction measures as a crucial element to exclude liability of third parties’ linking activities brings to mind echoes of the implied license doctrine.

Pursuant to the implied license doctrine, certain conduct, not expressly authorized by the rightholder, should be deemed lawful when it has generated in third parties, acting in good faith, the impression that the rightholder has implicitly agreed to such conduct.\textsuperscript{63} Adapted to copyright and the linking discourse, application of the implied license doctrine leads to the conclusion that no permission is required from the website owner before making a link to his site since the owner of a website is in fact giving an implied license to link when he poses a document on the web. The owner knows that the web is navigated by links and linking is by far more usual way to access a document posted on the net. The user is not a direct infringer and the author of the link cannot be a contributory infringer. The mere fact of the publication of a website amounts to creating an implied license, because the whole point of the internet is to able to link to other sites.\textsuperscript{64} In this context, the legality of linking can be also inferred

\textsuperscript{61} In order for a hyperlink provider to prove that its provision of links is not infringing, it must show not only that the work is freely available on another website but also that the work has been initially communicated by the copyright holder with his or her consent.


from the circumstance that the owner of the material has not implemented any technical measure, amongst the many available, to prevent linking.65

The implied license doctrine is mostly encountered in common law jurisdictions, however, the solution of assuming an implied license has been applied in several Member States.66 For example, in British Leyland v Armstrong Patents67, the claimant, whose patent had expired, argued that by manufacturing exhaust pipes for British Leyland cars, Armstrong infringed British Leyland’s copyright in the drawings for their exhaust pipes. The House of Lords held that a manufacturer grants to the purchaser of a car an implied license to undertake necessary repairs himself or acquire the “spare part” from the most competitive supplier, in this case Armstrong. By analogy, the user may argue that web publishing on an open network propounds an implied license to access the information and, an access necessarily involves the making available right, thus there must be an implied license to it.68

Similarly, in the Bundesgerichtshof Google Images case69, a German artist displayed samples of her work on her website and claimed that she did not want her artistic work to be indexed by Google and displayed, in the form of thumbnail images, as search results following users’ queries. The Federal Supreme Court held that, although the showing of thumbnail images by Google’s image search engine infringed the artist’s making available right, the circumstance that the rightholder had made the works available on the internet without resorting to any technological measure to prevent indexing, sufficed to show that she had given her implied consent to such activity; therefore, she could not later object to linking by unauthorized third parties.

66 Recital 30 of the Information Society Directive states that “the rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licenses, without prejudice to the relevant national legislation on copyright and related rights”. That is to say, the idea of an implied license will depend on the respective national law of every Member State, since copyright contract law is not yet harmonized around Europe.
67 British Leyland Motor Corporation Ltd v Armstrong Patents Company Ltd and Another (1986) A.C. 577, HL.
In the Svensson case, the CJEU concluded that the linking performed was not infringing since the copyright holder did not require the insertion of restriction measures. The CJEU’s reasoning was based on the “new public” element rather than on the implied license doctrine. Particularly, the Court explained that if users to whom the works have been communicated by means of a clickable link could access those works directly on the very first site on which they were initially communicated, without the involvement of the party providing clickable links to such material, 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 authorized the initial communication. In other words, the CJEU did not take into account the fact that the rightholder’s behaviour gave third parties acting in good faith the impression that she agreed to a widespread diffusion of her work, but it only devoted attention to whether the rightholder has decided to make the protected work openly accessible on a large scale or not.\footnote{Arezzo, E. (2014) Hyperlinks and making available right in the European Union – what future for the Internet after Svensson? \textit{International Review of Intellectual Property and Competition Law}, pp.8.}

In conclusion, it seems that according to the CJEU the provision of a clickable link, although amounting to an act of communication of the work, can be infringing only if the linked content has initially been uploaded on the net with restriction measures that has the effect of making it available only to a restricted set of users. In contrast, if the copyright holder has permitted widespread circulation of the work, as typically happens when the protected content is put on the internet without any restriction measures, it must be deemed that all internauts count as potential viewers, so that linking cannot possibly enlarge the set of users of the work.\footnote{Arezzo, E. (2014) Hyperlinks and making available right in the European Union – what future for the Internet after Svensson? \textit{International Review of Intellectual Property and Competition Law}, pp.8.}

\textit{What does “restricting public access” actually mean?}

Finally, the CJEU did not make clear exactly what constitutes a website publisher “restricting public access”. Therefore, the question whether the existence of subscription terms or other contractual restrictions on the original site would be sufficient on their own to amount to “access restrictions”, remained.

Although this issue was not explicitly addressed in the CJEU’s judgment, it would appear consistent with the Court’s reasoning to conclude that contractual restrictions may not in themselves suffice. Particularly, the Court’s judgment refers to author’s exclusive right to authorize or prohibit any communication to the public of their
works. If, then, the author’s initial communication of their work to the public is made on
the condition that contractual terms prohibit hyperlinking to the work, the existence of
such contractual restrictions may be sufficient for a court to decide that the initial
website is not freely accessible or freely available after all. As such, it remains a
possibility that a statement on a website expressly prohibiting hyperlinking to a
copyright work could mean that such a hyperlink then potentially infringes the author’s
rights under article 3(1) of the Directive.  

1.2 THE C MORE ENTERTAINMENT AB CASE (C-279/13)  
Similarly, to the Svensson case, the Swedish Supreme Court submitted to the
European Court of Justice another preliminary question in the case opposing C More
Entertainment AB to Linus Sandberg.

1.2.1 The facts of the case
C More Entertainment was a company running its own website. The company bought
the right to stream ice-hockey matches “live” and make these matches available to its
paying customers by allowing them to click on a link that would take them to a webpage
placed behind a pay-wall. The defendant (Linus Sandberg) decided to provide a link to
this page that would allow its visitors to watch the matches C More Entertainment
streaming for free.

1.2.2 The referral
The Swedish Supreme Court referred five questions to the CJEU for a preliminary
ruling. The main thrust of the reference was: (1) whether the insertion of hyperlinks on

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72 Baker, A. (2014) EU Copyright Directive: can a hyperlink be a "communication to the public? Computer
73 Case C-279/13 C More Entertainment AB v Linus Sandberg, Request for a preliminary ruling from the
Hogsta domstolen (Sweden), lodged on 22 May 2013.
Offprint of article from LIBER AMICORUM JAN ROSEN, pp.772.
75 The questions that were referred to the Court of Justice are set out below:

1. “Does the expression communication to the public, within the meaning of Article 3(I) of the
Information Society Directive, include measures to make available on a website open to the
public of clickable link to a work which is broadcast by the holder of the copyright in that work?
2. Is the manner in which the linking is done relevant to the answer to question 1?
3. Is it relevant if the access to the work to which the linking is done is in any way restricted?
4. May the Member States give wider protection to the exclusive right of right-holders by enabling
“communication to the public” to cover a greater range of acts than provided for in Article 3(I) of
the Information Society Directive?
internet sites constituted an act of communication to the public, and (2) whether the Member State may give wider protection to the exclusive right of authors by enabling communication to the public to cover a greater range of acts than provided for in the Copyright Directive. However, when the Svensson case was decided, the Swedish Court withdrew four out of the five questions it referred and the CJEU proceeded only with the question contained in (2) above.\textsuperscript{76}

1.2.3 The judgment

To reach its judgment, the CJEU took into account that: a) the objective of the Information Society Directive is not to remove or prevent differences between national legislations which do not adversely affect the functioning of the internal market\textsuperscript{77} and, b) neither article 3(2) of the Information Society Directive nor any other provision thereof states that EU legislature seeks to harmonize and prevent or remove any differences between the national legislations as regards the extent of the protection which the Member States may grant to the holders of the rights referred to in article 3(2)(d).\textsuperscript{78} Based on these considerations, the CJEU answered that Member States could provide for more protective provisions in respect of the broadcasting and communication to the public provided that such an extension does not undermine the protection of copyright.

1.2.4 Conclusions

The CJEU’s judgment in C More Entertainment case wasn’t much of a surprise since the broadcast was not offered on a freely accessible basis, but C More had confirmed that there was no free rein in terms of linking to all content on the internet. This case confirmed that in order to effectively limit the exploitation of copyright protected works by means of hyperlinking, right holders should restrict access to the works using paywalls and other technical measures. However, the C More case did not enlighten us further on questions such as the efficacy of other types of restrictions such as

\textsuperscript{5} May the Member States give wider protection to the exclusive right of authors by enabling “communication to the public” to cover a greater range of acts than provided in Article 3(I) of the Information Society Directive?”.


\textsuperscript{77} Ibid

restrictions included in the license terms and conditions of a “freely accessible” targeted website.\textsuperscript{79}

\textbf{1.3 THE GS MEDIA CASE (C-160/15)}\textsuperscript{80}

On 8 September 2016, the CJEU delivered a landmark ruling in the GS Media case on hyperlinks and copyright infringement.

\textbf{1.3.1. The facts of the case}

In the GS Media case, the defendant (GS Media) was the operator of a popular Dutch gossip website called GeenStijl. Sanoma, which was publishing the Playboy magazine, objected to the publication by the GeenStijl website of hyperlinks to other websites hosting unpublished photographs of media personality Britt Dekker, over which Sanoma had the rights and which it intended to publish in a forthcoming issue of Playboy. Despite Sanoma’ s demands, GS Media refused to remove the hyperlinks from the website.\textsuperscript{81}

The dispute was initially heard in the Amsterdam District Court and was subsequently appealed to the Amsterdam Court of Appeal and the Dutch Supreme Court, before being referred to the CJEU.

\textbf{1.3.2 The referral}

The case’ s reference\textsuperscript{82} for a preliminary ruling concerned the interpretation of article 3(1) of the Information Society Directive and in particular, whether, and in what

\begin{itemize}
\item[1(a)] 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 rightholder, does that constitute a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29?
\item[1(b)] Does it make any difference if the work was also not previously communicated, with the rightholder’s consent, to the public in some other way?
\item[1(c)] Is it important whether the ‘hyperlinker’ is or ought to be aware of the lack of consent by the rightholder for the placement of the work on the third party’s website mentioned in 1(a) above
\end{itemize}


\textsuperscript{80} Case C-160/15GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, Request for a preliminary ruling from the Supreme Court of the Netherlands, lodged on 8 September 2016.


\textsuperscript{82} The questions that were asked by the Dutch Supreme Court are:
circumstances, posting on a website a hyperlink to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a “communication to the public” within the meaning of article 3(1) of the Information Society Directive.\(^83\)

1.3.3 The judgment

The CJEU, as held in Svensson, reviewed the law on communication to the public as requiring both an “act of communication” and a “new public”, but also noted that an “individual assessment” should be applied in each case. To this end, the CJEU concluded that it is a key consideration whether the user knew or ought to know that the works in question were only already available owing to unlawful activity. Thus, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, such a person does not know and cannot reasonably know that that work had been published on the internet without the consent of the copyright holder, therefore he 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 contrast, when hyperlinks are posted for profit, it must be presumed\(^84\) that, that posting has been done with the full knowledge of the protected nature of the work and of the possible lack of the copyright holder’s consent to publication on the internet. In such circumstances, and in so far as this presumption is not rebutted, the act of posting a clickable link to a work illegally published on the internet constitutes a “communication to the public”. In

\[\text{(2a) If the answer to question 1(a) is in the negative: in that case, is there, or could there be deemed to be, a communication to the public if the website to which the hyperlink refers, and thus the work, is indeed findable for the general internet public, but not easily so, with the result that the publication of the hyperlink greatly facilitates the finding of the work?}\]

\[\text{(2b) In answering question 2(a), is it important whether the ‘hyperlinker’ is or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable by the general internet public?}\]

\[\text{(3) Are there other circumstances which should be taken into account when answering the question whether there is deemed to be a communication to the public if, by means of a hyperlink, access is provided to a work which has not previously been communicated to the public with the consent of the rightholder?}\]


\(^84\) It may be expected that the person who posted such a link, should carry out the checks necessary to ensure that the work concerned is not illegally published.
addition, the CJEU concluded that where it is established that the user knew or ought to have known the hyperlink posted provides access to a work illegally published, the provision of that link constitutes a “communication to the public”. The same applies if that link allows users to circumvent the restrictive measures taken by the site where the protected work is posted in order to restrict the public’s access to its own subscribers.85

1.3.4 Conclusions

To conclude, GS Media confirmed that Svensson applies only to the situation where the works linked to, were made freely available with the consent of the rightholder. However, the CJEU recognized that it is impossible or impracticable to find out whether a work is online with or without the rightholder’s permission.86 In that regard, the CJEU directed that there should be a presumption that the user ought to know the status of consent, where he/she is profiting or is seeking to profit, financially from providing the hyperlinks. In other words, it should be part of the due diligence, where the hyperlinking forms part of a commercial exercise, to check that the works to which hyperlinks are provided, are already online with the consent of the rightholder. Even if the goal is not financial gain, then the user might still be culpable, where it is on actual notice, or should otherwise have known that the works hyperlinked to, are online unlawfully.87

In this way, the CJEU ensured that the freedom to hyperlink is necessarily curbed. Where a hyperlink gives access to a work that should not already be online, and the user knows (or ought to know) that; or where that party seeks to profit from providing the link and therefore should have known that the original work is unlawfully online, this can be deemed to be a communication to a (new) public. The public that is


86 Particularly, the CJEU stated, “it may be difficult, in particular for individuals who wish to post such links, to ascertain whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet. Such ascertaining is all the more difficult where those rights have been the subject of sub-licenses. Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it”, GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, para. 46.

seeing the work online is not that contemplated by the rightholder. On that basis, intentional, deliberate, proliferation of unlawful copyright infringement is caught.  

2. FRAMING: THE BESTWATER INTERNATIONAL CASE (C-348/13)  

On 21 October 2014, the CJEU issued its decision in the BestWater case following a request for a preliminary ruling from the German Supreme Court.

2.1 The facts of the case

The dispute in BestWater arose from the display of a short video about water pollution, created by BestWater International, which produces and sells water filters. The video appeared on YouTube, apparently without knowledge or authorization by BestWater and was used by a competitor, who linked to the clip by means of “framing”, thereby making the clip visible on its own website. BestWater claimed copyright infringement of its clip and sought an injunction from the German courts. The defendant had meanwhile voluntarily ceased the use of the clip and the procedure was therefore limited to the restitution of damages.

2.2 The referral

The German Supreme Court referred to the CJEU the question whether where there is no transmission to a new public and no use of different technical means, the technique used by the defendants could amount to a communication to the public under the Information Society Directive and in a way that would require the rightholder’s consent.

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89 Case C-348/13 BestWater International GmbH v Michael Mebes and Stefan Potsch, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 June 2013.
92 The question that was referred to the Court of Justice is set out below: “Does the embedding, within one’s own website, of another person’s work made available to the public on a third-party website, in circumstances such as those in the main proceedings, constitute communication to the public within the meaning of Article 3(1) of the 2001 Copyright Directive (2001/29/EC), even where that other person’s work is not thereby communicated to a new public and the communication of the work does not use a
2.3 The order

The CJEU answered the referral in BestWater by way of a “reasoned order”. It considered that the technique used by the defendants raised the same issues in terms of copyright infringement as the provision of clickable links in Svensson and, therefore, it restated and applied the principles set out in detail in Svensson’ s judgment. Particularly, BestWater’s video was available to all internet users before the defendants’ alleged “communication” because it was freely accessible on YouTube. Therefore, there was no “new public” to which the work was communicated as a result of the defendant’s actions. Nor was there a different technical means, as the communication remained via the internet. Consequently, there was no infringing copying because the defendants were making the video available directly from YouTube.

2.4 Conclusions

The Court’s order raises several issues whereas questions remained unaddressed.

First of all, one would have hoped that the Court had seized this opportunity to differentiate its reasoning in the Svensson case and clearly distinguish between mere hyperlinking and framing. In the Svensson case, the CJEU determined that any form of hyperlink is in principle subject to the communication to the public right unless there is no “new public”. This reasoning seems very far-reaching given that a hyperlink is, as such, no more than a technical tool to switch from one URL address to another. By contrast, the framing technique (in particular of audio or video streams provided by another website) is markedly different from hyperlinking, because in this case the end-user is not directed to the webpage where the original content is placed. That makes

specific technical means which differs from that of the original communication?”, BestWater International GmbH v Michael Mebes and Stefan Potsch, para. 11

93 The CJEU’s rules of procedure (Rules) provide a means for the CJEU to reply to a referral by a national court by reasoned order only (not a hearing and detailed judgment) in limited circumstances. Those circumstances include where the question referred by national court in “identical to a question on which the court has already ruled” (Rules art. 99), Mazzola, L. (2015) BestWater for linking or framing content: BestWater International GmbH v Michael Mebes and Stefan Potsch. Entertainment Law Review, pp.2.

this type of communication more clearly an economic form of exploitation, which is a crucial distinction.\textsuperscript{95, 96}

Secondly, the question of whether embedding copyrighted videos available on the Internet would ever be tantamount to copyright infringement remained open in cases where the source video was uploaded without permission of the right owner. In this regard, it is remarkable that the CJEU recognized, but did not validate, the BestWater’s claim that it had not authorized the clip to be uploaded on YouTube, as this fact could and should have been taken into account for the question of a “new public”.

In addition, the wording of the request for a preliminary ruling by the German Supreme Court explicitly referred to the given circumstances of the actual case. Did the Court wish to indicate that as long as the copyright owner had not ordered YouTube to take the clip down it was considered tolerated and thereby lawfully available for everyone’s free use? And what if, though such a take-down order had been given, the clip re-appeared on YouTube or any other social network, as is often the case? It is difficult to imagine that the Court wished to suggest that the lawfulness of the first uploading of the original content is entirely irrelevant.\textsuperscript{97}

Finally, the lawfulness of embedding copyright – protected content subject to conditional access, e.g. the website hosting the source video was protected by a technological measure designed to prevent or restrict access, was not addressed.

3. BROWSING: THE MELTWEB E CASE (C-360/13)\textsuperscript{98}

On June 5, 2014, the CJEU handed down its judgment on the application of Directive 2001/29 to internet browsing; specifically, the creation and temporary storage of copies of copyright material on a computer monitor (on-screen copies) and in the computer’s “cache” on the hard disk drive (cached copies).

\textsuperscript{95} In the TVCatchup case (C-607/11), the question whether the third-party’s re-use of a broadcast programme was a communication under Article 3 of the Information Society Directive, the question of a “new public” was not held relevant.


\textsuperscript{97} Ibid

3.1 The facts of the case

The case involved a dispute between Public Relations Consultants Association Ltd (PRCA) and Newspaper Licensing Agency Ltd (NLA) (and others). The PRCA was an industry body for public relations professionals and was a party to these proceedings on behalf of its members in respect of their use of media monitoring services offered by the Meltwater group of companies (Meltwater). The NLA was a collective licensing agency which licensed copyright material and collected royalties on behalf of newspapers publishers in the United Kingdom. While Meltwater had, after a period of refusing to do so, agreed to purchase a license from the NLA in respect of its provision of the media monitoring service to its customers (including PRCA members), the PRCA maintained that the online receipt of the monitoring reports by Meltwater’s customers did not require a separate license.\(^99\)

Following lengthy litigation in the UK courts, the UK Supreme Court concluded that both on-screen copies and cached copies of copyright material satisfy the conditions of the exemption in article 5(1) of the Information Society Directive.\(^100\) Nevertheless, recognizing that the issue had a transnational dimension, the UK Supreme Court referred a question to the CJEU for a preliminary ruling.

3.2 The referral

The referral was focusing on the applicability of Article 5(1) of the Information Society Directive on temporary acts of reproductions and Article 5(5) of the same Directive on the three-step test, rather than the legality of linking to protected subject matter.\(^101\) In particular, the CJEU was asked whether copies made automatically on screen and in the Internet “cache” memory of one’s computer when browsing material on the Internet come within the scope of the exception (found in article 5(1) of the Information Society

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Directive) for temporary and transient or incidental copies forming an integral part of a technological process.\textsuperscript{102} \textsuperscript{103}

3.3 The judgment

The CJEU, relying on earlier case law\textsuperscript{104}, held that article 5(1) of the Information Society Directive must be interpreted strictly as it is “a derogation from the general rule established by the Directive, that the copyright holder must authorize any reproduction of his protected work”.\textsuperscript{105} What is more, the CJEU established an overarching principle, that article 5(1) must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of rights holders and of users of protected works who wish to avail themselves of those technologies.\textsuperscript{106}

Temporary act of reproduction?

Specifically, the CJEU concluded that both the on-screen and cached copies were temporary, given that the on-screen copies were automatically deleted as soon as the internet user moved away from the website, and cached copies were also normally

\begin{itemize}
\item an end-user views a web-page without downloading, printing or otherwise setting out to make a copy of it;
\item copies of that web-page are automatically made on screen and in the Internet “cache” on the end-user’s hard disk;
\item the creation of those copies is indispensable to the technical processes involved in correct and efficient Internet browsing;
\item the screen copy remains on screen until the end-user moves away from the relevant web-page, when it is automatically deleted by the normal operation of the computer; and
\item the copies are retained for no longer than the ordinary processes associated with Internet use referred to at (iv) and (v) above continue;
\end{itemize}

\textsuperscript{102} “In circumstances where:


automatically replaced by other content after a certain time, even though this would be affected by the capacity of the cache and on the extent and the frequency of internet usage by the internet user concerned.  

**Transient or incidental?**

In addition, it reached that on-screen caches were transient even though the technological process and copies remained in existence for as long as the browser remained open, determining that the duration of the caching was still limited to what is necessary for the technical process concerned to work properly while cached copies were held to be incidental in light of the technical process used because they neither exist independently nor have an independent purpose outside internet browsing.  

**An integral and essential part of a technological process?**

What is more, it stated that cached copies form an integral part of internet browsing, as they facilitate access to contents online since the acts of reproduction were carried out wholly in the context of the implementation of a technological process and the on-screen and cached copies were created and deleted by the technological process used for viewing websites and were made entirely in the context of that process. Furthermore, the completion of those acts was necessary because without the cached copies the internet would be unable to cope with current volumes of data transmitted online, rendering the process used for viewing websites considerably less efficient. Similarly, the technology enabling the viewing of websites on computers required on-screen copies to be made if it is to function correctly and efficiently.

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107 James, S (2014) And breathe... you can continue browsing the internet, as the CJEU hands down its decision in PRCA v NLA (Meltwater). *Computer and Telecommunications Law Review*, pp.2.
108 Ibid, p.3.
110 James, S. (2014) And breathe... you can continue browsing the internet, as the CJEU hands down its decision in PRCA v NLA (Meltwater). *Computer and Telecommunications Law Review*, pp.3.
Satisfying the conditions set out in article 5(5) of the Copyright Directive— the three-step test

Although the Supreme Court’s reference did not include any question relating to article 5(5) of the Information Society Directive, the CJEU held that on-screen and cached copies must also fulfil the components of the three-step test.

Specifically, the CJEU found that since these forms of copies are created only for the purpose of viewing websites, they were held to constitute a special case. Moreover, the copies were held not to reasonably prejudice the legitimate interests of those rightholders because the works are made available to internet users by the publishers of the websites who must obtain authorization from the copyright holders as that making available constitutes a restricted communication of the public, so their legitimate interests are safeguarded.112 Similarly, the creation of on-screen copies and cached copies does not conflict with a normal exploitation of the copyright works, with the on-screen and cached copies making it “possible for internet users to avail themselves of the communication to the public made by the publisher of the website concerned”.113

3.4 Conclusions

In summary, the CJEU’s judgment in the Meltwater case confirmed that the copies of copyright material which are created on a computer screen in order for webpages to be viewed by an internet user and the copies which are created in the cache of that internet user’s computer hard disk in the course of viewing a website will benefit from the exemption to copyright infringement as set out in article 5(1) of the Information Society Directive, on the basis that such copies satisfy the conditions of article 5(1) as well as the conditions set out in article 5(5). Consequently, such copies may be made without the authorization of the copyright holders.114

Undoubtedly, this decision is, in many ways, a resounding victory for common sense. The CJEU, in terms of both the law and the case itself, looked at the bigger

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picture, focusing on whether the copying was integral or essential to the technological process. A decision otherwise would almost certainly have damaged Europe’s attractiveness as a centre of commerce. In so doing, the CJEU gave a somewhat elastic interpretation of article 5(1) of the Information Society Directive, particularly around its findings that on-screen copies were transient even though they remained in existence for as long as the internet users kept their browser open and despite the fact that it had already made clear that the exceptions should be interpreted restrictively. Furthermore, article 5(5) of the Information Society Directive played a big role with the CJEU making it clear that it needs to be satisfied in addition to article 5(1). The key to satisfying the requirements of article 5(1) appears to be making sure that authorization has been sought at some level. If this were not the case, then there would have been the unsatisfactory and impractical consequence that internet users would not be able to browse content on the internet without the copyright owner’s consent.\(^{115}\)

In any case, the limits of this CJEU’s judgment should be borne in mind. The case concerned the application of article 5(1) to the browsing of websites only; downloading, forwarding or printing out the content of a website, as well as any kind of commercial exploitation of it, will fall outside of the article 5(1) exemption and/or fail to satisfy the additional conditions set out in article 5(5). In the context of data aggregation services, such as the media monitoring service provided by Meltwater, it is clear that those providing such services to customers will still need to obtain the consent or authorization of the relevant right holders. Moreover, those customers will still need to obtain a license to receive services which involve the delivery of copies other than on-screen copies and cached copies. It remains, therefore, to be seen whether the recipients of copyright materials in other online contexts, such as the end-users of media streaming services provided by a service provider akin to Meltwater, might try to use the Meltwater case to argue that their receipt of streamed content does not require the authorization of the rightholder, even if the provider is licensed.\(^{116}\)

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\(^{115}\) James, S. (2014) And breathe… you can continue browsing the internet, as the CJEU hands down its decision in PRCA v NLA (Meltwater). *Computer and Telecommunications Law Review*, pp.5.

CONCLUDING REMARKS

There is no doubt that the creation and ever-increasing importance of the internet have created great challenges for intellectual property law. Some of these challenges result from the need to apply established principles of intellectual property law to questions that the framers of the legislation could not have envisaged. Others derive simply from the nature of the internet.117

This being the case, in recent years the CJEU has issued some interesting, yet controversial rulings attempting to interpret EU copyright law and balance the rights and interests of the various stakeholders. By doing so, the CJEU interpreted the reproduction right and the concept of communication to the public, as well as the exceptions and limitations to exclusive rights more or less restrictively based on the actual facts of each case. In addition, it turned to other complementary criteria, such as the profit-making nature of the activity, the existence of an intentional, deliberate and indispensable intervention by the operator, the existence of a new public as well as of new technical means different from that of the original communications.118

Even though the CJEU’s judgments seemed to have favoured the rights of the users over those of the rightholders due to the inherent benefits of distribution of knowledge that the internet seeks to perform, it did appear to sufficiently protect the interests of the rightholders too. The fact that linking is only lawful if the information is freely available online and the decisions appear only to apply when the initial act of communication was done under the authority of the rightholder as well as the presumption of knowledge of illegal publications in the case that the hyperlinks are provided for profit, are important caveats that the CJEU included in its decisions to protect proprietors’ legitimate interests.119

However, and in spite of its attempt to safeguard a fair balance between the rights and interests of rightholders and of users who wish to avail themselves of these new technologies, the CJEU’s rulings on linking, framing and browsing tend to become overcomplicated, where arguments might be acceptable under some of the instances, whilst others might favour the opposite result. Particularly, concepts of public, making


available to the public, prohibition of evasion of technical restrictions are properly used by the CJEU. Conversely, theories of “new public” as well as “communication to the public by same technical means” appear controversial and give rise to some perplexities.\(^\text{120}\)

What it can be said is that in the CJEU’s judgments the common sense prevailed. This is because, if alternative answers were found, then the actions of hundreds of ordinary people who link and browse the internet every day, would have been to blame for copyright infringement. By doing so, the CJEU acknowledged the importance of the goals of the Information Society Directive by establishing the overarching principle that article 5(1) of the Directive must allow and ensure the development and operation of new technologies and safeguard a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter. In addition, it considered that the fact of categorizing all posting links to works published on other websites as “communication to the public” in the case where the copyright holders of those works have not consented to that publication on the internet, would have highly restrictive consequences for freedom of expression and on information and would not be consistent with the right balance which the Information Society Directive seeks to establish.\(^\text{121}\)

To conclude, the challenges thrown up by the new communicative technologies of the internet have been increasing owing to the accessibility of the internet from any place around the world and instant reproduction and recognition abilities. The CJEU has tried to protect the interests of the proprietors and the users in the diverse issues that have cropped up; however, it is still difficult to predict with certainty the nature of the issues that may be faced in the future.\(^\text{122}\) In any case, one can only welcome the efforts of the CJEU in harmonizing EU copyright law. Even though there are some who call the CJEU an “activist” court whereas others assert that it is going too far and stepping on the role of the EU legislator, taking into account the partial, fragmented and slow harmonization achieved and considering that full harmonization of copyright in the EU in the form of a single copyright code and title appears to be a long-term


target, the role of the CJEU has been fundamental in shaping EU copyright law.¹²³ What is left now is a good, well drafted law to keep up with the technological progress.

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