

## Enter the matrix: the effects of the CJEU's case law on linking and streaming technologies

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The Court of Justice of the European Union (CJEU) has published its *Svensson* decision on hyperlinks and *BestWater* order on embedding in 2014 – and thus contributed to a fierce debate on the future of popular online activities. On the one hand, the preliminary rulings evidenced considerable flexibility as they allow the use of hyperlinks to and the embedding of publicly available contents. Indeed, under *BestWater* the embedding of illegally published materials might be also accepted. On the other hand, those decisions have to be read in conjunction with the already existing case law of the CJEU, and to a certain extent the *Svensson* and *BestWater* rulings do contradict some of the earlier decisions. Not surprisingly, courts of the Member States are still struggling with the correct treatment of these forms of online activities, and thus they continue to rely on the CJEU's interpretation of EU Directives. This paper aims to briefly introduce the different types of linking. The CJEU case law will then be discussed: starting from the *Svensson/BestWater* cases, referring to former rulings such as *SGAE*, *TV Catch Up* or *ACI Adam*, and discussing the post-*Svensson* cases as well as currently pending applications. Finally, the paper aims to provide a balanced approach towards the treatment of linking, where external solutions – that is, other than the CJEU's own – might also be adopted.

### I. Trying to fit a square archaic peg into the hexagonal hole of modernity?

Notwithstanding its past spanning several decades, the copyright aspects of linking have always been subject to controversy. On the one hand, linking is an excellent example of end-user conduct in the information society as it gives rise to speedy and effective use of Internet. On the other hand, it enables access to content with a custom path even without the prior consent of the entitled parties. It is therefore essential to strike a balance among the interests of different stakeholders.<sup>1</sup> This not only concerns a meaningful distinction between various linking techniques, but also the creation of harmony between copyright and other rights, or as the case may be, fundamental rights. In addition, answers to these questions may not necessarily be taken from the analogue world. As stated by the Supreme Court of Canada, "strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity".<sup>2</sup>

The primary objective of linking is to facilitate access to information on the World Wide Web that has virtually become impossible to untangle by now. The Executive Committee of ALAI noted that "[g]enerally speaking, hypertext links and inline 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. The fundamental contribution of links to Internet traffic is to speed up the user's access to files on the Internet. 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".<sup>3</sup> Further, in the words of *Collins*, "hyperlinks are the synapses connecting different parts of the World Wide Web. Without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it".<sup>4</sup> At the same time, links make it possible for Internet users to express their opinions in an online environment. As *Dalal* indicates, "hyperlinks have long been understood to be critical to communication because they facilitate access to information. They provide visitors to a website with a way to navigate to internally referenced words, phrases, arguments, and ideas. Under this view, if the Internet is an endless expanse of information where 'any person ... can become a pamphleteer', then 'hyperlinks are the paths among websites, creating the bustling street corners for distribution of those pamphlets and inviting passers-by to engage more deeply with the issues raised'".<sup>5</sup> All of these quotes demonstrate the inevitable nature of linking in the digital age.

Technologically speaking, various types of links can be distinguished.<sup>6</sup> A hyperlink is known as a digital reference that may well be termed "an online footnote".<sup>7</sup> As *Tim Berners-Lee* said once, "Myth [one]: 'A normal link is an incitement to copy the linked document in a way which infringes copyright'. This is a serious misunderstanding. The ability to refer to a document (or a person or anything else) is in general a fundamental right of free speech to the same extent that speech is free. Making the reference with a hypertext link is more efficient but changes nothing else".<sup>8</sup>

A hyperlink may also refer to a website's main domain address (*surface* or *shallow link*) or an inside page (*deep link*). The latter is usually a lengthy and complex text which, as opposed to a simple home page address, cannot be expected to be casually memorised by end-users.

*Framing* enables a website to make external websites visually perceptible embedded in a "frame" and surrounded by the host website's information, like a "picture-in-picture". At the same time, the visualised content functions as a link: a path pointing to the source website. A similar objective is fulfilled by *in-line linking* (*inlining*), the difference being that in this case individual visual/graphic works become accessible from the linking site which function as paths to the host site. Images are displayed in both of these cases without being reproduced on the linking site servers.<sup>9</sup> Practically the same end is pursued by *embedding*, where audio-visual content is inserted into the host website.

To a significant extent, linking overlaps with *search engines* or *RSS feed*. Search engines provide Internet users with texts or visual links (known as *thumbnails*) following a keyword search. *RSS* ensures tracking of frequently updated website content in that the user, having set the *RSS*, may access all updates (*feed*) of the specified website by means of a single link.<sup>10</sup>

Taking everything into consideration, a two-fold distinction may be made among the various instances of conduct involving linking. One of them focuses on the service provider's (linking person's) mind-set. While search engines offer links exclusively on the user's initiative, passively and based on their own algorithms,<sup>11</sup> the *RSS*, upon subscription, automatically notifies users of the

latest news/changes and delivers reference links. The other relevant difference arises in the way the source content is accessed or otherwise made available. In the case of framing, inlining and occasionally embedding, the referenced content is automatically displayed on the page "invoking" the content and is made accessible without any further act on the user's side. Using hyperlink texts and most often watching embedded videos requires affirmative action by the end-user. Visitors of the website are required to click on the pointer in order to be able to view the linked content.

Due to these technological differences it is not possible to provide a uniform answer on bright line copyright rules with respect to linking. Indeed, the fact that several notable illicit services are based on some forms of linking<sup>12</sup> makes it clear that linking has to be discussed carefully. Indeed, a careful analysis is needed from a social perspective as well. As *Headdon* aptly noted:

"the proposition that linking should be controlled by law can understandably elicit powerful emotional responses".<sup>13</sup>

The essence of linking in all of its forms is that the service providers do not reproduce the content accessible at the other end of the path. In practice, the infringement of the economic right of reproduction is excluded. Instead, the possibility of integration into the traditional legal category of communication to the public as well as its subcategory known as making available to the public<sup>14</sup> may arise.

In this respect, a myriad of rulings have been encountered in the jurisprudence of the European Union from the past decade. In a considerable number of cases courts excluded liability for linking,<sup>15</sup> in some other instances, however, they ruled in favour of claimants.<sup>16</sup>

The aim of the article is to summarise the most recent case law of the Court of Justice of the European Union (CJEU) as well as its potential effects upon the fate of linking in general and beyond that on technologies like streaming. Chapter II introduces the "case law matrix" of the CJEU. It starts from *Svensson* and *BestWater* as well as those preliminary rulings that served as background decisions for the judges to apply the theory of a "new public" and the "communication to the public by same technical means" in linking cases. Further post-*Svensson* decisions, such as *C-More Entertainment* and *Public Relations v. Newspaper Licensing Agency*, as well as pending cases such as *GS Media* and *Stichting Brein* will be covered in order to demonstrate how complicated the treatment of this territory of law is. Chapter III tries to balance the interests at stake: it focuses both on the factual and social role of linking, as well as on the importance of protecting copyright holders.

## **II. Enter the CJEU matrix!**

### **1. The *Svensson* and *BestWater* rulings**

In 2014, the CJEU explored the copyright aspects of hyperlinks and embedding in two preliminary rulings. A decision was first rendered in the *Svensson* case.<sup>17</sup> The facts of the proceedings – the concerned technological solution in particular – were summarised by the CJEU as follows: "[t]he applicants in the main proceedings, all journalists, wrote press articles that were published in the Göteborgs-Posten newspaper and on the Göteborgs-Posten website. Retriever Sverige operates a

website that provides its clients, according to their needs, with lists of clickable Internet links to articles published by other websites. It is common ground between the parties that those articles were freely accessible on the Göteborgs-Posten newspaper site. According to the applicants in the main proceedings, if a client clicks on one of those links, it is not apparent to him that he has been redirected to another site in order to access the work in which he is interested. By contrast, according to Retriever Sverige, it is clear to the client that, when he clicks on one of those links, he is redirected to another site".<sup>18</sup>

The Swedish Supreme Court (Svea hovrätt) submitted four questions, essentially enquiring whether it constitutes an infringement of the right of communication to

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the public if a person publishes a link on its own website such that content located on another website is made available to the public.

The CJEU observed that Art. 3(1) of the InfoSoc Directive covers "communication of a work to the public",<sup>19</sup> which in its element supposes 1) "communication", 2) "of a work", 3) "to a new", 4) "public".

According to the Fourth Chamber, the act of communication must be construed broadly;<sup>20</sup> placing a hyperlink on a website thus satisfies the above criteria as it offers access on-demand. More precisely, "in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of that provision".<sup>21</sup> The concept of a "new public" was, however, crucial to the final outcome of the case.

The CJEU has interpreted the term 'public' as an indeterminate number of potential recipients that "implies ... a fairly large number of persons".<sup>22</sup> That said, placing a link on a public site is necessarily aimed at being received by the public.<sup>23</sup> However, what is missing in case of the examined facts is a "new public". Likewise, the CJEU also noted that the concept of a "new public" might be only relevant if the "re-communication" takes place with the same technical means.<sup>24</sup> That was certainly present in the *Svensson* case, as both the initial and the secondary communications took place via the Internet.<sup>25</sup>

The CJEU therefore stressed that "making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public. The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them. In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication".<sup>26</sup>

Consequently, in the light of the preliminary ruling, authorisation by the rightholders is not deemed necessary in case of linking, since it is carried out with the same technical means and at the same time and, therefore, does not result in the works being communicated to a new public. The Fourth Chamber emphasised, however, that if the link directs the public to a content which is not individually accessible by its members because viewing the content is subject to restrictive measures or a subscription (practically paywalls), the conceptual element of a “new public” could be established, and such linking will be subject to authorization.<sup>27</sup>

It is not absolutely clear what the CJEU means by technological measures. The fact that the term “circumvent” is included in the text might suggest that the CJEU made reference to effective technological measures<sup>28</sup> protected by EU law. The English version of the judgment, however, does not contain the expression “technological protection” which is part of the *acquis communautaire*, but the far more general term “restriction”. In view of this, there can be no doubt that the latter term not only covers effective technological measures but also paywalls, registration pages or “robot.txt” files.

Another request for a preliminary ruling was to be decided by the Luxembourg forum in the *BestWater* case. Pursuant to the Rules of Procedure of the CJEU, “where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.”<sup>29</sup> According to the Ninth Chamber, *BestWater* is exactly such a case.<sup>30</sup>

There, a two-minute long promotional video of a German company specialising in the production and sale of water filtration systems was made available on YouTube by unknown persons without the prior authorisation of the company. The defendants, two private individuals of a company that is a competitor of the plaintiff, embedded the relevant YouTube video on their own website. *BestWater* deemed this conduct to be infringing on its copyright and initiated legal proceedings. The case finally reached the CJEU where the justices were expected to establish whether framing (or to be more precise embedding) was in violation of copyright.<sup>31</sup>

The question submitted by the referring court seems to be in line with the CJEU’s previous jurisprudence. Accordingly, “in circumstances such as those in the main proceedings, does embedding a third-party’s copyright-

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protected work made available to the public on a third-party’s internet site into a person’s own website constitute a communication of the work to the public within the meaning of Art. 3(1) of Directive 2001/29/EC even if the foreign work is not being communicated to a new public and the communication is not the result of a specific technological process distinct from that of the initial communication?”<sup>32</sup>

One important element of the question concerns the concept of a “new public”. It was directed at the CJEU to establish whether the *Svensson* case might be interpreted as a precedent. The other cardinal point of the question focused on whether there was copyright infringement where the

communication was a result of a technological process identical to that of the original communication. Concerning the latter, the CJEU had already established in the *TV Catch Up* case that the existence of the Court's own requirement of a "new public" need not be examined where the user applies technological methods that are distinct from those applied during the communication to the first public.<sup>33</sup>

Given the CJEU's view represented in the above judgments, *BestWater* may not seem to have yielded any surprising results at first sight. As indicated by the CJEU, embedding is in full compliance with the two criteria mentioned above, since it concerns third-party content being placed onto a new website allowing use with technological means identical to those initially applied. This remains unaltered even if, at first sight, it may seem that the content is made available from the embedding website. In addition, this way, the content in question is not received by a new audience as any member of the audience had the opportunity to view the content through YouTube.<sup>34</sup>

However, the fact that the audio-visual content was uploaded to YouTube by unknown persons and not by BestWater should not be neglected.<sup>35</sup> Therefore, making the resource content available to the public on-demand was ultimately carried out by initially unlawful means. This circumstance, however, is a key distinction compared to the facts of *Svensson*. Thus, by paraphrasing the CJEU Rules of Procedure, the reply to such a question may not be clearly deduced from existing case-law or the answer to the question referred for a preliminary ruling permits reasonable doubt.

Nothing proves this more conclusively than the preliminary rulings of the CJEU handed down during other proceedings. The central issue of the *ACI Adam* case<sup>36</sup> revolved around the question whether, following reproductions made for private use, payment of fair compensation prescribed by the InfoSoc Directive is necessary where the reproduction comes from an unlawful source. Ultimately, the CJEU's negative answer unambiguously excludes the possibility of unhindered reproduction from unlawful sources, and hence the quasi-legality of file-sharing. In the light of the rationale of this judgment, it is absolutely incomprehensible why in the *BestWater* case the CJEU did not attach any importance to the fact that the promotional video was uploaded onto YouTube without authorisation.

## **2. Post-Svensson and BestWater case law**

Although the *C More Entertainment* case was ultimately decided solely under the umbrella of the scope of communication to the public, the case originated from a recent, popular method of using hyperlinks. C More Entertainment broadcasts ice hockey games via the Internet under a subscription model (the access fee was approximately 10 €). Mr. Sandberg set up a system that evaded C More Entertainment's paywall, and consequently Sandberg enabled end-users to access the streams of two ice hockey games via hyperlinks for free. Both the district and the appeals court found in favour of the plaintiff. Before the *Svensson* judgment was published, the Swedish Supreme Court (Högsta domstolen) took the view that it does not follow either from the InfoSoc Directive or the case law of the CJEU that providing a hyperlink to access protected materials is to be treated as communication to the public. The court thus referred five questions to the CJEU, including some concerning the legal treatment of hyperlinks. After the CJEU published its *Svensson* ruling and the Registry of the Court sent the judgment to the Högsta domstolen, the latter dropped its first four

questions, which were related to hyperlinks. This was the correct outcome, as the answers to the Högsta domstolen's questions were clearly deductible from the *Svensson* judgment.<sup>37</sup>

Another hyperlinks-related case found its way to the CJEU later, though decided earlier than the *C More Entertainment* case. In the *Public Relations v. NLA* case Meltwater (a group of companies) provided a news monitoring service, under which its clients received reports (headline, opening text and a "hit sentence") on media coverage as well as access to the source materials via hyperlinks on the basis of keywords submitted by the

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clients. If access to the source material was restricted by paywall, the Meltwater link did not circumvent such protection. Both the High Court and the Court of Appeals ruled in favour of the Newspaper Licensing Agency, but the Supreme Court had concerns about these conclusions. The focus of the case was on the reproduction of sections of the source materials both on-screen and in the cache memory of the end-users computers. Therefore the Supreme Court's referral focused on the applicability of Art. 5(1) of the InfoSoc Directive to temporary acts of reproduction and Art. 5(5) of the same directive on the three-step test, rather than the legality of linking to protected subject matter.

The CJEU held that cache copies as well as on-screen copies are to be treated as temporary acts of reproduction. Firstly, cache and on-screen copies are temporary, as they are deleted automatically after leaving a given website or when they are replaced by other contents.<sup>38</sup> Secondly, cache copies form an integral part of internet browsing, as they facilitate access to contents online and thus contribute to the effective and proper functioning of the internet.<sup>39</sup> Thirdly, on-screen copies are transient and incidental in nature, as they are deleted after leaving a specific website. The CJEU correctly noted that cache copies are not deleted solely by leaving a website, as they are kept in the RAM memory until the computer is turned off. The court, however, added that irrespective of whether cache copies are not transient in nature, the InfoSoc Directive requires the incidental *or* transient nature to meet the standards of Art. 5(1), and the incidental nature of cache copies is evidenced properly. The fact that the deletion of both on-screen and cache copies requires some form of human intervention does not change the outcome of the above syllogism.<sup>40</sup>

Further, the CJEU held that on-screen and cache copies not only meet the requirements regarding temporary acts of reproduction, but they also fulfil the components of the three-step test. The CJEU concluded that these forms of copies constitute a special case, do not unreasonably prejudice the legitimate interests of the authors, and do not conflict with the normal exploitation of the works. This is mainly due to the fact that the source materials were originally made available to the public by publishers having paid remuneration to the authors of those contents, and because browsing is the general means of accessing contents via the internet.<sup>41</sup>

Irrespective of the fact that the CJEU did not need to express any opinion on the linking perspective of the case, the *Public Relations v. NLA* judgment is vital to the fate of linking and streaming. Especially since the application of Art. 5(1) on on-screen and cache copies of media coverage made available by the publisher under proper authorization might be similarly applicable to other protected subject matter, including audio-visual contents streamed online. On the contrary, the

judgment – read strictly – might not function as a precedent in cases where the source material linked to and/or streamed is originally made available to the public without proper authorization.

### 3. Pending applications

Two applications currently pending before the CJEU have significant implications in the field of linking. Indeed, in one of them Advocate General *Wathelet* published his opinion that calls for an extremely liberal treatment of linking.

According to the facts of the case, C. Hermés shot photographs of G. B. Dekker under the commission of the Dutch Playboy magazine. The images were intended for publication in the December 2011 issue of Playboy; however, they were leaked prior to that. Unknown people uploaded the photographs to the servers of an Australian cyberlocker, FileFactory (and later to Imageshack's servers). GeenStijl, a Dutch website specialized in publishing materials on celebrities, published stories on the availability of the images and provided hyperlinks to the host site. Sanoma, the publisher of the Dutch Playboy, asked the cyberlockers to remove the images from their servers (which they actually did), and similarly, but unsuccessfully, requested GeenStijl to remove the links from their portal. Sanoma argued that setting a hyperlink directing end-users to protected contents that were made available to the public illegally infringes Sanoma's copyright. The trial court ruled in favour of Sanoma; however, GeenStijl's arguments were accepted on appeal.<sup>42</sup>

The Hoge Raad der Nederlanden (the Dutch Supreme Court) expressed its concerns about the applicability of the *Svensson* and *BestWater* rulings in this case, where hyperlinks direct end-users to copyrighted materials, which were made available to the public by unknown people without the permission of the rightholder.<sup>43</sup> The Hoge Raad referred several questions to the CJEU. According to the first question:

"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 Art. 3(1) of Directive 2001/29?"

(b) Does it make any difference if the work has also not previously been communicated, with the rightholder's consent, to the public in some other way?"

(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 and, as the case may be, of the fact that the work has also not previously been communicated, with the rightholder's consent, to the public in some other way?"<sup>44</sup>

The Advocate General agreed with the referring court that the CJEU case law does not provide a clear answer

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to the above scenarios, and hence the issue is a relevant one.<sup>45</sup> Although the Advocate General accepted the CJEU's argument that the right of communication to the public includes acts of making



available to the public, he fundamentally departed from the *Svensson* ruling. He declared that posting a hyperlink on a website – that accesses the content easier, quicker and directly – does not lead to an act of making the hosted material available to the public, assuming that the given contents are freely accessible via the internet. AG *Wathelet* shared the Portuguese Government's opinion that photographs were used by the person who initially provided access to them.<sup>46</sup> He further argued that both communication and making available to the public require the user's act to be "vital or indispensable" in order to promote the enjoyment of the protected work.<sup>47</sup>

AG *Wathelet* therefore opined that from the linking person's perspective it is both technically and legally irrelevant who originally uploaded the photographs to the cyberlockers. This means in essence that only the initial uploader makes the content available to the public, and therefore anyone – like GS Media – might provide a link to it, as such act does not constitute copyright-relevant use.<sup>48</sup> AG *Wathelet* concluded therefore that since one of the conceptual elements of "communication to the public" is lacking with respect to the linking person's act, it becomes irrelevant whether or not the rightholder authorized the initial communication.<sup>49</sup> AG *Wathelet* further stressed that GS Media's service was not indispensable to the works being made available, as the latter were freely accessible via the Internet.<sup>50</sup>

Finally, the Advocate General responded to the second question of the Hoge Raad in the negative, again in a rather liberal way:

"it is clear from para. 31 of the judgment in *Svensson and Others* that it is not sufficient that the hyperlink facilitates or simplifies users' access to the work in question".<sup>51</sup>

Another important case is still pending before the CJEU. There, the competent collective rights management association of the Netherlands, Stichting Brein, sued the producer of a media player (Filmspeler). The latter product allowed end-users to click on hyperlinks, which in turn directed them to films, series and live broadcasts that were made available online without proper authorization. End-users were also allowed to install different add-ons in the media player so that other contents – including authorized ones – might be streamed via hyperlinks.

Stichting Brein sued the defendant on 11 counts. The District Court of Mid-Netherlands (Rechtbank Midden-Nederland) referred two main questions to the CJEU. The first one is connected to the right of "communication to the public", namely whether setting up a media player that is capable of providing access via hyperlinks to unauthorized contents first made available by third parties requires authorization or not. The Rechtbank Midden-Nederland further added three sub-questions in this respect:

"[d]oes it make any difference

- whether the copyright-protected works as a whole have not previously been published on the internet or have only been published through subscriptions with the authorisation of the right holder?

- whether the add-ons containing hyperlinks to websites on which copyright-protected works are made directly accessible without the authorisation of the right holders are freely available and can also be installed in the media player by the users themselves?

- whether the websites and thus the copyright-protected works made accessible thereon - without the authorisation of the right holders - can also be accessed by the public without the mediator?"

Although some of the above sub-questions might be inferred from the prior rulings of the CJEU, the present case allows the forum to consider a clearly unique combination of facts. Similarly, the referring court's second question provides a chance for the CJEU to clarify its position on the illicit nature of source materials as an obstacle to lawful use. More precisely, whether the mere temporary reproduction of (illegal) streams on the screen and in the cache memory of the end-users' computers is lawful or not. If the CJEU allows such temporary reproductions, the referring court will need the CJEU to apply the three-step test of the InfoSoc Directive to the above scenario.<sup>52</sup> Generally speaking, the *Stichting Brein* will be one of the most awaited rulings of the CJEU. It allows the forum to set the most balanced approach with regard to the fate of hyperlinks and streaming, and consequently it will clearly affect the fate of online consumption of protected digital contents.

### III. The red pill or the blue pill?

The CJEU's rulings in the *Svensson* and *BestWater* cases are ground-breaking, as they almost inevitably immunize linking from copyright liability. Some elements of the decisions are, however, not fully grounded in EU (or international) copyright law. Four separate issues need to be addressed here in detail: does linking constitute *communication* to the public? Is the theory of a *new public* as well as the theory of the *same technical means* correct? Is the *illicit nature of the linked content* relevant to the legality of linking? Finally, if linking is treated as copyright-relevant use, what form of *law enforcement* provides the most balanced way of regulating this phenomenon? Who is the subject of law enforcement and is there any limitation to such liability?

#### 1. Does linking constitute communication/making available to the public?

Not surprisingly, commentators and scholars are divided over this question. The Executive Committee of ALAI argued that by clicking on the link the user requests the computer located at the other end to transmit the content available there towards the user. Thus, the content be

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comes available on the user's computer as well. The decisive condition of establishing copyright-relevant use is that by way of the direct or indirect conduct of the linking person the link should have the effect of making copyrighted content available to the person opening the link.<sup>53</sup> Based on this, the ALAI states 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".<sup>54</sup>

Contrary to the above, the European Copyright Society argued - prior to 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.<sup>55</sup> The Society opined that under the text of the InfoSoc Directive and its preparatory documents, the WCT and its proposal, 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".<sup>56</sup> 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, rather, the link only "directs" to the resource location of the content.<sup>57</sup> The professors were of the same opinion as regards framing as well.<sup>58</sup>

I think, however, that the categorization of linking as communication to the public by the CJEU is in accordance with the EU and international copyright norms. The CJEU has correctly noted that the said right has to be given a broad interpretation,<sup>59</sup> and hence the provision of a clickable link directing users to materials potentially protected by copyright needs to be treated as communication, indeed making available to the public. In the latter case, data transfer is not a condition of the use, it is sufficient if access to the content is provided by the user.<sup>60</sup>

A well-balanced interpretation of linking is expressed by the concurring opinion of Justice *Deschamps* delivered in the *Crookes v. Newton* case of the Supreme Court of Canada. The case was directed at answering the question whether a surface or a deep link referencing defamatory views made available online constitutes publication of the view for the purposes of defamation law.<sup>61</sup> According to the facts of the case, *Jon Newton* posted a commentary entitled "Free Speech in Canada" containing seven links on his website. Two of them directed to a website where defamatory materials were available concerning the politically ambitious CEO of a Canadian corporation and the Green Party of Canada. *Crookes* first personally requested *Newton* to remove the shallow and the deep link. Then failing to achieve his goal he repeated the notification by way of his legal representative. *Newton* refused to comply with the requests. *Crookes* sued *Newton* for defamation on the basis that by publishing the links referencing defamatory materials the defendant himself was publishing defamatory information. The decisions of both the first and the second instance were rendered in favour of the defendant.<sup>62</sup>

Based on the majority opinion of the Supreme Court of Canada, a hyperlink may be assessed as a content-neutral reference, a sort of online footnote at most. The person sharing the link only indicates to his reader that "something exists somewhere". What is more, the person sharing the link has no power to exert control over the linked content which may at any time be modified. For this reason, the defamatory statements are not made available to the public by the person creating the link but by the person that originally made them available to the public.<sup>63</sup> It was similarly emphasised by the Court that without links the Internet would be deprived of its very functioning. Any provision restricting linking is generally capable of undermining the advantages offered by this technology. In addition, all this would ultimately curtail the freedom of expression since a considerable number of end users would refrain from online references due to their fear of infringement. Ultimately, measures that restrain linking place the very existence of the Internet in jeopardy.<sup>64</sup> Naturally, this does not imply that a person linking to external content would automatically be exempt from liability. If the linked content is repeated on the linking person's

home page, i.e. if this person places a reference in an already defamatory environment, the aggrieved party may have access to a remedy in order to vindicate his or her reputation.<sup>65</sup>

Justice *Deschamps* formulated a well-defined and fully-fledged concurring opinion. He distanced himself from the majority view that equated hyperlinks with footnotes. Although he admitted on a theoretical level that a hyperlink might be regarded as a reference, significant differences could be found between a footnote and a link. While a click on the latter may cause the resource to be made readily available, the information referenced in a footnote must be located by making some or considerable effort.<sup>66</sup>

Furthermore, the possibility of defamation may not be excluded during the application of hyperlinks. One of the prerequisites for establishing liability is that the link is referenced deliberately by the linking person and the defamatory content made readily available via the link. On the other hand, the content thus made available is

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expected to reach third parties so that they may obtain a demonstrable knowledge and understanding of the defamatory content.<sup>67</sup>

Both elements of establishing infringement are an issue of fact, therefore, Justice *Deschamps* deemed setting any theoretical guidelines to be unnecessary. He was rather in favour of rendering judgment on a case-by-case basis. However, in relation to the inquiry of when something becomes readily available, he denoted a number of relevant circumstances to be examined. These were whether the hyperlink was user-activated or automatic; whether it was a surface or a deep link, and whether the linked information was available to the public (or possibly restricted).<sup>68</sup> One may verify whether the act was committed knowingly or not by making a contextual inquiry.<sup>69</sup>

If these factors are substantiated, the second condition of imposing liability is given greater priority: could any third party know and understand the defamatory content? In this connection, *Deschamps* proposed that several circumstances be taken into consideration. In addition to what was stated regarding ready availability, such examples are whether the website contained several hyperlinks and, if so, where the impugned hyperlink was placed compared to others; the context in which the link was presented to users; the number of hits on the page containing the hyperlink; the number of hits on the page containing the linked information (both before and after the page containing the link was posted); whether changes were made to the linked information and, if so, how they correlate with the number of hits on the page containing that information; and evidence concerning the behaviour of Internet users.<sup>70</sup>

To sum up, Justice *Deschamps* viewed that the legal treatment of linking might "depend on the mindset of the linking person and the applied technology making something readily available". Consequently, the technology that automatically allows requests on demand (viewing and listening) fit into the category of making available to the public. Similarly, the Court of Appeal of Warsaw found that providing a deep link that makes copyrighted content readily available falls under the economic right of communication to the public.<sup>71</sup>

Two remarks must be made in connection with Justice *Deschamps'* concurring opinion. First, the decision may not be applied to the realm of copyright without any reservation. Defamation occurs insofar as any third person has knowledge of the defamatory content. However, as for copyright, use only arises if content is made available to an indeterminate but great number of persons outside the privacy of the user. Provided that copyrighted content is made available to persons within the private sphere of the user (for example family members), no infringement occurs. What is even more apparent in copyright use is the lack of the second element of knowledge and understanding indicated with regard to defamation. The name of the economic right – “making available” – indicates that it is irrelevant whether or not access has actually been obtained.

Second, both the majority view and the concurring opinion refrain from applying the judgment to embedding or framing.<sup>72</sup> This dissociation especially makes sense in the light of the analysis elaborated in Justice *Deschamps'* concurring opinion. There can therefore be no doubt that embedded or framed contents will become readily perceivable. Furthermore, the mindset of the linking person is presumed to have encompassed publication and the visitor to the receiving website may acquire knowledge of the content. If the above Canadian viewpoint is considered suitable for implementation into the latter technological process in connection with copyright as well, framing and embedding will no doubt become an activity subject to authorisation.

Notwithstanding all the above, there is no guarantee that the opposite view (expressed especially by the European Copyright Society) cannot prevail in the long term. Advocate General *Wathelet's* opinion in the *GS Media* case has revealed a significant shift towards a liberal interpretation of linking, that is, that such activities are not covered by any of the relevant economic rights.<sup>73</sup>

## **2. Is the theory of a new public and the theory of same technological means correct?**

The CJEU's treatment of linking was more reformatory with respect to the theories of a new public and same technical means. Indeed, my impression is that the CJEU's view elaborated in *Svensson* and reaffirmed in *BestWater* practically made new law. The rationale of the two decisions *results in the exhaustion*<sup>74</sup> *of the right of making available to the public*. The CJEU ruled in *Svensson* that:

“the public targeted by the *initial communication* consisted of *all potential visitors* to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them. In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of the other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, *therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication*. Therefore, since there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceed

*ings. Such a finding cannot be called in question were the referring court to find, although this is not clear from the documents before the Court, that when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site. That additional circumstance in no way alters the conclusion that the provision on a site of a clickable link to a protected work published and freely accessible on another site has the effect of making that work available to users of the first site and that it therefore constitutes a communication to the public. However, since there is no new public, the authorisation of the copyright holders is in any event not required for such a communication to the public.”<sup>75</sup>*

The CJEU’s syllogism means that rightholders are unable to exercise their right of authorisation regarding some secondary uses, assuming that they communicated or authorized the communication of the content to the public in the first place.<sup>76</sup> As the relevant international and European copyright sources clearly state that exhaustion shall only limit the exercise of the right of distribution, our previous impression might merely be hypothetical.<sup>77</sup> The expressed application of exhaustion to the right of making available to the public would certainly extend the boundaries of the doctrine of exhaustion. Such judicial activism would contradict the legislative power’s primacy in regulating the scope of both the right of making available to the public and the doctrine of exhaustion. Consequently, the CJEU’s logic might only lead to *quasi or de facto exhaustion of the right of making available to the public*. This option is similarly unknown in the EU copyright system. Not surprisingly, several commentators have heavily criticized the approach adopted by the CJEU. *Mihály Ficsor*, Sr. argued that the CJEU’s former case law – starting from the *SGAE* ruling – was based on an outdated WIPO guide,<sup>78</sup> and the forum has similarly misinterpreted another study of the WIPO discussing the concept of “public”.<sup>79</sup> *Ficsor* stressed that the exclusive condition of applying the right of communication to the public is whether the act was carried out by the rights holder or a third person or entity.<sup>80</sup> The circumstance of the new communication that is to be transmitted to an audience not originally intended by the rights holder does not constitute a qualitative condition.<sup>81</sup> Similarly, *Ficsor* regards the CJEU’s view in *TV Catch Up* as being incorrect, which allows the conclusion that prior authorisation is only required if the secondary act of communication is realised by utilising a technical means different from the original one.<sup>82</sup>

The European Copyright Society argued however that the most important question is what the copyright holder’s intention (and authorisation) was directed at and whether Internet users were capable of accessing the content at issue without the intermediary act by the linking person. The Society argued that hyperlinks traditionally reference content made available on the Internet. Therefore, the rightholder who originally authorised the use needs to acknowledge that the content is available from any location and by any means on the Internet. This way, a hyperlink is no different to a reference that helps locate the resource.<sup>83</sup> *Axhamn* similarly argued that since the concept of “public” was not defined by any of the international copyright sources, “the notion of a ‘new public’ could be considered as a way for the CJEU to strike a balance between the interest in

stimulating the production of creative works and at the same time in fostering their dissemination – within the realms set by the international treaties”.<sup>84</sup>

In the light of the governing international and EU sources of law, the correct direction may simply be that the term “public” does not include the conceptual elements of the “new” nature of the audience or its permanence, or the difference of the applied technical means by the original and any secondary user. Consequently, in cases where the end-user himself elects the time and place of the use, the making available to the public becomes applicable, irrespective of the fact that the content was originally made accessible via the internet by the same technical means.

### 3. Is the illicit nature of the linked content relevant for the legality of linking?

The CJEU’s rulings allow another fierce discussion that might have direct relevance for the fate of linking, and might further broaden the scope of the quasi or de facto exhaustion of the right of making available to the public. The *Svensson* case affected contents lawfully published on Göteborgs Posten’s portal. Following the *a contrario* interpretation of the syllogism of the CJEU used in the *Svensson* decision, materials made available without the authorisation of the rightholders (these include, for example, video clips uploaded to YouTube by Internet users) may not be linked.<sup>85</sup> The facts of the *BestWater* case conflict with the previous proceedings. Oddly enough, the CJEU made a clear reference to the fact that the source video was uploaded to YouTube by unknown persons without proper authorization.<sup>86</sup>

In common law, these circumstances might be regarded as material differences in facts so that the technique of distinguishing could be applied. Not surprisingly, the CJEU’s order was not fully accepted by the referring German Federal Court of Justice (BGH). The domestic final decision emphasized that the legality of the first making available of the content via a clickable link is a prerequisite for the acceptability of the given activity.<sup>87</sup> A similar

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conclusion has been reached in the United Kingdom<sup>88</sup> and in Poland.<sup>89</sup>

Notwithstanding the above, Advocate General *Wathelet’s* opinion in the *GS Media* case might frustrate such domestic interpretation of the CJEU case law. There the AG has noted that the illicit nature of the originally published material is irrelevant with respect to the legality of linking, if the linked content was freely accessible on another website.<sup>90</sup>

It is hard to foresee how the CJEU will react to AG *Wathelet’s* position. The CJEU might overrule the AG’s categorization of linking and reaffirm its own opinion expressed in the *Svensson/BestWater* rulings that linking shall be treated as communication to the public. In the latter case the relevance of the legality of the source material will be pivotal. The outcome of the *GS Media* case is difficult to predict, as some elements of the CJEU case law matrix might contradict each other. The *ACI Adam* ruling has excluded the applicability of the private copying exception for copies made on the basis of illegal sources. The *Public Relations* ruling might allow for an opposite argument. There the CJEU had to focus solely on the applicability of Art. 5(1) of the InfoSoc Directive to the cache copies created with the help of news aggregating services. The CJEU concluded that the on-screen and cache copies of the protected subject matter are within the scope of the exception provided for

temporary acts of reproduction. This outcome was not affected by the fact that the defendant set hyperlinks to access the contents without the prior authorization of the rightholders who made those contents available to the public.

#### 4. What is the most balanced way of law enforcement?

I argued above that linking was properly called “making available to the public” by the CJEU, but the concept of a “new public” seems to be ill-founded. Similarly, the fact that the CJEU did not differentiate between linking to contents made available to the public lawfully and those made available illegally, looks unwise and might lead to confusion over the prior case law of the forum. Yet, the CJEU’s view on the evasion of technical restrictions seems to be correct. Such standard allows for remedies against those persons who knowingly and for commercial purposes provide direct access to copyrighted materials. A recent decision of the Austrian Federal Supreme Court (OGH) provides clear evidence for that. There the plaintiff made private radio channels available to the public; and used pre-roll ads (“Preroll-Werbung”) that functioned as the source of the plaintiff’s revenues, and at the same time restricted access to the streams. The defendant published hyperlinks that provided access to the streams of the plaintiff’s private radio channels. Further, the defendant allowed circumvention of the pre-roll ads, and replaced the latter by new advertisements that in turn generated income on defendant’s side. The OGH decided in favour of the plaintiff. The court did not consider the mere provision of the links by the defendant to be illegal. The OGH, however, interpreted the circumvention of the plaintiff’s pre-roll ads as being communication of the source content to a new public.<sup>91</sup>

Another non-European example might be shortly introduced as well. In the *Twentieth Century Fox Film Co. v. Hernandez et al.* case the Federal Court of Canada held that the person who captured the episodes of *The Simpsons* and *Family Guy* cartoons, uploaded them to web servers, and provided links to the streams of these episodes committed a copyright infringement. Indeed, as the defendant had acted in bad faith and received revenue from the infringing activities, the Federal Court of Canada awarded 10,000,000 CAD in statutory damages and 500,000 CAD in punitive and exemplary damages to Fox, as well as 78,572.25 CAD plus interest to cover Fox’s indemnity costs.<sup>92</sup>

The special (strict) treatment of commercial use of links was advocated by Pihlajarinne as well. She concluded in her report about a Finnish study on the same question that:

“[i]f more explicit guidance was needed to assess the loyalty of the linking in question, the following criteria could be used:

- 1. Is the linking commercial in nature or is it without intention of gaining economic advantage?
- 2. Is the service that is utilizing the linking based completely on systematic linking or is the linking occasional in nature?
- 3. Is the linked material selected mainly by the service provider or the user? This criterion is important in making the distinction between genuine search services and services using linking techniques as tools for content production. For instance, the user makes the decisive choice when typing a search term into a search engine service even though the material is indexed by the service



provider. The user is similarly active when using feed readers and some of the so-called second generation aggregation services".<sup>93</sup>

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The commercial perspective seems to be most clearly implemented in Europe by the amendment of the German Copyright Act to introduce a new form of protection in favour of publishers. However, the "Leistungsschutzrecht", an ancillary copyright protecting publishers' achievement, does not seem to be a success story. It has received more criticism than support so far.<sup>94</sup> Similarly, the introduction of the new ancillary right in Spain has been followed by the termination of Google News service rather than payment of any fair remuneration to the beneficiary publishers.<sup>95</sup>

Notwithstanding the above, the European Commission launched a consultation in March 2016 to examine whether the same ancillary right should be introduced at the European level.<sup>96</sup>

Irrespective of whether linking should be subject to authorization or not, another question might arise automatically: should it be prosecuted at all? This is a crucial question since hyperlinks constitute the neurotransmitters of the Internet. Without them, online data circulation could be significantly compromised, thereby preventing the effectiveness of freedom of access to information and expression.<sup>97</sup> In fact, it comes as no surprise that the same CJEU that supported freedom of expression more and more frequently<sup>98</sup> was also in favour of linking in the *Svensson* and *BestWater* cases.

Most recently, Advocate General *Wathelet* has expressed a balanced policy consideration on the importance of linking. He argued that:

"aside from the fact that, in principle, the posting of the hyperlinks in the main proceedings does not, in my view, constitute a 'communication to the public' within the meaning of Art. 3(1) of Directive 2001/29, I consider that any other interpretation of that provision would significantly impair the functioning of the Internet and undermine one of the main objectives of Directive 2001/29, namely the development of the information society in Europe. Such an interpretation could also distort the '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'.

It is a matter of common knowledge that the posting of hyperlinks by users is both systematic and necessary for the current internet architecture. While the circumstances at issue in the main proceedings are particularly obvious, I consider that, as a general rule, internet users are not aware and do not have the means to check whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder's consent. If users were at risk of proceedings for infringement of copyright under Art. 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.

In my view, such interference in the functioning of the internet must be avoided. In any event, I consider that extending the concept of 'communication to the public' to cover the posting of hyperlinks to protected works freely accessible on another website would require action to be taken by the European legislature".<sup>99</sup>

AG *Wathelet* thus warned about the possible negative consequences of the restrictive application of the relevant economic rights to linking activities, but he rightly concluded that the real solution should come from the legislators rather than the judiciary. Such a call for a European reform is not without any antecedents. In December 2015, the European Commission noted in its communication about a modern European copyright framework that it shall be examined whether any action is necessary to fine-tune the concepts of communication and making available to the public. As the European Commission noted "[t]here are contentious grey areas and uncertainty about the way these concepts are defined in EU law, in particular about which online acts are considered 'communication to the public' (and therefore require authorisation by right holders), and under what conditions. These questions create on the one hand uncertainty in the market and, on the other, put into question the ability of these rights to transpose into the online world the basic principle of copyright that acts of exploitation need to be authorised and remunerated. Apart from its significance for the fair distribution of value in the online market place, lack of clarity on the definition of these rights can also generate uncertainty for ordinary Internet users".<sup>100</sup>

The Commission's call to examine the viability of the relevant economic rights in the digital age indicates that a broader interpretation of the rights of communication and making available to the public might be warmly welcomed. I am, however, not persuaded that such a bright-line reform would be a proper solution. Indeed, referring to the discussion above with respect to the commercial use of hyperlinks as well as evasion of technological restrictions, it might be noted that the vast majority of links are used the opposite way. Clearly, links are generally shared with members of the public, but in a

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significant amount of cases their use is "private in nature". Think about sharing a hyperlink or embedding a video on Facebook. Certainly, "commercial" and "private" are not antonyms for each other, and thus not-for-profit acts might also lead to public use of protected material. Still, at least from a policy perspective, it is not illogical to immunize "non-commercial semi-public end-user activities" from copyright liability, especially in the era of web 2.0.<sup>101</sup>

If this argument is refuted, one may argue that safe harbours or defences generally accepted with respect to commercial and public uses are similarly applicable to "non-commercial semi-public end-user activities". The E-Commerce Directive does not include any safe harbour provision for linking, but it calls for a (biennial) re-examination of the state of affairs with respect to this form of online usage.<sup>102</sup> Although no such modification proposal has been made so far, some Member States opted for the introduction of such safe harbour rules. For example the Austrian law on e-commerce restricts the liability of linking service providers. The Austrian regulation is similar to the safe harbour granted for the benefit of hosting service providers. Immunity depends upon the lack of knowledge of the infringing content behind the link, as well as upon compliance with the obligation

to remove the link if the service provider becomes aware of the illegal nature of the source material.<sup>103</sup>

Justice *Deschamps'* dissent expressed in the *Crookes v. Newton* case provides another similar example for the balanced treatment of linking. Under the defence of "innocent dissemination", contributory entities such as bookstores, libraries and news vendors are exonerated from the legal ramifications of defamation if they had no knowledge of the infringement, were aware of no circumstances to put them on notice to suspect an infringement and committed no negligence in failing to find out about it. In *Deschamps'* view, it would be unjustified to exclude a linking person from having recourse to such a defence if they satisfy the above conditions.<sup>104</sup> The theory of "innocent dissemination" seems to be applicable to copyright cases as well. And it might be a good one to transplant into European copyright thinking.

I further agree with Advocate General *Wathelet*, who stressed in his opinion that in the *GS Media* case hosting service providers were "best placed to bring such infringing activities to an end".<sup>105</sup> Indeed, *Wathelet* noted that "[t]he injunction under Art. 8(3) of Directive 2001/29 and the third sentence of Art. 11 of Directive 2004/48 therefore relates to the initial communication to the public which infringes copyright and, in my view, is a direct and appropriate remedy for that infringement".<sup>106</sup> Although some have expressed a different opinion,<sup>107</sup> AG *Wathelet's* view correctly represents the dynamics of the information society. Similarly, his final word on the *GS Media* case is apt:

"[i]t should be noted that the operators of the *Filefactory.com* and *Imageshack.us* websites complied with *Sanoma's* request to remove the photographs in question from their websites. Consequently, the hyperlinks to those other websites on the *GeenStijl* website were rendered ineffective".<sup>108</sup>

#### **IV. Concluding remarks**

The CJEU has long treated copyright law as one of the different valuable forms of legal protection that has to be balanced with other fundamental rights. The CJEU has confirmed in its *FAPL* ruling that "the interpretation of those conditions must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose as resulting in particular from recital 31 in the preamble to the Copyright Directive and from Common Position (EC) No. 48/2000 ... . In accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other".<sup>109</sup> The same opinion was expressed later in the *Public Relations v. NLA* case.<sup>110</sup> The CJEU's rulings on linking and streaming have similarly evidenced the activism and the reformatory approach adopted by the forum.

However, this trend might lead to unexpected consequences. The preliminary rulings of the CJEU tend to become overcomplicated, where arguments might be acceptable under some of the precedents, whilst other rulings might favour the opposite result. As such, the main impact of the *Svensson/BestWater* rulings might be to upset the balance of copyrights and the fundamental interests of society.

It is not surprising that the CJEU's activist and liberal approach has been heavily criticised by proponents of the *status quo* of copyright. The latter position has its

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own merits. I also argued that concepts of public, making available to the public and prohibition of evasion of technical restrictions are correctly used by the CJEU. However, theories of a "new public" as well as "communication to the public by same technical means" are not properly supported by international or regional copyright norms. The logic and internal coherence of the case law matrix is not smooth yet, indeed, several rulings contradict one another.

Notwithstanding the above, the policy arguments expressed by the CJEU in its rulings on linking and streaming, and most recently by AG *Wathelet* in the *GS Media* case, are significant. Links are evidently the neurotransmitters of the Internet, an essential form of communication in the information society.

There might be two different paths to follow. Firstly, the CJEU, especially in the eagerly awaited cases of *GS Media* and *Stichting Brein*, might "rebalance" its own view on linking. Not necessarily in terms of an external balance between different fundamental rights, e.g. freedom of expression versus copyrights, but mainly in terms of an internal balance. That is, concepts of copyright law (e.g. economic rights, limitations/exceptions, three-step test) and social norms (especially commercial versus "non-commercial semi-public end-user activities") have to be weighed against each other more cautiously. Concepts like "innocent dissemination" could be transplanted as well. The impact of such a "rebalance" would be a "close(r) to real life" solution without the need for a time-consuming legislative procedure full of controversies. Ultimately, the majority of end-users would be immunized from remedies for linking to protected materials.

Secondly, it might be possible to rebalance the European copyright and e-commerce rules through legislative amendments. One of the options is to focus on regulating linking activities that are commercial in nature and immunize non-commercial uses at the same time. One of the reasons for the unpopularity of the ancillary right for the benefit of publishers is that it would regulate solely on the former of the two aspects mentioned above. The European Parliament refused to include the right in the resolution on the reform of the InfoSoc Directive.<sup>111</sup> Similarly, the German and Spanish "Google Tax laws" turned out to be less successful. The fate of the current consultation on a publishers' ancillary right therefore depends on the question how much freedom is left for "non-commercial semi-public end-user activities". The other option would be to fine-tune the definitions of communication and making available to the public in order to cover all online acts. The communication of the European Commission published in December 2015 calls for such approach; however, I consider this idea to be overly intrusive. I am not convinced that this re-examination of the economic rights would properly serve the interests of the information society, and the effects of such reform would be stifling rather than stimulating.

Alternatively, it might be timely to assess the economic, social and legal impacts of linking in accordance with Art. 21(1) of the E-Commerce Directive. The introduction of an e-commerce safe harbour provision for the benefit of linking service providers might be warmly welcomed by proponents of the information society. Surely, such provisions would provide effective means for

the rightholders to take action against those, including private users, who purposefully infringe copyrights/related rights.

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<sup>1</sup> *Toby Headdon*, An epilogue to Svensson: the same old new public and the worms that didn't turn, *JIPLP* 8/2014, 662.

<sup>2</sup> *Wayne Crookes and West Coast Title Search Ltd. v. Jon Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269, para. 36, p. 289. For the analysis of the case see: *Jeremy de Beer/Mira Burri*, Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada, *European Intellectual Property Review* 2/2014, 100-101.

<sup>3</sup> Association Littéraire et Artistique Internationale: Report and Opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet, *European Intellectual Property Review* 3/2014, 153.

<sup>4</sup> *Matthew Collins*, *The Law of Defamation and the Internet*, 3rd ed., Oxford University Press, New York 2010, para. 5.42.

<sup>5</sup> *Anjali Dalal*, Protecting Hyperlinks and Preserving First Amendment Values on the Internet, *University of Pennsylvania Journal of Constitutional Law* 2011, 1019.

<sup>6</sup> Regarding different types of linking see: *Alain Strowel/Nicholas Ide*, Liability with Regard to Hyperlinks, *Columbia Journal of Law and the Arts* 2001, 407-409.

<sup>7</sup> Such argument has been presented in several court proceedings. Compare to *Crookes v. Newton*, para. 30. The similar argument was presented by the Portuguese government in the *GS Media* case. See Opinion of Advocate General *Wathelet* delivered on 7 April 2016, Case C-160/15, ECLI:EU:C:2016:221, para. 23 – *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*.

<sup>8</sup> *Tim Berners-Lee*, *Axioms of Web Architecture – Links and Law: Myths*, April 1997 (<<http://www.w3.org/DesignIssues/LinkMyths.html>>).

<sup>9</sup> *Katia Bodard/Bruno de Vuyst/Gunther Meyer*, Deep Linking, Framing, Inlining and Extension of Copyrights: Recent Cases in Common Law Jurisdictions, *Murdoch University Electronic Journal of Law* 3/2004, points 6 and 7 (<[http://www.murdoch.edu.au/elaw/issues/v11n1/meyer111\\_text.html](http://www.murdoch.edu.au/elaw/issues/v11n1/meyer111_text.html)>).

<sup>10</sup> For the functioning of the RSS see *Umakant Mishra*, The mechanics of implementing RSS – Really Simple Syndication, 2012, p. 1-5 (<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1974987](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974987)>).

<sup>11</sup> It comes as no surprise that search engines in the United States or in Hungary are provided safe harbour protection of electronic commerce law. See § 512(d) of United States Copyright Act, 17 U.S.C., (hereinafter referred to as USCA) and Art. 11 of Act CVIII of 2001 on certain issues of electronic commerce activities and information society services.

<sup>12</sup> Compare to cyberlockers services providers, like RapidShare, Hotfile or MegaUpload, or torrent indexing sites, like The Pirate Bay or IsoHunt. The present paper is not discussing these services and the related case law.

<sup>13</sup> *Headdon* (supra note 1), 662.

<sup>14</sup> Art. 8 of the WCT and Arts. 10 and 14 of the WPPT. For similar provisions, see Art. 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the

harmonisation of certain aspects of copyright and related rights in the information society (hereinafter referred to as InfoSoc Directive).

<sup>15</sup> With regard to hyperlinks see: BGH, 17 July 2003, I ZR 259/00, GRUR 2003, 958-963 – *Paperboy.*; OLG Celle, 15 February 2007, 13 U 4/07, MMR 2007, 605 – *Linksetzung als unerlaubte Handlung.* In respect of framing and inlining see: OLG Jena, 27 February 2008, 2 U 319/07, Medien, Internet und Recht 4/2008, Document No. 2008/122 (<[http://medien-internet-und-recht.de/pdf/VT\\_MIR\\_2008\\_122.pdf](http://medien-internet-und-recht.de/pdf/VT_MIR_2008_122.pdf)>) – *Thumbnails & Google-Bildersuche*; BGH, 29 April 2010, I ZR 69/08, MMR 2010, 475-482 – *Vorschaubilder I*; BGH, 19 October 2011, I ZR 140/10, ZUM 2012, 477-482 – *Vorschaubilder II.*

<sup>16</sup> In *IFPI v. Olsson* the Swedish court established infringement of the copyright holders' economic rights in case of placing music referencing links that permitted automatic download after clicking on them. See *Jan Rosén*, Server Copyright Liability – Notes on the Swedish Act on Liability for Intermediaries and two Recent Decisions of the Swedish Supreme Court, *Scandinavian Studies in Law* 2002, 147-163. Similarly see Supreme Court of Norway, 27 January 2005, 37 IIC 120-123 (2006) – *Napster.no*. From Poland see Sąd Apelacyjny w Krakowie, z dnia 20 lipca 2004 r., I ACa 564/04. (Decision of the Court of Appeal of Krakow of 20 July 2004); Sąd Apelacyjny w Warszawie, z dnia 7 maja 2014 r., I ACa 1663/13 (Decision of the Court of Appeal of Warsaw of 7 May 2014). There are examples where the lawfulness of framing was rejected. See OLG Hamburg, 22 February 2001, 3 U 247/00, GRUR 2001, 831-832 – *Roche Lexikon Medizin*. For further cases – including some from the other side of the Atlantic – see *Strowel/Ide*, *Columbia Journal of Law and the Arts* 2001, 418-422, 424-432, 436-439.; *Alain Strowel/Vicky Hanley*, Secondary Liability for Copyright Infringement with Regard to Hyperlinks, in: Alain Strowel (Ed.): *Peer-to-peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar, Cheltenham 2009, p. 71-109; *Taina Pihlajarinne*, Setting the Limits for the Implied License in Copyright and Linking Discourse – The European Perspective, 43 IIC 704-706 (2012); *Johan Axhamn*, Internet Linking and the Notion of “New Public”, *Nordiskt Immateriellt Rättsskydd* 2/2014, 122, footnote 72; *Ignacio Garrote Fernández-Díez*, Comparative Analysis on National Approaches to the Liability of Internet Intermediaries for Infringement of Copyright and Related Rights, 2014 (<[http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries\\_garrote.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf)>).

<sup>17</sup> Judgment of the Court of Justice of 13 February 2014, Case C-466/12, ECLI:EU:C:2014:76 – *Nils Svensson and Others v Retriever Sverige AB*. For a brief summary of the judgment see *de Beer/Burri*, *European Intellectual Property Review* 2/2014, 101-104; *Axhamn* (supra note 16), 121-130; *Michiel Rijdsdijk*, Infringement Through Hyperlinking Requires New Kid on the Block, *World Intellectual Property Review*, March/April 2014, 69; *Pekka Savola*, Blocking Injunctions and Website Operators' Liability for Copyright Infringement for User-Generated Links, *European Intellectual Property Review* 5/2014, 280-281; *Andrew Moir/Rachel Montagnon/Heather Newton*, Communication to the Public: the CJEU Finds Linking to Material Already „Freely Available” Cannot be Restricted by Copyright Owners: *Nils Svensson and Others v Retriever Sverige AB (C-466/12)*, *European Intellectual Property Review* 6/2014, 399-400; *Headdon* (supra note 1), 664-665; *Gemma Minero*, Are hyperlinks covered by the right to communicate works to the public? The *Svensson* case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* (13 February 2014), *Queen Mary Journal of Intellectual Property* 4/2014, 322-327.

<sup>18</sup> *Svensson v. Retriever Sverige*, para. 8.

<sup>19</sup> *Ibid.*, para. 15.

<sup>20</sup> *Ibid.*, para. 17. Here, the CJEU relied on its former decision in the *FAPL* case. Compare to: Judgment of the Court of Justice of 4 October 2011, Joined Cases C-403/08, ECLI:EU:C:2011:631, para. 193 – *Football Association Premier League Ltd and Others v. QC Leisure and Others* and C-429/08, para. 20 – *Karen Murphy v. Media Protection Services Ltd*.

<sup>21</sup> *Svensson v. Retriever Sverige*.

<sup>22</sup> *Ibid.*, para. 21. Such uniform interpretation of the definition of “public” derives from the CJEU's case law. The CJEU did, however, refer only to the following cases: Judgment of the Court of Justice of 7 December 2006, Case C-306/05, ECLI:EU:C:2006:764, paras. 38-39 – *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*; Judgment of the Court of Justice of 13 February 2014, Case C-607/11, ECLI:EU:C:2013:147, para. 32 – *ITV Broadcasting Ltd and Others v. TV Catch Up Ltd*. The following rulings touched upon the concept of “public”, too: Judgment of the Court of Justice of 13 October 2011, Joined Cases C-431/09 – *Airfield NV and Canal Digitaal BV v. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* and C-432/09, ECLI:EU:C:2011:648, para. 72 – *Airfield NV v. Agicoa Belgium BVBA*. The failure of the CJEU to refer to the latter cases was highlighted by *Minero* (supra note 17), p. 325.

<sup>23</sup> *Svensson v. Retriever Sverige*, paras. 22-23.

<sup>24</sup> *Ibid.*, para. 24.

<sup>25</sup> *de Beer/Burri*, *European Intellectual Property Review* 2/2014, 103; *Axhamn*, *Nordiskt Immateriellt Rättsskydd* 2/2014, 125-126.

<sup>26</sup> *Svensson v. Retriever Sverige*, para. 25-27.

<sup>27</sup> *Ibid.*, para. 31. Compare to *Axhamn*, *Nordiskt Immateriellt Rättsskydd* 2/2014, 127-128.

<sup>28</sup> InfoSoc Directive, Art. 6.

<sup>29</sup> Art. 99 of the Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29 September 2012), as amended on 18 June 2013 (OJ L 173, 26 June 2013), p. 65.

<sup>30</sup> Order of the Court of 21 October 2014, Case C-348/13, ECLI:EU:C:2014:2315 – *BestWater International GmbH v. Michael Mebes and Stefan Potsch*. For a brief summary of the judgment see *Savola*, *European Intellectual Property Review* 5/2014, 281-282; *Gregor Schmid*, *BestWater: framing no 'communication to the public'*, *JiPLP* 2/2015, 82-83.

<sup>31</sup> *BestWater v. Mebes and Potsch*, paras. 4-10.

<sup>32</sup> *Ibid.*, para. 11.

<sup>33</sup> "It follows that, by regulating the situations in which a given work is put to multiple use, the European Union legislature intended that each *transmission or retransmission of a work which uses a specific technological means* must, as a rule, be individually authorised by the author of the work in question. Those findings are, moreover, supported by Arts. 2 and 8 of Directive 93/83, which require fresh authorisation for a simultaneous, unaltered and unabridged retransmission by satellite or cable of an initial transmission of television or radio programmes containing protected works, even though those programmes may already be received in their catchment area by other technological means, such as by wireless means or terrestrial networks. Given that the making of works available through the retransmission of a terrestrial television broadcast over the internet uses *a specific technological means different from that of the original communication*, that retransmission must be considered to be a 'communication' within Art. 3(3) of the Directive. Consequently, such a retransmission cannot be exempt from authorisation by the authors of the retransmitted works when these are communicated to the public. ... By contrast, the main proceedings in the present case concern the transmission of works included in a terrestrial broadcast and the making available of those works over the internet. As is apparent from paras. 24 to 26 above, each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technological conditions, using a different means of transmission for the protected works, and each is intended for a public. In those circumstances, it is no longer necessary to examine below the requirement that there must be a new public, which is relevant only in the situations on which the Court of Justice was expected to rule in the cases giving rise to the judgments in Joint Cases *SGAE, Football Association Premier League and Others* and Joint Cases *Airfield and Canal Digitaal*". See *ITV Broadcasting v. TV Catch Up*, paras. 24-26 and 39. (Emphasis added.)

<sup>34</sup> *BestWater v. Mebes and Potsch*, paras. 14-19.

<sup>35</sup> Yet, the facts established in the court order expressly emphasised that, as indicated by *BestWater*, the promotional video was available on YouTube without its authorisation. Cf. *ibid.*, para. 4.

<sup>36</sup> Judgment of the Court of Justice of 10 April 2014, Case C-435/12, ECLI:EU:C:2014:254 – *ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandeligen Thuiskopie vergoeding*.

<sup>37</sup> Judgment of the Court of 26 March 2015, Case C-279/13, ECLI:EU:C:2015:199 – *C More Entertainment AB v. Linus Sandberg*. On the judgment see *Oliver BrexI*, *Direktübertragung einer Sportveranstaltung über das Internet*, *GRUR Prax* 2/2015, 171; *Eleonora Rosati*, *Unauthorized hyperlinks to live TV broadcasts not infringements under the InfoSoc Directive*, *JiPLP* 8/2015, 582-583.

<sup>38</sup> Judgment of the Court of Justice of 5 June 2014, Case C-360/13, ECLI:EU:C:2014:1195, paras. 26-27 – *Public Relations Consultants Association Ltd v. Newspaper Licensing Agency Ltd and Others*.

<sup>39</sup> *Ibid.*, paras. 28-38.

<sup>40</sup> Ibid., paras. 39-51.

<sup>41</sup> Ibid., para. 54. On the original UK case and the CJEU's ruling see *Luke McDonagh*, Headlines and hyperlinks: UK copyright law post-Infopaq – Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and other companies [2010] EWHC 3099 (Ch), Queen Mary Journal of Intellectual Property 2/2011, 184-187; *Michael Hart*, The legality of internet browsing in the digital age, European Intellectual Property Review 10/2014, 630-639.; *Toby Headdon*, Browsing through the looking glass: from copyright to wonderland?, JIPLP 3/2015, 191-197.

<sup>42</sup> On the facts of the case see Opinion, *GS Media v. Sanoma Media Netherlands BV and Others*, paras. 9-18.

<sup>43</sup> Ibid., para. 19.

<sup>44</sup> Ibid., para. 20.

<sup>45</sup> Ibid., para. 43.

<sup>46</sup> Ibid., para. 54.

<sup>47</sup> Ibid., para. 57.

<sup>48</sup> Ibid., para. 60.

<sup>49</sup> Ibid., para. 61.

<sup>50</sup> Ibid., para. 70.

<sup>51</sup> Ibid., para. 74. On the AG's opinion see especially *Ana Ramalho*, The Opinion of AG Wathelet in *GS Media: what's in a "precedent"?*, Kluwer Copyright Blog, 26 April 2016 (<<http://kluwercopyrightblog.com/2016/04/26/opinion-ag-wathelet-gs-media-whats-precedent/>>).

<sup>52</sup> Request for a preliminary ruling from the Rechtbank Midden-Nederland (Netherlands) lodged on 5 October 2015 – *Stichting Brein v. Jack Frederik Wullems*, currently trading under the name Filmspeler (Case C-527/15). On the factual background of the case and the questions referred to the CJEU see Case C-527/15 – *Stichting Brein* – copyright brain-teasers about media players, EU Law Radar, 7 October 2015 (<<http://eulawradar.com/case-c-52715-stichting-brein-copyright-brain-teasers-about-media-players/>>).

<sup>53</sup> ALAI Report, p. 150-153.

<sup>54</sup> Ibid., p. 153-154.

<sup>55</sup> *Lionel Bently/Estelle Derclaye/Greame B. Dinwoodie/Thomas Dreier/Séverine Dussolier/Christophe Geiger/Jonathan Griffiths/Reto Hilty/P. Bernt Hugenholtz/M-C Jansses/Martin Kretschmer/Axel Metzger/Alexander Peukert/Marco Ricolfi/Martin Senftleben/Alain Strowel/Michel Vivant/Raquel Xalabarder*, The Reference to the CJEU in Case C-466/12 Svensson, Legal Studies Research Paper Series, Paper No. 6/2013 (<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326)>), p. 2. See further *Strowel/Ide*, Columbia Journal of Law and the Arts 2001, 403-448.

<sup>56</sup> *Bently et al.* (supra note 55), p. 2-6.

<sup>57</sup> Ibid., p. 8-11. See further *Lionel Bently/Brad Sherman*, Intellectual Property Law, Oxford University Press, Oxford 2009, p. 151.

<sup>58</sup> *Bently et al.* (supra note 55), p. 13-15.

<sup>59</sup> On the interpretation of the CJEU's case law related to the concept of communication to the public see *Katarzyna Klafkowska*, Public communication right: towards the full harmonization?, European Intellectual Property Review 12/2013, 751-758.

<sup>60</sup> Compare to *Jane C. Ginsburg*, Hyperlinking and „making available“, European Intellectual Property Review 3/2014, 147-148.; *Mihály J. Ficsor*, Svensson: honest attempt at establishing due balance concerning the use of hyperlinks – spoiled by the erroneous „new public“ theory, Copyright See-Saw, 5 May 2014 (<[http://www.copyrightseesaw.net/archive/?sw\\_10\\_item=63](http://www.copyrightseesaw.net/archive/?sw_10_item=63)>), p. 29-32.; *Axhamn*, Nordiskt Immateriellt Rättsskydd 2/2014, 119-120.

<sup>61</sup> *Crookes v. Newton*, para. 21, p. 284.

<sup>62</sup> Ibid., paras. 4-15, p. 277-281.

<sup>63</sup> Ibid., paras. 26-30, p. 285-286.



<sup>64</sup> Ibid., para. 36, p. 288-289.

<sup>65</sup> Ibid., paras. 40-42, p. 291-292.

<sup>66</sup> Ibid., para. 96, p. 313.

<sup>67</sup> Ibid., para. 93, p. 312.

<sup>68</sup> Ibid., para. 99, p. 314.

<sup>69</sup> Ibid., para. 101, p. 315.

<sup>70</sup> Ibid., para. 110, p. 318. Justice *Deschamps* took the position that the criterion of making a defamatory content readily available may not be established with respect to a shallow link, but it may be done so in case of a shallow link. The mindset side may be considered proven as the defendant in the latter case gave an accurate path to the content. Ultimately, Justice *Deschamps* did not find that the plaintiff had sufficient proof that any third person could have got to the unlawful resource content from Newton's article. Based on all the above, the dissent also supported the dismissal of the appeal brought before the court. See *ibid.*, paras. 124-130, p. 322-324.

<sup>71</sup> Judgment of 7 May 2014 of the Court of Appeal of Warsaw (Sądu Apelacyjnego w Warszawie) No. ACa 1663/13. (The translation of the case was supplied by the Polish Law Office Dzikowski Kowalczyk Muster.)

<sup>72</sup> As for the majority opinion, see *Ibid.*, para. 43, p. 292. As for *McLachlin's* and *Fish's* concurring opinion, see *ibid.*, para. 52, p. 295. For *Deschamps's* concurring opinion, see *ibid.*, para. 63, p. 299.

<sup>73</sup> Opinion, *GS Media v. Sanoma Media Netherlands BV and Others*, para. 54.

<sup>74</sup> The doctrine of the exhaustion is aimed to provide a limit to the right of distribution. See in particular Art. 6(2) of the WCT and Art. 4(2) of the InfoSoc Directive.

<sup>75</sup> *Svensson v. Retriever Sverige*, paras. 26-30.

<sup>76</sup> The same impression has been expressed by other commentators. See for example: *Axhamn*, Nordiskt Immateriellt Rättsskydd 2/2014, 128-129.

<sup>77</sup> *Headdon*, JIPLP 8/2014, 666.

<sup>78</sup> WIPO Guide to Copyright and Related Rights Treaties Administered by WIPO – Glossary of Copyright and Related Rights Terms, WIPO Publication No. 891(E), Geneva 2003.

<sup>79</sup> WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), WIPO Publication No. 615(E), Geneva 1978.

<sup>80</sup> Art. 11<sup>bis</sup>(1)(ii) of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, revised at Paris on 24 July 1971.

<sup>81</sup> *Ficsor* (supra note 61), p. 2-16.

<sup>82</sup> *Ibid.*, p. 16-20.

<sup>83</sup> *Bently et al.* (supra note 55), p. 12.

<sup>84</sup> *Axhamn*, Nordiskt Immateriellt Rättsskydd 2/2014, 126.

<sup>85</sup> *Ibid.*, p. 129.

<sup>86</sup> *BestWater v. Mebes and Potsch*, para. 4.

<sup>87</sup> The original German text sounds as follows: „Die Revision rügt daher mit Erfolg, dass das Berufungsgericht keine Feststellungen zur Behauptung der Klägerin getroffen hat, der Film sei nicht mit ihrer Zustimmung auf der Videoplattform 'YouTube' eingestellt und damit nicht im Internet frei zugänglich gewesen, als die Beklagten ihn über ihre Webseite im Wege des Framing zugänglich gemacht haben. ... Werden – wie im Streitfall – auf einer Internetseite anklickbare Links zu Werken bereitgestellt, die auf einer anderen Internetseite für alle Internetnutzer frei zugänglich sind, führt dies nach der Rechtsprechung des Gerichtshofs der Europäischen Union demnach nur dann nicht zu einer Wiedergabe der fraglichen Werke für ein neues Publikum, wenn die Werke auf der anderen Internetseite mit Erlaubnis der Urheberrechtsinhaber für alle Internetnutzer frei zugänglich sind.“ See BGH, 9 July 2015, I ZR 46/12, GRUR 2/2012, 173-174, paras. 31 and 34 – *Die Realität II*. A not full and literary translation of the case was published in IIC. See “The Reality II” (Die Realität II) Decision of the Federal Supreme Court (Bundesgerichtshof), 9 July 2015, Case No. I ZR 46/12, 47 IIC 232-237 (2016). On the decision of the BGH see *Jan Bernd Nordemann*, Linking to illegal

content unlawful under copyright law, according to the German BGH, Kluwer Copyright Blog, 10 February 2016 (<<http://kluwercopyrightblog.com/2016/02/10/linking-to-illegal-content-unlawful-under-copyright-law-according-to-the-german-bgh/>>); *Gerald Spindler*, Das Ende der Links: Framing und Hyperlinks auf rechtswidrige Inhalte als eigenständige Veröffentlichung?, GRUR 2016, 157-159.

<sup>88</sup> „[T]he facts of Svensson could hardly be further removed from the facts of the present case where ... the operators who make them available to the Target Websites are not authorised in any shape or form to do so. The case is, therefore, clearly distinguishable on its facts. ... *Arnold J* took the view that the operators were intervening in a highly material way to make the copyright works available to a new audience. I respectfully agree.” See *Paramount Home Entertainment v. British Sky Broadcasting* [2014] EWHC 937 (Ch), paras. 31 and 35. On the court decision see *Yin Harn Lee*, United Kingdom Copyright Decisions and Legislative Developments 2014, 46 IIC 228-229 (2015).

<sup>89</sup> Sądu Apelacyjnego w Warszawie, z dnia 7 maja 2014 r., I ACa 1663/13 (Decision of the Court of Appeal of Warsaw of 7 May 2014).

<sup>90</sup> Opinion, *GS Media v. Sanoma Media Netherlands BV and Others*, paras. 60-61.

<sup>91</sup> OGH, 23 February 2016, 4 Ob 249/15v, GRUR Int. 2016, 589-596. On the summary of the case see *Adolf Zemann*, Austria: Hyperlinking to Online-Radio Broadcasts, Mondaq, 18 May 2016 (<[www.mondaq.com/article.asp?articleid=492454](http://www.mondaq.com/article.asp?articleid=492454)>).

<sup>92</sup> Federal Court of Canada, T-1618-13, JIPLP 4/2014, 271-272 – *Twentieth Century Fox Films Corporation v. Nicholas Hernandez, John Doe and Jane Doe*.

<sup>93</sup> *Taina Pihlajarinne*, National Set of Rules for Commercial Linking? – the Finnish Discourse, Nordiskt Immateriellt Rättsskydd 6/2012, 649-650.

<sup>94</sup> On the German „Google Tax” law see *Georg Nolte*, Zur Forderung der Presseverleger nach Einführung eines speziellen Leistungsschutzrechts, Zeitschrift für Geistiges Eigentum / Intellectual Property Journal 2/2010, 165-195; *Guido Westkamp*, The new German publisher’s right – a violation of European Law? A comment, Queen Mary Journal of Intellectual Property 3/2013, 241-250; *Eleonora Rosati*, The German ‘Google Tax’ law: groovy or greedy?, JIPLP 7/2013, 497. The importance and actuality of the issue is clearly evidenced by the fact that IViR in collaboration with CIPIL dedicated a conference on the very topic. Presenters of the event agreed that “copyright will not be the answer to the challenge raised”. See *Barbara van der Berg*, Copyright & the struggle against Google News, Kluwer Copyright Blog, 18 May 2016 (<<http://kluwercopyrightblog.com/2016/05/18/copyright-struggle-google-news/>>).

<sup>95</sup> *Pedro Letai*, Thus bad begins and worse remains behind: Google News closes to Spanish media, Kluwer Copyright Blog, 22 December 2014 (<<http://kluwercopyrightblog.com/2014/12/22/thus-bad-begins-and-worse-remains-behind-google-news-closes-to-spanish-media/>>).

<sup>96</sup> Commission seeks views on neighbouring rights and panorama exception in EU copyright, 23 March 2016 (<<https://ec.europa.eu/digital-single-market/en/news/commission-seeks-views-neighbouring-rights-and-panorama-exception-eu-copyright>>).

<sup>97</sup> “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” See Art. 11(1) of the European Charter of Fundamental Rights (2010/C 83/02).

<sup>98</sup> *Tuomas Mylly*, The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU, in: Christophe Geiger, Research Handbook on Human Rights and Intellectual Property, Edgar Elgar, Cheltenham 2015, p. 103-131.

<sup>99</sup> Opinion, *GS Media v. Sanoma Media Netherlands BV and Others*, paras. 77-79.

<sup>100</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a modern, more European copyright framework, Brussels, 9 December 2015, COM(2015) 626 final, p. 9.

<sup>101</sup> It might be noted that the CJEU has also paid attention to the commercial and private nature of specific uses of protected subject matter. In the *FAPL* case the CJEU has noted that “the broadcaster may thus demand a different fee for access to its services according to whether the access is for commercial or for private purposes”. See *FAPL v. QC Leisure*, para. 130. In the *Del Corso* case, the CJEU has stressed that “[i]t follows from all the foregoing considerations that a dentist such as the one in question in the case in the main proceedings who broadcasts

phonograms free of charge in his dental practice, for the benefit of his clients and enjoyed by them without any active choice on their part, is not making a 'communication to the public' for the purposes of the application of Art. 8(2) of Directive 92/100". See Judgment of the Court of Justice of 15 March 2012, Case C-135/10, ECLI:EU:C:2012:140, para. 100 – *Società Consortile Fonografici (SCF) v. Marco Del Corso*.

<sup>102</sup> See Art. 21(2) of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>103</sup> „Ein Diensteanbieter, der mittels eines elektronischen Verweises einen Zugang zu fremden Informationen eröffnet, ist für diese Informationen nicht verantwortlich, 1. sofern er von einer rechtswidrigen Tätigkeit oder Information keine tatsächliche Kenntnis hat und sich in Bezug auf Schadensersatzansprüche auch keiner Tatsachen oder Umstände bewusst ist, aus denen einer rechtswidrigen Tätigkeit oder Information offensichtlich wird, oder, 2. sobald er diese Kenntnis oder dieses Bewusstsein erlangt hat, unverzüglich tätig wird, um den elektronischen Verweis zu entfernen.“ See Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden (Federal Act governing certain legal aspects of electronic commercial and legal transactions) (E-Commerce-Gesetz – ECG), BGBl. I Nr. 152/2001, § 17(2).

<sup>104</sup> Ibid., paras. 113-114., p. 319-320. At this instance, *Deschamps* made reference to a former judgment of the Supreme Court of Canada that elaborated on the theory of "innocent dissemination". See *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R.427, para. 89, p. 464.

<sup>105</sup> Opinion, *GS Media v. Sanoma Media Netherlands BV and Others*, para. 83. Compare to Recital 59 of the InfoSoc Directive.

<sup>106</sup> Ibid., para 84.

<sup>107</sup> *Spindler*, GRUR 2016, 159.

<sup>108</sup> Opinion, *GS Media v. Sanoma Media Netherlands BV and Others*, para. 83.

<sup>109</sup> *FAPL v. QC Leisure*, paras. 163-164.

<sup>110</sup> *PRCA v. NLA*, para. 24.

<sup>111</sup> European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), Strasbourg, 9 July 2015.