

Assessing the Legality of Hyperlink in the Right of Communication to the Public

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ABSTRACT

The expansion of the communication to the public right brings linking to the copyright protection. While the current case law contains conflicting interpretations of the right of communication to the public, this article will re-interpret this right in the context of hyperlinking, in line with the objectives of the Information Society Directive.

Keywords: Copyright, Communication to the public, Hyperlinking, New public

1. INTRODUCTION

Interconnectedness by linking plays an essential role in the internet. According to Tim Berners-Lee, there is no reason to ask for prior authorisation when users connect to another website by providing a link, otherwise, it will violate the freedom of speech. This means the owner of the linked-to website should not have the right to restrict the users from linking to his/her website. [1] However, the *Svensson* case, the first case at European level to include linking in the protection of the right of communication to the public, shows that links are not always copyright neutral. [2]

Right of communication to the public is a substitute for the right of distribution in the digital world, which is originally shaped by the 1996 WIPO Copyright Treaty and is harmonised in the EU by the Information Society Directive (InfoSoc Directive). The right of communication to the public implies that any acts of communication by wire or wireless means should be subject to authorisation or prohibition of the rightholder, covering two separate rights, the right of making available which is essential in the digital context, and broadcasting right. Making available to the public covers all the act of communications when a member of the public can access the copyrighted work in place and time chosen by them, predominantly to on-demand transmission. The legal text of the interpretation of the right of communication to the public is limited and CJEU has carved a set of conditions to assess the legality of the hyperlinks, encompassing two cumulative criteria: the act of communication and new public. [3]

This article will examine the application of the communication to the public right to hyperlinking, including four sections. The first section introduces how these conditions are forged by CJEU. The second section points out the problems of the overbroad interpretation of the communication to the public right. The third section proposes a consistent interpretation regarding the objectives of the Directive.

2. THE CONCEPTUAL FRAMEWORK

When assessing the legal status of linking to third-party content, it is necessary to examine whether the link is sufficient to constitute an act of communication. Besides, the different status of linked content needs to be considered. If the linked content is authorised, the new public condition needs to be met. Conversely, if the content of the link is unauthorised, the 'new public' test does not apply. In this case, whether the linker was aware that the originally published work was infringing is another factor to be considered.

2.1. Act of Communication

In the context of linking, an act of communication is any act as a consequence of which a work is made available in such a way that users can access it, which means there is no requirement of an act of transmission. In other words, it is irrelevant whether the user clicks on the link. [4] Thus, what is necessary to constitute an act of dissemination is the possibility for users to access the work on another website at a time and place of their choosing.

Furthermore, the mere provision of physical facilities to effect or carry out a communication is not reflected in the right to communication to the public,[5] but providing users with a link to the work for direct access is sufficient to constitute an act of communication if it would be difficult for users to access the work without that intervention. [6] Traditionally, the court focus on the indispensable role of the intervention. This means that an act of communication occurs only when the customer would be unable to enjoy the work without the intervention. [7] It could be seen that the role of the linker has transitioned to a more lenient standard when judging hyperlinks.

2.2. New Public

The ‘new public’ standard was created because the previous standard did not apply to the context of digital technology. Before the new standard emerges, the courts consider whether the new act communicated to the public uses the same or different technical means than the original act. For example, a programme transmitted via satellite radio is later made available on the Internet. [8] However, in the digital world, where all communications use the Internet, this is considered to be a single technological means.

The Court in *Svensson* stated that whether the act of communication points to a new public depends on whether the link circumvents the restrictive measures on the website where it was originally published. If the initial publication is not subject to any restrictive measures, then the initial public is all users on the Internet, meaning that there is no place for a new public. The question is what the characteristics of the restrictive measures are. The Court clarified the issue in *Bild-Kunst*, that restrictive measures need to be technical in nature. [9] However, there was a contradictory decision in *Renckhoff* where the Court stated that a new public was sufficient if the public to which the link was directed was not taken into account by the author. [10]

2.3. The knowledge test

The knowledge test applies when the linked content is unauthorised. If the linker knew or should have known the linked content is published without the consent of the copyright holder, the hyperlink itself infringes the right of communication to the public. [11] The subjective intention of the linker relies on a “for-profit” condition, which has two possible interpretations. The strict interpretation refers to the specific link to assess whether it aims at pursuing financial gain.[12] The broad interpretation refers to the website where the link is posted, to assess whether the overall operation of the website has a commercial nature. [13]

3. PROBLEMS

The interpretation of the right of the communication in hyperlinks context lacks consistency and is flawed from several dimensions. The interpretation should be consistent with the goal of the directive. Firstly, it aims to provide a high level of protection for copyright holders. [14] Another objective is to promote technological development and innovation in the digital environment. Lastly, harmonizing different national laws to enhance legal certainty and strike a fair balance between copyright holders and users.

Turning the indispensable role of the linker into a role that is only necessary makes the conditions for the act of communication too broad, which does not accommodate the development of technology and risks limiting future developments. [15] There are two types of hyperlinks. In the absence of a transmission, a simple hyperlink simply refers to the location of the work while it remains under the control of the copyright holder. An embedded link, on the other hand, takes the original work directly to another website. A link speeds up the dissemination of information on the Internet as opposed to simply providing the name and factual address of a file. Given that rights holders should have the ability to control subsequent use of their uploaded works, it is reasonable to regulate embedded links that involve the transmission or provision of work. However, a broad interpretation turns simple hyperlinks into acts of dissemination that disproportionately benefit rights holders at the expense of users and technology developers.

The new public test lacks legal certainty. If the public directed by the link is not taken into account by the author, the new public occurs. It thus introduces a contractual or mental element in the definition of new public. [16] The InfoSoc Directive does not specify how the prior consent of the author must be expressed. There are several expressions of copyright holders’ intention, including technological restrictions, contractual terms[17], and implicit consent. Using contractual terms to determine the rightsholder’s intention is problematic. According to the *Svensson* case, if the work is freely available online without explicit consent or restrictions, there was no “new public”. This means that linking would be subject to implicit consent. If copyright holders can terminate the freely accessible status of a work through contractual terms such as a notice on the website, an unreasonable burden would be put on users or platforms for constantly checking the status of the linked content.

The new public condition was created to limit the over-inclusive notion of the act of communication condition.[18] However, the application of this criterion in *Svensson* led to the exhaustion of the communication right for works made freely available online, which contradicts the non-exhaustion rule in Art. 3(3) of the

InfoSoc Directive. Exhaustion means that right holder should not exploit the distribution right once the work was put on the market. [19] If the work is made available online for free, there will be no new public, thus precluding any further dissemination to the public.

4. SOLUTION

To satisfy the high level of protection for copyright holders and to preserve the openness of the Internet, the interpretation of the new public standards should be changed and the act of communication and the presumption of knowledge should be interpreted narrowly.

Firstly, copyright holders should be able to control independent economic exploitation of the work. [20] Works might be exploited by different media on distinct markets without necessarily reaching a new public. [21] Given the need to give an appropriate return for the use of the work [22], the determining factor in deciding on the new public standard should depend on whether the secondary distribution of the work derives substantial economic value from the use of the work, and it is not important to consider whether the link reaches a separate audience. Such an interpretation is also in line with the knowledge test mentioned above when the work being linked to is unauthorised. Whether the linker is aware of the illegal status of the linked content depends on whether it is linking for profit. This should be interpreted using a strict interpretation of the knowledge test. This is because using the nature of the overall operation of the site rather than the specific link to presume knowledge of the platform would automatically place the onus on commercial sites to monitor all links, which would exclude platforms that lack proprietary software monitoring solutions.

As for the standard of the act of communication, the intervention of the linker should be indispensable rather than essential. If the link circumvents technical restrictions such as paywalls put in place by copyright holders, then the link plays an indispensable role in the act of communication, due to the fact that without such a link, the user would not be able to access the work. The essential standard is the relaxation of the concept of indispensable intervention and it would cover the link which merely provides the location of the work without circumventing the technical restrictions. Adopting such a looser standard will conflict with the notion of technological neutrality and proportionality. Hyperlinking is intimately bound to the conception of the Internet as a network, efficiently leading consumers from one location to another. While all internet users are accessible to the content uploaded online, the percentage of actual users that will visit and experience the content largely related to the efficiency of the dissemination of such content through the internet. Such dissemination is mainly facilitated by linking. If access to works freely

available online could be merely terminated by notice, it will impose an unreasonable burden on linkers to constantly check the status of the linked content and expand the right in the detriment of the dissemination of information. Thus, the intervention constituting the act of communication should only be accepted if it circumvents technological restrictions.

To maintain the dissemination of information online, sufficiency of the transmission should be required, it is thus necessary to differentiate embedded links and simple links. The former includes transmission because it directly brings the content to another website. As a result, the copyright holders lose the control over the original content and the technological measure imposed after the act of linking would become useless. In comparison, the simple links do not transmit or provide the work. Therefore, it is justifiable to regulate embedded links and there is no reason to restrict the simple links.

5. CONCLUSION

The current case law in assessing the legality of hyperlinks is inconsistent. To promote the incentive of copyright holders to share content and the dissemination of information, a narrower interpretation of the conditions of the right of communicate to the public should be adopted and the new public standard should be reconstructed to assess the profit gained by the secondary act.

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