

EU Court Holds That Hyperlinks Can Infringe Copyright

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In a landmark decision that departs from previous case law, the Court of Justice of the EU, the highest court of the EU, held that a website operator that posts hyperlinks to another site that contains copyright materials posted without the right holder's consent could itself be liable for copyright infringement.

The facts of the case

The case in question, *GS Media v. Sanoma Media Netherlands*, concerned a complaint by the Dutch publisher of Playboy magazine against the posting of hyperlinks in GS Media's popular Dutch website to third party websites where a number of photographs commissioned by Playboy magazine were available to be illegally downloaded. The Playboy publisher requested GS Media to remove the links several times. It even managed to cause third party websites to remove the photographs from their own sites. However, a defiant GS Media continued to provide new links to other websites where the photographs were available for downloading. Eventually, the photographs were published in Playboy magazine itself.

The legal issue – what is “communication to the public”

The decision turns on the interpretation of the concept of “communication to the public” in EU copyright law harmonized under legislation dating to 2001. The ruling is binding on all member states of the EU.

In a previous case (*Svensson* of 2014), the EU court held that the posting of a hyperlink to a website where the copyright works are already generally available to the public does not amount to “communication to the public” and therefore does not infringe the rightholder's rights. This was based on the notion that “communication to the public” of a work that is already available electronically (through broadcast or satellite services or the

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internet) requires an act by which the copyright material is communicated to a “new public”. The court held in *Svenssen* that providing a link to a website where the materials are already available does not communicate the content to a “new public”.

The *GS Media* decision distinguished the *Svensson* decision on the basis that its reasoning applied to cases where the copyright material was available on the third party website with the rightholder’s consent. The court considered that the position is different where the rightholder did not authorise the use of the materials on that other website.

When does the posting of a hyperlink amount to copyright infringement?

According to the decision in *GS Media*, two key factors determine whether the posting of a link to unauthorized materials on a third party website constitutes “communication to the public”:

Where the person providing the link is doing so without seeking to make a profit (that is, as a non-commercial activity) the posting of the hyperlink would constitute “communication to the public” (and therefore an infringement) only if that person knew or ought to have known that the materials were protected by copyright and made available on the third party website without the rightholder’s consent.

Where, on the other hand, the person provides the link as part of a for-profit activity, he should be expected, according to the decision, to carry out the “necessary checks” to ensure that the copyright materials on the website to which the hyperlink leads were posted legitimately with the right holder’s consent. Otherwise, there is a presumption against the person posting the hyperlink that he knew the materials were infringing.

The EU court noted the importance of maintaining a balance between the interests of right holders and the importance of providing a high level of protection to copyright materials, on the other hand, and the interests of free speech and the free circulation of information on the internet on the other. The court also acknowledged the importance of hyperlinks to the free circulation of information through the internet and the objective difficulties that anyone who wishes to ascertain the legitimacy of copyright materials posted on a third party website would face.

Nevertheless, the court considered that those concerns should only be taken into account when hyperlinks are used for non-profit purposes. Hence, in those cases, the infringement turns on the knowledge or deemed knowledge of the person providing the link. By contrast, if the link is provided as part of a for-profit activity, the burden lies on the person providing the links to ensure that the works are legitimately posted on the third party website.

However, despite the anti-commercial sentiment expressed in the court’s decision, the distinction between for-profit and not-for-profit activities is not as significant as it may seem. The decision made it explicitly clear that in any event (whether or not the link is provided as part of a for-profit activity) rightholders should have the right to notify the operator of a website that provide links to materials on third party websites that those

materials were posted illegally and that it should be able to take action against the website operator if it refuses to remove the link. In other words, even if the link is provided as part of a not-for-profit activity, once the website operator is notified of the infringement the continued use of the hyperlink will constitute an infringement.

The practical ramifications

The decision in *GS Media* creates a new form of copyright infringement. Essentially, it is a new judge-made form of secondary infringement. The court tilted the balance heavily against commercial activities by placing the burden on the operator to establish non-infringement before placing the hyperlink. However, even a not-for-profit website will infringe once it has actual or deemed knowledge of the infringement.

For rightholders, the decision establishes a new route for copyright enforcement. So far, rightholders could pursue websites that posted unlicensed materials and could issue take-down notices to hosting services that host such websites. In some countries (such as the UK) an additional remedy is available to require ISPs to block the infringing site.

Now right holders will be able to send take-down notices to any website operator if it provides links to infringing materials on third party sites and they will be able to seek damages from the operator if it refuses to remove the links to the illegal materials (as long as none of the copyrighted defences apply and as long as the right holder can establish the underlying infringement).

Hyperlinks are used in many websites, primarily by media and news-oriented sites, which provide numerous links as part of their wider content offering and within articles and other content. Links are also provided by search engines which provide the links as their main product. Both categories offer the links as part of their commercial profit making activity. As such, they are particularly vulnerable to potential liability for copyright infringement under the new rule.

The decision in *GS Media*, therefore, makes all major news and media companies and all search engine operators overnight into potential mass infringers of copyright due to the provision of hyperlinks on their websites. Infringements will only occur where hyperlinks lead to infringing materials on third party sites, but website operators and search engines now have the burden to ascertain that each hyperlink they provide does not lead to infringing content.

Effectively, this means that all such website operators will have to readdress their take-down and screening processes in order to minimize the risk of liability in relation to links provided to third party websites. Many site operators will have to weigh the benefit of incorporating links to third party sites against the extra costs of dealing with take-down notices and putting in place proper screening procedures and systems for clearing rights. The likely result may be a significant reduction in the use of hyperlinks by media organisations.

In regard to search engine services, it is only a matter of time before a case is brought

against Google to test the applicability of the new liability theory under the *GS Media* decision to the search results provided by the search engine. Google (and other search engines) will undoubtedly argue that the new rule does not apply to them because they only provide an algorithm to search the web – they do not provide links to other websites. It is the search, they will argue, that triggers the list of links, not the considered decision of the search engine operator. A distinction could be drawn, however, between paid-for links (“ads” or “sponsored links”) which are placed by the search engine in consideration of payments, and “natural results” generated by the algorithm. The search engine’s position would be more difficult to defend where it accepts payment in consideration of placing the link. Further, it could be argued that where Google is paid for allocating “adwords” it is agreeing to placing links to the paying websites higher up the list of results. If the logic of the *MS Media* decision is to be followed, in such circumstances it should be Google’s responsibility to ensure that the linked website does not contain infringing materials.

The Court of Justice of the EU is not averse to departing from its own decisions (as the *MS Media* case itself demonstrates) and at least in the area of copyright it appears willing to engage in judicial creativity. With that in mind, it is entirely possible that the law might change once again the next time this issue comes before the court.