Computer & Communications Industry Association

Tech Advocacy Since 1972

CCIA Comments on the *GS Media* Case (C-160/15)

Table of contents

- **Introduction to the GS Media case** p. 1
  - The Importance of Linking p. 2
  - Linking and exercise of freedoms p. 3
  - Facts p. 4
- **Question 1a** p. 6
  - Hyperlinks do not transmit work within the meaning of copyright law p. 6
  - The concept of transmission in the travaux préparatoires p. 7
  - The concept of transmission in international law p. 8
  - The concept of transmission in CJEU case law p. 9
  - The CJEU found in Svensson that a link is not a communication to the public p. 10
  - The CJEU already found in BestWater that links can point to content that infringe copyright and still not constitute a communication to the public p. 12
- **Question 1b** p. 13
- **Question 1c** p. 13
  - There is no need for a concept of awareness where secondary liability already exists p. 13
  - Difficulty of ascertaining the legal status of works posted on the Internet p. 15
- **Question 2a** p. 19
- **Question 2b** p. 20
- **Question 3** p. 20

Introduction to the *GS Media* case (C-160/15)

Hyperlinks are fundamental to modern communication. Millions of European citizens post links every day to Twitter, Facebook, their own blogs, and all over the web. News publishers post links to primary source materials and related stories. Search engines respond to queries with links to potentially relevant information scattered across the trillions of web pages that comprise the web. In light of the scale of the web and the scope of copyright law, there is no way to ascertain whether all the works at the other end of every link have been authorized by the relevant copyright owners.

In light of these realities and the central role of hyperlinks in the digital environment, it is of the utmost importance to further develop the rule of harmonized EU copyright law that publishing a link to content that is already freely available to the Internet public constitutes no infringement of the communication to the public right.[1] Following this approach, questions of liability for linking can be solved appropriately by balancing the relevant concerns of users and rightsholders, including whether the party posting the link was aware of the infringing nature of the material referenced by the link, in the light of the rules on secondary liability to be found in the E-Commerce Directive[2] and the national laws of EU Member States. The CJEU should therefore confirm in the *GS Media* case, as it did in the *Svensson* and *BestWater* cases, the general principle of EU copyright law that publishing a link to a resource already available without restriction online is not an act of communication to the public within the meaning of Article 3(1) of the Information Society Directive.

The Importance of Linking

In the words of one of the creators of the web: "*When you make a link, you can link to anything. That means people must be able to put anything on the Web, no matter what computer they have, software they use or human language they speak and regardless of whether they have a wired or wireless Internet connection*."[3] What makes the web a unique space is that everyone is able to make a link to any piece of information that can be freely accessed using public networks. If this capacity to link is put in doubt, the web would lose its universality and power. The most important information medium of our time would be hobbled. As the European Copyright Society wrote: "*The legal regulation of hyperlinking thus carries with it enormous capacity to interfere with the operation of the Internet, and therefore with access to information, freedom of expression, freedom to conduct business, as well – of course – with business ventures that depend on these types of linkages.*"[4]

The web relies on a simple but profound concept that explains its popularity: any person can share a citation to information with anyone else, anywhere. The other person can then click on the citation —the link— and immediately see the cited information.

The web is a protocol that made the internet easy to use. Decentralization is its essential design feature. One does not have to get approval from any central authority to add a page or make a link. All that users have to do is use standard protocols: write a page in hypertext markup language (HTML), name it and serve it up on the Internet using hypertext transfer protocol

[1] See to that effect CJEU, 13 February 2014, case C-466/12, Svensson; CJEU, 21 October 2014, case C-348/13, BestWater.
[2] In particular, see Article 14 of the E-Commerce Directive 2000/31/EC.
[3] Tim Berners-Lee, *Long Live The Web*, Scientific American, December 2010.
[4] European Copyright Society, *The Reference to the CJEU in Case C-466/12 Svensson*, 15 February 2013.

(HTTP). "*Decentralization has made widespread innovation possible and will continue to do so in the future*."[5]

It is worth highlighting in this context that the person uploading content on a website can easily define the way the website can be used in the communication process. Through not more than few words of HTML-code, as well as through other means, linking to a website can be excluded or restricted by its owner.[6] On content platforms such as Youtube, uploaders can prevent the embedding of a video by a simple click: on such platforms it is therefore a decision of the uploader to what extent content can be accessed through links and embeds. Hence, subjecting a link to a prior authorization requirement curtails the freedom of the person setting the link. Many business models, in particular when they are refinanced through ads, rely on this freedom: Newspapers for example, seeking as many clicks on their websites to maximise ad revenues, support links in social networks[7] to make their content as widely known as possible. These lawful business models could suffer if each link and each embed were subject to a license.

Each web page has a uniform resource locator (URL). The URL is an address that, when published using the proper HTML tags, allows an internet user to access the page directly, regardless of the content it leads to or who publishes that content. Thanks to links, the web is not just a collection of content, but something of greater value: an interconnected information space.

Linking and Exercise of Freedoms

The Web relies on the need and the right to link, without prior authorization. This is the reason why the questions that are asked to the CJEU in case C-160/15 are crucial: a ruling against the freedom to link would undermine the structure of the web. It would also *undermine the fundamental freedoms which the freedom to link helps to safeguard in the digital environment*, in particular freedom of expression and information. The Court of Justice has made it clear on several occasions that an appropriate balance between fundamental rights and freedoms, and the objectives of copyright protection must be found. In *Scarlet/SABAM*, the CJEU highlighted the need to ensure such a "fair balance" with regard to several rights and freedoms:

> "Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the

[5] Tim Berners-Lee, *Long Live The Web*, Scientific American, December 2010..
[6] For a recognition of this possibility in the context of exerting control over the display of online content, see German Federal Court of Justice, 29 April 2010, case I ZR 69/08, p. 11-12, available in German at www.bundesgerichtshof.de.
[7] One just needs to look at the bottom of news articles published online, which feature Twitter, Facebook and other social media button, to realize this.

> one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other."[8]

Similarly, the Court, in *UPC Telekabel Wien*, expressed concerns about copyright enforcement measures in the digital environment resulting

> "…primarily in a conflict between (i) copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter, (ii) the freedom to conduct a business, which economic agents such as internet service providers enjoy under Article 16 of the Charter, and (iii) the freedom of information of internet users, whose protection is ensured by Article 11 of the Charter."[9]

Given this particular importance attached to the maintenance of an appropriate balance between the different fundamental rights and freedoms at stake, the human rights dimension of the proper functioning of the Internet on the basis of hyperlinking technology must be factored into the equation in the assessment of the scope of the right of communication to the public vis-à-vis the freedom to link.

Facts

Sanoma, the publisher of the monthly magazine Playboy, hired a photographer to do a photo shoot with a popular Dutch TV personality. The photos were taken in mid-October 2011.

A few days after the photo shoot, Geenstijl.nl, a popular news website, published a racy headline along with a link to FileFactory, an independent file-hosting service, where the as-yet-unpublished photos had been posted by unknown persons. In November, Geenstijl.nl published another link to the same leaked photos, this time to ImageShack, a different independent file-hosting service. Geenstijl users posted additional links on the Geenstijl forums. Sanoma sent cease & desist letters prior to, and after, the posting of the links, which Geenstijl and its parent company ignored. At some point, the subject of the photos herself tweeted a link to these leaked photos. They were eventually published in the December 2011 issue of Playboy. After Sanoma brought a legal challenge in the Dutch courts and argued the case in several instances, prejudicial questions were finally referred to the CJEU by the Dutch Supreme Court in May 2015.

As the case comes to the CJEU, the outcome to be avoided is a legal rule that puts in jeopardy every person who posts a link, unless the person can be sure, in advance, that the material at the other end of the link is authorized by the copyright owner. It is common ground that the persons who originally posted the leaked photos on the Internet before the dispute between Sanoma and Geenstijl infringed copyright. It is also common ground that it is a question of national Member State law – and harmonized rules on secondary liability under European law – whether linking to these photos with the knowledge of their infringing nature can establish

[8] CJEU, 24 November 2011, case C-70/10, Scarlet vs. SABAM, para. 53.
[9] CJEU, 27 March 2014, case C-314/12, UPC Telekabel Wien vs. Constantin Film, para. 47

secondary liability for the person posting the link. So the crucial question posed to the CJEU is whether, in addition to existing national law rules on secondary liability, linking to infringing material can give rise to *direct* infringement of the communication to the public right under European law, which traditionally has been understood to be a strict liability offense. This paper shows it is possible to answer the prejudicial questions in the *GS Media* case in a manner that safeguards the freedom to link while also respecting the traditional contours of copyright law.

Questions Referred to the CJEU

1a. If anyone other than the copyright holder refers by means of a hyperlink on a website controlled by him to a website which is managed by a third party and is accessible to the general internet public, on which the work has been made available without the consent of the rightholder, does that constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29??

To safeguard the freedom to link and underlying fundamental freedoms, the CJEU should answer this question in the negative. Just as in the Svensson and Best Water cases, the Court should conclude that a reference by hyperlink to material that has been made freely accessible on the internet does not communicate the work to a "new public," and thus does not constitute a "communication to the public" within the meaning of Article 3(1). Any other result would put every person who posts a link[10] in jeopardy of copyright infringement liability, as it is impossible to ascertain in advance the owner and authorization status of every page on the web.

Hyperlinks do not transmit works within the meaning of EU copyright law

As an initial matter, the CJEU should clarify that a hyperlink is not a relevant act of communication to the public. A hyperlink is "*a relationship between two anchors, called the head and the tail. The link goes from the tail to the head. The head and tail are also known as destination and source, respectively.*"[11] The crucial point here is that with this configuration, a hyperlink is nothing more than a simple reference – a citation – to material that is available elsewhere on the Internet. Hyperlinking does not involve any act of transmission of a work. A hyperlink merely informs Internet users about the location of available online information.[12] In

[10] Note that the "*person who refers by means of a hyperlink*" is not just GS Media (which is the person who *also* controls the site where this link appears), but any person who creates any link anywhere, regardless of whether or not she owns or operates the website where the link is posted: under the facts of the case some users reposted links in the site forums. In other words, the questions refer to all persons who create or post links on sites they do not operate: for example a blogger who includes a link in a post, a Twitter user who shares a link on the social media platform, a Facebook user who shares a news story with her contacts, etc.

[11] This is the authoritative definition the W3C provides at www.w3.org/MarkUp/html-spec/html-spec_7.html. The W3C is the Consortium where the web was invented, that today develops web standards.

[12] European Copyright Society, *The Reference to the CJEU in Case C-466/12 Svensson*, 15 February 2013, p. 8. In the same sense German Federal Court of Justice, 17 July 2003, case I ZR 259/00, "Paperboy", available at www.bundesgerichtshof.de, para. 42: "*A person who sets a hyperlink to a website with a work protected under copyright law which has been made available to the public by the copyright owner, does not commit an act of exploitation under copyright law by doing so but only refers to the work in a manner which facilitates the access already provided*".

the absence of any transmission, hyperlinking does not amount to a relevant act of communication to the public in the sense of EU copyright law. As the CJEU stated in *FAPL*,

> "the concept of communication must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used."[13]

EU copyright law, thus, is based on a broad concept of communication to the public. For an act of hyperlinking to fall under this broad concept of communication, however, it is necessary that the hyperlinking involve a transmission of a protected work. Without transmission, there is no act of communication to the public in the sense of EU copyright law. This becomes evident when considering Recital 23 of the Information Society Directive 2001/29:

> "This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts."

The Concept of Transmission in the *Travaux Préparatoires*

The exclusive right of communication to the public in the EU is thus intended to cover "*any such transmission or retransmission of a work*" – but not more than that. This understanding also underlies the *travaux préparatoires* of the Information Society Directive. The Green Paper for the later Directive reflected the understanding that regulation of the right of communication to the public would be a regulation of copyright vis-à-vis transmission technologies:

> "The Commission takes the view that a Community solution should be found to the problem of communication to the public. The transmission technologies which will be used in the information society challenge the traditional understanding of the concept."[14]

The Follow-Up to the Green Paper, again, was based on an approach placing the right of communication to the public in the context of transmissions:

> "In view of the outcome of the consultation procedure, it is proposed to protect digital 'on-demand' transmission on the basis of a further harmonised right of 'communication to the public'. These harmonised rules would be linked as closely as possible to the traditional concept of communication to the public."[15]

In line with this preparatory work, the Commission Proposal for the Directive clarified that

[13] CJEU, 4 October 2011, cases C-403/08 and C-429/08, Football Association Premier League v. QC Leisure, para. 193.
[14] Green Paper, 19 July 1995, COM(95) 328 final.
[15] Follow-Up to the Green Paper, 20 November 1996, COM(96) 586 final.

> "[t]he notion of 'communication to the public' has been used as in the *acquis communitaires* and the relevant international provisions, such of the Berne Convention and the WCT."[16]

The Concept of Transmission in International Law

An exploration of the meaning of this reference to international copyright standards confirms that acts of communication to the public are to be equated with acts of transmission. The leading commentary on the Berne Convention by Professors Jane Ginsburg and Sam Ricketson summarizes the discussion on the rights of communication to the public in the Berne Convention under the heading "Rights of Communication to the Public by Transmission".[17] With regard to Berne provisions setting forth exclusive rights of communication to the public[18] they explain:

> "These texts appear to address all forms of transmissions ('*any* communication to the public'."[19]

In the Basic Proposal for the later WIPO Copyright Treaty, it was expressed clearly that "communication to the public" in the sense of international copyright law means "transmission":

> "As communication always involves transmission, the term 'transmission' could have been chosen as the key term to describe the relevant act. The term 'communication' has been maintained, however, because it is a term used in all relevant Articles of the Berne Convention in its English text."[20]

The Basic Proposal adds that, in light of the interchangeability of the terms, national legislation may opt for a right of 'transmission' instead of providing for a right of 'communication':

> "It seems clear that, at the treaty level, the term 'communication' can be used as a bridging term to ensure the international interoperability and mutual recognition of exclusive rights that have been or will be provided in national legislations using either the term 'transmission' or the term 'communication'."[21]

During the 1996 Diplomatic Conference that led to the adoption of the WIPO "Internet" Treaties, the understanding of the right of communication to the public as a right of control over the transmission of works also follows from the statements made by delegations during the

[16] Commission Proposal, 10 December 1997, COM(97) 628 final, 25.
[17] S. Ricketson/J.C. Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Oxford: Oxford University Press 2006, p. 717.
[18] Articles 11bis, 11(1)(ii) and 2, 11ter(1)(ii) and 2, 14(1)(ii) and 14bis(1) of the Berne Convention contain exclusive rights of communication to the public.
[19] S. Ricketson/J.C. Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Oxford: Oxford University Press 2006, p. 718 (emphasis in the original text).
[20] Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996, Geneva: WIPO 1999, Vol. 1, Document CRNR/DC/4, para. 10.15.
[21] Records of the Diplomatic Conference, ibid., para. 10.16.

negotiations. The Delegation of Australia expressed support for the proposals concerning the right of communication to the public pointing out that "*the main field of application of which was the transmission of text and images*."[22] Singapore expressed "*concern that the creation of an expanded communication right conferring a digital transmission right would create uncertainty for both copyright owners and users*."[23] Albania supported the proposed right of communication to the public "*dans la mesure où il complète utilement le droit de communication, prévu à l'article 11 et des autres articles de la Convention de Berne, en l'étendant à toute les catégories d'oeuvres et en visant expressément la transmission à la demande*."[24] Similarly, the delegation of Burkina Faso expressed support for the right of communication to the public "*quelle qu'en soit la catégorie et, en particulier, pour les cas de transmission à la demande*."[25] In all these statements underlying the recognition of the right of communication to the public in the WCT, the requirement of transmitting a literary or artistic work features prominently.

The Concept of Transmission in CJEU case law

Against this background, there can be little doubt that 'communication to the public' in the sense of the Information Society Directive – seeking, as one of its foremost objectives, to implement the WIPO Copyright Treaty[26] – means and requires an act of transmission as a precondition for invoking the exclusive right. The CJEU has repeatedly pointed out the direct connection between acts of communication to the public and the transmission of copyrighted material. In *SGAE/Rafael Hoteles*, the Court concluded:

> "Therefore, if, by means of television sets thus installed, the hotel distributes the signal to customers staying in its rooms, then communication to the public takes place, irrespective of the technique used to transmit the signal."[27]

With regard to the digtial environment, the Court more specifically pointed out in *Marco del Corso* that the right of communication to the public concerned "interactive on-demand transmissions":

> "As is clear from the explanatory memorandum to the Proposal for Directive 2001/29 (COM(97) 628), confirmed by recital 25 of that directive, making available to the public, for the purposes of that provision, is intended to refer to 'interactive on-demand transmissions' characterised by the fact that members of the public may access them from a place and at a time individually chosen by them."[28]

[22] Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996, Geneva: WIPO 1999, Vol. 2, Summary Minutes of Main Committee I, para. 306.
[23] Records of the Diplomatic Conference, ibid., para. 308.
[24] Records of the Diplomatic Conference, ibid., para. 310.
[25] Records of the Diplomatic Conference, ibid., para. 316.
[26] This overarching objective is reflected in Recital 15 of the Information Society Directive.
[27] CJEU, 7 December 2006, case C-306/05, SGAE vs. Rafael Hoteles, para. 46.
[28] CJEU, 15 March 2012, case C-135/10, SCF vs. Marco Del Corso, para. 59.

In *TVCatchup*, the CJEU explained once again:

> "It follows, in particular, from recital 23 in the preamble to Directive 2001/29 that the author's right of communication to the public covers any transmission or retransmission of a work to the public not present at the place where the communication originates, by wire or wireless means, including broadcasting."[29]

Given this decisive role of "transmission" for a finding of a relevant act of communication to the public, it becomes apparent that hyperlinking does not constitute communication to the public in the sense of EU law. As already pointed out above, the use of hyperlinking technology does not involve any act of transmission of a work. A hyperlink merely informs Internet users about the location of information available elsewhere on the Internet.[30] As the basic requirement of transmission is not fulfilled, there is no room to qualify hyperlinking as an act of communication to the public.

The CJEU Found in Svensson that a Link is not a Communication to the Public

In *Svensson*, the CJEU arrived at this result by holding that there was no "new public" apart from the public already reached by the primary online communication of a work. Following this line of reasoning, no relevant act of communication to the public was found.[31] Considering the described international and EU *acquis* underlying the right of communication to the public,it becomes clear that this approach introduces a Berne/WCT-plus standard: following the pre-existing international and EU *acquis*, the Court could have refused an act of communication altogether because the constituent element of "transmission" is missing in hyperlinking cases. Instead, the Court based its *Svensson* decision on the new public criterion which leads to a level of protection that is more generous than the international minimum standard in that it allows a finding of communication to the public in cases where a new public is reached – in spite of the fact that no transmission takes place. By not excluding the right of communication to the public in general but leaving the final decision to an assessment of the new public criterion, the Court thus keeps the possibility of granting protection in some cases, such as hyperlinks circumventing access restrictions in place at the source website.[32]

As the Court offers protection going beyond the international minimum standard, it also becomes clear that the approach taken in *Svensson* cannot validly be criticized for falling short of international protection obligations. When it is argued that the new public criterion used in the

[29] CJEU, 7 March 2013, case C-607/11, ITV Broadcasting vs. TVCatchup, para. 23.
[30] European Copyright Society, *The Reference to the CJEU in Case C-466/12 Svensson*, 15 February 2013, p. 8. In the same sense German Federal Court of Justice, 17 July 2003, case I ZR 259/00, "Paperboy", available at www.bundesgerichtshof.de, para. 42: "*A person who sets a hyperlink to a website with a work protected under copyright law which has been made available to the public by the copyright owner, does not commit an act of exploitation under copyright law by doing so but only refers to the work in a manner which facilitates the access already provided*".
[31] CJEU, 13 February 2014, case C-466/12, Svensson, para. 27-28.
[32] CJEU, 13 February 2014, case C-466/12, Svensson, para. 31.

Svensson decision violates international obligations by *de facto* introducing an exhaustion rule in the context of the right of communication to the public,[33] it is overlooked that on the basis of the international Berne and WCT *acquis*, the CJEU would have been free to deny the application of the right of communication to the public altogether. In line with international copyright law, the Court could have stated that in the absence of any transmission, there simply was no basis for the invocation of the exclusive right of communication to the public. Instead of such an outright exclusion of the right, the CJEU used the new public criterion to preserve an area of application for the right of communication to the public, namely with regard to hyperlinks that circumvent access restrictions. Paradoxically, the argument of incompliance with international law, thus, takes as a starting point the very element of CJEU jurisprudence that creates a backdoor for the invocation of the right of communication to the public in the absence of an act of transmission. With the grant of stronger protection than internationally envisaged, the Court even creates an enhanced risk of EU copyright law unduly restricting the freedom to link and encroaching upon the aforementioned fundamental rights and freedoms, in particular freedom of expression and information.

As the new public criterion is a Berne/WCT-plus element, the Court is free to modify its approach to hyperlinking cases without falling short of obligations in international copyright law. Considering the precondition of a transmission in international law, the Court could use the *GS Media* case to bring EU law in line with international standards and clarify that in hyperlinking cases, no relevant transmission of a work and, accordingly, no relevant act of communication to the public occurs – irrespective of the legal status of the Internet location to which the hyperlink refers. The Court could thus rely directly on the principle that there is no communication to the public without an act of transmission.[34] Alternatively, the Court could further develop the "new public" line of reasoning enunciated in *Svensson*: with the unrestricted appearance of a work on the Internet, the internet public has already been reached. A subsequent hyperlink does not target a "new public" and, thus, does not amount to a secondary act of communication to the public. Following one of these approaches, the Court could ban the risk of an encroachment upon freedom of expression and information, and safeguard the proper functioninig of the Internet as a source of information and platform for debate, and a driver of new online services and business models.

It is therefore submitted that, in light of the broad definition of hyperlinks question 1a implies, referring to a work by the means of a hyperlink is not a communication to the public within the meaning of Article 3(1) of the Information Society Directive. In the absence of a transmission of a work, a hyperlink cannot be viewed as a relevant communication to the public. In addition, where a work has been made freely accessible online, a link to the work cannot be said to make the work available to a "new public." Accordingly, it is not necessary to address whether the work was made available online without the rightholder's permission. If the Court were to

[33] Association littéraire et artistique internationale (ALAI), 17 September 2014, Opinion on the Criterion of "New Public".
[34] CJEU, 13 February 2014, case C-466/12, Svensson, para. 27.

conclude otherwise, it would realize the question contains insuperable difficulties in theory and practice. These unsurmountable difficulties are addressed below, in particular under question 1c and 3.

The CJEU already found in *BestWater* that links can point to content that infringe copyright and still not constitute a communication to the public

In addition to these more general considerations based on the international and EU *acquis*, it must not be forgotten that the question of linking to, or embedding, copyright infringing content has already been decided in BestWater.[35] The question referred to the CJEU, as it was written by the Bundesgerichtshof in that case, incorporated the facts of the case by referring to "*in circumstances such as those in the main proceedings*". These circumstances, as they were described by the referring court, indicated that the video at issue in BestWater may have been posted without the rightholders' consent. It was therefore clear to the Court that the facts of the case included the possibility that the content had been posted illegally. Despite this, neither in its ruling nor in its reasoning, is there the slighest hint that the outcome could depend on the lawfulness of the first communication serving as a basis for the hyperlink. As the CJEU is not free to answer prejudicial questions only in part, it would be inconsistent to assume that the BestWater decision is silent on the question of hyperlinking to illegal content. Instead, it is to be assumed that the Court addressed all aspects of the BestWater case and took its decision being aware of the fact that the source material might have been an illegal source.

The wording of the BestWater ruling[36] makes it clear that the ruling covers the situation where the link references a work not previously posted with the authorization of the rightsholder. In this paragraph (of an order that was published just in French and German), the crucial sentence referring to the rightholder's consent is introduced by "*notamment*" or "*insbesondere*" (which means "in particular" in English) indicating also that the court's ruling took into account the particular facts as described by the Bundesgerichtshof. As *Bestwater* explicitly refers back to the rules established in *Svensson*, it constitutes an important case precedent supporting the assumption that no communication to the public can be found in the absence of a new public – regardless of whether or not the referenced source is legal or illegal.

> ➠ For all the reasons above, it is submitted that there is no 'communication to the public' as defined in article 3(1) of Directive 2001/29 when a person other than the copyright holder refers, by means of a hyperlink on a website maintained by him, to a third-party website that is accessible to the general internet public where the work has been made available without the permission of the rightholder.

[35] CJEU, 21 October 2014, case C-348/13, BestWater.
[36] CJEU, 21 October 2014, case C-348/13, BestWater, at para. 16.

1b. Does it make any difference if the work was also not previously communicated, with the rightholder's consent, to the public in some other way?

As question 1b complements 1a, it must receive a similar answer. As noted above, when a hyperlink is used to refer to a work communicated to the public without restriction somewhere else on the Internet, no transmission of the work takes place and no new public is reached. Accordingly, there is no relevant act of communication to the public in the sense of EU copyright law. Against this background, it makes no difference whether the primary communication to the internet public was initiated by the rightholder herself or somebody else. If this primary communication to the public was carried out without the authorization of the rightholder, the rightholder can bring an action against the person who posted the work on the Internet. A hyperlinker, however, is not directly liable because the hyperlink does not involve a transmission of the work and does not amount to a relevant act of communication to the public. This does not exclude secondary liability of the hyperlinker pursuant to national law in cases where illegal postings are knowingly exploited or facilitated in a systematic way.

➠ It is thus submitted that there is no 'communication to the public' as defined in Article 3(1) of Directive 2001/29 when a person other than the copyright holder refers, by means of a hyperlink on a website maintained by him, to a third-party website that is accessible to the general internet public where the work has been made available without the permission of the rightholder, regardless of whether or not the work has been previously been communicated to the public with the permission of the rightholder.

1c. 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?

As already pointed out, this question of awareness, or (constructive) knowledge, strictly speaking, does not arise in the context of hyperlinking because hyperlinking technology does not involve any transmission of a work, does not target a new public, and thus does not amount to a relevant act of communication to the public. In consequence, there is no direct liability of hyperlinkers in the first place.

There is no need for a concept of awareness where secondary liability already exists

The answer to question 1(c) must also be in the negative because the concept of "awareness" is alien to the Information Society Directive, and indeed is alien to the concept of direct

infringement in copyright law more generally. The word, words of the same family, or words that are synonyms, cannot be found anywhere in the provisions of the Directive. The Court does not have the power to introduce this new concept in EU copyright law.

The question of "awareness" or some other standard of (constructive) knowledge, again, shows that questions of direct liability must be separated from standards applicable in the context of secondary liability. The safe harbour provisions for hosting in the E-Commerce Directive, for instance, address the criterion of knowledge of infringing material.[37] Similarly, national secondary liability standards focus on whether the provider of an Internet platform seeks to facilitate and support infringing use by users of the platform.[38]

The *GS Media* case itself can serve as an example illustrating the appropriate interplay of direct liability standards on the one hand, and secondary liability on the other. On second instance, the Court of Appeals of Amsterdam held that Geen Stijl Media had not opened a new, independent communication avenue by using hyperlinks to webpages on which the photos at issue had already been made available to the Internet public. Accordingly, no copyright infringement was found and direct liability was denied.[39] In this way, the Court of Appeals of Amsterdam safeguarded the freedom to link and prevented exposure of hyperlinkers to direct liability for copyright infringement.

This, however, did not mean that the conduct of GeenStijl was deemed permissible altogether. The Court of Appeals of Amsterdam concluded that GeenStijl had systematically facilitated access to the illegal postings of the photos that had been available elsewhere on the Internet and that, for this reason, Geen Stijl Media could be held liable as a secondary infringer under general tort law principles in national Dutch law.[40]

In summary, the adoption of an awareness or knowledge test in the framework of the determination of copyright infringement is not necessary to offer appropriate protection against excessive hyperlinking practices that cause harm to copyright owners by facilitating and exploiting the illegal posting of protected works elsewhere on the Internet. By contrast, the freedom to link can be preserved at the level of direct copyright infringement and be left to the application of more refined secondary liability standards – which include the question of awareness and knowledge – that follow from the E-Commerce Directive and national law in EU Member States.

[37] Article 14 of the E-Commerce Directive 2000/31/EC.
[38] For example, Dramatico Entertainment v. BSkyB, [2012] EWHC 268 (Ch) (applying secondary liability principles in UK law).
[39] Court of Appeals of Amsterdam, 19 November 2013, Geen Stijl Media/Sanoma, para. 2.4.7.
[40] Court of Appeals of Amsterdam, 19 November 2013, Geen Stijl Media/Sanoma, para. 2.7.3.

Difficulty of ascertaining the legal status of works posted on the Internet

Even if question 1(c) were deemed relevant, there is substantial reason to answer the question in the negative. From the perspective of the person who intends to create a simple link, there is **no way to make sure a link points to a work that is online with permission**, or that will stay online with permission. If the CJEU were to rule that linking to content posted without permission is illegal, the only links that would survive would be links by authors to their own works, or links posted after each author's permission had been obtained. This would create an autarkic web. It would be the exact opposite of what it is today: a place where links enable the exchange, comparing, and sharing of ideas and information.

Think, for example, of a Wikipedia page where the content is continually updated.[41] Or of a live report on an event on a news site that embeds tweets as the story evolves. There are countless examples of pages where content is frequently refreshed or updated: *the web is dynamic, and so are its pages*! The intrinsic nature of the web gives rise to a set of questions every time a link is added, in particular:

- How can one know whether a link points to a page where content was lawfully published?
- How can one control whether a link points to a page where the content remains lawful after the link has been created?

How can one know whether a link points to a page where content was lawfully published? If an internet user wants to know whether or not a work was posted with the rightholder's permission, she would first have to determine *who* this rightholder is.

There are cases where this would simply not be possible, because the rightholder has chosen to remain anonymous. Think of the blog written by a Syrian dissident, for example, which could include stories or photos by other dissidents. Anonymous publication is an exercise of the fundamental freedom of expression, and also in some cases crucial for the security of the publisher. One who would consider linking to a work published on that blog would never be able to identify who the rightholder of the work is. This would have the effect of preventing the creation of links to important content posted by individuals who may have the most relevant information relating to subjects of public interest. Hence, the particular facts in the *GS Media*

[41] Note that if a rightholder complains that a photo on which it has rights illustrate a Wikipedia article, this should not grant this rightholder to prevent a third party from linking to this web page nor prevent anyone from pointing to this page, this because:

- the photo can quickly be removed if notice is given to Wikipedia that it is infringing, in application of article 14 of the Directive 2000/31 on electronic commerce which provides that a hosting provider must remove content when it is notified this content is illegal;
- the photo can be replaced by another;

In other words if someone is made aware that part of the content accessible at a page she links to is infringing copyright, while the remainder of the page is fully legal, there is no legal reason why she should refrain from pointing to this page where most of the content is lawful.

case must not discredit the use of hyperlinks in cases where this is totally legitimate - even if the rightholder's permission cannot be obtained. The problem with a solution based on copyright, however, is that copyright is not elastic enough to distinguish between the individual circumstances of each case. Instead, the infringement test in copyright law is likely to erode the freedom to link altogether. Secondary liability standards, by contrast, offer a much more nuanced and appropriate instrument to develop tailor-made solutions for each individual situation.

The issue of identifying the rightholder, for instance, does not stop in cases where the work was published anonymously. There can be improper attribution of a work (resulting in asking the wrong person whether she voluntarily made a work available). There can be situations where the author puts her own works online but is not authorized to do so.[42] There are orphan works, whose authors are unknown; orphan works are so numerous that a Directive was developed to answer to the legal issues they raise.[43] It is frequent that those who link simply do not have the time to check: journalists are an example of internet users who abundantly create links without being in position to know whether what they link to was posted with permission: news does not wait![44]

In copyright law, contrary to what is provided in other branches of intellectual property such as patent law or trademark law, there is no such thing as a reliable database or register that would list the rightholder(s) of a work and provide up-to-date details so that they can be contacted. In the online environment, where millions of photos and blogs and tweets are being uploaded and published each day,[45] the dream of a universal registry of copyrighted works is slipping farther and farther away.

For each attempt to create a link there would be **extravagant transaction costs** to identify and then try to contact all relevant rightholders who can give an accurate and reliable[46] answer to the question: was this work posted with your permission?
As a result of these costs, content may only become available in Member States where efficient rights clearance mechanisms are in place. Online platform and service providers may also have to confine the rights clearance to Member States with online markets broad enough to recoup extravagant transaction costs afterwards. Practically speaking, more content may thus become available in bigger Member States, whereas Internet users in smaller and less wealthy Member

[42] For an example: Paris Court of First Instance, March 13, 2015, summarized in English at http://the1709blog.blogspot.fr/2015/04/tangible-digital-files.html
[43] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.
[44] Journalists or their published would not be protected by copyright exceptions. Under article L. 122-5 9° of the French Intellectual Property code for example, journals can only reproduce or copy "graphic, plastic or architectural works", nothing else (see N. Bouche, Intellectual Property Law in France (2011), § 246).
[45] www.businessinsider.com/the-future-of-digital-2013-2013-11?op=1 see slide which title is "758 million pictures shared each day"
[46] And intelligible! The person who links and the rightholder do not necessarily speak the same language.

States may be underserved. Hence, the recognition of a copyright claim against hyperlinks to illegaly posted material would lead to an undesirable digital divide of the internal market.

But even if it were assumed that the rightholder of a work could be located, and that it could be ensured that she authorized her work's online publication, there would remain other insuperable problems, the first being: **How can one know whether content lawfully remains online after the link has been created?**
At the time someone decides to point to it, a work available online may be authorized by its rightholder. After the link is posted, the owner of the exclusive right on the work can change her mind at any moment, and decide that the work should not be online anymore. US singer Taylor Swift recently decided that her songs should not be on Spotify[47] (meanwhile, her works remained on YouTube). Another legal music streaming service, Deezer, decided to keep her songs online after Universal Music abruptly decided to withdraw its repertoire from its platform (it eventually got a decision against Universal Music where a court found the label abused its dominant position).[48] A video of an astronaut singing David Bowie's song *Space Oddity* was posted lawfully, then became illegal, then became legal again – but only for two years.[49] All these examples tell the same story: when a work is online, its legal status can evolve. It can be made available without the rightholder's permission, then remain with its approval, or it can first be posted legally but remain online despite the rightholder's will.

There can also be cases where a rightholder is aware that its content is online but does not object to the illegal use. **How can one know whether a right owner is aware that its content is online without permission but does not object or retroactively approves?** Platforms that provide tools with which rightholders can know when a file that incorporates their works has been uploaded – such as DailyMotion's Signature, Vimeo's Copyright Match or YouTube's Content ID – allow these rightholders to block the file, but also to leave it online (generally with the option to track uses or monetize the content). This creates a paradoxical situation where the file is originally posted without authorization, but the rightholder retroactively blesses the publication through a system like Content ID. It can be difficult or impossible for someone who wants to link to material to know whether this retroactive authorization has occurred.

Should the person who creates a link to a work lawfully made available be liable when that work later turns out to infringe someone else's rights? There can be cases when the work that was published with permission is found to infringe someone else's work. The music industry provides multiple examples of songs that are found to be infringing after release (including the recent widely publicized case involving the global hit, "Blurred Lines").[50] In such a

[47] https://news.spotify.com/uk/2014/11/03/taylor-swifts-decision/
[48] Paris Court of First Instance, Sept. 5, 2011.
[49] http://www.theverge.com/2014/11/4/7153813/chris-hadfield-space-oddity-video
[50] To give just one other example, Madonna's *Frozen* was found infringing a prior work in Belgium: http://www.billboard.com/articles/news/60612/madonna-loses-belgian-plagiarism-case

situation, the link would point to what at first appeared to be a lawful content, but which later proved to be contrary to copyright.[51]
An internet user can also reasonably assume that a work was made available with permission, only to realize later that he was mistaken. In Belgium, for example, a court found[52] no criminal offence under copyright law for the embedding of a video where there was insufficient evidence that the suspect had acted intentionally; on the basis of the terms of service of the platform the video was originating from, it was reasonable for a user to have assumed that the video had been uploaded in full compliance with copyright law and that he was allowed to embed it on other websites (the court noted that the video had been on YT for more than a year without being reported before the suspect embedded it).

And there are also situations when **one may *need* to refer to a work despite being aware it is illegal**. Websites that publish court rulings publish them in their entirety… and will mechanically include links to websites the court found are structurally infringing copyright![53] Journalists sometimes need to make a point by including a reference to a work they know is illegal,[54] or to document their story.[55]

One final note: In view of how the internet is regulated today, it just takes a notice to take down what was published illegally. This removal will have the effect of "breaking" the link that was pointing to it. This shows, once again, that the person who posts has the control of the material (and thus must be liable), not the one who links to it (she has no control at all, and it would be contrary to the basic principles of liability that one could be liable when one cannot take action to prevent something from happening).[56] Moreover, this demonstrates that rightsholders have a variety of remedies with which to address content that has been posted without authorization, without the need to impose direct infringement liability for those who post hyperlinks.

---

[51] See also this case where Spotify, a legal platform, was sued for copyright infringement: https://gigaom.com/2013/09/04/spotify-sued-by-uk-dance-label-over-playlist-related-copyright-infringement/

[52] Brussels Court of Appeals, March 19, 2013

[53] Example with this French ruling where the court found *Allostreaming* is illegal and must be blocked: www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3935.

[54] Example in this story where the reporter wanted to criticize the presence of illicit links in the ruling of an authority which is supposed to enforce copyright: www.ilfattoquotidiano.it/2015/05/08/agcom-indaga-e-la-pirateria-ringrazia/1660735/.

[55] Journalists who point to documents under copyright published by Wikileaks for example.

[56] For court decisions supporting this point, see German Federal Court of Justice, 17 July 2003, case I ZR 259/00, "Paperboy", available at www.bundesgerichtshof.de, para. 42; Austrian Supreme Court, 20 September 2011, case 4Ob105/11m, "Vorschaubilder", p. 22-23: "*Only the person who has the original or a copy of a work can make that work available to other persons in a way that allows him to control access to the work. A person […] who only provides a link that can be used to view the work at its original location, however, only facilitates access to a file included in the source website without making that work available himself in the sense of § 18a of the Copyright Act. Under these circumstances, he does not control access, as the file can be deleted without his intervention…*".

➠ It is thus submitted that it is not relevant whether the hyperlinker is aware or ought to be aware of the fact that the rightholder has not given permission for the making available of the work on the website referred to in question 1a and, as the case may be, of the fact that the work has not previously been made available to the public with the permission of the rightholder.

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

The concept of "findability" is unknown in copyright law. Neither this word nor the word "findable," or any concept that would be related, can be found in the Information Society Directive. There are good reasons for this silence in the law. As a requirement of "awareness" or some other standard of (constructive) knowledge, a test of "findability" could hardly be applied in any consistent way in practice. The degree of "findability" depends on many factors, including the individual sophistication of the user searching the Internet. Moreover, the degree of "findability" can change quickly as social networks, search engines, and other online tools continue to evolve. Given this subjectivity and fluidity of any requirement of "findability", the test proposed in question 2(a) cannot be applied consistently and equally to hyperlinkers. Its introduction would create legal uncertainty for Internet users, encroach upon the fundamental guarantee of equal treatment and, practically speaking, have such a deterrent effect that today's common hyperlinking practices would be jeopardized. It would put an end to hyperlinking as a basis for freedom of expression and information in the digital environment which, again, constitutes an encroachment upon fundamental freedoms.

The CJEU also already made clear in its *Svensson* ruling that when a work is available on the web, it is communicated to the public.[57] A clickable link to this work is not a communication to a new public, the Court ruled (§ 25), assuming that when a link exists, it points to a "*protected work published and freely accessible*" (§ 30), except when technical restrictions are put in place to prevent the communication of the work (§ 31). In other words, when a work is online, it is communicated, without reference to whether the work is "findable".

➠ It is thus submitted that it is not relevant whether the hyperlinker is aware or ought to be aware of the fact that the rightholder has not given permission for the making available of the work on the website referred to in question 1a and, as the case may be, of the fact that the work has not previously been made available to the public with the permission of the rightholder.

[57] CJEU, 13 February 2014, case C-466/12, Svensson.

2b. In answering question 2(a), is it important whether the 'hyperlinker' is or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable by the general internet public?

This question combines two novel concepts which are not part of the *acquis communautaire* in copyright law: "awareness" and "findability". For the reasons explained above, the question should be answered in the negative.

➠ It is thus submitted that it is not relevant whether the hyperlinker is aware or ought to be aware of the fact that the website to which the hyperlink refers is not easily findable for the general internet public.

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

If the Court were to rule that there is a communication to the public where a hyperlink provides access to a work that has not previously been communicated to the public with the permission of the rightholder, its ruling would be inconsistent with what was ruled in other countries. In the USA in 2014, for example, after movie director Quentin Tarantino saw an unpublished script was leaked, he sued the website which created a link to the content (and created it knowingly), and lost.[58] Under US law, however, this does not leave rightsholders without a remedy. Instead, the matter of linking is addressed under secondary liability principles that are able to encompass the additional factors relevant to the imposition of liability, such as knowledge, the degree of contribution, and control.[59]

There would be a fundamental problem for internet users if they can be subject to copyright liability for linking based on different rules, especially if jurisdiction is based on mere accessibility of content on the Internet, as the CJEU ruled in *Pez Hejduk*.[60]

➠ It is thus submitted that there are no other factors that should be taken into consideration when answering the question whether there is a communication to the public where a hyperlink provides access to a work that has not previously been communicated to the public with the permission of the rightholder.

[58] www.shadesofgraylaw.com/media/00041943.pdf.
[59] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).
[60] C-441/13.