
March 2014

The ECJ's ruling regarding Swedish Internet linking – how does Internet linking relate to copyright

Can a link constitute copyright infringement? That question was answered by the ECJ through a preliminary ruling (case no. C-466/12) on 12 February 2014. In the ruling the ECJ answers the question, on request of Svea hovrätt, how the concept "communication to the public" in Article 3(1) of Directive 2001/29/EC (the "Infosoc Directive") shall be applied, and whether an Internet link, which gives access to copyright protected work which openly has been published on another website, constitutes such a communication to the public which under the Infosoc Directive may constitute copyright infringement. The court came to the conclusion that Internet linking to works which are freely accessible on another website shall not constitute communication to the public, which means that such linking is permitted without the author's (right holder's) consent. This is a welcome ruling for many reasons, but first and foremost because it is now finally clarifies what applies in principle as regards Internet linking, which by many is described as the most important function of the Internet and the core of the web.

Background

The background to the case was that four journalists, who worked for Göteborgs-Posten, in 2010 brought action against a media intelligence company in the Stockholm district court and claimed for damages based on the fact that the company, on its website, had provided links to articles which the journalists had published on Göteborgs-Posten's website. The articles were freely accessible to the public on Göteborgs-Posten's website. The journalists claimed that the company, without the journalists' consent, had used the articles by making them available on its website for its customers, and that the company in doing so had infringed the journalists' copyright in that the company had violated the journalists' sole right to make their work available to the public. The district court rejected the journalists' application after which the journalists appealed to Svea hovrätt (appellate court). The appellate court turned to the ECJ with a request for a preliminary ruling primarily to get an answer to the question whether Internet linking of the kind described above constitutes a *communication to the public* which requires the author's consent. Svea hovrätt shall now, after the ECJ ruling, finally try the Swedish case.

March 2014**The ECJ's ruling regarding Swedish Internet linking – how does Internet linking relate to copyright?****Communication to the public**

In order for an act to constitute a copyright infringement under the Infoc Directive and the Swedish Copyright Act, some form of *reproduction* of a work is required, e.g. copying, or that the work in some way is *communicated to the public*, e.g. when a piece of music is played on the radio. In the current case, no reproduction has been carried out since any duplication or copying has taken place. The assessment therefore falls within the scope of whether linking constitutes a *communication to the public* or not.

The requirement can be broken down into two parts; firstly it needs to be a *communication* (transfer), and secondly the communication needs to reach *the public*. The court concludes that in accordance with previous case law, communication means that the work is somehow made available. The link on the website makes the recipient's access to the work possible, which thereby constitutes making the work available and thus also a *communication* in the meaning of the requirement.

When it comes to the second part of the requirement, the court concludes that the public in the meaning of the requirement means an *indeterminate circle of potential recipients*. According to case law, it shall also be a "new public", i.e. a public which the author did not consider at the time of the original communication to the public.

In the present case, one can thus conclude that a *communication* has been made and that the communication was directed to an *indeterminate circle of potential recipients*. However, the crucial point here is that the authors, i.e. the journalists, already through their original publishing of the articles, as freely accessible material, on the Göteborgs-Posten's website have made the works available to the same *indeterminate circle of potential recipients*. There is thus no "new public" since the works already are published on the website and are freely accessible to the public. Thereby, the ECJ concluded that, in this case, there is no issue of a communication to the public in accordance with Article 3(1) of the Infoc Directive. The ECJ thus means that the author must be deemed to have consented to other market performers using links to the work to direct more recipients within the already intended or existing public. The links shall thus be seen purely as references to information which can be found on the net, which is also the natural way in which "surfing" of the web takes place today, where we from different websites are referred to different sources.

March 2014**The ECJ's ruling regarding Swedish Internet linking – how does Internet linking relate to copyright?****Free or restricted material**

In order to assess the concept *communication to the public* it is also of importance to consider what applies as regards linking to material which in some way is restricted through a payment function or similar. The ECJ clarified in the decision that if the link make access possible to works which are behind a payment wall or some other barrier, the linking results in the work being made accessible to a “new public” which the author did not consider at the time of the original publishing. Thus, linking to restricted material constitutes a communication to the public which requires the author’s consent in order not to constitute copyright infringement.

The court does not answer the question how matters stand if the author on its website, next to the work or in other ways would put up a prohibition against linking or in other ways communicate that he/she opposes linking of/to the material. My interpretation is that since the court has concluded that the act does not constitute a communication to the public which requires the author’s consent, the author cannot prevent linking/reference to the material through a prohibition. The only way that seems to be available is thus to limit the receiving public so that linking of the material constitutes a communication to a *new public*.

Exposure of the link

One of the questions posed in the case was whether any difference shall be made when assessing the matter between the cases when the work, after the link has been opened, is presented on the same website (*integrated link*) or if the user is redirected to the website where the work was originally presented (*redirecting link*). Here, the ECJ states that it is of no importance for the assessment whether the work is shown on the website where the work is located, despite the fact that the work was originally published and is located on another website. The court’s assessment is reasonable in that sense that it would not be technically possible to differentiate in the assessment between the two types of link since the *communication* and the *public* are the same in both cases. Even if the link is shown on the same website, it is not a *new communication* and it is not a *new public*.

However, what may become problematic with the court’s statement – that it does not matter for the assessment where the work is presented – is that taken to an extreme, the statement can be interpreted as, when a work is published on the Internet, anyone can thereafter display the entire work on its website without the author’s consent. A reader may then easily get the impression that the person behind the linking site is the real author or is the despatcher behind the material. Personally, I think that these consequences do not sit well with fundamental copyright and intellectual property right principles. It should reasonably be required that the link may not lose

March 2014
The ECJ's ruling regarding Swedish Internet linking – how does Internet linking relate to copyright?

its character of being a reference and thus it should be required that it is clearly evident who is behind the work and where the work was originally published. Unfortunately, in its decision the court does not discuss any of these questions or how much of the article's content which may be exposed on the site where the link is located, e.g. if one is allowed, next to the link, also to include the article's preamble and/or a thumbnail image of an image from the article.

However, it is important to bear in mind that what the ECJ has assessed in the present case is whether the link and the exposure of the work as such is a *communication to the public* or not. In the decision, the court discusses no other legal issues which may exist concerning the exposure of other authors' or market performers' works and content on one's own website. E.g. there may be a risk that the exposure constitutes misleading marketing or misuse of another's trademark in the event that the recipient is given the impression that the website, where the link is displayed, is provided by the author or by another market performer than what is really the case. In some cases these risks can probably be avoided through the freedom of the press protection which the linking performer may receive by holding a publisher's authorization, but they cannot be completely ruled out.

Harmonization in the EU

Finally, the court ends by stating that Article 3(1) of the Infosoc Directive shall be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public shall include a range of activities wider than those referred to in that provision. This conclusion is completely reasonable since the Internet cannot be a national concern, and protection must be harmonized throughout the community (and preferably through the Internet as a whole).

In 2009, the German government submitted a legal proposal setting forth that linking and indexing of copyrighted material should require the author's consent in attempt to provide newspapers and other publishing companies the possibility to receive payment for the work they publish. Now, one can thus conclude that any such legislation is hardly likely to see the light of day.

March 2014**The ECJ's ruling regarding Swedish Internet linking – how does Internet linking relate to copyright?****Briefly about the division of revenue and my own reflections**

This case and the debate regarding Internet linking derive originally from the fact that authors, often in their capacity as journalists at newspapers where material is published on the newspapers website, want to be paid for their work. Similarly, the media companies and the newspapers want to cover their expenses. For many years, news sites have tried to find alternative ways other than pure subscription revenue to get paid for their work. At the same time, the readers' and the general public's demand for free and accessible information has increased and the supply of apps and other services which automatically aggregate news have increased manifold. One way to try to get revenue has been through advertising revenue from news sites, another has been to put up payment walls for certain material. As regards advertising revenue, one can however observe that to a great extent it is the search engines and technology companies such as Google which gets the largest revenues from the sale of advertisements, since the journalists and the media companies provide the content in the material which e.g. Google's customers demand.

As a consequence of the reported decision, I believe that the media companies and newspapers will have to give up the battle for licensing income from linking and indexing, and rather adopt a tougher attitude when it comes to payment walls to access their material. This will in the long run lead to less information being freely available to the general public. My own reflection is that I believe that a change in attitude of the readers and the general public is required leading us to actually having to pay to get access to competent and well written journalism.



Siri Mårtensson,
Associate