MONSTERS
OF LAW

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A GUIDE to CJEU DECISIONS on FRAMING and LINKING

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FREE KNOWLEDGE ADVOCACY GROUP EU

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INTRODUCTION

Linking, hotlinking and framing are what made information on the internet so useful and easy to edit and share. One of the consequences is that content is presented to new audiences and through venues different than originally intended. This exposes an inherent tension between law written with static publishing practices in mind and the dynamic nature of sharing knowledge and information online.

Over a decade or more, the Court of Justice of the EU has issued a number of decisions on how we may or may not point to pages, documents or multimedia online. The Court is trying to square a circle here, explaining or extrapolating traditional concepts to this new realm. The jurisprudence is sometimes straightforward, then often patchy or even contradictory.

As users of these technologies we are also trying to navigate both the online environment and the growing jurisprudence on the topic. And it can be confusing! Extending our live event series Monsters of Law to the printed form, we pull together relevant cases in this booklet. Hopefully it will help all of us make sense of the rulings, put them into perspective and argue better.

Dimi Dimitrov

CJEU CASE LAW on **HYPERLINKING**

MONSTERS OF LAW

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Case number reference:
Case C-466/12
Nils Svensson, Sten Sjögren, Madelaine Sahlman and Pia Gadd v. Retriever Sverige Ab, 13 February 2014, ECLI:EU:C:2014:76.

SVENSSON

Making available through hyperlinking to an unrestricted source does not lead to a communication towards a new public.

SUMMARY

The applicants – journalists who worked for the Göteborgs Posten paper – regularly wrote and published articles for the online version of the paper. These articles were freely and openly available online to everyone on the paper's website. The defendant, Retriver Sverige, operated a website that periodically published for its subscribers a list of hyperlinks to articles published online by third party websites. The applicants claimed that every time a client uses the list and clicks on the available links, they are not necessarily and expressly made aware that these links are redirecting to a website other than the one managed by Retriver Sverige. Thus, according to them, this process – close to the framing technique – would constitute an (unauthorised) communication to the public. Conversely, the defendant claimed that it was made clear to the subscribers that the link works outside of the website at hand and that these links would redirect them to external websites.

Hyperlinking related question referred to the Court

The referring court asked, "whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision, on a website, of clickable links to protected works available on another website constitutes an act of communication to the public as referred to in that provision, where, on that other site, the works concerned are freely accessible".

Put more concisely, the question seeks to understand whether the act of linking to a work freely available on an external website can be construed as a communication to the public (which would require the preemptive authorisation of the relevant rightsholders).

Legal reasoning

The Court referred to the cumulative conditions that need to be met for the act in question to be qualified as a communication to the public. Namely, it considered whether the insertion of a link pointing to a freely available work on a different website constitutes i) an act of communication to ii) a new public.

While the Court acknowledged that "the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an act of communication", it found that it does not constitute a communication that reaches a new public and so, the second and cumulative condition was not met. It found that the same works as those covered by the initial communication made with the same technical means, "must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public". This means that the making available through hyperlinking does not lead to a communication towards a new public of the linked and shared works.

The Court stated that this is not the case, as the public targeted by the initial communication consisted of all potential visitors to the site concerned, given that access to the works on that site was not subject to any restrictive measures. Specifically, the Court held that "where all the

users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication."

Conversely, the Court considered the possibility that a hyperlink refers to a work that is available with restrictions (i.e. available for a specific public). In that case, it emphasises that where a hyperlink enables users to circumvent restrictions put in place by the website on which the protected work appears, and the link thus constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public. Specifically, in paragraph 32 the Court states that "where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation", this can amount to a communication to a new public.

Related CJEU case law

This is a key decision for the building of jurisprudence around the question of whether and to what conditions hyperlinking constitutes communication to the public. Namely, this is the first judgement of the CJEU that specifically deals with the issue of hyperlinking. In all subsequent case law concerning hyperlinking-related issues (i.e. VG Bild-Kunst, Spiegel Online, Renckhoff, Filmspeler and GS Media) the Court builds upon this judgement.

Case law referenced

The Svensson case refers and builds upon earlier key CJEU case law on the conditions that need to be met in order for an act to be qualified as communication to the public. It refers to SGAE, Premier League and ITV Broadcasting and it applies it, by analogy, to the act of hyperlinking.

Added value of the judgement

It is the first decision applying the article 3(1) of the Directive 2001/29 (and subsequent case law) to hyperlinking. It is an extremely useful and positive reference for any policy discussions around the directing of users through hyperlinks to content published without the authorisation of the rightsholder.

Unfortunately, the Court does not distinguish between the different technical types of hyperlinking nor the different types of links. It qualifies the activity of linking to third party works as an act of communication to the public. It also introduces the new public concept, but through a negative interpretation: there is no communication to a new public when the work or service has already been made available to the public without any access restrictions. On the other hand, when the work is already protected by access control measures and the link allows users to circumvent those measures, the conclusion would have to be that it is directed to a new public and that, as a result, unauthorised communication to the public exists. It follows that communication to a new public would also exist when the work or service is no longer available on the internet.

Case number reference:
Case C-348/13,
BestWater International GmbH
v Michael Mebes and
Stefan Potsch,
21 October 2014,
ECLI:EU:C:2014:2315.

BESTWATER INTERNATIONAL

Framing links to already freely available works is not a new act of communication to the public.

SUMMARY

Bestwater, a company selling water filtration systems (the applicant) held the copyright of a short promotional video entitled "Die Realität" ("The Reality"), which was uploaded to YouTube, but without the copyright holder's consent. The defendants found it and made it available on their websites using the framing technique. This means that the video was made available in a third-party content frame which could be displayed independently from the defendants' websites and from the one where it was actually stored. In practical terms, internet users could watch the video by clicking on a link, which then played it after retrieving it from the YouTube server. Bestwater maintained that his consent was necessary for making the work in question available even when choosing the framing technique.

Hyperlinking related question referred to the Court

Does framing constitutes a new type of communication to the public pursuant to Art 3(1) InfoSoc-Directive (2001/29/EC)? Put more simply, does the act of embedding a copyright-protected video on a third party website using technical means of framing infringe on the copyright holder's rights? Even when the work in question is neither transmitted to a new public nor communicated by a technology different from that of the original communication?

Legal reasoning

According to the Court, the insertion of an already freely available yet copyright protected work on another website by means of a link using the technique of framing cannot be qualified as 'communication to the public' within the meaning of Article 3 (1) of Directive 2001/29 because it is not transmitted to a new public nor is it communicated following a specific technical mode, different from that of the original communication.

Related CJEU case law

Case C-527/15 Stichting Brein v. Jack Frederik Wullems, 26 April 2017,

Case law referenced

Svensson C-466/12,EU:C:2014:76; SGAE, C-306/05, EU:C:2006:764; Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon, C-136/09, EU:C:2010:151; ITV Broadcasting e.a., C-607/11, EU:C:2013:147

Added value of the judgement:

It is a case that deals expressly with framing. Nevertheless, it builds on the then-recently issued Svensson decision and applies the hyperlinking-related reasoning to the framing technique.

It maintains the evaluation based on the two cumulative criteria of communication to a new public using the same technical means. It does not discuss the relevance of the copyright holders' consent in the insertion of the protected work through framing, but it highlights the lack of need for such a consent when the protected work has already been made legally available on a different website. In other words, the rightsholders' consent for the first communication to the public is sufficient for all communications that do not include a new public.

GS MEDIA

Linking and/or framing links of already freely available protected works published without the rightsholder's consent constitutes an independent act of communication to the public.

Case number reference:
Case C-160/15 GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc. and Britt Geertruida Dekker, 8 September 2016, ECLI:EU:C:2016:644

SUMMARY

The claimant GS Media operated the website GeenStijl on which, on multiple occasions, it had posted a hyperlink that referred to previously unpublished nude photos of a Dutch celebrity. The copyright holders of these pictures, i.e. the Playboy publishers, argued that this act constituted a communication to the public of the images within the meaning of Article 3(1) and sued for copyright infringement.

Hyperlinking related question referred to the Court

Does the fact of posting on a website a hyperlink to protected works, freely available on another website but without the consent of the copyright holder, constitute a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29?

Legal reasoning

The Court found that it cannot be inferred either from Svensson or from BestWater International that the hyper-linking or framing of protected works which have been made freely available on another website, but without the consent of their respective copyright holders, would be excluded as a matter of principle from the concept of communication to a public. On the contrary, the two previous judgements concerned links to works that had been already published with the consent of the rightsholder and so there

was no communication towards a new public. Thus, those previous decisions confirm the importance of such consent. According to this reasoning, the linking or framing of already freely available protected works published without the right-sholders' consent could qualify as a new communication to the public.

Recognising the chilling effect that this ruling could have on the functioning of the internet, the Court added that additional criteria are needed in order to assess whether hyperlinking or framing constitute acts of communication to the public. The Court introduces the following elements: profit and knowledge. According to this reasoning, when the posting of a hyperlink is carried out by a person who does not pursue a profit, it is necessary "to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder". However, if such a person knew or ought to have known that the published hyperlink provides access to a work illegally put online, the hyperlinking act constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29.

When the posting of hyperlinks is carried out for profit, it can be expected that the necessary checks are performed to ensure that the work in question is not illegally published on the linked website. In such circumstances, the act of posting a hyperlink to a work illegally published on the internet constitutes a communication to the public.

Based on the facts of the case in question, the Court said that it appears that GS Media was aware of the illegal nature of the photos, and it can therefore not rebut the presumption that the posting of those links occurred in

full knowledge of the illegal nature of that publication. Therefore, this hyperlinking constitutes a communication to the public.

Related CJEU case law

VG Bild-Kunst, Spiegel Online, Renckhoff, Filmspeler all refer to GS Media (often in combination with Svensson).

Case law referenced

GS Media is the third main hyperlink case of the Court, following Svensson and BestWater International, which are both discussed in the judgement. GS Media makes clear how the concept of communication to a public relates to the hyperlinking to work that has been made available without the consent of copyright holders, where the other two cases relate to works that have been published legally.

Added value of the judgement

This decision is relevant for its assessment of the profit-making element in the evaluation of the notion of communication to the public. Every time an entity posting a hyperlink knew or ought to have known that the work was unlawfully made public, communication to the public occurs. Also, there is a presumption of knowledge if the hyperlinking website is for profit.

This case should be read in conjunction with previous jurisprudence which found that profit-making is not a necessary condition for the constitution of an act of communication to the public (i.e. SGAE case) while later, the same Court found that it is not irrelevant (i.e. FAPL case).

Case number reference:
Case C-527/15
Stichting Brein
v. Jack Frederik Wullems,
26 April 2017,
ECLI:EU:C:2017:300.

FILMSPELER

The sale of a multimedia player containing pre-installed links to copyright protected works constitutes communication to the public.

SUMMARY

Mr Wullems was a seller of various models of a multi-media player under the name 'filmspeler', a device that acts as a media player between a source of visual and/or sound data and a television screen. The defendant installed add-ons available on the internet, created by third parties, some of which specifically linked to websites on which protected works were made available without consent of copyright holders. In particular, the add-ons' function was to retrieve the desired content from streaming websites and make it start playing with a simple click on the multimedia player. Watching audiovisual materials available on the internet without the consent of the copyright holders was advertised as a possibility.

Hyperlinking related question referred to the Court

Should the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, be interpreted as covering the sale of a multimedia player with pre-installed add-ons, available on the internet, and containing hyperlinks to freely accessible websites where copyright-protected works have been made available to the public without the consent of the right holders?

Legal reasoning

When the posting of hyperlinks is carried out for profit, it must be presumed that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder.

The Court states that if a person knew or ought to have known that the posted hyperlink provides access to a work illegally placed online, the provision of that link constitutes a communication to the public. The same applies if the link allows users of the website on which it is posted to circumvent restrictions taken by the site where the protected work is posted. Repeating the legal reasoning from previous case law (i.e. GS Media and Bestwater), it highlighted the presumption of knowledge of the (il)legality of the source whenever posting of hyperlinks is carried out for profit.

The Court found that the sale of the multimedia player was made in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on that player gave access to works published illegally on the internet. Furthermore, the multimedia player is supplied with a perspective of making a profit. According to the Court, the main attraction of such a multimedia player for potential purchasers lies precisely in the fact that these add-ons are pre-installed on it. Therefore, the sale of such a multimedia player constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29.

Related CJEU case law

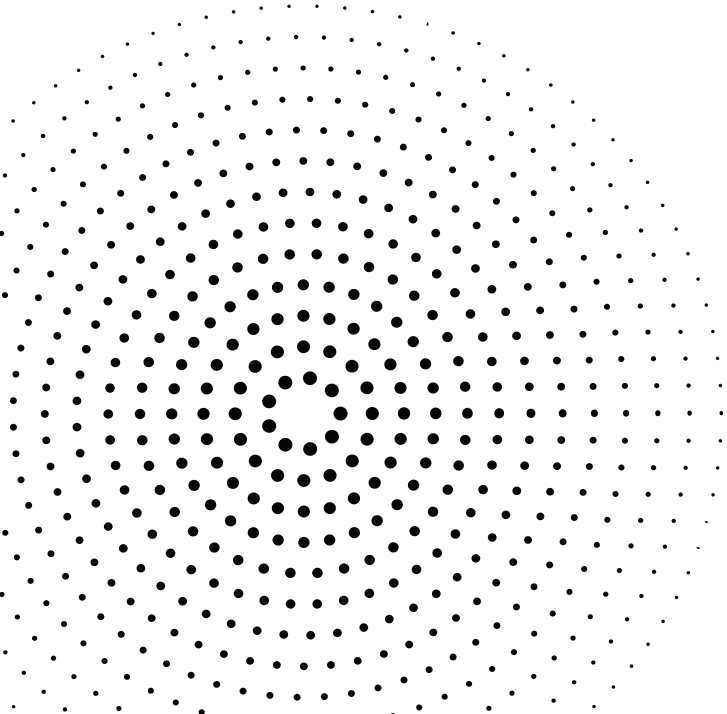
N/A

Case law referenced

In its judgement, the Court widens the scope of the concept of a communication to the public, following the judgements in BestWater International, GS Media and Svensson, all of which are discussed and referred to in the judgement.

Added value of the judgement

The Court stresses the need for individual assessment which needs to take in consideration several complementary criteria, autonomous and interdependent. The added importance of this judgement is that it extends the evaluation criteria for the concept of communication to the public to a consideration of which actor is performing them.



Case number reference:
Case C-516/17,
Spiegel Online v.
Volker Beck,
29 July 2019,
ECLI:EU:C:2019:625

SPIEGEL ONLINE

It is irrelevant for the application of the quotation exception whether the quoted work is "inextricably integrated" because the exception is also applicable where reference is made through hyperlinking

SUMMARY

Mr Beck is the author of a manuscript published initially in a collection of articles. The manuscript also appears in two versions, the author's unedited version and the publisher's edited one. Mr. Beck personally published both versions on his personal website, restricting the publication of the protected material on any other news sites and print media. Spiegel Online, an internet news portal, published an article related to the author, and it made the original version of the manuscript and book contribution available for download by means of hyperlinks.

Hyperlinking related question referred to the Court

Should Article 5(3)(d) of Directive 2001/29 be interpreted as meaning that the concept of 'quotations', referred to in that provision, covers a reference made by means of a hyperlink to a file which can be downloaded independently?

Legal reasoning

The Court interpreted the meaning of the concept of 'quotation' to be in the use by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user.

Therefore, the user of a protected work wishing to rely on the exception for quotations must establish a direct and close link between the quoted work and their own reflections, "allowing for an intellectual comparison to be made with the work of another". The use of the work must be secondary in relation to the assertions of that user.

However, it is not necessarily needed that the quoted work be inextricably integrated into the subject matter citing it.
A quotation may be made by including a hyperlink to the quoted work. The Court found that this is consistent with the legislative context of which the quotation provision forms a part, and emphasized that hyperlinks contribute to the sound operation of the internet. This interpretation is aligned with the objective of the exception for quotations, i.e. the establishment of a fair balance between the exclusive rights of the authors and the right to freedom of expressions of users of a work.

Related CJEU case law

VG Bild-Kunst

Case law referenced

The Court refers to GS Media and Renckhoff to underscore the foundational role that hyperlinks play in the sound operation of the internet and its importance in ensuring freedom of expression and of information.

Added value of the judgement

For discussions related to hyperlinking, this decision takes a pragmatic approach in examining whether the use of hyperlinks can be compliant with quotation obligations and the use of hyperlinks.

Case number reference:
Case C-161/17,
Land Nordrhein-Westfalen v.
Dirk Renkchoff,
07 August 2018,
ECLI:EU:C:2018:634.

RENCKHOFF

Posting a photograph, which has already been freely accessible online with the consent of the author, on another website constitutes a new act of communication to the public. Renewed consent from the author would be needed.

SUMMARY

A pupil created a presentation in German, which was uploaded on the school's website. This presentation included a photograph taken by the applicant, Mr Renckhoff, downloaded by the pupil from an online travel portal where it was posted without any technical restrictive measures. Mr Renckhoff claimed that this reproduction was unlawful because he had given an exclusive right of use to the operators of the online travel portal. Its posting on the school website would, thus, infringe his copyright.

Hyperlinking related question referred to the Court

The question referred to the CJEU was not hyperlink-specific. The Court is asked to assess whether the inclusion of a freely accessible work - published on a third-party website with the consent of the copyright holder - on a person's own publicly accessible website constitutes a making available of that work to the public within the meaning of Article 3(1) of [Directive 2001/29] if the work is first copied onto a server and is uploaded from there to that person's own website.

Legal reasoning

The Court utilized the existing case law on hyperlinking to discuss the difference between a hyperlink and an autonomous publication on a website without the authorisation of the copyright holder when it concerns a work which was previously communicated on another website and with consent of that copyright holder. Namely, the Court found that, referring to GS Media, hyperlinks contribute to the sound operation of the internet, while a publication of a photo on a website does not contribute to the same extent to that objective. The Court therefore stated that allowing such a publication without the copyright holder being able to rely on his exclusive rights, would fail to have regard to the fair balance which must be maintained in the digital environment.

Relying on the substantial role hyperlinking plays for preserving freedom of expression, the Court maintains that the difference between the case in question and the established case law is based on the fact that the user did not simply point to an existing communication. Rather, they constituted primary acts of an independent new communication of the work. For this communication, the rightsholder would have less control. Finally, the Court emphasized that the user's role was decisive in communicating the work to a (new) public, not previously taken into consideration by its author. This departs from Svensson, in which the lack of involvement by the administrator of the site on which the hyperlink had been inserted was key to the act being qualified as not a communication to the public.

Related CJEU case law

VG Bild-Kunst and Spiegel Online.

Case law referenced

This decision builds on the existing case law surrounding the interpretation of the concept of a communication to the public. It follows the judgments in BestWater International, GS Media and Svensson, all of which are discussed and referred to in the judgement.

Added value of the judgement

This case discusses the interpretation of the concept of communication to the public and it subscribes to the existing body of jurisprudence. Its added value stems from the discussion on the technical distinction between linking as in pointing towards an existing published work and instigating an independent communication to the public of a work sourced from the internet. Through the technical spelling out of the differences between hyperlinking to a protected work and downloading and publishing it, the Court uses the existing hyperlinking-focused case law to make a judgement on a question that did not expressly relate to hyperlinking.

VG BILD-KUNST

Case number reference:
Case C-392/19,
VG Bild-Kunst v. Stiftung Preußischer Kulturbesitz,
09 March 2021,
ECLI:EU:C:2021:181.

If the embedding of a copyright protected work in a website circumvents effective technological protection measures, then it constitutes a copyright violation.

SUMMARY

The copyright collecting society for visual art, VG Bild-Kunst, refused to license its catalogue to be used by Stiftung Preußischer Kulturbesitz (SPK), a cultural heritage foundation. SPK operates a digital library which includes thumbnails of images and links to the institutions providing the subject matter. The refusal was due to VG Bild-Kunst's claim to include a provision requiring effective technological measures that would prevent the framing of their copyright-protected works included in the licensed catalogue.

Hyperlinking related question referred to the Court

The Court was asked whether Article 3(1) of Directive 2001/29 must be interpreted as meaning that the embedding of copyright protected works, by means of the framing technique, in a third party website , while also circumventing protective measures against framing adopted or imposed by the copyright holder, constitutes a communication to the public within the meaning of that provision.

Legal reasoning

The Court replied affirmatively to the question it was asked, stating that Article 3(1) of the 2001 InfoSoc Directive "must be interpreted as meaning that the embedding, by means

of the technique of framing, in a third party website page, of works that are protected by copyright and that are freely accessible to the public with the authorisation of the copyright holder on another website, where that embedding circumvents measures adopted or imposed by that copyright holder to provide protection from framing, constitutes a communication to the public within the meaning of that provision."

After highlighting the need for individualized assessment based on non-autonomous, interdependent criteria about whether certain acts constitute communication to the public or not, the Court found that the copyright holder's actions are essential in determining the final qualification. Specifically, it found that the only way to prove the lack of consent towards framing is by imposing technological restrictions that expressly prohibit this technique. Simultaneously, the Court highlights the importance of safeguarding online users' ability to ascertain whether the rightsholder intended to oppose the framing of their works. These technological restrictions go, thus, in that direction. Finally, the Court chose to not follow the AG's opinion in adopting a differential treatment based on different technicalities of linking. Rather, it chose to apply its reasoning indiscriminately to all types of links.

Related CJEU case law

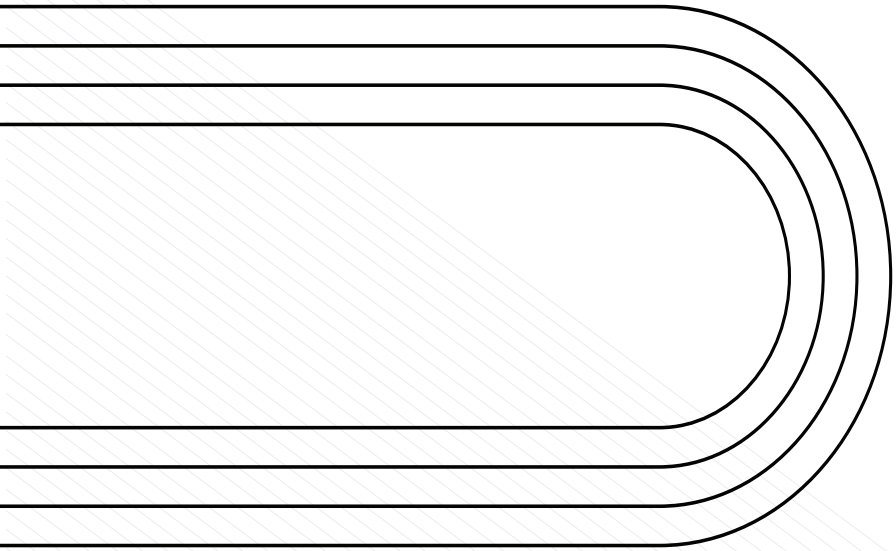
N/A

Case law referenced

The decision is the Court's latest ruling in establishing assessment criteria for hyperlinking, following judgements such as BestWater International, GS Media and Svensson.

Added value of the judgement:

This decision is particularly timely because it chooses to maintain a technological neutrality in the issue of hyperlinking. At the same time, the key contribution of the judgement is the affirmation of the technological restrictions as an explicit method of limiting consent and preventing subsequent framing.



CONCLUSION

The case law matrix that we have laid out above paints a complex picture of the regulation of a right to hyperlink. The CJEU lays out foundational elements that relate to the autonomous concept of communication to the public, i.e. an act of communication (i) to a (new) public (ii). Alongside these fundamental elements a wide array of conditions have been added that need to be taken into consideration, such as prior knowledge of the (il)legality of the act, the profit making involved in the communication in question, the imposition of contractual or technical means of protection precluding the linking or framing of the protected work.

The set of conditions built by the CJEU case law reveals that the court struggled (and still does) to create a unified framework to address hyperlinking while maintaining the balance of fundamental rights in the process. In the aftermath of precluding monitoring obligations, the act of hyperlinking still faces regulatory uncertainty that appears to be able to find resolution only seemingly in technological measures that would circumscribe the reach of permitted hyperlinking activities.

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TERMINOLOGY

Hyperlinking refers to the technical process of referencing content stored at a different location, through the creation of a link. The created hyperlink will point and direct the user to the location of the specified content. Framing is the technical embedding process, which allows users to view contents of a website within information from a different website. It is a type of linking that does not refer the user to visit a different website to view content, but rather it displays the linked content directly in the referencing website but within a specified frame.

According to the CJEU, hyperlinking is the provision of direct access to content through a link from one website to another (Svensson). Similarly, framing is "consisting in dividing a page of an Internet site into several frames and in displaying in one of them, by means of an 'inline linking', an element coming from another site in order to to hide from users of this site the original environment to which this element belongs" (Bestwater, para 17). While marking the technical distinction between the two processes, the CJEU does not proceed in creating a separate set of conditions under which these processes would fall under copyright regulation. Rather, the technology-neutral approach appears as a recurring theme in the case law, which progressively builds relevant criteria that remain outside the technological process and that focus on external factors to these processes.

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