

European Union (EU) Court Finds Non-Consensual Linking to Publicly Available Works Permissible in Europe

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A recent decision by the Court of Justice of the European Union (CJEU) interpreted a key European Union directive to find that where a work was already made accessible on the open internet by a rights-holder, then linking to that work does not require the consent of the rights-holder. The CJEU decision applies to European member states, and does not address law in the United States.

Case Background

In the case before the CJEU, journalist Nils Svensson wrote an article that was published in print and online at the website of *Goteborgs-Posten*, a Swedish newspaper. Mr. Svensson brought a claim against a news subscription company, Retriever Sverige AB, which created a news alert and linked to Mr. Svensson's article hosted on the newspaper's website. Mr. Svensson claimed that by linking to the article, Retriever Sverige had "communicated to the public" the article within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, and thereby violated Mr. Svensson's right to control distribution of the article.

Article 3(1) states:

Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Other journalists in similar circumstances joined Mr. Svensson's claim, and suit was filed in Sweden against Retriever Sverige.

Retriever Sverige argued that linking to publicly available works did not transmit those works and did not infringe on the authors' copyrights. Retriever Sverige noted that subscribers merely logged into Retriever Sverige's site, performed a search which provided hyperlink results, and when the subscriber clicked a link, the text of the article was retrieved from third party websites.

The primary question for the court was whether linking to a publicly available work, without the author's permission, is a prohibited "communication to the public" within the meaning of Article 3(1). The court also considered whether the outcome should differ depending on if, when the user clicks on the link, the copyrighted work is shown on another website or appears to be on the same website where the link is provided.

EU Court of Justice Decision

On February 13, 2014, the CJEU found that under Article 3(1), merely linking to an article that was already freely available to users online was not a violation of the author's rights. The Court clarified that to violate the copyright owner's rights under Article 3(1), the communication of the work must be directed at a "new public, that is to say, at a public not taken into account by the copyright holders when they authorized the initial communication to the public."

Accordingly, the Court found that when Mr. Svensson originally published his article in the *Goteborgs-Posten's* website, that publication targeted "all potential visitors to the site concerned," because *Goteborgs-Posten's* website was not access-restricted. Retriever Sverige's links did not make the article available to a "new public," and Retriever Sverige therefore did not need Mr. Svensson's consent.

The Court also concluded that linking to such publicly available articles would remain permissible under Article 3(1) even if the site gave the impression that the linked content was appearing on the linking website, because the final recipient viewers were still not a "new public."

The Court explained, however, that if the website restricted access - e.g., limiting the article to subscribers - then a link which bypassed those restrictions would indeed make the work available to a "new public," and would be impermissible without the rights-holder's consent. The Court also stated that where the work is "no longer available to the public on the site on which it was initially communicated," a subsequent link would communicate the work to a new public.

Finally, the Court clarified that EU member states may not broaden protection for their local copyright holders by broadening the concept of a "communication to the public," because this would directly contravene the purpose of the directive to harmonize differences in member states.

Implications of the Decision

Under the *Svensson* decision, website owners should take some comfort that under EU copyright law, sharing links to content from other sites that is currently publicly available, without restrictions on access, should not infringe Article 3(1) - even if it is not clear to the website user who clicks on the link that the content originates from the other website. This does not necessarily mean, though, that such linking would not give rise to other types of claims, or to claims under the copyright laws of jurisdictions outside the EU.

Similarly, a publisher who wishes to limit the right to link to their content should consider whether access restrictions are appropriate to inhibit linking to that content. While a publisher or author may desire to disseminate their content widely by publishing it without restriction, if those rights-holders do not restrict access in a cognizable fashion, the *Svensson* decision makes clear that other websites may link to that content without running afoul of Article 3(1).

The *Svensson* decision does leave some questions unanswered. For example, the decision does not

detail whether *all* technical restrictions on access to website content, no matter how perfunctory, are sufficient to prohibit linking to the content without the rights-owner's consent. Likewise, the *Svensson* decision does not discuss questions concerning non-technological restrictions, such as whether a user or distributor may link to a freely accessible article that is restricted by a website's terms & conditions, rather than technological measures.

Commentators are already criticizing the opinion for failing to address these and other issues raised by hyperlinking. It's safe to say that this will not be the last decision on the subject.

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