


# On and Beyond Hyperlinking

## Svensson Decision and the Right of Communication to Public

*The Nils Svensson v Retriever Sverige AB* decision addresses fundamental questions of copyright and Internet use. In essence, the case addresses the question of whether hyperlinking to freely accessible content requires authorisation.

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 The original plaintiffs of the Svensson case were Swedish journalists who wrote press articles that were published in the Göteborgs-Posten newspaper and on its website, where they were freely accessible. The defendant was a media monitoring company called Retriever Sverige AB, which operates an online service that provides users with lists of clickable links to articles published elsewhere.

The journalists claimed that Retriever was making unauthorised use of their articles by hyperlinking, which according to them constituted communication to public. Moreover, they claimed that it was not apparent to Retriever's users that they were being redirected to another site in order to access the article.

The Stockholm District Court rejected the journalists' claim. The applicants appealed the decision to Svea Court of Appeal, which lodged a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU). The questions referred to CJEU can be summarised as follows:

- 1) Does the provision of clickable links to another website constitute communication to the public within the meaning of Article 3(1) of the InfoSoc directive;
- 2) Is the assessment affected if access to the hyperlinked work has been restricted in some way;
- 3) Does it matter if the hyperlinked work is shown in such a way as to give the impression that it is appearing on the website which contains the link, and
- 4) Can member states give wider protection to authors by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(1) of the InfoSoc directive?

### The "New Public" as the Key?

The CJEU was up against an interesting challenge: hyperlinking is a core functionality of the Internet, and the various ways of linking

range from simple hyperlinking to e.g. embedding videos. A decision stating that hyperlinking as a rule requires approval from the owner of the targeted website might have had unpredictable and far-reaching consequences, and it might have affected not just news aggregators like the defendants, but also search engines, social media platforms and ordinary Internet users.

In this respect, the decision handed down by the CJEU on 13 February 2014 was likely a relief to many. The CJEU stated firstly that the provision of clickable links to copyright-protected works does constitute an act of communication to a public. However, in order to be covered by the right as provided in Article 3(1) of the Infosoc directive, the communication must be directed at a "new public". According to the CJEU, this means a public that was not taken into account by the copyright holders at the time the initial communication was authorised.

### No New Public Reached by Linking

As the works had already been freely accessible to anyone on the Göteborgs-Posten website and as the right holders had consented to that initial communication, no new public was reached as a consequence of Retriever's actions. Also, the CJEU noted that there was no new technology involved in Retriever's communication as compared to the communication that had previously taken place by Göteborgs-Posten.

Consequently, hyperlinking by Retriever did not infringe the right of communication to public and did not require the consent of the right holders. The conclusion would, however, have been different if the original website had restricted access to the content and the link would have circumvented such restrictions.

So far most commentators have considered the ruling a balanced one. Moreover, it seems consistent with CJEU's prior case law, includ-

ing inter alia the *SGAE* (C-306/05) and *TV CatchUp* (C-607/11) decisions. The Svensson decision seems to confirm that in order to be covered by the right of communication to public as provided for in the InfoSoc directive, an act of subsequent communication must satisfy either of the following two criteria: it must be made using a new technology or, if no new technology is present, it must reach a new public as compared to the initial communication.

Notably, in considering the "new public" criterion the CJEU emphasised the view of the right holders: a new public is defined as a group of recipients that was not taken into account by the right holders at the time the initial communication was authorised.

Moreover, the Svensson decision also seems to preclude the widening of the concept of communication to public at the national level. The CJEU stated that the member states do not have the right to give wider protection to copyright holders by broadening the scope of the concept of communication to the public.

### Does the Type of Links Matter?

In its answer to the third question the CJEU stated that, under the circumstances, its conclusions would not be affected even if the users clicking the link were under the impression that the work is appearing on the site that contains the link. This seems to imply that the ruling applies not only to ordinary hyperlinks, but also so-called "framing", inline links and embedding of content.

However, embedding in particular will be assessed in more detail in the CJEU's upcoming decision in the *BestWater* case (C-348/13), which also deals with the issue of hyperlinking to content that was made available without the authorisation of the right holders.

Another potentially important technical aspect relates to the term "clickable links" used by the CJEU throughout the decision. The consistent use of the term seems to imply that in

order for a link to be covered by the interpretation, some action from the user is required to “activate” the link and retrieve the content. In other words, the interpretation would apply to, e.g., embedded YouTube videos that start to play only when clicked, but not to automatically activated links.

#### Questions Left Unresolved

The CJEU made a clear distinction between material that is freely accessible on the Internet and access-restricted material: if access to the original material had been restricted by Göteborgs-Posten, and if Retriever’s hyperlinks had circumvented those restrictions, there would have been a new public.

In practice this means that in order to effectively limit the exploitation of their material by means of hyperlinking, right holders should restrict access to it. A restriction could for instance be a paywall that allows only to paying subscribers to access the content. The issue of technical restrictions in the context of linking will be addressed in more detail in the CJEU’s upcoming decision in the *C More* case (C-279/13).

Further decisions may also be needed to gain clarity on other practical issues left unresolved in the *Svensson* case. These include the relevance of restrictions included in the license terms of the targeted website, as well as the question of whether some forms of linking might constitute reproduction of the content, or whether other claims could be made in situations where an embedded link is held out as being associated with the linking site. Right holders, copyright enthusiasts and content users alike will need to stay tuned for a little longer. ■

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Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

#### Case law

*Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05), 7 December 2006.

*ITV Broadcasting Ltd et al. v TvCatchUp Ltd* (C-607-11), 7 March 2013.

*Nils Svensson et al. v Retriever Sverige AB* (C-466/12), 13 February 2014.

*C More Entertainment AB v Linus Sandberg* (C-279/13), upcoming.

*BestWater International GmbH v Michael Mebes et al.* (C-308/13), upcoming.