By Alain Strowel, 21 March 2014

No need to ask for authorization before hyperlinking, but…what did the EU Court of Justice mean in Svensson?

In a previous post (see here), I had asked to anticipate the response of the Court of Justice of the EU to several questions raised in the *Svensson* case (C-466/12). The core question was whether establishing an hyperlink to a copyrighted work could constitute a "communication to the public" (under Article 3 of the 2001/29 Directive on copyright in the information society). One could expect the CJEU to rely on is growing case law on what constitutes a communication to the public (see 4 oct. 2011, C-403/08 & C-429/08, *Premier League*; 15 mars 2012, C-135/10, *Consorzio Fonografici v. Del Corso*; 15 mars 2012, C-162/10, *Phonographic Performance Ltd*; 7 March 2013, C-607/11, *ITV Broadcasting v. TV Catchup*). To predict the outcome of the *Svensson* case on the basis of this case law was not obvious, however. Several groups has advocated opposing responses, for instance the European Copyright Society (see opinion of 15 Febr. 2013 here) and the ALAI (see Association Littéraire et Artistique Internationale opinion of 16 Sept. 2013 here).

On February 13, 2014, the CJEU handed down its response (here). The decision contains only a few paragraphs. For the Court,

> *"the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public' " (operative part of the decision)*

Therefore, the person placing such a link must not ask for a prior authorization as hyperlinking does not fall under the acts covered by copyright.

This is a positive outcome, not only for the functioning of the web, but also for preserving

copyright's relevance on the web. Everyone knows that hyperlinks are the glue with which the Web is made. Tim Berners-Lee, one of the founders of the Internet, saw the potential of using hyperlinks to link any information to any other information (see wikipedia article on hyperlink). Here is another telling presentation :

> *"Why are you here? It's not an existential question – it's a navigational one. And it's as critical to the future of the Internet as it has been to its past. If you are viewing this article online, chances are that you have reached this destination because you followed a humble hyperlink. And if you're above the age of, say, four, you know how it works. You click on a hyperlink – and you are magically beamed from one page to another. The hyperlink is the building block of the World Wide Web."*

To limit the possibility to establish hyperlinks could thus be considered as a brake on the engine of free expression that the web definitely supports and expands. Of course, some constraints to the freedom of expression and information, which arguably includes the freedom to place hyperlinks to other online sources as a way to expand the online conversation, are justified. Those limitations must respect the constraints put forward by Article 10(2) of the European Convention on Human Rights. Basically, the limitation by a law (such as copyright law) must be legitimate and proportionate. An across the board obligation to ask for a prior authorization before linking arguably would not pass the proportionality test. Therefore, concluding, as the CJEU did, that inserting clickable links does not require an authorization is right – and positive for the online sharing and discussion. It is also positive for the preservation of copyright online: indeed, would the CJEU have decided differently, the effectiveness and relevance of copyright would have been severely under question. Indeed, the burden required by the application of the basic principle of copyright, that authorization must be sought *before* committing an act falling under copyright's scope, would mean that a copyright law encompassing the simple establishment of hyperlinks would not be respected at all in practice. This, in turn, would risk to further undermine the relevance and value of copyright in the online world.

While the outcome of the *Svensson* case appears clear, it is not easy to understand the whole reasoning of the Court of Justice (We also lack an explanatory background as no Advocate General delivered an opinion in this case). There is an unclear zone or, one could say, a missing link in the Court's reasoning. Obviously, the CJEU considers that providing clickable links to protected works is "an act of communication", but that the second condition for a communication to the public, that the communication is made to a "new public" (as an indeterminate and fairly large number of potential recipients of the communication), is not met. I can only agree with this reasoning. In an article published in 2001 (*Liability with Regard to Hyperlinking*, 24 *Columbia Journal of Law and the Arts* 403), Nicolas Ide and I had written with a reference to the international rules (the 2001/29 Directive was not yet adopted) the following:

> *"Another question is whether the provision of a hyperlink is not equivalent to an act of communication to the public, within the meaning accepted in the WIPO treaties of 20 December 1996, namely 'the making available to the public of works in such a way that members of the public may access these works from a place and at a time*

> *individually chosen by them.' We do not think this to be the case: as the work is already available to the entire Internet community at the linked site's web address, we cannot be dealing with a new act of making it available to the public. The link does not extend the work's audience: surfers who access the work by activating the link can also consult the page directly (as long as they know its URL)."*

In *Svensson*, the issue turns around clickable links posted on the site of a media monitoring agency (Retriever) to the articles of journalists (including Mr Svensson) published on their newspaper's website. Retriever's customer who has paid a subscription fee can access a search function on Retriever's site. In response to a query based on search terms, the customer receives a list of clickable links. If the customer clicks a link, the linked-to site article is displayed in a pop-up window. The customer is not clearly informed that, by clicking on the link, he has been transferred to the website of the press publisher. The process thus can give the impression that the content originates from Retriever, but the risk of confusion is in principle not relevant for the copyright issue under consideration. However the possible confusion could be relevant for an action based on a claim of unfair competition. Links which blur the distinction between the linking and the linked-to sites can confuse the public or appear unfair.

What about framing links as in the CJEU pending case *Bestwater* (C-348/13; see the preliminary question here). This case brought forward by the German Federal Supreme Court (*Bundesgerichtshof*) regards the legitimacy of framing video content. YouTube's option to embed video clips on other websites is at the core of the *Bestwater* case (see on the *kluwercopyrightblog* a first presentation by B. Schuetze, here).

Now what about the next paragraph of the *Svensson* decision?

> *On the other hand, where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly 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, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public.* ***This is the case, in particular, 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****." (para 31)*

By adding this paragraph, the Court very probably wants to keep the door open for a copyright claim. Thus, in certain circumstances, posting clickable links might fall under the notion of "communication to the public". But when exactly? When some access restrictions are placed on the linked-to site and the link allows to by-pass those restrictions, the public that has access

through the link can differ from the public that can access the work on the linked-to site. The Court is right to consider that one should be able to oppose this circumvention of the access restrictions. The CJEU probably has in mind a paywall system. Another case pending before the CJEU, *C More Entertainment v. Linus Sandberg* (C-279/13, here) seems to be about a paywall system (A link to streamed ice-hockey matches is offered by C More Entertainment for visitors who pay for it. The defendant discovered the linked-to page and put the link on its own webpage, thus allowing to bypass the access restriction put in place by C More Entertainment).

While there might be good reasons to prohibit those practices, is it the best option to consider that a communication to the public takes place in those circumstances? Are there not other ways to address such situations?

How do you interpret the *Svensson* decision and what do you expect the CJEU responses to be in *Bestwater* and *C More Entertainment*?

Also, what do you think of the last sentence of the paragraph 31 in the *Svensson* decision? Could this impact the way search engines function?

(The post is in English, but you are free to respond in French if you so prefer!)