

Case C-466/12 Svensson: free movement of goods, capital, services, people, and ... hyperlinks

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What [this case](#) states (linking to freely available content on the internet is permissible) is so obvious that at first one might think: how could this ever have been a problem? There would have been a problem, however, if the Court had decided otherwise and had followed what in particular some copyright holders deem sensible: that permission from the copyright holder is needed for redirecting internet users via hyperlinks to freely available information. So, whereas the Svensson-case for EU scholars and practitioners is not of particular relevance, it is an important verdict for all EU citizens.

[Case C-466/12, Svensson v. Retriever Sverige AB](#), published on 13 Feb. 2014, deals with the question whether a copyright holder may forbid people to link to public information. At first sight this seems absurd: how could merely directing internet users to information that can be found freely elsewhere ever be relevant from a copyright perspective? We have to keep in mind, however, that while European copyright used to be the intellectually oriented “droit d’auteur”, in recent years we followed in the footsteps of the American tradition of the economically oriented “right to copy”.

Internet background

Hyperlinks made the internet as big as it is today. Tim Berners-Lee^[1] designed the world wide web based on the hyper text protocol (http), and the ease of disclosure and communication of information as well as the actual web originated thanks to hyperlinks. In itself the link is an innocent, neutral signpost that cannot easily become as dark and forbidden as some parts of the internet are. Still, there is some information you are not allowed to provide hyperlinks to, e.g. child porn. The question in this case is how to qualify links from a copyright perspective.

Links and communication to the public

[Directive 2001/29](#) on Copyright in the information society introduced the distinction between physical distribution (Article 4) and the electronic (by wire or wireless) communication to the public:

“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.”

In this case, the court decided that providing links to copyrighted works on news websites, does not constitute a communication to the public. For the defendant's behavior to be infringing, the communication made by Retriever Sverige AB must be directed at a new public, i.e. a public that was not taken into account by the copyright holders when they authorised the initial communication to the public.

New public

In previous cases the CJEU (4 October 2011, C-403/08 and C-429/08 (FAPL/Karen Murphy), para. 197; 13 October 2011, C-431/08 and C-432/08 (Airfield), para. 76.) decided that one of the relevant criteria for what counts as a new public is whether "the right holder did take into account" the people receiving the information. These previous cases dealt with broadcasting. The attempts by the Dutch judiciary to apply this criterion to the internet (e.g., Playboy/GeenStijl[2], NederlandFM[3]) demonstrated that it was not particularly suited for that purpose (e.g. Egeler & Lodder 2013 <http://dare.ubvu.vu.nl/handle/1871/41333>). In the NederlandFM case, the Dutch court ruled that the copyright holder had not taken into account the people that listened to internet radio via hyperlinks. An important contribution of the present case is that the public criterion is no longer subjective, which implies that someone can always claim he did not take into account a particular group of people.

Note that the concept "public" is very vague. The public is seen as a whole without any group specification. Is it possible that an author chooses his audience when uploading his works online? When an author finished writing an article, e.g. this blog post, of course he would like to have all the people in this world as his audience, whereas this rosy dream cannot come true in reality. Theoretically, when an article is posted on an open website without any accessing restrictions, all Internet users could read it. Whereas the public consists of people differing in geographical district, language, age, and interests etc., an author practically can never anticipate who will read his works when they are published online, let alone control who could read them. Efforts to partition the potential online readers into an "old public" and a "new public" will only be in vain. As the Court puts it (para. 26):

"The public targeted by the initial communication consisted of all potential visitors to the site concerned (...) not subject to any restrictive measures, all Internet users could therefore have free access to them."

People may have followed a link on another website, but this link is in no way essential for obtaining the information (para. 27):

“the users of the site managed by the [website with links] 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.”

Although the case dealt with ordinary links, the Court indicates that even embedded links are allowed (para. 29):

“Such a finding cannot be called in question (..) when (..) the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site.”

New economy: beyond copyright law

The case can be put in context with developments typical of the new economy that question the usefulness of copyright law-based solutions. As an example, one can look at the commercial profit model of modern electronic newspapers as well as other content websites. Observing the change of business model in the information age from a wider perspective, for numerous business websites the volume of traffic is everything to their business (see further Xu <http://jurel.nl/2014/02/14/>). The issue falls outside the scope of this post, but one should keep in mind that the current online marketing and advertisements raises questions of privacy.

The case provides yet another good illustration that the internet confronts us with questions not easy to answer. Innovation in new services is generally what makes the internet such an interesting place, but copyright just is not suited to address the questions of the new economy satisfactorily. It is hard to foretell what the right direction is, or legal ground, but given the appropriate circumstances it could arguably be fair to share some of the revenue obtained by re-using content of others.

It is clear that actions based on copyright cannot be used to ask compensation for the re-use of freely available information. Not all re-use is, however, relevant from an economic perspective. In the past children were threatened by cease and desist letters for having pictures of My Little Pony on their website.

From an economic perspective the so-called “profit-criterion” could be useful. It depends of course on the particular situation, but in principle compensation in cases where re-use provides revenues could be a reasonable. In such a case, legal tools such as unjust enrichment, fair competition or something else might be of help. The present case makes – correctly in our view – clear that copyright is not likely to be of much use in this regard. A danger of no compensation, in particular if a party earns much

with the content of others, is that content will be barred in walled gardens. We hope this is not the direction the internet is going.

** This post was co-authored with Nina Xu **

[1] A graduate of Oxford University, Tim Berners-Lee invented the World Wide Web, an internet-based hypermedia initiative for global information sharing while at [CERN](#), the European Particle Physics Laboratory, in 1989, see further <http://www.w3.org/People/Berners-Lee/>

[2] Court of Amsterdam 12 September 2012, <http://www.rechtspraak.nl/ljn.asp?ljn=BX7043>; In appeal Court applied correct criterion, Court of Appeal Amsterdam 19 November 2013, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2013:4019>

[3] Court The Hague 19 december 2012, [http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum%20Rechtbank%20's-Gravenhage%2019%20december%202012,%20zaaknr%20407402%20HA%20ZA%2011-2675%20\(Vereniging%20BUMA-Stichting%20Stemra%20tegen%20X\).pdf](http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum%20Rechtbank%20's-Gravenhage%2019%20december%202012,%20zaaknr%20407402%20HA%20ZA%2011-2675%20(Vereniging%20BUMA-Stichting%20Stemra%20tegen%20X).pdf)