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CJEU RULING IN SVENSSON CASE: FREE LINKING IN A FREE WEB?

Posted on 4 Marzo 2014 by [Marco Bellezza](#)

On February 13th, the Court of Justice of European Union (CJEU) released its [judgment](#) on case C-466/12, popularly known as the *Svensson* case. The case concerned the extension of the notion of “communication to the public” as provided by EU copyright law, Article 3, paragraph 1 [Directive 2001/29/EC](#) on the harmonization of certain aspects of copyright and related rights in the information society.

According to such provision: “1. 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”.

The case was brought to the CJEU following a Swedish litigation involving journalists and the owners of a website which provided visitors with links to the journalists’ articles that were published on freely accessible newspapers’ websites. The journalists sought compensation from the website owners claiming that the website owners infringed on their

exclusive right to make their articles available to the public by providing the aforementioned links on the website.

The national Swedish Court decided to refer four questions to the CJEU for preliminary ruling. The questions proposed to the European Court involve the limits and boundaries of the protection to authors' exclusive right of communicate their works to the public vis-à-vis the provision of links on the internet. The questions included:

- 1) Does providing a clickable link to protected works constitute a communication to the public within the meaning of the Directive 2001/29/EC?
- 2) Is the answer to question one in any way affected if the clickable link directs users to a free website or a website where the access is restricted?
- 3) In answering question one, should any distinction be drawn between cases where the protected work is shown after a click on another website and cases where such work is shown in a way that gives the impression that it is on the original website (i.e. framing)?
- 4) Is it possible for Member States to provide the authors' exclusive right with a wider protection than the one provided by the Directive?

The CJEU's answers to these questions will likely affect the ongoing debate at European Level on the reshaping of copyright rules for this digital era. It is worth noting that a [public consultation](#) that includes this issue was recently opened by the European Commission and will end on March 5, 2014.

Regarding question one, as clarified in the past by the CJEU, communication to the public includes, " *two cumulative criteria, namely, an 'act of communication' of a work and the communication of that work to a 'public'*" (paragraph 16 of the decision). According to the CJEU's interpretation, providing a clickable link to protected work falls within an 'act of communication.' Likewise, a website manager providing the clickable link is making a 'communication to the public' as there is an act of communication to an indeterminate number of potential recipients.

However, to provide the authors or rights holders with an exclusive right to authorize communication of their work, it is necessary that the public being communicated to is a 'new public' in respect to the public originally targeted by the right holders. In short, the rights holders' authorization is not required when the relevant act of communication to the public, such as providing a clickable link to protected works, targets the same public as the initial communication. The CJEU therefore ruled that since the journalists published their articles on the internet, and the articles were accessible for free, the 'public' targeted by the website manager who provided the clickable links was the same public initially targeted by the authors.

With this focus on the target public, in answering question three, the CJEU decided that there is no distinction between cases where the protected work is shown after the client is redirected to another website and cases where it is not clear that the client is being redirected if the targeted 'public' is the same in both accounts.

Responding to the second question, the CJEU stressed that the authorization of the right holder is always required when the access to the relevant contents is protected by means of technological measures or when the relevant content is no longer accessible on the website where the communication commenced. In those cases, indeed, it is arguable that the provision of the clickable link is targeted to a 'new public' than the one considered by the subject who made the initial communication.

In regards to the fourth question, the European Court recalled that a key aim of Directive 2001/29/EC is to, "*remedy the legislative differences and legal uncertainty that exist in relation to copyright protection.*" From this perspective, allowing a Member State to provide a wider protection to right holders, by extending the concept of 'communication to the public,' would conflict with the aims of the Directive. This would adversely impact the functioning of the internal market by increasing the differences between national laws that the Directive seeks to prevent. Indeed, it is worth noting that for a good functioning of the digital internal market it is important that all Member States ensure the same level of protection to

IP rights.

This CJEU ruling maintains of a certain degree of Internet openness at the EU level, allowing the links to free websites without the prior permission of the relevant right holder. It may also lead right holders' to different business choices in relation to their content, such as putting articles behind a paywall or under registration to the relevant website. Most importantly, this decision forms an important precedent in CJEU case law and will influence the ongoing debate about the boundaries of the exclusive rights granted by EU copyright Law in the digital era. In the upcoming months, the CJEU is expected to decide similar cases including the [C-More case \(C-270/13\)](#) (which will likely be dismissed due to its resemblance to the *Svensson* case), the [BestWater case \(C- 348/13\)](#) and the [Public Relations Consultants Association case \(C-360/13\)](#). It will be interesting to see how the Court will continue reshaping, or maintaining, elements of prevailing copyright rules.