

European Copyright Society

Opinion on

**The Reference to the
CJEU in Case C-
466/12 *Svensson***

15 February 2013

European Copyright Society

The Reference to the CJEU in Case C-466/12 *Svensson*¹

1. The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of Europe, seeking to promote their views of the overall public interest. The Society is not funded by, nor has been instructed by any particular stakeholders.
2. The ECS wishes to take the opportunity to put on record its views of the issues before the Court in Case C-466/12, *Svensson*. The importance of this particular reference should be evident to the Court. Although hyperlinking takes many forms and has multiple functions, there can be no doubt that it is the single most important feature that differentiates the Internet from other forms of cultural production and dissemination. Hyperlinking is intimately bound to the conception of the Internet as a network, and hyperlinks constitute paths leading users from one location to another. As the Supreme Court of Canada has stated “[h]yperlinks ... are an indispensable part of [the Internet’s] operation.”²
3. The legal regulation of hyperlinking thus carries with it enormous capacity to interfere with the operation of the Internet, and therefore with access to information, freedom of expression, freedom to conduct business,³ as well – of course – with business ventures that depend on these types of linkages. Europe has developed a significant sector of SMEs, many of whose web operations depend on the use and provision of links. The Court must not under-estimate the importance of its ruling in this case.
4. As Tim-Berners Lee, who is regularly accredited as being an inventor of the World Wide Web, has explained, a standard hyperlink is nothing more than a reference or footnote, and that the ability to refer to a document is a fundamental right of free speech.⁴
5. In a similar vein, US Law Professor Jessica Litman states,⁵:
“... the public has always had, and should have, a right to cite. Referring to a copyrighted work without authorization has been and should be legal. Referring to an infringing work is similarly legitimate ... Drawing a map showing where an infringing object may be found or dropping a footnote that

¹ Assistance with drafting this was provided by Yin Harn Lee, doctoral student at the University of Cambridge. We are grateful for her help.

²See *Crookes v Newton*, [2011] SCC 47, [2011] SCR 269 per Abella J, at [34].

³Jack Balkin, ‘The Future of Free Expression in a Digital Age’, (2009) 36 *Pepp. L. Rev.* 427.

⁴Tim Berners-Lee, ‘Axioms of Web Architecture. Links and Law: Myths’, at <http://www.w3.org/DesignIssues/LinkMyths.html>. See also, Steven Waldman, *The Information Needs of Communities: The Changing Media Landscape in the Broadband Age*, (FCC) 340.

⁵Jessica Litman, *Digital Copyright: Revising Copyright Law for the Information Age* (New York, Prometheus Books, 2001), 183. In *Intellectual Property Law* (Oxford: OUP 2009), Professors Lionel Bently and Brad Sherman state, at 151: “Most hyper-linking simply makes it easier to locate (and, if desired, access) works which are already available to the public, and it would be unduly constraining to require all links to be authorized.”

cites it invades no province the copyright owner is entitled to protect even if the object is blatantly pirated from a copyrighted work. Posting a hypertext link should be no different.”

General

6. Hyperlinking in general should be regarded as an activity that is not covered by the right to communicate the work to the public embodied in Article 3 of Directive 2001/29. We offer three reasons for this conclusion:

(a) Hyperlinks are not communications because establishing a hyperlink does not amount to “transmission” of a work, and such transmission is a pre-requisite for “communication”;

(b) Even if transmission is not necessary for there to be a “communication”, the rights of the copyright owner apply only to communication to the public “of the work”, and whatever a hyperlink provides, it is not “of a work”;

(c) Even if a hyperlink is regarded as a communication of a work, it is not to a “new public.”

7. This does not mean that creating hyperlinks in no circumstances involves liability. In fact, as is clear from national case-law, different forms of hyperlinking may indeed give rise to the following forms of liability

(a) Accessory liability (particularly in respect of knowingly facilitating the making of illegal copies);⁶

(b) Unfair competition;

(c) Infringement of moral rights;

(d) Circumvention of technological measures.

Only the last of these has been the subject of harmonization at a European level, and thus falls within the competence of the Court of Justice.

8. We begin by considering the concepts of “communication” and “the public” in Article 3 of Information Society Directive, 2001/29, before offering specific answers to the four questions referred to the Court.

The Meaning of “Communication” in EU Law: Article 3 of 2001/29

9. As the Court (Grand Chamber) states in Joined Cases C-403/08 and C-429/08, *FAPL* [193], “the concept of communication must be construed broadly, as referring to *any transmission of the protected works*, irrespective of the technical means or process used.”

⁶ See e.g. *Brein v Techno Design* [2006] ECDR 21 (Netherlands); *Universal Music v Cooper* [2006] FCAFC 187 (Full Federal Court of Australia); *Napster.no* [2005] IIC 120(Norway).

10. “Communication” thus occurs irrespective of whether the means of communication is by wire or wireless, but in all cases a communication presupposes an act of “transmission”, a technical act of emission (giving rise to potential reception of the work by “the public”).
11. That transmission of the work is a *sine qua non* of communication to the public is also clear from the legislation and its background. According to the Court, in “interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.” See Case C-306/05 *SGAE* [2006] ECR I-11519, [34].

Language

12. Article 3 reads

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.

13. Recital 23 of 2001/29 elaborates

This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. **This right should cover any such transmission** or retransmission of a work to the public by wire or wireless means, including broadcasting. **This right should not cover any other acts.**

14. The text of Article 3 refers to “means” by which a communication is effected. Recital 23 indicates that the means of communication involves transmission of a work; the word “such” refers back to communication and thus serves to define its scope. Recital 23 importantly elaborates that communication does not encompass any other acts.

The *Travaux préparatoires* of 2001/29

15. The Court has frequently referred to the *travaux préparatoires* when interpreting EU Directives.⁷ The *travaux* of 2001/29 also support the view that transmission is the *sine qua non* of communication. The Commission Proposal, COM(97) 628 final, 25, stated:

“The expression ‘communication to the public’ of a work covers any means or process other than the distribution of physical copies. This includes communication by wire or by wireless means. **An act of communication to the public can involve a series of acts of transmissions** as well as acts of

⁷ See, e.g., *FAPL*, referring at [192] to the Explanatory Memorandum (COM(97) 628 final) accompanying the Commission’s proposal (see also [AG110]) as well as, at [201], [AG131], the views of Parliament that were given effect to in the Common Position. The Advocate General (Kokott) in that case even refers to Council Documents.

reproductions, for instance a temporary storage of a work. With respect to the acts of reproduction, such as storage, the reproduction right (cf. Article 2) is of relevance. **If, at any point of a transmission or at the end of a transmission the work is communicated to the public, including through public display on screen, each such communication to the public requires authorization of the author.** The notion of "communication to the public" has been used as in the *acquis communautaire* and the relevant international provisions, such of the Berne Convention and the WCT. As in the *acquis communautaire*, it is a matter for the national law to define 'public'."

Clearly, the Commission envisioned "communications" as involving transmission.

International Law

16. As is well known, 2001/29 implemented the so-called WIPO treaties in particular Article 8 of the WCT. Indeed recital 15 states:

The Diplomatic Conference held under the auspices of the [WIPO] in December 1996 led to the adoption of two new Treaties, the [WCT] and the [WPPT] ... This Directive also serves to implement a number of the new international obligations

17. The Court has already observed that Article 3(1) of Directive 2001/29, "is inspired by Article 8 of the WCT, the wording of which it reproduces almost verbatim": Case C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, [72].
18. The Court should therefore consider whether Article 8 WCT provides any guidance as to the meaning of "communication to the public." See Case C-306/05 *SGAE* [2006] ECR I-11519, [35]; Case C-456/06 *Peek & Cloppenburg* [2008] ECR I-2731, [31]; Case C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, [51]-[55].
19. Article 8 reads

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising 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 these works from a place and at time individually chosen by them.

20. The WCT was adopted in response to the need to ensure that appropriate levels of protection were made available in the "digital environment." Indeed, this was widely referred to at the time as the "digital agenda". The preamble recognises

"the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works"

And thus

“the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new technological developments.”

21. The Basic Proposal for the Treaty which contained a draft Article 10, in similar terms, was accompanied by an explanatory commentary. Paragraphs [10.15]-[10.16] confirm the equation of “communication” with “transmission”:

“[10.15] **As communication always involves transmission, the term ‘transmission’ could have been chosen as the key term to describe the relevant act.** The term ‘communication’ has been maintained, however, because it is a term used in all relevant Articles of the Berne Convention in its English text. It deserves to be mentioned that in the French text the expression ‘la transmission publique’ has been used in Article 11 and 11 ter, and the expression ‘la transmission par fil au public’ has been used in Article 14 while ‘communication to the public’ and ‘communication to the public by wire’ are the English expressions. In Article 11 bis of the French text of the Convention, the corresponding expression is ‘la communication publique’.

[10.16] It seems clear that, at the treaty level, the term ‘communication’ can be used as a bridging term to ensure the international interoperability and mutual recognition of exclusive rights that have been or will be provided **in national legislations using either the term ‘transmission’ or the term ‘communication.’** The former refers to a technical transfer while the latter implies, in addition to the technical transfer, that something is communicated. For the purposes of the proposed Treaty, this slight difference between the terms is irrelevant. What is transferred or communicated is the work.”⁸

22. Finally it is worth observing that Member states have understood the concept of “communication” as equivalent to “transmission.” For example, in the United Kingdom, the legislature when implementing 2001/29 defined “communication” as electronic transmission. Section 20(2) of the Copyright, Designs and Patents Act 1988 (as amended) reads:

“References in this Part to communication to the public are to communication to the public by electronic transmission...”

Court of Justice Case Law on Notion of “Communication”

23. The Court has in recent years on several occasions interpreted the right of communication to the public as provided in Article 3(1) of Directive 2001/29: Case C-306/05, *SGAE v Rafael Hoteles*; Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*; Joined Cases C-

⁸ Records of the Diplomatic Conference on Certain Copyright and Neighbouring Right Questions, Geneva 1996, Vol 1, (Geneva: WIPO, 1999) 206.

403/08 and C-429/08 *Football Association Premier League and Others*; Joined Cases C-431/09 and C-432/09, *Airfield NV and Canal Digitaal BV v Sabam*, and *Airfield NV v Agicoa Belgium*; Case C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*; Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland*.

24. In most of these cases it was accepted as part of the factual background that there was a “transmission” by the relevant party.
25. In several of these cases the Court clarified that communication to the public requires an act of intervention (e.g. Case C-306/05, *SGAE v Rafael Hoteles*, [42]). This “intervening... to give access” might be interpreted as broader than “transmitting” the work and thus to be capable of encompassing the provision of hyperlinks. In our view, that would be a logical mistake, converting a description of one of the characteristics of a “communication” into a redefinition of “communication”. A communication undoubtedly involves an intervention, but not every intervention is a communication. It is only those interventions that involve (at least under 2001/29, electronic) transmission of a work that are communications.
26. If every intervention that gave access to a work were treated as a communication, the effect would be to transform the “communication” right into an “access right” covering any act that provides access to a work, as for example, where a bookstore or newsagent lets the public into its premises (compare Case C-456/06, *Peek and Cloppenburg KG v Cassina SpA* [2008] ECR I-2731 where the Court held that displaying works of applied art did not amount to distribution thereof, without mooting the possibility that it might be “communication to the public”), or a library allows access to its collection or reading rooms. To do so would confuse “communication” with rights such as “distribution”, “rental”, “lending”.

“To The Public”

27. The second aspect of Article 3 that is relevant in considering this reference is the requirement that the communication be “to the public”. The concept of the public has now been considered in a number of cases. Here, we wish to draw attention to one facet of that case-law: the requirement that where there has already been some form of communication to the work, a later communication makes it available to “a new public.”
28. In Case C-306/05 *SGAE* [2006] ECR I-11519, the Court stated

“[40] It should also be pointed out that a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11*bis*(1)(ii) of the Berne Convention, a communication made by a broadcasting organisation other than the original one. **Thus, such a transmission is made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.**”

See also Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgou Theatrikon kai Optikoakoustikon Ergon*, (ECJ, by Order, 18 March 2010), [38]

29. In Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR, the Court observed:

“ in order for there to be a ‘communication to the public’ within the meaning of Article 3(1) of the Copyright Directive ..., **it is also necessary for the work broadcast to be transmitted to a new public**, that is to say, to a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public...”

30. In Joined Cases C-431/09 and C-432/09, *Airfield NV and Canal Digitaal BV v Sabam and Airfield NV v Agicoa Belgium*, the Court again referred to the requirement of a “new public”; see Joined Cases C-431/09 and C-432/09 [77].

31. The Court has indicated that the question of whether a public is “new” depends upon whether the public was contemplated by the copyright owner at the time of authorising the initial transmission. In Joined Cases C-431/09 and C-432/09, *Airfield* it refers, at [76] to:

“**a public wider than that targeted by the broadcasting organisation concerned**, that is to say, a public which was not taken into account by the authors of those works when they authorised the use of the latter by the broadcasting organisation.”

32. The Court has held that a person who authorises “free to air broadcasts” does not contemplate the retransmission of such broadcasts to hotel rooms. In Case C-306/05 *SGAE* [2006] ECR I-11519, it stated

“[41] As is explained in the Guide to the Berne Convention..., **when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme.** According to the Guide, if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public. As the Guide makes clear, such public reception falls within the scope of the author’s exclusive authorisation right.

[42] The clientele of a hotel forms such a new public. The transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast in the catchment area. On the contrary, the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work.”

33. In Joined Cases C-403/08 and C-429/08, *FAPL*, the Court referred to the requirement of

“a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public.”

It found that

“[198] When those authors authorise a broadcast of their works, they consider, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. Where a broadcast work is transmitted, in a place accessible to the public, for an additional public which is permitted by the owner of the television set to hear or see the work, an intentional intervention of that kind must be regarded as an act by which the work in question is communicated to a new public ...

[199] That is so when the works broadcast are transmitted by the proprietor of a public house to the customers present in that establishment, because those customers constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works.”

34. In Joined Cases C-431/09 and C-432/09, *Airfield NV*, the Court emphasised that

“[79] Such activity ... constitutes an intervention without which those subscribers would not be able to enjoy the works broadcast, although physically within that area. Thus, those persons form part of the public targeted by the satellite package provider itself, which, **by its intervention in the course of the satellite communication in question**, makes the protected works accessible to a public which is additional to the public targeted by the broadcasting organisation concerned.”

Question 1

Hyperlinking Does Not Involve Transmission

35. Clearly, hyperlinking involves some sort of act – an intervention. But it is not, for that reason alone, an act of communication. This is because there is no transmission. The act of communication rather is to be understood as equivalent to electronic “transmission” of the work, or placing the work into an electronic network or system from which it can be accessed.
36. This is because hyperlinks do not transmit a work, (to which they link) they merely provide the viewer with information as to the location of a page that the user can choose to access or not. There is thus no communication of the work. As Abella J explained, speaking for the majority of the Supreme Court of Canada (in a case concerning hyperlinks and defamation):

“Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not.

...

Hyperlinks ... share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral — it expresses no opinion, nor does it have any control over, the content to which it refers.”⁹

37. In *Copyright Law in the Digital Society* (Oxford: Hart 2005) Professor Tanya Aplin states, at 151,

“It seems misconceived to say that ..[links]...constitute making available....all they have done is referred other users to where the files may be readily found. In other words, they have provided a form of citation to the copyright works. The ability to cite/hyperlink is a key feature of the way the Internet operates and could also be a fundamental aspect of a user’s freedom of expression. Thus, it is submitted that inserting a hyperlink in this manner would not and should not constitute making available to the public.”

National Case-Law

38. Two highest-level (supreme) courts in European states have in recent years pronounced judgments that deal with the issue of hyperlinking under copyright law. Both of these decisions are consistent with the approach advocated in this opinion.

(a) GERMANY. In *Paperboy*, Case I ZR 259/00 (17 July 2003) [2005] ECDR (7) 67, 77, the Bundesgerichtshof found that the “paperboy search engine” which searched newspaper websites and provided search results including hyperlinks, did not thereby infringe. The Court considered whether hyperlinking was “communication” under German law and under Article 3 of the Information Society Directive, 2001/29, concluding that there was no infringement. It observed:

“[42] A person who sets a hyperlink to a website with a work protected under copyright law which has been made available to the public by the copyright owner, does not commit an act of exploitation under copyright law by doing so but only refers to the work in a manner which facilitates the access already provided He neither keeps the protected work on demand, nor does he transmit it himself following the demand by third parties. Not he, but the person who has put the work on the internet, decides whether the work remains available to the public. If the web page containing the protected work is deleted after the setting of the hyperlink, the hyperlink misses. Access to the

⁹ *Crookes v Newton*, [2011] SCC 47, [2011] SCR 269, at [26], [30].

work is only made possible through the hyperlink and therefore the work literally is made available to a user, who does not already know the URL as the precise name of the source of the webpage on the internet. This is however no different to a reference to a print or to a website in the footnote of a publication.

[43] The Information Society Directive,, has not changed the assessment of hyperlinks, as are in question here, under copyright law ... According to Art.3(1) of the Information Society Directive Member States are obliged to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, 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 a time individually chosen by them. This provision refers to the use of works in their communication to the public. The setting of hyperlinks is not a communication in this sense; it enables neither the (further) keeping available of the work nor the on-demand transmission of the work to the user.”

(b) NORWAY

In *Napster.no* (2006) IIC 120 (27 January 2005), the Supreme Court of Norway held that the posting on a website (in this case, www.napster.no) of hyperlinks that led to unlawfully uploaded MP3 files did not necessarily constitute an act of making the files available to the public. It stated:

“[44] There has been no dispute that those uploading the music files carried out illegal copying and made the works publicly available. If the linking is regarded as making works publicly available, this will concern linking to both lawfully and unlawfully disclosed material. The conception of what constitutes making works publicly available must be the same in both cases...”

[45] The appellants claim that the linking involved an independent and immediate access to the music. A [the respondent] for his part has pointed out that the links only contained an address to a webpage and that, by clicking on the link, the music file would be stored temporarily on the user's own computer. Not until such storage took place would the user be able to play the music file or download it for later use.

[46] In my opinion, it is not decisive whether [direct/deep links] or [superficial links - links to the main page of the website] are involved, nor whether the user technically is “located” on his/her own computer, on napster.no, or has “moved” to the website to which the link leads. What must be decisive is how the technique functions - whether and how access is given.

[47] It cannot be doubted that simply making a website address known by rendering it on the internet is not making a work publicly available. This must be the case independent of whether the address concerns lawfully or unlawfully posted material...”

US Case-Law

39. In the United States the leading case regarding hyperlinking under copyright is the decision by U.S. Court of Appeal for the Ninth Circuit in *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828 (C.D.Cal.2006), 487 F.3d 701 (USCA, 9th Cir. 2007). Here Perfect 10 sued Google claiming that the latter's "Google Image search" infringed Perfect 10's copyrighted photographs of nude models, when it provided users of the search engine with thumbnail versions of Perfect 10's images, accompanied by hyperlinks to the website publisher's page . With respect to these links, the Appeal Court affirmed the first instance finding that these did not infringe Perfect 10's rights to control display or distribution of the works. As Judge Ikuta explained, at 717:

"Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen. Google may facilitate the user's access to infringing images. However, such assistance raises only contributory liability issues, . . . , and does not constitute direct infringement of the copyright owner's display rights."

Access to the Work

40. However, if contrary to the view expressed, the Court does take the view that a transmission is not required for there to be a communication, providing a hyperlink is not an intervention which gives *access to the work or a communication of the work*. As we have explained, a hyperlink is a location tool, allowing a user to find where a work is.
41. Indeed, as was noted in the German *Paperboy* case, it is clear that the creation of a hyperlink does not communicate the work because, in many circumstances, works can be removed from the Internet while the hyperlinks remain intact.
42. Another way to understand the point is to consider what permission would be needed to create a hyperlink were the Court to take the view that a hyperlink is a communication of a work. A hyperlink will provide a user with a location on the web – "a web-page". It seems to be assumed that the permission that might be required is that of the constructor (or "owner") of the webpage. But, if "hyperlinking" is communication of the works on the web-page, permissions would need to be obtained from all copyright-owners of all works contained on the web-page (as well as authors of those works, vis-à-vis moral rights).
43. And what if the web-page itself contained links to other pages? If those links are communications "of works" then presumably the "works" are regarded as accessible from the page, so the hyper-link to the page with links might equally be

a communication of those works. One immediately can see that conflating communications of locations with communications of works has potentially absurd consequences.

44. Given this, it is not surprising that hyperlinking fundamentally differs in nature from any act of intervention which the Court has previously treated as a communication of a work.
45. In *FAPL* and *SCF*, the presentation gave immediate sensory experience of the broadcast. Clearly, a hyperlink does not do this. In Cases C-431/09 and C-432/09, *Airfield*, the provision of decryption devices gave the technical possibility of access to the communication of the works. Once again, a hyperlink does not provide the technical possibility of access to a work that is not otherwise accessible. In *SGAE* and *PP(Ireland)*, the distribution of signals to rooms where televisions (receiving apparatus) were installed allowed users to access communications by switching on or selecting channels.

The New Public

46. Further, even if a hyperlinker is said to communicate a work, because it “intervenes to give access”, it cannot be the case that by so doing the person communicates the work “to the public”. This is because the work is not communicated to a “new public.”
47. For the public to be regarded as “new”, it seems a careful analysis is required of:
 - (a) The expectations of the copyright owner;
 - (b) Whether the public *could* access the work without the intervention of the third party.
48. On the assumption (with which we disagree) that a hyperlink constitutes a relevant “communication”, the question arises as to whether this is to a “new public”? In our view, in general it will not be for the following reasons:
 - (a) It is well-known that material placed on the Internet without e.g. firewalls can be accessed from anywhere, and can be located using a range of search tools. Consequently, the copyright holder who authorises or permits such making available, must be assumed to contemplate the access to the work from anywhere. The creation of a hyperlink will thus not normally add to the public, as the targeted public is universal.
 - (b) Equally, adding a hyperlink will not normally provide the possibility of access to users that they would not have in the absence of the hyperlink. The CJEU requires the intervention to be a sine qua non for that public to get access to the work, which is not the case with hyperlinks. The hyperlink will merely draw the potential user’s attention to the existence of the material and provide an easy-to-use tool for requesting the material to be sent.

49. In ‘Liability with Regard to Hyperlinks’ (24 *Columbia Journal of Law and the Arts* 403), Professor Alain Strowel and Nicholas Ide state, at 425:

“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). Concluding that there is a new communication to the public does not seem justified (and would cause considerable difficulties in terms of copyright management).”

Question 2

50. With respect to links to websites that are not publicly accessible, we reiterate our observation that a hyperlink is simply not a communication of the work. Thus there seems to be no reason to treat such activity as different under Article 3 of the Information Society Directive.
51. Nevertheless, national legal regimes may operate to prevent linking to works which are held in digital form in circumstances where access to them is limited such that they retain confidentiality or official secrecy (or that implicate an author’s moral right of divulgation).
52. However, if we are wrong with respect to the meaning of communication, and the Court concludes that it extends to the provision of access by means going beyond “transmission”, we reiterate our earlier view that there is no communication “of the work”, in that a hyperlink merely identifies an address (from which a work may, or may not, be transmitted).

Question 3

53. In principle, we are unable to see why “framing” as it is often called, should be treated any differently for copyright purposes from hyperlinking.
54. In *Perfect 10 v. Google, Inc.*, 487 F.3d 701 (USCA, 9th Cir. 2007), the Court of Appeal for the 9th Circuit held that it was inappropriate to grant preliminary relief in favour of Perfect 10 in so far as Google “framed” images from website operators sites. Circuit Judge Sandra Ikuta noted

“Perfect 10 argues that Google displays a copy of the full-size images by framing the full-size images, which gives the impression that Google is showing the image within a single Google webpage. While in-line linking and framing may cause some computer users to believe they are viewing a

single Google webpage, the Copyright Act, unlike the Trademark Act, does not protect a copyright holder against acts that cause consumer confusion.”

A footnote in the judgment observes that

“Perfect 10 also argues that Google violates Perfect 10's right to display full-size images because Google's in-line linking meets the Copyright Act's definition of "to perform or display a work 'publicly.'" 17 U.S.C. s 101. This phrase means "to transmit or otherwise communicate a performance or display of the work to ... the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." Id. Perfect 10 is mistaken. Google's activities do not meet this definition because Google transmits or communicates only an address which directs a user's browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself.”

55. In so far as there might be technical differences in some cases where the work is made available from the server of a person providing a hyperlink, it is our view that, even were there an act of communication or making available, such a communication or making available is not “to the public” because it is not to a “new” public – it is a public which already had the possibility of access to the material from the web. Just as an improved search-engine that improves the ability of users to locate material for which they are searching should not be required to obtain permission as a matter of copyright law, so providing links or access to material already publicly available should not be regarded as an act that requires any authorisation.
56. As the Court of Appeal for the Ninth Circuit implied in the *Perfect 10* case, the conclusion that “framing” is not communication to the public does not mean that such “framing” will *never* give rise to liability on the part of the “framer” – just that it does not do so under relevant Union copyright law.
57. In fact, “framing” might give rise to liability in various respects. Firstly, in so far as “framing” leads Internet users to believe that the material that they see originates with the framer, rather than with the website where it is published, this act may amount to unfair competition. On the whole, such action falls to be assessed under national law, in so far as “business to business” unfair competition lies outside the scope of the Unfair Commercial Practices Directive, 2005/29/EC.
58. In other cases, “framing” may implicate an author’s moral rights. Thus, for example, presentation of an image in a different context may infringe an author’s moral right to protect the integrity of the work. Once again, this is a matter that has been left to national law: see Term Directive, 2006/116, Article 9, recital 20; Database Directive, 96/9, recital 28; and Information Society Directive, 2001/29. Recital 19 of the latter reiterates that

The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright

Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

59. Clearly, these matters are ones on which the Court has (as yet) no competence to rule.

Question 4

60. Fourth, in our view, the communication right in Article 3 of the Directive is intended to harmonize the law fully on this point. Consequently, Member States cannot have different definitions or conceptions of this right.

61. Recital 6 indicates the general intention of the legislator in harmonizing:

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

62. Clearly, harmonization was regarded as necessary to remove existing differences and avoid the emergence of further differences. This implies that harmonization of the communication right was not “minimal harmonization,” setting a baseline, but full harmonization, setting a ceiling as well as a floor.

63. This is reinforced by the recitals 23 and 24 which deal specifically with the communication right and indicate that it shall not cover “any other acts”.

64. The Court has already stated that the exclusive rights laid down in the 2001/29 Directive should not receive a broader application by national laws. In Case C-456/06 *Peek & Cloppenburg* [2008] ECR I-2731, [38], the Court considered:

“That protection can be achieved only within the framework put in place by the Community legislature. Therefore, it is not for the Court to create, for authors’ benefit, new rights which have not been provided for by Directive 2001/29 and by so doing to widen the scope of the concept of distribution of the original of a work or a copy thereof beyond that envisaged by the Community legislature”: that prohibition to extend the rights provided for in the directive 2001/29, formulated here for the right of distribution, could be extended by analogy to the right of communication.”

65. This should be contrasted with the approach adopted in the Directive on Cable and Satellite Broadcasting adopted in 1993, which stated

Article 6 Minimum protection

1. Member States may provide for more far-reaching protection for holders of rights related to copyright than that required by Article 8 of Directive 92/100/EEC.

Conclusion

66. In Joined Cases C-403/08 and C-429/08, *FAPL*, the Court wisely construed the Information Society Directive, 2001/29, in a manner which took account of the realities of digital technology. When considering the scope of article 5(1), the Court acknowledged the importance of the goal of the Directive in recital [31]:

A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded.

67. The Court concluded [179]:

[Art 5]... is intended to ensure the development and operation of new technologies. If the acts at issue were not considered to comply with the conditions set by [Art 5], all television viewers using modern sets which, in order to work, need those acts of reproduction to be carried out would be prevented from receiving broadcasts containing broadcast works, in the absence of an authorisation from copyright holders. That would impede, and even paralyse, the actual spread and contribution of new technologies, in disregard of the will of the [EU] legislature as expressed in recital 31 in the preamble to the Copyright Directive.

68. In this case, the Court needs equally to consider the effect of its ruling. If hyperlinking is regarded as communication to the public, all hyperlinks would need to be expressly licensed. In our view, that proposition is absurd.

On behalf of the European Copyright Society:

Prof. Lionel Bently
Director, Centre of Intellectual Property and Information Law (CIPIL), University of Cambridge, United Kingdom

Prof. Estelle Derclaye
Professor of Intellectual Property Law, University of Nottingham, United Kingdom

Prof. Graeme B. Dinwoodie
Director, Oxford Intellectual Property Research Centre (OIPRC), University of Oxford, United Kingdom

Prof. Dr. Thomas Dreier
Director, Institut for Information and Economic Law, Karlsruhe Institut of Technology (KIT),
Germany

Prof. Séverine Dusollier
Director, Centre de recherche information, droit et société (CRIDS), University of Namur,
Belgium

Prof. Christophe Geiger
Director, Centre d'Etudes Internationales de la Propriété Intellectuelle (CEIPI), University of
Strasbourg, France

Jonathan Griffiths
School of Law, Queen Mary University of London, United Kingdom

Prof. Reto Hilty
Director, Max Planck Institute for Intellectual Property, Munich, Germany

Prof. P. Bernt Hugenholtz
Director, Institute for Information Law, University of Amsterdam, Netherlands

Prof. M-C. Janssens
Professor Intellectual Property Law, University Leuven (KU Leuven), Belgium

Prof. Martin Kretschmer
Director, CREATE, University of Glasgow, United Kingdom

Prof. Axel Metzger
Director, Institute for Legal Informatics, Leibniz University, Hannover, Germany

Prof. Dr. Alexander Peukert
Goethe-Universität Frankfurt am Main, Germany

Prof. Marco Ricolfi
Chair of Intellectual Property, Turin Law School, Italy

Prof. Martin Senftleben
Professor of Intellectual Property, VU University Amsterdam, Netherlands

Prof. Alain Strowel,
Professor, Saint-Louis University and University of Liège, Belgium

Prof. Michel Vivant,
Professor, SciencesPo, Paris, France.

Prof. Raquel Xalabarder
Chair on Intellectual Property, Universitat Oberta de Catalunya, Barcelona, Spain.