

HYPERLINK & INTERNET LIBERTY — OBSERVATIONS FROM CJEU SVENSSON CASE*

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I. *Recent Phenomenon on Hyperlinks Copyright Infringement*

The evolving information technology facilitates not only the online distribution of works but also contributes rampant copyright piracy phenomenon. Activities such as illegal P2P file-switching uploading unauthorized audiovisual works on platforms (i.g. Youtube or Dailymotions) for the public have threatened rightholders' interests. Recently, the copyright "pirates" use the hyperlink technology in the so-called contents aggregator websites, which enable users to read articles or watching videos from the platforms without quitting the current websites. Shall the copyright holder's rights be protected against the act of communication of works to the public by means of Internet hyperlinks? If the answer is yes, how shall we conserve the liberty of using hyperlinks, which are technically vital to operate Internet and socially essential to access information?

In fact, the Internet consists of enormous amount of hypertext pages ("webpages"), which are interconnected by hyperlinks. A typical user of a hyperlink on the current host website will be taken to the linked website through the hyperlink, and can there retrieve target information (copyrighted works) on the user's computer. However, evolving web language skills (such as frame linking or deep linking) enable Internet users to access information provided by the target website on the current host website, without actually going to the target website.

According to Article 8 of World Copyright Treaty of World Intellectual Property Organization (WIPO WCT), the author is entitled to enjoy the right of communication of his works to the public as one of the exclusive rights. "Public communication" means to make available or communicate to the public the content of a work through sounds or images by wire or wireless networks, or through other means of communication, including enabling the public to receive the content of such work by any of the above means at a time or place individually chosen by them. The infringer of the right of communication to the public risks both civil liability and criminal sanction in the national laws¹. However, the question whether the act of providing hyperlinks constitutes the infringement of the public communication right has been debated in the recent cases in the European Union Court of Justice of the European Union

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¹ For example, article 92 (Criminal sanctions) of the Copyright Act (Taiwan) provides: "A person who infringes on the economic rights of another person without authorization by means of public recitation, public broadcast, public presentation, public performance, public transmission, public display, adaptation, compilation, or leasing, shall be punished by imprisonment for not more than three years, detention, or in lieu thereof or in addition thereto a fine not more than seven hundred and fifty thousand New Taiwan Dollars."

(CJEU). We'll try to deliver in this article our observations on these cases and a comparative study on Taiwanese case law.

II. CJEU Hyperlink Cases

1. Overview of CJEU Cases

In the *Svensson* case (2014)², the defendant operated a website that contained a list of links that redirected users to articles previously published by the plaintiffs on the website of the Stockholm newspaper *Göteborgs-Posten*. The CJEU rendered a milestone decision on the question of whether hyperlinking to subject matter protected by copyright requires the permission of the rightholder. The CJEU held that (i) the mere provision of hyperlinks to copyright protected works does constitute an act of communication, as the links must be considered to be making the works available; and (ii) the (freely available) website was aimed at an indeterminate and large number of people sufficient to constitute a “public”. In other words, the Court considered the concept of communication to the public to include two cumulative criteria, namely, an “act of communication” of a work and the communication of that work to a “public”.³

The *Svensson* decision is followed by subsequent decisions of the CJEU. In the case of *BestWater* (2014)⁴, the Court extended application of the above rules to all kinds of hyperlinks, including the “embedded link” widely used in video contents aggregator websites. Later in the *GS Media* (2016)⁵, the Court added a new subjective criteria: if the provider of hyperlink “knowing the illegality of contents linked on target website”, it would constitute an act of communication to the public.

2. Observations

a. Hyperlinking constitutes an act of communication

The first criterion was justified on the ground that linking to third-party works on the Internet constitutes an act of communication, irrespective of the type of link users may have before them. The International Literary and Artistic Association (ALAI) takes the same position⁶, arguing that the exclusive right of “making available” under the WCT and the EU legislation implementing the WCT covers links that enable the public to access specific protected material⁷. It is irrelevant whether the link takes the user to specific content on a third-

² CJEU 13 February 2014, Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*.

³ See Case C-466/12, *paragraphs 14~19*.

⁴ See C-348/13, 21 October 2014, *BestWater International GmbH vs Mebes et al.*

⁵ See C-160/15, 8 September 2016, *GS Media BV v Sanoma Media Netherlands BV et al.*

⁶ ALAI, Report on the making available and communication to the public in the internet environment—focus on linking techniques on the Internet, 2013, Executive Summary, available online: <http://www.alai.org/en/>

⁷ ALAI, *ibid.*, Executive Summary (p.1) states that, what matters is that the act (i) is performed by an individual person (ii) directly or indirectly has the distinct effect of addressing the public, irrespective of the tool used by the individual, and (iii) concerns subject matter protected by copyright or related rights.

party website, or whether the linking site retains a frame around the content, so that the user is not aware that she is accessing the content from a third-party website. It is also irrelevant for the act of offering access whether the work made available through the link is itself infringing. It is the act of that offering that triggers the act of making available, and that act is the same whatever the copyright status of the work that is being made available. The act of providing embedded hyperlinks in webpages or in mobile applications enables users to watch videos on the linked-to site and therefore constitutes an act of communication. So do the acts of relaying messages, videos or news (by copying and posting their hyperlinks) on Facebook⁸.

However, the making available right does not cover links that merely refer to a source from which a work may subsequently be accessed. For example, linking to a homepage hosting several works to be accessed subsequently should be deemed a simple linking act and not an act of communication.

b. Appreciation of the criterion “new public”

Although the CJEU adopts a broad understanding of the act of communication to better protect the author’s communication right, Internet users do not have to worry about an unpredictable or imminent infringement liability because there are still some “filters” or balance mechanisms to preserve fair use of online works, for example, the author’s implicit permission under some circumstances⁹ or exceptions to exclusive rights. The CJEU, for the sake of Internet freedom, introduced the second criterion of the “new public” to prevent the provision of hyperlinks from being regarded as an act of communication to the public¹⁰.

In fact, the CJEU held that these links were not directed at a new public, as the articles were previously freely available to the public on the original website. That is to say, if there is no new public, the inclusion of the links cannot be considered a new act of communication to the public. As to the “freely available” concept, the present decision states that there is no communication to a new public when the work or service has already been made available to the public without any access restrictions. In other words, if the work is protected by access control measures and the hyperlinking allows users to circumvent those measures, there is a “new public” and as a result there exists an unauthorized communication to the public.

Noteworthy though, the ALAI points out the following: the “new public” criterion is in conflict with international treaties and EU Directives, as it has the effect of inappropriately exhausting the exclusive right of communication to the public of works made available over generally accessible websites by authors or rightholders. This result, although ostensibly good for keeping Internet open, would not be just and fair for those who made their works available online. If online copyrighted works are not to be free for use without author’s permission, why

⁸ The same opinion may be observed in Case C-466/12, paragraph 19: “As is apparent from Article 3(1) of Directive 2001/29, for there to be an ‘act of communication’, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity (see, by analogy, Case C-306/05 SGAE [2006] ECR I-11519, paragraph 43)”.

⁹ For example, a rightholder sets up two similar websites containing his literary works for the purpose of diminishing illiteracy, but he only announces his express consent of free use on one of the websites. Users of the rightholder’s second website may be eligible to argue implicit permission. However, it would be risky to adopt excessively the author’s implicit permission, as it might ignore the rightholder’s real will and decision.

¹⁰ The “new public” criterion was developed by the CJEU’s case law when construing the exclusive right of communication to the public. See Case C-306/05, SGAE; Case C-135/10, Del Corso; Case C-607/11, TVCatchup.

shall we impose on the authors an obligation of restricting access to their works to enjoy the communication right of those works? Moreover, to the extent that Svensson mandates that the “new public” criterion will not apply if restrictions accompanying the work’s making available have not been taken, it risks violating the Berne Convention’s prohibition of formalities as condition for the exercise of exclusive rights, as it establishes an obligation on copyright owners to adopt technical protection measures to protect their rights.¹¹

III. *Comparative Study — Taiwan IP Court’s Decision*

1. Facts

Compared to the CJEU case law, the Taiwanese jurisprudence refuted totally violation of the public communication right with different reasoning. In the similar case of video contents aggregator website case, the defendant was prosecuted for setting up webpages with an embedded video player which hyperlinks the user to copyrighted TV dramas previously uploaded by unknown actors on a video platform, YouTube. The district court rendered a non-guilty decision, which was upheld by the Taiwan IP Court (TIPC). TIPC held that providing hyperlinks as such doesn’t communicate the works to the public; rather, it merely takes the user to the target website, and it is the target website that communicates works to the public. Therefore, providing hyperlinks did not violate the right of public transmission. However, if the actor knew of the illegality of contents on the target website and intentionally provided them via hyperlink on his website, such an act may render him an accomplice or abettor to the infringer of the right of public transmission.¹² An appeal was not allowed, as the criminal punishment for copyright infringement did not meet the threshold for appeal to the Supreme Court¹³.

According to Article 26bis of the Taiwan Copyright Act, the author is entitled to enjoy the right of public transmission of his works as one of the exclusive rights¹⁴. “Public transmission” means to make available or communicate to the public the content of a work through sounds or images by wire or wireless networks, or through other means of communication, including enabling the public to receive the content of such work by any of the above means at a time or place individually chosen by them (Article 3(1)(x)¹⁵). The infringer of the public transmission right risks both civil liability and criminal sanction (Article 92)¹⁶.

¹¹ ALAI, Opinion on the criterion “New Public”, developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public, 17 September 2014, p. 2. The Study Group proposing the Report and Opinion was chaired by Jan Rosén, and its members included Valérie-Laure Bénabou, Mihály Ficsor, Jane Ginsburg, Igor Gliha, Silke von Lewinski, Juan José Marin, Antoon Quaevlieg, Pierre Sirinelli and Uma Suthersanen.

¹² Taiwan New Taipei District Court, Criminal chamber. No. 102-Tzu-Yi-Zi-16 (22 August 2014).

¹³ The TIPC’s jurisprudence on minor offenses cannot be appealed to the Supreme Court and is therefore final.

¹⁴ Article 26bis of the Copyright Act stipulates: “1. Except as otherwise provided in this Act, authors of works have the exclusive right of public transmission of their works. 2. Performers have the exclusive right of public transmission of their performances reproduced in sound recordings.”

¹⁵ Article 3 of the Copyright Act defines several kinds of exploitation of works, which are used to specify the scope of the author’s exclusive (economic) rights.

¹⁶ Article 92 (Criminal sanctions) of the Copyright Act provides: “A person who infringes on the economic rights of

2. Reasoning

As the present case was prosecuted for criminal sanction, the TIPC first examined whether providing embedded hypertexts which intentionally enable the public to watch illegal videos on YouTube infringes the public transmission right of the rightholders, and then examined whether the accused can be deemed an accomplice or abettor to the principal infringer if he himself were not the principal infringer.

(1) Providing hyperlinks did not violate the public transmission right

The TIPC held that the accused simply copied and pasted the hyperlinks (URL addresses) on his webpages. Such an act enabled the public to access other websites through his website, but did not publicly transmit works and therefore did not infringe the author's public transmission right. Though the embedded function enabled the presentation of YouTube's videos on the host website, this hyperlink with embedded function did not constitute communication of works to the public; rather, it transported its users to the target webpage, which was communicating works to the public. Therefore, the act of providing hyperlink with embedded function did not violate the public transmission right¹⁷.

(2) Hyperlink provider may still be an accomplice or abettor to the principal infringer

The TIPC further held that the hyperlink provider may still be considered an accomplice or abettor to the principal infringer if he knew of the illegality of contents on the target website and intentionally provided them via hyperlinks.

(3) The prosecutor failed to prove that the accused was an accomplice or abettor to the principal infringer

The TIPC held that the Prosecutor failed to prove the identity of the principal infringer who illegally uploaded audiovisual works on the Internet platforms and the conspiracy between the principal infringer and the accused (accomplice or abettor). Besides, the knowledge about the previous illegal uploading by the accused and his intention of providing unauthorized works via hyperlinks were not proved either. By the imperative of presumption of innocence, the TIPC acquitted the accused.

another person without authorization by means of public recitation, public broadcast, public presentation, public performance, public transmission, public display, adaptation, compilation, or leasing, shall be punished by imprisonment for not more than three years, detention, or in lieu thereof or in addition thereto a fine not more than seven hundred and fifty thousand New Taiwan Dollars.”

¹⁷ The TIPC basically followed the reasoning of the copyright authority, namely the Taiwan Intellectual Property Office (TIPO). The TIPO considers the act of providing hyperlinks (with embedded function or not) as a simple transporting act and thus does not constitute an act of public transmission. It is not the hyperlink provider who communicates or transmits works to the public; it is the one initiating the uploading on a platform who transmits the works to the public and should be liable as the principal infringer of the public transmission right. See Explanation No. 1020604B (4 June 2013) and Explanation No. 10200092090 of 19 November 2013.

3. Critics on the TIPC's decision

(1) Providing hyperlinks made access to information on the target website possible

The present decision is followed by other decisions of the TIPC¹⁸, which reflects the Court's general technological viewpoint: hyperlinks, functionally designed to facilitate free interconnection of websites, are a fundamental part of the Internet's infrastructure. In case of providing a simple hyperlink that directs users from website A to website B, the website B (homepage) is by default open for connection as an entrance for information (copyrighted works) stocked on it. Users can either retrieve the specified information through the hyperlink on the homepage or jump deep into the information via its URL address. In the latter situation, copyrighted works can be directly accessed or made available via such a "deep link"¹⁹. In addition, if a webpage of website B is juxtaposed within the webpage of website A (framing²⁰), copyrighted works are also made available via such a frame hyperlink. To sum up, works on website B, except its homepage, are made available to the public if they are directly accessible via hyperlinks. However, the owner of website B can take technical measures such as encrypted URL address or prevent users from directly accessing its information. In the present case, the teleporting through hyperlinks to the target website made access to information on the target website possible, which matters the most from the aspect of copyright law.

(2) Misinterpreting the right of public communication

The qualification of the act of providing hyperlinks by the present decision seems to be too simple and appears to have misread the definition of "public transmission", which was defined as "making available or communicating to the public the content of a work" by technical means in an interactive way.²¹ This definition was influenced by the WIPO WCT (1996). Based on the interpretation of the legal text, the act of establishing hyperlinks to make video available is an "act of transmission" subject to the scope of the right of public transmission. The legislative explanation of the Article 3(I)(x) clearly states that it does not require that the user actually transmit or receive works, and it suffices if the user is in the position to transmit or receive. It is questioned whether the TIPC, by excluding too early all acts of providing hyperlinks from act of transmission²², jumped to a conclusion without correct

¹⁸ For example, Criminal chamber No. 104-Shin-Tzu-Shan-Yi-Zi-76 (31 December 2015), in which the accused set up a website ("Tao-Shi's Interactive Entertainment Hall") providing hyperlinks to the Chinese audiovisual website "Youku" where users can access infringing copies of films (ex. "Batman") directly on the blog of the accused. The decision held that the accused did not upload or provide users with download of the films on his blog; the act of providing hyperlinks to the Chinese website did not constitute an act of transmission to the public, nor an act of accomplice or abettor to the principal infringer uploading the videos, and acquitted the accused.

¹⁹ Most websites are organized hierarchically, with a homepage at the top and deeper pages within the site, reached by links on the homepage. The deep linking, which refers to using a hyperlink that takes a user directly to a page other than the top or homepage, runs counter to the expectation of the homepage, namely luring users to enter its website from the homepage, which can help boosting the advertising business of the homepage.

²⁰ Framing is a method of presentation in a webpage that breaks the screen up into multiple non-overlapping windows. Each window contains a display from a separate HTML file.

²¹ In an amendment draft proposed by TIPO in 2016, the definition will be slightly modified to be fully compliant with international legislation: "by wire, wireless means of communication or the others", "at a time and place individually chosen by them".

interpretation of the WCT.

IV. *Conclusion:* *A Nuanced Approach to Protecting Copyright in the Internet Environment*

The right of communication to the public should be interpreted correctly in accordance with the Berne Convention and the WIPO WCT. It would be inappropriate to exclude at once all hyperlinks (deep links, frame links and embedded video players) from the notion of “communication” or “making available” to the public. It would also be inadequate to introduce the criterion of “new public” or the subjective criterion of “knowing the illegality of content”, which is in conflict with the said treaties. A correct application of the public communication right set out in the Berne Convention and the WCT can provide a reasonably broad possibility of allowing legitimate hyperlinking.²³ The basic hyperlinking to homepages is open in any event. However, deep links, frame links, and embedded video players (classified as a kind of frame links) are not clearly so and should be subject to the scrutiny of relevant exceptions and limitations of economic rights. After finding that the person who embeds on his webpage a video player to watch video on YouTube, or who aggregates films or news through hyperlinks on a website, committed an act of public communication, the next step would be to examine whether his act was for commercial purpose (turning advertisement clicks into income) or for educational or informational use, and could be exempted from infringement liability.

Neither Taiwanese nor European courts consider the act of providing hyperlinks to be an infringement of the public communication right. Internet users, including hyperlink providers, hence enjoy more freedom to use online works via hyperlinks. However, it would be regrettable if authors’ online works are exposed to rampant Internet piracy. The present decision reduces the scope of the public communication right and is not enough to deter the rampant Internet piracy. Although theoretically it is still possible to hold the actor liable for his hyperlinking act based on being an accomplice or abettor to the principal infringer (uploader), the Taiwanese case law reveals the difficulty of criminal prosecution. It is hence worth keeping on observing the development of the hyperlink copyright infringement case law.

²² In some similar cases, the EU Court of Justice adopts two criteria, namely “act of transmission” and “to the public,” to examine hyperlinking issues. The “to the public” criterion is controversial. See *infra* discussion in 3.

²³ ALAI, Report and opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet, 17 June 2015, p. 9.

