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Legal issues of hyperlinking in copyright and related rights

Abstract

Hyperlinks are essential to the functioning of the internet because they facilitate seamless access to the content of various websites, but they raise serious copyright issues. This study examines the criteria established by the Court of Justice of the European Union for determining when a hyperlink constitutes “communication to the public”, and compares this approach with that of the United States, where disputes over hyperlinks are often treated as unfair competition rather than as copyright infringement. Through a comparative legal analysis and a review of case law, the study analyses leading cases such as *Svensson*, *GS Media* and *Renckhoff*, as well as the United States of America cases such as *Ticketmaster v. Microsoft*. The results reveal that while the European Union provides some guidance on the use of hyperlinks, it is not consistent across cases. In contrast, the United States of America law treats hyperlinks more as functional tools, which are often not subject to copyright control. This analysis highlights the difficulties of reconciling digital copyright protection with the functional nature of hyperlinking.

Keywords: hyperlink, embedding, copyright, framing, Court of Justice of the European Union

Introduction

Hyperlinks¹ play a crucial role as functional elements of the World Wide Web for Internet users – the linking of web pages enables structured browsing of the global “spider web” containing an abundance of scattered information. Most blogs and social media posts, and increasingly news articles, use hyperlinks to direct users to thematically related material, such as other news stories, blog posts, photos, video and audio files.² Websites contain a wealth of content, such as text, images, graphic design elements, etc., that is protected by intellectual property law; however, the way links are placed frequently overlooks the problematic aspects of intellectual property rights that arise from the linking.

The European Union (EU) does not currently have any legal acts that specifically govern hyperlink usage. Nonetheless, hyperlinks are regarded as one of the “safe harbors” of related rights under EU copyright law. On 26 March 2019, the European Parliament adopted a new Directive on copyright in the digital single market (Directive 2019/790), Article 15 of which enshrines a new exclusive right for electronic press publishers.³ This right grants press publishers established in a member state a related right to allow information society service providers to reproduce and make their electronic press publications publicly available, and at the same time, to demand royalties from them. Using hyperlinks or brief excerpts does not require permission. However, the question arises: do hyperlinks always fall within the exceptions to the related rights of press publishers (and simultaneously, the copyright of works published in press publications)? If not, what kind of linking could be deemed a violation of these rights?

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- 1 The Cambridge University Dictionary defines a hyperlink as “a connection that allows you to move easily between two computer documents or two pages on the internet”, in *Cambridge online dictionary*, <https://dictionary.cambridge.org/dictionary/english/hyperlink> (access: 28.09.2024). In the encyclopedic dictionary of computing, a hyperlink is defined as “a link in a hypertext, which has a visible part and a component hidden under it – the address of the indicated object”, in V. Dagienė, G. Grigas, T. Jevsikova, *Enciklopedinis kompiuterijos žodynas*, Vilnius 2005, p. 413. Therefore, the term “link” is used in this paper as a synonym for a hyperlink [author’s note].
 - 2 E. O’Hare, *Hyperlinking in the EU: Balancing Freedom of Expression with Protection of Copyright and Reputation without Breaking the Internet*, “Stevens&Bolton”, 29.05.2019, <https://www.stevens-bolton.com/site/insights/articles/hyperlinking-in-the-eu> (access: 28.08.2024).
 - 3 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC. OJ L 130, 17.5.2019, pp. 92–125.

In terms of jurisprudence, since the time of the *Svensson*⁴ case, which was the first at the EU copyright level, several “hyperlink cases” have been heard both in the Court of Justice of the European Union (CJEU) and in courts of other jurisdictions. Such a situation shows that links raise a number of legal issues regarding authors and related rights. In addressing and interpreting these issues, the CJEU has developed a complex set of criteria that must be analyzed on a case-by-case basis. The court eventually extended the conventional framework of exclusive rights in response to legal disputes involving hyperlinks. These cases were distinguished by the fact that they involved certain types of links that differ from each other in their mechanisms of action.

The aim of this paper is to discuss problematic copyright issues related to hyperlinks, starting with a retrospective review of the approach developed in judicial practice and ending with a current regulatory assessment of copyright and related rights.

For the aim to be achieved, the following objectives are set. First, the concept of a hyperlink is explained. Second, the main legal issues related to hyperlinks are identified from a theoretical and comparative perspective and jurisprudential trends are identified. Third, the study looks at whether the interpretation of hyperlinks presented in the CJEU’s practice in the context of copyright violation is analogously applicable in the case of new restrictions on the rights of electronic press publishers. Thus, the subject of this paper enshrines the main problematic issues of copyright related to hyperlinks.

Although these matters are widely discussed both in the European Union and globally, the originality of the paper comes in the fact that the intersection of hyperlinks and the rights of publishers has not been fully examined either in the practice of the CJEU or in the academic field of legal science. It should be noted, nevertheless, that this issue is relevant due to the inclusion of hyperlinks in the regulation of the related rights of press publishers in the EU copyright regulation.

The research employs a comparative legal methodology to examine how the European Union’s and United States’ legal frameworks approach the use of hyperlinks in the context of copyright law. A detailed examination of landmark cases such as *Svensson v. Retriever Sverige AB*, *GS Media v. Sanoma Media Netherlands BV*, and *Renckhoff v. Land Nordrhein-Westfalen* was conducted to understand the evolving jurisprudence of the Court of Justice of the European Union. Similarly, the United States of America (US) cases such as *Ticketmaster Corporation v. Microsoft Corporation* and *Kelly v. Arriba Soft Corporation* were analyzed to highlight the contrasting approach in defining hyperlink-related copyright infringement. The study compares

4 Case C-466/12, *Nils Svensson and Others vs Retriever Sverige AB*, ECLI:EU:C:2014:76.

criteria like “communication to the public” as interpreted by the EU with US interpretations under the fair use doctrine, focusing on the underlying principles driving each jurisdiction’s legal reasoning. Furthermore, the research evaluates the economic and practical implications of these interpretations, including the impact on content creators, publishers, and end users. Relevant statutory instruments, such as Directive 2019/790 and the US Copyright Act 1976,⁵ were reviewed to contextualize the legal frameworks. This dual approach provides a robust foundation for assessing whether hyperlinking constitutes copyright infringement in different jurisdictions.

1. Concept, purpose and essential differences

The freedom of every Internet user to share information, program, and innovate without asking for permission arises from the ethos of the Internet, a principle that envisions a decentralized network.⁶ The European Copyright Society has expressed the opinion⁷ that links are the most important feature that differentiate the Internet from other forms of cultural dissemination. Moreover, hyperlinks “are a necessary mechanism for the proper functioning of the Web”⁸ and, according to Web developer Tim Berners-Lee, there is no reason to ask for prior permission when users link to another site, because otherwise freedom of expression is violated.⁹ This means that the owner of a hyperlinked website should not be able to restrict the right of users to link to its website.¹⁰ Such an approach is supported by ordinary web users, equating the situation of hyperlinks to the position that recommending a book in a library does not require the author’s permission for such an action.¹¹

⁵ Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (1976), codified at 17 U.S.C. §§ 101–810.

⁶ E. Lupfer, *The Ethos of the Internet and a Culture of Innovation*, “Social Media Today”, 7.12.2011, <https://www.socialmediatoday.com/content/ethos-internet-and-culture-innovation> (access: 07.09.2024).

⁷ European Copyright Society, *Opinion of the European Copyright Society of 15 February 2013 on the request for a preliminary ruling submitted by the CJEU in case C-466/12 Svensson*, 2013, <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/> (access: 09.09.2024).

⁸ M. Sableman, *Link Law: The Emerging Law of Internet Hyperlinks*, “Communication Law and Policy” 1999, No. 4(4), p. 560.

⁹ T. Berners-Lee, *Links and Law: Axioms of Web Architecture*, “Commentary on Web Architecture”, 1997, <https://www.w3.org/DesignIssues/LinkMyths.html> (access: 05.08.2024).

¹⁰ Y. Wang, *Assessing the Legality of Hyperlink in the Right of Communication to the Public*, “Advances in Economics, Business and Management Research” 2022, No. 651, p. 273.

¹¹ M. Sableman, *Link Law: The Emerging Law of Internet Hyperlinks*, “Communication Law and Policy” 1999, No. 4, 561.

Nevertheless, this principle of Internet freedom, *de lege lata*, has exceptions. The concept and types of hyperlinks must first be clarified in order to understand in which cases hyperlinks may violate copyright.

The distinguishing feature of all hyperlinks is the functionality that allows linking several Internet information sources or other objects, and the hyperlink itself is described as “a link to an electronic address where additional information can be found”.¹² From a technical standpoint, a hyperlink is essentially an instruction to the web browser to perform this action.¹³ On the original web page, this link can be represented as a word, phrase, or picture.¹⁴ According to this perspective, hyperlinks are meant to “show the way” to the content that the user needs, however, some authors may consider this approach “outdated” because hyperlinks come in a variety of shapes and forms on the Internet today, and as Tsoutsanis states, “one measure does not fit for everyone”.¹⁵

Hyperlinks come in many different types. Perhaps the clearest and most detailed description of them is provided by the CJEU Advocate General Maciej Szpunar in his opinion in the VG Bild-Kunst case:

- In “simple” links (English simple link) the home page of another website is linked. Clicking on the link opens this page instead of the previous one or opens a new web-browser window.
- “Deep” links do not direct the user to the main page of another website, but to an internal page or even a specific resource on the website, such as a graphic element or similar.
- Inlining links are hyperlinks that enable users to display certain information or images from another information source on their website. The embedding technique often makes it appear as though the user is browsing on a single website, and the user is unaware that a particular object displayed on the website is embedded from another website.¹⁶

¹² H.A. Deveci, *Hyperlinks Citations, Reproducing Original Works*, “Computer Law & Security Review” 2011, No. 27(5), p. 465.

¹³ L. Tammenlehto, E. Ahvo, *Technological Neutrality, Hyperlinking and Criminal Liability – In Search of the Missing Link?*, “IIC – International Review of Intellectual Property and Competition Law” 2025, Vol. 56, p. 1073.

¹⁴ M.D. Pendleton, *Websites and Hyperlinks: Copyright and Conflict of Law Implications*, “Asia Pacific Law Review” 1999, No. 7(2), p. 238.

¹⁵ A. Tsoutsanis, *Why Copyright and Linking Can Tango*, “Journal of Intellectual Property Law & Practice” 2014, No. 9(6), p. 496.

¹⁶ Opinion of Advocate General Maciej Szpunar of 10 September 2020 in VG Bild-Kunst v Stiftung Preußischer Kulturbesitz, C-392/19, ECLI:EU:C:2020:696.

Another kind of link is occasionally mentioned in the scientific literature: a framed link, which appears on a website as a special window that enables the user to view content from another website in its original source without switching to a new window.¹⁷ This technology is regarded as a method of organizing the visual presentation of information, the principle of operation of which is similar to that of embedded links.¹⁸ Thus, in summary, it can be said that simple and deep links take the user to another website, while embedded and framed links partially reflect the content transferred from other sources in the original source.

Although both simple and deep links direct Internet users to other websites, they may have different impacts on the possible advertising revenue generated from visits to the linked sites, which could lead to an unfair competitive effect. Simple links that direct users to another site's home page do not affect the latter's advertising revenue in any way, but deep links, which take users directly to a linked internal webpage, can bypass advertising banners that are placed on the homepage of the website,¹⁹ therefore, deep links can reduce revenue generated from viewing ads on the parent website. Furthermore, deep links have the ability to bypass security and direct users to paid content, avoiding the imposed fee for accessing the content, thereby harming the economic interests of the owner of the site being referred to.²⁰

It is clear that the differences between the references include many nuances and a specific understanding of each of their types, therefore, no universal definition of them has been formed. Legal scholarship defines links as a technical means to connect different web pages.²¹ Although hyperlinks (in other words, acts of hyperlinking) are included in Directive 2019/790 and the Law on Copyright and Related Rights of the Republic of Lithuania²² as exceptions to the related rights of press publishers, they do not contain their concept. By analyzing the terms, we can conclude that the exception applies to all acts of hyperlinking described

17 D. Leung, *What's All the Hype About Hyperlinking?: Connections in Copyright*, "Intellectual Property Brief" 2020, No. 7(1), p. 63, <https://digitalcommons.wcl.american.edu/ipbrief/vol7/iss1/3> (access: 05.10.2024).

18 E. Arezzo, *Hyperlinks and Making Available Right in the European Union – What Future for the Internet After Svensson?*, "IIC – International Review of Intellectual Property and Competition Law" 2014, No. 45(5), p. 3.

19 D. Leung, *What's All the Hype...*, p. 64.

20 E. Arezzo, *Hyperlinks and Making Available...*, p. 3.

21 *Ibidem*.

22 Law on Copyright and Related Rights of the Republic of Lithuania of 18 May 1999, No. VIII-1185 (as amended), Valstybės žinios, 1999, No. 50-1598.

up to that point because both of the cited legal acts use the plural form without defining the precise types of hyperlinks. However, as Rosati asserts, it is still unclear why the EU legislator selected the technologically specific term “acts of hyperlinking”, instead of, for example, the more technologically neutral term used first by the court that submitted the request for a preliminary ruling and then by the Court of Justice of the European Union in the *Svensson* case, i.e. “clickable link” (or “Internet link”).²³

It should be mentioned that in the past, the function of all hyperlinks in the digital environment has been equated to that of links in footnotes.²⁴ However, this comparison is only applicable to deep or simple footnotes, not framed links, and particularly embedded links, which enable quick access to linked content in the original source by simply pressing a button.²⁵ The question of whether link type matters for legal evaluation is raised by this distinction between hyperlinks. The answer will be provided in the conclusions of this paper.

2. Hyperlinks vs copyright

2.1. Interpretation by the CJEU

As previously mentioned, neither the European Union nor its Member States have adopted specific legal acts regulating the use of Internet links, and thus their legal framework is primarily shaped by judicial practice. The first relevant CJEU case was *Svensson*,²⁶ which dealt with a dispute over deep linking in news articles.²⁷ This case concerns the author’s exclusive right to authorise or prohibit any communication

²³ E. Rosati, *DSM Directive Series #6: ‘hyperlinking’ in the press publishers’ right*, “The IPKat”, 16.06.2019, <https://ipkitten.blogspot.com/2019/06/dsm-directive-series-6-hyperlinking-in.html> (access: 28.11.2023).

²⁴ D.L. Burk, *Proprietary Rights in Hypertext Linkages*, “Journal of Information Law & Technology” 1998, No. 2, https://warwick.ac.uk/fac/soc/law/elj/jilt/1998_2/burk/burk.doc&ved=2ahUKEw-iDr5r7zeaKAXzGxAIHclOK3oQFnoECBgQAQ&usq=AOvVaw3HADJtpEBWIPO4Q4kzXy0b (access: 27.11.2024).

²⁵ A. Tsoutsanis, *Why Copyright and Linking Can Tango*, “Journal of Intellectual Property Law & Practice” 2014, No. 9(6), p. 498.

²⁶ Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, ECLI:EU:C:2014:76.

²⁷ Swedish journalists led by Nils Svens sued Retriever Sverige for placing hyperlinks on its website to the journalists’ copyrighted articles. For their part, the representatives of Retriever Sverige disagreed with the claim, arguing that the hyperlinks to the articles did not violate the copyright of the journalists, as they did not convey the content of the articles, but only directed to the web address where the plaintiffs’ articles can be found.

to the public²⁸ of their works, including making it publicly available via computer networks, based on the interpretation presented in Part 1 of Article 3 of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter referred to as the InfoSoc Directive).²⁹ The CJEU ruled that in order to speak of an “act of communication to the public”, it is sufficient that the work is made available to the public in such a way that the members of that public can become familiar with it, regardless of whether or not they make use of this opportunity.³⁰ However, the *Svensson* case determined that hyperlinking to works that are already freely available to the public did not constitute copyright violation. The CJEU also explained that although the right of public publication must be understood in a broad sense, the term “public” must be interpreted through making the work available to a new public. “Because of the fact that there are no special copyright regulations for hyperlinking purposes, traditional notions of copyright law are applicable to issues of hyperlinking”.³¹ The new public means that if a work becomes available to persons to whom the author did not initially grant access, it becomes available to a new public.³² Thus, hyperlinks, which allow users to bypass a website’s access restrictions, make a work or part of it publicly available to a new audience.

This approach is also reflected in the practice of national courts of the Member States. For instance, in its judgment of 11 April 2014, the Gdańsk Court of Appeal held that the publication of hyperlinks directing users to another website containing biographical information about the claimant did not constitute a communication to the public of that content.³³ Referring to the reasoning developed by the CJEU in the *Svensson* case, the court concluded that the defendant could not be held liable,

²⁸ In the CJEU decision of 14 June 2017 C-610/15, *Stichting Brein*, EU:C:2017:456, the EU Court of Justice noted that “act of communication to the public” has two cumulative criteria: the act of publishing a work must be performed and this work must be communicated to the public.

²⁹ Directive (EU) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 167, 22.06.2001, pp. 10–19.

³⁰ J. Axhamn, *Striking a Fair Balance Between the Protection of Creative Content and the Need to Foster Its Dissemination: The Challenges Posed by Internet Linking and Meta Search Engines*, in: T. Kerikmäe (ed.), *Regulating eTechnologies in the European Union*, Cham 2014, p. 107, <https://link.springer.com/book/10.1007/978-3-319-08117-5> (access: 07.12.2024).

³¹ P. Szwajdler, *Limitations of the Freedom of Hyperlinking in the Fields of Copyright Law, Trademark Law and Unfair Competition Law: Is Case-by-case Approach Sufficient?*, “Computer Law & Security Review” 2022, No. 45, p. 5.

³² Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, ECLI:EU:C:2014:76.

³³ Judgement of the Court of Appeal in Gdańsk of 11 April 2014, I ACa 7/14, Legalis no. 1093072.

since the hyperlink merely facilitated access to information already available online and did not involve its dissemination.³⁴

On 21 October 2014, the CJEU issued a preliminary ruling in the *BestWater*³⁵ case, which addressed a dispute³⁶ over framing technology hyperlinks. The court decided whether framing constitutes a public announcement under Article 3(1) of the InfoSoc Directive. Although the case dealt with frame-type hyperlinks rather than deep links, the court referred to the *Svensson* case, but noted that when Internet users click on that link, the work is displayed in such a way as to give the impression that it is appearing on the site where the link is located, when in fact the work is from another site. The CJEU ruled that the embedding of a copyrighted work on a website using framing technology cannot be considered a communication to the public under Article 3(1) of the InfoSoc Directive, if the copyrighted work is not transmitted to a new public and is not transmitted by technical means that differ from the technical means of the original transmission.³⁷ As a result, the CJEU treated framed links similarly to deep links in this preliminary ruling, demonstrating that the type of link has little bearing on copyright violation.

A few years later, the CJEU ruled in the *GS Media*³⁸ case that if a work is freely available, but references to the work are made for financial gain, such an act can be considered a violation of the copyright of public communication of the work. In order to determine whether hyperlinks violate an exclusive right, the court suggested a list of criteria. The CJEU clarified in its ruling that whether or not links to third-party content fall within the scope of Article 3(1) of the InfoSoc Directive

34 J. Konikowska-Kuczyńska, *Publication of a Hyperlink and Communication of a Work to the Public within Court of Justice of the European Union and Courts of Selected European Countries Case Law*, "Studia Iuridica Lublinensia" 2022, Vol. 31(2), p. 117.

35 Case C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch*, ECLI:EU:C:2014:2315.

36 The plaintiff, a company selling water filtration systems, owned a promotional video about environmental pollution that was uploaded to the YouTube video platform without the plaintiff's consent. Both defendants presented this video on their websites by framing, that is, they presented it in a frame that displayed the said video stored on the server of the YouTube platform. The plaintiff claimed that the use of the frame made the video publicly available without his consent.

37 Case C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch*, ECLI:EU:C:2014:2315.

38 The Supreme Court of the Netherlands made a request for a preliminary ruling in a case dealing with a dispute between Sanoma (publisher of Playboy magazine) and GS Media regarding links placed on a website operated by the latter company (GeenSijl) to a website containing unpublished photos of Dutch TV presenter Britt Dekker, taken for an upcoming issue of Playboy magazine.

depends on the role of the person who granted access and the nature of the deliberate intervention of the person, the publication using specific technical means, which differ from the previously used criteria, or, if they do not exist, the criteria of publication to a “new public” and the nature of profit-seeking publication.³⁹ Despite its flexibility, the violation evaluation methodology described by the court is complex and fragmented, because it is directly tied to the subjective assessments of the link creators’ behavior and its impact.

With regard to the case law of the national courts of the Member States, it should be noted that the “new public” criterion applied by the CJEU has not been universally accepted there. In particular, both the Dutch and Swiss Supreme Courts, when interpreting Article 11bis of the Berne Convention,⁴⁰ have taken the position that it is sufficient to establish that a communication is made to the public and that it is carried out by an entity other than the original communicator. These courts have rejected the additional requirement of a “new public”, emphasizing that such a criterion does not derive from the wording of the Berne Convention and is not necessary for the finding of copyright infringement.⁴¹ Nevertheless, it should be noted that, despite these differences in national case law, the “new public” criterion remains an essential element in the jurisprudence of the CJEU and continues to be applied when assessing the legality of hyperlinking under European Union law.

The practice of the CJEU in interpreting the legality of the use of hyperlinks is inconsistent, and even on the contrary, it is adapted to the specific circumstances of the digital use of copyrighted works.⁴² In the *Renckhoff*⁴³ case, the CJEU rejected its own proposed methodology. Moreover, it should be noted that the opinion

39 Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644.

40 Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as revised at Paris on 24 July 1971 and amended on 28 September 1979.

41 P.B. Hugenholtz, S.C. van Velze, *Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”*, “IIC – International Review of Intellectual Property and Competition Law” 2016, Vol. 47, p. 797.

42 T. Synodinou, *The Renckhoff Judgment: The CJEU Swivels the Faces of the Copyright Rubik’s Cube (Part I)*, “Kluwer Copyright Blog”, 02.10.2018, <https://copyrightblog.kluweriplaw.com/2018/10/02/renckhoff-judgment-cjeu-swivels-faces-copyright-rubiks-cube-part-ii/> (access: 26.11.2024).

43 Decision of the CJEU of 7 August 2018 in the case C-161/17, *L Land Nordrhein-Westfalen v. Dirk Renckhoff*, ECLI:EU:C:2018:634. On 25 March 2009, a presentation by one of the students was posted on the website of Walthrop High School in Germany, which included a photo taken by photographer Dirk Renckhoff. This photo was originally posted on an online travel portal that did not have any restrictions on downloading the photo, therefore, the student downloaded the photo from this portal and provided a link to this portal in the presentation. Renckhoff believed that he had granted exclusive rights to use the photo only for the travel portal, so using the photo on the school’s website was a violation of his copyright.

of Advocate General Campos Sanchez-Bordona⁴⁴ and the opinion of the Court differed significantly on these issues. The main issue that the CJEU had to resolve in its preliminary ruling was whether the term “act of communication to the public” in Article 3(1) of the InfoSoc Directive should be interpreted to include the publication of a hyperlinked photograph on a school website if the photograph had previously been published on a travel portal without restriction and with Renckhoff’s consent.⁴⁵

In the opinion of Advocate General, in which he relied on the arguments of the CJEU in the *GS Media* case, he noted that the photograph had a secondary character in the student’s presentation, it was available on an online travel platform without any technical restrictions, thus, it was not intended for the “new public”, and the student did not have the goal of making a profit.⁴⁶ The CJEU assessed the situation in the opposite way. The court noted that copyright protection is preventive and *erga omnes* in nature, and therefore also applies to the website of an educational institution, and to claim that placing a work that was previously published on a travel website with the copyright holder’s consent on another website is not considered making it available to a new public would mean that the right to public publication would be subject to the exclusion rule.⁴⁷ The Court also noted that the *Renckhoff* case’s circumstances were different from those of the *Svensson* case, which was previously evaluated. Thus, there is a big difference between a hyperlink on a website to the portal where the work was published and the inclusion of a reproduced work, even if the source is also linked. Therefore, as Synodinou notes, the use of the CJEU’s arguments in hyperlink cases is a *lex specialis* that is supported by the fact that hyperlinks are essential to the Internet’s proper operation.⁴⁸ However, this *lex specialis* does not apply to other copyrights, such as the reproduction of a work.

On 9 March 2021, the CJEU issued a preliminary ruling in the case of *VG Bild-Kunst v SPK*,⁴⁹ in which it re-examined the dispute⁵⁰ regarding hyperlinks,

⁴⁴ Opinion of Advocate General Campos Sánchez-Bordona of 25 April 2018 in *Land Nordrhein-Westfalen v Dirk Renckhoff*, C-161/17, ECLI:EU:C:2018:279.

⁴⁵ Case C-161/17, *L Land Nordrhein-Westfalen v. Dirk Renckhoff*, ECLI:EU:C:2018:634.

⁴⁶ Opinion of Advocate General Campos Sánchez-Bordona of 25 April 2018, *Land Nordrhein-Westfalen v Dirk Renckhoff*, C-161/17, ECLI:EU:C:2018:279.

⁴⁷ Case C-161/17, *L Land Nordrhein-Westfalen v. Dirk Renckhoff*, ECLI:EU:C:2018:634.

⁴⁸ T. Synodinou, *The Renckhoff Judgment*...

⁴⁹ Case C-392/19, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, ECLI:EU:C:2021:181.

⁵⁰ The dispute arose between VG Bild-Kunst (German Association for the Collective Administration of Copyrights in Fine Art) and Stiftung Preußischer Kulturbesitz (German Cultural Heritage Foundation), when VG Bild-Kunst refused to enter into a license agreement with the Stiftung

specifically the inline links into a frame, often called simply framing. By weighing the interests of Internet users and copyright holders, the CJEU further strengthened the position of the latter with this ruling. According to the court, licensees may be contractually required by copyright licensors to put in place technical safeguards against framing or linking to other websites that contain the works. Any additional association with a “new society” would result from avoiding such restricted access.⁵¹ This gave the rights holders more authority over the works and created another criterion to be taken into account when assessing the legality of hyperlinking.⁵²

In summarizing the CJEU’s practice under discussion, it should be mentioned that hyperlinks that point users to copyrighted works may violate one of the exclusive rights of copyright – public communication of the work, including making it publicly available through computer networks. According to the interpretations of the Court, it is likely that a violation of this kind will be proven after it has been established that the hyperlinked work was first published illegally, that technical access restrictions on the linked website were circumvented, that the linking person actually knew whether the work was published without the author’s consent, that the linking person’s actions were motivated by profit, and that contractual (licensed) access to the work was restricted. Conversely, if a hyperlink points to a legally published work whose access is unrestricted by contractual or technical means, is posted for non-commercial purposes, and is transmitted using the same technical means, it is unlikely to be considered violation. This raises the question whether such criteria may be applied analogously to the rights of press publishers under Directive (EU) 2019/790.

2.2. Approach of the US Courts

The United States of America’s exclusive property rights of the author are regulated by Article 106 of the US Copyright Act 1976. They include public performance, public display, reproduction and distribution, etc., and these rights are limited

Preußischer Kulturbesitz for the use of the works of the collective management association, unless their agreement included a provision obliging them to implement technological measures to prevent third parties from creating framed links to thumbnails of works included in the agreement. VG Bild-Kunst argued that the requirement to limit the type of framing references by means of costly technical measures is unjustified.

51 M. Burri, *Permission to Link: Making Available via Hyperlinks in the European Union after Svensson*, “SSRN Electronic Journal” 2014, p. 252.

52 Case C-392/19, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, ECLI:EU:C:2021:181.

by the doctrine of fair use, which aims to balance the interests of the public and the author, in certain cases allowing the use and distribution of the author's works.⁵³ As in the case of the EU, US Copyright Law does not regulate hyperlinks, therefore, legal regulation comes from court precedents.

The issue of the legality of simple links was decided in the case of *Ticketmaster Corporation v. Microsoft Corporation*.⁵⁴ Although the premise of the dispute⁵⁵ was unfair competition, because Ticketmaster claimed that Microsoft Corporation was profiting at Ticketmaster's expense by directing Internet users to live event information without its consent and openly offering it as a service to its users, but the court relied on copyright and ruled that simple hyperlinks do not violate copyright when they direct users to other websites because no copy of the work is made.⁵⁶

The possibility of hyperlinking without permission was also at issue in *The Washington Post Company et al. v. Total News, Inc.*⁵⁷ in the Southern District of New York. In this case, the disputed links⁵⁸ did not take users to another website. Instead, the hyperlink actually moved the content from the linked site to the site that hosted it. The plaintiff, *The Washington Post Company*, filed a suit alleging that the disputed links placed on the website of the defendant *Total News* constitute misappropriation, unfair competition, trademark dilution and misleading indication of the content's origin. The dispute remained unresolved, because the court did not say whether the defendants had the right to create the hyperlinks without the plaintiff's permission, and the parties entered into a settlement agreement in which the plaintiff granted the defendant permission to host the hyperlink (*The Washington Post Company, et al. v. Total News*, 1997).

53 M. Stonkienė, *Intellectual Property Law*, Vilnius 2011, p. 41.

54 The United States District Court, C.D. of California of 27 May 2000 in the case *Ticketmaster Corporation v. Microsoft Corporation*, Civ. No. 97–3055.

55 The plaintiff, Ticketmaster, a company that sells tickets to entertainment events and operates a website that lists upcoming live events, filed suit alleging that Microsoft, which operates a website providing information about Seattle, placed a link on its website directing visitors to Ticketmaster's website. These links were added without the consent of Ticketmaster.

56 The United States District Court, C.D. of California of 27 May 2000 in the case *Ticketmaster Corporation v. Microsoft Corporation*, Civ. No. 97–3055.

57 Decision of the United States District Court S. D. of New York of 2 May 1997 in the case *The Washington Post Company, et al. v. Total News, Inc. et al.*, Civ. No. 1190.

58 The plaintiff, *The Washington Post*, operated a website that published various copyrighted articles and received additional revenue from advertising on its website. Defendant, *Total News*, hosted hyperlinks on its website, using framing technology, where website visitors could view articles and other content from plaintiff's websites surrounded by advertisements placed on defendants' website, from which they received profits.

Framing technology was also discussed⁵⁹ in 2002 in the case *Leslie A Kelly v Arriba Soft Corporation*.⁶⁰ The court found that plaintiff, Kelly, had established a *prima facie* case of copyright violation based on the fact that Arriba illegally reproduced and posted thumbnails of plaintiff's photos on its website, but these defendant's actions were "fair use" under the fair use doctrine. A similar issue regarding photographic images was decided in case *Perfect 10, Inc. v. Google*,⁶¹ in which the court examined links displayed in a Google search. The court noted that Google servers do not store photographic images, Google does not make copies of images within the meaning of the US Copyright Act, and therefore cannot transfer them.

Comparing the disputes handled by the US courts and the CJEU, it can be stated that the legality of hyperlinks in the US is primarily questioned in the context of unfair competition, profit reduction, lack of advertising revenue, brand dilution, since links are not regarded as one of the ways to use the authors' exclusive rights, because according to US case law, the mere provision of a link does not give rise to a claim for making copies of a work. In contrast, hyperlinks are viewed in the European Union as a way to make a work publicly available through computer networks, which violates copyright. For this reason, in the cases examined by the CJEU, links are interpreted through the prism of violation of the right of public publication.

3. Is an analogy possible?

Referring back to the new related rights of electronic press publishers and their exception – hyperlinks, it should be noted that after the adoption and transposition into national law of the new Directive on copyrights in the common digital market, neither the European Union nor the courts of the Member States have yet addressed cases concerning references to press publications or their parts. Such cases are likely to arise, though, and it is reasonable to wonder if the courts will follow the CJEU's current reasoning regarding hyperlinks.

⁵⁹ The plaintiff, Leslie A. Kelly, was a professional photographer whose photographs were placed on Kelly's website and on other websites with which L.A. Kelly had licensing agreements. The defendant, Arriba Soft Corporation, operated an Internet search engine that displayed results in small images instead of plain text. Arriba obtained its image database by copying images from other websites. By clicking on one of the small images, the user could view a large version of the same image on the Arriba website.

⁶⁰ The United States District Court for the C. D. of California of 6 February 2002 in the case *Kelly v. Arriba Soft Corp.*, Civ. No. 00-55521.

⁶¹ The United States District Court, C.D. of California of 16 May 2007 in the case *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM (SHx).

The exclusive rights of electronic press publishers “overlap” with already existing copyrights, “because even currently, according to current copyright laws, press publishers have property rights to their publications or as employers to “official” works (articles) created by their employees, or they have taken over (own) under contracts, as well as independent property rights to collective works”. Thus, hyperlinks to works that are also included in an electronic press publication should be subject to the regulation of making available to the public as outlined in CJEU practice. It is reasonable to assume that links that circumvent paid content “walls” or otherwise limit access to the website’s content will be deemed violations, even in the case of hyperlink exceptions.

In situations where hyperlinks lead users to restricted access content that is not regarded as copyright, it is challenging to say with certainty whether the CJEU’s case law on hyperlinks would apply. On the one hand, publishers of electronic press have the same exclusive right to allow or prohibit making an electronic press publication or part of it publicly available, therefore existing regulation of hyperlinks in the practice of the CJEU can be applied in the given case as well. On the other hand, as Synodinou argues, the CJEU itself makes it very clear in the *Renckhoff* case that its prior jurisprudence on hyperlinks and their meaning is *lex specialis*, which cannot be applied in the *Renckhoff* case.⁶² Therefore, it is possible that the Court will adopt a completely new and different approach to hyperlinks in the event of new related rights disputes.

Regarding the approach established in US case law, it should be noted that it cannot be directly transplanted to the rights of press publishers in the European Union. As shown above, US courts do not consider hyperlinks to be a use of copyrighted works, as the mere provision of a link does not constitute reproduction or distribution of the work. Instead, the legality of hyperlinks is primarily assessed through the lens of fair use, and in certain cases, unfair competition. From this perspective, it can be argued that the provision of links to press publications would not in itself constitute an infringement of publishers’ rights, even if such provision of links affects their economic interests. However, such an approach would be difficult to reconcile with the legal system of the European Union, where hyperlinks are interpreted as a potential act of public distribution. Thus, it can be concluded that the US approach may serve as a comparative example, but it cannot be fully transposed into the European context due to fundamental differences in the understanding of the concept of hypertext links under copyright law.

62 T. Synodinou, *The Renckhoff Judgment...*

Let us return to the question of whether hyperlinks should always fall under the exception to press publishers' rights or whether, in certain cases, they may be considered an infringement. Although Directive (EU) 2019/790 provides for an exception for acts of hyperlinking, it does not define its precise scope or limits. This creates a legal gap that must be bridged through interpretation, most likely by relying on the criteria developed in the CJEU's case law.

As noted by Szwajdler, "it is obvious that re-communication based on surface or deep links is legal until the discussed process facilitates access to illegal sources or is used to circumvent access restrictions".⁶³ It can be argued that, on the basis of the CJEU's jurisprudence, hyperlinks should be considered lawful where they merely facilitate access to content that is already freely available and where no additional intervention is required in order to access such content. In such cases, hyperlinking does not result in making the work available to a new public and therefore does not interfere with the exclusive rights of the rights holder. Such an interpretation corresponds to the approach adopted in the *Svensson* case and further developed in subsequent case law, where the decisive factor lies not in the act of linking itself, but in the conditions under which access to the work is provided.

However, it should also be emphasized that the legal assessment of hyperlinks may differ where they are used in a manner that goes beyond mere facilitation of access. In particular, hyperlinks may fall outside the scope of the exception where they enable users to circumvent technical or contractual restrictions, such as paywalls or other access control mechanisms. In such situations, hyperlinking may lead to making the work available to a wider circle of persons than originally intended by the rights holder, and therefore may be considered as communication to a new public.

It must be acknowledged that the application of these criteria to press publisher's rights is not straightforward. The new related right has a different rationale, aimed primarily at protecting the economic interests of press publishers in the digital environment. For this reason, it is possible that the CJEU will change and adapt this existing criteria or develop new ones that better reflect the specific objectives of Directive (EU) 2019/790.

Therefore, while an analogy with existing CJEU case law provides a useful starting point, it does not offer a complete answer. Their legal qualification depends on a combination of factors, including the accessibility of the content, the existence of access restrictions, the intent and knowledge of the linking party, and the economic

⁶³ P. Szwajdler, *Limitations of the Freedom...*

context of the linking activity. Only by assessing these elements together can it be determined whether a particular hyperlink constitutes lawful use or an infringement of rights.

Conclusions

The concept of hyperlinks does not exist either in Directive (EU) 2019/790 or the Law on Copyright and Related Rights. In legal commentary, this term is typically defined through an essential functional feature, namely the ability to link multiple online information sources or other items on various websites (linking can occur in different sections of the same website).⁶⁴ Although at least four different types of references currently exist, CJEU case law notes that the type of reference is irrelevant for legal assessment.

The issue of the legality of hyperlinks has been repeatedly addressed by both the CJEU and US courts in various contexts. Comparing the disputes heard by the two, the legality of hyperlinks in the US is primarily questioned in the context of unfair competition, loss of profits due to a decrease in advertising revenue and brand dilution, since hyperlinks are not regarded as a means of exercising the author's exclusive rights, and therefore, according to US case law, the mere insertion of a hyperlink does not give rise to a copyright claim. In the European Union, on the contrary, hyperlinks are regarded as a way to occasionally make a work accessible to a "new public" via computer networks and thus copyright is violated. Therefore, the CJEU considers hyperlinks from the perspective of a violation of the right to communicate the work to the public.

The legislator limited the new collateral rights of electronic press publishers to the hyperlink exception, which allows hyperlinks to direct Internet users to objects protected by those rights. However, if hyperlinks are used to circumvent access restrictions, future disputes are likely to occur. The article concludes that the CJEU's current regulation of hyperlinks is appropriate and can be adapted to new cases of violation of the rights of electronic press publishers.

At the same time, it should be noted that the legal assessment of hyperlinks depends on the specific circumstances of each individual case. As demonstrated in the analysis, the CJEU has developed certain criteria which are applied on a case-by-case basis, taking into account factors such as the accessibility of the content, the existence

⁶⁴ A hyperlink is typically defined in legal scholarship through its functional ability to connect different online resources; see e.g. A. Tsoutsanis, *Why Copyright and Linking Can Tango*, "Journal of Intellectual Property Law & Practice" 2014, Vol. 9(6), p. 496.

of technical or contractual restrictions, as well as the conduct of the person providing the hyperlink. This suggests that a uniform legal qualification of hyperlinking is not possible, and that a certain degree of flexibility is inherent in its assessment.

It should also be noted that the introduction of the new related rights of press publishers adds an additional level of complexity to the legal assessment of hyperlinks. Although recognized as an exception under Directive (EU) 2019/790, the absence of a clear definition of their scope leads to uncertainty in their practical application. Therefore, it is reasonable to assume that future case law of the CJEU will play an important role in clarifying the limits of this exception and in determining whether the criteria developed in previous hyperlink cases will be maintained or further adapted.

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Problemy prawne hiperlinkowania w prawie autorskim i prawach pokrewnych

Streszczenie

Hiperłącza mają zasadnicze znaczenie dla funkcjonowania Internetu, ponieważ ułatwiają płynny dostęp do treści różnych stron internetowych, natomiast z drugiej strony ich obecność wywołuje liczne kontrowersje dotyczące praw autorskich. Niniejsze opracowanie analizuje kryteria ustalone przez Trybunał Sprawiedliwości Unii Europejskiej w celu określenia, kiedy hiperłącze stanowi „publiczne udostępnienie”, i porównuje to podejście z tym, stosowanym w Stanach Zjednoczonych, gdzie spory dotyczące hiperłączy są często traktowane jako kwestie nieuczciwej konkurencji, a nie jako naruszenie praw autorskich. Poprzez analizę prawnoporównawczą i przegląd orzecznictwa artykuł ten przedstawia wiodące sprawy w sądzie europejskim, takie jak *Svensson*, *GS Media* i *Renckhoff*, a także sprawy amerykańskie, takie jak *Ticketmaster v. Microsoft*. Wyniki pokazują, że chociaż Unia Europejska zapewnia pewne wytyczne dotyczące korzystania z hiperłączy, nie są one spójne we wszystkich sprawach. Z kolei prawo amerykańskie traktuje hiperłącza bardziej jako narzędzia funkcjonalne, które często nie podlegają kontroli praw autorskich. Analiza ta podkreśla trudności w pogodzeniu ochrony praw autorskich w środowisku cyfrowym z funkcjonalnym charakterem hiperlinkowania.

Słowa kluczowe: hiperłącze, osadzanie, prawa autorskie, framing, Trybunał Sprawiedliwości Unii Europejskiej

CYTOWANIE

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