Svensson and hyperlinks: where do we stand?

The ruling in Svensson

Once a copyright work has been made freely available on the internet by the copyright owner, no further authorisation is required in order to hyperlink to the work. This is the case even where the work is "framed" in the hyperlink.

Arriving hot on the heels of the recent UK Supreme Court decision in the Meltwater litigation, the Court of Justice of the European Union (CJEU) has recently given judgment in the much-anticipated case of Svensson and Others v Retriever Sverige AB (Case C-466/12). As was the case in Meltwater, the case has significant consequences for internet users across the EU.

THE DISPUTE

Svensson concerned the issue of hyperlinking, and in particular whether hyperlinking falls within the ambit of a copyright owner’s exclusive right to “authorise or prohibit any communication to the public of [its] works”, as enshrined in Article 3 of the Copyright Directive (2001/29/EC) (Article 3).

In Svensson, the defendant operated a media monitoring website that provided its clients with lists of clickable hyperlinks to press articles that were available elsewhere on the internet. Mr Svensson was one of four journalists who had given consent to the newspaper he worked for to publish on its website press articles in which he held the copyright, but objected to the inclusion on the defendant’s website of hyperlinks to those same press articles. Mr Svensson contended that, by providing hyperlinks to his articles, the defendant had infringed his exclusive right under Article 3 to make his copyright works available to the public, and had thus infringed his copyright.

There was plenty of academic and practitioner interest in the lead up to the decision in Svensson, as it related to such a fundamental aspect of how the internet operates. Some commentators have pointed to the need to ensure a high level of protection for rights owners, which on one view supports a broad construction of the exclusive right to make a work available protected by Article 3. However, others have focussed on the practical ramifications if hyperlinking was held to fall within Article 3. At the forefront of this opposition has been the European Copyright Society, comprised of a number of leading IP academics. In their view, the proposition that hyperlinking is protected by Article 3, and thus needs an express licence from the copyright owner in order to avoid liability for copyright infringement, is “absurd”.


DECISION OF THE CJEU

In its decision, the CJEU noted that the concept of communication to the public in Article 3 invokes two cumulative criteria: first, that there is an “act of communication” in respect of the relevant copyright work; and second, that the work is communicated to a “public”.

Taking the first of these criteria, the CJEU opined that the provision of hyperlinks to a copyright work must be considered to be “making available” the work if persons receiving the hyperlinks may potentially access it via those hyperlinks. The CJEU saw this as synonymous with an “act of communication” within the meaning of Article 3, which was therefore present on the facts. This aspect of the decision is in stark contrast to the contrary position advocated by many commentators: that hyperlinks can never be “acts of communication” on their own because establishing a hyperlink does not amount to a “transmission” of the relevant work, which is itself a prerequisite for a “communication”.

When considering the second of the two criteria, the CJEU noted that it is settled case-law that where a communication relates to a work that has already been made freely available on the internet, as was the case in Svensson, then Article 3 will only be invoked if the communication is directed at a “new public”. A “new public” means a public not taken into account by the copyright owner when the work was originally made available on the internet. The CJEU considered that this requirement was not made out on the facts as, irrespective of the hyperlinks, the relevant articles were already freely available on the internet with no restrictive measures, and thus all internet users could (potentially) freely access them. The hyperlinks did not extend access to the articles to any “new public”, and so there was no infringement of Mr Svensson’s Article 3 rights.

Notably, the CJEU distinguished the present case from a scenario where a hyperlink makes it possible for an internet user to circumvent restrictive measures put in place when the copyright work was originally made available on the internet. An example of this would be restrictions limiting access to the work to subscribers only. In such circumstances, the hyperlink would constitute an intervention without which general internet users would not be able to access the copyright work, resulting in a communication to a new public within the meaning of Article 3.

COMMENTARY

The decision in Svensson has on the whole been welcomed by most commentators as a sensible application of copyright law in a digital context. The practical difficulties of requiring authorisation from the underlying copyright owner to hyperlink would make hyperlinking unworkable given the way the internet operates and the near-universal use of hyperlinks by internet users.

That is not to say however that aspects of the decision have not attracted criticism.

Meaning of “communication”

As regards the first aspect of the decision, that a hyperlink to a copyright work does amount to an "act of communication" in respect of the work within the meaning of Article 3 of the Copyright Directive, many commentators have questioned this analysis. There has been much discussion of the “signpost” argument – that a hyperlink is akin to a bookmark or signpost to the fact that a work exists and is available at a given location. This is distinct from a communication of the work itself, as the work is not transmitted via the hyperlink. However, the decision in Svensson confirms that "communication" within the meaning of Article 3 should be construed more broadly than this.
Erosion of copyright?
As regards the second aspect of its decision, that once a copyright work has been made freely available on the internet by the copyright owner, no further authorisation is required in order to hyperlink to the work as there is no "new public" for the purposes of Article 3 of the Copyright Directive, the CJEU has held in effect that a copyright owner who puts material on the internet without placing it behind a pay wall or other gating mechanism must be taken to contemplate access of the work by all internet users. On the CJEU's reasoning, such a communication is universal, and the copyright owner has ceded control over who accesses the material while it is online. This will of course be concerning to rights owners, and it will be interesting to see if the CJEU's decision leads to the increased use of pay walls and other restrictive measures online, in order that the "new public" condition is met.

It is, however, worth noting that it seems the ruling in Svensson only applies where a copyright work has been made available on the internet with the copyright owner's authorisation. The CJEU noted expressly that there will be a "new public" where a hyperlink is provided to a work which is no longer available to the public on the site on which it was originally communicated, while being accessible on another site on an unauthorised basis. In this respect Svensson therefore seems far from a "pirate's charter".

In a similar vein, it is worth also noting how the decision in Svensson interrelates with the doctrine of exhaustion of rights. Article 3 itself states that the exclusive rights enshrined in Article 3 "shall not be exhausted by any act of communication to the public". In one sense, the CJEU's decision in Svensson could be viewed as running contrary to that statement, as it was held that when a copyright owner allows universal access to a work on a website, a further communication of the same work cannot attract infringement liability (due to the absence of a "new public"). However, one must not take this point too far. For one thing, as noted in the previous paragraph, the copyright owner's Article 3 rights are not exhausted indefinitely in such circumstances, as the owner can in effect regain control over the communication of the work by removing it from the website on which it was originally communicated. Further, the owner's Article 3 rights notwithstanding, any person accessing a work which has been re-communicated by hyperlink will still of course be subject to the other aspects of the owner's copyright (e.g., the owner's exclusive reproduction and distribution rights under Articles 2 and 4). Svensson therefore falls a long way short of instituting exhaustion via the back door.

Separately, there remains a lack of clarity as to what kinds of restrictive measures will need to be implemented to meet the "new public" condition. While subscription-only services will clearly qualify, there is some doubt for example as to the effectiveness of website terms and conditions that prohibit "deep linking" to the website's content. Providing a link in contravention of such terms and conditions would arguably provide no greater access to the content, as general internet users could have already accessed the content directly.

Framing
Finally, the CJEU noted in Svensson that had the defendant "framed" Mr Svensson's press articles (such that it appeared as though the articles appeared on the defendant's website, as opposed to merely providing a hyperlink to them on the newspaper website) that would not have altered its decision. That aspect of the decision will be of particular concern to rights owners, who often contend that "framing" a work is akin to reproducing the copyright work itself. Svensson suggests however that "framing" should be assessed in the context of a copyright owner's Article 3 rights rather than the separate reproduction rights afforded to the owner under Article 2.
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