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"Link Away"
The CJEU rules on Svensson C-466/12

Summary

The long awaited judgment in *Case C-466/12 Svensson* was released earlier today (13th February 2014) by the Court of Justice of the European Union (CJEU). The Court should be commended for a decision which: (a) was mercifully brief (a mere 42 paragraphs) (b) appears commercially sensible; and (c) did not 'break' the Internet.

In summary, the CJEU was asked whether the use of hyperlinks infringed copyright in a copyright work that is being linked to (in the case in question, the copyright works were articles written by the Claimant Swedish Journalists). The CJEU said that there was no infringement, provided the link does not 'circumvent restrictions' put in place by the website where the copyright work appears.

The Decision

In more detail, the CJEU was asked to interpret Article 3(1) of the InfoSoc Directive [2001/29] as to whether providing a hyperlink to a copyright work by someone who was not the copyright owner (to apply the test in *C-607-11 ITV and ors [2013*]) was: (i) an act of communication; and (ii) a communication to the public - thereby requiring the authorisation of the copyright holder.

The CJEU held that the provision of the hyperlink was an 'act of communication' (given that this must be construed broadly following *C-403/08 and C-429/08 the FAPL [2011]*). But, and here is the clever bit, to be considered a 'communication to the public', where such a communication is made on the Internet, the communication must be '*directed at a new public... at a public that was not taken into account by the copyright holders when they authorised the initial communication*'. Therefore, it follows that if a copyright work is available freely on the Internet already, it has already been communicated to the public and linking to that copyright work does not lead to the work being communicated to a 'new public'.

Furthermore, the CJEU threw in a further curveball that such a finding cannot be called into question when Internet users click on the link at issue, and the work appears in such a way as to give the impression that it is appearing on the website on which that link is found - even if the work comes from another website.

The CJEU caveated this position by holding that where a link '*circumvents restrictions*' put in place by the website on which the hyperlink appears, this is a communication to the public -

and, thus, authorisation of the copyright holder would be required. Therefore, if your copyright materials are behind password protection or a pay-wall, then as a matter of copyright law your permission is required.

Comment

As other commentators have noted, there are some decisions awaiting this one which will clarify the position regarding other types of links: *C-348/13 Bestwater* which relates to framing (and is the one that I am probably the most excited about) and *C-279/13 C-More Entertainment* which relates to broadcast works. No doubt this judgment will feature prominently.

It will also be interesting to see how this decision (and those that will follow) sit in the longer term with *Infopaq* (the Danish newspaper case) as this judgment promised (and on that occasion delivered) a '*high level of protection of authors*'. In *Svensson* it was, after all, a group of Swedish journalists who were arguing their permission was required.

Overall, the CJEU should be commended for a pragmatic legal justification of the status quo. It seems that this judgment will avoid the kind of fallout which the SEO and OBA industry saw from the Cookies' Directive which, whilst there were certainly more human rights issues in play than here, jarred with the reality of the way the Internet works. Link away!

Richard Barnett
13 February 2014

We welcome comments and questions on the topic discussed above or if you require any advice on intellectual property or digital media. If you require further assistance please contact: David Hansel: dah@hanselhenson.com: 00 (44)(0)207 307 5106 *or* Richard Barnett: rab@hanselhenson.com: 00 (44)(0)207 307 5140