

## **COPYRIGHT LIABILITY FOR LINKING AND EMBEDDING: AN E.U. VERSUS U.S. COMPARISON AND GUIDE**

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### **I. INTRODUCTION**

Linking is a fundamental part of our online language – it organizes and allows us to navigate the endless expanse of information that is the World Wide Web. Whether used by private individuals on social media accounts or journalists in news articles, links are everywhere. For publishers on global platforms, this means exposure to liability is, also, everywhere. Understanding hyperlinking liability in the European Union, as well as the United States, is thus a prerequisite, both for media companies and the lawyers advising them.

Until recently, the act of linking to material that is either copyrighted or defamatory in the United States did not, on its own, carry liability. In February 2018, however, the Southern District of New York handed down an opinion altering the status quo of copyright infringement. At the time of writing, in the Second Circuit, embedding a tweet, without any actual copying, violates the Copyright Act. This development makes the framework of link liability in United States potentially as complicated as the legal framework developed in Europe over the course of the last five years..

Linking to copyrighted material in the EU may trigger liability in one of two situations: (1) linking to copyrighted content in such a way that enables users to circumvent access restrictions to the original content or (2) linking by a commercial website in circumstances where the hyperlinker has knowledge that it is infringing copyright. As discussed in this article, the European Court of Justice is quick to find the required knowledge for liability. That said, absent these situations, similarly to the U.S., *hyperlinking* to copyrighted content, without more, does not lead to liability.

Regarding defamation, no European Union court has pronounced itself yet on the issue of linking to allegedly defamatory material. An application is currently pending before the European Court of Human Rights (“ECtHR”), and while jurisprudence from around the world and policy both strongly favor protecting hyperlinkers, the ECtHR is not bound by either of these.

This section reviews U.S. and European law on link liability in both the copyright and defamation contexts and sets forth a checklist of questions an attorney (or editor) ought to ask before deciding, prepublication, whether a proposed link may lead to liability.

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## II. LINKING AND COPYRIGHT – US

Recent developments in the Second Circuit have made the distinction between “hyperlinking” and “in-line linking” or “embedding” particularly important when determining liability.

### A. *Hyperlinks and Copyright in the US*

For Internet Service Providers (“IPS”), link liability is regulated by the Digital Millennium Copyright Act 1998. It provides a safe harbor for IPSs, which are not liable for copyright infringement so long as certain conditions are met, namely that the ISP does not have actual knowledge that the material is infringing and upon obtaining such knowledge, acts expeditiously to remove or disable access to the material.<sup>1</sup>

In terms of content providers *generally*, not just ISPs, liability for hyperlinking to copyrighted works has received less judicial attention in the United States than other jurisdictions.<sup>2</sup> Unless a US publisher actively encourages direct copyright infringement, the mere hyperlinking to copyrighted material does not constitute copyright infringement since no copying is involved.<sup>3</sup> Hyperlinks have been described as the “digital equivalent of giving the recipient driving directions to another website on the Internet”.<sup>4</sup> The hyperlink itself does not contain the copyrighted or protected derivative work.<sup>5</sup>

### B. *“In-line linking” or “Embedding” and Copyright in the US*

The same no longer holds true across the US for “in-line linking” or “embedding” (third-party content hosted on website as opposed to sending user to that website).<sup>6</sup>

At the Circuit level, only two Circuits have weighed in on the issue: the Ninth Circuit and the Seventh Circuit. A greater number of district level courts have addressed the

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<sup>1</sup> 17 U.S.C.A. § 512. See § 512 for definition of ISP.

<sup>2</sup> U.S. Copyright Office, *The Making Available Right in the United States* (Feb. 2016) at 57, available at [http://www.copyright.gov/docs/making\\_available/making-available-right.pdf](http://www.copyright.gov/docs/making_available/making-available-right.pdf).

<sup>3</sup> *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at \*2 (C.D. Cal. Mar. 27, 2000) (“hyperlinking does not itself involve a violation of the Copyright Act [...] since no copying is involved.”) *See also* *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 838 n.9 (C.D. Cal. 2006) (“Google does not risk liability for direct infringement merely by linking to content hosted on and served by third-party websites.”)

<sup>4</sup> *Pearson Educ., Inc. v. Ishayev*, 963 F. Supp. 2d 239, 250 (S.D.N.Y. 2013) (“A hyperlink does not itself contain any substantive content; in that important sense, a hyperlink differs from a zip file. Because hyperlinks do not themselves contain the copyrighted or protected derivative works, forwarding them does not infringe on any of a copyright owner’s five exclusive rights under § 106.”)

<sup>5</sup> *Id.*

<sup>6</sup> See *infra*, note 19.

issue, most recently the Southern District of New York in *Goldman v. Breitbart* – an opinion that has already caused concern for publishers across the US.<sup>7</sup>

**(i) The Ninth Circuit – *Perfect 10, Inc. v Amazon, Inc* and the “Server Test”**

In 2007, the Ninth Circuit affirmed that Google’s in-line linking to third-party websites that displayed infringing full-size versions of Perfect 10’s images did not violate Perfect 10’s exclusive right to “display” under the Copyright Act.<sup>8</sup> Essentially, Google did not “display” the images for the purpose of the Copyright Act: Google’s computers did not store the photographic images, nor did they have a copy of the images on their servers.<sup>9</sup> What Google did was provide HTML instructions directing a user’s browser to a website publisher’s computer that did store the full-size photographic images. The Ninth Circuit explained that providing the HTML instructions was 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.”<sup>10</sup>

As a result, a website publisher would be directly liable for infringement only where the image is hosted on the publisher’s own server, as opposed to embed or linked from a third party server (the “Server Test”).<sup>11</sup> The Ninth Circuit effectively treated in-line linking as a form of hyperlinking. By accepting Google’s fair use argument even in the context of in-line linking, as opposed to hyperlinking, the Ninth Circuit afforded clear protection to search engines that display thumbnail images through in-line linking.<sup>12</sup> As a result, search engines, like Google, were able to capitalize on the display of images, even expanded ones, without running foul of copyright laws.

The Ninth Circuit did, however, note that under certain circumstances, hyperlinking or in-line linking could raise contributory liability issues. One would

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<sup>7</sup> See *infra*, Section II(B)(iii).

<sup>8</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1161.

<sup>11</sup> The Ninth Circuit endorsed the district court’s referral to the test as the “server test.” See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007).

<sup>12</sup> *Perfect 10*, 416 F.Supp.2d at 848 (holding, among other factors, that Google’s use of thumbnails was highly transformative as a search engine transforms an image originally created for entertainment, aesthetic or even informative function into a pointer directing a user to a source of information).

infringe contributorily by intentionally inducing or encouraging direct infringement.<sup>13</sup> In *Perfect 10*, for example, the Ninth Circuit reversed the District Court's finding and held that Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted work and nevertheless failed to take such steps<sup>14</sup>.

### **(ii) The Seventh Circuit – *Flava Works, Inc. v. Gunter***

Five years later, the Seventh Circuit considered whether a social bookmarking website, [www.myVidster.com](http://www.myVidster.com), which enabled its users to share videos hosted elsewhere online through embedded frames, was secondarily liable for its users' sharing and embedding of illegal copies of the Plaintiff's copyright videos.<sup>15</sup> Similarly to *Perfect 10*, upon arriving on the Defendant's website, thumbnails would appear, which the user could click on to view the video. While the Seventh Circuit accepted that myVidster was providing a "connection between the server that hosts the video and the computer of myVidster's visitor", as long as the *visitor* made no copy of the copyrighted video, there was no violation of the copyright owner's exclusive right to "reproduce" and "distribute" the work. What myVidster had done was a "bad thing to do", but it was not copyright infringement.<sup>16</sup> The question of direct infringement was never reached.

### **(iii) New York Southern District - *Goldman v Breitbart***

"When the Copyright Act was amended in 1976, the words "tweet", "viral", and "embed" invoked thoughts of a bird, a disease, and a reporter". So began Judge Forrest's

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<sup>13</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 (2005). Even where knowledge of the infringing nature is clear, there is no contributory infringement without primary infringement. *See e.g.* *Tarantino v. Gawker Media, LLC*, No. CV 14-603-JFW FFMX, 2014 WL 2434647, at \*5 (C.D. Cal. Apr. 22, 2014) (Tarantino's suit against Gawker for linking to a leaked copy of the screenplay for *The Hateful Eight* did not survive Gawker's motion to dismiss as Tarantino failed to plead a single act of direct infringement in the first place).

<sup>14</sup> *Perfect 10*, 508 F.3d at 1172. Due to factual disputes over the adequacy of Perfect 10's notices to Google and Google's responses to the notices, the issue was remanded to the District Court. All three factors have to be present for liability to attach. *See also* *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y.), judgment entered, 111 F. Supp. 2d 346 (S.D.N.Y. 2000), aff'd sub nom. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (inclusion of hyperlinks on defendants' web-site that linked to pages at other web-sites that automatically downloaded computer software that enabled decryption of digitally encrypted movies on digital versatile disks (DVDs), contained code for decryption software, or offered user choice of downloading decryption software constituted "offering, providing, or otherwise trafficking in" technology designed to circumvent technological measure controlling access to copyrighted work, thereby violating the DMCA).

<sup>15</sup> *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

<sup>16</sup> *Id.* at 757 ("bypassing Flava's pay wall by viewing the uploaded copy is equivalent to stealing a copyrighted book from a bookstore and reading it. That is a bad thing to do (in either case) but it is not copyright infringement. The infringer is the customer of Flava who copied Flava's copyrighted video by uploading it to the Internet.")

opinion handed down on February 15, 2018, in which the Court held that, even without any copying, embedding a tweeted photograph from Twitter is an infringement of the photograph owner's copyright.<sup>17</sup>

The case arose out of a photograph taken by the Plaintiff (Justin Goldman) of Tom Brady, Danny Ainge and other on a street in East Hampton. Goldman uploaded the photograph to his Snapchat Story. Shortly thereafter, the photograph went "viral", and ended up on Twitter in a number of tweets. The defendant news outlets featured the photograph on their webpages by "embedding" the Tweets into articles they had published.<sup>18</sup> Goldman filed suit against the defendant websites, claiming that their actions violated his exclusive right to display his photograph under section 106(5) of the Copyright Act.<sup>19</sup> The Defendants moved for summary judgment, arguing that they had simply provided "instructions" for the user to navigate to a third party server on which the photograph resided, bringing them within the ambit of *Perfect 10*.

Judge Forrest, denying the Defendants' motion, declined to apply *Perfect 10*'s Server Test, finding that neither the plain language of the Copyright Act, its legislative history, nor link liability jurisprudence since *Perfect 10* provided a basis for finding that possession of a copy of an infringing image is a prerequisite to displaying it.<sup>20</sup>

- **Language of the Copyright Act:** referring to the "illuminating" definitions of the word "display" in § 101<sup>21</sup>, every defendant, Judge Forrest found, had actively taken steps to "display" the images: they had all, navigated to Twitter, copied the Tweet's URL and included the HTML code containing a link to the URL of the Tweet.<sup>22</sup> As such, the act of including the code in the overall design of the webpage (embedding) constituted the "process" necessary to "display" the photograph, without any copying ever taking place.<sup>23</sup> Judge

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<sup>17</sup> *Goldman v. Breitbart News Network, LLC*, No. 17-CV-3144 (KBF), 2018 WL 911340, at \*1 (S.D.N.Y. Feb. 15, 2018).

<sup>18</sup> Embedding is the process by which a webpage coder intentionally adds a specific "embed" code to the Hypertext Markup Language ("HTML") instructions so that a browser retrieves a photograph hosted on a third party server and incorporates it into the webpage. Even though the underlying photograph was hosted in another location and was never downloaded by the Defendant websites, it appeared seamlessly integrated into their webpages. *Id.* at \*2.

<sup>19</sup> To display a work, under the Copyright Act, is to "show a copy of it, either directly or by means of a film, slide, television image, or any other device or process". 17 U.S.C. § 101.

<sup>20</sup> *Goldman*, at \*7.

<sup>21</sup> To "display" a work means to transmit a display of the work "by means of any device or process" and "to transmit" means "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent. 17 USC § 101.

<sup>22</sup> See e.g. Defendant Gannett's declaration in *Goldman* ("if I wanted that web page to display a photo that a third party user had posted to a site like Twitter, I could do so without me ever having to make a copy of the photo. I would simply include in my HTML code some additional coding containing a link to the URL of the Twitter page where the photo appeared.") (emphasis added) *Goldman* at \*8.

<sup>23</sup> *Id.*

Forrest refused to apply Perfect 10's Server Test, concluding that "the plain language of the Copyright Act called for "no more."<sup>24</sup>

- **Legislative History of the Copyright Act:** Judge Forrest further anchored her opinion in the Copyright Act's legislative history<sup>25</sup>, finding that the Server Test was never intended by the Copyright Act and was, if valid at all, a mere product of the facts of *Perfect 10*: a defendant search engine and active steps by a user to view the full-sized images.<sup>26</sup> Such a fact pattern, according to Judge Forrest, was manifestly different from opening up a favorite blog or website to find a full color image awaiting the user, "whether he or she asked for it, looked for it, clicked on it, or not."<sup>27</sup>
- **Jurisprudence since *Perfect 10*:** Judge Forrest rejected that Perfect 10 is part of an "unbroken line of authority"<sup>28</sup>, noting that (i) only one circuit – the Seventh Circuit in *Flava Works*<sup>29</sup> – has addressed the issue in the context of the display right; (ii) only one New York Southern District decision has addressed the Server Test as a factual matter<sup>30</sup>; and, (iii) only one other Northern District of Texas decision discussed and rejected *Perfect 10*.<sup>31</sup>
- **Applying Copyright to New Technologies:** While Congress did not intend to freeze the scope of copyrightable subject matter at the then stage of

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<sup>24</sup> Id.

<sup>25</sup> Id. ("the Copyright Act's authors intended to include "each and every method by which images ... comprising a ... display are picked up and conveyed;" [...] Persuasive as well is the warning of the Register of Copyrights that a "basic right of public exhibition" was necessary to the 1976 Amendments precisely because "information storage and retrieval devices ... when linked together by communication satellites or other means ... could eventually provide libraries and individuals throughout the world with access to a single copy or a work by transmission of electronic images.")

<sup>26</sup> Id. at \*10.

<sup>27</sup> Id. at \*10.

<sup>28</sup> Id. at \*5.

<sup>29</sup> While the Seventh Circuit found that the defendants were not contributory infringers, the district court had held that *Perfect 10* could not be read to stand for the proposition that inline linking can *never* cause a display of images or videos that would give rise to a claim of direct copyright infringement. See [Flava Works, Inc. v. Gunter](#), 2011 WL 3876910, at \*4 (N.D. Ill. Sept. 1, 2011), [rev'd on other grounds](#), 689 F.3d 754 (7th Cir. 2012) ("In our view, a website's servers need not actually store a copy of the work in order to 'display' it.")

<sup>30</sup> See *Goldman* at \*6. While four New York Southern District Court decisions have discussed the Server Test, only one has done so in the context of the display right. See [Capitol Records, LLC v. ReDigi Inc.](#), 934 F. Supp. 2d 640 (S.D.N.Y. 2013) ("The Ninth Circuit has held that the display of a photographic image on a computer *may* implicate the display right, though infringement hinges, *in part*, on where the image was hosted.") Id. at 652 (emphasis added).

<sup>31</sup> [The Leader's Institute, LLC v. Jackson](#), 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017) (distinguishing Perfect 10 on its facts – unlike Google, plaintiffs did not merely provide a link by which users could access defendant's content but displayed the content as if it were its own – and finding that by framing defendant's copyrighted works, the plaintiffs impermissibly displayed the works to the public.)

communication technology, in answering questions with previously un contemplated technologies, the Court noted, judges must not be distracted by new terms or new forms of content, but turn instead to familiar guiding principles of copyright.<sup>32</sup> As such, Judge Forrest leaned on the Supreme Court’s decisions in *Aereo*, finding that the key principle from that decision – that liability should not turn on mere technical distinctions that are invisible to the user – applied with equal force to the case at hand.<sup>33</sup>

In denying the defendant’s motion to dismiss, Judge Forrest noted there were a number of defenses still to consider, namely “a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement.”<sup>34</sup> Such defenses, however, may not suffice to proactively counter the “tremendous chilling effect on the core functionality of the web” that Judge Forrest’s opinion may have if upheld by the Second Circuit.<sup>35</sup>

### *c. Linking and Aggregating in the US*

According to the New York Southern District Court, the fair use defense does not extend to news aggregators who host headlines, portions of articles and hyperlinks to the original content.<sup>36</sup> In *AP v. Meltwater U.S. Holdings, Inc.*, the Court viewed the news aggregator, Meltwater, as a “classic news clipping service”, not a search engine. The Court described the news aggregator as an expensive subscription service that markets itself as a news clipping service, not a publicly available tool to improve access to content across the Internet. Meltwater had not offered evidence that its customers actually used

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<sup>32</sup> Goldman at \*1.

<sup>33</sup> See *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014) ([finding that](#) Aereo had breached the broadcaster’s performance right by selling its subscribers a technologically complex service that allowed them to watching television programs over the internet at about the same time as the programs were broadcast over the air).

<sup>34</sup> Goldman at \*10.

<sup>35</sup> Note that Goldman’s companion case, *Goldman v. Advance Publications, Inc. et al* (1:16-cv-09031) is still pending before Judge Carter, Jr. On March 5, 2018, discovery was stayed pending Judge Forrest’s decision on whether to clarify an interlocutory appeal in *Goldman v. Breitbart*. It is also worth noting Playboy’s announcement on February 28, 2018 that it would not refile its complaint against the culture and technology website Boing Boing for linking to an image gallery entitled “Every Playboy Playmate Centerfold Ever” (which has since been taken down). See *Playboy Entertainment Group Inc v. Happy Mutants, LLC et al* (2:17CV09140) (filed on 11/07/2017 with the Central District Court of California). Earlier in February, Judge Olguin granted the Defendant’s motion to dismiss but gave Playboy a chance to file its complaint. In what has been welcomed as a victory for content creators, the Electronic Frontier Foundation, which represented Boing Boing, commented on Playboy’s decision to abandon the case as follows: “It’s hard to understand why Playboy brought this case in the first place, turning its legal firepower on a small news and commentary website that hadn’t uploaded or hosted any infringing content.”. See Nazer, Daniel, “Playboy Drops Misguided Copyright Case Against Boing Boing”, Feb. 28, 2018, available at <https://www.eff.org/deeplinks/2018/02/playboy-drops-misguided-copyright-case-against-boing-boing>.

<sup>36</sup> *AP v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013).

its service to improve their access to underlying news stories excerpted in its news feeds. In fact, customers rarely clicked-through to the underlying article. There was, therefore, no transformative use.<sup>37</sup>

### III. LINKING AND COPYRIGHT – EU

Link liability in the US and the EU do not lend themselves to a perfect comparison. On the one hand, Judge Forrest’s decision in *Goldman* brings the analysis of link liability in the US and the EU closer together in so far as liability does not depend on the act of copying. Liability for copyright infringement by linking in the EU, is not predicated on whether a copy has been made, but rather, whether (1) a link amounts to “a communication to the public” and (2) the website had knowledge of the infringement. On the other hand, the *Goldman* decision leads to a more restrictive result in the US as compared to the EU, where embedding copyrighted content does not carry liability unless it circumvents a pay-wall or similar restriction. The analysis of liability in the EU, is complex and requires an overview of the legal framework and resulting case law.

#### A. Linking in the EU: “communication to the public”

The CJEU’s jurisprudence on linking to copyrighted work really turns on the interpretation of one term: “communication to the public”.

In 2001, the European Parliament introduced Directive 2001/29/EC, the legal framework to achieve a harmonized framework on copyright and related rights. Article 3(1) of the Directive provides:

“Member States shall provide authors with the exclusive right to authorize 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.”

The key term of Article 3(1) – “communication to the public” – is not defined in the Directive. On the one hand, Article 3(1) clearly grants authors a high level of “preventative” protection<sup>38</sup>, especially when compared to the speech protective regime in the US. Recital 23 of the Directive expressly states that “communication to the public” must be interpreted broadly.<sup>39</sup> Conversely, Recitals 3 and 31 of Directive also iterate the need to maintain a fair balance between the interest of copyright holders and the

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<sup>37</sup> *Id.* at 556.

<sup>38</sup> Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV*, 8 September 2016 at [28]. See also the European Commission’s statement on the importance of intellectual property rights in the European internal market. According to the European Commission, “in a world where EU companies compete more on innovation, creativity and quality than on price, intellectual property is a powerful tool for EU enterprises to become more competitive.” EUROPEAN COMMISSION, <http://ec.europa.eu/growth/industry/intellectual-property/> (last visited Nov. 21, 2016).

<sup>39</sup> Recitals are the introductory paragraphs of a Directive.

fundamental rights of users of protected objects, in particular, their freedom of expression and information.<sup>40</sup>

The meaning of “communication to the public”, as a result, has been at heart of European jurisprudence on link liability.

***B. Svensson and Others (C-466/12) and BestWater (C-348/13) – hyperlinks and embeds are a “communication to the public” only if they communicate copyrighted content to a “new” public***

The outcome of the *Svensson* decision – hyperlinks do not infringe copyright – is similar to the US position. It is important to understand *how* the CJEU reached its conclusion as it reveals a much thinner protection for hyperlinkers than the outcome might suggest.

A number of journalists sued Retriever Sverige AB, the operator of a news-monitoring service, for publishing hyperlinks to press articles they had written for the Swedish newspaper *Göteborgs-Posten*. The hyperlinks linked to the *Göteborgs-Posten*, where the articles were freely available, and other websites.

The question referred by the Swedish courts to the CJEU was whether Article 3(1) of the Directive must be interpreted as meaning that the provision, on a website, of hyperlinks to protected works freely available on another website constitutes an act of “communication to the public” as referred to in that provision.

The CJEU concluded that a hyperlink to a copyrighted work made freely available on another website with the authority of the copyright holder is not a “communication to the public”. The CJEU defined the concept “communication to the public” as including two cumulative criteria, namely, (1) an *act of communication* of a work and the communication of that work to (2) a *public*.<sup>41</sup>

The term (1) *act of communication*, the CJEU explained, is construed broadly to grant copyright holders a high level of protection<sup>42</sup>. The Court had no difficulty finding that a hyperlink provides users direct access to protected works, regardless of whether they avail themselves of that opportunity, and is thus an act of communication within the meaning of Article 3(1).<sup>43</sup>

The term (2) *public* the CJEU decided refers to an indeterminate number of potential recipients and implies a “fairly large number of persons”.<sup>44</sup> According to settled case law,

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<sup>40</sup> Directive No. 2001/29/ED of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

<sup>41</sup> Case C-466/12 *Svensson and Others v. Retriever Sverige AB*, 13 February 2014 at [16].

<sup>42</sup> *Id.* at [17].

<sup>43</sup> *Id.* at [19]-[20].

<sup>44</sup> *Id.* at [21].

however, the communication must also be directed at a “new” public, that is to say, a public that was not taken into account by the copyright holders at the time they authorized the initial communication to the public.<sup>45</sup> For example, the CJEU explained, where a clickable link makes it possible for users to circumvent restrictions put into place by the site on which the protected work appears, like a fire wall, and the link constitutes an intervention without which those users would not be able to access the works transmitted, those users must be deemed a “new” public.

By making available the articles by hyperlinks, Retriever Sverige AB had not communicated the works to a “new” public. The users who had accessed the articles on *Göteborgs-Posten*’s website via the hyperlinks published by Retriever Sverige AB could have accessed the works directly on *Göteborgs-Posten*’s website without the involvement of Retriever Sverige AB. Such users, therefore, were part of the public taken into account by the journalists when they authorized the initial communication.<sup>46</sup> According to the CJEU, a copyright holder who authorizes the freely accessible publication of his or her work online has included all Internet users as the public.<sup>47</sup>

The CJEU qualified its reasoning, specifying that where a hyperlink makes it possible for users to circumvent the restrictions put into place by the site on which the protected work originally appeared, the link would constitute an intervention without which those users would not be able to access the work. The copyright holder would not have taken such users into account as the potential public when authorizing the initial communication, making those users a “new” public.<sup>48</sup>

Hyperlinking in this case was an “act of communication”, but it did not communicate copyrighted content to a “new” “public”, and therefore did not constitute copyright infringement.

In *BestWater*, the CJEU relied on its reasoning in *Svensson*, applying the same analysis to embedded links:

“The embedding in a website of a protected work which is publicly accessible on another website by means of a link using the framing technology...does not by itself constitute communication to the public within the meaning of [the EU Copyright directive] to the extent that the relevant work is neither communicated to a new public nor by using specific technical means different from that used for the original communication.”<sup>49</sup>

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<sup>45</sup> *Id.* at [24].

<sup>46</sup> *Id.* at [26]-[27].

<sup>47</sup> *Id.* at [24]-[28].

<sup>48</sup> *Svensson* at [31].

<sup>49</sup> See Case C-348/13, *BestWater Int’l GmbH v. Michael Mebes, Stefan Potsch*, 21 October 2014

***C. GS Media BV v. Sanoma Media Netherlands BV (Case C-160/15) – a rebuttable presumption of knowledge applies if the hyperlinking is done by a commercial website***

In 2015, the CJEU considered whether linking to a work that is freely available on the Internet, but had been made available without the consent of the copyright holder, constituted copyright infringement. This case is important for global publishers because of the presumption of knowledge that now applies to commercial websites.

Sonoma, the publisher of Playboy, hired a photographer to do a photo-shoot with a popular Dutch actress. Within a few days, Geenstijl.nl, one of the 10 most visited news websites in the Netherlands, run by GS Media, obtained a hyperlink to a file hosted on the website FileFactory.com, an independent file-hosting service located in Australia, where the unpublished photographs were available for download. Sonoma asked Geenstijl not to publish the link but Geenstijl proceed to do so anyway. Geenstijl continued repeatedly ignored cease and desist letters and posted more links to the photographs. Ultimately, the websites publishing the photographs (FileFactory.com and Imageshack.us) complied with Sanoma's requests to remove the photographs.<sup>50</sup>

Sanoma brought an action before the Amsterdam District Court (Netherlands), claiming that by posting the hyperlinks on the GeenStijl website, GS Media had infringed the photographer's copyright and acted unlawfully towards Sanoma. The District Court ruled in Sanoma's favor.<sup>51</sup>

The case eventually reached the Supreme Court of the Netherlands, which referred the following question to the CJEU: whether, and in what possible circumstances, the fact of posting, on a website, a hyperlink to protected works, freely accessible on another website, *without the consent of the copyright holder*, constitutes a "communication to the public" within the meaning of Article 3(1) of the Directive?<sup>52</sup>

The CJEU concluded that where links are provided with the pursuit of financial gain (i.e. by a commercial publisher), there is a rebuttable presumption that the act of posting a hyperlink to a work illegally placed on the Internet is a "communication to the public".

In reaching this decision, the CJEU interpreted *Svensson* as intending to refer only to the posting of hyperlinks to works which had been made freely available on another website with the consent of the copyright holder.<sup>53</sup> Here, there was no such consent. The pictures had been leaked without the photographer or Sonoma's consent.

The CJEU began by noting the contribution made by hyperlinks to the exchange of opinions and information on the Internet.<sup>54</sup> It recognized the inherent difficulty for

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<sup>50</sup> *GS Media* at [6]-[15].

<sup>51</sup> *Id.* at [17].

<sup>52</sup> *Id.* at [25].

<sup>53</sup> *Id.* at [43].

<sup>54</sup> *Id.* at [45].

individuals posting hyperlinks to ascertain whether copyright holders had consented to the posting of their work in the first place.<sup>55</sup> Ultimately, however, the CJEU focused on the motive of the person posting the hyperlink as a determining factor.

If no profit is pursued, the CJEU held, it is necessary to take into account that such a person does not know and cannot reasonably know that the work was initially posted without the copyright holder's consent, unless evidence exists to the contrary.<sup>56</sup> Rather, it must be established that the non-profit pursuing publisher knew or ought to have known that the hyperlink provided access to a work illegally placed on the Internet (e.g. he was notified by thereof by the copyright holders) to be found liable. The same presumption applies in the event that the hyperlink allows users to circumvent restrictions taken by the site where the protected work was originally posted.<sup>57</sup>

But, where the posting of the hyperlink is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure the work was not illegally published in the first place. There is a rebuttable presumption that the posting occurred with full knowledge of the protected nature of the work and the possible lack of consent to publication by the copyright holder, making it a "communication to the public" within the meaning of Article 3(1).<sup>58</sup>

In either case, there must be also be a *new* public for the communication to be to the "public" within the meaning of Article 3(1).<sup>59</sup>

The CJEU considered it to be "undisputed" that Sonoma had not authorized the publication of the photos on the Internet and that GS Media was aware of this. GS Media, therefore, could not rebut the presumption that the posting of the links occurred in full knowledge of the illegal nature of the publication. GS Media had effected a "communication to the public".<sup>60</sup>

The Advocate General's opinion, which the CJEU declined to follow, offered not only a more nuanced approach but also an opportunity to depart from the reasoning in *Svensson*.<sup>61</sup> According to the Advocate General, hyperlinks which lead, even directly, to protected works do not "make available" those works to a public where the works are freely accessible on another website. Hyperlinks merely facilitate the finding of those works.<sup>62</sup> The intervention of the 'hyperlinker' must be vital or indispensable to benefit from or enjoy the works for the hyperlinking to be an "act" of communication in the first

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<sup>55</sup> *Id.* at [46].

<sup>56</sup> *Id.* at [47]-[49].

<sup>57</sup> *Id.* at [50].

<sup>58</sup> *Id.* at [51].

<sup>59</sup> *Id.* at [52].

<sup>60</sup> *Id.* at [54].

<sup>61</sup> The role of the Attorney General is to assist the Court in some of the cases presented before it by delivering reasoned submissions, which are known as opinions. Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 252.

<sup>62</sup> *Svensson* at [54].

place.<sup>63</sup> Rather than considering the level of intervention to determine whether there had been a communication to a “new” public – as in *Svensson* – the Advocate General considered it only in examining the existence of an *act* of communication instead.<sup>64</sup>

Consequently, hyperlinks which direct to protected works freely accessible on another site – whether posted with or without the copyright owner’s consent – could never be classified as an “act of communication” within the meaning of Article 3(1) of Directive 2001/29, since the intervention of the hyperlinker is not indispensable to the making available of the protected work in question.<sup>65</sup> Users could access the photographs on *Geenstijl* without GS Media’s intervention. GS Media’s motives and fact that it was or ought to have been aware that the initial communication of the photographs on *Filefactory.com* and *Imageshack.us* had not been authorized by Sanoma would not be relevant consideration under Article 3(1) if no *act* of communication occurred in the first place.<sup>66</sup>

The Advocate General did not, however, advocate a complete departure from *Svensson*. If a hyperlink makes it possible for users to circumvent restrictions put in place by the website where the work was first made available, the hyperlink would be an indispensable intervention without which the users could not enjoy the work. In such circumstances, the hyperlink would constitute an *act* of communication under Article 3(1).<sup>67</sup>

By declining to follow the Advocate General’s approach, the CJEU missed a valuable opportunity. The use of hyperlinks is not only systemic but also necessary in the current Internet architecture.<sup>68</sup> Most of the time, Internet users will not know, nor have the means to determine whether the initial publication to the public of a protected work that *appears* freely accessible on the Internet was made with or without the copyright holder’s consent.<sup>69</sup> On the other hand, it is much easier to determine whether restrictions are in place on accessing the work, for example, where access is reserved to subscribers/members or password protected. A person using hyperlinks to circumvent access restrictions is likely to do so with full knowledge of its actions. In such circumstances, it is arguably more fair and practical to find liability under Article 3(1). The focus is on the apparent accessibility of the work, not the hyperlinker’s motives nor whether the protected work has been placed online with the authorization of the copyright holder.

Under the current status quo, to rebut the presumption, a hyperlinker must show that he or she did not have full knowledge of the protected nature of the work and the lack of

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<sup>63</sup> *Id.* at [57].

<sup>64</sup> *Id.* at [59].

<sup>65</sup> *Id.* at [60].

<sup>66</sup> *Id.* at [63].

<sup>67</sup> *Id.* at [73].

<sup>68</sup> Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV*, Attorney General Opinion, 7 April 2016 at [78].

<sup>69</sup> *Id.*

consent to publication by the copyright holder. The continued linking after receipt of cease and desist letters, as in *GS Media*, will make it impossible to rebut the presumption.

Websites operating for a profit in Europe, therefore, should be particularly cautious about hyperlinking to any copyrighted material, while non-commercial websites should also take care about hyperlinking to obviously copyrighted material (e.g. websites streaming pirated material).

#### **D. *Stichting Brein v Wullems (Case C- 527/15) and Stichting Brein v Ziggo BV (Case C-610/15) – broadening the concept of “communication to the public”***

Since the start of 2017, the CJEU has already handed down two opinions strengthening the rights of copyright holders by giving a broad interpretation to what amounts to a “communication to the public”.

##### **(i) *Hyperlinking and products***

In *Stichting Brein v Wullems*<sup>70</sup>, the CJEU addressed the question whether there is a “communication to the public” when a defendant sells a product in which he has installed add-ons containing hyperlinks to websites on which copyrighted works (films, series and broadcasts) are available without the copyright owners permission. Mr Wullems sold such a product, the *filmspeler*, on which he pre-installed add-ons containing hyperlinks, which upon connecting the *filmspeler* to the internet and to a user’s screen, allowed the user to stream images and sound from the internet without consent of the copyright owners.

The CJEU, reiterating the purpose of Directive 2001/29 to establish a high level of protection for authors, held that:

1. The concept “communication to the public” must be interpreted broadly;<sup>71</sup>
2. The sale of a multimedia player constitutes a “communication to the public”;<sup>72</sup>
3. Mr Wullems, in full knowledge of the consequences of his conduct, had preinstalled add-ons on the multiplayer that made it possible to access protected works on a television screen via the hyperlinks contained in the add-ons. By providing the hyperlinks, Mr Wullems had done more than provide “physical facilities”, to which Directive 2001/29 would not apply: he was “essential” in making the copyrighted works available to the public;<sup>73</sup>
4. The *filmspeler* had been purchased by a “fairly large number of people”, who without the hyperlink could not have accessed the copyrighted works (the “new” public);<sup>74</sup> and

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<sup>70</sup> Case C – 527/15, *Stichting Brein v Wullems*, 14 June 2017.

<sup>71</sup> *Id.* at [27].

<sup>72</sup> *Id.* at [38], [42].

<sup>73</sup> *Id.* at [41].

<sup>74</sup> *Id.* at [45], [50].

5. The *filmspeler* was provided with a view to making a profit.<sup>75</sup> Mr Wullems was therefore presumed to have carried out the necessary checks to make sure that the hyperlinks did not grant access to illegally published material.

Mr Wullems, the CJEU concluded, was guilty of copyright infringement under Directive 2001/29.

***(ii) Hyperlinking in the context of peer-to-peer sharing networks***

A few months later, in *Stichting Brein v Ziggo BV*<sup>76</sup>, the CJEU considered another new question: is there a “communication to the public” by the operator of a website, if no protected works are available on the website, but metadata on protected works that are present on users’ computers are indexed and categorized on said website, so that users can search for, upload and download protected works from the website?

The case, brought also by Stichting Brein, a Dutch anti-piracy association, concerned a well-known file sharing website, The Pirate Bay (“TPB”). TPB, like other peer-to-peer sharing networks, did not itself store the copyrighted material but stored .torrent files that were used to access the underlying material hosted by users. TPB used “magnet links”, which identify the content of the .torrent file, and indexed those links so that they could be easily searched by users of the peer-to-peer platform.

The CJEU, reiterating its holdings in *Svensson*, *GS Media* and *Wullems*, concluded that as a rule, “any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an ‘act of communication’ for the purposes of Article 3 (1) of Directive 2001/29.”<sup>77</sup> Even though the copyrighted works had been placed on TPB by the users, by indexing .torrent files on the platform in such a way that allowed users to easily locate the copyrighted works and share them with the peer-to-peer network, TPB had made available and managed an online sharing platform “with full knowledge of the consequences of their conduct”.<sup>78</sup> They played an “essential” role in making the works available. Moreover, it was clear (i) that a “large number of subscribers” had downloaded media files using TPB and (ii) that TPB could not be unaware that the platform provided access to works published without the consent of the rights holder, making the communication at issue to a “new public” within the meaning of Article 3 (1).

Commercial publishers in the EU should therefore proceed with caution when using hyperlinks. The last five years have witnessed the CJEU not only impose a presumption of knowledge of the infringing act but also significantly broaden the notion of “communication to the public”. While non-commercial publishers still operate with more leeway, the pendulum has clearly swung in favor of protecting copyright holders and *all*

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<sup>75</sup> *Id.* at [51].

<sup>76</sup> Case C-610/15, *Stichting Brein v Ziggo BV and another*, 14 June 2017.

<sup>77</sup> *Id.* at [34].

<sup>78</sup> *Id.* at [36].

publishers should, at the very least, carry out minimum due diligence when linking to material that could be infringing.

### *E. Linking and Aggregating in the EU*

In 2015, the EU announced its intention to consider whether liability should attach to news aggregators for linking to publisher content.<sup>79</sup> It noted that solutions have been attempted in certain Member States, but considered that these carry the risk of further fragmentation in the digital single market.<sup>80</sup> In September 2016, the EU released its proposal for Member States to provide publishers of press publications with greater control over the digital use of their press publications.<sup>81</sup> Since then, the European Commission has recommended a set of operational measures to be taken by companies and Member States before it determines whether legislation is necessary.<sup>82</sup> With regards to illegal content, which includes copyright infringement, the Recommendation provides a mechanism for flagging illegal content, which it recommends that all online platforms, both big and small, put in place.<sup>83</sup> The Recommendations encourage websites to take proactive measures to identify and remove illegal content, including automated steps, such as upload filters. Critically, the Recommendations are non-binding and do not prejudice the Directive and its exemption for online intermediaries for liability for content posted under certain conditions (see Section III (A) above).

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<sup>79</sup> European Commission, *Towards a modern, more European copyright framework* (Dec. 2015), available at <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-626-EN-F1-1.PDF>.

<sup>80</sup> Spain, for example, enacted legislation in 2015 requiring publishers to charge news aggregators for publishing snippets or headlines, causing Google News to shut its news site in Spain. See Eric Auchard, *Google to shut down news site in Spain over copyright fees*, REUTERS, Oct. 29, 2014, <http://www.reuters.com/article/us-google-spain-news-idUSKBN0JP0QM20141211>. In Germany, legislation enacted in 2013 granted press publisher's ancillary rights over news content. See Eleonora Rosati, *The German 'Google Tax' law: groovy or greedy?* JOURNAL OF INTELLECTUAL PROPERTY LAW AND PRACTICE WEBLOG (June 26, 2013) at <http://jiplp.blogspot.it/2013/06/the-german-google-tax-law-groovy-or.html>. As a result, Google News in Germany became an "opt in" service for publishers. See Tim Worstall, *Google News Goes Opt In In Germany*, FORBES, June 22, 2013, <http://www.forbes.com/sites/timworstall/2013/06/22/google-news-goes-opt-in-in-germany/#26c127397a9b>.

<sup>81</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (Sept. 2016), available at <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>. For a critical analysis of how certain proposals will actually harm news organizations, see Malcolm, Jeremy, "European Copyright Leak Exposes Plans to Force the Internet to Subsidize Publishers", Aug. 26, 2016, ELECTRONIC FRONTIER FOUNDATION, available at <https://www.eff.org/deeplinks/2016/08/european-copyright-leak-exposes-plans-force-internet-subsidize-publishers>. For an update, see Malcolm, Jeremy, "How Have Europe's Upload Filtering and Tax Plans Changed?", Feb. 13, 2018, ELECTRONIC FRONTIER FOUNDATION, available at <https://www.eff.org/deeplinks/2018/02/how-have-europes-upload-filtering-and-link-tax-plans-changed>.

<sup>82</sup> See European Commission Press Release dated 1 March 2018, available at [http://europa.eu/rapid/press-release\\_MEMO-18-1170\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-1170_en.htm).

<sup>83</sup> Id.

## IV. HYPERLINKING AND DEFAMATION – EU vs. US

### A. *Hyperlinks and defamation in the US*

The mere hyperlinking to defamatory content, in the US, is a relatively easy call to make for publishers. This is because publication alone of a hyperlink to an allegedly defamatory website does not constitute republication of that defamatory content.<sup>84</sup> A mere reference to a previously published article does not present material before a new audience.<sup>85</sup> While it may call the *existence* of the article to the attention of a new audience, it does not present the *defamatory content* of the article to the audience<sup>86</sup>. Hyperlinks do not typically demonstrate the intent or ability to garner a wider audience than the initial iteration of the online statement could reach.<sup>87</sup> Thus a hyperlink, without more, is not properly a republication.<sup>88</sup> To find otherwise would result in a continual

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<sup>84</sup> The analysis will vary from state to state, but there is wide consensus that publication alone of a hyperlink does not trigger liability. *See e.g.* *Life Designs Ranch, Inc. v. Sommer*, 191 Wash. App. 320, 364 P.3d 129 (2015), review denied, 185 Wash. 2d 1022, 369 P.3d 500 (2016); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, 2007 WL 935703, at \*7 (S.D.Cal. Mar. 7, 2007) (“there is no authority to the effect that providing links to statements already published on the Web, without more, republishes those statements. Rather, the court finds that such linking is more reasonably akin to the publication of additional copies of the same edition of a book, which is a situation that does not trigger the republication rule”); *In Re Philadelphia Newspapers LLC*, 690 F.3d 161 (E.D.Pa.2012) (neither a hyperlink to an unchanged article, nor a mere reference, without more, is a republication); *Haefner v. N.Y. Media, L.L.C.*, 27 Misc. 3d 1208(A), 910 N.Y.S.2d 405 (Sup. Ct. 2009) (holding that the hyperlinks in the second article merely redirected the reader to the first article, and thus did not constitute republication to support a cause of action under New York law”); *Klayman v. City Pages*, No. 5:13-CV-143-Oc-22PRL, 2015 WL 1546173 at \*\*1-7 (M.D. Fla. 2015) (holding no Florida authority supported the proposition that providing links to statements already published, without more, republishes those statements).

<sup>85</sup> *Salyer v. S. Poverty Law Center, Inc.*, 701 F.Supp.2d 912, 916 (W.D.Ky.2009) (finding that a 2008 article on a news section of a website linking back to an allegedly defamatory 2006 article did not republish the 2006 article).

<sup>86</sup> *Id.*

<sup>87</sup> *In Re Philadelphia* at 175.

<sup>88</sup> *Life Designs Ranch, Inc. v. Sommer*, 191 Wash. App. 320, 336 (2015). Note a recent opinion by the Nevada Supreme Court holding that hyperlinks to a source constitute the attribution necessary to invoke the fair report privilege, *Adelson v. Harris*, No. 67120, 2017 WL 4294562 (Nev. Sept. 27, 2017) (hyperlink provided sufficient source of attribution to put an average reader on notice that the petition in question drew from an underlying summary of judicial proceedings). How will courts draw the line being accepting hyperlinked material as sufficient context for the purposes of invoking the fair report privilege without accepting that hyperlinks constitute republication of alleged defamatory content? While the defendants’ briefings to the Nevada Supreme Court, and the Second Circuit where the case originated, limited themselves to arguing the former, it is open to question whether plaintiff’s counsel going forward may try to blur this line and fashion an argument that the latter must also suffice to put the average reader on notice of the linked-to defamatory content.

retriggering of the limitations period, which would undermine the purposes of applying the single publication rule to the Internet.<sup>89</sup>

Publishers beware however. Where a new webpage enhances, modifies or targets a new audience, hyperlinking may amount to republication of the defamatory content.<sup>90</sup> The content in the hyperlink would have to provide a context for the new article that goes beyond merely restating defamatory allegations and also enhances and modifies the statements.<sup>91</sup> In short, republication online must at least involve an “affirmative act”.<sup>92</sup>

Other jurisdictions have taken a similar approach. The Supreme Court of Victoria in Australia held that hyperlinks are to be treated as references, stating that “hyperlinks are no more than a choice that is offered to the reader to quickly and conveniently pursue further reading of separate publications that may relate in some way to the text of the [original article]”.<sup>93</sup> The Supreme Court of Canada similarly held that mere hyperlinking to defamatory matter is not a sufficient basis for imposing liability for defamation, even if the publisher of the hyperlink is aware of the defamatory nature of the underlying linked material.<sup>94</sup> Content is only “published” by the hyperlinker where the hyperlinker presents the content in a manner equivalent to adoption or endorsement of the specific content, e.g. by placing a reference in a text that repeats defamatory content from a secondary source.<sup>95</sup>

### ***B. EU to hear its first defamation by hyperlinking case***

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<sup>89</sup> *Salyer* at 918 (“the single publication rule is designed to prevent stale claims and to ensure the legislature’s intent in passing statutes of limitations is met. By enacting a statute of limitations, the legislature clearly demonstrates a desire to require lawsuits be brought within a specified time of initial publication. Websites are frequently, if not constantly, updated. Methods of access to portions of the website can change on a regular basis and links to previous posts on a website are constantly added and taken away from sites.”); see also *Slozer v. Slattery*, No. 2566 EDA 2014, 2015 WL 7282971, at \*13 (Pa. Super. Ct. Nov. 18, 2015) (defendant posting a link to allegedly defamatory website with a “like” designation on defendant’s Facebook page was not a republication of the defamatory website sufficient to support a separate cause of action for defamation.)

<sup>90</sup> *Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.*, 2015 WL 5724838, \*18 (Del. Ch. 2015) (holding that he website owner was not entitled to dismissal because it was reasonably conceivable that the articles were false and defamatory, and that the later 2014 article republished statements in the prior 2012 articles because it enhanced, modified, or directed the prior articles to a new audience).

<sup>91</sup> *Id.*

<sup>92</sup> *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 616 (7th Cir. 2013). See also *Clark v. Viacom Intern'l, Inc.*, 617 F. Appx. 495, 505 (6th Cir. 2015) for Sixth Circuit guidance on what types of activity have been held to constitute republication.

<sup>93</sup> *Cripps v. Vakras* [2014] VSC 279 (20 June 2014) at [19]. Kyrou J’s ruling on hyperlinks was not challenged on appeal. See *Vakras v. Cripps* [2015] VSCA 193 (24 July 2015).

<sup>94</sup> *Crookes v Newton* [2011] 3 SCR 269 upholding *Crookes v. Wikimedia Foundation Inc.* [2008] BCSC 1424 (where the majority drew a distinction between hyperlinks and other times of “publication”, describing hyperlinks essentially as “references”. Hyperlinks communicate that something exists but do not, by themselves, communicate content)

<sup>95</sup> *Id.*

Neither the European Court on Human Rights nor the Court of Justice of the European Union has addressed the issue of defamation by hyperlinking. An application is currently (at time of writing) pending before the European Court of Human Rights: *Magyar Jeti ZRT v. Hungary*, App. No. 11257/16.

The applicant, Magyar Jeti ZR, publishes the Hungarian news portal 444.hu. On 6 September 2013, 444.hu published an article detailing an incident that had occurred between a group of football supporters and a school where children were predominantly of Roma origin. The football supporters reportedly made racist remarks, waved flags and one allegedly urinated on the school building. The article included a hyperlink to a video on Youtube.com of an interview with the head of the local Roma minority self-government and a parent and child of the school. The interview referred to persons related to *Jobbik*, a right-wing Hungarian political party, previously criticized for its anti-Roma and anti-Semitic stance.<sup>96</sup>

*Jobbik* quickly initiated legal proceedings against several respondents, including the operators of 444.hu, alleging that its right to reputation had been violated by the Youtube video.<sup>97</sup>

On 30 March 2014, the Hungarian Court of Appeal found the applicant objectively liable for the content of the Youtube video. It was irrelevant whether the news portal had acted in good faith. The Higher Kúria court also upheld the judgment, finding that by hyperlinking to Youtube, the applicant had transferred information through the Internet, spread the statements and assumed objective liability for any defamatory content in it.

The applicant lodged its complaint to the European Court of Human Rights (“ECtHR”) under Article 10 of the European Convention on Human Rights (“ECHR”)<sup>98</sup>, claiming the domestic courts unduly restricted their freedom of expression and freedom of the press.

### ***C. How should the ECtHR decide Magyar Jeti ZRT application?***

From a U.S. perspective, it is clear that Magyar Jeti ZRT should not be found liable for defamation in the U.S.

The European Court is of course not compelled to follow the U.S. approach. The

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<sup>96</sup> *Magyar Jeti ZRT v. Hungary*, App. No. 11257/16, at \*1.

<sup>97</sup> *Id.* at \*2.

<sup>98</sup> Article 10(2) of the European Convention on Human Rights reads “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”.

reluctance across several democracies to anchor liability for defamation in a mere hyperlink, however, does suggest that the Hungarian courts' restriction on freedom of speech is not *necessary* in a democratic society nor does it correspond to a pressing social need as required by Article 10(2) of the ECHR.

A number of associations have already intervened in defense of the media, calling on the ECtHR to uphold the news portal's Article 10 rights.<sup>99</sup> These interveners have highlighted the vital importance of hyperlinks to the effective exercise of free speech on the Internet.<sup>100</sup> It is no exaggeration to say that the very foundation of the World Wide Web is the "ability to seamlessly "link" documents and locations to each other". It is this feature that makes the Internet so universally accessible by allowing anyone to easily navigate within and among Websites by just clicking on hyperlinks.<sup>101</sup> Hyperlinks direct users to content and provide structure in what is already a boundless conversation.<sup>102</sup>

The importance of hyperlinks in our online dialogue, moreover, is at its apex in the context of journalism. The use of hyperlinks enables journalists to cross-reference each other, improves interactivity with readers, bolsters credibility by providing readers direct access to supporting information and increases transparency by referring the reader to the news gathering process.<sup>103</sup>

The ECtHR should proceed from the starting point that a person posting a hyperlink is not, without more, liable for the linked content.<sup>104</sup> Much like the Canadian and U.S. courts have held, liability should be imposed only where the hyperlink is present in a manner that is equivalent to repetition or endorsement of the sting of the libel.

## V. CONCLUSION - CHALLENGES FOR MEDIA ENTITIES

Differences in link liability analysis in the EU and the US pose obvious difficulties for global publishers and newsrooms, but also for the media lawyers who must counsel

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<sup>99</sup> Article 19, *Third-Party Intervention Submissions by Article 19* (Sept. 30, 2016), available at [https://www.article19.org/data/files/Magyar\\_Jeti\\_Zrt\\_v\\_Hungary\\_-\\_Article\\_19\\_Final.pdf](https://www.article19.org/data/files/Magyar_Jeti_Zrt_v_Hungary_-_Article_19_Final.pdf) (hereinafter "Article 19 Intervention") and European Information Society Institute *Third Party Intervention Submission by European Information Society Institute (EISI)* (Aug. 1, 2016), available at [http://www.eisionline.org/files/Interventions/final-Intervention\\_Jeti.pdf](http://www.eisionline.org/files/Interventions/final-Intervention_Jeti.pdf) (hereinafter "EISI Intervention").

<sup>100</sup> See e.g. Article 19 Intervention, at p.2.

<sup>101</sup> 2 Cal. Transactions Forms--Bus. Transactions § 8:28

<sup>102</sup> See Matthew Collins, *The Law of Defamation and the Internet* (3rd ed., 2010), [5.42] "Without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it"; *GS Media* at [45] ("hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterized by the availability of immense amounts of information").

<sup>103</sup> Juliette de Mayer, 'Mapping the hyperlinked environment of online news: issues and challenges for the French news sites' Paper presented at the IAMCR 2010 Conference (July 18-22, Braga Portugal) cited at [7] of EISI Intervention.

<sup>104</sup> Article 19 Intervention at [31].

them.

As of 2018, advising that “linking is protected in the US, not in the EU” is no longer possible. In both jurisdictions, certain actions will lead to liability – the key is understanding what triggers liability in the CJEU’s eyes and how this differs from US jurisprudence.

In deciding whether to publish a link to a copyrighted work, a global publisher concerned with exposure to liability in the EU should ask:

1. Is the link a hyperlink or an embed? Hyperlinking, without more, does not carry liability in the US or the EU. Embedding in the Second Circuit, however, depending on the outcome of the *Goldman* case, may now pose an even greater risk than doing so in the EU.<sup>105</sup>
2. Is the hyperlink or embed enabling direct copyright infringement? If so, intentionally linking in such circumstances could expose the publisher to liability in both the US and the EU.<sup>106</sup>
3. Consider your liability even if you do not think you are actively contributing to the infringement. Are you providing a platform allowing users to share protected works? Have you installed add-ons with hyperlinks permitting access to copyrighted materials? Does the link make it possible for its users to circumvent restrictions put into place on the site where the copyrighted work originally appears (like circumventing a paywall? If so, liability may be triggered in both the US and the EU depending on the level of knowledge you are found to have had.<sup>107</sup> Bear in mind the ease with which the CJEU has recently found publishers, and even product sellers, to have the requisite knowledge for copyright infringement.<sup>108</sup>
4. Does the publisher operate for profit?  
→ In most cases, the answer will be yes. Publishers of commercial websites will be presumed to have carried out the necessary checks to ensure the work was not placed illegally online in the first place.<sup>109</sup> If anything indicates the work may have been published illegally, a risk-averse commercial publisher seeking to avoid liability in the EU should not publish the hyperlink.  
→ If the answer is no, a nonprofit publisher unaware of copyright infringement will be shielded from liability in the EU, unless it can be shown that the publisher knew or ought to have known that the hyperlink provided access to a work illegally placed on the Internet.<sup>110</sup>
5. Even if the answer to questions 2, 3 & 4 is no, consider whether publishing the link grants access to new users that were not part of the public taken into account

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<sup>105</sup> See generally *Goldman*.

<sup>106</sup> See *Perfect 10*, 508 F.3d at 1172, Case C-466/12 *Svensson* and Case C-160/15 *GS Media*.

<sup>107</sup> See generally in the EU Case C-610/15 *Ziggo* and Case C – 527/15 *Wullems* and *Flava Works* and *Perfect 10* in the US.

<sup>108</sup> See generally Case C – 527/15 *Wullems* and Case C-610/15 *Ziggo*.

<sup>109</sup> See *GS Media* at [51].

<sup>110</sup> *Id.* at [50].

by the copyright holders when they placed their work online. The answer will usually be no, but asking this final question will provide extra reassurance for more risk adverse publishers.

In terms of exposure to defamation liability, the status quo will be clearer once the ECtHR hears Magyar Jeti ZRT's application.

With the US and EU legal framework becoming increasingly complicated and means of technology and methods of content consumption constantly evolving, global publishers would be well advised to issue publication guidelines and routinely seek updates from their counsel.