The Making available right in the US and EU: The hyperlinking quandary

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EU

CJEU: *Svensson* (2014); *GS Media* (2016) Hyperlinking is a “making available” - actual communication not required

- But communication to the public via a secondary transmission requires a “new public” or a different technical means

(*Svensson*) Content made accessible on the internet by the author without restrictions; unauthorized hyperlink leads to authorized site:

A hyperlink is not a "communication to the public" because the same means of communication (internet) are employed, and there is no "new public" that the author did not take into account in authorizing the first internet communication of the work

Content never made available without restriction on the internet (corresponds to facts of *GS Media*, because the posted photos had not been lawfully divulged)

The “new public” requirement does not apply because the author took no public into account if he never authorized internet access. This conclusion, after *Svensson*, would lead us to conclude that the act was a communication to the public

BUT . . .

CJEU introduces an *additional* criterion, consisting of two alternatives, prerequisite to qualifying the provision of the hyperlink as a communication to the public: a for-profit purpose, or knowledge of the illegality of the source website; these criteria are necessary to a fair balance between copyright protection and protection of freedom of expression on the internet

QUID when the author has authorized unrestricted access on one site, but another site makes the work available without authorization? First interpretation:

If the first lawful posting means that no "public" accessing the work via another site can be a "new public," whatever the legality of the other site to which the link leads, then the right of communication to the public is effectively exhausted, and hyperlinks to the second site do not make a communication to the public, even if they are provided with a for-profit purpose, or with knowledge of the illegality of the linked-to site.

Second interpretation:

For the for-profit purpose or the knowledge of the illegality of the linked-to site to characterize the act of making available by hyperlink as a communication to the public, the "new public" criterion must apply only to links to *authorized* sites; the criterion would not apply to third party unauthorized sites. *Svensson* then would not effectively create a rule of Internet "exhaustion" of the right of communication to the public.

Filmspeler, *Ziggo*: When is facilitation an act of communication to the public?

- AG opinions consider the “indispensable” role of an intermediary who facilitates third-party violations of the making available right
- *Filmspeler*: intervention “increase[s] the range of potential users”
- *Ziggo*: intervention makes user access less complex and more efficient

Hyperlinking: US

- Hyperlinks offer access to works, but not clear that US has fully approximated a making available right with respect to offers of access
- Hyperlinks are a second-level offer; primary offer comes from source website
- US caselaw (Perfect10 v. Amazon (9th Cir. 2007)) applies "server theory" to hold that the source website, not the linker, commits the act of public display (or performance)
- Liability, if any, would be based on theories of secondary liability

Secondary Liability

- Contributory Infringement: supplying means to commit infringement with specific knowledge of works infringed
- Inducement: intent to enable copyright infringement; specific knowledge of which works infringed not required if:
- Promoted the service as enabling infringement
- Derived a financial benefit from infringement
- Took no measures to avoid infringement