



Accepted Papers

Bileta Annual Conference 2016

## Hyperlinking, making available and copyright infringement:

### Lessons from European national courts

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Over the last twenty years, the dramatic popularity of the internet has transformed it into an interactive and user-oriented space filled with vast amounts of information and digital content, capable of being shared among its users. The carriers of these amounts of information on the Web are websites consisting of numerous individual webpages, which contain text, image and sound. Equally significant and functional components of webpages are hyperlinks which have the ability to connect webpages together or even direct users to downloadable digital files. In this respect, hyperlinks have played a central role in transforming the way people find and share information.

Hyperlinks have been said to have by nature an inherent capability of infringing copyright.<sup>1</sup> For example, issues for copyright infringement may arise where a link directs to content which is released online without the author's consent. In this sense, the essay will focus on the potential of hyperlinks to infringe copyright by specifically examining whether hyperlinks may constitute communication to the public and whether the provision of hyperlinks constitutes a direct copyright infringement by violating the author's exclusive 'making available' right.<sup>2</sup> The assessment is accomplished through a comparative study of European case law, in particular, by deducing legal arguments from national cases which were adjudicated before the *Svensso*<sup>3</sup> case. The analysis will show that most European national courts concluded that hyperlinking is not an act of communication to the public. However, acts of infringement by means of hyperlinking have been generally captured under provisions and doctrines on indirect liability, such as contributory infringement or authorization.

Discussing principles expressed in *Svensson* itself and drawing conclusions from national case law, I will assess the treatment of hyperlinking in relation to copyright infringement and liability. I will argue that national laws on indirect liability, coupled with the provision against circumvention of technological measures, are sufficient to determine liability in cases where copyright infringement takes place via hyperlinking.

<sup>1</sup> Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union: What Future for the Internet after *Svensson*?' (2014) 45 IIC 524

<sup>2</sup> Directive 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 [2001] L167/10, Art. 3(1)

<sup>3</sup> Case C466/12 *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* [2014] OJ C 379/31