

The Court of Justice of the European Union (CJEU), Europe's highest court, has given its much anticipated ruling on when hyperlinking will be lawful (*Svensson v Retriever Sverige AB*).

## The Dispute

The dispute concerned four journalists who wrote for the Swedish newspaper *Göteborgs-Posten*. The articles also appeared on the *Göteborgs-Posten* website. Retriever Sverige (Retriever) operated a website which provided its clients with clickable links to articles published on other websites. It included links to articles published on the *Göteborgs-Posten* website written by the four journalists. The journalists argued that this practice amounted to copyright infringement, relying on Article 3(1) of the [Copyright Directive](#). Article 3(1) provides "Member States shall provide authors with the exclusive right to authorise or prohibit a communication to the public of their works ... 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 journalists argued that, by providing links to their articles, Retriever was communicating their works to the public and that this required their prior consent. The Swedish court asked the CJEU to interpret the scope of Article 3(1).

## The Judgment

The CJEU held that Retriever's provision of links to the articles was not a communication of the articles to the public. A communication to a "new public" would be required; that is, a communication of the articles to a public that was not taken into account by the journalists when their articles were first published on the *Göteborgs-Posten* website. As the *Göteborgs-Posten* website was freely accessible by any Internet user without restrictions, the articles had already been made available to the public as a whole. Therefore, there was no "new public" to whom Retriever could communicate the articles. As such, Retriever was free to provide links to the articles on its website without consent. This was the case even if, when a user clicked on that link, the article appeared in such a way as to give the impression that it was appearing on Retriever's site.

The position would be different if the links provided by Retriever had made it possible for users to circumvent some restrictions on access to *Göteborgs-Posten* website. In that case, all users accessing the articles via the links provided by Retriever would be deemed to be a "new public". Retriever's use of the links would have required prior permission from the journalists. Such permission would also be required if the articles had subsequently been removed from *Göteborgs-Posten* website or access restrictions subsequently added to the *Göteborgs-Posten* site.

## Implications

Squire Sanders' intellectual property and technology specialist, [Carlton Daniel](#), comments:

*"This is a significant decision on when it will be lawful to link to, and frame, material protected by copyright. It is a welcome clarification since the confusion on linking left by the Shetland Times case in the mid-1990s. At face value the ruling is clear – a website may hyperlink to copyright material appearing on a third party website provided that material is freely accessible. There is also no problem with framing the material to give the impression that it is part of the linking website rather than the third party site.*

*However, the practical application of the ruling may be problematic. It is clear that a website must not make the material accessible to a public who could not have accessed it before (which the court calls a "new public"). To know if the hyperlink communicates the material to a 'new public' you would need to know who the copyright owner originally intended to communicate his or her material to. How should that be assessed? Presumably, if the material is freely accessible on the third party website, the original communication is to everyone and there is no new public left for the hyperlink to communicate the material to for the first time. However, how is 'freely accessible' assessed? It is clear from the ruling that material on an access restricted website is not 'freely accessible' and linking to this material to circumvent the restrictions would be unlawful. Material on a subscription only site probably isn't 'freely accessible' either (and it would appear that a 'subscription' need not be paid for to prevent third party access), but what about material on a site which requires certain personal details to be entered before the material can be viewed? What if the "manager" of a website uses geo-location tools to direct users in one territory (say the UK) to material on a .co.uk site but the link allows those tools to be circumvented so that users in the UK are taken to material on the corresponding .com domain. The material on .com would be 'freely available' but the website manager would not envisage that individuals in the UK would view it. In those circumstances, would the link be communicating the .com materials to a new public amounting to copyright infringement? And what if the third party site has no access restrictions but its terms and conditions say that permission is required to link to material on it?*

*There is also the problem of website access restrictions which fail. Should a website owner, unaware of any restrictions, be liable for linking to material on that site? Also, what if the material is freely accessible but has been placed on the website without the copyright owner's consent? Would the link be unlawful? And who should bear the risk of access restrictions being placed subsequently on what was freely available material, transforming a lawful link into a potentially unlawful one?*

*The CJEU assumes that the 'public' implies a 'fairly large number of persons', but that may not be the case. What if the copyright material is published on a freely available website but on an obscure domain name with details of its publication only being given to a select few? Would this publication be to the public as a whole (so linking to it would be lawful) or only to those select few (meaning linking to it would be a communication to a new public and amount to copyright infringement)?*

*Although the CJEU seems to say that framing is fine from a copyright point of view, it remains open to a website operator to claim passing off or unfair competition (or to ask regulators to enforce legislation such as the Consumer Protection from Unfair Trading Regulations 2008 or the ASA's CAP Code) where it is not clear that the user is viewing third party material when on another's website.*

*These unanswered questions mean that the ruling does not perhaps give websites, or copyright owners, the clarity on when hyperlinking will be lawful that they would like."*

If you are a website owner wanting to use hyperlinks or a copyright owner wanting to resist their use, please feel free to contact [Carlton](#) for advice.

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