

LINK LIABILITY – AN EU/US COMPARISON AND GUIDE

I. INTRODUCTION

Linking is a fundamental part of our online language. Whether it is by private individuals on social media accounts or journalists in news articles, hyperlinks are everywhere. For publishers on global platforms, this means their 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.

Generally, in the United States, the act of linking to material that is either copyrighted or defamatory does not, on its own, carry liability. In Europe, the analysis is more complex.

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.

Concerning copyrighted material, hyperlinkers essentially risk liability in the EU in one of two situations: (1) hyperlinking to copyrighted content in such a way that enables users to circumvent access restrictions to the original content or (2) hyperlinking by a commercial website in circumstances where the hyperlinker has knowledge that it is infringing copyright. Absent these situations, similarly to the U.S., hyperlinking to copyrighted content, without more, does not lead to liability.

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

II. HYPERLINKING AND COPYRIGHT – EU vs. US

A. Hyperlinks and Copyright in the US

Unless a US publisher actively encourages direct copyright infringement, the mere hyperlinking to copyrighted material does not constitute copyright infringement.

For Internet Service Providers (“IPS”), the situation 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 material¹.

In terms of content providers generally, not just ISPs, liability for linking to copyrighted works has received less judicial attention in the United States than other jurisdictions².

The starting point is that hyperlinking does not itself involve a violation of the Copyright Act since no copying is involved³. Hyperlinks have been described as the “digital equivalent of giving the recipient driving directions to another website on the Internet”⁴. The hyperlink itself does not contain the copyrighted or protected derivative work⁵.

The same is true for in-line linking (third-party content hosted on website as opposed to sending user to that website). The Ninth Circuit made this clear in the *Perfect 10, Inc. v. Amazon.com, Inc.* case⁶. It found that no copyright infringement had been committed by Google’s in-line linking to third-party websites that displayed infringing full-size versions of Perfect 10’s images⁷. 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 images⁸. 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.”⁹

In other words, in-line linking was treated as a form of hyperlinking. But the *Perfect 10* decision did more than protect a hyperlinker in the traditional sense from

¹ 17 U.S.C.A. § 512. See § 512 for definition of ISP.

² 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.

³ *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.”)

⁴ *Pearson Educ., Inc. v. Ishayev*, 963 F. Supp. 2d 239, 250 (S.D.N.Y. 2013).

⁵ *Id.*

⁶ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁷ *Id.* at 1160.

⁸ *Id.*

⁹ *Id.* at 1161.

direct copyright infringement. By accepting Google's fair use argument even in the context of in-line linking, as opposed to hyperlinking, the Ninth Circuit effectively protected the storing of thumbnail images by a search engine¹⁰. As such, the decision is a landmark for search engines that store and display full size images through in-line linking. Search engines, like Google, are able to capitalize on the display of images, even expanded ones, without running foul of copyright laws.

The take-away for publishers, however, is not "hyperlink away". There are circumstances where hyperlinking or in-line linking can raise contributory liability issues. One infringes contributorily by intentionally inducing or encouraging direct infringement¹¹. 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 steps¹².

Interestingly, 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 content¹³. In *AP v. Metwater 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 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 use¹⁴.

¹⁰ *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).

¹¹ *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 Hatful Eight* did not survive Gawker's motion to dismiss as Tarantino failed to plead a single act of direct infringement in the first place).

¹² *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).

¹³ *AP v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013).

¹⁴ *Id.* at 556.

In 2015, the EU announced its intention to consider whether liability should attach to news aggregators for linking to publisher content¹⁵. 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 market¹⁶. 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 publications¹⁷. No formal action has, however, been taken.

At present, the analysis of liability for copyright infringement by linking in the EU ultimately leads to a similar result as in the US. There are, however, two key differences in the CJEU's reasoning: (1) the analysis of hyperlinks as a "communication to the public" and (2) the presumption of knowledge of infringement that applies to commercial websites.

B. Hyperlinks and the EU: "communication to the public"

The CJEU's jurisprudence on hyperlinking to copyrighted work really focuses on 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

¹⁵ 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>.

¹⁶ 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>.

¹⁷ 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>.

“preventative” protection¹⁸. Recital 23 of the Directive expressly states that the term must be interpreted broadly¹⁹. Conversely, Recitals 3 and 31 of Directive also iterate the need to maintain a fair balance between the interest of copyright holders and the fundamental rights of users of protected objects, in particular, their freedom of expression and information²⁰.

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

C. Svensson and Others (C-466/12) – hyperlinks as a “communication to the public”

This outcome of this decision – hyperlinks do not infringe copyright – is similar to the US position. How the CJEU reached its conclusion is important to understand as it reveals a 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*²¹.

The term (1) *act of communication*, the CJEU explained, is construed broadly to grant copyright holders a high level of protection²². The Court had no difficulty finding that a hyperlink provides users direct access to protected works, regardless of whether they

¹⁸ 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).

¹⁹ Recitals are the introductory paragraphs of a Directive.

²⁰ 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.

²¹ Case C-466/12 *Svensson and Others v. Retriever Sverige AB*, 13 February 2014 at [16].

²² *Id.* at [17].

avail themselves of that opportunity, and is thus an act of communication within the meaning of Article 3(1)²³.

The term (2) *public* the CJEU decided refers to an indeterminate number of potential recipients and implies a fairly large number of persons²⁴. According to settled case law, 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 public²⁵. 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, 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 communication²⁶. 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 public²⁷.

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* public²⁸.

Hyperlinking in this case did not constitute copyright infringement, not because the hyperlink is not an “act of communication”, but rather, because it is not an act communicating the copyrighted content to a “new” public.

²³ *Id.* at [19]-[20].

²⁴ *Id.* at [21].

²⁵ *Id.* at [24].

²⁶ *Id.* at [26]-[27].

²⁷ *Id.* at [24]-[28]. *See also* Case C-348/13, BestWater Int’l GmbH v. Michael Mebes, Stefan Potsch, 21 October 2014 (holding that “[t]he mere fact that a protected work, freely available on an [I]nternet site, is inserted into another [I]nternet site by means of a link using the ‘framing’ technique . . . cannot [be] classified as ‘communication to the public’ . . . since the work at issue is not transmitted to a new public or communicated [via] a specific technical method different from that of the original communication.”)

²⁸ *Svensson* at [31].

D. GS Media BV v. Sanoma Media Netherlands BV (Case C-160/15) – presumption of knowledge for commercial websites

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 photographs²⁹.

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 favor³⁰.

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 Directive³¹?

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 holder³². 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 Internet³³. It recognized the inherent difficulty for individuals posting hyperlinks to ascertain whether copyright holders had consented to

²⁹ *GS Media* at [6]-[15].

³⁰ *Id* at [17].

³¹ *Id.* at [25].

³² *Id.* at [43].

³³ *Id.* at [45].

the posting of their work in the first place³⁴ 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 contrary³⁵. 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 posted³⁶.

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)³⁷.

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)³⁸.

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"³⁹.

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*⁴⁰. 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 works⁴¹. 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 place⁴². Rather than considering the level of intervention to determine whether there had

³⁴ *Id.* at [46].

³⁵ *Id.* at [47]-[49].

³⁶ *Id.* at [50].

³⁷ *Id.* at [51].

³⁸ *Id.* at [52].

³⁹ *Id.* at [54].

⁴⁰ 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.

⁴¹ *Svensson* at [54].

⁴² *Id.* at [57].

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* instead⁴³.

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 question⁴⁴. 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 place⁴⁵.

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)⁴⁶.

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 architecture⁴⁷. 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 consent⁴⁸. 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 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.

⁴³ *Id.* at [59].

⁴⁴ *Id.* at [60].

⁴⁵ *Id.* at [63].

⁴⁶ *Id.* at [73].

⁴⁷ Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV*, Attorney General Opinion, 7 April 2016 at [78].

⁴⁸ *Id.*

III. 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 content⁴⁹. A mere reference to a previously published article does not present material before a new audience⁵⁰. 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 audience⁵¹. Hyperlinks do not typically demonstrate the intent or ability to garner a wider audience than the initial iteration of the online statement could reach⁵². Thus a hyperlink, without more, is not properly a republication⁵³. To find otherwise would result in a continual retriggering of the limitations period, which would undermine the purposes of applying the single publication rule to the Internet⁵⁴.

Publishers beware however. Where a new webpage enhances, modifies or targets a new audience, hyperlinking may amount to republication of the defamatory content⁵⁵. The content in the hyperlink would have to provide a context for the new article that goes

⁴⁹ 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).

⁵⁰ *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).

⁵¹ *Id.*

⁵² *In Re Philadelphia* at 175.

⁵³ *Life Designs Ranch, Inc. v. Sommer*, 191 Wash. App. 320, 336 (2015).

⁵⁴ *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.”).

⁵⁵ *Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.*, 2015 WL 5724838, *18 (Del. Ch. 2015) (holding that the 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).

beyond merely restating defamatory allegations and also enhances and modifies the statements⁵⁶. In short, republication online must at least involve an “affirmative act”⁵⁷.

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]”⁵⁸. 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 material⁵⁹. 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 source⁶⁰.

B. EU to hear its first defamation by hyperlinking case

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 stance⁶¹.

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 video⁶².

⁵⁶ *Id.*

⁵⁷ *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.

⁵⁸ *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).

⁵⁹ *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)

⁶⁰ *Id.*

⁶¹ *Magyar Jeti ZRT v. Hungary*, App. No. 11257/16, at *1.

⁶² *Id.* at *2.

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”)⁶³, 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 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 rights⁶⁴. These interveners have highlighted the vital importance of hyperlinks to the effective exercise of free speech on the Internet⁶⁵. 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 hyperlinks⁶⁶. Hyperlinks direct users to content and provide structure in what is already a boundless conversation⁶⁷.

⁶³ 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.”

⁶⁴ 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 (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 (hereinafter “EISI Intervention”).

⁶⁵ See e.g. Article 19 Intervention, at p.2.

⁶⁶ 2 Cal. Transactions Forms--Bus. Transactions § 8:28

⁶⁷ 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

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 process⁶⁸.

The ECtHR should proceed from the starting point that a person posting a hyperlink is not, without more, liable for the linked content⁶⁹. 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.

IV. CONCLUSION - CHALLENGES FOR MEDIA ENTITIES

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

Advising that “hyperlinks are protected in the US, not in the EU” would be an inaccurate oversimplification. 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 hyperlink to a copyrighted work, a global publisher concerned with exposure to liability in the EU should ask:

1. Is the link enabling direct copyright infringement? If so, intentionally linking in such circumstances could expose the publisher to liability even in the more speech friendly US courts.
2. Does the link make it possible for its users to circumvent restrictions put into place on the site where the copyrighted work originally appears? If so, publishing the link will trigger liability in the EU.
3. 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. 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.

opinions and information in that network characterized by the availability of immense amounts of information”).

⁶⁸ 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.

⁶⁹ Article 19 Intervention at [31].

4. Even if the answer to question 2 & 3 is no, consider whether publishing the link grants access to new users that were not part of the public taken into account 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. Until then, global publishers can continue to publish hyperlinks in the US with confidence but might consider taking a more cautious approach for their EU publications.

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