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Comment

IMPLICATIONS OF REPOSTING COPYRIGHT MATERIAL ONLINE AND *SVENSSON* DISTINGUISHED IN CJEU JUDGMENT

Land Nordrhein-Westfalen v Dirk Renckhoff (Case C-161/17) EU:C:2018:634

This comment considers the CJEU's recent decision in *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634, concerning the legality of reposting copyright-protected material on the Internet. Notably, the earlier decision of the CJEU in *Svensson* – which was a case on hyperlinking and although cited fairly extensively in argument – was carefully distinguished on the facts.

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I. Introduction

1 In the realm of copyright law, the Court of Justice of the European Union ("CJEU"), over the years, has had numerous opportunities to consider the scope of the copyright owner's exclusive right to "communicate" a work "to the public".[1] This is particularly notable in the line of cases that involved the online practice of hyperlinking and framing,[2] with its genesis in *Nils Svensson et al v Retriever Sverige AB*[3] ("*Svensson*"). More recently, the CJEU had occasion to consider, yet again, the same legal question – albeit on very

1 See, *eg*, 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 Art 3(1). See also ss 26(1)(*a*)(iv) and 26(1)(*b*)(iii) – to be read with the definition of "communicate" in s 7(1) – of the Singapore Copyright Act (Cap 63, 2006 Rev Ed).

2 See, *eg*, *BestWater International GmbH v Michael Mebes et al* (Case C-348/13) EU:C:2014:2315; *GS Media BV v Sanoma Media Netherlands BV et al* (Case C-160/15) EU:C:2016:644; [2016] Bus LR 1231; [2017] 1 CMLR 921; *Stichting Brein v Jack Frederik Wullems* (Case C-527/15) EU:C:2017:300; and *Stichting Brein v Ziggo BV et al* (Case C-610/15) EU:C:2017:456.

3 (Case C-466/12) EU:C:2014:76; [2014] WLR(D) 67; [2014] 3 CMLR 4; [2014] ECDR 9; [2014] Bus LR 259; [2015] EMLR 5.

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different facts – in *Land Nordrhein-Westfalen v Dirk Renckhoff*.[4] Although the outcome (and reasoning) of this latest CJEU decision is, to this author, far less controversial than that of the earlier hyperlinking cases,[5] it is still worthy of comment for its timely reminder that all materials which are found/posted online without any accompanying access restrictions may not necessarily be (and usually are not) copyright-free.

II. Factual background

2 The facts briefly are these. A photographer had granted an exclusive licence to an online travel portal to use his photograph on its website, without imposing any access/downloading restrictions. A student from a secondary school in the German city of Waltrop managed to download that photograph from the travel portal without prior authorisation and then uploaded it – albeit with proper attribution as to source – on the school's website for the purposes of a school project/presentation. The photographer (who was also the owner of copyright in the photograph) subsequently brought an infringement action against the school for having breached his exclusive rights to reproduce the work and to communicate (or make available) the work to the public.

3 The legal question that is relevant for our purposes is whether the student's act of uploading the photograph on the school's website amounted to a "communication" of the copyright work "to the public" (indeed, to a "new public").[6] The Hamburg Regional Court (at first

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4 (Case C-161/17) EU:C:2018:634.

5 Much academic ink has already been spilt on the various controversies surrounding these hyperlinking cases – see, *eg*, Alain Strowel & Nicolas Ide, "Liability With Regard to Hyperlinks" (2001) 24 Colum VLA J L & Arts 403; Maurice Schellekens, "Reframing Hyperlinks in Copyright" (2016) 38(7) EIPR 401; Matthias Leistner, "Closing the Book on the Hyperlinks: Brief Outline of the CJEU's Case Law and Proposal for European Legislative Reform" (2017) 39(6) EIPR 327; Lyubomira Midelieva, "Rethinking Hyperlinking: Addressing Hyperlinks to Unauthorised Content in Copyright Law and Policy" (2017) 39(8) EIPR 479; and Cheng Lim Saw, "Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty" (2018) 49(5) IIC 536.

6 According to the established jurisprudence of the Court of Justice of the European Union (see, *eg*, *Nils Svensson et al v Retriever Sverige AB* (Case C-466/12) EU:C:2014:76; [2014] WLR(D) 67; [2014] 3 CMLR 4; [2014] ECDR 9; [2014] Bus LR 259; [2015] EMLR 5 and its progeny), the plaintiff must prove that the copyright work in question had been communicated to a "new public" when the specific technical means employed by the defendant for the unauthorised communication are the *same* as those used for the initial communication authorised by the plaintiff. In this context, a "new public" means "a public that

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instance) and the Higher Regional Court of Hamburg (on appeal) both ruled in favour of the photographer on the copyright point, notwithstanding that the photograph in question could easily have been accessed and downloaded from the travel portal itself by any Internet user. When the dispute was subsequently brought before the *Bundesgerichtshof* on a point of law, the German Federal Court of Justice decided to stay proceedings and refer the following question to the CJEU for a preliminary ruling:[7]

> Does the inclusion of a work – which is freely accessible to all internet users on a third-party website with the consent of the copyright holder – on a person's own publicly accessible website constitute a making available of that work to the public within the meaning of Article 3(1) of [the EU Information Society Directive][8] if the work is first copied onto a server and is uploaded from there to that person's own website?

III. Comment on CJEU's holding

4 The CJEU answered the above question in the affirmative, after setting out the twin criteria for the concept of "communication to the public" – namely, an "act of communication" of a work and the communication of that work to a "public" (in this case, to a "new public").[9]

5 As regards the requirement that there must first be an "act of communication", the court reiterated the test set out in its earlier decision in *Svensson* that the work in question must have been made available by the defendant "in such a way that the persons forming [the] public may access it, irrespective of whether or not they avail themselves of that opportunity".[10] Given that the student's act of uploading the

was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work": see *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [24].

7 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [12].

8 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.

9 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [19].

10 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [20] (citing *Nils Svensson et al v Retriever Sverige AB* (Case C-466/12) EU:C:2014:76; [2014] WLR(D) 67; [2014] 3 CMLR 4; [2014] ECDR 9; [2014] Bus LR 259; [2015] EMLR 5 ("*Svensson*") at [19]). For a critique of the Court of Justice of the European Union's test of "access" as articulated in *Svensson* in the hyperlinking context, see Cheng Lim Saw, "Linking on the Internet and Copyright

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photograph on the school's website "gives visitors to the website on which it is posted the opportunity to access the photograph on that website",[11] the first criterion was, uncontroversially, found to be satisfied.

6 In relation to whether the photograph in question had been communicated (or made available) by the defendant to a "new public",[12] the CJEU also came to a positive conclusion after carefully considering the arguments raised by both sides. Relevantly, should a distinction be made at law between, on the one hand, a defendant who uploads an infringing copy of the copyright work on his own website (here, the school's website) and, on the other,[13] one who simply furnishes a hyperlink on his own website that directs Internet users to the target website (here, the online travel portal) on which the same work had initially been made available to the public without any access restrictions and with the consent of the copyright owner?

7 On one view, it may be argued that because the copyright work in question had already been made available to the public on the target website without the copyright owner imposing any restrictions as regards access, there ought to be no copyright repercussions for the defendant to subsequently upload a copy of the same work on his own website without first obtaining the copyright owner's consent. However, the CJEU quite rightly pointed out that this argument is inherently flawed as this will be tantamount to an outright *exhaustion* of the copyright owner's rights[14] to control the further exploitation of the copyright work *after* its initial posting online[15] – which, in any event, is in violation of Art 3(3) of the EU Information Society Directive[16] ("the Directive"). Further, the CJEU also emphasised that it was "irrelevant" to the legal issue at hand that "the copyright holder did not limit the ways in which Internet users could use the photograph", saying

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Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty" (2018) 49(5) IIC 536.

11 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [21].

12 Because both the initial communication of the photograph on the travel portal and its subsequent communication on the school's website were made with the *same* technical means.

13 *Cf* the facts and outcome of the Court of Justice of the European Union's decision in *Nils Svensson et al v Retriever Sverige AB* (Case C-466/12) EU:C:2014:76; [2014] WLR(D) 67; [2014] 3 CMLR 4; [2014] ECDR 9; [2014] Bus LR 259; [2015] EMLR 5.

14 The Court of Justice of the European Union termed such rights as rights of a "preventive nature": see *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [29] and [30].

15 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [30]–[31].

16 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [32]–[33].

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that the enjoyment and exercise of the right of communication to the public (as enshrined in Art 3(1) of the Directive) "[should] not be subject to any formality".[17]

8 On the contrary, and as the facts of the instant case well illustrate, the student/school had clearly communicated (or made available) the plaintiff's photograph to a "new public" because the public gaining access to the copyright work on the school's website would not be the same public that the copyright owner had in mind when he authorised the initial posting of the photograph on the website of the travel portal.[18] This is quite unlike the factual scenario in *Svensson* where, in light of the mechanics of how a hyperlink operates in the online environment,[19] the public gaining access to the copyright work hosted on the target website via a hyperlink supplied on the linking website is not any different from the public gaining access to the same work upon visiting the target website directly.

9 Crucially, the CJEU was careful to point out that their earlier decision in *Svensson* – which was "handed down in the specific context of hyperlinks" – was not a relevant precedent for the purposes of the instant case for a variety of reasons.[20] In particular, the court observed that the student, in reproducing the plaintiff's photograph on a private server and then uploading it on the school's website, had "played *a decisive role* in the communication of that work to a [new] public" [emphasis added].[21] This was to be contrasted with "*the lack of any*

17 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [36].

18 See *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [35]:

> In such circumstances, the public taken into account by the copyright holder when he consented to the communication of his work on the website on which it was originally published is composed solely of users of that site and not of users of the website on which the work was subsequently published without the consent of the rightholder, or other internet users.

19 What a hyperlink does, in essence, is to connect a user's Web browser (after the user has clicked on the hyperlink supplied on the linking website) with the target website. The user then interacts directly with the interface of the target website, as though the user had visited the target website directly without having relied on the hyperlink.

20 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [39]. See, more generally, [37] *ff*.

21 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [46].

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involvement by the administrator of the site on which the clickable link had been inserted" [emphasis added] in the *Svensson* decision.[22]

10 Ultimately, the CJEU answered the question that was referred to it in the following terms:[23]

> [T]he concept of 'communication to the public', within the meaning of Article 3(1) of [the EU Information Society Directive], must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.

IV. Conclusion

11 This recent decision of the CJEU is indeed a timely reminder that the unauthorised reposting of a copyright work on one's own website gives rise to a "new" communication to the public – which is independent of the initial communication of the same work on another website authorised by the copyright owner – and is therefore an infringement of copyright (subject, of course, to applicable defences). It would certainly do well for all Internet users to remember that if a copyright work (which has already been made freely available on another website with the consent of the copyright owner) must be referenced or referred to, it is best to simply supply a hyperlink to it on one's own website so as to be able to take advantage of the CJEU's fact-specific *Svensson* decision.

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22 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [45]. With respect, this is a rather curious distinction to draw. If it were indeed true that there was a "*lack of any involvement* by the administrator of the site on which the clickable link had been inserted [namely, the 'hyperlinker']", then it appears natural to this author to question whether it would have been more appropriate for the Court of Justice of the European Union in *Nils Svensson et al v Retriever Sverige AB* (Case C-466/12) EU:C:2014:76; [2014] WLR(D) 67; [2014] 3 CMLR 4; [2014] ECDR 9; [2014] Bus LR 259; [2015] EMLR 5 to have examined the potential copyright liability of the hyperlinker in that case through the lens of accessory or indirect liability instead, rather than from the perspective of primary or direct liability (which analytical model appears better suited to cases where the alleged defendant had "played *a decisive role*" in the communication of the copyright work to the public). See, in this regard, the commentary in Cheng Lim Saw, "Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty" (2018) 49(5) IIC 536 (especially at 549–553).

23 *Land Nordrhein-Westfalen v Dirk Renckhoff* (Case C-161/17) EU:C:2018:634 at [47].

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12 In summary, reposting copyright-protected material online clearly flouts copyright law, but the converse is true in so far as hyperlinking to freely accessible and *licensed* content is concerned.[24]

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24 Readers are advised that the concession made by the Court of Justice of the European Union ("CJEU") in *Nils Svensson et al v Retriever Sverige AB* (Case C-466/12) EU:C:2014:76; [2014] WLR(D) 67; [2014] 3 CMLR 4; [2014] ECDR 9; [2014] Bus LR 259; [2015] EMLR 5 only applies in cases where the hyperlink supplied leads Internet users to freely accessible online material which was made available to the public *with the consent of the copyright owner*. The legal consequences *vis-à-vis* copyright liability on the part of the hyperlinker may well be different where the source material in question – though freely accessible by the public – had been posted on the target website *without the consent of the copyright owner*. In this regard, readers are also advised to consult the CJEU's later decision in *GS Media BV v Sanoma Media Netherlands BV et al* (Case C-160/15) EU:C:2016:644; [2016] Bus LR 1231; [2017] 1 CMLR 921 ("*GS Media*") in which the court sought to draw a distinction between cases where the posting of the hyperlink was carried out *for profit* (in which case, a *rebuttable presumption* will arise – so declared the CJEU – that the hyperlinker possessed *actual knowledge* that the hyperlink would have directed users to material which had been made freely accessible on the target website *without* the consent of the copyright owner) and those where the posting of the hyperlink was carried out *without a profit motive* (in which case, it would be relevant to consider whether the hyperlinker possessed *actual or constructive knowledge* of the same). For further commentary on the various controversies engendered by the *GS Media* decision (particularly in relation to the new "knowledge" requirement), see Cheng Lim Saw, "Linking on the Internet and Copyright Liability: A Clarion Call for Doctrinal Clarity and Legal Certainty" (2018) 49(5) IIC 536 (especially at 544–548). The author is grateful to the anonymous referee for suggesting the inclusion of this footnote.

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