Court of Justice of the European Union: Case Nils Svensson and Others v Retriever Sverige AB

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On 13 February 2014, the Court of Justice of the European Union (CJEU) delivered a preliminary ruling after a request from the the *Svea hovrätt* (Svea Court of Appeal) in Sweden.

The national proceedings relate to a case between three journalists (the "applicants") and Retriever Sverige AB (Retriever Sverige), a Swedish company operating a website that provides its clients with lists of clickable Internet links to articles published by other websites.

The applicants had written articles that were published in a Swedish newspaper as well as on that newspaper's website (where the articles were freely accessible). Retriever Sverige's website included clickable Internet links (hyperlinks) redirecting users to the articles in which the applicants held copyright. The applicants initiated proceedings under the Swedish Act on Copyright in Literary and Artistic Works (1960:729) against Retriever Sverige claiming compensation on the ground that Retriever Sverige had made unauthorised use of their articles, by making the article available to its clients through hyperlinks.

By a judgment of 11 June 2010, the court of first instance rejected their application as the court found that the (reference) linking did not constitute a relevant exploitation of the copyright of the articles in question. The applicants then appealed to the Svea Court of Appeal which decided to refer four questions to the CJEU.

The first three questions were answered jointly and essentially concerned the issue of whether Article 3(1) of Directive 2001/29/EC (InfoSoc Directive) must be interpreted as meaning that providing clickable links to protected works on a website, which are freely available on another (initial) website, constitutes an act of communication to the public.

The CJEU considered that the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of Article 3(1) the InfoSoc Directive. Moreover, the 'act of communication' such as that made by the manager of a website by means of clickable links is aimed at all potential users of the site managed by that person,

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was found to be directed to an indeterminate and fairly large number of recipients. Such communication was held to be made to a ‘public’ accordingly.

According to the CJEU the decisive factor in determining whether the authorisation of the copyright holders was required for a communication to the public by making the article available to its clients through hyperlinks was whether the communication was to a ‘new’ public.

The CJEU went on to hold that, “where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.” Under such circumstances there is no ‘new’ public and authorization of the copyright holders is not required for a communication to the public.

The CJEU added that this conclusion could not be questioned even if the work would appear in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site. The CJEU makes no distinction with regard to the nature of the linking used.

On the last question the CJEU considered that the objective of the InfoSoc Directive would inevitably be undermined if the concept of communication to the public were construed as including a wider range of activities than those referred to in Article 3(1) of the InfoSoc Directive; a Member State must refrain from exercising the right granted to it by Article 20 of the Berne Convention. Therefore the CJEU found that the InfoSoc Directive precludes a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.

It is now for the Svea Court of Appeal to apply the criteria established by the CJEU on the national case.

Judgment of the Court (Fourth Chamber), Nils Svensson and Others v Retriever Sverige AB, Case C-466/12, 13 February 2014

http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=34059

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