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Hyperlinking and Copyright Infringement in the EU

Julia Launders

In recent years, the Court of Justice of the European Union has delivered important judgments clarifying the relationship between hyperlinking and copyright infringement, namely in *Svensson* and *GS Media*. In the age of the internet, these judgments are critical for elucidating the level of protection afforded to authors online, specifically for how the right of a communication to the public applies to hyperlinked works. The aim of this article is to critically examine these judgments and their implications for affected stakeholders. This article will first demonstrate how definitional uncertainty of the concept of a communication to the public paved the way for two separate tests for hyperlink liability. Each test is examined in turn, examining the advantages and disadvantages of the objective test in *Svensson* and the subjective test in *GS Media*. However, the greatest problem in the current law is the risk that subsequent cases will not recognise these tests as being different. This is because *GS Media* interprets *Svensson* as affirming the importance of the consent of the right holder - falsely re-characterising it as subjective, which is a problem best exemplified in the case of *Renckhoff*. It is submitted that unless future courts recognise the difference in approach in *Svensson* and *GS Media*, *Svensson* will be misapplied and lead to anomalous results, further fragmenting an already complex area of law.

Introduction

The relationship between hyperlinking and copyright infringement is fraught with complexity. The following paper will critically evaluate this relationship within the European Union (EU),¹ as set out by the Court of Justice of the European Union (CJEU) in *Svensson*² and *GS Media*.³ The first section will illustrate the background to understanding this complicated relationship, namely by examining what hyperlinks are and how they relate to copyright. The second section will outline how the prior lack of a clear definition of a communication to the public in the CJEU laid the foundation for two different tests for hyperlink liability within *Svensson* and *GS Media*. The third and fourth sections proceed to outline how the test for hyperlink liability in *Svensson* is objective whilst the test in *GS Media* is subjective, as well as the shortcomings of each approach. The greatest problem in this area of law, however, is not necessarily the divergence in approach. The greatest problem is the risk of subsequent cases reformulating *Svensson* as a subjective test, as a result of the judgment in *GS Media*. Rather than distinguishing the objective approach of the court in *Svensson*, *GS Media* falsely attributes the previous court as affirming the subjective consent of the copyright holder. This problem

¹ The scope of this paper is confined to examining rights afforded to authors under the Information Society Directive, and as such is not concerned with Related Rights, Database rights under the Database Directive or copyright under the Software Directive.

² Case C-466/12 *Svensson v Retriever Sverige AB* [2014] ECLI:EU:C:2014:76.

³ Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* [2016] ECLI:EU:C:2016:644.

is examined in the fifth section through the case of *Renckhoff*.⁴ Finally, the paper concludes by summarising the current state of the law.

1. Background

A hyperlink is an icon or text on a website, typically visually emphasised in some way, that when clicked takes the end-user to another website (target website) either in a new window or replacing the current window. As such, the act of hyperlinking is when a party posts a hyperlink on a website. It is the action of this party (the linker) in posting a hyperlink on a website (host website) that is the central focus of this paper.⁵

A detailed technical explanation of hyperlinks is beyond the scope of this paper. However, there are three key features of hyperlinks that must be borne in mind.⁶ The first is that hyperlinks are indispensable to the operation of the internet. The fruition of the World Wide Web was founded on the unrestricted ability to link between web pages and this ability is imperative for its continued functionality.⁷ The second feature is that the linker at no stage reproduces or copies the contents of the target website. When an end-user clicks the hyperlink, their web browser is directed to the target website as if the user had entered the website address into the browser themselves. The last feature is that different forms of hyperlinks exist, such as embedding or framing. These make it appear to the end-user as if the linked content forms part of the host website.⁸

The ubiquity of hyperlinking has troubled authors of copyright works. Hyperlinks can direct users to websites that contain protected works. As such, the central question is whether the act of hyperlinking to protected works infringes the copyright subsisting in those works. The answer to this question depends primarily on whether the act of hyperlinking falls within the exclusive rights of the author. These rights are harmonised in Directive 2001/29/EC (InfoSoc Directive) which provides authors with the right to authorise or prohibit any reproduction,

⁴ Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] ECLI:EU:C:2018:634.

⁵ This paper is not primarily concerned with the actions of end-users or ISPs. Nor is it concerned with instances where a work is reproduced in the hyperlink icon.

⁶ For a technical explanation see Graham Smith, *Internet Law and Regulation* (4th ed, SM 2007) 56-8.

⁷ Andrew Murray described hyperlinking as being akin to the DNA of the World Wide Web in *Information Technology Law: The Law and Society* (3rd edn, OUP 2016) 276; Smith (n 6) 56.

⁸ For embedded links (in-line linking) see Smith (n 6) 58. For framing see Smith (n 6) 75-6; Tanya Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (Hart Publishing 2005) 157-9.

communication to the public, or distribution of their work.⁹ It is established that the act of hyperlinking primarily engages the right of authors to communicate to the public.¹⁰

Article 3(1) of the InfoSoc Directive ensures that authors are provided with the exclusive right to authorise or prohibit any communication to the public.¹¹ Article 3(3) ensures that this right is non-exhaustible. Hyperlinking will thus infringe copyright when it constitutes an unauthorised act of communication to the public. Unfortunately, the InfoSoc Directive does not define what constitutes a communication to the public (or CTTP). This means the burden has fallen on the CJEU to define the concept. It is this absence of a definition that has led to the difficulties in determining liability for copyright infringement. As will be demonstrated in the next section, the lack of a legislative definition coupled with the inconsistent case law of the CJEU allowed the court to fashion two separate tests for hyperlink liability in *Svensson* and *GS Media*.

2. What is a Communication to the Public?

The core dilemma within this area of law is an absence of a unified conception of a CTTP within the CJEU. Prior to its judgments on hyperlinks, the concept of a CTTP had been outlined in a number of cases, primarily dealing with transmissions.¹² Each of these cases generally defined the concept as consisting of an ‘act of communication’ which is communicated towards ‘a public’. However, not only are the definitions of these elements not consistent in the case law of the CJEU, but the criteria used to determine them are not entirely clear. As observed by Midelieva, in determining whether a CTTP existed, the case law has identified the criteria of ‘new public’,¹³ ‘indispensability’, ‘full knowledge’, and ‘profitmaking intention’ as relevant.¹⁴ However which of these criteria apply for determining a CTTP is not clear nor consistent. The result is that there is no uniform definition of a CTTP applied throughout the cases. Clark and Dickenson have observed that the lack of guidance on the

⁹ 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] OJ L167/10.

¹⁰ As noted by Tatiana Eleni Synodinou who observes that the right of communication to the public has ‘proved to be the cornerstone for the application and enforcement of copyright on the internet’ in ‘Decoding the Kodi box: to link or not to link?’ (2017) 39 (12) EIPR 733.

¹¹ This right includes the narrower right of making available to the public which is intended to cover interactive and on-demand transmission. See Case C-279/13 *C More Entertainment AB v Linus Sandberg* [2015] ECLI:EU:C:2015:199.

¹² For an overview of the development of the concept of CTTP, see Birgit Clark and Julia Dickenson, ‘Theseus and the labyrinth? An overview of “communication to the public” under EU copyright law: after Reha Training and GS Media Where are we now and where do we go from here?’ (2017) 39(5) EIPR 265.

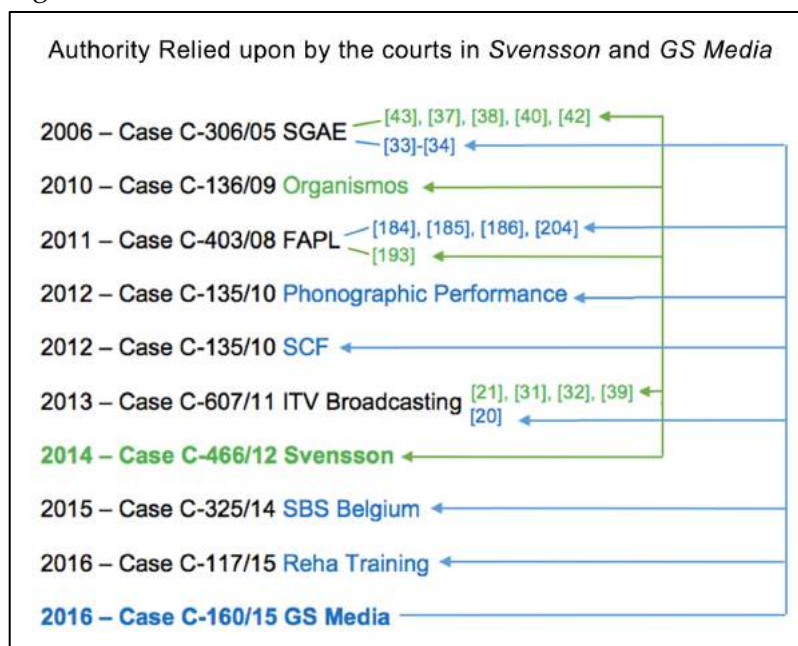
¹³ Pauline McBride notes how this criterion has developed in a ‘haphazard’ fashion and traces its development in ‘The “new public” criterion after *Svensson*: the (ir)relevance of website terms and conditions’ (2017) 63(7) IPQ 262.

¹⁴ Lyubomira Midelieva, ‘Rethinking hyperlinking: addressing hyperlinks to unauthorised content in copyright law and policy’ (2017) 39(8) EIPR 479, 482.

application of these criteria means that ‘there are various potential combinations and permutations’ of tests for CTTP - a statement that rings especially true in the context of hyperlinking.¹⁵

The lack of a clear consistent definition of CTTP allowed for the development of separate tests of liability in *Svensson* and *GS Media*. Rather than ‘building a solid conceptual core for this right’, the CJEU in each case chose to rely on conflicting authority.¹⁶ This not only led to separate tests, but delegitimises the authority of the court. The following diagram (Figure 1) illustrates which cases were relied upon as authority in *Svensson* and *GS Media*. The clear selectivity of different authorities for CTTP is evident. There is no use of the same authority in either of the cases, as the courts chose to rely on different preceding cases. In the event that they rely on the same preceding case, they rely on completely different parts of the judgment. Admittedly, the court is free to proceed with an inconsistent pick-and-mix approach in choosing which authority to support their definitions of CTTP. As Mideliéva¹⁷ and Ramalhão¹⁸ observe, this is because the CJEU is not bound to follow its previous judgments in the absence of a doctrine of binding precedent. However, such an explanation does not legitimise the court’s approach when their very purpose is to provide harmonised protection for authors. As a result of an inconsistent definition of CTTP, the court in *Svensson* and *GS Media* has set out different tests for hyperlink liability.

Figure 1.¹⁹



¹⁵ Clark and Dickenson (n 12). They proceed to note in their criticism that ‘[s]imply stating that these criteria should be combined, without stating how, only tells half of the story and inevitably results in uncertainty’ at 268.

¹⁶ Synodinou (n 10) 736.

¹⁷ Mideliéva (n 14) 482.

¹⁸ Ana Ramalho, ‘The Opinion of AG Wathelet in *GS Media*: what’s in a ‘precedent?’ (26 April 2016), <<http://kluwercopyrightblog.com/2016/04/26/opinionagwathetletgsmediawhatsprecedent>> accessed 15 January 2020.

¹⁹ Diagram is made by author.

The definition of a CTTIP in *Svensson* is based on a sequential test, each step determined objectively. The court held that a communication to the public consisted of ‘two cumulative criteria’.²⁰ The first was whether an act of communication had occurred. This would be satisfied if the act made the work available to the public in a way that was accessible to them, regardless of whether the public actually accessed it.²¹ The second criterion was whether that act had been communicated to a public, which they held to be an ‘indeterminate number of potential recipients’ as well as a ‘fairly large number of people’.²² They further noted the requirement that in cases where the work was communicated with the ‘same technical means’,²³ it was further necessary that the act be communicated to a ‘new public’ - essentially introducing a third criterion.²⁴ They held ‘new public’ to mean the ‘public that was not taken into account by the copyright holder when they authorised the initial communication to the public’.²⁵ The court further took into account the intervention, or indispensability, of the linker when considering the new public.²⁶ In this way, the court conceived CTTIP as consisting of three elements to be examined consecutively: (1) whether there was an act of communication, (2) whether it was communicated to a public, and (3) whether that public was a new public.

This conception is starkly contrasted with that set out in *GS Media*.²⁷ The court initially notes that CTTIP includes the two cumulative criteria of an ‘act of communication’ and communication to a ‘public’.²⁸ However, they proceed to state that the test required an ‘individualised assessment’ of ‘several complementary criteria, which are not autonomous and are interdependent’.²⁹ They noted that the presence of these criteria may differ depending on the factual circumstances before it and so any assessment of them required both an assessment of the individual criteria as well as how the criteria related to one another.³⁰ The first factor of relevance was the ‘indispensable role played by the user and the deliberate

²⁰ *Svensson* (n 2) [16].

²¹ This part of the judgment is drawn by analogy from Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECLI:EU:C:2006:764.

²² *Svensson* (n 2) [21]; This expanded definition taken from Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchUp Ltd* [2013] ECLI:EU:C:2013:147.

²³ *ibid*; A criterion first identified in the case quoted.

²⁴ *Svensson* (n 2) [24]; The new public criterion was first identified in *SGAE* (n 21).

²⁵ *ibid*. This definition aligns more with the definition set out in Case C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* [2011] ECLI:EU:C:2011:631.

²⁶ Cheng Lim Saw, ‘Linking on the internet and copyright liability: a clarion call for doctrinal clarity and legal certainty’ (2018) 49(5) IIC 536; Mideliava (n 14); Stavroula Karapapa, ‘The requirement for a “new public” in EU copyright law’ (2017) 42(10) EL Rev 63; Saw, Mideliava and Karapapa all note that the court considers indispensability as an aspect of the new public, whereas previous cases have considered it when determining whether there was an act of communication.

²⁷ The court in this case instead chose to draw on the previous cases of Case C-135/10 *Phonographic Performance (Ireland) Limited v Ireland and Attorney General* [2012] ECLI:EU:C:2012:141 and Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* [2016].

²⁸ *GS Media* (n 3) [32].

²⁹ *ibid* [33].

³⁰ *ibid* [34].

nature of its intervention'.³¹ The court defines an act of communication based on whether it is a deliberate intervention to give access with 'full knowledge' and to protected works.³² The second factor of relevance is the concept of the 'public' - the meaning of which they shared with the court in *Svensson*.³³ The third factor was the commercial nature of the communication.³⁴

The key differences in approach between the two previous cases are clear. *Svensson* considers CTTIP to be made up of tripartite elements: an act of communication, communication to a public, and a new public. All elements must be satisfied for CTTIP to exist and the absence of any element means there has not been a CTTIP. In contrast, the court in *GS Media* conceived of CTTIP as factually sensitive and dependent on the nature and presence of varying factors. The relevant factors for consideration included criteria far beyond what was considered relevant by the court in *Svensson*, including the role of the linker and the profit-making nature of the act. The benefit to the test in *Svensson* is that it guarantees a certain outcome - either an act consists of all three required elements or it does not. The downside to this test is that it does not adapt to different factual contexts well, which is something that the *GS Media* conception can do. These separate tests for determining a CTTIP are the starting point for unravelling the tangled web of hyperlink liability for copyright infringement. Before considering when each test applies and how they are to be reconciled with each other, it is necessary to consider the approach of each court in detail. The following sections will demonstrate how the test in *Svensson* is objective whilst the test in *GS Media* is subjective.

3. Hyperlink Liability under *Svensson*

Svensson was the first opportunity of the CJEU to rule on whether a hyperlink constituted a CTTIP. As already outlined, the court defined a CTTIP as occurring where there existed: an act of communication, that such act was communicated to a public as well as to a new public. In the application of this test, it is clear that the court assesses each of these elements objectively. The test is objective because it determines whether the general act of hyperlinking is a CTTIP, and does not consider subjective factors such as whether the author has consented to publication, or the knowledge or role of the linker. As such, it focuses on assessing the act itself, not on the mental states of any of the parties. In the case, the authors concerned were a set of journalists who published articles on a newspaper website and all these articles were freely accessible online. The linker was Retriever Sverige who operated a website that provided to its users a set of clickable links to articles from other websites,³⁵ some of which

³¹ *ibid* [35].

³² Some, such as Mideliava (n 14), seem to think the court considers indispensability as part of the 'new public' criterion, but the clear use of the word 'an act of communication' indicates the court is cognizant of this criterion coming within the act of communication assessment. Furthermore, Christina Angelopoulous praises the court in *GS Media* for returning the focus of the test on the 'act of communication' rather than the 'new public' criterion. See Christina Angelopoulous, 'Hyperlinks and copyright infringement' (2017) 76(1) CLJ 32, 34.

³³ *GS Media* (n 3) [36].

³⁴ *ibid* [38]; This criterion was first identified in *ITV Broadcasting* (n 22).

³⁵ This practice is known as deep-linking.

were direct links to articles by the authors. The authors objected to this practice on the basis that the provision of these links constituted a CTTTP.

The court, having outlined its understanding of what constituted a CTTTP, proceeded to examine whether the act of hyperlinking in these circumstances infringed the rights of the authors. Firstly, they determined that the provision of hyperlinks constituted an act of communication on the basis that the hyperlinks afforded direct access for users to the works of the author and made those works available for access, regardless of whether the works were actually accessed.³⁶ The court has based this conclusion on the objective question of the accessibility of the works, not on the intentions or knowledge of the linker or the copyright holder. Secondly, they determined that such an act of communication was also made to a public. It was found to be communicated to the public because this act of communication 'by the manager of a website...is aimed at all potential users of the site managed by that person, that is to say, an indeterminate and fairly large number of recipients'.³⁷ As such, 'it must be held that the manager is making a communication to the public'.³⁸ Similarly, in assessing this second element, the court examines who objectively had access to the linker's website. Thus far, the provision of hyperlinks in this case satisfied the first two criteria.³⁹

The court held that the final criterion - whether the act of communication was communicated to a new public - had not been satisfied. The definition of a new public was, it recalled, 'a public that was *not* taken into account by the copyright holders when they authorised the initial communication to the public'.⁴⁰ This aspect of the judgment must be read carefully as it is easy to attribute the judgment as requiring an examination into the 'mental state of the author'.⁴¹ The court does not in fact engage in a subjective examination as to the consent of the author. Rather, the court concludes, by virtue of the fact that users could freely access the original articles themselves, that they must thus be deemed to comprise the public intended by the initial communication.⁴² In other words, because the works could easily be accessed by the users themselves, it must be presumed that they were the target of the initial communication and so did not form a new public. As such, the provision of hyperlinks could not be considered a CTTTP on the basis that they were not communicated to a new public. That outcome would continue to be true, they held, if the hyperlinks appeared as if they belonged to the host website.⁴³ The result would be different, however, if the work was published on a website with restrictions in place and the hyperlink permitted access to that work by

³⁶ *Svensson* (n 2) [18], [20]; Emanuela Arezzo has criticised this finding on the basis that the court offers little to no substantive justification for this conclusion in 'Hyperlinks and making available right in the European Union – what future for the Internet after *Svensson*?' (2014) 45(5) IIC 524, 538.

³⁷ *Svensson* (n 2) [22].

³⁸ *ibid* [23].

³⁹ As noted by Arezzo (n 36) and Karapapa (n 26), what is apparent in the judgment is how short the court spends on the first two limbs of the test. This is particularly disappointing considering many commentators disagree with the classification of hyperlinking as an act of communication.

⁴⁰ *Svensson* (n 2) [24] (emphasis added).

⁴¹ Alexander Ross and Claire Livingstone, 'Communication to the public: Part 1' (2012) 23(6) EntLR 169, 171.

⁴² *Svensson* (n 2) [26]-[27].

⁴³ *ibid* [29]-[30]; This finding was upheld by a subsequent case of the court in Case C-348/13 *BestWater* [2014] ECLI:EU:C:2014:2315.

circumventing said restrictions, in which case it would be communicated to a new public. It would also constitute a CTPP if the work was no longer accessible on the website of the initial communication or only accessible to a 'restricted public'. This assessment of a new public is not determined by subjectively examining who the copyright holder had in mind when they authorised the initial publication, rather, it is based on the objective accessibility of the works.

The problem with a strictly objective conception of CTPP in these circumstances is that it effectively exhausts the right of communication to the public once a work is published online and is not sensitive to different factual circumstances that may fundamentally alter the nature of the hyperlink. Firstly, hinging the assessment of a new public on the objective fact that users could freely access the works themselves is to effectively exhaust the authors CTPP right as soon as it is published and freely accessible on the internet.⁴⁴ By finding that all potential internet users are part of the public of the initial communication, the court has effectively declared that there will never be a new public for any republication of the work on the internet where it is freely accessible. This is despite the fact that the CTPP right is expressly held to be a non-exhaustible right.⁴⁵ Karapapa argues that the effect of *Svensson* is not an exhaustion of the right, but rather an acceptance of the implied licence doctrine.⁴⁶ However, this argument assumes that the objective fact of whether the work is freely accessible online, which is the basis of the court finding no new public, is a reflection of the intent of the author. The reality is that, as McBride notes, the objective access of the target website does not mean that the author has subjectively consented to the access of their work.⁴⁷ The result of this effect is that authors may be disinclined to publish their works online or license their works which leads to defensive practice by authors, consequently hampering the free flow of information on the internet.

The second shortcoming of this objective approach is that the court's decision is binding on all similar types of hyperlinking. It is not sensitive to different facts such as the type of hyperlink used and the knowledge of the linker thereof as well as the profit-making nature of the link. Regarding different forms of hyperlinking, the court finds that its determination is not altered if a hyperlink appears as if it is part of the host website. In making no distinction between different forms of hyperlinking, the court accepts the practice of embedding and framing which makes it possible for website operators to deceive internet users as to the origin of the works.⁴⁸ An author has no control over how their work may be framed, embedded, or even hyperlinked to, even though the courts have emphasised the preventive nature of the right.⁴⁹ The European Copyright Society approve that no such distinction should be made as to the form of hyperlink, as other avenues of redress in unfair competition law and moral

⁴⁴ As identified by the ALAI in ALAI Report and Opinion on a Berne compatible reconciliation of hyperlinking and the communication to the public right on the Internet.

⁴⁵ Article 3(3) of the InfoSoc Directive.

⁴⁶ Karapapa (n 26) 74.

⁴⁷ McBride (n 13) 272-276.

⁴⁸ 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, 329.

⁴⁹ See *Reha Training* (n 27) [30]; *Renckhoff* (n 4) [29].

rights can provide adequate protection for authors.⁵⁰ However, as Leistner notes, these legal frameworks would provide ineffective protection as they have not been harmonised at EU level.⁵¹ It is submitted that as such, the type of hyperlinking is of significant concern, particularly when popularity of websites is often determined by the amount of times it is linked to - something which framing impacts.

4. Hyperlink Liability under *GS Media*

Having considered the objective approach in *Svensson* and its accompanying difficulties for the effective protection of authors, the following section considers the contrasting approach of the court in *GS Media*. It might be considered that the difficulties for authors presented by the objective approach in *Svensson* is perhaps the reason why the court in *GS Media* opted to refashion a new conception of CTTIP. In *GS Media*, the author was the company Sanoma who had been transferred ownership of photographs intended to be published in a *Playboy* magazine. The linker in this case was a Dutch website that had acquired a link to a page on *Filefactory.com*, which allowed the photographs in question to be downloaded from the target website. The publication of these photographs on the target website was made without the authorisation of the right holder and so differs in this respect to *Svensson*. The linker proceeded to post this hyperlink on their website in a series of articles. Had the court applied the *Svensson* test to these facts, it would have been found that the hyperlink in question was a CTTIP as it would have been communicated through a different technical means. The court, however, chose to adopt an entirely separate approach.

As outlined in the third section, the conception of CTTIP by the court in this case constituted an individualised assessment of a variety of related factors. Before examining those criteria in light of the facts, the court expressly distinguished the finding in *Svensson*, noting that that case was not authority for the proposition that there was a blanket exemption on hyperlinks from the scope of CTTIP.⁵² The court went on to engage in a novel human rights assessment, in light of submissions that categorising all hyperlinks to works published on the internet without the right holders consent as a CTTIP would be too restrictive in light of the Charter of Fundamental Rights.⁵³ The court emphasised the importance of hyperlinks for the ‘sound operation’ of the internet which guaranteed the freedom of expression and the freedom of information.⁵⁴ They further noted the practical difficulty of internet users in ascertaining whether a work on a website had been published with the consent of the right holder or not, something not acknowledged by the court in *Svensson*.⁵⁵

Having considered the rights at stake, the court went on to find that the liability for copyright infringement of linkers depended on their intention and whether their action constituted an intervention without which users would find it difficult to access the work. This reframes the

⁵⁰ European Copyright Society, ‘Opinion on the Reference to the CJEU in Case C466/12 *Svensson*, 15 February 2013’ (20 February 2013).

⁵¹ Leistner (n 48) 330.

⁵² *GS Media* (n 3) [43].

⁵³ *ibid* [44]; Saw (n 26) 547-548.

⁵⁴ *GS Media* (n 3) [45].

⁵⁵ *ibid* [46].

assessment in subjective terms by focusing on the intention of the linker. Where a linker provided a hyperlink for non-profit purposes, as a rule, they are considered not to have knowledge of the illegal nature of the work, unless it can be shown that they knew or ought to have known otherwise. Any attribution of knowledge on the part of the linker constitutes a CTTT. A presumption of knowledge applies to linkers who post commercially, as they are deemed to have '[carried] out the necessary checks'.⁵⁶ Unless this presumption can be rebutted, the linkers are considered to have carried out a CTTT. The court further noted that authors always have the option of notifying linkers of the illegal nature of the work, in which case those linkers are imputed with knowledge and cannot rely on the exemptions under article 5(3) InfoSoc Directive.⁵⁷ Thus, liability under the *GS Media* test does not hinge on the objective factor of whether the work was accessible, such as the case was in *Svensson*. Instead, it is dependent on the subjective factors relating to the linker. On the facts of this case, they found the provision of hyperlinks constituted a CTTT as the linker, posting for-profit, could not rebut the presumption of knowledge as they had been notified several times by the authors of the illegal nature of the work.

Whilst finding on the facts of this case, the court's adoption of an individualised assessment means it did not provide an exhaustive answer as to whether all hyperlinks to illegal works constituted an act of CTTT. This determination, they hold, is dependent on the subjective intention of the linker. This is a blatant shift from basing hyperlink liability on the objective facts of a case to subjective factors.⁵⁸ Clark and Dickenson describe this shift as an injection of a mens rea requirement into CTTT.⁵⁹ In particular, the court has brought the focus of its reasoning onto three subjective features: the consent of the right holder, the knowledge of the linker, and the profit-making nature of the hyperlinking. Whilst the intention of the court to bring focus to these subjective elements was well motivated,⁶⁰ it is a radical departure from the objective conception of CTTT in *Svensson*.

The problem with having two clearly conflicting approaches to CTTT is that these must be reconciled. *GS Media* does this by distinguishing *Svensson* on the basis that it only applies to cases where the work was initially published online with the consent of the right holder and notes that *Svensson* confirms the importance of the consent of the right holder. However, in doing so, *GS Media* refashions *Svensson* in subjective terms, a problem that is explored in greater detail in the next section.

5. *GS Media* Reformulates *Svensson* as Subjective: The *Renckhoff* Problem

What has thus far been demonstrated is that the test for hyperlink liability is drastically different in *Svensson* and *GS Media*. Crucially, however, one of the greatest problems with the

⁵⁶ *ibid* [51].

⁵⁷ *ibid* [53].

⁵⁸ 'There is a significant shift towards the conscience, knowledge and intention of the person who offers the hyperlinks, which appears to mutate the absolute character of the rights granted by copyright' Synodinou (n 10) 735.

⁵⁹ Clark and Dickenson (n 12) 269.

⁶⁰ 'The emphasis on the deliberate intervention and intentions of the linker injects a touch of fairness and equity into the application of this right' Synodinou (n 10) 736; Also confirmed by Leistner (n 48).

current law is this new element of the consent of the copyright holder to the initial publication and the risk this presents to diluting the objective standard in *Svensson*. Specifically, *GS Media* falsely categorises the test in *Svensson* as confirming the subjective consent of the copyright holder to the initial publication. The following section will outline why *Svensson* is not a confirmation of the consent of the copyright holder and why it is problematic that *GS Media* held that it did.

The key criterion for the court in *Svensson* in determining whether a hyperlink constitutes a CTTIP is whether it is communicated to a new public. *GS Media* reinterprets this case as emphasising the importance of the consent of the author, as on the facts of *Svensson* the journalists consented to the initial publication of the work on the internet. However, this would be a false understanding of *Svensson*. The court in *Svensson* neither considers nor engages with the consent of the right holder. It applies its test and finds that but for the requirement of a 'new public', hyperlinks would have infringed copyright as they constitute both an act of communication and are communicated to a public. In examining the requirement of a 'new public', the court does not engage whatsoever with the question of whether the author consented to its initial publication of the work online. Instead, it infers consent by concluding that the public intended by the initial publication consisted of all potential visitors to the site because of the objective fact that the works were freely accessible to users. This point is also confirmed by McBride who notes 'the effect [is] that "accessibility" is treated as an objective question, unrelated to the scope of the copyright holder's authorisation'.⁶¹ In this way, the court does not consider the consent of the author, but rather finds that the author has given consent *because* their works are freely accessible by internet users.⁶²

The problem, however, is that *GS Media* has reframed the test in *Svensson* as consisting of a subjective examination into the consent of the copyright holder. The false re-characterisation of *Svensson* as subjective is most evident in the recent case of *Renckhoff*.⁶³ The facts of the case concerned the publication of a photograph on a website with the consent of the right holder. The photograph was subsequently downloaded and republished on another website without the consent of the right holder. If one applies the test in *Svensson*, the consent of the right holder is not relevant in determining whether the act is a CTTIP. The determinative factor is whether the republication on the second website is communicated to a new public. Under this test, the public of the initial communication should have been held to be all internet users because the work was freely accessible on the original website and there were no restrictions

⁶¹ McBride (n 13) 273.

⁶² *ibid* 272-276; McBride examines this, noting further that whether the initial website can be accessed does not equate to the copyright holders' intention, as it amounts to equating the actions of the owner of the initial website with the subjective intentions of the copyright holder.

⁶³ *Renckhoff* (n 4).

in place on the original website. Thus, the republication would not have amounted to a communication to a new public and would not have been a CTTT.

However, the court in *Renckhoff* came to the opposite conclusion and found that the republication was communicated to a new public. They held that ‘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’.⁶⁴ Immediately, the focus of the court in assessing the new public criterion is on ‘the public taken into account by the copyright holder when he consented’ to the initial publication.⁶⁵ First, the court examines whether the author consented to the republication of their work on another website. If no consent is found, they conclude that the republication was directed at a new public. This is in stark contrast to the language used in *Svensson* which focuses on ‘the public targeted by the initial communication’,⁶⁶ not on the public targeted subjectively at the time of the initial publication by the copyright holder as in *Renckhoff*. This newfound importance of the subjective consent of the copyright holder in *Renckhoff* can easily be attributed to *GS Media*. In *Svensson*, consent is not mentioned once – the court only mentions the *authorisation* of the copyright holder. Crucially, any such finding of authorisation by the copyright holder in *Svensson* is based on the objective fact of whether the work was freely accessible, not an assessment of whether the copyright holder subjectively consented. The first mention of consent is only in *GS Media*.

As a result of *GS Media*, the objective test in *Svensson* has been re-characterised in favour of the subjective consent of the copyright holder in *Renckhoff*. *Renckhoff*, furthermore, considers in its assessment of the new public criterion the lack of consent of the copyright holder of the republication, whilst in *Svensson*, the lack of the authors’ consent as to the hyperlinking of their works was irrelevant. Crucially, in *Renckhoff*, the court held that in assessing whether a new public existed, it was completely irrelevant that the copyright holder ‘did not limit the ways in which internet users could use the photograph’.⁶⁷ This reasoning is also at odds with *Svensson*, which considers the presence or absence of restrictions on websites as an objective manifestation of the authorisation of the author. The shift in focus in *Renckhoff* is to the subjective intention of the copyright holder, rather than the objective fact that the work was freely accessible on the initial website.

It is thus clear that *Svensson* outlines an objective test and does not conduct a subjective assessment of the consent of the copyright holder, despite the re-characterisation by *GS Media*.

⁶⁴ *ibid* [35] (emphasis added).

⁶⁵ *ibid* [35].

⁶⁶ *Svensson* (n 2) [24].

⁶⁷ *Renckhoff* (n 4) [36].

This conclusion is vital for ensuring that the tests for hyperlink liability in each case are correctly applied in future cases, both at European and domestic level. Distinguishing *Svensson* as applying to cases where the initial online publication is consented to by the author does not mean that the test in *Svensson* changes. It is still objective; *GS Media* simply limits the applicability of the objective test to cases where the author initially consented to the publication of the work online. It would be wrong to interpret the objective test as requiring a subjective examination into the mental state of the copyright holder. Initial consent is simply a pre-requisite for the applicability of objective test in *Svensson*. Once this is understood, it is evident that *Renckhoff* has misapplied the objective test of CTTTP in *Svensson*.

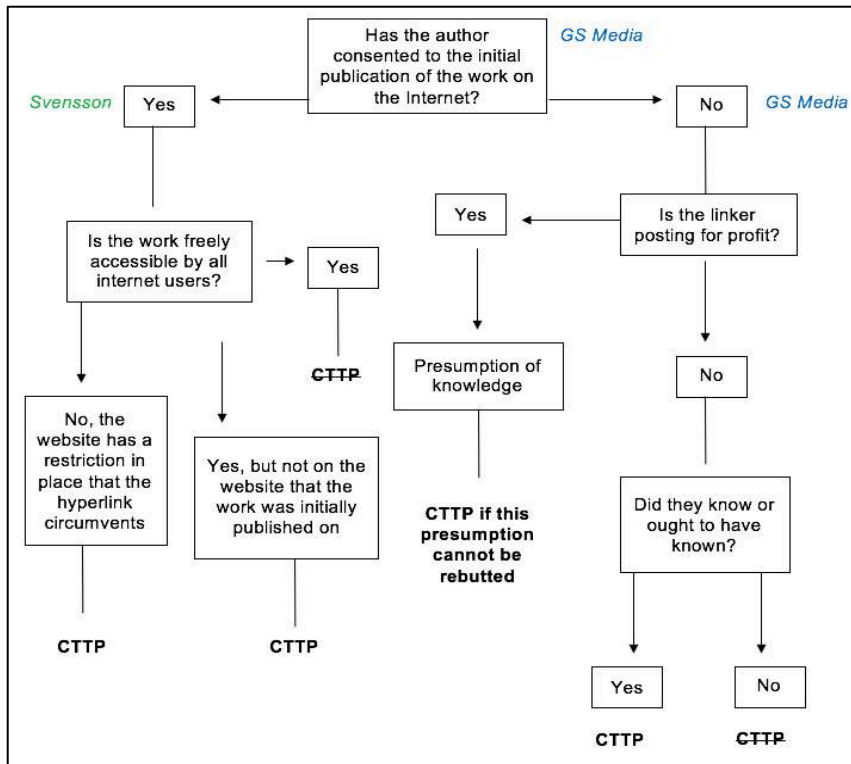
Conclusion

What has been demonstrated is that the test for hyperlink liability is drastically different in *Svensson* and *GS Media*. The test in *Svensson* evaluates whether a CTTTP has occurred as an objective question of fact. The test in *GS Media*, however, no longer determines whether a CTTTP occurs; instead, it focuses on the knowledge of the linker of the absence of consent of the right holder. This divergence in approach was possible because of the lack of a clear and consistent definition in statute or case law of a CTTTP.

The outcome is that there is no single overarching test for liability, but rather which test applies, *Svensson* or *GS Media*, depends on whether the work was initially published online with the consent of the right holder. It is, however, important not to incorporate the subjectivity of the consent of the copyright holder into the objective test in *Svensson*, a risk which materialised in *Renckhoff*. The following diagram (Figure 2) serves to illustrate the current state of the law. If a work is initially published online with the consent of the right holder, then the objective test in *Svensson* applies. If the work was not initially published online with the consent of the right holder, then the subjective test in *GS Media* applies.

Figure 2:⁶⁸

⁶⁸ Diagram is made by author.



The current law is confusing, complex, and offers varying standards of protection for stakeholders, depending on whether the objective or subjective test applies. It is submitted, however, that in the absence of legislative intervention and the unlikely event of the courts applying a uniform definition of CTTIP (given the lack of consistency in the previous case law), the least the courts can do is be clear in recognising the distinction between these tests. Otherwise, characterising both tests as subjective will only lead to results that are at odds with the conclusion in *Svensson*, as demonstrated by the outcome in *Renckhoff*, and this risk is particularly heightened given that national courts may easily interpret *Svensson* in light of *GS Media* as subjective.