

UiO : **Faculty of Law**
University of Oslo

New era for hyperlinking in EU

How GS Media case influenced the Internet landscape in Europe

Candidate number: 8026

Submission deadline: 11.12.2016

Number of words: 17.746



Table of contents

1. Introduction.....	3
2. Linking cases	4
2.1. Setting the stage - The Svensson case.....	4
2.2. The elephant in the room - BestWater case.....	6
2.3. To each their own - GS Media case	7
2.4 Visit from the three wise men or... ..	8
3. Hyperlinks	9
3.1. The concept of a hyperlink.....	9
3.2. The right to make the work available	9
3.2.1. Communication to the public	9
3.2.2. Making available right	10
3.3. Legal concepts of hyperlinks previous to the Svensson decision.....	11
3.3.1. National courts on hyperlinks	11
3.3.2. Hyperlinks according to Svensson.....	12
4. Legal institutes that regulate hyperlinks in EU and in the USA	17
4.1. Secondary liability doctrine in USA	17
4.1.1. Secondary and vicarious liability	17
4.1.2. The inducement liability	18
4.2 EU secondary liability	20
4.3 Hyperlink provision as a secondary liability issue in EU.....	23
5. Impact that the GS Media case had on the online world.....	26
5.1 The test.....	26
5.2 Unfair balance of fundamental rights	29
6. Conclusion.....	34
References	37

1. Introduction

September 8th, 2016 marks the day that the practice of the Court of Justice of the EU (the Court) changed, to a degree, the established flow of data across the Internet. On this day the Court delivered a decision in the GS Media case, in which it delivered a decision that providing a hyperlink, which leads to the content that has been placed online without the authorization of the copyright holder, is an infringement of the public communication right.

This decision has shaken the online world and will definitely have a tremendous effect on the way people will use the World Wide Web in the future.¹

This Master thesis will try to answer some of the questions surrounding this decision, mainly how will it affect the future of the Internet in Europe. It will also address the reason why the Court has deliberated such a ruling and, in my view, misinterpretation of the vital institutes found in the Community law which are relevant to this ruling and which have influenced the Court to determine provision of hyperlinks as a means to make the work available to the public.

The second part of the paper will concentrate on the impact that the three decisions regarding the problem of hyperlinking, Svensson case, BestWater case and finally GS Media case had and what is the current state when it comes to hyperlinking.

In the third part a closer look will be made at the public communication right as it is established by the Directive 2001/29/EC (InfoSoc directive). This will be followed by the thorough analysis regarding the hyperlink provision and its interpretation prior and after the Svensson decision.

The result of this analysis will provide the reader with some new observations and conclusions which are in relation to the Svensson decision and which point to the misinterpretation of the institutes of the Community law in regards to the public communication right.

In the fourth part a comparative study will be devised to determine the difference between the legal texts and consequently court decisions between the US legal system and that of the EU. The chapter will focus on the US secondary liability doctrine as well as the comparative look at the legislation covering these issues in EU and in USA, mainly E-Commerce Directive (ECD) and Digital Millennium Copyright Act (DMCA), respectively. Through this comparative study it will be determined whether there is a possibility to derive secondary liability through Community law.

In the fifth part the focus will be on Court's assessment made in the GS Media of the provision of hyperlinks that lead to the infringing materials that are copyrighted. The test which determines the existence of communication to the public will be reassessed as it differs from the one present in the Svensson decision, but the main emphasis of the analysis will be put on the balance of the fundamental rights exercised by the Court and whether this exercise depicts the actual state of things.

In the conclusion all the issues will be summed up and the assessment will be delivered whether the copyright holders have been granted a proportionate protection against the

¹ Sacquet; Masnick;

infringements of their works and whether such protection could have been established through some other institute of the Community law.

2. Linking cases

2.1. Setting the stage - The Svensson case

On February 13, 2014 the Court of Justice of the European Union (CJEU) delivered a judgement in case C-466/12, the so-called Svensson case. This was the first case that delivered a decision on the topic of hyperlinking in the online sphere.

The main issue in the case was that a Swedish company Retriever Sverige AB which operates a website that provides its clients with lists of hyperlinks to articles published by other websites, have provided hyperlinks to the articles of the applicants which were found on the website of the newspaper Göteborgs-Posten.

The applicants were of the opinion that their copyright was infringed by the notion that the Retriever Sverige, through hyperlinks that were available on its website, made the pertinent work available to the public.

Four questions were referred to CJEU for a preliminary ruling:

- (1) If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive [2001/29]?
- (2) Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
- (3) When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?
- (4) Is it possible for a Member State to give wider protection to authors' exclusive right by enabling communication to the public to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29?

The first three questions were considered together and the court found that there had not been an infringement of the applicant's right to make the work available to the public and that in the said case hyperlinking had not amounted to be deemed as an act of communication to the public. It is important to stress out the wording of the Court, since it used the term 'clickable links'² in order to define hyperlinks. This leads us to conclusion that the hyperlinks in question are the ones that are simple text links that open another window when clicked upon. This claim is further established through the Court's separate elaboration on the issue of framing, a technique that provides access to the linked material within the website of the hyperlink provider.

The Court first tackled the concept of communication to the public, which by the Court's accord included two cumulative criteria:

- (1) that the act of communication of a work exist, and

² Svensson, para. 14

(2) that such work is communicated to a public.

For the first prong of the test, the Court based its decision on the fact that the act of communication should be construed broadly, as was previously determined in joined cases C-403/08 and C-429/08 FAPL,³ in order to insure a high level of protection for copyright holders, based on the Recitals 4 and 9 of the InfoSoc directive. It was concluded that since the hyperlinks afforded users of the Retriever Sverige direct access to the work in question, provision of hyperlinks had to be deemed as making the pertinent work available to the public.

The Court then considered the second prong of the test regarding the notion of the public. According to the interpretation made by the Court in the SGAE case,⁴ the Article 3(1) of the InfoSoc directive refers to the term public as an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. Since all the visitors of the Retriever Sverige website had an opportunity to access protected works through hyperlinks placed on this website this condition was successfully met and communication to the public was indeed made.

However, having in mind the previously settled case-law, such communication, which concerns the same works as those covered by the initial communication, must be made through the use of different technical means in order to be regarded as a communication to the public.⁵ The Court established that since both the initial communication and the provision of hyperlinks have been conducted through the use of Internet then this criterion had not been fulfilled.⁶

This put emphasis on the criterion whether the initial communication had been directed at a new public.⁷ This concept of a new public refers to the public not taken into account by the copyright holders at the moment of authorization of the initial communication to the public. The Court found that this condition had not been met, which it based on the fact that by not putting any restrictions on the material that was available on the applicants' website, the public that could access the works through the Retriever Sverige website was indeed taken into account by the applicants when they authorized the initial communication to the public.

As regards the question concerning the framing practice, the Court found that provision of hyperlink that allows the initial content to appear as it is an integral part of the website that provides a hyperlink to such work does not constitute public communication right.⁸

The Court was very diligent to make clear that the material in question had been authorized by the copyright holder and that there had not been any restrictions implemented on the website of initial communication of the works.⁹

The Court had not addressed the potential situation where the copyrighted material would have been placed online without authorization and then linked to by a third party, but it did deliberate on a situation in which a provision of hyperlink would allow users to circumvent the protection of the website of the initial communication of the work. Such practice,

³ FAPL, para 193

⁴ SGAE, para. 38

⁵ ITV Broadcasting, para. 39

⁶ Svensson, para. 24

⁷ SGAE, para. 40 and 42

⁸ Svensson, para. 30

⁹ Svensson, para. 27

according to the Court is to be considered as making the work available to the public and thus as an infringement of the copyright.¹⁰

2.2. The elephant in the room - BestWater case

The main question referred to the Court in this case was whether embedding a video from a third party website (in this particular case from the YouTube platform) would constitute an infringement of the right to make a work available to the public. The added shade in this case was that the video material in question had not been uploaded onto the third party's website with the authorization of the copyright holders.

Deliberating on the disputed situation the Court followed the doctrine established in the Svensson case and determined that embedding of content presents nothing more than a form of framing practices. According to the interpretation made in Svensson this form of content presentation does not present a new technical mode of communicating the work to the public, nor does it represent communication to the public if the work has already been freely available to the general public on the website of origin.¹¹

The main deficiency of this decision is that the Court never explicitly determined the effect that the work in question was not uploaded on the YouTube platform with the authorization of the copyright holder.¹²

It seems as if the Court did not want to make the decision of this impact on the functioning of the Internet, because in its decision the Court on two occasions cites the Svensson case and basically underlines that the initial communication of the work had been authorized.¹³

The question referred to the Court by the Bundesgerichtshof was whether embedding practices can be construed as a communication to the public even when the work in question is not directed to a new public nor communicated following a different specific technical means to that of the original communication, based on the facts of the case?¹⁴

In the facts of the case it is clearly established that the copyright holder, BestWater International, had not placed the video material onto the YouTube platform and that that posting was done without its consent, meaning that it was not authorized.

In its final ruling and in the paragraph 19 as well, the Court delivers that linking to a work through the technique of embedding cannot be deemed as communication to the public to the extent that the work in question is not directed to a new public nor communicated following a specific technical mode, different from original communication.¹⁵

Therefore, if we were to consider only the question and the ruling itself we would have come up with the conclusion that the question whether the pertinent copyrighted material had been

¹⁰ Svensson, para. 31

¹¹ BestWater, para. 19

¹² BestWater, para. 4

¹³ BestWater, para. 16 and 18

¹⁴ BestWater, para 11

¹⁵ BestWater, para 20

The judgement of this case was never released in English, so the only resources that are available are the French and German versions of the ruling. The trouble is that the French version states that the work in question is not transmitted to a new public, while the German version translates to the phrase that the work in question is not directed to a new public. This provides for some interpretation as to the real meaning of the provision of hyperlink and it will be assessed in the third section of the paper.

placed online with or without authorization is irrelevant and that it is up to copyright holders to monitor online use of their content.¹⁶

But, as it was stated above, it seems that the Court really did not want to deliver a decision of such magnitude and that it merely limited this decision to the question whether embedding as a linking practice can be viewed as a communication to the public as per Article 3(1) of the InfoSoc directive.

Both conclusions have their merits, the first one based on the fact that embedding is just another form of framing technique, which was decided upon in the Svensson decision, and the second one based on the clear demarcations that the communication to the public must be authorized by the copyright holder throughout the decision's text. By not addressing the elephant in the room the Court created a legal uncertainty which was finally resolved when the Court delivered a judgement in the GS Media Case.

2.3. To each their own - GS Media case

When the Court delivered the judgement in the GS Media case all the uncertainties regarding hyperlinking to the content that was uploaded on the third party websites without authorization of the copyright holder were removed.

The main object of the case was an infringement of the certain pictures, of which Sanoma, the applicant in this case, had an exclusive right to publish, as well as the authorization to exercise the rights and powers arising from the copyright. The pictures were somehow uploaded on the Internet, more precisely they were hosted on the Filefactory.com, without the consent of the copyright holder and presented a clear infringement of the reproduction right vested in him.

The Netherland's based website GeenStijl, a profit-based website focusing on gossip articles which is owned by the GS Media, published an article on its website that led to the location of these pictures, although it received an email from the applicant stating that the pictures were placed on the Internet without their permission and that they should not publish an article relating to them.

The pictures were subsequently removed from the servers of the Filefactory.com website, but the infringement was repeated again using a different hosting site, this time Imageshack.us, and the GeenStijl site again published an article with the hyperlink leading to the pictures in question. The pictures were then removed from the Imageshack.us, but the problem persisted, as the pictures moved from one host provider to another.

The Court weighed the different influences that hyperlinks have on the intellectual property right holders, the dissemination of their content over the Web, the purpose that hyperlinks have for the expansion of the freedom of expression and on the freedom to receive information. A final result is that rebuttable presumption will be established that the hyperlink provider, acting for profit, had the knowledge about the illegality of the content to which it is linking to on its webpage and will thus be liable for the infringement of the public communication right.¹⁷

¹⁶ <http://ipkitten.blogspot.rs/2014/10/that-bestwater-order-its-up-to.html>

¹⁷ GS Media, para. 51

In another accord the hyperlink is also to be regarded as a communication to the public if the hyperlink provider does not pursue profit, but it has knowledge or ought to know that the hyperlink leads to a work that is infringing on the right of the copyright holder.¹⁸

The Court had arrived to these conclusions by elaborating on previously settled case-law, with which it established a new test to determine whether hyperlinks that lead to a work that has been placed on the Internet without authorization present communication to the public or not.

The first criterion of the test concerns existence of a deliberate intervention of the hyperlink provider through which it connects end users with the work in question. The Court draws the criterion from established case-law and determines that in order for a hyperlink to be construed as communication to the public the provider of a hyperlink “intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work”.¹⁹

This is followed by the provision of the concept of the public, which is determined as an indeterminate number of potential viewers and implies, moreover, a fairly large number of people, as previously determined in the SCF and PPI cases.²⁰

In order to complete the public criterion the Court implemented the test devised in the Svensson case regarding the notion of the technical means through which the work has been communicated and the relevance of the ‘new public’ to which the pertinent content was communicated.²¹

Finally, the Court incorporates the criterion regarding the profit-making nature of the communication stating that the provision of hyperlinks will be interpreted as a communication to the public if it is done in order for the provider of the hyperlink to generate profit.²² According to this view if the provider of hyperlinks gains any sort of revenue from its online presence, the rebuttable presumption of knowledge will be present that the content had been previously placed online without the authorization of the copyright holder.

The Court finally reaches the conclusion that the respondent in this case had indeed, based on the test provided, infringed copyright in the respect that it did made the work available to the public through the provision of the hyperlink on its website.²³

2.4 Visit from the three wise men or...

The three cases which were represented determine the course that Internet will continue to develop. Many have already expressed their concerns to the future of the Internet and the freedom of expression which was best exercised over this platform,²⁴ while others, mainly intellectual property holders have welcomed the conclusions that the Court have arrived at.²⁵

The next part of the paper will delve into the essence of the problem and try to determine whether the decisions that were made are justified or not.

¹⁸ GS Media, para 48

¹⁹ GS Media, para. 35

²⁰ GS Media, para. 36

²¹ Svensson, para. 24

²² GS Media, para. 38

²³ GS Media, para. 54

²⁴ see supra note 1

²⁵ Collins and Swindells, p. 3

3. Hyperlinks

This chapter aims at providing answers whether the Court's reasoning in the depicted linking cases is of any merit. In order to do so a concept of the hyperlink will firstly be inspected. This will be followed by the overview of the public communication right and finally an insight as to how the hyperlinks were regarded before and after the Svensson decision.

3.1. The concept of a hyperlink

While working at CERN, Sir Tim Berners Lee developed an idea that would allow scientist working in different departments at CERN a better way of communication over the Internet. He combined a protocol that used hypertext (HTTP) with the Transmission Control Protocol (TCP), the heart of the Internet, together with the domain name system and the platform was born - the World Wide Web (the Web).²⁶

Through the use of hypertext, which is basically any document that contains links that lead to different documents found on the Internet,²⁷ Berners was able to allow easier access to the research documents of a vast number of unsorted material the scientists at CERN had created over the years.²⁸ This allowed for a much easier communication.

Hyperlinks are at the center of the Web,²⁹ well actually their central feature, the so-called URL (Uniform Resource Locator). The URL represents a location where a certain resource is found on the Internet, it is a mere reference to the resource and it serves as the resource's identification.³⁰

Basically, hyperlinks allow users to access the wanted materials without having to duplicate the material on multiple websites, but they serve other functions as well. Since the Web had overgrown its initial scientific settings and became a place where people conduct business, contact each other and create their own content, links have also become a currency of a sort. Today we browse the Internet mostly through the use of search engines. These search engines provide us with the most relevant search results based on our query. The algorithms used for this purpose are extremely complicated, but one of the main criteria that influences the results of a search query is how well is a webpage connected, i.e. how many hyperlinks it provides that lead to other webpages. Therefore, the hyperlinks represent a main vein of the Web and its way of functioning.

3.2. The right to make the work available

When InfoSoc directive was enacted the public communication right was harmonized among member states, but more importantly the new right of making a work available to the public was created. Being a part of the public communication right in order for it to be defined examination of the main principles of the public communication right will be conducted.

3.2.1. Communication to the public

The opportunities in the information society to communicate the work to the public are ever expanding and thus a harmonization of the public communication right was necessary in order for copyright holders to receive the protection they needed against infringement of their work.

²⁶ Berners-Lee, p. 20, 28-29

²⁷ W3C reference 1

²⁸ Berners-Lee, p. 15

²⁹ Baggioa, p. 1

³⁰ Berners-Lee, p. 39

Article 3 of the InfoSoc directive establishes an exclusive right of the authors to communicate their work to the public. As per Recital 23 of the InfoSoc directive the communication to the public encompasses any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.³¹ It also states that it should cover any communication of the work to the public not present at the place where the communication originates.³²

The main notion of the communication term is that it represents a transmission of the work to the public.³³ This idea is visible in the different translations of the Berne Convention. “In the Berne Convention the exclusive right of communication to the public of works has been regulated in a fragmented manner,”³⁴ however the most comprehensive provision is found in its Article 11(1)(ii).³⁵³⁶ While the English version contains the term communication to the public, the French version determines it as transmission to the public.

Travaux préparatoires of the WIPO copyright treaty also emphasizes the notion that communication “implies transmission to a public not present in the place where the communication originates.”³⁷ And although the same document determines that the two terms can be used simultaneously and that the term communication is of a wider scope, according to the Recital 25 of the InfoSoc directive it is clear that the lawmaker had the transmission as an irreplaceable part of the communication concept.

Furthermore, the settled case-law also suggests that a certain transmission of a work is necessary in order for a work to be communicated to the public. It was stated in FAPL decision that the “concept of communication must be construed broadly, as referring to any *transmission* [emphasis added] of the protected works, irrespective of the technical means or process used.”³⁸

3.2.2. Making available right

Making available right represents the form of communication to the public of a work that is achieved through the Internet transmission,³⁹ from a place and at a time individually chosen by the members of the public. Since it is part of the public communication right it must be interpreted consistently as the parent right would be.⁴⁰

But this right has been tailored to meet the needs of the current online world and it is in that regard different from its parent right. The main difference, obviously, is that the work may be accessed by the public on demand. The mere possibility that the work can be accessed is enough for this right to be infringed by an unauthorized entity and as Waelde rightfully observes is the chief purpose of this new right.⁴¹

Still, the need of transmission of the work is paramount for the right to acquire protection, as is plain from the wording of the InfoSoc directive in which it is stated that “[i]t should be

³¹ InfoSoc, Recital 23

³² *ibid.*

³³ Stamatoudi, p. 408

³⁴ Travaux préparatoires, para. 10.01

³⁵ Berne Convention, Art. 11

³⁶ Travaux préparatoires, 10.02

³⁷ *ibid.*, 10.14

³⁸ FAPL, para 193

³⁹ Waelde, p. 156

⁴⁰ Stamatoudi, p. 409

⁴¹ Waelde, p. 156

made clear that all right holders recognized by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them.⁴² Therefore, although the making available right does not demand that the access is gained over the content in question; such access needs to be provided through the use of a transmission of a sort.

A lot of emphasis has been put in this sub-chapter on the point that a work must be transmitted in order for public communication right to manifest. This was done intentionally in order to establish a solid foundation for the elaboration of whether the hyperlink provision constitutes the public communication right.

3.3. Legal concepts of hyperlinks previous to the Svensson decision

Svensson decision had deemed that hyperlinks can be used to make a work available to the public. This decision had brought an end to the contended views that different member states had on this issue, the views of which will be elaborated on in the following section.

3.3.1. National courts on hyperlinks

Swedish Supreme Court ruled that provision of hyperlinks to works may constitute making that work available to the public in the Olsson case.⁴³ The court held that by allowing the general public to download works through the provision of hyperlinks Olsson had made an active action that was necessary in order for the work to be made available through the use of the hyperlinks to the public.⁴⁴

Contrary to this position, German Federal Court deliberated in the Paperboy case⁴⁵ that that the setting of deep links did not infringe the new right of making available to the public.⁴⁶ Its rationale was that the hyperlinks which contained only the addresses of the pertinent work did not themselves contain any part of those works and provided merely access to the said works on a different website where they had been previously already accessible to the general public.

In Napster.no the Norwegian Supreme Court the defendant was held liable for infringement of public communication right by the court of first instance on the basis that it provided direct links to the infringing music files. Norwegian Supreme Court decided that the provision of hyperlinks cannot be deemed as making the work available to the public; however it found Napster.no liable for copyright infringement on account of liability for contribution.⁴⁷

The same view was taken by the European Copyright Society (ECS) when it issued its opinion on the questions referred to the Court in the Svensson case. ECS is an organization comprised of prominent scholars and academics in the field of intellectual property law, which provides valuable advice on the current issues based on its vast expertise in this field.

⁴² InfoSoc, Recital 25

⁴³ Olson

⁴⁴ Rosén, p. 157

⁴⁵ Paperboy

⁴⁶ Stempelwitz, para. 2-3

⁴⁷ Napster.no, para. 62

In this opinion the concept of hyperlink is determined so that it represents a mere reference or a footnote⁴⁸ and that it cannot be considered as a communication of the work to the public.⁴⁹

Case-law on the other side of the Atlantic suggests that hyperlinks present mere references and not a communication to the public. The Supreme Court of Canada determined that “[c]ommunicating something is very different from merely communicating that something exists or where it exists,”⁵⁰ while the US Ninth Circuit Court of Appeals determined that hyperlinks are mere “HTML instructions that direct a user’s browser to a website publisher’s computer that stores”⁵¹ the pertinent work.

3.3.2. Hyperlinks according to Svensson

In Svensson case the Court deliberated a decision that the provision of hyperlinks either provided in the form of clickable links or through the use of framing technique, does not make a work available to the public if the transmission is conducted through a different technical mean and that the new public is not given access to the said works. The Court also assessed the situation where a provision of hyperlink would allow a user to bypass the protective mechanism put in place by the website manager to which the hyperlinks lead to. In this section an account will be taken on all these issues in order to determine whether the Court’s position have any merit.

3.3.2.1. *Communication to the public test*

The main thing that is observable from the Svensson decision is that the Court did not invest any of its time to determine the concept of hyperlinks, it just reasoned this decision with the notion that the act of communication must be understood broadly in order to ensure a high level of protection to the copyright holders as provided by the InfoSoc directive.⁵²

The Court reasoned that the concept of making available right has two criteria:

1. the act of communication of a work and
2. the communication of the said work to the public.

Referring to the FAPL decision the Court observed that the communication to the public must be construed broadly.⁵³ However by referencing to this case the Court omitted the fact that in FAPL the concept of communication to the public is construed broadly as to encompass any transmission of the protective works. The Court leaves out the important condition that a transmission of the work must be present in order for a communication of a work to the public to exist.

In the following paragraphs the Court refers to the SGAE case and iterates that persons need only to be able to have access to the work in question, not actually to access it. Through this availability only, the Court tries to justify its decision to omit the necessary transmission to the scheme of the things. Still, as was previously stated Recital 25 of the InfoSoc directive clearly proscribes that the action of transmission of a sort must be present in order for an on-demand service to present making a work available to the public.

⁴⁸ Svensson opinion, para 4

⁴⁹ Svensson opinion, para 6

⁵⁰ Crookes, para. 26

⁵¹ Perfect 10, para 717

⁵² Svensson, para. 17

⁵³ Svensson, para. 17

By referencing to the SGAE case the Court equates two different situations preset in SGAE and Svensson and makes a clear-cut analogy between these cases.

In the SGAE case the facts suggested that by providing television sets with access to broadcast the hotel allowed the new public access to the broadcast, the new public being guests of the hotel. This is justified by the notion that the broadcaster's broadcast had been directed only to the recipient of the television signal and not to the subsequent public that had been allowed access to the broadcast based on the intervention made by the hotel. By making a clear cut analogy to this case the Court disregarded that the SGAE determined a hotel to be the distributor of the signal which transmits the broadcast to the guests of the hotel.

Through provision of clickable links the hyperlink provider only provides the location of the pertinent content. The venue is changed when a user clicks on the hyperlink, she is redirected to a different virtual location, i.e. the address to which the hyperlink points and is no longer present at the website of the hyperlink provider. Therefore, the provider of hyperlink does not transmit any content it just directs the person to the right address from which such transmission will be completed.

The proper analogy concerning the Svensson case would have been established if the hotel placed television sets with one program that listed TV channels that can be seen and from which location. In this respect the hotel owner would have acted as the provider of clickable links - normal hyperlinks.

Hyperlink provider does obtain additional benefit, detectable in the higher rankings in search engines' results page and additional revenue gathered through possible ads present on the page containing the hyperlinks. Just the same as the hotel owner with its decision to place a TV set in each room.⁵⁴ However, while this is true, the intention of the original uploaders of the content in question was to provide it to the widest possible number of people. By following clickable-links and landing on the original page the users are still being referred to the intended page of origin. This complies with the selected passages of The Guide to the Berne Convention that was cited in the SGAE decision.⁵⁵ Through these actions users are only transferred to the page where the content had been placed in the first place and thus are fulfilling the intention of the original uploader.

The added benefit of the hyperlink provider can be treated as a spillover effect from the original communication of the copyrighted material.

Through this action the hyperlink provider does not inflict any harm to the copyright holder, which is one of the more valuable criterions when determining the infringement committed.⁵⁶ This standpoint is further reinforced in the Reprobel⁵⁷ decision in which the Court linked the concept of fair compensation to the actual harm.⁵⁸ The provision of hyperlinks can only amount to higher visitation of the website where the content was originally placed and thus mutually benefit both parties.

⁵⁴ SGAE, para. 44

⁵⁵ SGAE, para 42

⁵⁶ InfoSoc, Recital 35

⁵⁷ Reprobel, para. 48

⁵⁸ Roseti, p. 169

In these circumstances such a form of spillover cannot be recognized as a substitute for the pertinent content, but more as a complement to it, since it boosts the number of visits to its website.⁵⁹

The business model used by the hyperlink provider is the result of the possibilities that Internet as a medium provide for the better use of surplus that is not used. This is possible because no harm is caused to the copyright holder and IP law is not about compensating for "spillovers", which are ubiquitous.⁶⁰

The Court then moved to the issue of what constitutes the public. According to the decision the Court assessed the previously settled case-law to determine that the public consists of a fairly large number of persons.⁶¹ The Court recognized the further need to determine whether the new communication to the public had been communicated through the use of different technical means and to a new public, if any of these conditions were to be fulfilled a communication to the public would be present as was determined by previous case-law.

The Court was satisfied that there had been no use of a different technical mean since the Internet was the medium through which the work had been made available⁶² and as regards the new public criterion, the Court again drew its conclusion by referencing to the SGAE case.

The SGAE case suggests that the transmission of the work must be made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public.⁶³ Again the main concept is that a transmission was made, which was again omitted by the Court, but more importantly a condition had been set in the SGAE decision that necessitates the intervention made by the entity that further transmits the broadcast, in that particular case the hotel.

According to this notion "the hotel is the organisation which intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work."⁶⁴ The provision of hyperlinks is deemed to be an intervention made by the hyperlinks provider, but the factual situation again differs from the one described in the SGAE case. The second quoted sentence determines that had there not been the intervention of the infringer that the public would not have been able to access the work, regardless of the fact that it is physically in the area covered by the broadcast. In the Svensson case the provision of hyperlinks is not the only way to gain access to the work. In fact the work had been freely provided, so the intervention made by Retriever Sverige is not the one as is described in the SGAE. The work could be accessed if the user had a website address where it was originally posted on, or a user could use the search engine to find the work through the use of keywords. Therefore the intervention made by the Retriever Sverige is not the one that would allow access to the work that could not otherwise be accessed.

The conclusion can be drawn that an improper determination of the concept of hyperlink and improper interpretation of both Article 3 of the InfoSoc directive, and previously settled case-

⁵⁹ Bohannan, p. 53

⁶⁰ Bohannan, p. 54

⁶¹ Svensson, para. 21

⁶² Svensson, para. 24

⁶³ SGAE, para. 40

⁶⁴ SGAE, para. 42

law have allowed the Court to expand the public communication right to encompass the provision of hyperlinks as a way to make the work available to the public. Repercussions of this expansion will ultimately lead to the deterioration of the functioning of the Internet, as will be explained in the fifth chapter.

3.3.2.2. *The use of framing techniques*

Based on the assumption that the provision of hyperlinks represents communication to the public, the Court expressed its opinion that since the content had not been presented to the new public and that it had been presented through the same technical meaning the use of framing technique does not affect the conclusion drawn in the analysis regarding the provision of normal hyperlinks, i.e. clickable links.⁶⁵

It should be stated that the creator of the Web, Sir Berners-Lee, a great champion of free speech and information access, had opted for a system where normal hyperlinks would not have attract liability to the hyperlink provider, while the website owner who embeds material from a different website, provided through the use of framing techniques, would be responsible for the placing of such content on her website.⁶⁶

Through the use of framing technique the provider of hyperlink merely incorporates the whole page within its own webpage. It does not circumvent or restrict any of the content found on the original page. Therefore the only difference between the normal links and embedded ones is that the material is presented within the website of the hyperlinker.

This action does not cut possible revenue of the copyright holder that it would generate if the third party visited its own webpage instead of the one of the hyperlink provider. In fact, it might only increase its revenue. Therefore, any resemblance to the reproduction of content through the use of this technique that has been hinted at in the *BestWater*⁶⁷ decision is irrelevant.

The content that is provided to a third party is dependent on its status on the website of the original communication to the public and it does not cut down the monetary gains to the copyright holder, as would be the case if the content was copied and then put independently onto the other website.

The use of the framing technique might provide different presentation of the content in question (it being placed on the website of the hyperlink provider), but in reality it does nothing more than a provision of a normal hyperlink would have done. The notion that was given by Sir Berners Lee that the responsibility should rest upon the hyperlink provider in the case at hand should be considered only in the aspect of the author's moral rights. Unfortunately, due to the limits of this paper further discussion on this point will not be conducted.

3.3.2.3. *TPMs*

The Court took notion of the scenario in which a provided hyperlink could be used to circumvent the protective mechanisms of the website communicating the protected work. This way of using a hyperlink represents a circumvention of the technological protective means

⁶⁵ Svensson, para. 30

⁶⁶ W3C reference 2

⁶⁷ *BestWater*, para. 17-18

(TPMs). The only use of such hyperlinks would be to circumvent the TPMs put in place and would thus fall under the scope of the Article 6 of the InfoSoc directive.⁶⁸

By incorporating it into the protective mechanism of the public communication right the Court has once again unnecessarily broaden its scope. InfoSoc clearly states that “[t]echnological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright[...].”⁶⁹ Therefore, TPM protection has been enacted in order to allow the copyright holder to determine when and how a work will be communicated to the public and to which portion of it. Overriding these protective measures should not have been encompassed under the public communication right, as the communication to the public of work is suitably protected through the use of TPMs.

If a copyright holder does not impose any sort of TPMs in order to limit its work from being made available to the general public, then it should be considered, according to the theory of implied license that its intention has been to allow such access to its work.⁷⁰ However, if its intention is to limit the access to said work then the use of TPMs and the protection that is available through the Article 6 of the InfoSoc directive is sufficient to protect its interests.

3.3.2.4. *Conclusion*

Svensson decision resolved the confronted interpretations of the national courts in regards to the question what provision of hyperlinks represents. The Court recognized provision of hyperlinks as a form through which, in certain cases, the protected work is made available to the public.

Throughout the presentation made in this paper the fact that the Court misinterpreted what provision of hyperlinks constitutes has been made clear.

Although the public communication right should be broadly interpreted, the necessary condition for its existence is the act of transmission, which is not realized through the provision of hyperlinks. Furthermore, even the test used in Svensson to determine whether a hyperlink provision is iteration of the public communication right had been delivered through the poor interpretation of the Court’s case-law.

All of this stems from the Court’s reluctance to determine the true nature of the hyperlink. In Svensson the Court only determined what a hyperlink provision is not in the case in question - a communication to the public. It did not provide the answer to what it actually represents in this case. The answer to this question, one which is based on the report on the nature of hyperlinks in this paper, is that the hyperlinks present information about the online location of certain content or a reference to such content. In this respect the hyperlinks must be viewed as information. The reason why the obvious is stated is that this will play a significant role in the next chapter which will deal with the secondary liability approach taken up by the US jurisprudence, which will provide answers as to what other solutions there are regarding the regulation of this issue.

⁶⁸ InfoSoc, Art. 6(2)(b)

⁶⁹ InfoSoc, Recital 47

⁷⁰ Stamatoudi, p. 470

4. Legal institutes that regulate hyperlinks in EU and in the USA

In order to understand the difference in approaches taken by courts set in the USA and the Court of justice of EU we must first take a look at the differences in the dedicated legislation. So far the main talk regarding the EU legislation and jurisprudence revolved around the InfoSoc directive, however in this chapter E-Commerce directive together with DMCA will be the main focus of the comparative study. The reason for this is that in these two documents lies the root from which two different approaches have been devised by the respective courts.

4.1. Secondary liability doctrine in USA

4.1.1. Secondary and vicarious liability

In the US legislation a safe harbor set of rules is present in the 512 section. This section corresponds to the Articles 12-15 of the ECD, however apart from covering the instances where mere conduit, caching and hosting services as ECD safe harbor rules do, the DMCA safe harbor also covers the limitation of liability regarding the information location tools,⁷¹ i.e. provision of hyperlinks among other services.

In the Article 512(d) of the DMCA a safe-harbor is established for the provision of Information Location Tools, which include a directory, index, reference, pointer, or hypertext link. The provision states that there will be no liability attached to the provider of service where that service constitutes referring or linking a user of that service to an online location containing infringing material or infringing activity if the provider of information location tools does not have actual knowledge of the primary infringement, or is not aware of facts or circumstances from which infringing activity is apparent and upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material. Furthermore the provider of information location tools must not derive any financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.

This determines that if a hyperlink leads to the content which presents an infringement of a protected work, the provider of such hyperlink is secondary liable for the infringement. In order to understand this treatment of hyperlinks an accord of how secondary liability is established will be conducted.

Firstly, in order for a secondary infringement to exist a primary infringement of the copyright needs to occur.⁷² One of the reasons that a secondary liability could not have been considered in the Svensson case was exactly that this prerequisite never existed. The copyrighted material in question in this case was not infringed in the first place.

DMCA was enacted in 1998 and it was made to fit the current concepts of the secondary liability found in the American jurisprudence, mainly vicarious and contributory liability.⁷³

The US doctrine had, through previously settled case-law, delivered two separate instances of secondary liability - vicarious liability and contributory liability.

The test for vicarious liability was established in Shapiro case. In this case plaintiff claimed that the department store was vicariously liable since it provided office space to the record concessionaire who sold infringing copies of the copyrighted work based on the fact that the

⁷¹ DMCA, Art. 512(d)

⁷² Högberg, p. 914

⁷³ WIPO Implementation, p. 50

concessionaire paid approximately ten percent of its sales for the use of office space.⁷⁴ According to the court such financial arrangement was the proof of direct financial interest that the department store had in sales of an infringed protected works. The Second Circuit determined that the requirements for vicarious liability are:

1. an obvious and direct financial interest in the exploitation of the copyright materials, and
2. the right and the ability to supervise the conduct of the direct infringer.⁷⁵

Further notion, delivered in *Shapiro* was that in order for this liability to be attached to a secondary infringer no requirement of knowledge regarding the primary infringement was necessary.⁷⁶

In *Gershwin Publishing* case the Second Circuit shaped the doctrine of the contributory liability. This case focused the secondary liability issue revolving the fact that the owner of a dance hall benefited from the infringement of protected works that were performed live at his venue,⁷⁷ based on the:

1. knowledge of the direct infringement, and
2. material contribution to, causation of, or inducement of the infringement.⁷⁸

The focus, according to the contributory liability doctrine is placed on the intent, because certain knowledge regarding the direct infringement is required as well as the notion that the secondary infringer had played a role in the primary infringement.

The contributory liability had evolved since the *Gershwin* case and in the famous *Sony* case the Supreme Court had constructed safe harbor for dual-use devices (devices capable of both infringing and non-infringing uses). Since the case was about video recording technology the court devised this safe-harbor rule from the notion that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes."⁷⁹ The court went a step further and determined that the safe-harbor rule would apply even in cases where the device is merely capable of substantial non-infringing uses.⁸⁰

Sony decision established a balance between the copyright holders' rights and the development of the new technologies of copying and distribution.⁸¹ However, consequent use of contributory liability in cases revolving around the issues of infringement in the online setting.

4.1.2. The inducement liability

The hyperlinking question in USA jurisprudence had been activated when P2P protocol became one of the easiest ways to infringe on the copyright. In landmark cases of *Napster* and *Aimster*, cases that revolved around software that allowed their users to share infringing materials through the use of the P2P protocol, the copyright holders sued software developers

⁷⁴ *Shapiro*, para. 4

⁷⁵ Högberg, p. 915

⁷⁶ *ibid*

⁷⁷ Lemley, p. 1367

⁷⁸ Högberg, p. 919

⁷⁹ *Sony*, para. 442

⁸⁰ *ibid*

⁸¹ Högberg, p. 922

for secondary infringement on the basis that their software allowed users to directly infringe upon their rights.

The defendants argued that they should be exempt of liability according to the reasoning of the Sony test, based on the fact that their software could have been used for other non-infringing uses.

At this point it had become apparent that, firstly, courts have trouble distinguishing between vicarious infringements from contributory liability.⁸² This stemmed from the initial troubles Sony court had when making distinction between the two and this has led to the expansion of the secondary liability.⁸³

The courts have brought such conclusions that the non-infringing use of the software in Napster case was irrelevant,⁸⁴ which is in direct opposition to the Sony test; the conditions for vicarious liability had been loosened significantly regarding the directness of the financial gain prong of the Shapiro test;⁸⁵ and that the dual-use technology has to be merely capable of substantial non-infringing uses, a notion proscribed in the Sony decision was derogated in the Aimster decision to that the non-infringing use has to primary use of the device.⁸⁶ All of this resulted in the fact that the main assessment of the courts was now pointed to the analysis whether software developers had illicit intent to make profit on the infringing of the copyright by their users,⁸⁷ which sparked the main concern that it allowed “copyright holders to reach and restrain the implementation of core technologies of copying and distribution.”⁸⁸

Among such uncertainty, a Grokster case emerged. In this case, Grokster, a software company, provided P2P software that enabled its users to share among them infringing copies of copyrighted material.⁸⁹ According to the plaintiff the use of this software enabled users to commit primary infringements and because of that the secondary liability fell on Grokster. Grokster pursued the defense set in the safe harbor provisions of the DMCA, however the Court ruled in favor of the plaintiff.

The influence of Grokster case is of paramount importance, since it finally brought order to the concerns circling the scope and definitions of vicarious and contributory liability. Through the Grokster case the Supreme Court was able to reset the previous case-law decisions that have taken up the wrong path and deduced a new type of secondary liability - the inducement liability.⁹⁰

According to this doctrine the one who distribute a device with the object of prompting its use to infringe copyright as shown by clear expression or other affirmative steps taken to foster infringement is liable for the resulting acts of infringement by third parties.⁹¹

The Supreme Court was able to distinguish certain cases that will be encompassed by this doctrine, while not influencing the definitions set in previous settled-case law regarding the other forms of secondary liability. Instead of continuing the path which lower instance courts

⁸² Högberg, p. 927

⁸³ Högberg, p. 929

⁸⁴ Lemley, p. 1359

⁸⁵ Lemley, p. 1366

⁸⁶ Lemley, p. 1362

⁸⁷ Högberg, p. 922

⁸⁸ *ibid*

⁸⁹ Grokster, para. 2

⁹⁰ Högberg, p. 948-949

⁹¹ Grokster, para. 34

have taken, consisting of the practice to expand the use of contributory and vicarious liability, the Supreme Court had cut the cord and devised this doctrine in order to be narrowly used in situations such as these where hyperlinks are used to point to and aid copyright infringement. This doctrine comes in play only in instances where someone is distributing a device or providing other means that facilitate copyright infringement.⁹²

The fact that provision of hyperlinks was provided through the use of software, rather than on a website does not limit this doctrine to the cases that concern only P2P cases. As it was stated the doctrine will take effect in instances where someone has distributed a device or provided other means to facilitate copyright infringement. Therefore, providing a hyperlink on a website that leads to an infringing copy of copyrighted material presents a mean to facilitate copyright infringement.

The greatest success of the inducement liability theory is that it established a notion that “[t]he DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe.”⁹³

The following case-law after *Grokster* confirmed the inducement liability doctrine and it is now an established practice that when there is “a finding that a defendant induced infringement necessarily renders that defendant ineligible for section 512 safe harbors.”⁹⁴

Having established the main principles guiding the US jurisprudence in relation to hyperlinking cases the next part of this chapter will examine whether common principles of secondary liability exist in different member states of the EU and are there provisions in the ECD that would allow such protection to the copyright holders.

4.2 EU secondary liability

Secondary liability is present in EU legislation; however it is only implicitly mentioned in various directives. The main idea about the secondary liability in the field of copyright law according to the EU secondary legislation comes from the InfoSoc directive and its Article 8(3) which states that

“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”⁹⁵

Practically the same installment is present in the Enforcement⁹⁶ directive which limits itself to areas other than InfoSoc directive, but with it forms a sound mechanism for enforcement.

These provisions establish the institute secondary liability in the Community law limited to injunction relief only. The necessary condition that a primary infringement has occurred is present and injunction relief can be claimed against the intermediaries whose services are used for this purpose.

Further injunction relief, as well as damage claims, is acknowledged in the safe harbor provisions of the ECD. As previously stated these apply to intermediaries that provide

⁹² Högberg, p. 950

⁹³ Charlesworth, p. 12

⁹⁴ Fung, para. 67-68

⁹⁵ InfoSoc, Art. 8(3)

⁹⁶ Enforcement directive, Art. 9

services of mere conduit,⁹⁷ caching⁹⁸ and hosting of content.⁹⁹ Safe harbor rules are rounded with the ‘No general obligation to monitor’ provision, which states that intermediary providers will not be obligated to monitor the information which they transmit or store, nor to actively seek facts or circumstances that indicate illegal activity.¹⁰⁰

For the purpose of this paper main emphasis will be on the hosting services, therefore an in-depth analysis of Articles 12 and 13 of the ECD will not be conducted.

However, before proceeding with the analysis the notion that the whole of ECD concerns only Information Society Services (ISS) needs to be addressed. ISSs are determined as any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.¹⁰¹ Providers of these services are therefore eligible to use the provided safe harbor provisions.

First paragraph of the hosting article determines that the hosting service provider will not be held liable if it does not have actual knowledge, or constructive knowledge (this in respect for claims for damages) of the illegal activity or information conducted by the user of that service. If the hosting provider acquires such knowledge it is obligated to expeditiously remove or to disable the access to the information.¹⁰²

In the scenario where the user of the hosting service is under the control of the service provider safe harbor provision will not stand.¹⁰³

Secondary liability test derived from these provisions corresponds to Gershwin contributory liability test, discussed earlier, since its main elements are the knowledge of infringement and the element of control.

This form of contributory liability has been recognized in the case-law of Member states. In Germany this concept goes by the name of Störerhaftung, meaning the ‘interferer liability’. German Federal Court of Justice has held in the three landmark Internet auction cases,¹⁰⁴ that “an internet platform provider is not tortuously liable as an infringer or participant in the infringing acts of its users as long as it had no actual and concrete knowledge of those acts.”¹⁰⁵

This concept, however, differs from the concept of secondary liability provided by the ECD and ne Member states national law since, if “any person who has wilfully made a causal contribution to the direct infringement of an IPR by third parties can be held subject to injunctive relief”¹⁰⁶ only and under the condition that “the contributor has violated a reasonable duty of care to prevent such direct infringements.”¹⁰⁷

⁹⁷ ECD, Art. 12

⁹⁸ ECD, Art. 13

⁹⁹ ECD, Art. 14

¹⁰⁰ ECD, Art. 15

¹⁰¹ ECD, Recital 17

¹⁰² ECD, Art. 14(1)

¹⁰³ ECD, Art. 14(2)

¹⁰⁴ Leistner, p. 78

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

Störerhaftung doctrine allows copyright holders to file for damages, but only in cases where a violation of the duty of reasonable care had occurred.¹⁰⁸

Similar notion of secondary liability is found in the UK, both in the common law and equity. The two-tier system for the protection of the IPR holders basically represents the first two paragraphs of the Article 14 of the ECD. The broad concept of the secondary liability fits the first paragraph of the said article since it allows for injunctive relief where no specific knowledge is obtained by the intermediary service provider; and the narrower concept of liability where damage claims are possible and which includes specific knowledge of the intermediary and active role in the infringement¹⁰⁹ and which mirrors the second paragraph of the safe harbor provision in question. The broader concept was developed in the Amstrad cases¹¹⁰ which undoubtedly resemble the Sony case delivered by the US jurisprudence. Through these cases it was established that a general knowledge of a producer of dual-use technology cannot be sufficient as to determine secondary liability, because there was no real control over the use of the technology by the producer and that in those cases no duty of reasonable care was demanded.

These iterations of secondary liability are in concurrence with the settled case-law of the CJEU. In its pivotal case C-324/09 L'Oréal,¹¹¹ a case where eBay auction site used to provide certain assistance to its users, when setting their eBay pages, who then infringed on the trademarks of the plaintiff, the Court stated that the secondary infringer would be stripped of the safe harbor protection if it was established that it provided certain assistance to the direct infringer since this would negate its neutral position as an intermediary provider and provide it with knowledge or control over the actions of the direct infringer.¹¹²

Second condition of the Störerhaftung doctrine, the duty of reasonable care, mirrors this decision in the fact that under L'Oréal the intermediary provider must "take measures that contribute not only to bringing to an end infringements committed through that marketplace, but also to preventing further infringements."¹¹³

Similar is stated in the L'Oréal decision, where the Court determines that the intermediary provider will be liable for any further infringements, which were initially awarded injunctive relief.¹¹⁴ This is based on the interpretation of the Article 15 of the ECD and 11 of the Enforcement directive, which determines that "[...]the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement."¹¹⁵

This allows the Court to issue injunctions that would incorporate duty of reasonable care. This would not affect the no general obligation to monitor rule, as it would only refer to the initial infringement and not future undetermined ones. The end result is that the secondary liability as defined by the Community law legislation and settled case-law clearly resembles the institute of Störerhaftung.

Making a quick recap of the comparative analysis it can be stated that the ECD acknowledges the institute of secondary liability as it was established in the Gershwin case and that it sets

¹⁰⁸ Leistner, p. 80

¹⁰⁹ Leistner, p. 86

¹¹⁰ Amstrad cases

¹¹¹ L'Oréal

¹¹² L'Oréal, para. 116

¹¹³ *ibid*, para. 131

¹¹⁴ L'Oréal, para. 144

¹¹⁵ Enforcement directive, Art. 11

limitations to this liability in the form of safe harbor provisions. Furthermore, the Amstrad cases are essentially replicas of the Sony case, both in the facts of the case and in its reasoning. Finally, the L'Oréal case provides us with the notion that the safe harbor provisions are intended for truly neutral intermediary service providers, a concept that has been devised by Grokster and its inducement liability doctrine.

The conclusion, therefore, can be drawn that the secondary liability concept in EU has been laid down on solid foundations and that according to the current case-law of both Member states and the Court great similarities can be deduced towards the US system. The question remains now whether provisions of Community law allow that hyperlink provision be interpreted as a secondary liability.

4.3 Hyperlink provision as a secondary liability issue in EU

Previous chapter introduced the concept of secondary liability as it is present in the EU Community law, therefore a thorough study will now be conducted to see what the limits of use of the ECD in the context of safe harbor provisions and its application to hyperlinking cases are.

ECD is established on the horizontal approach for liability for all sorts of content found on the Internet.¹¹⁶ This presents a regime completely opposite to the one that is present in the USA where different legislative acts tend to different types of content found on the Internet. The obvious advantage of the US system is that the DMCA is completely focused on copyright protection, while the ECD has to take into consideration how its provisions will influence all sorts of situation regarding different content.

It is thus no wonder that the wording of the Article 14 of the ECD is vague. In its first paragraph, under the knowledge condition of the safe harbor provision it is stated that the knowledge must be in respect to the illegal activity or information. This phrasing opens the door to questions as to the instances and definition of the illegal information with regards to copyright.

Recital 46 could have provided further instructions regarding this topic that have been overlooked by the Court in the Svensson decision. It states that “[i]n order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level.”¹¹⁷

However, due to the horizontal approach on which ECD is based the said recital cannot be applied to the situation at issue. According to the preamble part of the ECD the use of safe harbor provisions is limited to those ISSPs whose activity is of mere technical, automatic and passive nature.¹¹⁸ This would render its application to the hyperlink providers impossible, because of an active role the hyperlink provider has when placing hyperlinks on its website.

This is the consequence that the horizontal approach brings. Because it is intended to encompass all the illegal acts found on the Internet it cannot separate sever illegal activity from the more benign one. ECD makes no distinction between placing the information

¹¹⁶ Edwards, p. 50

¹¹⁷ ECD, Recital 46

¹¹⁸ ECD, Recital 42

regarding copyright infringement and other illegal conduct that cannot be tolerated, i.e. different types of obscene and criminal content.¹¹⁹ Since it deals with varying degrees of illegal actions the directive assumes more restrictive stance and equates the copyright infringement with the rest of illegal activity.

Because of this unavoidable nature of the ECD the Recital 42 applies only to the ISSPs whose activity is of mere technical, automatic and passive nature¹²⁰ and seemingly limits its application to the current issue.

This however does not limit the Court's ability to derogate from the interpretative authority that recitals have. According to Nilsson judgement "[...]the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question".¹²¹ Therefore the power that recitals have is only of interpretative nature and as such can be disregarded when rights provided in the articles of legislation are interpreted.¹²²

In the not so recent study conducted by the OECD the definition of the intermediary has been coined as to include those who "[...]give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties."¹²³ Providers of hyperlinks have been acknowledged as new types of intermediaries that do not necessarily fall under the auspices of the ECD,¹²⁴ but it is also stated that some of the Member states (namely Austria, Portugal and Spain)¹²⁵ when interpreting ECD do include them in the term's definition.

Segregated approach to this issue does not only bring legal uncertainties to the international entities which are present in all the Member states through their presence online, but also goes against the maximal harmonization approach that the directive establishes and according to which member states cannot have more protective rules than those present in the ECD.¹²⁶

According to such interpretation Recital 46 is even more valuable as it approves of this trend and is therefore of crucial importance for the proper interpretation of the Article 14. The whole safe harbor section of the ECD is entitled 'Liability of intermediary service providers', however, through the section the term of intermediary service provider is not defined. Recital 46 does not define it either, but it broadens its scope to any 'provider of an information society service' and not just the internet and access service providers. This recital opens the possibilities of broader interpretation of the intermediary service provider even to the likes of providers of hyperlinks, as long as they fit the description of ISS provider (ISSP).

It seems that the Court in the Svensson decision could have used the opportunity to determine the scope of the intermediary service providers as to encompass hyperlink providers and thus further establish a harmonized market in the EEA. This would have been a logical move made by the Court and one that would foster the proper functioning of the Internet. Settled-case law regarding Internet issues is appreciative of the mechanisms on which Internet operates and is thus led by the arguments that do not oppose its functioning. Therefore it has been standard

¹¹⁹ Edwards, p. 49

¹²⁰ see supra note 116

¹²¹ Nilsson, para. 54

¹²² Stamatoudi, p. 450

¹²³ OECD report, p.9

¹²⁴ OECD report, p. 11

¹²⁵ Lesiak, p. 287

¹²⁶ Brownsword, para. 2

practice that Internet issues are not bound by the strict interpretation of the Community law it by the established law, in these circumstances the Court rather interpreted the law so that it fits the Internet purposes best.

This sort of reasoning is present in the Lindqvist¹²⁷ case where the Court observes that the simple act of loading a personal data on the website cannot be construed as a transfer of personal data to a third country. The Court takes the view that if this was the case, that none of the personal data should be placed online because they could always be accessed by the Internet user from a third country that does not ensure adequate protection of the personal data.

This decision of the Court puts the emphasis on the way that the Internet works and demands that the law enable the proper functioning of the Internet.

Similar approach can be found in the TUD case. This case concerned the respondent's right as a library to create electronic copies of books and provide access to such e-books to its users through specifically dedicated terminals on the premises.

Here the plaintiff wanted to established the interpretation of the Article 5(3)(n) of the InfoSoc directive, so that the copyright holder could, by means of a unilateral and essentially discretionary action, deny the establishment concerned the right to benefit from that limitation, i.e. to provide access to e-books as previously stated.

Should this have been the case the field of the exception to the public communication right would be narrowed that it would only encompass the rare exceptions of books where there have not been any e-book releases yet offered on the market.¹²⁸

Therefore the Court once again used this rationale and provided that the EU laws must be assessed through the lenses of the reality and not to be interpreted for their own benefit alone.

Granted, the Court was addressed with the questions regarding the Communication to the public right as per the InfoSoc directive, but it did broaden its answer to incorporate the meaning its decision would have on the circumvention of the TPMs. Had it properly assessed the concept of hyperlinks it could have created a sound and impenetrable doctrine regarding hyperlinking practices online.

At the end of the previous chapter it had been provided that if the hyperlink provision cannot be construed as a communication to the public it must represent information regarding to the location of the content in question, i.e. a reference. This notion is important because it provides us with the true meaning of what hyperlink really is - a reference.

The Svensson case established the way in which hyperlinks will be interpreted in the future case-law of the Court. As it was previously stressed out the notion that hyperlinks represent a form of communication is not valid and it is the view of this author that the Court should have interpreted hyperlinks as references, i.e. the information regarding the location where certain content can be found. Had this been the case, the Court would be able to attach secondary liability to the hyperlink provider that hyperlinks to the infringing content, in accordance with the method of interpretation elaborated on throughout this subsection.

The conclusion drawn in the Svensson case would have stayed the same, i.e. there would have been no infringement detected and it would established a setting through which Court would

¹²⁷ Lindqvist, para. 68-69

¹²⁸ TUD, para. 32

be able to deal with further cases that include hyperlinking to the infringing material without having to further broaden the public communication right, as will be discussed in the next chapter.

5. Impact that the GS Media case had on the online world

The Court did not reassess its established perception of hyperlinks, so the main issue in GS Media was whether the provision of hyperlinks represents communication to the public in a scenario where it leads to infringing content.

It had been emphasized by the Court in both Svensson and BestWater cases that the provision of hyperlinks leading to the content which was placed online with authorization and without it would be assessed through different reasoning. In Svensson and in BestWater cases the notion of the legality of the placed content was clearly stated,¹²⁹ so that further cases could have the opportunity to devise a different approach to the issues of illegally placed content.

On the first glance, the difference between the pertinent types of content to the hyperlink leads to demands such distinction. However there are other circumstances which have to be taken into consideration when determining the aptness of such reasoning.

This was the reasoning of the Advocate General Watheleta, who in its opinion regarding this case, upheld the view that hyperlink provision does not represent the communication to the public¹³⁰ on the basis that it lacks the necessary condition of transmission and concordantly difference between the initially authorized content and unauthorized one is not pertinent to the assessment of the case.¹³¹ Similar approach can be found in Napster.no case, where the Norwegian Supreme Court decided that such distinction should not affect the way that the hyperlinks are assessed.¹³² Different conclusions and imposition of liability based on such distinction could and indeed in this case will, as the AG Watheleta points out in his opinion,¹³³ create a chilling effect to the exercise of the freedom of expression.

Since the Court took the former view, a new test based upon previously settled case-law was established, one which takes into consideration several complementary criteria, which must be applied both individually and in their interaction with one another.¹³⁴

In the following subsections accounts will be made on the test as well as on the fact whether a fair balance has been established between copyright and other rights safeguarded by the Charter of fundamental rights of the European Union (the Charter).

5.1 The test

Although the AG The test provided in GS Media decision does not drift far from the one established in Svensson case. Its main criterions are those which are present in the Svensson case, mainly (1) that there has been an intervention by the provider of the hyperlinks¹³⁵ (this criterion is no longer implied to, it has assumed a prominent place), (2) that the hyperlink is provided to the public, which moreover includes the necessity for a protected work to be communicated through the use of different technical means, or failing that to be

¹²⁹ Svensson, para. 15; BestWater, para. 18

¹³⁰ GS Media opinion, para. 54

¹³¹ GS Media opinion, para. 63

¹³² Napster.no, para. 44

¹³³ GS Media opinion, para. 78

¹³⁴ GS Media, para. 34

¹³⁵ GS Media, para. 35

communicated to a new public¹³⁶ and (3) that the relevant part of the test is whether communication is made for a profit-making purposes.¹³⁷

A lot has been said regarding the first two conditions in the second part of this paper. Here it will only be stated that the Court emphasized the necessity of intervention, which is now the first criterion to be assessed, instead of, as was the case in Svensson decision, it being a part of the new public sub-criterion. The Court refers to the newer case-law in order to establish this criterion, but in doing so it is still unsuccessful to provide an adequate analogy, as was the case with SGAE reference in Svensson decision.

The SCF an Phonographic Performance (Ireland) cases both resemble SGAE factually and as such also lack the factual resemblance to the issue in hyperlinking cases.

The condition that the communication has been made to the ‘public’ is completely taken from the previously settled case-law, mainly from Svensson, so any further elaboration on this subject is unnecessary, as it has been discussed at length previously.

The main difference is that the Court refers to the relevance of the profit-making nature of the communication, i.e. provision of hyperlink.

This criterion has been derived from two previously established case-laws, but in the process of its implementation it suffered changes in its wording that in turn changed the essential meaning of the criterion. GS Media determines that the profit-making nature of the communication is a relevant condition of it. While establishing this as a condition the Court refers to the FAPL decision which stated that it is to be observed that it is not irrelevant that a ‘communication’ within the meaning of Article 3(1) of the Copyright Directive is of a profit-making nature.¹³⁸ The idea of double negative standards in law can be interpreted as both equal to the positive statement or as “a slightly less stringent standard”¹³⁹ than that of positively coined standard. The implication of different interpretation can be significant to the final result of the analysis. The Court seems to take the former view since it does not acknowledge the existence of double negative in the FAPL decision, but merely translates it to its positive form. As a firm believer that double negative standards cannot be equated with their positive translations I am of the opinion that this was not the right path to be taken by the Court.

However more importantly, the pertinent FAPL case paragraph refers to a SGAE case which has a different interpretation of the profit-making condition. In this case it is clearly stated that the Court is of the conviction that “the pursuit of profit is not a necessary condition for the existence of a communication to the public”¹⁴⁰ and that the Court merely “established that the communication is of a profit-making nature in circumstances such as those in the main proceedings.”¹⁴¹ Therefore the conclusion can be drawn, based on the wording of the SGAE that the communication can be of a profit-making nature, but that this notion does not affect its status, i.e. it would be deemed as a communication either way.

The Court has evidently broadened the scope of the communication to the public, even more, with this decision. Its wording does suggest that the condition of profit-making nature is not

¹³⁶ GS Media, para. 36-37

¹³⁷ GS Media, para. 38

¹³⁸ FAPL, para. 204

¹³⁹ Bygrave, p. 340

¹⁴⁰ SGAE, para. 44

¹⁴¹ *ibid.*

essential, but as is further elaborated in the decision it is of main importance when assessing the liability of the hyperlink providers and ultimately a triggering point that establishes the rebuttable presumption of liability.

According to the GS Media case the rebuttable presumption of infringement of public communication right exists in instances where provision of hyperlinks is “carried out for profit.”¹⁴² Contrary to this position if the provision of hyperlink has not been carried out for profit, the assumption will stand that such hyperlink provider does not know and cannot reasonably know that it is linking to a work illegally placed online.¹⁴³

This is especially important when we take into account the standards set by the settled case-law in regards to the notion of remuneration as proscribed by the ECD.

According to the ECD every service that is provided for remuneration, at a distance by electronic means and at an individual request is deemed to present ISS.¹⁴⁴ The remuneration criterion has not been elaborated in the ECD but the abundant case-law suggests it should be interpreted broadly. In Papasavvas the Court deliberated a ruling which determined that the remuneration for the ISS does not need to be directly received by the recipient of the service, but that the service can be remunerated by the income generated by advertisements posted on a website.¹⁴⁵ The Court went a step further and determined in McFadden that if a service is provided for the purposes of advertising the goods sold or services supplied by that service provider then it also represents an ISS.¹⁴⁶ This broadens the possible instances where hyperlink providers will be immediately held liable.

Therefore, liable for infringement of public communication right will not only be big corporations or news websites such as GeenStijl in this case, but also small bloggers and others who derive some benefit from the provision of hyperlinks. These smaller hyperlink providers usually will not be able to conduct desired checks concerning the lawfulness of the content and will be thus in a much worse situation than the big Internet players that have been targeted through this decision, leading to the creation of chilling effect that will deprive the end-users of their freedom to receive information, as will be described in the following subsection.

It is predicted that the Internet shall surpass the television as the largest medium for advertising in 2016.¹⁴⁷ Both InfoSoc and ECD set as one of their main goals the promotion of “development of the information society in Europe¹⁴⁸” and “[t]he development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry[...]¹⁴⁹” According to the newly formed situation there is no doubt that the freedom of expression and of information will be narrowed, since now many of the websites will have to conduct a research before they provide the public with the hyperlink, and this will lead to websites looking for different jurisdictions in which they ought

¹⁴² GS Media, para. 51

¹⁴³ GS Media, para. 47

¹⁴⁴ see supra 100

¹⁴⁵ Papasavvas, para. 30

¹⁴⁶ McFadden, para. 43

¹⁴⁷ Friedman

¹⁴⁸ InfoSoc, Rec. 2

¹⁴⁹ ECD, Rec. 2

to be based, ones that do not have such strict liability notions. In turn such reaction will definitely hamper the establishment of EU as one of the leading Information Society forces in the world.

This should not be read as a statement that providers of hyperlinks that lead to illegal content, which infringes on copyright, should be left unpunished. The fact that the content made available was not communicated under the authorization of the copyright holder influences the reasoning of the case, however the presumption of knowledge imposed on the hyperlink providers who act for profit should not have been made. The Court had clearly not taken into consideration the effect this decision will have on all categories of ISSPs. To impose rebuttable presumption on the hyperlink provider presents the imbalance in the final correlation between the fundamental human rights and the rights of the copyright holders, as will be discussed in the following section.

5.2 Unfair balance of fundamental rights

In *GS Media* the Court held that the balance should be struck between the copyright holders' right to intellectual property as proscribed in the Article 17(2) of the Charter and the fundamental rights of end-users, mainly freedom of expression and of information, safeguarded by Article 11 of the Charter.¹⁵⁰

Right to property states that “[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions”¹⁵¹ and that no one can be deprived of this right, except in certain cases, where the public interest demands it or it has been proscribed by the law.¹⁵²

On the other hand freedom of expression, as enshrined by the Charter, dictates that everyone will have the right to hold opinions and to receive and impart information and ideas.¹⁵³

Neither of these rights is absolute, therefore in situations “where several fundamental rights are at issue, the Member States must, when transposing a directive, ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the applicable fundamental rights protected by the European Union legal order.”¹⁵⁴

As was presented, in *GS Media* the Court did not consider different categories of hyperlink providers and the actual likelihood that they can conduct proper research regarding the lawfulness of the uploaded content to which they wish to hyperlink. Not taking into consideration such pertinent criterion can lead to serious imbalance between the colliding rights.

This is especially the case where the rights and freedoms colliding are so intertwined. Similar issue, as the one found in *GS Media*, was the center of the US Supreme Court ruling in the case of *Harper & Row Publishers, Inc. v. Nation Enterprises*.¹⁵⁵ In this case the a news magazine published excerpts of an unpublished Gerald Ford's forthcoming memoirs on the pretense that it was in the interest of the freedom of expression that certain facts from these memoirs is published immediately. The Court determined that by doing so, the magazine infringed the copyrighted material since pertinent information was bound to be released

¹⁵⁰ *GS Media*, para. 31

¹⁵¹ The Charter, Art. 17

¹⁵² *ibid.*

¹⁵³ The Charter, Art. 11

¹⁵⁴ *Promusicae*, para. 68

¹⁵⁵ *National Enterprises*

within a certain time-frame after the publication of the article.¹⁵⁶ The Court emphasized that copyright furthers freedom of expression by providing rights that enable independent writers and artists to make a living from their expression.¹⁵⁷

In cases which concern copyright another aggravating circumstance is that if the proper balance is not established, even the overprotected right can be deteriorated by such decision. The copyright protection is enacted in order to protect innovators and foster innovation.¹⁵⁸ However, human creativity is always in a sense build upon previous works of previous creators. Providing an overprotective mechanism to the copyright holders could trigger a contra-productive effect which would deteriorate creativity and innovation¹⁵⁹ in a way that the access to copyrighted content would be accessible only to the wealthy elite.¹⁶⁰

Therefore, copyright can be an agent of freedom of expression, but its overprotection can deteriorate itself as well as freedom of expression and of information.

The Court has been pretty one-sided when it exercised the balance between the right to intellectual property on one side and freedom of expression and of information on the other side. It provided arguments that according to the Recitals 9 and 10 of the InfoSoc directive copyright holders are supposed to enjoy high level of protection since this is one of the main goals of the directive and that based on that protection they are entitled to an appropriate reward.¹⁶¹ The reason for this is that proper protection of intellectual property “will foster substantial investment in creativity and innovation.”¹⁶² Given the multitude of ways that copyrighted content may be infringed over the Internet and the annual loss of 3 billion dollars of the motion-picture industry due to piracy in potential worldwide revenue,¹⁶³ there is no reason not to provide copyright holders with high protection. However, it should be noted that such protection must be appropriate.

The Internet as a form of communication forum has allowed great transfer of information among its users and provided them with the so far unprecedented opportunities to express themselves. When we take into account that 40 percent of the world population is connected through this medium¹⁶⁴ provides us with the significance it had up to this point.

According to the study conducted at Oxford, called the Mystery Shopper Test¹⁶⁵ a major UK ISP was asked to remove a webpage which hosted allegedly infringing copyright material.¹⁶⁶ The material in question was not copyrighted anymore, but was in public domain for some time. The result of the test was that the content was removed without much protest.

The shift of responsibility to be mindful of the origin and legality of the work posted on a website has now put pressure on the hyperlink provider. The websites hosting hyperlinks to other websites are now responsible for the dissemination of illegally uploaded content on the third-party website if such conduct is profit driven.

¹⁵⁶ Samuelson, p. 319

¹⁵⁷ *ibid.*

¹⁵⁸ InfoSoc, Rec. 4

¹⁵⁹ Bohannon, p. 34

¹⁶⁰ Lessig, p. 25

¹⁶¹ GS Media, para. 30

¹⁶² InfoSoc, Recital 4

¹⁶³ De Vany, p. 292

¹⁶⁴ Seidler

¹⁶⁵ Achlert, p. 3

¹⁶⁶ Law and the Internet, p. 75

As was discussed this responsibility will not only affect the big companies that have developed their businesses according to the provision of hyperlinks, as was the case with GeenStijl in the GS Media case, but also anyone who can be deemed to fall under the category of the ISSP.

As it has been shown by the Mystery Shopper Test, the ISPs were inclined to remove the allegedly infringing material despite the fact that through that they violated the freedom to impart and receive information of their subscribers rather than to face litigation suits from the copyright holders. Having in mind that the test was conducted with the major UK ISP then it is certain that it did not lack the financial power or the ability to conduct a valid legal research of the issue at hand. According to the GS Media decision even amateur-like websites and blogs will be presumed liable for infringement. Without sufficient funds and knowledge to conduct proper research they will definitely be inclined not to share hyperlinks leading to materials of suspicious origin and will thus result in deterioration of their freedom of expression.

The necessity to check if the material has been uploaded with the authorization of the copyright holder will in many of these cases provide a very cumbersome task. In situations where authors prefer to remain anonymous¹⁶⁷ or where there had been an improper attribution of the work¹⁶⁸ this task will prove to be almost impossible and will definitely result in chilling effects on the free speech. Furthermore the links provided might be changed overtime, so this will constitute an obligation for the hyperlink provider to regularly check the webpage to which it links in order to be sure none of the infringing material has been put on it. This would be in a complete contrast to the Article 15 of the ECD, which provides that no general obligation to monitor can be imposed on the intermediary providers.

A similar situation occurred in France when HADOPI law was enacted. The law established a graduated response in protecting copyright holders' interests. The Internet user would have three warnings when she would download pirated material from the web and afterwards the ISP would disconnect her.¹⁶⁹ Conseil Constitutionnel determined that HADOPI was unconstitutional on the basis that it violated freedom of expression since the control to determine who will have access to the Internet was left to the non-judicial body and that by doing so the law also violated the right to a fair trial which states that everyone is presumed innocent until proven guilty.¹⁷⁰

A direct response to the HADOPI law was the implementation of the Internet freedom provision in the Framework directive. This provision determined that the access to Internet of the end-users should be regarded as a fundamental right of persons and that it could be restricted only if such restriction is appropriate, proportionate and necessary.¹⁷¹

GS Media decision differs from the HADOPI law in the sense that it is not pointed to the end-users who infringe copyright and that it does not decline judicial review, however it reverts the presumption that the hyperlink provider is innocent and determines that it is to be presumed liable for providing pertinent hyperlinks.

¹⁶⁷ CCIA reference, p. 15

¹⁶⁸ CCIA reference, p. 16

¹⁶⁹ Law and the Internet, p. 82

¹⁷⁰ O'Brien

¹⁷¹ Framework directive, Art. 1(3a)

With the Internet freedom provision the EU determined that protection of copyright holders' interests is important, but that it has to respect the right to freedom of expression and of information that is now embodied in the newly formed fundamental right of Internet access. GS Media case, although it is not pertinent to the end-user, declines the principle that the access to Internet should be available to everyone, because it creates a chilling effect that diminishes the natural flow of data and content that occurs online. By not being sure whether they are able to hyperlink to certain content and as a result not hyperlinking to it because they might be found liable for infringement, the hyperlink providers are denied the basic Internet property and that is to disseminate the content online.

The trouble with GS Media is (1) that it failed to recognize the plurality of hyperlink providers of different financial and organizational standings,¹⁷² (2) their right to conduct business and (3) that it overlooked the protection given previously to the copyright holders in UPC Telekabel Wien case.¹⁷³

In UPC Telekabel the Court assessed the situation where copyrighted material was uploaded to a website without authorization of the copyright holder, just as was the case in the GS Media case, but here the perspective was different. Here the liability of an Internet Service Provider (ISP) was assessed.

The infringed material was available for streaming or to download on a third party website. The issue at hand was whether the ISP was secondary liable for the primary infringement on the basis that it provided access to the Internet to its users and thus to the material in question.

The copyright holders claimed that according to the Article 8(3) of the InfoSoc directive the defendant, the ISP in question, was to be deemed as an intermediary and applied with the national court for interim measure. The copyright holders basically demanded of the ISP to block the access to the pertinent webpages that were infringing their protected works. The type of the injunction granted by the Appeal court was of an 'outcome injunction,'¹⁷⁴ since it corresponded to the *Erfolgsverbot*, an institute found in the Austrian law "that allows the judge to require that the defendants achieved a certain result without specifying the measures that should be taken for that purpose."¹⁷⁵

Since the defendant would not comply with this request the case made it to the Court. The Court in turn decided that the ISP should, indeed, be regarded as an intermediary within the meaning of the Article 8(3) of the InfoSoc directive and that based on that conclusion it is obligated to take measures "provided that (i) they do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that they have the effect of preventing unauthorised access to protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right."¹⁷⁶

¹⁷² see supra p. 48

¹⁷³ UPC Telekabel

¹⁷⁴ Angelopoulos

¹⁷⁵ *ibid.*

¹⁷⁶ UPC Telekabel, para. 63

The Court had previously taken into consideration the impact such a decision would have on the related rights, those being the freedom to conduct a business and the freedom of information of internet users.

Based on the reasoning that the injunction in question was an outcome injunction it did not infringe the freedom of the ISP to conduct its business.¹⁷⁷ Furthermore, the interim measure allows for the ISP to avoid liability by proving that it has taken all reasonable measures to block the pertinent content.¹⁷⁸

As regards the freedom of information issue, the Court determined that since the measures deployed by the ISP are to be strictly targeted it should not influence the information that the internet users are normally able to access and which is lawfully present online.¹⁷⁹ The Court even establishes a back-up protection of the freedom of information when it determines that “the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.”¹⁸⁰

Finally, the Court acknowledged the fact that the enforcement of this type of injunction will not lead to a complete cessation of the copyright infringement, since the ISP might apply certain reasonable measures, which would devoid it of liability, but which would not be successful in preventing further infringements.¹⁸¹ However, the Court referred to a SABAM decision, which maintained that the right to intellectual property is not inviolable and must not for that reason be absolutely protected.¹⁸²

According to this protection scheme the end-users are denied access to the infringing material.

Had the decision in GS Media been focused solely on one entity, as was the case in UPC case, where there had been only one category of addressee - an ISP, the fair balance would have been stricken. Since this was not the case the balancing exercise had been exercised poorly. One’s inability to conduct proper research regarding the lawfulness of the content to which one wishes to link to, will eventually lead to the decision not to hyperlink, thus creating a chilling effect.

The Court also does not acknowledge the right to conduct business for the hyperlink providers, although hyperlink aggregation has been present as a business model during the past couple of years.¹⁸³

UPC Telekabel determines that the freedom to conduct business includes “the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it.”¹⁸⁴ Provision of hyperlinks is just a use of resources available to managers of the websites. Obligation of preemptive check-ups of the content found online determined by the Court in GS Media can present an unavoidable obstacle for smaller hyperlink to conduct their business.

¹⁷⁷ UPC Telekabel, para. 50-51

¹⁷⁸ UPC Telekabel, para. 53

¹⁷⁹ UPC Telekabel, para. 56

¹⁸⁰ UPC Telekabel, para. -57

¹⁸¹ UPC Telekabel, para. 58-59

¹⁸² SABAM, para. 43

¹⁸³ Dellarocas, p. 2

¹⁸⁴ UPC Telekabel, para. 49

The main issue arising from the exercise of the balance of rights in the GS Media case is that the rebuttable presumption of knowledge is too rigid for the Internet community.

Through its development the Internet has become a tool that people use every day and through which they can share their thoughts and information found on it. The scope of the GS Media decision affects the most of Internet users and will definitely restrict future provision of hyperlinks, since the liability is presumed. However the protection given to the copyright holders according to the GS Media decision is no broader than it was before.

The final effect is perhaps even more inept than the one that was provided through the UPC Telekabel protection measures. The content that infringes the copyright holders' rights is still available, even after the damages are claimed. It still resides on the website of origin.

According to the UPC Telekabel scheme the hyperlinks that lead to the content posted by the original infringer would be void and the user would be presented with the message that the content has been blocked.

This would more effectively protect the interests of the copyright holders. What is more interesting the copyright holders might even benefit from the actions of the hyperlink providers since they could point to the location of the original infringement and allow interim measures to be applied to the pertinent website.

The end result does not justify the imposition of presumed liability, since the copyright holders have already been granted with the sufficient protective mechanism.

6. Conclusion

Protection of the copyright holders' interests must be protected; however the way which the Court decided to take in order to achieve this protection is debatable.

Svensson, BestWater and GS Media decisions have focused on the interpretation that provision of hyperlinks is a primary infringement of public communication right. In these cases the Court has not even considered the possibility of secondary liability approach. Through this conduct the Court has broaden the scope of the public communication right as was presented in this paper.

The current situation somewhat resembles the one which was depicted in the fourth section of this paper regarding the state of the US law. There it was stated that the courts have expanded the definitions of contributory infringement and blurred the lines delineating the differences between two institutes of secondary liability - vicarious and contributory liability. Today in EU law we have a situation where the public communication right has been expanded so that it is evolved into something new entirely and whose lines are also blurred so that it too incorporates other institutes into itself.

The consequence of this interpretation is that the active role in detecting infringing copyrighted content has been shifted from the copyright holders to the hyperlink providers. As it has been presented in this paper such obligation can present a cumbersome task to smaller entities providing hyperlinks online and it will most definitely lead to chilling effect of freedom of expression.

Copyright holders are obtaining more and more protection measures. This is exemplified in this case through the cases of L'Oréal, where the Court established the reasonable duty of care for auction sites regarding the recurring infringements; UPC Telekabel, where interim protection has been established regarding the illegally uploaded copyrighted material; and GS

Media through the imposition of rebuttable presumption of knowledge on the hyperlink providers.

Furthermore obligations imposed through these decisions present burdens to the addressees right to conduct business, some of which are quite considerate. It is estimated that some ISPs have spent the sums of seven figures in obtaining systems that would allow them to fulfill the imposed obligations of filtering.¹⁸⁵

This scenario resembles an attempt found in the early version of Australia's Broadcasting Service Amendment (On Line Services) Act 1999. According to this proposal, which never got implemented, ISPs were obligated to either remove obscene and violent content or to block access to it if it was physically held abroad (by order of an access-prevention notice).¹⁸⁶

GS Media and UPC Telekabel protection mechanisms allow just this. Obligations of the hyperlink providers generate the similar effect to that of removing the material and the ISPs are obligated to block access to it. But, remember, the total liability approach never came into force in Australia and it dealt with content of offensive and violent nature, while an active total liability approach is now present in EU for the copyrighted content, which poses a smaller treath to the general public than the offensive and violent kind.

On the other hand, the astronomical potential losses that copyright holders suffer each year demand that something changes. However, there still has not been a proper respond of the copyright holders to this situation. The entertainment industry is reluctant to take part in this new market, as Lessig points out in his book *Remix*.¹⁸⁷ "Access is the mantra"¹⁸⁸ Lessig states and suggests that entertainment industry should focus its attention not on fighting piracy, but to finding a way to immerse itself in this new platform, through a new business model, that would allow it to provide access to everyone and thus eliminate the need for piracy.

One of the rare examples of such conduct is the YouTube's effort to establish its Content ID filtering system. This system allows copyright holders to gain revenue from the infringing copies of their copyrighted material. Content ID consists of a library of meta-files that represent the protected work, which is automatically engaged when a video is uploaded to determine if such video material is infringing on certain protected work.¹⁸⁹ If an infringement is found the copyright owner is presented with a choice to either: block or mute the pertinent video file, appropriate the revenue this video would provide to its uploader or track the viewership statistics of the video.¹⁹⁰

According to the analysis formed in this paper freedom of expression and of information is highly affected and derogated through the improper balancing of rights exercise conducted by the Court and because of the misinterpreted nature of public communication right. In GS Media the Court may have stricken the proper balance between the fundamental rights, but only in regards that single case, by not taking account to the other categories that will be affected by its ruling it thus created an unbalanced situation that will reflect poorly in the future use of the Internet as a medium for communication.

¹⁸⁵ Cartier, para. 41

¹⁸⁶ Edwards and Waelde, p. 20

¹⁸⁷ Lessig, p. 40

¹⁸⁸ Lessig, p. 46

¹⁸⁹ Content ID reference

¹⁹⁰ *ibid.*

The clear answer to this problem in the US jurisprudence was the Grokster decision which once and for all placed the institute of secondary liability in the aspects of online world on the good footing and provided us with the inducement liability. Is the EU jurisprudence in need of our own Grokster? The short answer, based on the analysis conducted in this paper, is yes.

The use of secondary liability in this aspect would provide for an effective and elegant solution to this problem. It would allow for the unobstructed flow of information in the Internet community and provide for the proper protection of the copyright holders.

In a hypothetical scenario, a website pursuing profit would be able to hyperlink to a location on which the content has been disseminated originally. If it turned out that this content was illegally placed on the Internet the hyperlink provider would have to remove hyperlink from its website, while the copyright holder would have the lead as to the location of the infringing material. Furthermore after the injunctive relief had been established the hosting website that provided its services for the original infringer would be obligated by the duty of proper care to track and block any further infringement of the same work based on the settled case-law.

The end user would in this case be left only with the option to use a circumvention tool that would allow her to avoid the blocking measure of the ISP and access the pertinent content, but this conduct would be protected on the basis of the Article 6 of the InfoSoc directive.

The intention of the Court in GS Media case was to provide the copyright holders with the protection they are entitled to, however the balance of relevant freedoms was not struck. Had the Court ruled that there is no difference between the websites pursuing profit and those which do not, the proper balance would have been achieved. This lack of judgement occurred from the fact that the Court did not take into consideration the real state of the online community and the almost ubiquitous presence of revenue mechanisms found on the Internet.

Chilling effect that will occur will diminish EU's potential to develop as one of the leading players in the ICT sector and will thus directly oppose the digital single market strategy according to which "the individuals and businesses can seamlessly access and exercise online activities."¹⁹¹

¹⁹¹ DSM reference

References

List of Judgements/Decisions

Court of Justice of European Union case-law:

C-162/97 Criminal proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn, EU:C:1998:554 (**Nilsson**)

C -101/01 Criminal proceedings against Bodil Lindqvist, EU:C:2003:596 (**Lindqvist**)

C-306/05 Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA, EU:C:2006:764 (**SGAE**)

C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU., EU:C:2008:54 (**Promusicae**)

Joined cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd, EU:C:2011:631 (**FAPL**)

C-324/09 L'Oréal SA and Others v eBay International AG and Others, EU:C:2011:474 (**L'Oréal**)

C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)., EU:C:2011:771 (**SABAM**)

C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso, EU:C:2012:140 (**SCF**)

C-162/10 Phonographic Performance (Ireland) Limited v Ireland and Attorney General, EU:C:2012:141 (**PPI**)

C-607/11 ITV Broadcasting Ltd and Others v TV Catch Up Ltd, EU:C:2013:147 (**ITV Broadcasting**)

C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH., EU:C:2014:192 (**UPC Telekabel**)

C-466/12 Nils Svensson and Others v Retriever Sverige AB, EU:C:2014:76 (**Svensson**)

C-117/13 Technische Universität Darmstadt v Eugen Ulmer KG, EU:C:2014:2196 (**TUD**)

C-348/13 BestWater International GmbH v Michael Mebes and Stefan Potsch, EU:C:2014:2315 (**BestWater**)

C-572/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL, EU:C:2015:750 (**Reprobel**)

Opinion of Advocate General Wathelet delivered on 7 April 2016 in the case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, EU:C:2016:221 (**GS Media opinion**)

C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others, EU:C:2016:644 (**GS Media**)

International case-law:

Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (**Shapiro**)

Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159 (2d Cir. 1971) (**Gershwin**)

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (**Sony**)

Harper & Row, Publishers, Inc., et al. v. Nation Enterprises, et al. 471 U.S. 539, (1985), 105 S. Ct. 2218; 85 L. Ed. 2d 588 (**National Enterprises**)

Amstrad Consumer Electronics Plc v British Phonographic Industry Limited [1986] FSR 159; CBS Songs Ltd and Others v Amstrad Consumer Electronics PLC and other [1987] 2 WLR 1191 (**Amstrad cases**)

IFPI Sweden v Tommy Olsson, no. B 413-00, Stockholm Supreme Court 2000 (**Olsson**)

Tono and others v Frank Allan Bruvik d/b/a Napster, Hr-2005-00133-A, Rt-2005-41 (Supreme Court of Norway, 27 January 2005 - Docket No. 2004/822) (**Napster.no**)

Verlagsgruppe Handelsblatt GmbH v Paperboy, Bundesgerichtshof No 1 ZR 259/00, 17 July 2003, [2005] ECDR 7 (**Paperboy**)

MetroGoldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005) (No. 04-480) (**Grokster**)

Perfect 10, Inc. v. Google Inc. 508 F.3d 1146 (9th Cir. 2007) (Perfect 10)

Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578, 2009 U.S. Dist. LEXIS 122661 (C.D. Cal. Dec. 21, 2009) (**Fung**)

Crookes v. Newton, 2011 SCC 47, [2011] 3 S.C.R. 269 (**Crookes**)

Cartier International AG and others v British Sky Broadcasting Limited and others [2016] EWCA Civ 658 (**Cartier**)

Treaties/Statutes

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, OJ L 167 , 22.6.2001, p. 10 (**InfoSoc directive**)

Charter of Fundamental Rights of the European Union, 2010/C OJ L 83/02, 30.3.2010, p. 389 (**The Charter**)

Basic proposal for the substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by the diplomatic conference, CRNR/DC/4 (**Travaux préparatoires**)

Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979 (**Berne Convention**)

Digital Millennium Copyright Act of 28 October 1998, Public Law 105-304, 105th Congress, H.R. 2281 (**DMCA**)

WIPO Copyright Treaties Implementation and On-Line Copyright Infringement Liability Limitation, Part 2 of 22 July 1998, Rept. 105-551, 105th Congress (**WIPO Implementation**)

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45 (**Enforcement directive**)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1 (**ECD**)

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p.33 (**Framework Directive**)

Secondary Literature

Stamatoudi, I.A. (2014) *EU Copyright Law: A Commentary*, Edward Elgar Publishing, Cheltenham, United Kingdom (**Stamatoudi**)

Waelde, C., Brown, A., Cornwell, J. and Kheria, S. (2016) *Contemporary Intellectual Property: Law and Policy*, fourth edition, Oxford University Press, Oxford, United Kingdom (**Waelde**)

Berners-Lee, T. with Fischetti, M. (2000) *Weaving the Web: the original design of the World Wide Web by its inventor*, HarperCollins Publishers Inc., New York, USA (**Berners-Lee**)

Bohannan, C. and Hovenkamp, H. (2012) *Creation without Restraint: Promoting Liberty and Rivalry in Innovation*, Oxford University Press, New York, USA (**Bohannan**)

Edwards, L. and Waelde, C. (2009) *Law and the Internet*, third edition, Hart Publishing, Portland, USA (**Edwards**)

Bygrave, L.A. (2002) *Data protection law: approaching its rationale, logic, and limits*, first edition Kluwer Law International, New York, USA (**Bygrave**)

Lessig, L. (2008) *Remix - Making Art and Commerce Thrive in the Hybrid Economy*, Bloomsbury, London, United Kingdom (**Lessig**)

Baggioa, R. and Coriglianoa, M.A., (2009) “On the Importance of Hyperlinks: a Network Science Approach”, retrieved from <https://pdfs.semanticscholar.org/8242/cff374942c3653e9566946430fa66b9936d.pdf> (**Baggioa**)

Rosén, J. (2002) “Server Copyright Liability – Notes on the Swedish Act on Liability for Intermediaries and two Recent Decisions of the Swedish Supreme Court”, *Stockholm Inst. for Scandinavian Law*, 147, 147 n.1 (**Rosén**)

Stemplewitz, J. (2004) “BGH I ZR 259/00 - Legality of Deep Links”, Miller/Zumbansen (eds), *Annual of German and European Law 2004*, retrieved from http://www.cgerli.org/fileadmin/user_upload/interne_Dokumente/Judgments/bghizr25900.htm#n4 (**Stemplewitz**)

Högberg, S.K. (2006) “The search for intent-based doctrines of secondary liability in copyright law”, *Columbia Law Review*, May, 2006, Vol.106(4), retrieved from https://bibsys-k.alma.exlibrisgroup.com/view/action/uresolver.do;jsessionid=A2ADD74293B6D41AABD3CDE95DD0170E.app03.eu01.prod.alma.dc03.hosted.exlibrisgroup.com:1801?operation=resolveService&package_service_id=3675814640002204&institutionId=2204&customerId=2200 (**Högberg**)

Lemley, M.A. and Reese, R.A. (2004) “Reducing digital copyright infringement without restricting innovation”, *Stanford Law Review*, 1 May 2004, Vol. 56(6), retrieved from <https://bibsys->

k.alma.exlibrisgroup.com/view/action/uresolver.do?operation=resolveService&package_service_id=3675811310002204&institutionId=2204&customerId=2200 (**Lemley**)

Charlesworth, J.C. (2011) “The Moral of the Story: What Grokster Has to Teach about the DMCA”, *Stanford Technology Law Review*, 29 May 2011, Vol. 6, retrieved from <https://journals.law.stanford.edu/sites/default/files/stanford-technology-law-review/online/charlesworth-moral-of-the-story.pdf> (**Charlesworth**)

Leistner, M. (2014) “Structural aspects of secondary (provider) liability in Europe”, *Journal of Intellectual Property Law & Practice*, 2014, Vol. 9, No. 1, retrieved from <http://jiplp.oxfordjournals.org/content/9/1/75.full.pdf> (**Leistner**)

Rosati, E. (2016) “CJEU links fair compensation in Articles 5(2)(a) and (b) of the InfoSoc Directive to actual harm requirement”, *Journal of Intellectual Property Law & Practice*, 2016, Vol. 11, No. 3, retrieved from <http://jiplp.oxfordjournals.org/content/11/3/167.full.pdf+html> (**Rosati**)

OECD Report (2010) *The Economic and Social Role of Internet Intermediaries* retrieved from <https://www.oecd.org/internet/ieconomy/44949023.pdf> (**OECD report**)

Lesiak, M. (2009) “An Analysis of the Liability of Internet Service Providers”, *Masaryk University Journal of Law and Technology*, vol. 3, retrieved from <https://journals.muni.cz/mujlt/article/viewFile/2541/2105> (**Lesiak**)

Brownsword, R. and Howells, G. (2000) “Europe's E-commerce Directive - A Too Hasty Legislative Rush to Judgment??”, *JILawInfoSci* 6; (2000-2001) 11(1) *Journal of Law, Information and Science* 77 retrieved from <http://www.austlii.edu.au/au/journals/JILawInfoSci/2000/6.html> (**Brownsword**)

Samuelson, P. (2002) “Copyright and Freedom of Expression in Historical Perspective”, *Berkeley Law Scholarship Repository*, 1.1.2002, retrieved from <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1048&context=facpubs> (**Samuelson**)

De Vany, A.S. and Walls, W.D. (2007) “Estimating the Effects of Movie Piracy on Box-office Revenue”, *Rev Ind Organ* (2007) 30: 291. doi:10.1007/s11151-007-9141-0, retrieved from <http://link.springer.com/article/10.1007/s11151-007-9141-0> (**De Vany**)

Ahlert, C., Marsden, C. and Yung, C. (2004) “How ‘Liberty’ Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation”, retrieved from http://leetupload.com/database/Misc/Papers/liberty_disappeared_from_cyberspace.pdf (**Ahlert**)

Dellarocas, C., Katona, Z. and Rand, W. (2010) *Media, Aggregators and the Link Economy: Strategic Hyperlink Formation in Content Networks*, retrieved from <http://idei.fr/sites/default/files/medias/doc/conf/sic/dellarocas.pdf> (**Dellarocas**)

Edwards, L. and Waelde, C. (2005) “Online intermediaries and Liability for Copyright Infringement”, *WIPO, Paper of Seminar on Copyright and Internet Intermediaries*, retrieved from <https://www.era.lib.ed.ac.uk/bitstream/1842/2305/1/wipo-onlineintermediaries.pdf> (**Edwards and Waelde**)

Sacquet, M., (2016) “Hyperlinks under attack in Europe (or “when you thought it could not get worse”...)”, retrieved from <http://www.project-disco.org/intellectual-property/090916-hyperlinks-attack-europe-department-thought-not-get-worse/#.WDwxTdUrLIU> (**Sacquet**)

- Masnack, M., (2016) “Terrible Ruling: EU Decides That Mere Links Can Be Direct Infringement”, retrieved from <https://www.techdirt.com/articles/20160908/11305735465/terrible-ruling-eu-decides-that-mere-links-can-be-direct-infringement.shtml> (**Masnack**)
- Collins, T., (2016) “CJEU backs hyperlinks to unauthorised copyright, subject to conditions”, retrieved from <http://www.stevens-bolton.com/news/cjeu-backs-hyperlinks-unauthorised-copyright-subject-conditions/> (**Collins**)
- Swindells, R. and Holmey, F., (2016) “The CJEU's Decision in GS Media: Connecting the Dots on Hyperlinking” retrieved from http://www.jonesday.com/files/Publication/ee4cbc1e-742a-4f89-a2fd-672b42ad0a09/Presentation/PublicationAttachment/0ec68484-6056-4000-b448-6af6f75e1ec2/CJEUs_Decision_in_GS_Media.pdf (**Swindells**)
- Rosati, E. (2014) “That BestWater order: it's up to the rightholders to monitor online use of their works”, retrieved from <http://ipkitten.blogspot.rs/2014/10/that-bestwater-order-its-up-to.html> (**IPKat Reference**)
- Seidler, N. (2014) “Freedom of expression online: finding the appropriate balance”, retrieved from <https://www.internet-society.org/blog/public-policy/2014/12/freedom-expression-online-finding-appropriate-balance> (**Seidler**)
- Friedman, W. (2015) “Internet Poised To Be Biggest Ad Medium In 2016”, retrieved from http://www.mediapost.com/publications/article/254584/internet-poised-to-be-biggest-ad-medium-in-2016.html?utm_source=Webbiquity.com (**Friedman**)
- O'Brien, D. (2009) “France Declares Three Strikes Unconstitutional” retrieved from <https://www.eff.org/deeplinks/2009/06/three-strikes-dead-in-france> (**O'Brien**)
- Angelopoulos, C. (2014) “CJEU in UPC Telekabel Wien: A totally legal court order...to do the impossible” retrieved from <http://kluwercopyrightblog.com/2014/04/03/upc-telekabel-wien/> (**Angelopoulos**)
- What is HyperText, World Wide Web Consortium (W3C), retrieved from <https://www.w3.org/WhatIs.html> (**W3C reference 1**)
- Berners-Lee, T. (1997) “Links and Law”, retrieved from <https://www.w3.org/DesignIssues/LinkLaw> (**W3C reference 2**)
- “CCIA Comments on the GS Media Case (C-160/15)”, retrieved from <http://www.ccianet.org/wp-content/uploads/2016/02/CCIA-Comments-on-the-GS-Media-Case-7.2015.pdf> (**CCIA reference**)
- “How Content ID works”, YouTube, retrieved from <https://support.google.com/youtube/answer/2797370?hl=en> (**Content ID reference**)
- Digital Single Market, European Commission, <https://ec.europa.eu/digital-single-market/en/digital-single-market> (**DSM reference**)