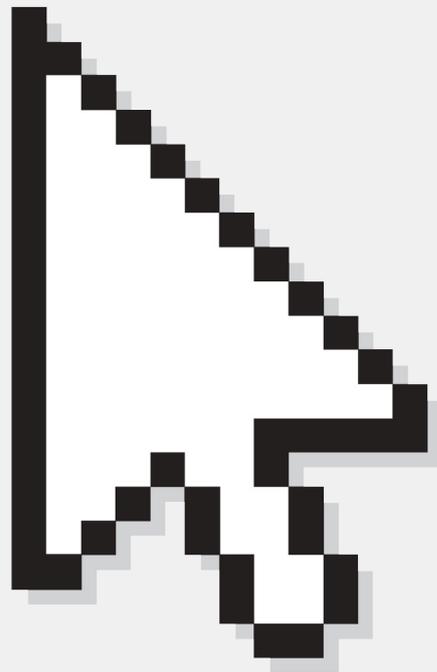


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# Do Hyperlinks Infringe Copyright?



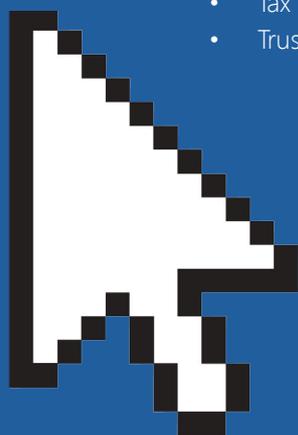
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# Do Hyperlinks Infringe Copyright?

Evolving case law from the Court of Justice of the European Union (“CJEU”) confirms that links to copyright works which are freely accessible on the internet do not infringe copyright, but where links are to content made available without the copyright owner’s consent the answer is more nuanced.



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## Hyperlinks

Clickable links direct internet users to works on another website in two main ways:

- by taking the user directly to the work on another website; and
- by embedding the work in such a way as to give the impression that the work appears on the site on which the link is found (i.e. framed by the linking site).

Copyright will often exist in the work to which users are redirected when clicking a link.

## The law

Article 3(1) of Directive 2001/29/EC provides that the author of a copyright work has the exclusive right to authorise or prohibit any communication to the public of their work.

## Permitted hyperlinks

The CJEU has found that links to works which are freely accessible on the internet do not infringe copyright, even if the link reproduces the work in such a way as to give the impression that it is appearing on the site on which the link is found (e.g. if the work is framed by the linking site).

The basic rationale is:

- the concept of a communication under article 3(1) includes two criteria: (i) an act of communication; and (ii) communication to a public;
- providing a link or framing is an act of communication; but
- in order to be a communication to the public, it must be:

- communicated using specific technical means which are different from those previously used by the rights holder; or
- directed at a “new public”: i.e. a public which was not taken into account by the rights holder when it authorised the initial publication elsewhere on the internet.

For example, journalists whose press articles were first published and made freely accessible to all internet users, without restriction, on newspapers’ websites, could not complain that links to those articles infringed their copyright; the initial publication of the articles targeted all internet users, so the links did not communicate the articles by new technical means or to a ‘new public’<sup>1</sup>.

## Links which risk copyright infringement

Not all links escape infringement.

### Restricted works

Links may infringe copyright if they circumvent measures taken to restrict access to the work, e.g. works behind a paywall and available to subscribers only. In those circumstances, the link may communicate the work to a ‘new public’ not intended by the rights holder. That may also be the case where a work is no longer available to the public on the site on which it was initially communicated, although clarification is awaited.

## Content available without the copyright holder’s consent

Where the link is to a work published online without the rights holder’s consent, the position is more nuanced and depends

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<sup>1</sup> *Svensson and others v Retriever Sverige AB* (C-466/12)

to some extent on whether the person providing the link does so in pursuit of a profit and their state of knowledge.

Where a person provides a link to a work freely available on another website without the rights holder's consent:

- If that person does so not for profit and does not know, and cannot reasonably know, that it was published unlawfully, there should be no infringement.
- By contrast, there may be infringement if that person:
  - knows, or should reasonably know, that the work was published unlawfully (e.g. if notified of the rights holder's lack of consent);
  - posts links for profit, in which case it is expected that person carries out necessary checks to ensure linked content is not unlawfully published and there is a rebuttable presumption that publication of the link occurred with full knowledge of the protected nature of the linked work and possible lack of consent

If the rights holder has published the same work on another website (i.e. not the unlawful website linked) then it seems arguable there will be no communication to a 'new public', which should avoid infringement.

For example, publication by a Dutch entertainment website of Playboy photographs leaked on the internet without consent is likely to constitute infringement, particularly where the photographs were not removed after Playboy notified its rights<sup>2</sup>.

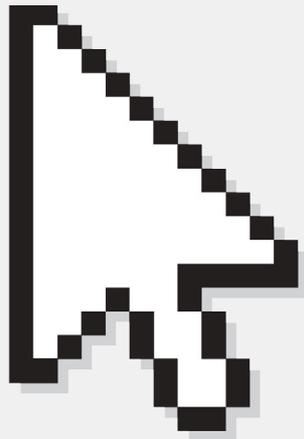
## Comment

The European court's approach appears intended to strike a fair balance which avoids ordinary internet users facing infringement action where they innocently post links, for example on social media feeds, whilst providing some measure of protection for rights holders where their works are published and linked without consent.

Businesses which publish links will face some practical difficulties and will now need to take greater care over the source and legality of the content linked.

Links at a glance				
Is linked publication freely available?	Has the rights holder given consent to publication?	Does linking party do so for a profit?	Does linking party know linked publication is unlawful?	Possible infringement?
Yes	Yes			No
Yes	No	No	No	No
Yes	No	No	Yes	Yes
Yes	No	Yes	Rebuttable presumption of knowledge	Yes
No	Yes			Yes
No	No			Yes

<sup>2</sup> *G S Media BV v Sanoma Media Netherlands BV & others* (C-160/15)



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