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Data: 16/11/2026 11:45:33

Articles

Studia Iuridica Lublinensia vol. 31, 2, 2022
DOI: 10.17951/sil.2022.31.2.117-143

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Publication of a Hyperlink and Communication of a Work to the Public within Court of Justice of the European Union and Courts of Selected European Countries Case Law

Publikacja hiperlinku a publiczne udostępnianie utworu w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej oraz sądów wybranych państw europejskich

ABSTRACT

Currently, we very often deal on the Internet with the publication of links, so-called hyperlinks, that direct to the protected content. Posting hyperlinks on websites creates a possibility of accessing works. This issue is of crucial importance to the operation of the Internet because hyperlinks can be used in a way infringing copyright. Internet users are frequently unaware of the fact that their acts can infringe copyright to a work. We should pay attention to the fact that posting hyperlinks to websites containing works protected by copyright evokes doubts as to the qualification thereof coming to the question if every posting of the hyperlink should be treated as using the work or is there any additional criteria that should be fulfilled. For this reason, national courts make requests to the Court of Justice of the European Union for a preliminary ruling about the content of copyright law. What is more, the member states' national courts have to settle cases of complex factual circumstances concerning communication of digital content to the public. This caused the need for a closer look at the publication of a hyperlink guiding to the page containing the copyrighted work as communication to the public and verification of accordance to the law referring to communication to the public on the Internet with jurisprudence practice. The main target of the consideration is an attempt to answer the question whether the publication of a hyperlink on a website leading to a protected work constitutes communication to the public. To answer this question, the article analyzes the rulings of the Court of Justice of the European Union, national courts of the EU Member States and Polish courts as well as

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Data: 16/11/2026 11:45:33

doctrine representatives' opinions. On this foundation, the distinct elements concerning the publication of a hyperlink on a website within the context of communication to the public have been indicated.

Keywords: communication of a work to the public; hyperlink; Internet; work

INTRODUCTION

Currently, technological progress provides the general public with Internet access to copyrighted works. This is particularly connected with technical change and development as well as various business models, which provide users with a possibility of relatively simple sending/conveying digital content.[1] Within this scope, the issue of hyperlinks (linking, hyperlinking[2]), i.e. referencing to another website, attracts special attention. Hyperlinks are words highlighted in a text or Internet domains which direct Internet users to other Internet websites or to other locations on the same webpage.[3] In short, the following types of links are technically distinguished: direct – linking to the homepage, and deep – allowing users to access or use the work skipping the homepage, i.e. connecting users to the subpage or directly opening a file placed there.[4] We should also distinguish between embedded and framed links. These links direct users through the Internet browser to the content which is displayed on the webpage with the link while the user is then not directed to the website of an entity where specific content has been placed. As far as embedded links are concerned, they are inserted in a website containing the link. Once activated, they remain its part from the user's perspective whereas with regard to framed links, the content is displayed in separate frames.[5] Furthermore, we should distinguish inline links, where a user of a specific webpage has access to the content from another website without leaving the original website.[6] Thanks to hyperlinks placed on websites works can be accessed. Yet, some uses of hyperlinks may infringe copyright.

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[1] On the new ways of Internet usage, see more in N. Karpiuk, *Blockchain as a Non-Standard Response to the Limitation of Positive Law in the Social Media Environment*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), pp. 295–307.

[2] K. Klafkowska-Waśniowska, *Zamieszczanie odesłań internetowych a zakres autorskich praw majątkowych*, "Białostockie Studia Prawnicze" 2015, no. 19, p. 51.

[3] K. Moruń, *Odpowiedzialność prawna za odesłania w internecie*, "Przegląd Prawa Handlowego" 2007, no. 13, p. 40 and the literature of the subject cited therein.

[4] D.K. Gęsicka, *Publiczne udostępnianie utworu w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2014, no. 125, p. 39; K. Klafkowska-Waśniowska, *op. cit.*, p. 51.

[5] K. Klafkowska-Waśniowska, *op. cit.*, pp. 51–52. See also W. Szpringer, *Linking, framing, meta-tagi (perspektywa konkurencji)*, http://vagla.pl/skrypts/w_szpringer_linking_framing.pdf (access: 30.10.2021).

[6] K. Moruń, *op. cit.*, p. 41.

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Data: 16/11/2026 11:45:33

The main target of the consideration is an attempt to answer the question whether the publication of a hyperlink on a website leading to a protected work constitutes communication to the public. The main problem of consideration requires extracting the specific goals. The following specific goals have been stated:

1. How within the jurisdiction of the Court of Justice of the European Union (CJEU) and the EU Member States' national courts understanding the law of communication to the public was changing?
2. In particular is it possible to observe widening the concept of communication to the public or rather narrow understanding of the term?
3. If the national courts understand the right of communication to the public in the same way as the CJEU?

The following thesis was formulated in the study: Placement of a hyperlink on a website constitutes a communication to the public within the meaning of 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,[7] depending on whether the hyperlink was made available for profit and the poster's awareness that such action is illegal.

Taking into account the subject of considerations in the study, it was decided to use several complementary research methods: the method of literature analysis, analysis of legal acts, analysis of judicial decisions. The rulings analyzed herein appear to be the most vital with regard to determination of the existence of communication to the public within the context of publication of hyperlinks leading to websites containing protected works.

Placing hyperlinks directing to websites, i.e. making their web addresses available and providing access to the content included on other websites, is a problem evoking qualifying doubts.[8] In particular, the term "communication to the public" itself, which appears in Directive 2001/29/EC,[9] arises doubts in the practice. Hence, national courts ask prejudicial questions[10] to the CJEU about the content of this

[7] 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 167/10, 22.6.2001), hereinafter: Directive 2001/29/EC.

[8] D.K. Gęsicka, *op. cit.*, p. 39.

[9] Harmonisation of Member States' legislation within the scope of copyright and related rights contributes to proper operation of the European Union's internal market. See I. Wróbel, *Pojęcie publicznego udostępniania utworów w prawie UE – przegląd orzecznictwa TS*, "Europejski Przegląd Sądowy" 2014, no. 8, p. 37. The Directive 2001/29/EC is one of the most important EU legal acts in this field. See M. Pęk, *Ochrona nadań w prawie Unii Europejskiej*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2011, no. 111, p. 116.

[10] On the legitimacy of the preliminary questions referred to the CJEU, see more in Z. Czarnik, *The Legitimacy of Preliminary Questions to the Court of Justice of the European Union (CJEU) on the Legal Status of Supreme Court Judges in Poland*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), pp. 151–168.

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Data: 16/11/2026 11:45:33

right.[11] Due to this, the CJEU has time and again examined the issue of legal qualification of hyperlink publication most often within the context of communication of a work to the public. The CJEU's opinion thereon is widely commented by the doctrine, and the Luxemburg Court is often criticized for lack of consistence, clarity and cohesion as well as complexity of legal argumentation.[12] What is more, the member states' national courts have to decide about complex factual circumstances related to the provision of access to digital content too. This issue is important because users currently exchange links on Internet websites, among others to films, music or TV series, thus creating libraries of links. On social networking portals as well, users place links to memes, music files and photos.[13]

The issue of communication of a work to the public has been regulated in Directive 2001/29/EC. Its application embraces traditional areas of exploitation of copyright and related rights as well as Internet services.[14] Pursuant to Article 3 (1) thereof, Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.[15] Article 3 (1) of Directive 2001/29/EC specifies the right of

[11] E. Traple, *Europeizacja prawa autorskiego w orzeczeniach Trybunału Sprawiedliwości*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2014, no. 126, p. 208.

[12] R. Markiewicz, *Zdezorientowany prawnik o publicznym udostępnianiu utworów*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2016, no. 134, pp. 5–14; idem, *Svensson a sprawa polska*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2014, no. 126, pp. 56–59; D.K. Gęsicka, *op. cit.*, pp. 41–42; E. Traple, *Europeizacja…*, pp. 211–212; E. Arezzo, *Hyperlinks and Making Available Right in the European Union: What Future for the Internet after Svensson?*, 12.3.2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404250 (access: 10.11.2021), pp. 29–30; P. Mezei, *Enter the Matrix: The Effects of the CJEU's Case Law on Linking and Streaming Technologies*, "Journal of Intellectual Property Law & Practice" 2016, vol. 11(10), pp. 793–794.

[13] D.K. Gęsicka, *op. cit.*, p. 39.

[14] M. Pęk, *op. cit.*, p. 116.

[15] It should be noticed that the Polish wording of Directive 2001/29/EC uses the concept of "the right to make a work available". However, if we refer to the wording of this Directive in other languages, e.g. English or French, it is "the right of communication to the public" and *droit de communication d'oeuvres au public*. The terminology adopted in the Polish wording of Directive 2001/29/EC to the extent of communication to the public does not correspond to a large number of Polish wordings of other directives which use this concept. Likewise K. Wojciechowski, *Pojęcie komunikowania publicznego utworu w prawie autorskim*, [in:] *Oblicza prawa cywilnego. Księga jubileuszowa dedykowana Profesorowi Janowi Błeszyńskiemu*, ed. K. Szczepanowska-Kozłowska, Warszawa 2013, p. 634; J. Konikowska-Kuczyńska, *Publiczne udostępnianie utworu w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej i sądów polskich*, [in:] *Sto lat polskiego prawa handlowego. Księga Jubileuszowa dedykowana Profesorowi Andrzejowi Kidybie*, red. M. Dumkiewicz, K. Kopaczyńska-Pieczniak, J. Szczotka, vol. 2, Warszawa 2020, pp. 590–591.

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Data: 16/11/2026 11:45:33

communication to the public of works on the Internet while Article 3 (2) thereof refers to related rights.[16] Interpreting the term "communication to the public", the wording of international law acts should also be taken into account, in particular Bern Convention.[17] According to the CJEU,[18] communication to the public depends on the fulfilment of two prerequisites: the work must be communicated, i.e. it is accessible, and communication is public, i.e. it is addressed to an indeterminate number of recipients.[19] Hence, the question arises here whether the publication of a hyperlink on a website leading to a protected work constitutes communication to the public. The analysis of case-law and doctrine representatives' opinions allows to indicate distinct elements concerning the publication of a hyperlink on a website within the context of communication to the public.

There are two criteria of communication to the public to be analyzed. First, it would be examined the premise of communication the work to the public, then the criterion of the new public would be analyzed.

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[16] R. Markiewicz, *Zdezorientowany prawnik…*, p. 11. On the other hand, Article 8 (2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ L 376/28, 27.12.2006) regulates the right of a compensatory nature which is granted to performers and phonogram producers who have the right to obtain "a single equitable remuneration paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public". See S. Żyrek, *Zamieszczanie na stronach internetowych hiperłączy umożliwiających uzyskanie dostępu do utworów chronionych prawem autorskim, wprowadzenie i wyrok Trybunału Sprawiedliwości z 13.02.2014 r., C-466/12, Nils Svensson i in. przeciwko Retriever Sverige AB*, "Europejski Przegląd Sądowy" 2019, no. 3, p. 50. See also I. Wróbel, *Pojęcie publicznego udostępniania utworów…*, p. 38. It should further be noticed that the CJEU in the judgment of 31 May 2016 ruled that the concept of "communication to the public" used in Article 3 of Directive 2001/29/EC and Article 8 (2) of Directive 2006/115/EC have the same meaning. See judgment of the CJEU of 31 May 2016, C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*, ECLI:EU:C:2016:379, point 33.

[17] M. Stawiński, *Linki internetowe do chronionych utworów a publiczne udostępnianie utworu – glosa – C-466/12*, "Monitor Prawniczy" 2015 no. 2, p. 101; Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24 1971, (Journal of Laws 1990, no. 82, item 474).

[18] Judgment of the CJEU of 2 June 2005, C-89/04 *Mediakabel BV p. Commissariaat voor de Media*, ECLI:EU:C:2005:348, point 30. See also judgment of the CJEU of 14 July 2005, C-192/04 *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) i Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, ECLI:EU:C:2005:475, point 31. In subsequent judgments, the CJEU refers to the ruling in the Mediakabel case and the criterion of an indeterminate number of recipients applied therein as well as the criterion of programmes intended for reception by the public to accept communication to the public. See E. Traple, *Autorskie prawa majątkowe*, [in:] *System Prawa Prywatnego*, vol. 13: *Prawo autorskie*, ed. J. Barta, Warszawa 2017, p. 242.

[19] See M. Nowikowska, *Utwór jako przedmiot prawa autorskiego*, [in:] *Prawo własności intelektualnej*, ed. J. Sieńczyło-Chlabicz, Warszawa 2018, p. 76.

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Data: 16/11/2026 11:45:33

THE PREMISE OF COMMUNICATION THE WORK TO THE PUBLIC

The premise of communication the work to the public remains a problematic issue all the time. The situation is particularly difficult due to the fact that the CJEU itself appears to be ambiguous in its qualification assessments related to online linking. An attempt to organize this issue should begin with closing to the point of view of the Luxembourg tribunal. This should allow for the further examination of whether the courts of the European Union Member States have received the judgments of the EU tribunal.

What regards the premise of communication to the public, the CJEU expressed its opinion in particular in the cases of Svensson, GS Media and Stichting Brein. In the Svensson case sentence of 13 February 2014, the CJEU stated that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public. In another judgment in the GS Media case of 8 September 2016, the CJEU upheld its previous line of case-law and complemented it by an additional criterion of fault. In the next judgment in the case of Stichting Brein of 14 July 2017, the CJEU went further in its interpretation of the principles and factors of the judgment in the GS Media case.

The provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public,[20] as the CJEU decided in its judgment of 13 February 2014 in the Svensson case.[21] This opinion was in line with public expectations, it not only eliminated a potential threat to the Internet as such if the decision was to the contrary but also saved the Internet just through the retention of linking's legality.[22] The request for a ruling has been made in proceedings between N. Svensson, S. Sjögren, M. Sahlman and P. Gadd and Retriever Sverige AB concerning compensation allegedly payable to them for the harm they have suffered as a result of the inclusion on Retriever Sverige AB company's website of hyperlinks redirecting users to press articles in which the applicants hold the copyright.[23] According to the CJEU, "every act of communication of a work to the public has to be authorised by the copyright holder".[24] In

[20] Pursuant to Article 3(1) of Directive 2001/29/EC.

[21] Judgment of the CJEU of 13 February 2014, C-466/12 *Nils Svensson and Others v Retriever Sverige AB*, ECLI:EU:C:2014:76, operative part of the order, hereinafter: the judgment in the Svensson case. The CJEU has also ruled in this judgment (operative part of the order, point 2) that a Member State may not introduce laws giving copyright holders wider protection by laying down that the concept of communication to the public includes a wider range of activities than those listed in Article 3 of Directive 2001/29/EC. Cf. more detailed considerations in J. Konikowska-Kuczyńska, *op. cit.*, pp. 597–598.

[22] R. Markiewicz, *Svensson a sprawa…*, p. 56.

[23] Judgment in the Svensson case, point 2.

[24] *Ibidem*, point 15. See more M. Kupczyk-Czerniawska, *Linkowanie w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej i sądów polskich*, "Temidium" 2016, no. 3, p. 60.

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Data: 16/11/2026 11:45:33

this judgment, the Court summarizes the premise of communication to the public and the criterion of new public. It even states that when there is an act of making available to the public and there is no prerequisite for a new public, then there is no use of the work. What is more, the prerequisite of a legal publication of a link is not relevant, i.e. when Internet users click on a disputable link, "the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site".[25] It is essential that in the Svensson case, the Court for the first time "referred the prerequisites of recognizing an act as a communication of the work to the public" to a situation in which a website provided links to protected works published by the copyright holder on the website to which the link refers. The Court stated that such an activity may constitute making the work available to the public, but in this case it was not taking place, i.e. there was no communication to the public.[26]

The CJEU's opinion according to which publication of clickable links may constitute an act of communication to the public has been questioned by Advocate General M. Watheletin the opinion[27] delivered on 7 April 2016 in the case *GS Media BV v Sanoma Media Netherlands BV and Others*.[28] The Advocate noticed "possible departure from the case-law stemming from the judgment in *Svensson and Others* (…) on the concept of 'act of communication', which is a criterion that must be met in order to establish a 'communication to the public' within the meaning of Article 3 (1) of Directive 2001/29, and its application to hyperlinks".[29] He further observed that "hyperlinks posted on a website which direct to works protected by copyright that are freely accessible on another website cannot be classified as an 'act of communication' within the meaning of Article 3 (1) of Directive 2001/29 since the intervention of the operator of the website which posts the hyperlink (…) is not indispensable to the making available of the photographs in question to users".[30] The Advocate proposed to interpret Article 3 (1) of Directive 2001/29/EC in a way where an act of communication to the public cannot be deemed as communication

Publication of a link may constitute communication of a protected work to the public, however, not if the link directs to the work communicated to the public with the consent of the copyright holder. See more S. Żyrek, *op. cit.*, p. 48.

[25] Judgment in the Svensson case, point 29. See R. Markiewicz, *Svensson a sprawa…*, pp. 60–61.

[26] S. Żyrek, *op. cit.*, p. 50. Cf. J. Konikowska-Kuczyńska, *op. cit.*, pp. 589–599.

[27] Opinion of Advocate General M. Wathelet delivered on 7 April 2016, Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:221, point 44, hereinafter: the opinion of Advocate General M. Wathelet.

[28] Judgment of the CJEU of 8 September 2016, C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others*, ECLI:EU:C:2016:644, point 51, hereinafter: the judgment in the GS Media BV case.

[29] Opinion of Advocate General M. Wathelet, point 44. See more R. Markiewicz, *Zdezorientowany prawnik…*, p. 14.

[30] Opinion of Advocate General M. Wathelet, point 60.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

to the public if "a link posted on a website directs to another website on which works protected by copyright are freely accessible for users without the consent of the copyright holder". He further claimed that it is not important whether the entity posts on a website a hyperlink to another website, where the works protected by copyright are freely accessible to the public, is or ought to possess knowledge that the copyright holder has not authorised the placement of specific works on that other website or that, additionally, those works hadn't been previously made available to the public with the copyright holder's consent, and that a hyperlink to another website, where the works protected by copyright are freely accessible to the public, which facilitates access to specific works, doesn't constitute an act of communication to the public.[31] R. Markiewicz notices that a hyperlink merely facilitates access to a work; it does not make it available.[32] Hence, making a work available to the public should not be treated the same as making a link available to the public, i.e. a tool which facilitates access to a work.[33] I agree with this opinion because hyperlinks which lead to protected works do not "make available" those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works.[34]

In accordance with the CJEU's judgment of 8 September 2016 in the GS Media BV case,[35] there is no communication to the public when a person posting a hyperlink "does not know and cannot reasonably know" that the work has been published on the Internet without the consent of the entitled entity.[36] This judgment upholds and complements the previous case-law by an additional criterion of fault because the Court has introduced the necessity of the existence of fault (intentional or unintentional), on the part of a person who posts a link to such a work, as a condition to the finding of an infringement.[37] The Court ruled that in order to establish whether posting on a website links to protected works, which are freely accessible on another website, without the consent of the entitled entity, constitutes a "communication to the public", it is to be determined whether those links have been provided "without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website" or whether those links have been provided for such a purpose, a situation in which that knowledge must be presumed.[38] This judgment

[31] *Ibidem*, point 88.
[32] R. Markiewicz, *Zdezorientowany prawnik*..., p. 14.
[33] Idem, *Svensson a sprawa*..., pp. 57–58.
[34] See opinion of Advocate General M. Wathelet, point 54.
[35] Judgment in the GS Media BV case, point 51.
[36] Judgment in the GS Media BV case, point 47. See R. Markiewicz, *Zdezorientowany prawnik*..., p. 18.
[37] R. Markiewicz, *Zdezorientowany prawnik*..., p. 14, 18.
[38] Judgment in the GS Media BV case, operative part of the order.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

provides for a different qualification of the act depending on the fact whether a hyperlink has been posted with or without the pursuit of financial gain.[39] When the posting of a hyperlink is carried out for profit, it can be expected that the person who posted such a link checks if it does not lead to the website where a specific work has been published without the consent of the copyright holder. Therefore, it may be presumed that the posting has been made "with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the Internet by the copyright holder".[40] In such circumstances, we deal with a presumed breach of duty in a form of intentional fault.[41] This presumption is rebuttable.[42] R. Markiewicz rightly observes that, formally, in order to establish whether communication to the public actually occurred, it does not matter whether a link has been posted for profit. Factually, a person acting for this purpose will always be liable for such conduct while a person who has acted without such a purpose will be obliged to "stop such conduct only after notifying copyright holders about it".[43] The CJEU has indicated three fundamental conditions necessary to declare inadmissibility of posting hyperlinks without the consent of the copyright holder, that is: an intentional nature of the Internet user's conduct and his role in making a work available, a "new" public or "new" technology used to make a work available as well as carrying it out for profit.[44]

The CJEU ruled that GS Media effected a "communication to the public", within the meaning of Article 3 (1) of Directive 2001/29/EC.[45] A request for preliminary ruling was made by the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) and concerned the interpretation of Article 3 (1) of Directive 2001/29/EC. The request was made in the proceedings between GS Media BV and Sanoma Media Netherlands BV, Playboy Enterprises International Inc. and Ms Britt Geertruida Dekker, and regarded the posting on the GeenStijl.nl website, operated by GS Media, of hyperlinks to other websites enabling photographs of Ms B.G. Dekker, taken for "Playboy" magazine, to be viewed. The CJEU decided that GS Media

[39] E. Milczarek, *Odpowiedzialność za udostępnianie hiperłączy*, "Prawo Mediów Elektronicznych" 2017, no. 2, p. 19.

[40] Judgment in the GS Media BV case, point 51.

[41] R. Markiewicz, *Linkowanie w orzecznictwie Trybunału Sprawiedliwości. Ilustrowane prawo autorskie*, LEX/el.

[42] Judgment in the GS Media BV case, point 51.

[43] R. Markiewicz, *Linkowanie w orzecznictwie*...

[44] M. Bogdanowicz, *Pobierać czy linkować, oto jest pytanie. Wyrok TSUE w sprawie dopuszczalności korzystania ze zdjęć w Internecie*, 5.10.2018, http://ipllectual.pl/pl/pobierac-czy-linkowac-oto-jest-pytanie-wyrok-tsue-w-sprawie-dopuszczalnosci-korzystania-ze-zdjec-w-internecie (access: 30.10.2021); B. Oręziak, *Analiza prawnej dopuszczalności zamieszczania hiperlinków w internecie. Uwagi na tle wyroku Europejskiego Trybunału Praw Człowieka z 4.12.2018 r. w sprawie MAGYAR JETI ZRT przeciwko Węgrom*, "Prawo w Działaniu" 2019, no. 40, p. 282.

[45] Judgment in the GS Media BV case, point 54.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

provided the hyperlinks to the files containing the photos at issue, hosted on the Filefactory website, for profit, while Sanoma had not authorised the publication of those photos on the Internet.[46] R. Markiewicz rightly notes that the CJEU's judgment in the GS Media BV case has not been based on the opinion of Advocate General M. Wathelet, and that it is a breakthrough with regard to the issue of the "importance of a subjective mindset of a wrongdoer related to linking".[47] We should also pay attention to the fact that such unification of liability of a person making available materials on a website without the consent of the copyright holder and making available a link to these materials arise controversy because, frequently, subjects who carry out their activities for profit and professionally may not be able to check whether specific materials have been lawfully made available on a website.[48] This obligation is not easy to fulfil.[49] In effect of the CJEU's position adopted thereon, a person who makes a hyperlink available will never be absolutely certain if his/her conduct is legal.[50] One should also point out that there is a discord between the CJEU's position according to which publication of clickable links constitutes an act of communication to the public and the opinion of Advocate General M. Wathelet. It should be noted that the opinion of Advocate General M. Wathelet was leading to a liberal interpretation of an act of communication to the public within the context of posting a hyperlink to a website where a copyrighted work is placed.[51] On the other hand, the CJEU believes that such interpretation of Article 3 (1) of Directive 2001/29/EC guarantees authors a high level of protection assumed by the Directive.[52] Z. Pinkalski rightly notes that "the CJEU's judgment in the Svensson case is a judgment that has 'saved the Internet' while the judgment in the GS Media case aims to destroy the Internet in its present form".[53] In my opinion, R. Markiewicz is right saying that this position "accurately reflects concerns emerging in the wake of this judgment".[54] The doctrine has noticed that the CJEU case-law concerning liability for posting hyperlinks to protected works is, "in a wider perspective, a Pyrrhic victory of the copyright holders".[55]

[46] *Ibidem*, point 1, 2, 54.

[47] R. Markiewicz, *Zdezorientowany prawnik…*, p. 14, 18.

[48] E. Milczarek, *op. cit.*, p. 20.

[49] M. Oleksyn, A. Zdanowicz, *Linki w Internecie a prawa autorskie*, 2.4.2017, https://www.rp.pl/Prawo-autorskie/304029981-Linki-w-Internecie-a-prawa-autorskie.html (access: 20.10.2021).

[50] Z. Pinkalski, *Linkowanie do utworów i jego ocena z punktu widzenia naruszenia praw autorskich. Glosa do wyroku TS z dnia 8 września 2016 r., C-160/15*, LEX/el. 2016.

[51] P. Mezei, *op. cit.*, p. 784.

[52] Judgment in the GS Media BV case, point 53. See also M. Kupczyk-Czerniawska, *op. cit.*, p. 61.

[53] Z. Pinkalski, *op. cit.* and the literature of the subject cited therein. Likewise R. Markiewicz, *Zdezorientowany prawnik…*, p. 20.

[54] Likewise R. Markiewicz, *Zdezorientowany prawnik…*, p. 20.

[55] S. Żyrek, *op. cit.*, p. 54 and the literature of the subject cited therein.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

According to the CJEU, the making available and management of an online sharing platform is communication to the public while the concept of communication to the public embraces the making available and management, on the Internet, of a sharing platform "which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network". This is how the CJEU ruled in the judgment of 14 June 2017 in the case *Stichting Brein v Ziggo BV, XS4ALL Internet BV*.[56] The above case was initiated by a request for a preliminary ruling made by Supreme Court of the Netherlands (Hoge Raad der Nederlanden) concerning interpretation of Article 3 (1) and Article 8 (3) of Directive 2001/29/EC. The request was made in the proceedings between StichtingBrein, a foundation which safeguards the interests of copyright holders, and Ziggo BV and XS4ALL Internet BV, Internet access providers. The dispute concerned requests made by StichtingBrein for an order requiring Ziggo BV and XS4ALL to block the domain names and IP addresses of the online sharing platform "The Pirate Bay".[57] In this case, the CJEU made an "extensive interpretation of the principles and factors from the judgment in the GS Media case" and proposed a "new form of complicity in linking".[58] The CJEU found it reasonable to hold liable in civil law an Internet user who by making available and managing, on the Internet, a sharing platform operating by means of indexation of metadata relating to protected works and the provision of a search engine, "allowed users of that platform to locate those works and to share them in the context of a peer-to-peer network" (complicity in linking or making available indirectly).[59] The CJEU based the above reasons on the *sine qua non* condition,[60] without the operators making such a platform available and managing it, the works could not be shared by the users or, at the very least, sharing them on the Internet would prove to be more complex.[61]

Similarly to the CJEU, the European Union Member States' national courts have a problem with understanding the criterion of communication to the public. It is worth paying attention here to the judgment of the Court of Appeal of Amsterdam of 19 November 2013, according to which posting on a website of a hyperlink to

[56] Judgment of the CJEU of 14 June 2017, C-610/15 *Stichting Brein v Ziggo BV, XS4ALL Internet BV*, ECLI:EU:C:2017:456, point 47, operative part of the order, hereinafter: the judgment in the Stichting Brein case.

[57] Judgment in the Stichting Brein case, point 1, 2. On resolving international disputes regarding intellectual property, see more in D. Lewis, *The Adoption of International Arbitration as the Preferred ADR Process in the Resolution of International Intellectual Property Disputes*, "Białostockie Studia Prawnicze" 2021, vol. 26(5), pp. 41–62.

[58] B. Oręziak, *op. cit.*, p. 282.

[59] *Ibidem*; judgment in the Stichting Brein case, operative part of the order.

[60] B. Oręziak, *op. cit.*, p. 282.

[61] Judgment in the Stichting Brein case, point 36.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

a work is not communication of the work to the public unless this work "can be found in ICT networks and accessed without this link". In such a case, "a work is made available through another medium, which means the work is exploited in a new field". The Court of Appeal noticed that publication of a hyperlink does not differ from "placing a footnote in the text of an article referring to another article or book". For this reason, it will not enter the sphere of the copyright law monopoly, nor will it be communication to the public of an autonomous meaning.[62] Posting a link should be understood as communication of a work to the public, a new channel of access, but only when the work is made available on the Internet but "the access thereto is of a private nature, i.e. when a specific work is not localized by search engines". Furthermore, the Court of Appeal noticed that "even though redirecting under other conditions cannot be treated as an infringement of copyright, it may be deemed unlawful in the light of the Civil Code due to special facilitation and encouragement to refer to a work". According to R. Markiewicz, this corresponds to the construction of incitement and aiding and abetting set forth in the Polish Act.[63]

Court of Appeal of the Czech Republic, on the other hand, ruled in the judgment of 27 February 2013 that publication of the so-called "embedded link" on a website is communication to the public of a work that link redirects to. This judgment was criticized at that time because it did not account for the then case-law of the CJEU to this extent and "opposed the pro-directive interpretation".[64] The Brussels Court of Appeal, in turn, in the judgment of 11 May 2011, in the case of *Copiepresse, publishers of Belgian press, v Google Inc.*,[65] concerning Google News service, ruled that Google infringed copyright.[66] The problem of qualification concerned a form of linking – direct and deep links. The issue of linking was of a secondary importance due to the infringement of the reproduction right.[67] Whereas the Barcelona Court of Appeal[68] decided that posting links to the material protected by copyright is not communication to the public and it is not an infringement of copyright.[69]

Polish courts have ruled on the issue of posting hyperlinks to the extent of communication to the public as well. Accordingly, it results from the judgment

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[62] D.K. Gęsicka, *op. cit.*, p. 40; judgment of the Court of Appeal of Amsterdam of 19 November 2013, *GeenStijl v Sanoma*, 507119 IHA ZA 11-2896.

[63] R. Markiewicz, *Svensson a sprawa…*, p. 61.

[64] D.K. Gęsicka, *op. cit.*, p. 40; judgment of the Supreme Court of the Czech Republic of 27 February 2013, 8 TDO 137/2013.

[65] Judgment of the Court of Appeal of Brussels of 11 May 2011, no. 2007/AR/1730.

[66] P. Waglowski, *Belgijskie Copiepresse vs. globalne Google. Kto wygrał tę batalię?*, http://prawo.vagla.pl/node/9498 (access: 23.10.2021).

[67] K. Klafkowska-Waśniowska, *op. cit.*, p. 53 and the literature of the subject cited therein.

[68] Judgment of the Court of Appeal of Barcelona of 7 July 2011, sentence no. 301/2011.

[69] P. Waglowski, *Sąd w Hiszpanii: linkowanie nie jest powielaniem, rozpowszechnianiem ani publicznym udostępnianiem*, http://prawo.vagla.pl/node/9497 (access: 23.10.2021).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

of the Court of Appeal of Kraków of 20 July 2004[70] that posting hyperlinks met characteristics of communication to the public. According to the Court, posting the so-called deep link on a website of an Internet portal that allowed users direct opening of another website, i.e. "bypassing (skipping) in-page navigation of another portal's homepage", which contains an image of a person, meets characteristics of communication to the public of this image. The Court claimed that posting a link to a website containing the image of the plaintiff met characteristics of communication of an image to the public because it created a situation where a non-limited number of users of the website could familiarize themselves with her image. If such a link was not posted, in order to access the website the link directed to, an Internet user would have to know the website's address and undertake "appropriate 'searching' actions".[71]

The District Court of Warsaw,[72] on the other hand, decided that making a hyperlink available is an infringement of copyright and an act of dissemination of the content the hyperlink directs to.[73] The Court ruled that an act of infringement of economic rights was posting a link to the video clip infringing the plaintiff's economic rights which was shown through YouTube service because after visiting the plaintiff's profile, every Internet user could view the content of the video clip through the so-called deep linking, i.e. after clicking the icon "Play", the video was played back on the plaintiff's profile without the need to go to www.youtube.com.

According to the judgment of 18 December 2013 of the Court of Appeal in Katowice,[74] placement of a hyperlink to the television material constitutes communication to the public and infringes the personal rights of the claimant plaintiff. In this ruling, the Court found that "the link to the television material (…) is a reference to material prepared by a publisher other than the defendant and posted on a website other than the defendant's website and concerning this matter, which was mentioned in the defendant's short information note, (…) such a situation can be compared to the one in which the press material refers to other material by way

[70] Judgment of the Court of Appeal of Kraków of 20 July 2004, I ACa 564/04, Legalis no. 448186. This judgment is treated as the first judicial opinion in Poland about the qualification of hyperlinks. See T. Targosz, *Naruszenia dóbr osobistych w Internecie – rewolucja orzecznictwa*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2018, no. 140, p. 96 and the literature of the subject cited therein.

[71] Judgment of the Court of Appeal of Kraków of 20 July 2004, I ACa 564/04, Legalis no. 448186. Likewise M. Wróbel, *Prawo do umieszczania linku odsyłającego do innej strony internetowej, na której znajduje się utwór chroniony prawem autorskim – glosa*, "Monitor Prawniczy*"* 2015, no. 17, p. 935; R. Markiewicz, *Svensson a sprawa…*, p. 58.

[72] Judgment of the District Court of Warsaw of 12 July 2013, I C 504/12, not published. See more M. Wróbel, *op. cit.*, p. 935.

[73] M. Wróbel, *op. cit.*, p. 935.

[74] Judgment of the Court of Appeal in Katowice of 18 December 2013, V ACa 524/13, LEX no. 1415953.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

of a quotation, without changing the content of that other material, (…) it must be assumed that the defendant referred to other people's statements in his press material, indicating their source". The Court indicated that placing a hyperlink to another website allowed the Internet users "to become familiar with the content of this website immediately and directly". By placing a hyperlink on an information portal page to another website, the defendant made the Internet users, by activating the link, obtain direct access to the website of another portal, therefore the defendant "increased the group of people who could read the content of the website, to whose link goes back". The Court also noted that, had that hyperlink not been provided, access to the website concerned that link and would have required the address of that site to be known. The Court emphasized that the defendant, by placing this hyperlink, referred to someone else's statements and indicated their source and "does not exclude the unlawfulness because such a structure of the statement does not release the journalist from the diligence referred to in Article 12 (1) of the Press Law". The defendant infringed the personal rights of the plaintiff because by placing a hyperlink to another website, it led to an increase in the group of people who could read the content presented there. It is important, as A. Wójcik points out, that if we compare this position with the later judgment of the CJEU in the Svensson case, in this situation there was no new public and the ruling of the Court of Appeal could have looked different, taking into account the "pro-EU law interpretation imperative".[75]

In the judgment of 11 April 2014,[76] the Court of Appeal of Gdańsk ruled that posting a link on a website directing to another website containing a biographical note about the plaintiff "did not constitute public communication of clickable links posted on a website which direct to other websites". According to the Court, a reference made to the opinion expressed by the CJEU in the judgment in the Svensson case helped to settle the Polish case. The Court of Appeal adopted the same position as in the above-mentioned case. The Court ruled that it was groundless to consider the defendant's liability for an infringement of the plaintiff's personal interests because the defendant had not disseminated information about the plaintiff.[77] What is more, the Court noticed that its ruling was not influenced by the above-mentioned judgment of the Court of Appeal of Kraków of 20 July 2004.[78]

[75] A. Wójcik, *Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 18 grudnia 2013 r. w sprawie V ACa 524/13*, "Forum Prawnicze" 2014, no. 3, pp. 51–50.

[76] Judgment of the Court of Appeal of Gdańsk of 11 April 2014, I ACa 7/14, Legalis no.1093072.

[77] *Ibidem*. See more M. Wróbel, *op. cit.*, p. 935, M. Kupczyk-Czerniawska, *op. cit.*, p. 62.

[78] Judgment of the Court of Appeal of Kraków of 20 July 2004, I ACa 564/04, Legalis no. 448186.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

THE CRITERION OF NEW PUBLIC

What regards the criterion of new public, the CJEU made statements in particular in cases: *Svensson*, *BestWater*, *Land Nordrhein-Westfalen and VG Bild-Kunst*. In the justification of the judgment in the Svensson case, the CJEU indicated that the scope of communication to the public requires so that it is aimed at to a new public. In BestWater and Land Nordrhein-Westfalen and VG Bild-Kunst cases, the CJEU upheld its position.

Note that the reasons to the ruling in Svensson case imply that the provision of clickable links to protected works must be considered to be an "act of communication".[79] The CJEU pointed out that in order to be covered by the concept of "communication to the public", a communication must be made by the same technical means and must also "be directed at a new public,[80] that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public".[81] Hence, the concept of a "new public" was of "crucial importance to the final settlement in this case"[82] because the CJEU noticed that since there was no new public, "the authorisation of the copyright holders is (…) not required for such a communication to the public".[83] Since the works which the links directed to were freely accessible on a website, we cannot talk about a new public that protected works are made available to.[84] That is to say, such a form of linking is lawful because "making available" was not "directed at a new public" since the same persons could have accessed the works on the first site.[85]

[79] Judgment in the Svensson case, point 20.

[80] The concept of a "new public" has been defined neither in Directive 2001/29/EC nor any other act of the EU law. The CJEU case law explains and unifies the scope of this concept within the context of making works available to third parties (see D.K. Gęsicka, *op. cit.*, pp. 34–35). E. Traple (*Autorskie prawa majątkowe…*, p. 229) underlines that the criterion of a "new public" should be understood as a public other than the one the initial communication has been directed at. This is a public which has not been taken into account by the author when she or he was giving consent to the communication to the public to the initial public.

[81] Judgment in the Svensson case, point, 24. See more R. Markiewicz, *Svensson a sprawa…*, p. 57. It should be underlined that this judgment upholds the application of the criterion of a new public as an element of a definition of communication to the public, which was used first time in the CJEU's judgment of 7 December 2006, C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, ECLI:EU:C:2006:764. See more S. Żyrek, *op. cit.*, p. 52.

[82] P. Mezei, *op. cit.*, p. 781.

[83] Judgment in the Svensson case, point 30.

[84] Z. Zawadzka, *Autorskie prawa majątkowe. Ograniczenia treści autorskich praw majątkowych*, [in:] *Prawo własności intelektualnej*, ed. Joanna Sieńczyło-Chlabicz, Warszawa 2018, p. 146.

[85] M. Kupczyk-Czerniawska, *op. cit.*, p. 60.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

Similar to the Svensson case, in the CJEU's order of 21 October 2014 in the BestWater case[86] on linking through the use of the framing technique, the Court ruled that the mere fact that a protected work, freely available on an Internet site, is inserted into another Internet site by means of a link using the "framing" technique cannot be classified as "communication to the public" within the meaning of Article 3 (1) of Directive 2001/29/EC since the work at issue is not transmitted to a new public or communicated a specific technical method different from that of the original communication.[87] This case was submitted to the CJEU in effect of a prejudicial question asked by the Federal Court of Justice of Germany (Bundesgerichtshof): "Does the embedding, within one's own website, of another person's work made available to the public on a third-party website (…) constitute 'communication to the public' within the meaning of Article 3 (1) of Directive 2001/29/EC, even where that other person's work is not thereby communicated to a new public and the communication of the work does not use a specific technical means which differs from that of the original communication?". The dispute concerned a promotional film about water pollution BestWater International held economic rights to. The video was posted on YouTube without BestWater's consent and on the websites of sales agents of BestWater's competitor with the use of a framing technique. When users clicked the link, the film from the video platform popped up and appeared on the sales agents' websites giving the impression it was actually there. BestWater made a claim to stop broadcasting and sought damages. Analysing this complaint, the CJEU noticed that if a work has already been subject to "communication to the public" in the meaning of Article 3 (1) of Directive 2001/29 /EC, a new act of communication effected in accordance with the same technical method may be classified as "communication to the public" in the meaning of this provision only when this act is effected by a new public.[88] According to the CJEU, if all Internet users have free access to a work on another website with the consent of the copyright holder, it will not be communication to the public in the meaning of Article 3 (1) of Directive 2001/29/EC.[89] From the point of view of qualifying an activity as "communication to the public", it does not matter if the copyright holder does not consent to the original communication of the work to the public.[90]

The CJEU's position in the Svensson case is not uniform. The claim saying that making links available is the same as making protected works available has not been explained by any insightful legal reasoning. The judgment in this case has also been

[86] Order of the Court (Ninth Chamber) of 21 October 2014, C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch*, ECLI:EU:C:2014:2315, hereinafter: the order in the BestWater case.

[87] *Ibidem*, operative part of the order.

[88] *Ibidem*, point 15.

[89] *Ibidem*, point 16.

[90] E. Milczarek, *op. cit.*, p. 18.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

found quite peculiar as it was made in effect of a request for a preliminary ruling, which should be a tool to provide the Court with a possibility to "clarify the applications of normative provisions with obscure contours".[91] Even though the Court gave the referring court a univocal solution, it failed to provide explicit guidelines or specify clear principles on how to settle future cases concerning publication of hyperlinks.[92] Although judgments in the Svensson case and BestWater case are landmark, as they almost inevitably immunize linking from copyright liability.[93] The above CJEU's judgments have not dispelled all doubts about communication of a work to the public within the context of posting a hyperlink.

It results from the CJEU's judgment of 7 August 2018 in the case *Land Nordrhein-Westfalen v Dirk Renckhoff*,[94] that factors and principles from the judgment in the GS Media case do not decide about legality of links referring to works that are available on the Internet with the consent of the copyright holder but merely "simple subsuming of an autonomically understood concept of a 'new public' under the facts".[95] The Court decided that communication to the public covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.[96] Moreover, invoking a well-established line of case-law,[97] the Court emphasized that in order to be categorised as a "communication to the public", a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a "new public", that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public.[98] The request was made in the proceedings between Land of North Rhine-Westphalia, Germany (the Land Nordrhein-Westfalen) and a photographer Mr Dirk Renckhoff (concerning the unauthorised use by a pupil of a school for which that *Land* is responsible of a photograph taken by Mr Renckhoff), which was "freely accessible on one website", to illustrate a school presentation posted by that school on another website.[99]

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[91] E. Arezzo, *op. cit.*, p. 15, 24.

[92] *Ibidem*, p. 24, 29, 30.

[93] P. Mezei, *op. cit.*, p. 786.

[94] Judgment of the CJEU of 7 August 2018, C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff*, ECLI:EU:C:2018:634, hereinafter: the judgment in the Land Nordrhein-Westfalen case.

[95] B. Oręziak, *op. cit.*, p. 283.

[96] Judgment in the Land Nordrhein-Westfalen case, operative part of the order.

[97] Judgment in the Svensson case, point 24; judgment in the GS Media BV case, point 37; judgment in the Stichting Brein case, point 28.

[98] Judgment in the Land Nordrhein-Westfalen case, point 24.

[99] *Ibidem*, point 2.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

From the most recent judgment of the CJEU of 9 March 2021 in the case of *VG Bild-Kunst vs Stiftung Preußischer Kulturbesitz*[100] shows that the placing on a third party website, embedding a framing technique, of works protected by copyright that have been made freely accessible to the public with the consent of the copyright holder on another website, and the placement is done by circumventing the anti-framing measures applied or commissioned by copyright holder, it is made available to the public. The request for a preliminary ruling has been made by the German Federal Court of Justice (Bundesgerichtshof) in a proceedings between VG Bild-Kunst, a visual art collective copyright management organization and a cultural heritage foundation (Stiftung Preußischer Kulturbesitz a visual arts copyright collecting society in Germany), and cultural heritage foundation (Stiftung Preußischer Kulturbesitz) which runs a digital library (Deutsche Digitale Bibliothek). The library website contained links to digital content on Internet portals, and the library website itself only contained thumbnails of the images. VG Bild-Kunst made the conclusion of a license agreement with the foundation for its use of the catalog of works made available by VG Bild-Kunst subject to inclusion in the agreement of a provision that would oblige the foundation, as a licensee, to use "effective technological measures" against third party use of framing. The foundation stated that the condition was not justified from the point of view of the copyright law and therefore brought an action to establish that VG Bild-Kunst was obliged to grant the foundation a license without making it conditional on the application of the aforementioned technological measures. The CJEU decided that placing a protected work on a website of a third party, which was made freely available to the public with the consent of the copyright holder, on another website, using a framing technique, must be classified as "making that work available to a new public".[101] It should be said that if the CJEU ruled otherwise, it would be inconsistent with the Charter of Fundamental Rights and could also upset the balance in the digital environment.[102] This ruling is of great importance from the point of view of website managers, but also the Internet users themselves, as it will constitute communication to the public and posting on a third party website using the framing technique of works, which may lead to copyright infringement.

Another judgment that should be invoked here is the judgment of the Court of Appeal of Warsaw of 7 May 2014,[103] wherein the Court ruled that even though posting a clickable link "redirecting to the Internet location where the work is placed

[100] Judgement of the CJEU of 9 March 2021, C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, ECLI:EU:C:2021:181.

[101] Judgment in the VG Bild-Kunst case, point 2, 10, 11, 12, 48.

[102] K. Sztobryn, A. Urbanek, *Framing a udostępnianie utworu nowej publiczności. Omówienie wyroku TS z dnia 9 marca 2021 r., C-392/19 (CNIL)*, LEX/el. 2021.

[103] Judgment of the Court of Appeal of Warsaw of 7 May 2014, I ACa 1663/13, LEX no. 1466985. See more R. Markiewicz, *Svensson a sprawa*..., p. 66; M. Kupczyk-Czerniawska, *op. cit.*, pp. 61–62.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

and playing back this work" is making a work available, the plaintiff's economic rights to the work were not infringed because the defendant used an audio-visual work of an unknown author which was placed on the website and no objections were made as to the infringement of copyright to this work. In this case, a person of an unknown identity placed on the plaintiff's public profile, in a social media portal, a link to the video clip (containing a fragment of the song used without the knowledge and consent of the plaintiff) which, after visiting the plaintiff's profile, allowed every Internet user to view the content of this video clip through the so-called deep linking, i.e. after clicking the icon "Play", the video was played back on the plaintiff's profile. The Court noticed that "assuming that posting links, in general, does not, however, infringe copyright, then, when copyright is infringed by a person posting a work on the Internet, prerequisites of liability under Article 422 of the Polish Civil Code[104] through aid provided by a person posting the link may be taken into account". A person posting a link to a work thus facilitates access thereto by "increasing a number of available Internet addresses and networks as well as a number of clickable 'places' leading directly to the work". The court did not share the position of the Luxembourg tribunal that dissemination requires a new public and that in fact "first communication on the Internet, provided that the public has not been restricted, will result in the new public criterion not being fulfilled in any subsequent communication via the network". This conclusion neither follows from the Rafael Hotels case judgment nor from the Directive, and is also inconsistent with the wording of point 24 of the Preamble. The Court emphasized that the criterion of new public may be one of the criteria for stating a new act of exploitation, but it is not a *sine qua non condition*. It should be stated that according to the Court, it is not merely posting a link itself (deep or another) that decides about a potential infringement of copyright but the effect of using the link. The Court noticed that if the audio-visual work infringed the plaintiff's rights, the defendant would face liability for placing the link, which, however, did not occur in this case. At this point, it is worth paying attention that the dominant view in Polish doctrine is that the publication of a hyperlink to the website on which the work is located does not constitute the use of the work. However, we are dealing with an indirect infringement of copyright in the form of ancillary measures (Article 422 of the Polish Civil Code) in the event of culpable placing of a hyperlink to a work that has been posted on the Internet without the consent of the copyright holder.[105] It is not allowed to place a hyperlink through which the website "on which there is an infringement of proprietary copyrights" is opened. Then, the proprietary copyrights are infringed by the subscriber of the website to which the referral is made and also by the subscriber of the website on which the hyperlink is

[104] Act of 23 April 1964 – Civil Code (Journal of Laws 2020, item 1740).
[105] R. Markiewicz, *Svensson a sprawa*..., s. 66.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

located. We are dealing here with an indirect infringement of copyright in the form of ancillary provisions (Article 422 of the Polish Civil Code) by an Internet user who links to such a page.[106] T. Targosz properly states that the CJEU "refers – in terms of unlawfully shared content – with the criteria of transgression liability, in particular the so-called indirect breaches", but it is not always easy to apply replies to existing national institutions, such as Article 422 of the Polish Civil Code.[107] It follows from the above that if posting a reference (link) to materials that contain unlawfully disseminated content is culpable, then it is postulated that the entity that publishes this reference bears liability under the support pursuant to Article 422 of the Polish Civil Code.

CONCLUSIONS

Posting hyperlinks to the content placed on other websites is an up-to-date legal issue evoking doubts as to the qualification thereof.[108] For this reason, the CJEU has time and again considered the issue of publication of a hyperlink to a website containing a protected work to the extent of communication of this work to the public. In the Svensson case, the CJEU for the first time "referred the prerequisites of recognizing an act as a communication of the work to the public" to the situation wherein links to protected works have been made available on the website and these works have been published on the website the links directed them to by the copy right holder. The Court ruled that making available on a website of clickable links to protected works freely available on another website does not constitute an act of communication to the public.[109] What is more, the Court decided that in order to effect communication to the public, a protected work should be communicated using specific technical means or to a new public, that is to say, to a public that was not taken into account by the copyright holders when they authorised the initial communication of their work to the public. According to the Court, if a work is freely accessible to all Internet users on another website with the consent of the copyright holder, it will not be communication to the public in the meaning of Article 3 (1) of Directive 2001/29/EC, shortly, it will be lawful to link to shared works with the permission of the copyright holder.

An intentional act of the Internet user and his role in making a work available, a "new" public or "new" technical means used to make a work available, and the pursuit of financial gain in making a work available are, due to the CJEU, three

[106] M. Kupczyk-Czerniawska, *op. cit.*, s. 62.
[107] T. Targosz, *op. cit.*, s. 107.
[108] D.K. Gęsicka, *op. cit.*, s. 39; B. Oręziak, *op. cit.*, p. 281.
[109] Pursuant to Article 3 (1) of Directive 2001/29/EC.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

fundamental conditions necessary to declare the linking inadmissible without the consent of the copyright holder.[110] There is no communication of a work to the public when a person posting a hyperlink "does not know and cannot reasonably know" that the work has been published on the Internet without the consent of the entitled entity.[111] The Court ruled that to specify if the fact of including on a website hyperlinks to protected works, which are freely accessible on another website without the consent of the entitled entity, constitutes a "communication to the public", it is to be determined whether those links have been provided "without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website" or if those links have been included for such a purpose, a situation in which that knowledge must be presumed. Furthermore, in the Court's opinion, making available and managing a sharing online platform is communication to the public. It is important that posting works that come from another website on a website will constitute an infringement of copyrights only if measures are taken to prevent framing. However, if the website on which the works are located does not have any protection against framing, then it will be allowed. If the works were not previously available to an undefined number of recipients, Polish licensees are required to apply anti-framing measures, which are required by the authors. On the contrary, licensees are not obliged to do so if the copyright holder originally made the communication to the public without the necessary technological safeguards, then the works were available to an unlimited audience and could not be directed to a new public.[112]

The jurisprudence of the CJEU had a significant impact on Polish courts in the matter of understanding the provision of hyperlinks. In their judgments, Polish courts referred to the jurisprudence of the Luxembourg tribunal in this respect and also engaged in polemics with it. Both the Court of Appeal of Warsaw and the Court of Appeal of Gdańsk referred to the judgment in the Svensson case. It is worth noting that the Court of Appeal of Gdańsk shared the CJEU's opinion presented in the above-mentioned case whereas the Court of Appeal of Warsaw decided that the interpretation adopted by the CJEU "is not univocally right".[113] Also in the judgment of the Court of Appeal in Warsaw of 7 May 2014 the aforementioned judgment of the CJEU was evoked, however, a polemic was raised with the position regarding sharing, recognizing that "none of the activities performed by both the linking

[110] M. Bogdanowicz, *op. cit.*; B. Oręziak, *op. cit.*, p. 282.

[111] Judgment in the GS Media BV case, point 47. Likewise R. Markiewicz, *Zdezorientowany prawnik…*, p. 18.

[112] K. Sztobryn, A. Urbanek, *op. cit*.

[113] J. Matczuk, M. Michalska, *Linkowanie a prawo autorskie*, https://www.rp.pl/Opinie/301119985-Linkowanie-a-prawo-autorskie.html (access: 10.11.2020).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 16/11/2026 11:45:33

party and the link user, in itself it does not apply to the work as such, there is no use of the work".[114] The analysis also clearly shows that prior to the Svensson case, Polish courts qualified the posting of hyperlinks as communication to the public. The liability of the person who posted the hyperlink to the infringing content has been assumed. Such an act was treated as dissemination of the content available through linking[115] whereas a person making a link available was held liable for such communication.[116] It should be noted that the judgment of the CJEU in the Svensson case has changed Polish courts' approach to linking.[117] R. Markiewicz properly states that while linking to works can be understood as use within the meaning of Article 17 of the Polish Act 4 February 1994 on copyright and related rights,[118] there are no grounds for considering, as part of pro-EU interpretation, further necessary factors reconstructed by the Luxembourg tribunal to determine whether a specific activity constitutes the communication of works to the public. This applies, i.a., to the possibility of using the work in accordance with its function, new public, and the circumstances that the linking person knew or should have known that its operation allows third parties to access the work. It should be agreed with the author that until the amendment to the Copyright and Related Rights Act, Polish courts should limit themselves to indirect infringement of the law basing on Article 422 of the Civil Code.[119] It is also important that so far there have been no Supreme Court judgments regarding the issue of posting hyperlinks.

Both J. Bart and R. Markiewicz aptly state that the CJEU introduced the criterion of a "new public", and also indicate a clearly visible tendency to include copyright protection for activities that do not involve direct exploitation of the work, including, among others, considering that the use of a work also consists in helping to "reach" or "transfer" "to an already shared work". The authors properly state out that it would be worth considering the current provision of Article 17 of the Copyright and Related Rights Act, according to which the content of copyright is based on the use of the work in all fields of exploitation, which makes it impossible to "differentiate the scope of protection according to the criterion of whether a given form of exploitation is addressed to a new or existing public", as well as whether the behavior was culpable and whether it was carried out for profit. One should agree with J. Bart and R. Markiewicz that it is worth considering the dif-

[114] A. Nowicka, *Komentarz do art. 6*, [in:] *Ustawy autorskie. Komentarze*, ed. R. Markiewicz, vol. 1, Warszawa 2021, s. 230.

[115] Judgment of the District Court of Warsaw of 12 July 2013, I C 504/12, not published. See more M. Wróbel, *op. cit.*, p. 935.

[116] M. Wróbel, *op. cit.*, p. 935.

[117] *Ibidem*.

[118] Journal of Laws 2019, item 1231.

[119] R. Markiewicz, *Zdezorientowany prawnik…*, pp. 8–9.

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Data: 16/11/2026 11:45:33

ferentiation of the existence of protection depending on whether the exploitation relates to a new public.[120]

It should be noted that before the CJEU's judgment in the Svensson case, final judgments of national courts of the EU Member States lacked uniformity. S. Żyrek rightly claims that the judgment in the Svensson case is a landmark ruling in the CJEU case-law to the extent of liability of a person posting hyperlinks to websites containing protected works.[121]

Even though the CJEU case-law plays an essential role in the uniform application of law in the EU Member States, and it results from its judicature when we deal with communication of a work to the public when hyperlinks are posted, taking into account rapid development of technology and Internet and the ensuing common use of links by its users, doubts about the qualification thereof will continue to arise to this extent.

In response to the questions posed in the first part of the article, understanding the concept of communication to the public has changed, in particular, because the criterion of new public has been brought to the fore when assessing whether posting a link on the Internet constitutes a kind of use of work. It is not clear whether the CJEU is giving a broad or a restrictive interpretation. At the same time, however, the Luxembourg tribunal proposes additional criteria: placing a hyperlink for commercial purposes and the advertiser being aware that such action is unlawful. This allows to clarify the scope of the activities of communication to the public. It seems that the national courts of the Member States have difficulties in adopting judgments of the CJEU, with attention being drawn to the fact that the jurisprudence of the Luxembourg tribunal is evolving. It therefore seems that the assessment of the question of whether the Member States' national courts understand the right to communication to the public in the same way as the CJEU remains an open question.

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[120] J. Barta, R. Markiewicz, *Prawo autorskie*, Warszawa 2016, pp. 158–159.

[121] S. Żyrek, *op. cit.*, p. 50.

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Data: 16/11/2026 11:45:33

ABSTRAKT

Współcześnie w Internecie bardzo często mamy do czynienia z publikacją odesłań, czyli tzw. hiperlinków, prowadzących do chronionych treści. Poprzez umieszczanie na stronach internetowych hiperłączy tworzy się możliwość uzyskania dostępu do utworów. Materia ta dotyka problemu o kluczowym znaczeniu dla działania Internetu, ponieważ hiperłącza mogą być wykorzystywane w sposób naruszający prawa autora. Internauci często nie są świadomi, że ich działanie może naruszać prawa autorskie do utworu. Należy zwrócić uwagę na to, że zamieszczanie hiperlinków do stron internetowych, na których znajdują się utwory chronione prawem autorskim, wywołuje wątpliwości kwalifikacyjne sprowadzające się do odpowiedzi na pytanie, czy każde umieszczenie hiperlinku będzie stanowiło postać korzystania z utworu czy też konieczne jest spełnienie dodatkowego kryterium w tym zakresie. W związku z tym sądy krajowe zwracają się z pytaniami prejudycjalnymi o treść tego prawa do Trybunału Sprawiedliwości Unii Europejskiej. Także sądom krajowym państw członkowskich przedstawiane są do rozstrzygnięcia złożone stany faktyczne, które dotyczą udostępniania treści cyfrowych. Z tego względu pojawiła się potrzeba bliższego przyjrzenia się zagadnieniu publikacji hiperlinku do strony, na której znajduje się chroniony utwór, w kontekście jego publicznego udostępniania i zweryfikowania określonego przepisami prawa do publicznego udostępniania utworu w Internecie z praktyką orzeczniczą. Głównym celem rozważań jest próba odpowiedzi na pytanie, czy publikacja na stronie internetowej hiperlinku odsyłającego do chronionego utworu stanowi publiczne udostępnianie. Aby na nie odpowiedzieć, w opracowaniu analizie poddano orzeczenia Trybunału Sprawiedliwości Unii Europejskiej, sądów krajowych państw członkowskich Unii Europejskiej oraz sądów polskich, a także poglądy przedstawicieli doktryny. Na tej podstawie wskazano charakterystyczne elementy dotyczące publikacji hiperłącza na stronie internetowej w kontekście publicznego udostępniania.

Słowa kluczowe: publiczne udostępnianie utworu; hiperlink; Internet; utwór