

# Is linking unlawful? - the Judgment of the Court of Justice in (C-160/15) *GS Media BV v Sanoma Media Netherlands BV*

Does the posting of a link to a copy of a photograph without the permission of the owner of the rights in that photograph infringe copyright in that photograph? This was the question referred to the Court of Justice by the Supreme Court of the Netherlands in [\(C-160/15\) \*GS Media BV v Sanoma Media Netherlands BV\*](#). The Court's answer has considerable significance for the future regulation of communication over the internet. Can you be sure, for example, that images to which you post links on your blog, your Twitter feed or your Facebook page have been licensed by the person who owns copyright in those images.



## ***GS MEDIA BV* – FACTS AND ISSUE**

A copyright owner has a number of exclusive rights, including the right to control the “communication to the public” of a work. Under the United Kingdom’s Copyright Designs & Patents Act 1988 (CDPA 1988), this right is granted under [s.20 CDPA 1988](#), which implements [Art 3 of the European Union’s Information Society Directive](#). The right to control communication to the public covers, for example, the broadcasting of a protected work or the placing of a protected work on a website. (see section 8.2.4 of the *Intellectual Property* subject guide).

The Court of Justice has already handed down a number of important judgments on the scope of the “communication to the public” right. *GS Media* provides a further chapter in this story. The case concerned a claim for copyright infringement relating to certain photographs. The photographs had been uploaded without permission onto an Australian website. The defendant in the national proceedings was a website which had provided its users with a link to the unauthorised copies of the photographs on the Australian site. It was argued that, in providing a link to the photographs without permission, the defendant had infringed the right to control the “communication to the public” of the work. However, in the light of the Court of Justice’s case-law on Art 3, the Supreme Court of the Netherlands was uncertain whether such a claim could be justified and, accordingly, referred the issue to the Court of Justice for a preliminary ruling.

## **(C-466/12 *SVENSSON*)**

The idea that linking to a photograph stored on the internet may infringe the copyright in that photograph might surprise many of you. You might think that linking is just the same as providing a footnote to an academic article or pointing out a particular book on a library shelf. Neither of those activities would involve copyright infringement. Alternatively, however, you might think that linking to a work is effectively the same as making a copy of the work available on a website and ought therefore to be treated as a communication to the public under copyright law.

In the earlier case of [Svensson](#), the Court had already considered the potential liability of a defendant which had provided a link to a work that had been made freely available elsewhere on the internet by the copyright owner. In such circumstances, the Court had concluded that the provision of a link does not constitute a communication to the public because the link does not communicate the work

to a “new public” (because the copyright owner had already communicated the work to the public at large by making it freely available over the internet). Was the situation in *GS Media* to be treated differently?

## THE JUDGMENT IN *GS MEDIA*

The Court explicitly acknowledged that the ability to communicate via the internet is an important aspect of the right of freedom of expression and information under [Art 11 of the EU’s Charter of Fundamental Rights](#). Accordingly, it recognised that:

“...[I]t may be difficult...for individuals who wish to post such links, to ascertain whether the website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet.” [46]

As a consequence, where a person posts a link to a work in the course of a non profit-seeking activity, the Court considered that it was necessary to take account of the fact that he or she does not know, and cannot reasonably know, whether the work has been published with the consent of the copyright holder. Without such knowledge, liability did not arise. By contrast, if a person knew, or ought to have known, that a link provided access to a work illegally placed on the internet, he or she was to be regarded as having communicated that work to the public.

However, where the posting of a link was carried out in the course of profit-making activities, the situation was to be analysed differently. In such a case, the person posting a link to a work could be expected to carry out checks to establish whether the work had been lawfully published or not. On the basis of this expectation, a rebuttable presumption arose that the act of posting a hyperlink to a work illegally placed on the internet would constitute a ‘communication to the public’ under Article 3(1) of Directive 2001/29.

## COMMENTARY ON THE JUDGMENT IN *GS MEDIA*

The Court’s judgment seeks to protect right-holders in the digital environment without imposing an unreasonable burden on a widely-employed form of communication. Nevertheless, it has been subject to a great deal of hostile commentary.

The distinction that the Court has drawn between a defendant who knows (or who ought to know) that a link provides access to an infringing work and a defendant who does not has been criticised on the ground that it introduces an unorthodox concept into EU copyright law ([See here, for example](#)). Traditionally, a defendant’s state of mind has not been considered relevant when courts have considered the application of a copyright owner’s exclusive rights. *GS Media* appears to depart from this understanding.

Others have argued that the Judgment threatens freedom of communication over the internet. They ask whether it is realistic to expect profit-making organisation to know whether copies of works accessible over the internet are licensed or not? Will the obligation to carry out necessary checks apparently imposed by the Court in *GS Media* “chill” communications in digital networks ([See here, for example](#))? This concern is exacerbated by the fact that a blog or other website may well be regarded as profit-seeking simply because it receives income from advertising.