Linking and the right to control communication to the public of a work in copyright law

PROFESSOR JONATHAN GRIFFITHS, MODULE CONVENOR FOR INTELLECTUAL PROPERTY

TRANSCRIPT

Hello, I'm Professor Jonathan Griffiths. I'm making this blog in connection with the Intellectual Property module on the Undergraduate Laws program. The subject matter of the blog today is "Linking and the right to control communication to the public of a work in copyright law". In particular, the relatively recent judgment in the Chancery Division of the High Court of England and Wales in Warner Music v TuneIn.

The question of whether hyperlinking to a work constitutes copywriting infringement, in particular, whether it constitutes the making available of the work, is an important issue in intellectual property law. One with which copyright jurisdictions around the globe have had to wrestle. Those of you who've worked closely with the materials in intellectual property or IP, as we more usually call it, will have seen that the Court of Justice in the European Union has already set down some important ground rules on the question of linking communication to the public.

In *Svensson*, in interpreting Article 3 of the Information Society Directive, the Court held that no liability will arise for making available to the public when a defendant publishes a link to a work that's been placed on a website with the consent of the right holders. According to the court, there's no liability in such circumstances because the link doesn't communicate the work to a "new public". That is to a public other than that envisaged by the right holder when he or she gave consent to the initial post. Clearly, the situation would be different if the link took users beyond a paywall, or other protective device, for example, because then, there would be a communication to a "new public". That's a distinction that arises from the Court of Justice judgment in *Svensson*.

By contrast, in *GS Media* a different situation was considered. That was the situation when a link went not to a work which had been posted with the right holder's consent but when a link went to a work posted on a website or other source without the consent of the right holder. In such circumstances, the Court of Justice held that in the interest of freedom of expression, a person who posts a link will only be liable where he or she knew or ought to have known that the link provided access to a work that had been illegally placed on the internet, that is without the consent of the right holder. However, if the link was posted in the course of a profit-making activity, the person posting that link could be expected to carry out checks to establish whether the work had been lawfully published or not. Accordingly, according to the court in *GS Media*, in such circumstances, there was a

rebuttable presumption that the link had been published with knowledge of the fact that the work to which the link lead had been posted without permission.

Svensson and *GS Media* are controversial in copyright circles. For example, it's been argued that the concept of the "new public" employed in *Svensson* lacks rigour and has no real basis in international copyright law. It's also being argued that the standard apparently imposed in *GS Media* places an unreasonably high burden on commercial operators such as organisations responsible for search engines, for example. It also introduces standards of liability based upon knowledge that are more appropriate to the assessment of secondary liability which is covered by national law than to the establishments of primary liability for copyright infringement under the directives.

However, in addition to these and other criticisms, it's also been suggested that there might be other cases in other situations which are not completely covered by *Svensson* or *GS Media* and where the court will have to consider anew what the solution ought to be. What, for example, about a situation in which a website that targets the United Kingdom and offers links to works which can be lawfully communicated to the public in another jurisdiction but where there is no license for communication to the public in the UK? In no circumstances, the work is posted legally in country X albeit the right holder hasn't explicitly consented to that activity because the radio or other station is allowed to do it without consent. What happens if the defendant links to that site and thereby makes the work available to a public in the UK?

That's exactly the situation which Mr. Justice Birss had to consider in *Warner Music v TuneIn*. That case concerned a web-based service that was called TuneIn that permitted users to access radio streams across the world through a series of aggregated links. The links to the radio streams fell into a number of different categories. There were some links that went to stations where right holders had licensed the communication of their work to the public more generally. In those circumstances, *Svensson* applied and the defendants couldn't be liable because they hadn't communicated the works to a "new public".

There were also some links to some websites which were communicating copyright works without any license or any statutory authority at all. In those circumstances, that was a *GS Media*-type situation. Of course, TuneIn was a commercial operator and could've been expected to be aware of the license status of the works in those other jurisdictions.

There was also a more complicated category. This is a category of links on TuneIn which were directed to sites on which works were posted in another jurisdiction without the explicit permission of the right holders but where the radio station in the other jurisdiction wasn't acting unlawfully because that other jurisdiction operated a statutory licensing system that allowed works to be played. Did a link to a site in those circumstances constitute making available of the works to the public in the UK when that link was clearly targeted at customers in the UK?

In those circumstances, Mr. Justice Birss considered that *Svensson* was more closely relevant than *GS Media* because the initial posting to which the defendant's site was linking

was a lawful one, albeit it wasn't entirely consensual. However, the key question according to the judge was, "What's the scope of the deemed consent that is granted at the point of the work was initially posted?" That's a pretty artificial question in a way, isn't it? Because there wasn't any explicit consent. When we're asking what the “new public” is, we have to ask a question like this. We have to ask what was in the right holder's mind at that point. In this instance, that consent has to be deemed because it wasn't actual consent.

In answering that somewhat far-fetched question, the judge held that the right holder would have expected the websites on which the work was posted to be accessed via certain types of link, standard internet search engines, for example. That would've simply be assumed to be within the normal situation. The right holder wouldn't have taken the public served by a commercial aggregating site like TuneIn into account. As a consequence, liability arose under Section 20 in relation to that category of radio streams.

Mr. Justice Birss's judgment, and there's more to it if you go and read it than I've summarized here, is an interesting one. It extends the applicable principles on linking and communication to the public to a previously uncovered situation. Importantly, it makes a distinction between different sorts of link by reference to the deemed understanding of right holders. They're deemed to expect one type of link but not deemed to expect another. This is a more nuanced and subtle approach than was maybe seen in *Svensson*. It's a more nuanced approach to the idea of the “new public”.

It represents a further step in the linking saga. By no means, I think, does it represent the last word on this issue. I'm sure we're going to see many more cases on linking and copyright in future.